2018

APRIL

INFORMATION NOTE 217

Case-law of the European Court of Human Rights

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

English edition

ISSN 1996-1545

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Layout: Publications Unit

Photographs: Council of Europe

Cover: interior of the Human Rights Building (Architects: Richard Rogers Partnership and Atelier Claude Bucher)

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ARTICLE 5 § 1

Deprivation of liberty

Application of domestic administrative escort, arrest and detention procedure: *violations*

Tsvetkova and Others v. Russia, 54381/08 *et al.*, judgment 10.4.2018 [Section III]

Facts – The applicants were subject to the domestic administrative escort, arrest and detention procedure under the federal Code of Administrative Offences (CAO) which empowers the police to apply such measures. The CAO defines the procedure of escorting someone to a police station as being that by which an offender is compelled to follow the competent officer for the purposes of compiling an administrative-offence record when it cannot be done on the spot. In exceptional cases relating to the need for a proper and expedient examination of an administrative case or for securing the execution of any sentence imposed for an administrative offence, the person concerned may be placed under administrative arrest. Sentences of administrative detention should be executed immediately after the delivery of the relevant judgment by a court.

Ms Tsvetkova, who was escorted to the police station on suspicion of shoplifting but was not subsequently prosecuted, complained that the record of her administrative arrest contained no references to the grounds or reasons for her arrest, in breach of Article 5 § 1 of the Convention.

Mr Bgantsev was accused of using foul language at his work place. He was escorted to the police station where he was subjected to the arrest procedure, detained, convicted of minor hooliganism and sentenced to five days' detention. In the Convention proceedings, he submitted that the only reason and legal ground for his arrest was listed in the administrative-offence record and read "for taking a decision". There had been nothing to prevent the police officer from compiling the record on the spot, as required by the CAO.

Mr Andreyev was taken to the police station on suspicion of evading military service, but was charged with a different administrative offence of an unpaid fine for a traffic offence. He was not released after the administrative-offence record had been drawn up, but was instead placed in a detention centre for reasons which were not specified and sentenced to two days of detention for the offence. In the Convention proceedings, he argued that there had been no lawful grounds or exceptional circumstances for keeping him in detention.

Mr Dragomirov was arrested for being drunk and looking untidy in a public place and taken to the police station. He was subsequently convicted of an administrative offence and sentenced to five days' administrative detention. Upon appeal his conviction was quashed owing to a serious defect in the prosecution evidence after he had already served part of his sentence.

Mr Torlopov took part in a demonstration in the vicinity of a court building. He was taken to the police station and subjected to administrative arrest before later being released. In the Convention proceedings, he argued there had been no reasonable grounds for suspicion that he had taken part in a public event in a prohibited area. He argued that the applicable regulations were unforeseeable in their application and gave room for arbitrary actions on the part of the authorities.

Mr Svetlov was accused of an administrative offence because he had no valid driving licence. He was taken to the police station, placed under administrative arrest, convicted of the offence and sentenced to five days' administrative detention. The applicant appealed but continued to serve his sentence while his appeal, which was later dismissed, was pending. In the Convention proceedings, he alleged, *inter alia*, that the lack of suspensive effect of his appeal against the sentence of administrative detention had violated his right to the presumption of innocence (Article 6 § 2 of the Convention).

Law – Article 5 § 1 of the Convention

(a) *Administrative escorting and administrative arrest (Ms Tsvetkova, Mr Andreyev, Mr Bgantsev and Mr Torlopov)*

(i) *Deprivation of liberty* – The applicants' detention in police stations under administrative arrest fell within the scope of Article 5 § 1 and administrative escorting (including the taking of a person to a police station and his or her presence there) amounted to "deprivation of liberty". Nothing suggested the applicants could have freely decided not to follow the police officers to the station or, once there, could have left at any time without incurring adverse consequences. Throughout the events there was an element of coercion which, notwithstanding the relatively short duration of the procedure in certain cases was indicative of a deprivation of liberty.

(ii) *Applicability of any of the sub-paragraphs of Article 5 § 1* – It was significant that each applicant was suspected of an "offence" punishable under the CAO. There was no reason to doubt that the domestic statutory framework *per se* was compatible with the spirit and purpose of Article 5 § 1 (c) of the Convention.

(iii) *Compliance* – In Ms Tsvetkova's case it was not clear from the record of administrative arrest, nor was it convincingly established in the course of a pre-investigation criminal inquiry, what administrative offence the applicant was suspected of. Yet it had been essential to specify this information, *inter alia*, in view of the domestic requirement that administrative arrest could exceed three hours only in relation to offences punishable by detention.

Likewise, the Court was not satisfied that Mr Andreyev's and Mr Bgantsev's administrative arrests had complied with Russian law so as also to be "lawful" within the meaning of Article 5 § 1 (c). In Mr Andreyev's case, no justification was provided, as required by Article 27.3 § 1 of the CAO, to show the administrative arrest was effected in an "exceptional case" or that it was "necessary for the prompt and proper examination" of the case or for "ensuring enforcement of the penalty imposed in the case", which, as it happens, concerned a charge relating to a delay in paying a fine of EUR 7. Mr Andreyev's thirty-nine-hour detention was thus unjustified, arbitrary and disproportionate.

Similarly, while there was no reason to doubt that the arresting officer had a reasonable suspicion that Mr Bgantsev had committed an administrative offence, the Court was not satisfied that it was compliant with domestic law to hold him in detention overnight following the compiling of the administrative-offence record as there was nothing to suggest that there was a risk of his reoffending, tampering with evidence, influencing witnesses or fleeing justice or that such considerations were pondered and justified his deprivation of liberty.

In Mr Torlopov's case, the Court considered that the applicable normative framework was not sufficiently foreseeable and precise in its application to avoid the risk of arbitrariness and so was not satisfied that his taking to the police station and retention there were "lawful" within the meaning of Article 5 § 1 (c).

Conclusion: violations in respect of Ms Tsvetkova, Mr Bgantsev, Mr Andreyev and Mr Torlopov (unanimously).

(b) *Sentence of administrative detention (Mr Dragomirov)* – The Court reiterated that a period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention.

Mr Dragomirov had already served part of the sentence before the appeal court found, in substance, that no offence had been committed. The findings made on appeal disclosed a serious defect in the trial judgment (the police officer's report having been demonstrably untruthful) adversely affecting the pertinent period of detention. Having regard to the quashing of the trial judgment by the appeal court and the gravity of the underlying defects identified in relation to the trial proceedings, the Court considered that in the particular circumstances of the case there was a sufficient basis to conclude that the applicant's detention "after conviction", which he had already served in part, was not "lawful" within the meaning of Article 5 § 1 (a) of the Convention.

Conclusion: violation in respect of Mr Dragomirov (unanimously).

Article 2 of Protocol No. 7 and Article 6 § 2 of the Convention (*Mr Svetlov*): The Court had to determine whether the lack of suspensive effect of an appeal against a trial judgment imposing the sentence of administrative detention and the examination of such an appeal after the sentence had already been served violated Article 6 § 2 of the Convention or Article 2 of Protocol No. 7.

(i) *Article 2 of Protocol No. 7* – In contrast to the position in *Shvydka v. Ukraine,* the Court highlighted that under Russian domestic law a trial judgment did not "enter into force" immediately. While it was possible to lodge an appeal within ten days of the trial judgment, a first-instance court was formally required to forward the statement of appeal to the appellate court on the day of its receipt; and the appeal court was formally required to examine it within one day. It was also noted that under the CAO an appeal court was empowered to review the case in its entirety, and was not confined to examining the scope of the arguments raised in the statement of appeal. Therefore, there had been procedural safeguards in place.

Nevertheless, the essential factual elements and legal matters at the heart of the Court's findings in *Shvydka* also applied to Mr Svetlov's case.

Although the CAO required that appeal proceedings be expedited within certain time constraints, the fact remained that there had been a delay and the appeal was examined after he had served the sentence in full. The Court was not convinced that any particular feature of the administrative-offence procedure or the consideration of expediency outweighed the disadvantage caused to the defendant *vis-à-vis* his right of appeal by the absence of any alternative to the immediate execution of the penalty of administrative detention.

Conclusion: violation in respect of Mr Svetlov (unanimously).

(ii) *Article 6 § 2 of the Convention* – While Mr Svetlov had remained protected under Article 6 § 2 as regards possible adverse statements in appeal proceedings relating to questions of both fact and law, the mere fact that an appeal against the trial judgment did not have suspensive effect *vis-à-vis* enforcement of the penalty did not entail a violation of that provision.

Conclusion: no violation in respect of Mr Svetlov (unanimously).

The Court also held, unanimously, that there had been a violation of Article 5 § 5 in respect of Mr Andreyev, but no violation of that provision in respect of Mr Dragomirov, and that there had been violations of Articles 3 and 13 on account of Mr Bgantsev's conditions of detention and lack of effective remedies.

Article 41: awards ranging from EUR 1,000 to EUR 3,600 in respect of non-pecuniary damage.

(See *Shvydka v. Ukraine*, 17888/12, 30 October 2014, Information Note 178)

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Access to court

Alleged excessively formalistic interpretation of procedural rules (*ratione valoris* admissibility threshold): *no violation*

Zubac v. Croatia, 40160/12, judgment 5.4.2018 [GC]

Facts – Civil cases are brought before the Croatian Supreme Court by means of an appeal on points of law, which may be either: (i) an "ordinary" appeal on points of law, a full individual right where the disputed part of the impugned decision represents a value exceeding a specific threshold, which stood at 100,000 Croatian kunas (HRK) at the material time; or (ii) failing that, an "extraordinary" appeal on points of law seeking to ensure a uniform interpretation of the law. In either case the appeal is confined to points of law.

The applicant brought a civil action, the subject matter of which was evaluated by her first lawyer at HRK 10,000 (about EUR 1,400). After the applicant had changed lawyers, the parties exchanged pleas at an initial hearing on the merits. At a subsequent hearing the lawyer re-evaluated the subject matter at HRK 105,000. However, the "civil claim" mentioned in the action could only be amended under a special court decision which was no longer possible at that stage. Nevertheless, the trial courts used the new figure in calculating the court fees. The applicant's appeal on points of law was dismissed by the Supreme Court, which declared it inadmissible *ratione valoris* on the grounds that the subject matter indicated in the first-instance claim document had not been validly amended.

In the Convention proceedings, the applicant alleged that in breach of Article 6 § 1 of the Convention she had been prevented from having access to the Supreme Court. In a judgment of 6 September 2016 (see Information Note 205) a Chamber of the Court found a violation of that provision by four votes to three.

On 6 March 2017 the case was referred to the Grand Chamber at the Government's request.

Law – Article 6 § 1

(a) *The impugned restriction* – The restriction in issue was not the result of inflexible procedural rules: the relevant law and practice allowed for the possibility of amending the subject matter of the dispute; the applicant had also been at liberty to lodge an "extraordinary" appeal on points of law, but had omitted to do so.

(b) *Legitimacy of the aim pursued* – The Supreme Court's main function was to ensure the uniform application of the law and the equality of all before the courts. Therefore, setting a specific *ratione valoris* threshold was legitimately geared to guaranteeing that the Supreme Court was called upon to deal only with cases of a level of importance consonant with its role. Moreover, review by that court of irregularities committed by the lower courts in setting the value of the dispute was also a legiti-

mate concern, regarding the rule of law and the proper administration of justice.

(c) *Proportionality of the obstacle* – In this case, the respondent State had to be granted a wide margin of appreciation: (i) the applicant's case had been examined by two levels of jurisdiction; (ii) the case had not raised any unfairness issues; and (iii) the Supreme Court's role had been confined to reviewing the proper implementation of domestic law by the lower courts.

For the reasons set out below, that margin of appreciation had not been overstepped.

Firstly, the conditions for allowing an appeal on points of law were foreseeable. The Supreme Court's case-law was consistent and clear: whether the error in question was attributable to the lower courts or to one of the parties, when the value of the subject matter of the dispute was unlawfully changed at an advanced stage in proceedings, an appeal on points of law was not permitted. Furthermore, the law required a specific court decision in order to change the value of the subject matter of the dispute.

In the present case, at the time when such a decision could validly have been requested and also when the applicant had so requested, she had been represented by a qualified lawyer practising in Croatia who was supposed to be conversant with Croatian law and jurisprudence.

Accordingly, even though the lower courts had subsequently seemed to accept the increased value of the subject matter (at least for the purposes of calculating court fees), the applicant and her lawyer had clearly been in a position to grasp that the late change to the value of the subject matter of the dispute would preclude access to the Supreme Court.

Secondly, the errors which had impeded the applicant's access to the Supreme Court were primarily and objectively attributable to her, as represented by a lawyer:

– the fact that the applicant's first lawyer practised in Montenegro rather than in Croatia was exclusively a matter for her free choice of legal representative; she could clearly have instructed a Croatian lawyer, which she had in fact subsequently done;

– the alleged disproportion between the value indicated in the claim document and the real value of the property in issue was irrelevant; the applicant was entitled to set the value of the subject matter of the dispute at an amount which did not necessarily correspond to the commercial value of the property;

– it would have been possible to modify the value initially indicated up until the time of the presentation of the defence's substantive arguments, but the applicant had failed to do so, despite already being represented by a Croatian lawyer;

– the applicant's change of lawyer had not prevented the new lawyer from personally requesting the change in the value of the subject matter of the dispute earlier on, at the first hearing on the merits.

Based on full knowledge of the relevant facts, the Supreme Court's interpretation of the relevant domestic law would not seem to have been arbitrary or manifestly unreasonable.

The applicant's procedural error could not be excused by the subsequent error committed by the courts, as that would run counter to the principle of the rule of law and the requirement of diligent and proper conduct of the proceedings and the careful implementation of the relevant procedural rules.

The applicant could not have had any legitimate expectation arising from the increase in the court fees which she had paid, merely as a consequence of her own conduct, and for whose reimbursement she could have applied.

Thirdly, it could not be affirmed that when the Supreme Court declared the applicant's appeal on points of law inadmissible it had been applying excessive formalism. In a situation where domestic law had allowed it to filter cases coming before it, to hold that that court should be bound by errors committed by the lower courts could severely impede its work and make it impossible for it to fulfil its specific role.

In the absence of any reason to cast doubt on the procedural framework established by law for indicating the value of the subject matter of the dispute, it could not be said that applying the mandatory provisions in question had amounted to excessive formalism. On the contrary, it had enhanced legal certainty and the proper administration of justice: the Supreme Court had simply restored the rule of law after the errors committed by the applicant and by the two lower courts on an issue affecting its jurisdiction. Since the rule of law was a fundamental principle of democracy and of the Convention, there could be no expectation, derived from the

Convention or otherwise, that the Supreme Court would ignore or overlook obvious procedural irregularities.

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In sum, there had been no disproportionate hindrance impairing the very essence of the applicant's right of access to a court or transgressing the national margin of appreciation.

Conclusion: no violation (unanimously).

ARTICLE 6 § 1 (CRIMINAL)

Fair hearing, equality of arms

Lawyer not permitted to conduct his own defence in criminal proceedings: *no violation*

Correia de Matos v. Portugal, 56402/12, judgment 4.4.2018 [GC]

(See Article 6 § 3 (c) below, page 13)

Fair hearing, independent and impartial tribunal

Legislative amendment enacted during trial extending limitation periods in respect of offences that had not become time-barred: *no violation*

Chim and Przywieczerski v. Poland, 36661/07 and 38433/07, judgment 12.4.2018 [Section I]

Facts – The Foreign Debt Service Fund (FOZZ) was established to manage the funds earmarked for servicing Poland's foreign debt. The first applicant was the Deputy Director General of FOZZ and the second applicant a Director of a company involved in financial dealings with FOZZ. The first applicant was convicted of misappropriation of FOZZ's property and the second applicant was convicted of misappropriation and theft of FOZZ's property. In 2005, several months after the initial verdict against the applicants, the Parliament enacted an amendment to the Criminal Code, extending limitation periods in respect of various categories of the offences. The extended limitation periods were to be applied to offences committed prior to entry into force of the Act, except for offences which had already become subject to limitation. The amendment was applied in the criminal proceedings against the second applicant with regard to the offence of theft of FOZZ's property.

Law – Article 6 § 1

(a) *Tribunal established by law* – The appellate courts findings were dispositive of the issue that the composition of the first-instance court in the applicants' case, in so far as it included Judge A.K., did not comply with the applicable requirements of domestic law. However, the appellate courts concluded that the irregular assignment of Judge A.K. to the first-instance court had not affected the content of the trial court's judgment and dismissed the applicants' appeals as unfounded. In consequence, the original defect in the assignment of Judge A.K. to the trial bench had not been remedied. Accordingly, the first-instance court which had heard the applicants' case could not be regarded as a "tribunal established by law".

Conclusion: violation (unanimously).

(b) *Lack of impartiality* – With regard to the subjective test of impartiality, the Court scrutinised Judge A.K.'s statement made at the opening of the trial and the passages of reasoning complained about by the applicants. In relation to the newspaper interview where Judge A.K. stated, "Unfortunately, we have succeeded in creating a belief among criminals that they [can] go unpunished", the Court considered it would have been preferable for him refrain from expressing his views in the media entirely. However, this or the other statements could not be considered indicative of Judge A.K.'s personal prejudice or bias. Concerning the objective test of impartiality, the applicants' fears of a lack of impartiality on account of Judge A.K.'s irregular assignment to the trial bench had not been objectively justified. Regarding the alleged involvement of Judge A.K. in the amendment of the Criminal Code, the amendment had entered into force after the trial court's verdict had been given and the legislation could only have been relevant for the appellate stage of the proceedings. It followed that Judge A.K. could not have applied the amendment to the applicants' case. Even assuming that he had participated in the parliamentary debate in an advisory capacity he had not carried out both advisory and judicial functions in the same case. There was no indication that Judge A.K. had been involved in the drafting of the bill at issue. The applicants' fears related to the alleged involvement of Judge A.K. in the passage of the amendment could also not be regarded as objectively justified.

Conclusion: no violation (unanimously).

(c) *Legislative interference in the criminal proceedings* – The Court examined whether the criminal proceedings had been unfair as a result of legislative intervention only with regard to the second applicant. The amendment contained a guarantee that no prosecution was possible in respect of offences that had become time-barred in accordance with the rules applicable prior to its entry into force. The amendment could not be regarded as a legislative interference in the second applicant's case since that law did not influence the judicial determination of the case in the substantive sense, but merely extended the temporal limits of criminal liability in respect of offences that had not become time-barred. The rules on limitation periods, which could be construed as merely laying down a prior condition for the examination of a case, had no bearing on the exercise of the right to a fair hearing. The application of the amendment extending limitation periods to the case against the second applicant could thus not be interpreted as a violation of the right to a fair hearing.

Conclusion: no violation (unanimously).

Article 41: claim in respect of non-pecuniary damage sustained by the first applicant dismissed; finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage sustained by the second applicant; claims for both applicants in respect of pecuniary damage dismissed.

(See also *Coëme and Others v. Belgium*, 32492/96 *et al.*, 22 June 2000, Information Note 19; *Scoppola v. Italy (no. 2)* [GC], 10249/03, 17 September 2009, Information Note 122; and *Previti v. Italy* (dec.), 1845/08, 12 February 2013, Information Note 160)

Fair hearing

Summary reasoning in the Supreme Court's dismissal of a request to seek a preliminary ruling from the Court of Justice of the European Union: *no violation*

Baydar v. the Netherlands, 55385/14, judgment 24.4.2018 [Section III]

Facts – The applicant, in the context of his cassation appeal in criminal proceedings, requested the Supreme Court refer a preliminary question to the Court of Justice of the European Union (CJEU). The Supreme Court, referring to section 81(1) of the Judiciary (Organisation) Act, dismissed the applicant's request and stated that its decision required no further reasoning, "as the grievances do not give rise to the need for a determination of legal issues in the interest of legal uniformity or legal development".

Law – Article 6 § 1: In previous cases, not concerning the context of domestic accelerated proceedings, the Court held that national courts, against whose decisions there was no remedy under national law, were obliged to give reasons for their refusal to request a preliminary ruling from the CJEU in light of the exceptions provided for in the case-law of CJEU (see *Dhahbi v. Italy*, 17120/09, 8 April 2014, Information Note 173). At the same time, it was acceptable under Article 6 § 1 of the Convention for national superior courts to dismiss a complaint by mere reference to the relevant legal provisions governing such complaints if the matter raised no fundamentally important legal issue (see *John v. Germany* (dec), 15073/03, 13 February 2007) and similarly to dismiss an appeal on points of law without further explanation if it was deemed to have no prospect of success (see *Gorou v. Greece (no. 2)* [GC], 12686/03, 20 March 2009, Information Note 117). The Court, however, had to ascertain that decisions of national courts were not arbitrary or otherwise unreasonable.

Section 81 of the Judiciary (Organisation) Act allowed the Supreme Court to dismiss an appeal in cassation for not constituting grounds for overturning the impugned judgment and not giving rise to the need for a determination of legal issues, while section 80a of the same Act allowed it to declare an appeal in cassation inadmissible for not having any prospect of success. The aim of those provisions was to keep the length of proceedings reasonable and allow the courts of cassation or similar judicial bodies to concentrate on their main tasks of ensuring uniform application and correct interpretation of the law.

Following the Supreme Court's explanation of its practice concerning the application of the above provisions, it was inherent in a judgment dismissing or declaring inadmissible an appeal in cassation that there was no need to seek a preliminary ruling since the matter did not raise a legal issue that needed to be determined. The summary reasoning contained in such a judgment therefore implied an acknowledgement that a referral to the CJEU could not lead to a different outcome in the case.

Moreover, in accordance with the relevant CJEU's case-law, domestic courts, against whose decisions there was no remedy under national law, were not obliged to refer a question about the interpretation of EU law if the answer to that question could not have any effect on the outcome of the case, whatever it might be (see the CJEU judgment in *Lucio Cesare Aquino v. Belgische Staat*, C-3/16, 15 March 2017).

Therefore, in the context of accelerated procedures within the meaning of section 80a or 81 of the Judiciary (Organisation) Act, no issue of principle would arise under Article 6 § 1 where an appeal in cassation, including a request for referral, was declared inadmissible or dismissed with summary reasoning, where it was clear from the circumstances of the case that the decision was not arbitrary or otherwise manifestly unreasonable.

In the instant case, in accordance with the relevant domestic provisions, the applicant's appeal in cassation had been considered and decided by three members of the Supreme Court, after having taken cognisance of the applicant's written grounds of appeal, the Advocate General's advisory opinion and the applicant's written reply. The applicant's appeal on points of law had therefore been duly examined and no unfairness could be discerned in the proceedings before the Supreme Court.

Conclusion: no violation (unanimously).

(See also *Ullens de Schooten and Rezabek v. Belgium*, 3989/07, 20 September 2011, Information Note 144)

Impartial tribunal

Refusal of change of venue for criminal trial despite pending civil action by accused impugning trial court's conduct: *violation*

Boyan Gospodinov v. Bulgaria, 28417/07, judgment 5.4.2018 [Section V]

Facts – The applicant, who had been sentenced on appeal to a prison term of shorter duration than the time which he had already spent in pre-trial detention, filed an action for damages against the State with another court. The relevant civil proceedings were stayed pending the outcome of a second set of criminal proceedings against him, on the grounds that they might affect the outcome of the dispute. The applicant unsuccessfully applied for a change of venue for the second set of criminal proceedings on the grounds that the criminal court's involvement in his civil action raised an impartiality issue. He was ultimately sentenced to a further prison term, which, combined with the first sentence, exceeded the duration of his pre-trial detention, leading to the dismissal of his civil action.

Law – Article 6 § 1: Even though four judges on the bench of the criminal court hearing the second case had not taken part in the previous criminal proceedings against the applicant, the fact that they were professionally attached to one of the defendants in the concurrent civil proceedings, together with the fact that the latter had been suspended pending the outcome of the second criminal case, gave the applicant sufficient cause for legitimate doubt as to those judges' objective impartiality.

Furthermore, under the relevant budgetary regulations, the possible award to the applicant – had his action for damages been successful – would have had to be paid from the budget of the criminal court in question.

Even though it had not been established that that fact had in any way influenced the individual situations of the criminal court judges, it could legitimately have reinforced the applicant's doubts.

Moreover, domestic law – which required judges to withdraw from a criminal case where there was any doubt as to their impartiality, even in cases other than those explicitly mentioned – provided for reassigning the case to another court where all the judges had withdrawn.

The applicant's request to that effect had been dismissed on purely formal grounds, without detailed examination. The applicant also unsuccessfully raised the issue before the two higher courts, that is to say the Court of Appeal and the Supreme Court of Cassation, which had themselves been respondents in the same civil proceedings for damages. By failing to reply to his arguments, those courts had also failed to dispel the legitimate doubt concerning bias on the part of the court of first instance.

In short, the court of first instance which had dealt with the second criminal case against the applicant had failed to satisfy the requirements of objective impartiality, and the higher courts had failed to remedy that situation.

Conclusion: violation (unanimously).

Article 41: EUR 3,600 in respect of non-pecuniary damage.

ARTICLE 6 § 3 (c)

Defence through legal assistance

Lawyer not permitted to conduct his own defence in criminal proceedings: *no violation*

Correia de Matos v. Portugal, 56402/12, judgment 4.4.2018 [GC]

Facts – The applicant, a lawyer, was prosecuted for insulting a judge.

In the Convention proceedings, the applicant alleged that the decisions of the domestic courts refusing him leave to conduct his own defence in the criminal proceedings against him and requiring that he be represented by a lawyer had violated Article 6 §§ 1 and 3 (c) of the Convention.

Law – Article 6 §§ 1 and 3 (c)

(a) *Preliminary remarks concerning the content and context of the applicant's complaint* – The present case concerned the scope of the right for defendants with legal training to defend themselves in person. However, the applicant had been suspended from the Bar Council's roll at the time of the impugned proceedings before the domestic courts and could not therefore have acted as counsel in his own case.

Furthermore, the applicant had previously lodged an application based on similar complaints, which had given rise to a decision of 15 November 2001 (*Correia de Matos v. Portugal* (dec.), 48188/99). In that decision the Court had found that while it was true that, as a general rule, lawyers could act in person before a court, the relevant courts were nonetheless entitled to consider, making use of their margin of appreciation, that the interests of justice required the appointment of a representative to act for a lawyer who had been charged with a criminal offence and who might therefore, for that very reason, not be in a position to assess the interests at stake properly or, accordingly, to conduct his own defence effectively. The Court had therefore rejected the application as being manifestly ill-founded, on the grounds that the applicant's defence had been conducted appropriately and that his defence rights under Article 6 §§ 1 and 3 (c) had not been breached.

(b) *Examination of the relevance and sufficiency of the grounds supporting the Portuguese legislation applied in the present case* – Bearing in mind the considerable freedom in the choice of means which the Court's well-established case-law conferred on States to ensure that their judicial systems were in compliance with the requirements of the right in Article 6 § 3 (c), and given that the intrinsic aim of that provision was to contribute to ensuring the fairness of the criminal proceedings as a whole, the standards adopted by those States, and the international developments, were not determinative.

The domestic courts had faithfully reflected the reasoning followed by the Portuguese Constitutional Court, Supreme Court and Courts of Appeal for many years. They had stressed that the rules on compulsory legal assistance in criminal proceedings applied by them were designed not to limit the defence's action but to protect the accused by securing an effective defence; that the accused's defence in criminal proceedings was in the public interest and that the right to defence by counsel could not therefore be waived; and that the relevant provisions of the Code of Criminal Procedure reflected the premise that an accused was better defended by a legal professional trained in advocacy who was unencumbered by the emotional burden weighing on the defendant and could offer a lucid, dispassionate and effective defence.

The decision of the Portuguese courts requiring the applicant to be represented by counsel had been the result of comprehensive legislation seeking to protect accused persons by securing an effective defence in cases where a custodial sentence was possible. Furthermore, a member State might legitimately consider that an accused, at least as a general rule, was better defended if assisted by a defence lawyer who was dispassionate and technically prepared, and that even a defendant trained in advocacy, like the applicant, might be unable, as a result of being personally affected by the charges, to conduct an effective defence in his or her own case.

The legitimacy of such considerations applied even more forcefully since, in the instant case, the defendant had been suspended from the Bar, was not therefore a duly registered lawyer and was excluded from providing legal assistance to third persons. Furthermore, the applicant had already been charged with insulting a judge (see the Court's decision cited above). In view of the special role of lawyers in the administration of justice and, in that context, their duties particularly in regard to their conduct, there had been reasonable grounds to consider that the applicant might have lacked the objective and dispassionate approach considered

necessary under Portuguese law to conduct his own defence effectively.

Moreover, the particularly restrictive nature of the Portuguese legislation from the perspective of an accused like the applicant did not mean that he had been deprived of all means by which to choose how his defence was conducted and to participate effectively in his own defence. While under Portuguese law on criminal procedure the technical legal defence was reserved for counsel, the relevant legislation conferred on an accused several means by which to participate and intervene in person in the proceedings.

The accused had the right to be present at all stages of the proceedings which affected him or her, to make statements or remain silent concerning the substance of the charge and to submit observations, statements and requests, in which he or she could address questions of law and fact and which, without having to be signed by counsel, were added to the case file. Furthermore, he or she could revoke any measure carried out on his or her behalf. Moreover, Portuguese law provided that the accused was the last person who could address the court after oral pleadings had ended and prior to the delivery of the judgment.

Lastly, if the accused was not satisfied with court-appointed defence counsel, he or she could request a change of counsel on a valid ground. Accused persons were also free to instruct a lawyer of their own choosing whom they trusted and with whom they could agree on a defence strategy in their case. While accused persons, if convicted, had to bear the costs of mandatory representation, they could request legal aid if they were unable to pay those costs. In that connection, the applicant had been charged the relatively modest sum of EUR 150 for his representation by court-appointed counsel, and that sum had never been paid.

Hence, despite the requirement to be assisted by counsel, a relatively broad scope remained in practice for an accused like the applicant to influence how his defence was to be conducted in the criminal proceedings against him and to participate actively in his own defence.

The essential aim of the Portuguese rule of mandatory legal representation in criminal proceedings was to ensure the proper administration of justice and a fair trial respecting the right of the accused to equality of arms. Having regard to the procedural context as a whole in which the requirement of mandatory representation had been applied, and bearing in mind the margin of appreciation enjoyed by the member States with regard to the choice of means by which to ensure that an accused's defence was secured, the reasons provided for the requirement of compulsory assistance overall and in the present case had been both relevant and sufficient.

(c) *Overall fairness of the trial* – The applicant's defence had been assured by his court-appointed defence counsel.

The applicant, for his part, had not attended the hearings in order to present his own version of the facts or his own interpretation of the relevant legal provisions, and had thus deliberately decided not to participate effectively in his defence together with his counsel. He had not communicated with his counsel and had not attempted to instruct her and determine with her how his defence should be conducted. And while he did not have a relationship of trust with his counsel and suspected her of being inexperienced, he had not challenged the quality of her work or her qualifications before the domestic courts, nor had he alleged that she had made any procedural mistakes. Furthermore, he had not appointed another lawyer of his own choosing with whom he could have agreed on a defence strategy.

Moreover, the fact that the applicant had been charged for a second time with insulting a judge could have resulted in a custodial sentence of four months and fifteen days which could not be considered as minor. Given the circumstances and the nature of the offence with which he had been charged, it was not unreasonable for the domestic courts to consider that the applicant lacked the objective and dispassionate approach considered necessary under Portuguese law in order for an accused to conduct his own defence.

There were no cogent reasons to doubt that the applicant's defence by court-appointed counsel had been conducted properly in the circumstances of the case or to consider that the conduct of the proceedings by the domestic courts had been in any way unfair. It appeared from the applicant's observations and his repeated applications to the Court that his main concern was not the particular criminal proceedings in question but his desire to pursue his principled stance against mandatory legal assistance under Portuguese law.

Conclusion: no violation (nine votes to eight).

(See also *Ibrahim and Others v. the United Kingdom*, 50541/08 *et al.*, 13 September 2016, Information Note 199)

ARTICLE 8

Respect for private and family life, positive obligations

Burial of a victim of a criminal act without taking reasonable steps to inform his relatives: *violation*

Lozovyye v. Russia, 4587/09, judgment 24.4.2018 [Section III]

Facts – The applicants' son was murdered in St Petersburg. While the authorities made some attempt to identify the relatives of the deceased, the son was buried in St Petersburg before that investigation process ended. The applicants later found out, exhumed his body and reburied him in their home town. Responding to their complaints about the authorities' failure to notify them of their son's death, a district court established that the investigator had not taken sufficient steps to find the relatives of the deceased, though the criminal case-file contained enough information to do so. Subsequently, the applicants instituted unsuccessful compensation proceedings.

Law – Article 8: The applicants' right to respect for their private and family lives had been affected by the authorities' failure to inform them, or even to take steps to inform them, of the death of their son before he had been buried. In situations such as the one in the instant case, where the State authorities, but not family members, were aware of a death, there was an obligation for the relevant authorities to at least undertake reasonable steps to ensure that surviving members of the family were informed.

As regards the relevant legal framework, there was no explicit obligation on the authorities to notify relatives of an individual who had died as a result of a criminal act, although there was a certain obligation to search for them for the purpose of granting them victim status in a criminal case. However, the lack of clarity in domestic law and practice was not sufficient in itself to find a violation of the respondent State's positive obligations under Article 8.

Regarding whether the authorities had taken reasonable practical efforts, as followed from the domestic court's findings, there were several avenues the authorities could have used to locate the applicants but had not done so. The decision to bury the applicants' son had been taken before the search for his relatives had officially ended. In those circumstances and given the personal information about the deceased that was available, the authorities had not acted with reasonable diligence and, therefore, had not complied with their positive obligation in the present case.

Conclusion: violation (unanimously).

Article 41: EUR 10,000 jointly in respect of non-pecuniary damage; EUR 539 jointly in respect of pecuniary damage.

Respect for private life

Adoption of child without due consideration of his aunt's interest in becoming his legal tutor: *violation*

Lazoriva v. Ukraine, 6878/14, judgment 17.4.2018 [Section IV]

Facts – In July 2012 a district court in Chernivtsi (Ukraine) deprived the applicant's sister of her parental rights over her five-year-old son and he was subsequently put on a list for adoption. In August and September the same year, the applicant, who lived in Magadan (Russia), 12,000 km away from Chernivtsi, informed the Childcare Service of Chernivtsi and the orphanage where her nephew was staying that she was preparing the necessary documents to make a formal application to become his legal tutor. In mid-September the Childcare Service responded that a couple had already submitted all the necessary documents for the adoption and had been given permission to establish contact with the child. The applicant was advised to lodge a tutelage application with the court in Chernivtsi as soon as possible.

In early October a district court in Chernivtsi granted the adoption to the identified couple. Some days later, the Tutelage and Guardianship Service of Magadan declared the applicant suitable to become a legal tutor or guardian. At the end of October, the applicant went to Chernivtsi to submit a formal application to become her nephew's tutor but was informed that it would not be possible as the child had already been adopted prior to her arrival in Ukraine. The applicant lodged an unsuccessful appeal against the adoption decision.

Law – Article 8: As the applicant had not lived with her nephew and only visited him once during five years, their relationship was not of a kind that fell within the concept of "family life". Regarding the applicant's possible intention to establish "family life" with her nephew by becoming his legal tutor, Article 8 did not guarantee the right to found a family.

The applicant's interest in maintaining and developing the relationship with her nephew fell within the scope of "private life". The interest in question was not without factual or legal basis considering that the nephew was her relative; there had been some contact between them albeit not of a regular or permanent nature; her intention to become his tutor was genuine in light of her vested efforts in becoming his tutor; and the fact that she had previously become a tutor for his half-sister. Furthermore, domestic law gave preference to relatives where a question of care arose because of the parents' inability to exercise their duties *vis-à-vis* their child.

The adoption had entailed a severing of ties between the applicant and her nephew and defeated her attempt to become his tutor. It had constituted an interference with the applicant's right to respect for her private life.

The case disclosed a "procedural dysfunction or fault" on the part of the Ukrainian authorities and courts. Although the applicant's intention to become her nephew's tutor had been acknowledged in the different stages of the adoption process, all instances had failed to give any meaningful consideration to it. The local courts had furthermore failed to clarify why the adoption better served the best interests of the child as opposed to the tutelage which his aunt intended to establish. The local authorities' and courts' reluctance to deal with the matter of tutelage could be explained by the fact that an application for tutelage had not been submitted by the time of the contested adoption. However, the applicant had diligently acted in line with the advice she had been given by the Childcare Service of Chernivtsi. Moreover, her arguments as to time constraints had been completely ignored. Therefore, the interference had not been in compliance with the procedural requirements implicit in Article 8.

Conclusion: violation (unanimously).

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

Respect for private life

Police obtaining subscriber information associated with dynamic Internet Protocol (IP) address without a court order: *violation*

Benedik v. Slovenia, 62357/14, judgment 24.4.2018 [Section IV]

Facts – On the basis of information concerning the exchange of files with child pornography through a certain peer-to-peer file sharing website, the police, without a court order, requested an Internet service provider (ISP) to disclose data regarding a user to whom a dynamic Internet Protocol (IP) address had been assigned at a particular time.[1] The ISP provided the name and address of the relevant user, who was subscriber to the Internet service relating to the respective IP address.

Subsequently, the police obtained a court order demanding that the ISP disclose both the personal and traffic data of the subscriber linked to the IP address in question. On this basis the applicant's family home was searched with computers being seized that were found to contain pornographic material involving minors. The applicant was found guilty of the criminal offence of displaying, manufacturing, possessing and distributing pornographic material.

The applicant then unsuccessfully complained before the domestic courts that the privacy of correspondence and other means of communication could only be suspended on the basis of a court order and therefore any unlawfully obtained information should be excluded as evidence. In this respect, the Constitutional Court concluded that the applicant, who had not hidden in any way the IP address through which he had accessed the Internet, had consciously exposed himself to the public and had thus waived the legitimate expec-

1. IP addresses are series of digits assigned to networked computers to facilitate their communication over the Internet. When a website is accessed, the IP address of the computer seeking access is communicated to the server on which the website consulted is stored. ISPs allocate to the computers of Internet users either a "static" IP address or a "dynamic" IP address, that is to say an IP address which changes each time there is a new connection to the Internet. Unlike static IP addresses, dynamic IP addresses do not enable a link to be established, through files accessible to the public, between a given computer and the physical connection to the network used by the ISP.

tation of privacy. As a result, though the data concerning the identity of the user of the IP address were protected as privacy under the Constitution, no court order was required to disclose them in the applicant's case.

Law – Article 8

(a) *Applicability*

(i) *Nature of the interest involved* – The subscriber information associated with specific dynamic IP addresses assigned at certain times in principle concerned personal data. In addition, it was not publicly available and therefore could not be compared to information found in a traditional telephone directory or public database of vehicle registration numbers. In order to identify a subscriber to whom a particular dynamic IP address had been assigned at a particular time, the ISP had to access stored data concerning particular telecommunication events. Use of such stored data could on its own give rise to private life considerations. The sole purpose of obtaining the subscriber information in the present case was to identify the particular person behind the specific dynamic IP address. Information on such online activities engaged the privacy aspect the moment it was attributed to an identified or identifiable individual. Therefore what would appear to be peripheral information sought by the police, namely the name and address of a subscriber, had to be treated as inextricably connected to his or her relevant online activity thus revealing personal data. To hold otherwise would be to deny the necessary protection to information which might reveal a good deal about the online activity of an individual, including sensitive details of his or her interests, beliefs and intimate lifestyle.

(ii) *Whether the applicant was identified by the contested measure* – The applicant was the user of the Internet service in question by means of his own computer at his home and it was his online activity that had been monitored by the police. The fact that he was not personally subscribed to the Internet service had no effect on his privacy expectations, which were indirectly engaged once the subscriber information relating to his private use of the Internet was revealed.

(iii) *Whether the applicant had a reasonable expectation of privacy* – Notwithstanding the publicly accessible nature of the file-sharing network at issue, the applicant expected, subjectively, that his activity would remain private and that his identity would not be disclosed. The fact that he did not hide his dynamic IP address could not be decisive in the assessment of whether his expectation of privacy was reasonable from an objective standpoint. The anonymity aspect of online privacy was an important factor to be taken into account in such assessment. In particular, it had not been argued that the applicant had ever disclosed his identity in relation to the online activity in question or that he was for example identifiable by the file-sharing network through an account or contact data. The applicant's online activity therefore engaged a high degree of anonymity, as confirmed by the fact that the assigned dynamic IP address, even if visible to other users of the network, could not be traced to the specific computer without the ISP's verification of data following a request from the police. In addition, the Constitution guaranteed the privacy of correspondence and of communications and required that any interference with this right be based on a court order. Therefore, the applicant's expectation of privacy with respect to his online activity could not be said to be unwarranted or unreasonable.

(iv) *Conclusion* – The applicant's interest in having his identity with respect to his online activity protected fell with the scope of the notion of "private life". Article 8 was therefore applicable.

(b) *Compliance* – The police request to the ISP and their use of the subscriber information leading to the applicant's identification amounted to an interference with his rights under Article 8. The police measures had some basis in domestic law. As the relevant legislation was not coherent as regards the level of protection afforded to the applicant's privacy interest, the Court relied on the Constitutional Court's interpretation, according to which the disclosure of the identity of the communicating individual and traffic data[2] in principle required a court order. As to the Constitutional Court's position that the applicant had waived the legitimate expectation of privacy as he had not hidden in any way the IP address through which he had accessed the Internet, the Court did not find it reconcilable with the scope of the right to privacy under the Convention. Therefore, a court order was necessary

2. "Traffic data" means any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof. Traffic data may *inter alia* consist of data referring to the routing, duration, time or volume of a communication, to the protocol used, to the location of the terminal equipment of the sender or recipient, etc.

in the present case and nothing in the domestic law prevented the police from obtaining it.

The domestic authorities' reliance on the provisions of the Criminal Procedure Act, which concerned a request for information on the owner or user of a certain means of electronic communication and did not contain specific rules as to the association between the dynamic IP address and subscriber information, was therefore manifestly inappropriate. Moreover, it offered virtually no protection from arbitrary interference. At the relevant time there appeared to have been no regulation specifying the conditions for the retention of data obtained under the Criminal Procedure Act and no safeguards against abuse by State officials in the procedure for access to and transfer of such data. Furthermore, no independent supervision of the use of these police powers had been shown to have existed, despite the fact that those powers compelled the ISP to retrieve the stored connection data and enabled the police to associate a great deal of information concerning online activity with a particular individual without his or her consent.

In sum, the law on which the contested measure was based and the way it had been applied by the domestic courts lacked clarity and did not offer sufficient safeguards against arbitrary interference. The interference with the applicant's right to respect for his private life was thus not "in accordance with the law".

Conclusion: violation (six votes to one).

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

(See also *Delfi AS v. Estonia* [GC], 64569/09, 16 June 2015, Information Note 186)

Respect for private life, positive obligations

Stateless migrant unable to regularise residence status following break-up of predecessor State, despite many years of tolerated stay: *violation*

Hoti v. Croatia, 63311/14, judgment 26.4.2018 [Section I]

Facts – In 1962 the applicant was born in the autonomous region of Kosovo in the former Socialist Federal Republic of Yugoslavia (SFRY). His parents were political refugees from Albania. In 1979 he moved to Croatia, which was at the time part of the SFRY, and he has lived there ever since.

The applicant is stateless. During the existence of the former SFRY, his residence status in Croatia was regularised through the recognition of the effects of his domicile in Kosovo and the refugee status granted to his parents by the local authorities there. However, following the break-up of the former SFRY, his residence status passed through many stages and legal regimes. He applied for Croatian citizenship and a permanent residence permit but both applications were refused.

From 2011 onwards his status was dependent on one-year extensions of a temporary residence permit granted on humanitarian grounds. Under the Aliens Act, in order to prolong his stay on humanitarian grounds, the applicant needed a valid travel document or, failing that, the consent of the Ministry of the Interior, which was discretionary. In 2014 he was refused an extension for failing to provide a valid travel document even though there had been a possibility for him to travel to Kosovo to obtain such a document there. The applicant unsuccessfully challenged that decision before the domestic courts.

Law – Article 8: The applicant was unemployed as his prospect of finding employment was *de facto* hampered without the regularisation of his residence status. The prospect of him securing normal health insurance or pension rights was therefore also adversely affected. In those circumstances, particularly in view of the applicant's advanced age and the fact that he had lived in Croatia for almost forty years without having any formal or *de facto* link with any other country, the uncertainty of his residence status had adversely affected his private life.

Although the applicant had not been subject to a process of erasure of his residence status, his case bore some resemblance to that of the applicants in *Kurić and Others v. Slovenia*, as it concerned a complex and very specific factual and legal situation related to the regularisation of the status of aliens residing in Croatia following the break-up of the former SFRY.

Moreover, the applicant was stateless. His residence status in Croatia, although not always regularised, had been tolerated by the Croatian authorities for a number of years. His position could not be considered on a par with that of other potential immi-

grants seeking to regularise their residence status in Croatia.

The principal question to be examined in the instant case was therefore whether, having regard to the circumstances as a whole, the Croatian authorities had provided an effective and accessible procedure or combination of procedures enabling the applicant to have the issue of his further stay and status in Croatia determined with due regard to his private-life interests.

Under the relevant domestic law stateless persons were not required to have a valid travel document when applying for a permanent residence permit in Croatia. However, this was of limited relevance as in order to be able to apply for permanent residence, stateless persons needed five years' uninterrupted temporary residence in Croatia and for that a valid travel document was required. Thus, in reality, contrary to the principles flowing from the UN Convention relating to the Status of Stateless Persons (to which Croatia acceded on 12 October 1992 by succession), stateless individuals, such as the applicant, were required to fulfil requirements which by virtue of their status they were unable to fulfil.

It was difficult to understand the Croatian authorities' insistence on the applicant's obtaining a travel document from the authorities in Kosovo, while his statelessness was evident from his birth certificates issued by the authorities in Kosovo in 1987 and 2009. Furthermore, the Croatian authorities had never considered providing administrative assistance to facilitate the applicant's contact with the authorities of another country to resolve his situation as provided in the international instruments to which Croatia was a party.

With respect to the extension of the applicant's temporary stay on humanitarian grounds through the Ministry's consent, such consent was purely discretionary, was not exercised consistently and appeared to take no account of the special features of the applicant's case and his private-life situation. Nor had the domestic courts taken those matters into account when examining the applicant's complaints.

Consequently, the respondent State had not complied with its positive obligation to provide an effective and accessible procedure or a combination of procedures enabling the applicant to have the issues of his further stay and status in Croatia determined with due regard to his private-life interests under Article 8.

Conclusion: violation (unanimously).

Article 41: EUR 7,500 in respect of non-pecuniary damage.

(See also *Kurić and Others v. Slovenia* [GC], 26828/06, 26 June 2012, Information Note 153; and *Abuhmaid v. Ukraine*, 31183/13, 12 January 2017, Information Note 203)

Respect for family life

Decision by domestic authorities to allow adoption of psychologically vulnerable child by foster parents: *case referred to the Grand Chamber*

Strand Lobben and Others v. Norway, 37283/13, judgment 30.11.2017 [Section V]

In 2008 the first applicant, who was single and had been identified by the child welfare authorities as being in need of guidance on motherhood, gave birth to a baby boy (the second applicant). After the birth she moved into a family centre with her son so that her ability to give him adequate care could be monitored. Three weeks later she withdrew her consent to stay in the centre. Concerned about her parenting skills, the child welfare authorities obtained an emergency care order and the child was placed with foster parents. The authorities later obtained a full care order. In 2011 they successfully sought an order by the County Social Welfare Board for the first applicant to be deprived of her parental responsibility and for the child's foster parents to be allowed to adopt him. That order was upheld by the City Court, which found that particularly weighty reasons existed for consenting to the proposed adoption. Although the first applicant's general situation had improved (she had married and had a baby daughter for whom she appeared to be able to care), the situation was different with her son, whom several experts had described as a vulnerable child who was easily stressed and needed a lot of quiet, security and support. In the City Court's view, the first applicant would not be sufficiently able to see or understand his special care needs which, if not met, would give rise to a considerable risk of abnormal development. The child's fundamental attachment was to his foster parents, with whom he had been living almost since birth, and adoption would give him a sense of belonging and security for longer than the period a foster-home relationship would last. The first applicant was refused leave to appeal against the City Court's decision.

In a judgment of 30 November 2017 (see Information Note 212), a Chamber of the Court held, by four votes to three, that there had been no violation of Article 8. In the Court's view, taking into account that there had been no positive development in the mother's competence in contact situations throughout the three years in which she had had rights of access, that the decision-making process was fair, and having regard to the fact that the domestic authorities had the benefit of direct contact with all the persons concerned, there were such exceptional circumstances in the present case as could justify the measures in question and they were motivated by an overriding requirement pertaining to the child's best interests.

On 9 April 2018 the case was referred to the Grand Chamber at the applicants' request.

(See also the Factsheets on Parental rights and Children's rights)

Respect for family life

Exceptional circumstances justifying adoption of children, victims of domestic violence, by foster parents: *no violation*

Mohamed Hasan v. Norway, 27496/15, judgment 26.4.2018 [Section V]

Facts – The applicant and her husband, Iraqi nationals residing in Norway at the material time, had two daughters, born in 2008 and 2010. As the applicant's husband was violent towards her and their children, she repeatedly spent time in crisis centres and her first daughter was twice placed in an emergency foster home. In late 2010 the authorities placed both children in emergency foster care. In 2011, during a contact visit with the applicant, the children were abducted by two masked individuals who forced their way in and attacked the applicant using an electroshock weapon. The children were later found and the father admitted he had orchestrated the abduction.

Following this incident, the County Social Welfare Board issued an order, which was upheld on appeal, for both children to be taken into care in separate foster homes at secret addresses and no contact was allowed between them and their parents. A further decision was taken in 2014 to keep the children in foster care, remove parental authority and to allow their adoption by their foster parents. The applicant and her husband appealed unsuccessfully. In the domestic proceedings, the applicant acknowledged her children's attachment to their foster homes and did not request that the children be returned to her.

Law – Article 8: Concerning the decision-making process, the applicant had been present and represented by legal counsel at the proceedings before the Board and the City Court. Each body comprised of a professional judge or equivalent, a psychologist and a lay person with the case being heard over the course of two days. An expert had given written statements and appeared at the hearings to be questioned. The applicant had thus been sufficiently involved in the decision-making process, seen as whole, to be provided with the requisite protection of her interests and fully able to present her case. Moreover, she had also had access to review her case through leave-to-appeal proceedings before the High Court and Supreme Court.

The factors motivating the authorities were clearly the need to protect the applicant's daughters and ensure that they could be brought up in a safe environment suited to their particular vulnerability by the persons to whom they had attached as carers. The domestic authorities had also had due regard to individual factors relating to each child, such as their age and maturity, as well as the effects of the decision with regard to their cultural background and relationships with relatives.

The decision to remove the applicant's parental authority and to authorise the adoption of her daughters had been taken "in exceptional circumstances". The domestic courts had referred to numerous incidents of domestic violence and abuse by the applicant's husband, as a result of which the children had experienced several broken relationships and become particularly vulnerable. The children had lost their attachment to the applicant and had developed such an attachment to their foster parents that it would have been harmful for them to be removed. Moreover, the applicant would not be able to take care of two children with such a traumatic background and it was improbable that any of the parents would be able to exercise parental authority over them in the future. Furthermore, the abduction risk was of such a nature that even if the children were to remain in temporary care, the applicant could not in any event be given access to them. Given that they had been living under a strict security regime because of that risk, and taking into account their history, it was especially important

that stability and predictability be ensured. In that respect, an adoption, compared with long-term foster case, ensured a higher degree of security. While the applicant had established an independent life for herself after the final breakdown of the relationship with her former husband, she would not have been able to protect the children against him and his relatives.

In sum, the decision-making process had been fair. The removal of parental authority and consent to adoption had been justified by exceptional circumstances and motivated by overriding requirements pertaining to the children's best interests. Therefore, the impugned measures did not amount to a disproportionate interference with the applicant's right to respect for her family life.

Conclusion: no violation (unanimously).

(See also *Strand Lobben and Others v. Norway*, 37283/13, 30 November 2017, Information Note 212, referred to the Grand Chamber on 9 April 2018 (see the summary above); and the Factsheet on Children's rights)

ARTICLE 10

Freedom of expression

Defence counsel reprimanded for statement made to the press on leaving court after the verdict: *violation*

Ottan v. France, 41841/12, judgment 19.4.2018 [Section V]

Facts – The applicant, a lawyer, was acting for the father of a minor who had been killed by a gendarme using his service firearm in March 2003. The death had given rise to riots in the working-class neighbourhood where the victim – a member of a community of foreign origin – had lived. The gendarme, who had been committed for trial before an assize court on charges of manslaughter, was acquitted in October 2009 after tense court proceedings. In the minutes following delivery of the verdict the applicant was questioned by the journalists who were present in view of the trial's sensitive and high-profile nature. Invited to state whether he had expected such a verdict, the applicant replied "I always knew that it was possible. A white, exclusively white, jury, in which not all communities are represented ... the door was wide open to acquittal, it's not a surprise."

In December 2010 the court of appeal issued a warning to the applicant. His appeal on points of law was dismissed in June 2012.

Law – Article 10: The disciplinary penalty imposed on the applicant amounted to an interference with the exercise of the right to freedom of expression, had been prescribed by law and pursued the aims of protecting the reputation or rights of others and maintaining the authority and impartiality of the judiciary.

The applicant's statement had been made in response to a question from a journalist, when the acquittal verdict had already been delivered and the hearing before the assize court had ended. In consequence, it was not part of "conduct in the courtroom", in respect of which a lawyer enjoyed judicial immunity.

The Court examined the applicant's complaint on the basis of the criteria adopted by it in *Morice v. France* [GC] (29369/10, 23 April 2015, Information Note 184), namely: (i) the applicant's status and the role played by his statement in the task of defending his client; (ii) contribution to a debate on a matter of public interest; (iii) the nature of the impugned remarks; (iv) the specific circumstances of the case; and (v) the nature of the sanction imposed.

(i) The impugned statement had been part of an analytical approach that could possibly have contributed to persuading the principal public prosecutor to lodge an appeal against the acquittal and thus giving the applicant an opportunity to continue his client's defence before an enlarged assize court of appeal.

(ii) The applicant's remarks, which concerned proceedings before an assize court sitting with a lay jury and the conduct of a criminal trial relating to the use of firearms by the police, were part of a debate on a matter of public interest in the context of a case which had received wide media coverage. In consequence, the national authorities had a duty to ensure a high level of protection of freedom of expression, with a particularly narrow margin of appreciation being afforded to them.

(iii) The applicant's comments did not accuse the jurors of racial prejudice. They were a general assertion with regard to the potential link between the composition of the jury and the gendarme's acquittal. They were akin to a general criticism of the functioning of the criminal-justice system, social relations, the question of diversity in jury

selection and the link between jurors' origins, their decision-making and their impartiality. In addition, the applicant had referred only to the possibility and not to its certainty, which was closer to a critical discussion than to an accusation of systematic partiality, something that would have been incompatible with the respect due to the justice system. Although the impugned statement was capable of shocking, it was nonetheless a value judgement which had had a sufficient factual basis, was in line with discussions at national and international level and had a sufficiently close connection with the facts of the case, having regard to its social and political context.

(iv) The applicant's statements had to be placed in the tense context in which the verdict had been delivered. They had applied to the assize court as a whole, the professional judges and the jury. However, the facts of the case did not support the conclusion that the applicant had attacked the authority and impartiality of the judiciary in such a manner as to justify his conviction.

(v) The penalty imposed on the applicant was the lightest possible in disciplinary proceedings, namely a warning. Nevertheless, this was not a trivial matter for a lawyer. Lastly, even when the sanction was the lightest possible, that fact could not in itself suffice to justify the interference with the applicant's freedom of expression.

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In the light of the foregoing, the applicant's conviction had thus to be regarded as disproportionate interference with his right to freedom of expression. It had not therefore been necessary in a democratic society.

Conclusion: violation (unanimously).

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

Freedom of expression

Conviction of blogger for publishing post using unconstitutional (Nazi) symbol: *inadmissible*

Nix v. Germany, 35285/16, decision 13.3.2018 [Section V]

Facts – The applicant is a blogger who produced a series of six posts complaining of what he considered to be the Employment Agency's racist and discriminatory interaction with his eighteen-year-old daughter (who was of German-Nepalese origin) regarding her professional development.

His third post contained a statement accompanied by a picture of the former SS chief Heinrich Himmler, showing him in SS uniform, with the badge of the Nazi party (including a swastika) on his front pocket, and wearing a swastika armband. Next to the picture the applicant posted a quote of Himmler concerning the schooling of children in Eastern Europe during the occupation by Nazi Germany to the effect that parents who wanted to offer their children good education had to submit a request to the SS and the police leadership.

Criminal proceedings were instituted against the applicant with the domestic court convicting him of the offences of libel and using symbols of unconstitutional organisations because of the picture displayed in the blog post. The applicant's appeals were dismissed.

In the Convention proceedings, the applicant complained under Article 10 of the Convention about his criminal conviction for the blog post.

Law – Article 10: The applicant's conviction amounted to an interference with his right to freedom of expression. The interference was prescribed by law and pursued the legitimate aim of preventing disorder.

As to whether the interference had been necessary in a democratic society, in light of the historical context, States which experienced the Nazi horrors could be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated. The legislature's choice to criminally sanction the use of Nazi symbols, to ban the use of such symbols from German political life, to maintain political peace and to prevent the revival of Nazism was seen against this background.

No criminal liability arose where the use of such symbols was meant to serve civil education, to combat unconstitutional movements, to promote art or science, research or teaching, to report on current or historical events, or serve similar purposes. In addition, the exemption from criminal liability where opposition to the ideology embodied by the used symbols was "obvious and clear" constituted an important safeguard for the right to freedom of expression.

The symbol used by the applicant could not be considered to have any other meaning than that of Nazi

ideology. The Court accepted that the applicant did not intend to spread totalitarian propaganda, to incite violence, or to utter hate speech, that his expression had not resulted in intimidation and he may have intended to contribute to a debate of public interest. However, in the absence of any reference or visible link to the applicant's earlier posts, it was not immediately understandable to readers that the impugned post was in fact part of a series concerning the interaction between the employment office and the applicant's daughter. Nor was there a single phrase referring to racism or discrimination. Therefore, the domestic courts could not be faulted for having considered only the specific utterance that was evident to the reader, that is the picture of Himmler in SS uniform with a swastika armband, the quoted statement, and the text written underneath, when assessing the applicant's criminal liability or for finding that there was no connection between the text and the policies which the Nazi symbols stood for.

This gratuitous use of symbols was exactly what the provision sanctioning the use of symbols of unconstitutional organisations was intended to prevent, to pre-empt anyone becoming used to certain symbols by banning them from all means of communication. The Court saw no reason to depart from the domestic courts' assessment that the applicant did not clearly and obviously reject Nazi ideology in his blog post.

The domestic authorities had thus adduced relevant and sufficient reasons and had not overstepped their margin of appreciation. The interference had therefore been proportionate to the legitimate aim pursued and was thus "necessary in a democratic society".

Conclusion: inadmissible (manifestly ill-founded).

(See also the Factsheet on Hate speech)

ARTICLE 13

Effective remedy

New case-law making remedy effective in length-of-proceedings cases, but only recently made public: *violation*

Brudan v. Romania, 75717/14, judgment 10.4.2018 [Section IV]

Facts – In its judgment in *Vlad and Others v. Romania* (40756/06 *et al.*, 26 November 2013, Information Note 168), the Court had invited Romania to introduce effective remedies in respect of the excessive duration of civil or criminal proceedings.

Pending the creation of specific remedies, the courts had then undertaken to accept compensation claims lodged on the general basis of tortious liability (Article 1349 of the New Civil Code). By a judgment of 30 January 2014, published on the internet on 22 September 2014, the High Court of Cassation and Justice enshrined and clarified this trend.

In November 2014 the applicant submitted a complaint concerning length of proceedings directly to the European Court, considering that no effective domestic remedy was available to her at that date.

Law – The question of exhaustion of domestic remedies was joined to the merits.

Article 13: In assessing the "effectiveness" of a compensatory remedy, the Court had identified the following criteria (see *Burdov v. Russia (no. 2)*, 33509/04, 15 January 2009, Information Note 115, and *Valada Matos das Neves v. Portugal*, 73798/13, 29 October 2015, Information Note 189): (i) an action for compensation had to be examined within a reasonable time; (ii) the compensation had to be paid promptly and generally no later than six months from the date on which the decision awarding compensation became enforceable; (iii) the relevant procedural rules had to be fair; (iv) the legal costs could not place an excessive burden on litigants where their action was justified; (v) the level of compensation could not be unreasonable in comparison with the awards made by the Court in similar cases.

(a) *The effectiveness of an action for tortious liability* – More than four years after the judgment in *Vlad and Others*, the examples submitted by the Government showed that domestic judicial practice had developed substantially:

– although the legislation did not impose a specific timeframe for ruling in this type of litigation, the time taken by the courts to settle such disputes did not seem unreasonable;

– with regard to the payment of compensation awards, there was no reason to doubt the authorities' diligence;

– there appeared to be no infringement of the principle of fairness in the conduct of such proceedings;

– for individuals who did not have sufficient resources, the national legislation provided for aid in the form of exemptions, discounts and staggered or suspended payment of the costs of proceedings; in addition, it was in principle for the unsuccessful party to pay those costs, and litigants who had applied for their reimbursement did not seem to have been turned down;

– the amount of compensation awarded was frequently higher than the amounts awarded by the Court in similar cases, and never lower than 80-90% of those sums.

The criteria implemented by the domestic courts in assessing whether or not the length of time taken to deliver judgment was reasonable seemed compatible with those identified by the Court.

This case-law had been consolidated by the High Court's judgment of 30 January 2014, in which the basic criteria to be used in this type of remedy had been set out. These principles had subsequently been followed by the lower courts.

In this context, the strictly compensatory nature of the remedy thus introduced could not be regarded as insufficient to the extent of rendering it flawed.

It thus appeared that the recommendation made by the Court under Article 46 of the Convention in *Vlad and Others* had been followed.

In conclusion, in the light of the domestic courts' consistent practice, an action for tortious liability represented an effective remedy for complaining about the excessive length of proceedings before the criminal or civil courts.

(b) *The effectiveness of this remedy in the present case* – Where the domestic remedy had resulted from developments in the case-law, fairness required a reasonable lapse of time so that individuals concerned could learn of the domestic decision enshrining it. The length of this period varied according to the circumstances, and particularly the publicity surrounding the relevant decision.

In the present case, it was from the point that it was "published on the Internet" (on 22 September 2014) that the judgment of 30 January 2014 had become available for consultation on the database of the High Court's case-law. In those circumstances, it was appropriate to identify a date six months after this Internet publication as the point from which the public could no longer have been unaware of the relevant judgment.

It was therefore from 22 March 2015 that this remedy had acquired the degree of certainty required by the Court to enable and oblige its use for the purposes of Article 35 § 1 of the Convention. This conclusion was valid both for proceedings that had already ended and for those that were still pending at national level, as no distinction was made in domestic case-law between pending and concluded proceedings.

As this date was subsequent to the date on which the present application had been lodged, the plea of inadmissibility for non-exhaustion of domestic remedies had to be dismissed.

Conclusion: violation (unanimously).

The Court also found unanimously a violation of Article 6 § 1 on account of the length of the proceedings.

Article 41: no claim made in respect of damage.

ARTICLE 14

Discrimination (Article 1 of Protocol No. 1)

Alleged discriminatory treatment in level of wages paid to prisoners: *inadmissible*

Dobrowolski and Others v. Poland, 45651/11 *et al.*, decision 13.3.2018 [Section I]

Facts – The applicants were employed while serving prison sentences, receiving a salary equal to half of the statutory minimum wage guaranteed to other employees. The law was amended on 8 March 2011 and the minimum wage of convicted persons was aligned with that of other employees.

Nine applicants lodged civil claims against the State on the basis that the Constitutional Court had established the unconstitutionality of the relevant legislation. The applicants sought reimbursement of the difference between full and half the minimum wage for the periods of their employment prior to 8 March 2011. The domestic courts dismissed all actions lodged stating that the salary received by the applicants for their work had been calculated in accordance with the law.

In the Convention proceedings, the applicants relied on Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. They

complained, *inter alia*, that the regulation allowing those engaged in work while imprisoned to be paid half of the basic minimum wage system had been discriminatory.

Law – Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1: The Court observed that the application concerned relations between prisoners carrying out remunerated work and their employers. The applicants' work was not compulsory and they had been aware of the financial conditions before accepting them. The Court noted that the State regulated the minimum wage of prisoners to not less than half the minimum statutory wage but placed no limit on the maximum amount they could in theory reach. The applicants' belief that prior to the law changing on 8 March 2011 their pay should have been equal to that of ordinary workers had not been recognised by law or any judicial decision.

The Constitutional Court's judgment declaring the impugned provision unconstitutional did not create an enforceable claim to the full minimum wage as the Constitutional Court expressly postponed its application until 8 March 2011. It was clearly provided that the unconstitutional provision of the domestic law would not lose its binding force until twelve months after the official publication of the judgment. Prior to the judgment and the subsequent amended legislation, the applicant did not have a legitimate expectation which could give rise to an issue under Article 1 of Protocol No. 1 to the Convention.

In sum, the applicants had not shown they had a claim which was sufficiently established to be enforceable, and therefore could not argue that they had a "possession" within the meaning of Article 1 of Protocol No. 1. Since Article 14 of the Convention was not autonomous, and since the facts of the cases did not fall within the ambit of Article 1 of Protocol No. 1, Article 14 could not apply in the instant case.

Conclusion: inadmissible (incompatible *ratione materiae*).

ARTICLE 35

ARTICLE 35 § 1

Exhaustion of domestic remedies

Judicial review to be exhausted in respect of decision refusing to grant stay on removal of seriously ill people: *inadmissible*

Khaksar v. the United Kingdom, 2654/18, decision 3.4.2018 [Section I]

Facts – The applicant is an Afghan national who was injured in a bomb blast in Afghanistan, suffering serious injuries with complex medical repercussions. He left his country to seek medical care in the United Kingdom, claiming asylum upon entry. The Secretary of State for the Home Department refused the application, finding that the applicant's medical condition was not at such a critical stage that it would be inhumane to remove him to Afghanistan.

All the applicant's appeals to the domestic courts were dismissed. Following the decision of the Court in *Paposhvili v. Belgium* ([GC], 41738/10, 13 December 2016, Information Note 202), the applicant made further submissions, arguing that his Article 3 and 8 rights would be engaged and breached by return to Afghanistan. The Secretary of State considered that the submissions did not amount to a fresh claim, examining the applicant's case under the principles applied throughout the previous domestic proceedings in respect of the threshold applicable to a breach of Article 3 in medical cases.

While the decision could not be appealed, the applicant did not apply for the available judicial review before the High Court.

Law – Article 35 § 1: Notwithstanding the refusal of the Secretary of State to reconsider the applicant's case in light of the *Paposhvili* test, the Court noted that the Court of Appeal had recently provided formally binding guidance, based on the test set out in *Paposhvili v. Belgium* [GC], to all courts and tribunals below the level of the Supreme Court in respect of decisions taken regarding a stay on removal of seriously ill people. In this regard the applicant did not seek permission before the High Court for judicial review of the decision of the Secretary of State, to enable the domestic courts to consider the matter in accordance with the domestic law. Therefore, the applicant had failed to exhaust all domestic remedies available to him.

Conclusion: inadmissible (failure to exhaust domestic remedies).

(See also *N. v. the United Kingdom* [GC], 26565/05, 27 May 2008, Information Note 108)

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Demand for retrospective repayment of welfare benefit mistakenly administered and constituting the applicant's sole source of income: *violation*

Čakarević v. Croatia, 48921/13, judgment 26.4.2018 [Section I]

Facts – In 1996 the Employment Bureau granted the applicant unemployment benefits for a fixed period of time which was subsequently renewed until further notice. In March 2001 the Bureau found that she had been receiving the benefit beyond the twelve-month period allowed by law and terminated her entitlement with effect from June 1998. The Bureau brought a civil action against the applicant for unjust enrichment, seeking repayment of about EUR 2,600, together with statutory interest, on the basis of the unemployment benefits she had received between June 1998 and March 2001. The domestic courts upheld the repayment order.

Law – Article 1 of Protocol No. 1

(a) *Applicability* – An individual should be entitled to rely on the validity of a final administrative decision in his or her favour, and on the implementing measures already taken pursuant to it, provided that neither the beneficiary nor anyone on his or her behalf had contributed to such a decision having been wrongly made or wrongly implemented. Thus, while an administrative decision could be subject to revocation for the future (*ex nunc*), an expectation that it should not be called into question retrospectively (*ex tunc*) was to be recognised as being legitimate, unless there were weighty reasons to the contrary in the general interest or in the interest of third parties.

Several circumstances spoke in favour of recognising the applicant's legal position as protected by a "legitimate expectation" for the purposes of the application of Article 1 of Protocol No. 1. Firstly, there was no indication that the applicant had contributed to the disbursement of the benefits being continued beyond the applicable statutory time-limit. Secondly, the applicant had received the unemployment benefits in good faith. Thirdly, the administrative decision had not contained any express mention of the fact that under the relevant statutory provisions the entitlement would expire on a certain date. Fourthly, there was a long lapse of time after the expiry of the statutory time-limit during which the authorities had failed to react while continuing to make the monthly payments. Those circumstances were capable of inducing the applicant to believe that she was entitled to receive those payments. Therefore, taking into account the nature of the benefits as current support for basic subsistence needs, the applicant had a legitimate expectation of being able to rely on the payments she had received as rightful entitlements. The fact that the courts had subsequently established that the payments had taken place without a legal basis in domestic law was thus not decisive. Article 1 of Protocol No. 1 was applicable.

(b) *Compliance* – Unlike in *Moskal v. Poland*, what was at issue was not the discontinuation of the applicant's unemployment benefit but an obligation imposed on her to repay benefits already received in reliance on an administrative decision.

As regards the proportionality of the interference, the applicant had not been alleged to have contributed to the receipt of benefits beyond her legal entitlement. As the competent authority had taken a decision in the applicant's favour and continued to make the respective payments, the applicant had a legitimate basis for assuming that the payments received were legally correct. It was not reasonable to conclude that the applicant was required to realise that she was in receipt of unemployment benefits beyond the statutory maximum period.

The authorities had failed in their duty to act in good time and in an appropriate and consistent manner. Even though the unemployment benefit payments which the applicant should not have received were entirely the result of an error of the State, the applicant had been ordered to repay the overpaid amount in full, together with statutory interest. Therefore, no responsibility on behalf of the State was established, and the State avoided any consequences of its own error with the burden being placed on the applicant only.

The applicant had been offered to repay her debt in sixty installments. However, the sum ordered to be repaid represented a significant amount of money for her given that she had been deprived of her only source of income, as well as her overall financial situation. The sum she had received on account of unemployment benefits was very modest and as such had been consumed for her subsistence. The national courts in ruling unjust enrichment had not taken into consideration the applicant's health and

economic situation. She had been suffering from a psychiatric condition, was incapable of working and had been unemployed for a long period of time. She had no bank accounts, no income of any sort, and no property of any significance. Such circumstances meant paying her debt even in installments would have put at risk her subsistence.

In sum, the requirement imposed on the applicant to reimburse the amount of the unemployment benefits paid to her in error by the competent authority beyond the statutory maximum period had entailed an excessive individual burden on her.

Conclusion: violation (unanimously).

Article 41: EUR 2,600 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See *Moskal v. Poland*, 10373/05, 15 September 2009, Information Note 122).

ARTICLE 2 OF PROTOCOL No. 7

Right of appeal in criminal matters

Appellate review only after sentence of administrative detention had been served in full: *violation*

Tsvetkova and Others v. Russia, 54381/08 *et al.*, judgment 10.4.2018 [Section III]

(See Article 5 § 1 above, page 6)

GRAND CHAMBER (PENDING)

Referrals

Strand Lobben and Others v. Norway, 37283/13, judgment 30.11.2017 [Section V]

(See Article 8 above, page 19)

OTHER JURISDICTIONS

European Union – Court of Justice (CJEU) and General Court

Need for effective judicial review to assess the necessity of making membership of a denomination a requirement for employment by the church

Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV, C-414/16, judgment 17.4.2018 (CJEU, Grand Chamber)

The Evangelisches Werk für Diakonie und Entwicklung eV (the German Protestant Social Welfare and Development Organisation – hereafter "Evangelisches Werk") published an offer of employment for a project for producing a parallel report on the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. The offer specified that candidates had to be members of a Protestant church or a church belonging to the Working Group of Christian Churches in Germany. One candidate, of no denomination, was shortlisted after a preliminary selection but was not invited to interview. Believing that she had been the victim of discrimination on grounds of her religion, she brought an action in the German courts against Evangelisches Werk and claimed compensation.

The German Federal Labour Court referred the following questions to the CJEU: (i) whether Article 4(2) of Directive 2000/78/EC[3] should be interpreted as meaning that a church or other organisation whose ethos was based on religion or belief, and which intended to recruit an employee, could itself determine authoritatively the occupational activities for which religion, by reason of the nature of the activity concerned or the context in which it was carried out, constituted a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation; (ii) whether a national court was required, in a dispute between individuals, to disapply a provision of national law which it was not possible to interpret in conformity with Article 4(2) of Directive 2000/78; and (iii) what the criteria should be for ascertaining in the particular case whether, having regard to the ethos of the church or organisation in question, religion or belief constituted, in view of the nature of the activity concerned or the context in which it was carried out, a genuine, legitimate and justified occupational requirement within the meaning of Article 4(2) of Directive 2000/78.

Regarding the first question, Article 4(2) of Directive 2000/78 provided that a church or other organisation whose ethos was based on religion or belief

3. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

could lay down a requirement related to religion or belief if, having regard to the nature of the activity concerned or the context in which it was carried out, religion or belief constituted a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. That Article was also designed to ensure a fair balance between the right to autonomy of churches and other organisations whose ethos was based on religion or belief, on the one hand, and, on the other hand, the right of workers under the Directive not to be discriminated against on grounds of religion or belief, *inter alia*, when they were being recruited. In situations where those rights might clash, a balancing exercise had to be performed, in accordance with the criteria laid down in the Directive, in order to ensure a fair balance between them. In the event of a dispute, it had to be possible for the balancing exercise to be the subject of review by an independent authority, and ultimately by a national court.

Hence, where a church or other organisation whose ethos was based on religion or belief asserted, in support of an act or decision such as the rejection of an application for employment by it, that by reason of the nature of the activities concerned or the context in which the activities were to be carried out, religion constituted a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it had to be possible for such an assertion to be the subject of effective judicial review.

With regard to the third question, it was not for the national courts, in principle, to rule on the ethos as such on which the purported occupational requirement was founded (see the ECHR judgment in *Fernández Martínez v. Spain* [GC], 56030/07, 12 June 2014, Information Note 175). They were nevertheless called on to decide on a case-by-case basis whether the three criteria, that the requirement be "genuine, legitimate and justified", were satisfied from the point of view of that ethos. Thus, Article 4(2) of Directive 2000/78 had to be interpreted as meaning that the genuine, legitimate and justified occupational requirement it referred to was a requirement that was necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it was carried out, and could not cover considerations which had no connection with that ethos or with the right to autonomy of the church or organisation. That requirement had to comply with the principle of proportionality, be appropriate and not go beyond what was necessary for attaining the objective pursued.

Regarding the second question, a national court hearing a dispute between two individuals was obliged, where it was not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78, to ensure the judicial protection deriving for individuals from Article 21 (prohibition of any discrimination based on religion or belief) and Article 47 (right to effective judicial protection) of the Charter of Fundamental Rights of the European Union and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.

(As regards the ECHR case-law, see also *Lombardi Vallauri v. Italy*, 39128/05, 20 October 2009, Information Note 123; *Obst v. Germany*, 425/03, 23 September 2010, Information Note 133; *Schüth v. Germany*, 1620/03, 23 September 2010, Information Note 133; and *Siebenhaar v. Germany*, 18136/02, 3 February 2011)

European Union – Court of Justice (CJEU) and General Court

Eligibility criteria for subsidiary protection for a non-EU national suffering from the psychological after-effects of previous torture which might be aggravated if he were returned to his country of origin

MP v. Secretary of State for the Home Department, C-353/16, judgment 24.4.2018 (CJEU, Grand Chamber)

In 2009 a Sri Lankan national lodged an asylum application in the United Kingdom on the grounds that he had been detained and tortured by the Sri Lankan security forces because of his membership of a certain organisation and that he was liable once again to suffer ill-treatment if he returned to his country of origin. That application was rejected by the relevant authorities. The applicant was refused subsidiary protection on the grounds that he had not established that he was still threatened in his country of origin. On the other hand the authorities acknowledged that, in view of the severity of the applicant's mental illness, which had been caused by torture, and since he would be unable to obtain the healthcare required by his condition, expelling him to Sri Lanka would be incompatible with

Article 3 of the European Convention on Human Rights (hereafter "Article 3 of the Convention").

On appeal, the Supreme Court of the United Kingdom asked the CJEU whether the definition of subsidiary protection set out in Articles 2 and 15 of Directive 2004/83/EC[4] covered a real risk of serious harm to the physical or psychological health of the applicant if returned to the country of origin, resulting from previous torture or inhuman or degrading treatment for which the country of origin was responsible.

In its judgment the CJEU reiterated that under Article 2(e) of Directive 2004/83, a third country national was eligible for subsidiary protection only if substantial grounds had been shown for believing that, if returned to his country of origin, he would face a real risk of suffering one of the three types of serious harm defined in Article 15 of that directive, that is to say, with particular reference to Article 15(b), torture or inhuman or degrading treatment or punishment.

The fact that the person concerned had in the past been tortured by the authorities of his country of origin was not in itself sufficient justification for him to be eligible for subsidiary protection when there was no longer a real risk that such torture would be repeated if he were returned to that country.

The request for a preliminary ruling concerned a third country national who had not only been tortured by the authorities of his country of origin in the past, but who, in addition – even though there was no longer any risk of him being tortured again if returned to that country – continued to suffer severe psychological after-effects resulting from the torture. Furthermore, according to duly substantiated medical evidence, those after-effects would be substantially aggravated and lead to a serious risk of him committing suicide if he were returned to his country of origin.

Article 15(b) of Directive 2004/83 should be interpreted and applied in a manner consistent with the rights guaranteed by Article 4 of the Charter of Fundamental Rights of the European Union, the meaning and scope of which were equivalent to those of Article 3 of the Convention. Furthermore, Articles 4 and 19(2) of the Charter as interpreted in the light of Article 3 of the Convention and of the recent case-law of the European Court of Human Rights (see its judgment in *Paposhvili v. Belgium* [GC], 41738/10, 13 December 2016, Information Note 202) precluded the removal of a third country national where such expulsion would, in substance, lead to a serious, rapid and irreversible decline in his state of mental health, and especially where such decline would lead to a significant reduction in life expectancy.

The national courts had held that Article 3 of the Convention precluded the applicant being removed from the United Kingdom to Sri Lanka. Thus the present case concerned not the protection against removal deriving, under Article 3 of the Convention, from the prohibition on exposing a person to inhuman or degrading treatment, but rather the separate issue as to whether the host Member State was required to grant subsidiary protection status, under Directive 2004/83, to a third country national who had been tortured by the authorities of his country of origin and suffered severe psychological after-effects which, in the event of him being returned to that country, could have been substantially aggravated and led to a serious risk of him committing suicide.

Both the cause of the current state of health of a third country national in a situation such as that in the main proceedings, namely acts of torture inflicted by the authorities of his country of origin in the past, and the fact that, if he were to be returned to his country of origin, his mental health disorders would be substantially aggravated on account of the psychological trauma that he continued to suffer as a result of that torture, were relevant factors to be taken into account when interpreting Article 15(b) of Directive 2004/83. Nevertheless, such substantial aggravation could not, in itself, be regarded as inhuman or degrading treatment inflicted on that third country national in his country of origin.

Thus Articles 2(e) and 15(b) of Directive 2004/83, read in the light of Article 4 of the Charter, should be interpreted as meaning that a third country national who in the past had been tortured by the authorities of his country of origin and no longer faced a risk of being tortured if returned to that country, but whose physical and psychological health could, if so returned, seriously deteriorate, leading to a serious risk of him committing suicide on account of trauma resulting from the torture he

4. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

had been subjected to, was eligible for subsidiary protection if there was a real risk of him being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture, that being a matter for the national court to determine.

(As regards the ECHR case-law, see *Saadi v. Italia* [GC], 37201/06, 28 February 2008, Information Note 105; and *Paposhvili v. Belgium* [GC], 41738/10, 13 December 2016, Information Note 202)

Inter-American Court of Human Rights (IACtHR)

State environmental obligations to ensure the right to life and personal integrity

Advisory Opinion OC-23/17, Series A No. 23, opinion 15.11.2017

[This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. A more detailed, official abstract (in Spanish only) is available on that Court's website: www.corteidh.or.cr.]

The request – The Republic of Colombia presented a request for an advisory opinion for the Inter-American Court of Human Rights (hereafter "the Court") to rule on State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity, recognised in Articles 4 and 5 of the American Convention on Human Rights (ACHR) and Articles 1(1) and 2 of the said treaty. Colombia submitted three specific questions, which the Court interpreted and summarised in two basic issues:

1. What is the content and scope of the term "jurisdiction" in Article 1(1) of the ACHR, in the context of compliance with environmental obligations, particularly in relation to extraterritorial conducts of a State, or with effects beyond its national territory?

2. What State obligations arise from the general obligations to respect and ensure the right to life and personal integrity, in relation to environmental damages?

Law – As a general introduction to the issue of human rights and the environment, in its Advisory Opinion, the Court recognised the existence of an irrefutable relationship between the protection of the environment and the realisation of other human rights, due to the fact that environmental degradation affects the effective enjoyment of other human rights. In making this declaration, the Court made reference to the European Court of Human Rights (ECHR) case-law regarding the effects that severe environmental degradation can have on rights such as the rights to life, to privacy and to private property (the Court referenced, among others: *Öneryildiz v. Turkey*, *Budayeva and Others v. Russia*, *López Ostra v. Spain*, *Guerra and Others v. Italy*, *Tătar v. Romania* and *Di Sarno and Others v. Italy*).

Additionally, the Court emphasised the interdependence and indivisibility between human rights, the environment and sustainable development. Based on said connection, the Court noted that currently: (i) numerous human-rights systems recognise the right to a healthy environment as an independent right, and, simultaneously, (ii) numerous other human rights are particularly vulnerable to environmental degradation, all of which results in a series of environmental obligations for States to ensure that they comply with their duty to respect and ensure those rights.

In answering Colombia's first question, the Court ruled that (i) States Parties to the ACHR have the obligation to respect and ensure the rights recognised in this instrument for all persons subject to their jurisdiction; (ii) the term "jurisdiction" in the ACHR is broader than the territory of a State and includes situations beyond its territorial limits, and thus, States must respect and ensure the human rights of all persons subject to their jurisdiction, even if they are not within its territory; (iii) the exercise of jurisdiction under Article 1(1) of the ACHR encompasses any situation in which a State exercises effective authority or control over an individual or individuals, either within or outside its territory. Although, it emphasised that the exercise of jurisdiction outside the territory of a State is an exceptional situation that must be examined restrictively in each specific case. In reaching this conclusion, the Court referenced the ECHR's case-law concerning extraterritorial application of the European Convention on Human Rights, such as the cases of *Loizidou v. Turkey*, *Ilaşcu and Others v. Moldova and Russia*; *Al-Skeini and Others v. the United Kingdom*, *Chiragov and Others v. Armenia*, *Catan and Others v. the Republic of Moldova and Russia*, *Banković and Others v. Belgium and others*, among many more. The Court also gave the opinion that States have the obligation to prevent causing transboundary damage and that, in this regard, a person can be considered within the jurisdiction of the State of origin, if there is a causal connection between the incident that took place on its territory

and the violation of the human rights of persons outside its territory. According to the Inter-American Court, the exercise of jurisdiction arises when the State of origin exercises effective control of the activities that caused the damage and consequent violation of human rights.

In order to answer Colombia's second question, the Court ruled on the States' substantive and procedural obligations regarding environmental protection, which arise from the obligation to respect and ensure the rights to life and personal integrity. Regarding substantive obligations, the Court made an extensive analysis of the preventive and precautionary principles, as well as the duty of cooperation in relation to transboundary environmental harm.

The Court found that States must prevent significant environmental damage. In order to comply with this obligation of prevention, the Court ruled that States must regulate, supervise and monitor the activities under their jurisdiction that could cause significant damage to the environment; carry out environmental impact assessments (EIA) when there is a risk of significant damage to the environment; prepare contingency plans in order to establish safety measures and procedures to minimise the possibility of major environmental disasters and mitigate any significant environmental damage that could have occurred, even when this happened despite preventive actions by the State. Concerning EIAs, the Court adopted a similar criteria to that of the ECHR in cases such as *Dubetska and Others v. Ukraine*, where it was stated that for adverse effects of environmental pollution to be considered as human-rights violations, they must attain a certain minimum level relative to each case, and that elements such as the context, the intensity and the duration of the nuisance must be taken into account for its determination.

The Court also found that States must act in keeping with the precautionary principle to protect the right to life and to personal integrity in the event of possible serious and irreversible damage to the environment, even in the absence of scientific certainty. Lastly, regarding substantive obligations, the Court found that States must cooperate, in good faith, when they become aware that an activity planned under their jurisdiction could generate a risk of significant transboundary damage and in cases of environmental emergencies.

Finally, with respect to procedural obligations, the Court found that States have several concrete obligations derived from the right of access to information, public participation, and access to justice, in both domestic and transboundary contexts. When addressing obligations that stemmed from the right of access to information, the Court took note of ECHR cases, such as *Guerra and Others v. Italy*, *Taşkin and Others v. Turkey*, *McGinley and Egan v. the United Kingdom*, among others, to highlight States' positive obligation to provide an effective and accessible process for individuals to access all relevant information, regarding dangerous activities that may cause environmental damage, in order for people to evaluate the risks to which they may be exposed. Additionally, after also taking note of the ECHR's case-law in cases such as *Grimkovskaya v. Ukraine*, the Court concluded that States have an obligation to guarantee public participation in environment-related policies, without discrimination, in an equitable, significant and transparent manner, for which they must have previously guaranteed access to the relevant information.

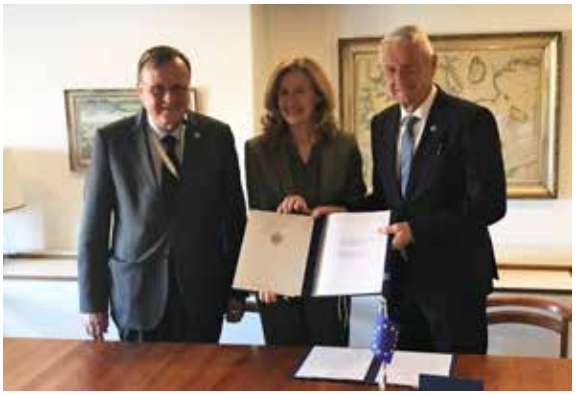
COURT NEWS

Elections

During its spring session held from 23 to 27 April 2018, the Parliamentary Assembly of the Council of Europe elected Ivana Jelić judge of the Court in respect of Montenegro. Her nine-year term in office will commence no later than three months after her election.

Protocol No. 16 to the Convention

France has just ratified Protocol No. 16 to the Convention. This tenth ratification triggered the entry into force of that protocol which will be effective on 1 August 2018 (after a three-month delay), solely in respect of the States which have signed and ratified it.



Protocol No. 16 will allow the highest courts of the member States of the Council of Europe to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention, in the context of cases pending before the national courts.

New edition of the Rules of Court

A new edition of the Rules of Court has just been published on the Court's Internet site (www.echr.coe.int – Official texts). This new edition incorporates amendments to Rule 29 (on *ad hoc* judges) made by the Plenary Court. It entered into force on 16 April 2018.

Copenhagen Declaration

On 12 and 13 April 2018 a high-level conference on the reform of the Convention system was held in Copenhagen at the initiative of the Danish Chairmanship of the Committee of Ministers, attended by more than 20 Ministers of Justice.

A joint Declaration was formally adopted by all 47 member States of the Council of Europe at the close of the conference.

Rule 47 of the Rules of Court: new video

The Court has recently produced a video in Spanish for applicants. The aim of the video is to heighten awareness among Spanish applicants concerning the most common errors made in Spain when completing the application form.

The video is the first in a series aimed at countries in which recurrent errors have been identified in relation to Rule 47 (on the contents of an individual application) of the Rules of Court.

It is available on the Court's Internet site (www.echr.coe.int – Applicants – Other languages) and its YouTube channel (https://www.youtube.com/user/EuropeanCourt).

2018 René Cassin advocacy competition

The final round of the 33rd 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 Court in Strasbourg on 6 April 2018.

Thirty-two university teams from eight countries (Armenia, Austria, Belgium, France, the Netherlands, Romania, Russia and Switzerland) competed on a fictitious case concerning whistleblowers and European human-rights law. Students from the University of Saint-Étienne (France) were declared the winners after beating a rival team from the University of Angers (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 (http://concourscassin.eu).

RECENT PUBLICATIONS

Practical Guide on Admissibility Criteria: 4th edition

The Practical Guide on Admissibility Criteria describes the conditions of admissibility which an application to the Court must meet. This fourth edition covers case-law up to 28 February 2017. It can be downloaded from the Court's Internet site (www.echr.coe.int – Case-Law). Translations of this new edition into non-official languages are under way.

Handbook on European non-discrimination law: 2018 edition

A new edition of the Handbook on European non-discrimination law, completed in February 2018, has been published jointly by the Court and the European Union Agency for Fundamental Rights (FRA). Translations into French and other languages are under way. This 2018 edition in English can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law).

New Case-Law Guide

As part of its series on the case-law relating to particular Convention Articles the Court has recently published a Case-Law Guide on Article 18 of the Convention (limitation on use of restrictions on rights). Translation into French is pending.

All Case-Law Guides can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law).

Factsheets: new translations

As a result of collaboration with the Supreme Court of the Slovak Republic, some of the Court's factsheets are now available in Slovak; funding from the South Programme II (2015-2017) has also enabled translation of certain factsheets into Arabic. Moreover, the factsheet on conscientious objection has also been translated into Greek.

All the Court's factsheets, in English, French and some non-official languages, are available for downloading from the Court's Internet site (www.echr.coe.int – Press).

Facts and figures by State: Czech Republic and Denmark

The Court has launched a new series of documents which presents by State the main judgments of the Court and their impact in the country concerned. Two documents concerning the Czech Republic and Denmark have just been published on the occasion of the Presidencies by these States of the Committee of Ministers in 2017. They are available on the Court's Internet site (www.echr.coe.int – Statistics).

Information documents: new translations

Three new translations – into Dutch, Greek and Portuguese – of the publication "Your application at the ECHR" have just been published on the Court's Internet site (www.echr.coe.int – The Court – General presentation). This document describes the various stages of the procedure by which the Court examines an application

Mijn verzoekschrift bij het EHRM (nld)

Η προσφυγή σας στο ΕΔΔΑ (ell)

A sua queixa ao TEDH (por)

Annual Report 2017 on the execution of judgments of the Court

The Committee of Ministers' Eleventh Annual Report on the supervision of the execution of judgments of the European Court of Human Rights has just been published (www.coe.int – Execution of judgments of the Court). It gives an overview of recent trends in the execution process, as well as numerous examples of reforms which have been introduced and country-by-country data on the number of new, pending and closed cases.

Αντίρρηση συνείδησης (ell)

Domáce násilie (slk)

Nenávistné prejavy (slk)

Ochrana detí a mladistvých (slk)

العنف العائلي

العنف ضدّ المرأة

المتاجرة بالبشر

الهوية الجنسية

المساواة بين النساء والرجال

OTHER INFORMATION

Commissioner for Human Rights

On 3 April 2018 Dunja Mijatović took up the post of Council of Europe Commissioner for Human Rights. National of Bosnia and Herzegovina, she is the first woman to hold this post, succeeding Nils Muižnieks (2012-2018), Thomas Hammarberg (2006-2012) and Alvaro Gil-Robles (1999-2006).

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.

The Information Note, compiled by the Court's Case-Law Information and Publications Division, contains summaries of cases examined during the month in question which the Registry considers as being of particular interest. The summaries are not binding on the Court.

In the provisional version the summaries are normally drafted in the language of the case concerned, whereas the final single-language version appears in English and French respectively. The Information Note may be downloaded at www.echr.coe.int/NoteInformation/en. For publication updates please follow the Court's Twitter account at twitter.com/echrpublication.

The HUDOC database is available free-of-charge through the Court's Internet site (http://hudoc.echr.coe.int/sites/eng). It provides access to the case-law of the European Court of Human Rights (Grand Chamber, Chamber and Committee judgments, decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions).

ENG

www.echr.coe.int

The European Court of Human Rights is an international court set up in 1959 by the member States of the Council of Europe. It rules on individual or State applications alleging violations of the rights set out in the European Convention on Human Rights of 1950.

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE