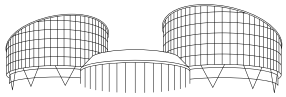

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law

No. 147 December 2011

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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Positive obligations

Suicide of prisoner with mental-health problems held in an ordinary cell: *violation*

De Donder and De Clippel v. Belgium - 8595/06
Judgment 6.12.2011 [Section II]

Facts – The applicants were the parents of a young man undergoing psychiatric treatment who was arrested on suspicion of attempted theft. In May 1999 he was found guilty and his detention was ordered under the Social Protection Act since, on account of his mental disturbance, he was incapable of controlling his actions and posed a danger to himself or society. He was temporarily detained in the psychiatric wing of a prison before being admitted to a psychiatric clinic as a "resident patient". He was subsequently allowed to live away from the clinic at weekends, provided that he adhered to certain requirements. However, the deputy public prosecutor ordered his return to the prison psychiatric wing as he was not complying with the prescribed conditions. In July 2001 the young man was admitted to the ordinary section of the prison and was placed in a cell shared with three other people. The following day, after a violent dispute with one of his fellow inmates, he was placed in segregation in a punishment cell. A psychiatrist altered his medication, and he was then moved to an individual cell. In August 2001 the applicants' son hanged himself in his cell. An investigation was opened, in the course of which charges were brought against two psychiatrists and a prison governor. The case was eventually discontinued and all subsequent appeals were to no avail.

Law – Article 2

(a) *Substantive aspect* – The Indictments Division of the Court of Appeal had examined whether the prisoner's suicide had been foreseeable and had found that, on account of his complex personality, there had been no reason to conclude that any of the accused should have known that he would commit suicide. However, that reasoning did not stand up to scrutiny in the circumstances of the case. There had been a real risk that the prisoner would attempt to kill himself, seeing that he had been doubly vulnerable, first as a person deprived of his liberty since the suicide rate was very high among the prison population, and, even more so, as a person suffering from mental disorders making him incapable of controlling his actions. Admittedly, the immediacy of such a risk had been difficult to determine, but that criterion should not be applied categorically in cases of suicide. In addition, it could not be inferred from the prisoner's lack of previous suicide attempts that the authorities could not have known that such a risk existed. They must have been aware of the prisoner's considerable fragility on account of his mental illness, given that he had been "compulsorily admitted" to the prison under the Social Protection Act. Furthermore, his previous conduct had prompted the deputy public prosecutor to recall him to the psychiatric wing of the prison. The day after his arrival, he had assaulted one of his cellmates, an act that had very probably been a reflection of his unease.

The prisoner had been detained under the Social Protection Act, which provided that the persons to whom it was applicable were subject not to the rules on ordinary detention but to the rules on compulsory admission, so that they could be given the psychological and medical support their condition required. In addition, the deputy public prosecutor's decision of July 2001 recalling him to prison had specified that he should be admitted to the psychiatric wing. Accordingly, the applicants' son should never have been held in the ordinary section of a prison. By acting in this way, outside the rules of domestic law, the authorities had contributed to the risk of the young man's committing suicide. Therefore, by definition, they had not done all that could reasonably be expected of them to prevent that risk, by that very fact breaching Article 2 of the Convention. Furthermore, while in prison the young man had been treated without much regard for his mental disorder or his status as a person detained under the rules on compulsory admission; this was illustrated by his placement in a punishment cell, the fact that the psychiatrist who had seen him four days before his suicide had been unaware of his status and the fact that this had been his only meeting with a psychiatrist during his detention. Admittedly, his detention in the ordinary section of the prison had also been due to a chronic shortage of places. However, circumstances of that nature could not dispense a State Party from complying with its obligations under Article 2; to find otherwise would amount to accepting that it could disclaim responsibility by means of its own failings.

Accordingly, while remaining aware both of the respondent State's efforts to assist the young man – who had, for example, had access to specialist clinics, where he had received support and therapy

appropriate to his condition – and of the serious difficulties faced by the prison authorities and medical staff on a daily basis, the Court concluded that there had been a violation of Article 2 in its substantive aspect.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – The Court could not find any evidence to suggest that the investigation conducted in the present case had not satisfied the requirements of an effective investigation.

Conclusion: no violation (unanimously).

Article 5 § 1: The deprivation of liberty had had a legal basis in the Social Protection Act, which authorised the investigating judicial authorities to order the detention of a person charged with a serious or lesser criminal offence "where there [were] reasons to believe that the accused [was] suffering from a mental disorder or from a severe mental disturbance or defect making him incapable of controlling his actions". Firstly, however, the Act in question clearly specified that the detention should not take place in an ordinary prison environment but in a specialised institution or, as an exceptional measure and subject to restrictive conditions, in a prison psychiatric wing. Secondly, the deputy public prosecutor's decision of July 2001 recalling the applicants' son to prison had specified that he was to be placed in the psychiatric wing. Accordingly, his detention in an ordinary prison environment had been manifestly in breach of domestic law. Further reiterating that in principle, the "detention" of a person as a mental-health patient was "lawful" for the purposes of Article 5 § 1 (e) only if effected in a hospital, clinic or other appropriate institution, the Court held that the circumstances of the case disclosed a breach of that provision, which required "detention" to take place "in accordance with a procedure prescribed by law" and to be "lawful".

Conclusion: violation (unanimously).

Article 41: EUR 25,000 to each of the applicants in respect of non-pecuniary damage.

Life
Positive obligations
Effective investigation

Inadequate preparation of hostage-rescue operation and lack of effective investigation: *violations*

Finogenov and Others v. Russia - 18299/03 and 27311/03
Judgment 20.12.2011 [Section I]

Facts – In the evening of 23 October 2002 a group of armed terrorists belonging to the Chechen separatist movement took some 900 people hostage in the Moscow "Dubrovka" theatre. The applicants were either hostages or relatives of those hostages who died in the course of the subsequent rescue operation. The hostages were held at gunpoint and the theatre building was booby-trapped. The terrorists demanded the immediate withdrawal of Russian troops from the Chechen Republic. Negotiations were conducted and several hostages were shot dead. Meanwhile, the authorities created a "crisis cell" under the command of the Federal Security Service, which was in charge of planning a rescue operation. In the morning of 26 October 2002 Russian security forces pumped an unknown narcotic gas into the main auditorium through the building's ventilation system. A few minutes later, when almost all the terrorists had lost consciousness under the influence of the gas, the special squad stormed the building and killed most of them. The hostages were then evacuated from the building and transported to hospitals in ambulances or city buses. However, some 125 hostages died either on the spot, during transportation or in hospital. A criminal investigation was opened into the events, but it was subsequently decided not to pursue the investigation into the planning and conduct of the rescue operation. The applicants' subsequent criminal-law complaints and civil actions for compensation in respect of non-pecuniary damage were dismissed.

Law – Article 2

(a) *Applicability* – The official explanation for the mass deaths of the hostages was that all the deceased had been weakened by the siege or were seriously ill. The official expert report concluded that there had been no "direct causal link" between the deaths and the use of the gas, which had been just one of many factors. The Court found such a conclusion difficult to accept. It deemed unthinkable that 125 people of different ages and physical conditions should have died almost simultaneously as a result of various pre-existing health problems. Their deaths could equally not be attributed to the conditions in which they had been held for three days, during which none of them had died notwithstanding prolonged food and water deprivation coupled with stress. The Government admitted that it had been impossible to foresee the effects of the gas and that some losses had been unavoidable, implying that the gas had not been

harmless. Although it had probably not been intended to kill the terrorists or the hostages, the gas was dangerous, and potentially fatal for anyone in a weakened condition, and it was safe to assume that it had been the primary cause of death of a large number of the victims. The situation thus fell within the scope of Article 2 of the Convention.

(b) *Substantive aspect*

(i) *Use of force*: The applicants claimed that the hostage crisis could have been resolved peacefully and that nobody would have been killed if the authorities had pursued the negotiations. However, the Court noted that the situation at the time had seemed very alarming: heavily armed specialists, dedicated to their cause, had taken hostages and were making unrealistic demands. The first days of negotiations had not brought any visible success and the hostages' situation had been worsening. There existed a real, serious and immediate risk of mass human losses and the authorities had every reason to believe that a forced intervention was unavoidable. Their decision to end the negotiations and storm the building had, therefore, not run counter to Article 2.

(ii) *Use of gas*: Although the domestic law allowed the use of weapons and special-purpose hardware and other means against terrorists, it did not indicate the type of weapons or tools that could be used or the circumstances in which their use was permitted. However, the general vagueness of the law did not necessarily result in a breach of Article 2, in particular not in a totally unpredictable and exceptional situation such as the instant one that required a tailor-made response. Although the gas used was dangerous, and potentially lethal, it had not been intended to kill and it could not be said that it was used "indiscriminately" since it had left the hostages a high chance of survival which depended on the efficiency of the subsequent rescue efforts. All the evidence demonstrated that the gas had the desired effect on the terrorists rendering most of them unconscious, so facilitating the liberation of the hostages and reducing the likelihood of an explosion.

Conclusion: no violation (unanimously).

(iii) *Planning and implementation of the rescue operation*: The Court also had to consider whether the rescue operation was planned and implemented in accordance with the State's positive obligations under Article 2, in particular, whether the authorities had taken all necessary precautions to minimise the effects of the gas on the hostages, evacuate them quickly and provide them with the necessary medical assistance.

The rescue operation was not spontaneous since the authorities had had about two days to reflect and make specific preparations. Some preparations had indeed been made: hundreds of doctors, rescue workers and other personnel were deployed, hospital-admission capacity was increased and ambulances were put on alert about the possible need for a mass evacuation. However, the original rescue plan had been flawed in many respects: there appeared to have been no centralised coordination of the various services involved; there were no instructions on how information about the victims and their condition should be exchanged (one result of this was that some victims received multiple doses of the antidote); it was unclear what order of priorities had been set for the medics; no medical assistance was provided during the mass transportation of victims on city buses; and there was no clear plan for the distribution of victims to the various hospitals, with significant numbers arriving at the same hospital at the same time.

There had been problems with the implementation of the rescue operation too: since the original plan had been prepared on the assumption that the hostages would be wounded by an explosion or gunshots, there were no toxicologists present and the rescue workers and doctors were not given any specific instructions on how to deal with hostages who had been exposed to an unknown gas; it seemed likely that they were not informed about the use of the gas until the evacuation was almost over, which would explain why most of the evacuated victims were placed on the floor face-up thus increasing the risk of suffocation and of fatalities among the hostages. Indeed, it was difficult to understand why the information about the gas could not have been given to the doctors and rescue workers earlier, either shortly before or at least immediately after its use, and why the evacuation had started so late, with most of the unconscious hostages remaining exposed to the gas without medical assistance for over an hour. Many witnesses had also testified to the shortage of antidote and it was unclear when the antidote was administered or how those who received it were distinguished from those who did not.

All these factors indicated that the rescue operation had not been sufficiently prepared and that the State had therefore failed to fulfil its positive obligations under Article 2.

Conclusion: violation (unanimously).

(c) *Procedural aspect* – The investigation into the rescue operation was manifestly incomplete. First of all, it was very narrowly defined, excluding any

possibility of negligence on the part of the authorities. Even though the investigators addressed certain issues relating to the planning and conduct of the rescue operation, many facts crucial to the question of possible negligence were never established. First and foremost, the formula of the gas was never revealed to the investigators, nor was it ever established when the decision to use the gas was taken or how much time was available to evaluate its possible side-effects. This was also impossible to establish from the crisis cell's working documents, since, according to the Government, they were all destroyed. Given that these papers could have been an essential source of information about the planning and the conduct of the rescue operation, the Court found such indiscriminate destruction of documents unjustified. Moreover, the investigators had failed to question all the members of the crisis cell, in particular those responsible for the decision to use the gas and for calculating the dosage, or other witnesses, such as bus drivers, journalists or those who had allegedly helped install the gas recipients. It was never established how many doctors were on duty on the day of the operation, or what preliminary instructions were given to ambulances and city buses as to where to transport the victims. In addition, it was never established why the mass evacuation had started only two hours after the beginning of the operation or how much time it had taken to kill the terrorists and neutralise their bombs. Lastly, the investigation team was not independent, since it included representatives of the law-enforcement agencies which had been directly responsible for the planning and conduct of the rescue operation. In sum, the investigation into the authorities' alleged negligence in the case was neither thorough nor independent, and was therefore not "effective".

Conclusion: violation (unanimously).

Article 41: Awards ranging between EUR 8,800 and EUR 66,000 to each of the applicants in respect of non-pecuniary damage.

Use of force

Death of hostages as a result of use of potentially lethal gas to neutralise hostage takers: *no violation*

Finogenov and Others v. Russia - 18299/03 and 27311/03
Judgment 20.12.2011 [Section I]

(See above, page 8)

ARTICLE 3

Inhuman or degrading treatment
Effective investigation

Ill-treatment in police custody and lack of effective investigation: *violations*

Taraburca v. Moldova - 18919/10
Judgment 6.12.2011 [Section III]

Facts – Growing discontent – amidst allegations of electoral fraud – about the 2009 general elections in Moldova led thousands of young people to demonstrate in the centre of Chişinău on 6 and 7 April 2009. A relatively small number of demonstrators turned violent and 250 protestors took over and looted the lower floors of the Presidential Palace and Parliament buildings, setting parts of the buildings alight. Police and special forces were called in to restore order. Mass arrests were made over the following days with the media reporting on and showing video footage of young people being arrested and beaten by the police. A subsequent public inquiry into the incident established that excessive force had been used against demonstrators.

The applicant alleged that, after peacefully attending the protests on 7 April 2009, he and a friend, S., were bundled into a vehicle by three plain-clothed officers and taken to a police station. While there, he was beaten by uniformed police until he fainted. A prison doctor examined him that day but recorded no signs of ill-treatment. He was assigned a legal-aid lawyer and on 10 April was brought before an investigating judge, who ordered his detention pending trial for thirty days. That night he was transferred to prison. On the way there he alleged that he was made to walk through a corridor of police officers each of whom hit him as he went past. On 14 April while still in detention the applicant made two complaints of ill-treatment to the prosecuting authorities and was immediately examined by a doctor, who recorded scratches and bruising to his face. The applicant was released on 16 April 2009 and the criminal proceedings against him were subsequently discontinued. The prosecutor decided not to launch a criminal investigation into his complaints of ill-treatment, essentially on the basis of a statement by S. that he had not been ill-treated or seen the applicant being ill-treated.

Law – Article 3

(a) *Substantive aspect* – The background to the case appeared to have been one of systematic and large-scale ill-treatment of detainees by the police within a relatively short period of time, as confirmed by the findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT), the Commissioner for Human Rights of the Council of Europe and the parliamentary inquiry commission tasked with the elucidation of the causes and consequences of the events following the general election in April 2009. As to whether there was sufficient evidence that the applicant had been ill-treated, the Court noted he had been in good health with no signs of ill-treatment when seen by a prison doctor shortly after being detained. However, a week later another prison doctor had found injuries to his face. The Government had not given an acceptable explanation for the origin of these injuries and had failed to rebut the strong presumption created by the materials, including reports by various international and national bodies, before the Court. The extremely overcrowded conditions in which the applicant had been held initially and the absence of assistance for his injuries had contributed to the anguish the applicant must have suffered as a result of his ill-treatment and the other circumstances of his arrest. The fact that the applicant had not complained of police brutality until a week later did not, as suggested by the Government, prove that he had not been ill-treated. On the contrary, it was perfectly understandable that he had only made his complaint when he had seen a lawyer he felt he could trust, given the state of insecurity at the time with many people being openly ill-treated and humiliated, judges examining cases in police stations in a summary manner and legal-aid lawyers ignoring their clients' visible injuries. The fear and helplessness the applicant must have felt had indeed been shared by a majority of the alleged victims, as corroborated in the CPT report which noted that most complaints had emerged after a release or a transfer to an establishment under the Ministry of Justice.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – The Court also found a procedural violation of Article 3 in that no proper criminal investigation had been initiated, there had been a series of unexplained delays, part of the inquiry had been carried out by the authority that employed most of those suspected of the ill-treatment, the authorities had failed for over a week to react to visible signs of ill-treatment on the applicant's face and no attempt had been made to obtain potentially important evidence from co-detainees or through an identity parade.

Conclusion: violation (unanimously).

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

Inhuman or degrading treatment

Detention of alien minors accompanied by their mother in a closed centre: *violation*

Kanagaratnam v. Belgium - 15297/09
Judgment 13.12.2011 [Section II]

Facts – The applicants – a mother and her three children – are Sri Lankan nationals of Tamil origin. In January 2009 the first applicant, accompanied by her children, arrived at the Belgian border having travelled from Congo, and applied, on that same day, for asylum and subsidiary protection at the border. Pursuant to the Belgian law on the entry, residence, settlement and expulsion of aliens, the authorities decided to refuse them entry and return them, on the ground that the mother was in possession of a false passport. The same day, the Aliens Office decided to place the family in a closed transit centre for illegal aliens, 127bis, pending processing of their asylum application. The family subsequently applied to the courts to be released, but without success. In February 2009 the Office of the Commissioner-General for Refugees and Stateless Persons refused the applicants asylum and subsidiary protection on the ground that some of the mother's statements concerning the risk in Sri Lanka lacked credibility. After having been informed of the decision to return them to Congo, the first applicant sought a temporary measure, fearing that she would be subjected to inhuman treatment were she to be returned to Congo and, subsequently, to Sri Lanka. On 20 March 2009 the European Court decided to suspend the family's return until 20 April 2009, which, after the family's refusal to board the plane, was extended by one month. The family remained in detention pending their return, in accordance with national legislation. The Aliens Office again decided to refuse the family entry into Belgium and to return them to Congo and the family's detention in the closed centre was extended. After having again applied for release, the family was finally released following a decision of the Aliens Office taken on 4 May 2009, after a second asylum application had been made on 23 March 2009 and was under consideration. Having regard to the fact that the applicants

had been released and that they could not be removed pending the outcome of their asylum application, the temporary measure suspending their removal was lifted on 18 May 2009. In September 2009 the Office of the Commissioner-General for Refugees and Stateless Persons granted the mother and her children refugee status.

Law – Article 3

(a) *The three children* – The Court had twice found that Belgium had violated Article 3 on account of having detained accompanied alien minors and an unaccompanied alien minor in a closed transit centre. The Court noted that the Government had acknowledged that the detention of minors posed a problem of principle under Article 3 and welcomed the decision taken by the Belgian authorities to no longer detain in closed transit centres, families who were unlawfully resident in Belgium.

The circumstances of the instant case were comparable with those of the case of *Muskhadzhiyeva and Others v. Belgium* (no. 41442/07, 19 January 2010, Information Note no. 126). They concerned minor children detained with their mother in the same centre, closed transit centre 127bis, which the Court had held to be inappropriate for the needs of children because of the conditions of detention, as described in various national and international reports. Other reports had been published since the above cited judgment, including the first such report to be published by an official Belgian authority, the Federal Ombudsman, which stressed the particularly disastrous effects on children's balance and development of placing them in closed transit centres. The best interests of the child as enshrined in Article 3 of the United Nations Convention on the Rights of the Child had to be paramount, including in the context of expulsion. In the instant case, the Court had to proceed on the basis that the children were vulnerable both because they were children and because of their personal history. Undoubtedly, even before their arrival in Belgium they had experienced a traumatic situation. Separated from their father following his arrest, they had, with their mother, left a country racked by civil war and had been anxious about reprisals by the local authorities. That vulnerability had been acknowledged by the Belgian authorities since they had finally granted them refugee status. Then, on their arrival in Belgium, the children had been stopped at the border and immediately placed in a closed transit centre pending their return. Finally, their detention had been particularly lengthy, almost four months. The Belgian authorities had, therefore, exposed the children to feelings of anxiety and inferiority and, in full knowledge of the facts, had risked compromising their development. The situation experienced by the children had amounted to inhuman and degrading treatment.

Conclusion: violation (unanimously).

(b) *The first applicant* – In the case of *Muskhadzhiyeva and Others* cited above, the Court had considered that although the mother's feeling of powerlessness to protect her children from detention and the conditions of that detention might have caused her anxiety and frustration, the constant presence of her children must have somewhat appeased that feeling so that it did not reach the level of severity required to constitute inhuman treatment. In the instant case, the first applicant had remained with her children during the detention. Consequently, while acknowledging that the dilution of her parental role, her reduced power to control her children's lives and her powerlessness to end her children's suffering had certainly exposed the first applicant to extreme uncertainty and helplessness, the Court did not have sufficient grounds for departing from the approach adopted in the case referred to above.

Conclusion: no violation (unanimously).

Article 5 § 1 (f): The applicants had been stopped at the border where they had been able to make an asylum application. It was decided to refuse them entry and to return them on the ground that they had been in possession of a false passport. Their detention was therefore covered by the first limb of Article 5 § 1 (f).

(a) *The three children* – In the judgment in the case of *Mubilanzila Mayeke and Kaniki Mitunga v. Belgium* (no. 13178/03, 13 October 2006, Information Note no. 90), the Court had found that there had been a violation of Article 5 § 1 (f) in respect of the child applicant, on the ground that the latter had been detained in a closed transit centre designed for adult illegal aliens in the same conditions as an adult, which were therefore unsuitable given her extreme vulnerability as an unaccompanied minor alien. The Belgian legal system in force at that time and applied in the above-cited case had not sufficiently guaranteed the child's right to liberty. As in the above-cited judgment, the Court considered in the instant case that the fact that the children had been accompanied by their mother was not a reason to depart from that conclusion.

Conclusion: violation (unanimously).

(b) *The first applicant* – A decision had been made as to the first period of detention upon the first applicant's arrival in Belgium, pursuant to the law

on the entry, residence, settlement and expulsion of aliens, on the ground that she had attempted to enter the country without the required documentation and had made an asylum application. That provision had enabled the Aliens Office to detain the applicant in a closed transit centre for two months. The validity of that decision had expired on 22 March 2009 at midnight. The fact that the Aliens Office had decided to keep the applicant in detention on the day on which the Court had notified the temporary measure on 20 March 2009 did not render her detention unlawful even if the removal procedure had been temporarily suspended. Likewise, the error as to the facts giving rise to the new detention order had not affected the lawfulness of the detention for the purposes of Article 5, which continued to be justified. On 23 March 2009, at the end of the initial period, the Aliens Office made another detention order on the basis of the same legislative provision, also valid for a period of two months, on the ground that the applicant had made a second asylum application. On 25 March 2009 the second asylum application was transferred to the Office of the Commissioner-General for Refugees and Stateless Persons for an examination on the merits. The applicant was finally released on 4 May 2009. Having regard to the foregoing, the placement in and continued detention of the first applicant had been decided "in accordance with a procedure prescribed by law" within the meaning of Article 5 § 1 (f).

The Court had no reason to doubt the good faith of the Belgian authorities. Nether did it have any objection, a priori, to considering that the first applicant's placement in detention, in conjunction with the order to leave the country issued "at the border" on 23 January 2009, fell within the circumstances envisaged by the case-law relating to the first part of Article 5 § 1 (f). However, it queried the lawfulness of the applicant's continued detention until 4 May 2009 after expiry of the initial period of two months provided by the Aliens Act, while a second asylum application had been lodged, taken into consideration and referred for an examination on the merits. In those circumstances, the continued and particularly lengthy detention of the first applicant in a place manifestly inappropriate for accommodating a family, in conditions which the Court had itself held, with respect to the children, to be in breach of Article 3, had been arbitrary. In view of the foregoing, the continued detention of the first applicant had not been "lawful" within the meaning of Article 5 § 1 (f).

Conclusion: violation (unanimously).

Article 41: 7,650 EUR to the first applicant and 13,000 EUR to each of the children in respect of non-pecuniary damage.

Delay in determining appropriate treatment for detainee at advanced stage of HIV infection: *violation*

Yoh-Ekale Mwanje v. Belgium - 10486/10
Judgment 20.12.2011 [Section II]

(See below)

Expulsion

Threatened deportation of alien at advanced stage of HIV infection to country of origin without certainty that appropriate medical treatment was available: *deportation would not constitute violation*

Yoh-Ekale Mwanje v. Belgium - 10486/10
Judgment 20.12.2011 [Section II]

Facts – The applicant, a Cameroonian national, left Cameroon in 2002. In 2006 she began a relationship with a Dutch national living in Belgium. All their applications for permission to marry were refused. In September 2009 the Aliens Office issued a first order requiring the applicant to leave the country, on the grounds that she did not have valid papers for residence in Belgium and was in possession of a false passport. The applicant was placed in a closed centre for illegal immigrants pending the issuing of travel papers by the authorities in Cameroon with a view to her deportation. She informed her lawyer that she had been HIV-positive since 2003 and that the infection was already at an advanced stage. On 16 October 2009 she was released and ordered to leave the country by 21 October 2009. On 17 December the Aliens Office served her with a second order to leave the country and an order for her removal, accompanied by a decision to detain her in a designated place. The applicant was placed the same day in a closed centre with a view to her expulsion. On 23 December the Aliens Appeals Board rejected a request lodged by the applicant's lawyer under the extremely urgent procedure for a stay of execution of the order to leave the country. Several applications for the applicant's release lodged by her counsel were rejected and all the appeals were unsuccessful. On 16 February 2010 the Aliens Office decided to extend the applicant's detention until

15 April 2010. On 22 February, having been informed that the applicant was due to be deported the following day, her lawyer requested the European Court to apply Rule 39 of the Rules of Court with a view to having her deportation to Cameroon suspended. The Court granted the request the same day. The applicant was released on 9 April 2010.

Law – Article 3

(a) *In the event of deportation to Cameroon* – The applicant had been diagnosed as HIV-positive in 2003. She had received treatment which she had subsequently discontinued. Having developed resistance to the medication, she now required a combination of two new types of medication, with which she had been treated since March 2010. The medication in question was apparently available in Cameroon, but was distributed to only 1.89% of the patients who needed it. Depriving the applicant of this new treatment would result in a deterioration of her health and place her survival in doubt in the short or medium term. Nevertheless, the Court had already held that such circumstances were not sufficient to amount to a violation of Article 3 (see *N. v. the United Kingdom* [GC], no. 26565/05, 27 May 2008, Information Note no. 108). There had to be more compelling humanitarian considerations at stake (see *D. v. the United Kingdom*, no. 30240/96, 2 May 1997), relating chiefly to the health of the person concerned before the enforcement of the deportation order. In the instant case, it was apparent from a medical certificate issued in June 2010 that the applicant's condition had stabilised under the effects of the new treatment. She was therefore not in a "critical state" and was fit to travel. Hence, there were no compelling humanitarian considerations at stake in the present case.

Conclusion: Deportation would not constitute a violation (unanimously).

(b) *The applicant's detention* – The applicant, who was HIV-positive, had a serious and incurable disease. Her health had worsened and the infection had progressed while she was in detention. A number of medical certificates sent to the Aliens Office stating that the applicant's survival was in doubt demonstrated that the Belgian authorities had indeed been informed during the applicant's first period of detention that she was HIV-positive. However, she had not undergone an examination at the request of the Aliens Office until 9 February 2010, when she was examined by hospital specialists, who had reportedly been shocked by the Belgian authorities' lack of diligence. Furthermore, the treatment prescribed to the applicant on 26 February 2010 had not been administered until 1 March 2010. Accordingly, the authorities had clearly not acted with the requisite diligence in failing to take at an earlier stage all the measures that could reasonably have been expected of them to protect the applicant's health and prevent a worsening of her condition. That situation had impaired the applicant's dignity and, combined with the distress caused by the prospect of being deported, had subjected her to particularly acute hardship causing suffering beyond that inevitably associated with detention and with her condition. It had therefore amounted to inhuman and degrading treatment.

Conclusion: violation (unanimously).

Article 13 in conjunction with Article 3: Although the Court had held that the applicant's deportation to Cameroon would not amount to a violation of Article 3, that complaint had not been declared inadmissible and had been examined on the merits. The applicant had, prima facie, had an arguable claim and Article 13 was applicable in the instant case.

The applicant complained that the Aliens Office had conducted the procedure for her deportation without knowing what kind of treatment she needed and, hence, without having assessed what medical treatment was actually possible in Cameroon and whether she would face a risk of treatment contrary to Article 3. This complaint raised in substance the question whether the applicant had had an effective remedy before the Belgian authorities enabling her to complain of the alleged risk of inhuman and degrading treatment in the event of her deportation to Cameroon. It therefore fell to be examined under Article 13 taken in conjunction with Article 3. The only consideration given to the possible risk had been in the context of the proceedings concerning the applicant's request for leave to remain on medical grounds in accordance with the Aliens Act. The latter provided for the Aliens Office to consult a medical officer in order to determine whether the state of health of the person making the request was such as to entail a risk under Article 3 if no appropriate treatment were available in his or her country of origin. In the instant case the opinion issued by the medical officer on 12 January 2010 refusing the applicant's request for regularisation of her situation on medical grounds had listed various items of information and general considerations concerning the availability of the medication in Cameroon and the medical infrastructure for administering it. In the

absence of a specific medical examination, the medical officer had not known what kind of treatment the applicant required. Hence, the information available to the medical service of the Aliens Office in making its decision had been limited. An examination to determine the appropriate treatment had not been carried out at the request of the Belgian authorities until 9 February 2010 and the Aliens Office had not been informed of the results until 26 February 2010. The Aliens Appeal Board, in examining an application to have the decision of the Aliens Office set aside, had subsequently held, on 19 April 2010, that the grounds for the Aliens Office's decision had been correct in view of the information that had been available to it. Accordingly, the Belgian authorities had quite simply dispensed with a careful and thorough examination of the applicant's individual situation before concluding that no risk would arise under Article 3 if she were deported to Cameroon and continuing with the deportation procedure ordered on 17 December 2009. The applicant had therefore not had an effective remedy.

Conclusion: violation (unanimously).

Article 5 § 1 (f): As the applicant had been subject to a deportation order when she was taken into detention, the case fell within the scope of the second limb of Article 5 § 1 (f).

Both the applicant's placement in detention on 17 December 2009 and the extension of her detention on 16 February 2010 had been ordered under the Aliens Act, according to which aliens who had been refused leave to remain in Belgium could be placed in detention for the time strictly necessary to enforce the deportation order, subject to a maximum two-month time-limit. The person's detention could be extended provided that action had been undertaken to ensure his or her deportation and was being pursued with diligence, and that there was a still a realistic prospect that he or she would be deported within a reasonable time. The order extending the applicant's detention had set 3 February 2010 as the date of her removal to Cameroon, but this had been prevented by the interim measure indicated by the Court on 22 February 2010. Ruling on the applicant's release, the domestic courts had confirmed that her continuing detention was in accordance with the law and had held that the need to comply with the interim measure indicated by the Court did not mean that the authorities could not deport the applicant within the statutory time-limit while still taking account of the Court's final decision. Although the Court agreed with this assessment in so far as the interim measure did not have an impact on the lawfulness of the detention as such, the latter could not be based on the likelihood of the Court's delivering its ruling within the time-limit laid down by the Belgian legislation. While acknowledging that the statutory time-limit had not been exceeded, the Court observed that the authorities had known the applicant's exact identity, and that she had been living at a fixed address known to the authorities, had consistently appeared for her appointments with the Aliens Office and had taken several steps to try to regularise her situation. Against this background, the authorities had not considered a less drastic measure such as granting the applicant temporary leave to remain, in order to safeguard the public interest in her detention and at the same time avoid keeping her in detention for a further seven weeks although she was HIV-positive and her health had deteriorated in detention. In the circumstances, the Court did not perceive any link between the applicant's detention and the Government's aim of securing her removal from the country.

Conclusion: violation (unanimously).

Article 41: EUR 14,000 in respect of non-pecuniary damage.

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Detention aimed at preventing participation in demonstration: *violation*

Schwabe and M.G. v. Germany - 8080/08 and 8577/08
Judgment 1.12.2011 [Section V]

Facts – The applicants drove to Rostock with a view to participating in demonstrations against the G8 summit in Heiligendamm, which was due to take place from 6 to 8 June 2007. In the evening of 3 June 2007 their identity was checked by the police in a car park in front of Waldeck prison. Having searched their van, the police found banners bearing the inscription "freedom to all prisoners" and "free all now" and arrested them. The next day a district court ordered their detention until 9 June to prevent the imminent commission of a criminal offence. On appeal, a regional court upheld the

first-instance decision finding that with their banners the applicants had intended to incite others to free prisoners from Waldeck prison. A court of appeal rejected the applicants' further appeals finding that the police had been entitled to assume that the applicants would drive to Rostock and display their banners at the demonstrations, which were partly violent. No criminal proceedings were ever brought against the applicants for incitement to free prisoners.

Law – Article 5 § 1: The second alternative of Article 5 § 1 (c) allowed the States to detain a person as a means of preventing a concrete and specific offence as regards, in particular, the place and the time of its commission and its victims. In the applicants' case the domestic courts had diverged on the specific offence they considered the applicants were about to commit: while the district and regional courts had considered that the applicants had intended to incite others to free prisoners detained in Waldeck prison, the court of appeal had considered that they intended to use their banners to incite demonstrators in Rostock to liberate prisoners by force. In addition, the inscriptions on the banners could have been understood in different ways; for their part, the applicants had explained during the domestic proceedings that the slogans were addressed to the police, urging them to end the numerous detentions of demonstrators, and not intended to call upon others to free prisoners by force. Furthermore, the applicants had not themselves carried any instruments which could have served to violently free prisoners. The Court was therefore not convinced that the applicants' continuing detention could have reasonably been considered necessary to prevent them from committing a sufficiently concrete and specific offence. Nor could it have been justified under Article 5 § 1 (b) "in order to secure the fulfilment of any obligation prescribed by law" since the police had not ordered them to report to a police station in their town of residence or prohibited them from entering the area in which the summit-related demonstrations were to take place. The applicants' preventive detention was not justifiable under any other sub-paragraph of Article 5 § 1 of the Convention.

Conclusion: violation (unanimously).

Article 11: Given their detention for the entire duration of the G8 summit, the applicants had been prevented from participating in the demonstration against the summit, which did not appear to have been organised with violent intentions. Contrary to what the Government had claimed, it had not been proven that the applicants themselves had had any violent intentions either. No weapons had been found on them and the ambivalent nature of the slogans on their banners could not serve to prove that they had deliberately intended to incite others to violence. The applicants' detention had therefore interfered with their right to freedom of peaceful assembly. As to the proportionality of that interference, the Court acknowledged the considerable challenge the authorities were facing in order to guarantee the security of the participants at the summit and maintain public order. However, by participating in the demonstration the applicants had sought to take part in a debate on a matter of public interest, whose aim was to criticise the high number of detentions of demonstrators rather than to resort to violence or incite others to do so. Their almost six-day detention, which the Court had found to be in breach of Article 5, was not a proportionate measure to prevent the possible incitation of others to free demonstrators detained during the summit. There had been other effective but less intrusive measures available to the authorities to achieve their aims, such as seizing the banners they had found in the applicants' possession.

Conclusion: violation (unanimously).

Article 41: EUR 3,000 to each applicant in respect of non-pecuniary damage.

Article 5 § 1 (f)

Prevent unauthorised entry into country

Detention of alien minors accompanied by their mother in a closed centre: *violation*

Kanagaratnam v. Belgium - 15297/09
Judgment 13.12.2011 [Section II]

(See Article 3 above, page 11)

Expulsion

Absence of link between detention of alien at advanced stage of HIV infection and the aim pursued by her deportation: *violation*

Yoh-Ekale Mwanje v. Belgium - 10486/10
Judgment 20.12.2011 [Section II]

(See Article 3 above, page 13)

Article 5 § 3

Length of pre-trial detention

Refusal to take detention abroad pending extradition into account when determining whether maximum period of detention on remand had been exceeded: *inadmissible*

Zandbergs v. Latvia - 71092/01
Judgment 20.12.2011 [Section III]

Facts – In 1993 criminal proceedings were initiated against the applicant. In 1994 he left Latvia for the United States of America in breach of an undertaking not to leave his residence. In 1998 the Prosecutor General's Office filed a request with the United States Department of Justice for the applicant's extradition on a murder charge. In September 1998 the United States authorities took the applicant into custody pending extradition proceedings. In December 1999 he was convoyed to Frankfurt Airport (Germany) and handed over to the Latvian authorities. On the same day he was brought to Riga and placed in prison. Subsequently, his detention on remand was extended several times by court order. The applicant appealed, stating that the time he had spent in custody in the United States had to be counted as a part of the overall time of his pre-trial detention and that, consequently, his detention had exceeded the maximum period permitted by the Code of Criminal Procedure. His appeal was dismissed. In April 2003 the applicant was found guilty of organising murder and sentenced to nine years' imprisonment. The time he had spent in pre-trial detention or custody both in Latvia and in the United States was counted as part of his sentence. His conviction was upheld on appeal.

Law – Article 5 § 3: In so far as the applicant had complained about the refusal of the Latvian courts to consider the time he had spent in custody in the United States as part of his detention on remand in Latvia, no provision of the Code of Criminal Procedure applicable at the material time provided for the inclusion of time served abroad in pre-trial detention or custody in the overall length of detention on remand. On the contrary, the new provisions of the Code explicitly excluded such possibility. In principle, neither Article 5 § 3 nor any other provision of the Convention created a general obligation for a State party to take into account the length of pre-trial detention suffered in a third State.

Conclusion: inadmissible (partly manifestly ill-founded and partly incompatible *ratione materiae*).

The Court also found violations of Article 5 § 3 (length of pre-trial detention in Latvia) and Article 5 § 4 and no violation of Article 6 § 1 of the Convention.

ARTICLE 6

Article 6 § 1 (criminal)

Fair hearing

Insufficient reasoning in criminal conviction leading to forty-year prison sentence: *violation*

Ajdarić v. Croatia - 20883/09
Judgment 13.12.2011 [Section I]

Facts – In 2005 the applicant was arrested for car theft and detained in a remand prison. During his detention, he fell ill and was transferred to a prison hospital, where he shared a room with seven other inmates. One of these inmates, M.G., was accused of killing three people in 1998, and another, S.Š., was a former police officer who had been sentenced for attempted murder. At an unspecified date, S.Š. informed the police that he had knowledge of the circumstances of the 1998 murders. He later gave a statement before the investigating judge of the competent county court explaining that he had overheard private conversations between the applicant and M.G. which revealed that the applicant had in fact been an accomplice to the three murders M.G. had been accused of. The applicant was subsequently charged on three counts of murder and the criminal proceedings against him were joined to those already pending against M.G. S.Š. repeated his testimony in court, but two other inmates, who had spent time with them in the same room at the prison hospital, did not support his evidence. A psychiatric report concluding that S.Š. was suffering from emotionally instability and histrionic personality disorder was also submitted to the court. The county court ultimately sentenced the applicant and M.G. each to forty years' imprisonment and the judgment was upheld by the Supreme Court.

Law – Article 6 § 1: According to the Court's established case-law, judgments of courts and tribunals should be properly reasoned, although the extent of this duty might vary according to the nature of the decision and the circumstances of each particular case. The Court noted at the outset that the applicant had been sentenced to forty years' imprisonment on three counts of murder

solely on the basis of evidence given by S.Š. The national courts had expressly stated that there had been no other evidence implicating the applicant in the murders at issue. However, they had made no efforts to verify S.Š.'s statements but had accepted them as truthful, irrespective of the medical evidence that he suffered from emotional instability and histrionic personality disorder and had not received the psychiatric treatment that had been recommended for him. Moreover, his statements referring to the applicant's involvement in the murders were unclear, imprecise and often contradictory. Despite this, the domestic courts had made no comments on the evidence to the contrary that had been given by other inmates who had shared the room with the applicant, M.G. and S.Š. For those reasons, the Court concluded that the decisions reached in the applicant's case had not been adequately reasoned, had failed to observe the basic criminal-justice requirement of proof beyond reasonable doubt and had not been in accordance with the *in dubio pro reo* principle.

Conclusion: violation (unanimously).

Article 41: EUR 9,000 in respect of non-pecuniary damage; respondent State required to secure the reopening of the proceedings, should the applicant so request.

Independent and impartial tribunal

Police officer's participation on jury in case involving disputed police evidence: *violation*

Hanif and Khan v. the United Kingdom - 52999/08 and 61779/08
Judgment 20.12.2011 [Section IV]

Facts – The first applicant was a taxi driver who was arrested after the police found six kilograms of heroin in the boot of his car. He claimed that he had no knowledge of the drugs and that they must have been left there by a customer. The second applicant was charged with conspiracy to supply heroin and the two men were subsequently tried together. The trial court heard evidence from a police officer, M.B., who testified that the first applicant had had no passengers on the journey in question. During his testimony, one of the jurors, A.T., sent a note to the trial judge indicating that he was a police officer and that he knew M.B. The judge then questioned A.T., who stated that he had known M.B. for about ten years, that on two occasions they had worked on the same case but not in the same team and that he was able to judge the case impartially. The defence's subsequent request to discharge A.T. was rejected. The applicants were ultimately convicted and sentenced to eight and seventeen years' imprisonment, respectively.

Law – Article 6 § 1: The Court noted the various procedural safeguards which had been in place in the applicants' case in order to exclude any doubts as to A.T.'s impartiality: he was one of twelve jurors, had been selected at random among the local population and before commencing his jury service had been required to swear an oath or make a solemn declaration that he would try the case faithfully and give a true verdict according to the evidence. Moreover, A.T. had drawn the trial judge's attention to the fact that he was a police officer and knew M.B. and had subsequently been questioned in that respect. However, the first applicant's defence had depended to a significant extent on his challenge to the evidence of the police officers, including M.B., whom A.T. had known for ten years and with whom he had worked on several occasions. The Court did not examine whether the presence of a police officer on a jury – a possibility allowed under the laws of England and Wales by a recent legislative amendment – could ever be regarded as compatible with Article 6 of the Convention. However, it did consider that, where there was an important conflict regarding police evidence in the case and a police officer personally acquainted with the officer giving the relevant evidence was a member of the jury, jury directions and judicial warnings were insufficient to guarantee that such a juror might, albeit subconsciously, favour the evidence of the police. Given that the second applicant was a co-defendant of the first applicant and was convicted by the same jury, the Court considered that it would have been artificial to reach a different conclusion with regards to the "tribunal" which tried him.

Conclusion: violation (unanimously).

Article 41: Finding of a violation constituted sufficient just satisfaction.

Article 6 § 3 (d)

Examination of witnesses

Convictions based on statements by absent witnesses: *no violation/violation*

Al-Khawaja and Tahery v. the United Kingdom - 26766/05 and 22228/06
Judgment 15.12.2011 [GC]

Facts – The first applicant (Mr Al-Khawaja), a consultant physician, was charged with two counts of indecent assault on two female patients. One of the patients, ST, died before the trial, but had made a statement to the police prior to her death which was read to the jury. The judge stated that the contents of the statement were crucial to the pros–ecution on count one as there was no other direct evidence of what had taken place. The defence accepted that if the statement were read to the jury at the trial they would be in a position to rebut it through the cross-examination of other witnesses. During the trial, the jury heard evidence from a number of different witnesses, including the other complainant and two of the dead witness's friends in whom she had confided promptly after the incident. The defence was given the opportunity to cross-examine all the witnesses who gave live evidence. In his summing up, the trial judge reminded the jury that they had not seen ST give evidence or be cross-examined and that the allegations were denied. The first applicant was convicted on both counts.

The second applicant (Mr Tahery) was charged, *inter alia*, with wounding with intent following a gangland stabbing. None of those questioned at the scene claimed to have seen the applicant stab the victim, but two days later one of those present, T, made a statement to the police implicating the second applicant. At the trial, the prosecution applied for permission to read out T's statement on the ground that he was too frightened to appear in court. The trial judge granted that application after finding on the basis of evidence from both T and a police officer that T was afraid of giving evidence (although his fear was not caused by the second applicant) and that special measures, such as testifying behind a screen, would not allay his fears. T's witness statement was then read to the jury in his absence. The second applicant also gave evidence. The judge, in his summing up, warned the jury about the danger of relying on T's evidence, as it had not been tested under cross-examination. The applicant was convicted and his conviction was upheld on appeal.

Both applicants lodged applications with the European Court complaining that their convictions had been based to a decisive degree on statements from witnesses they had been unable to cross-examine in court and that they had therefore been denied a fair trial. In a judgment of 20 January 2009 a Chamber of the Court held unanimously in both cases that there had been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (d) of the Convention on the grounds that the loss of the opportunity to cross-examine the witnesses concerned had not been effectively counterbalanced in the proceedings.

Law – Article 6 § 1 in conjunction with Article 6 § 3 (d): Article 6 § 3 (d) enshrined the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle were possible but must not infringe the rights of the defence. As a rule, this required that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness made his statement or at a later stage of the proceedings. Two consequences followed from this general principle.

First, there had to be a good reason for admitting the evidence of an absent witness. Good reason existed, *inter alia*, where a witness had died or was absent owing to fear attributable to the defendant or those acting on his behalf as, in this latter case, the defendant had to be taken to have waived his rights under Article 6 § 3 (d). Where the witness's absence was due to a general fear of testifying not directly attributable to threats by the defendant or his agents, it was for the trial court to conduct appropriate enquiries to determine whether there were objective grounds, supported by evidence for that fear. Before a witness could be excused from testifying on grounds of fear, the trial court had to be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable.

Second, a conviction based solely or to a decisive degree on the statement of an absent witness whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, would generally be considered incompatible with the requirements of fairness under Article 6 ("sole or decisive rule"). This was not, however, an absolute rule and was not to be applied in an inflexible way, ignoring the specificities of the particular legal system concerned, as that would transform the rule into a blunt and indiscriminate instrument that ran counter to the traditional way in which the Court approached the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice. Accordingly, even where a hearsay statement was the sole or decisive evidence against a defendant, its admission as evidence would not automatically result in a breach of Article 6 § 1.

At the same time where a conviction was based solely or decisively on the evidence of absent witnesses, the Court had to subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case was whether there were sufficient counterbalancing factors in place, including measures that permitted a fair and proper assessment of the reliability of that evidence to take place.

In that connection, the Court considered that the domestic law had contained strong safeguards designed to ensure fairness.[1] As regards how those safeguards were applied in practice, it considered three issues in each case: whether it had been necessary to admit the statements of the absent witnesses; whether untested evidence of the absent witnesses had been the sole or decisive basis for each applicant's conviction; and whether there had been sufficient counterbalancing factors including strong procedural safeguards to ensure that each trial, judged as a whole, was fair.

(a) *The first applicant's case* – It was not in dispute that ST's death had made it necessary to admit her statement if her evidence was to be considered. The judge had been quite clear about its significance ("no statement, no count one") and it had therefore to be regarded as decisive. The reliability of that evidence was supported by the fact that there were only minor inconsistencies between ST's statement to the police and the account she had given promptly after the alleged incident to two friends, who had both given evidence at the trial. Most importantly, there were strong similarities between her description of the alleged assault and that of the other complainant, with whom there was no evidence of any collusion. In a case of indecent assault by a doctor on his patient during a private consultation where only he and the victim were present, it would be difficult to conceive of stronger corroborative evidence, especially when each of the other witnesses was called to give evidence at trial and their reliability was tested by cross-examination. Although the judge's direction to the jury was found to be deficient on appeal, the Court of Appeal also held that it must have been clear to the jury from that direction that ST's statement should carry less weight because they had not seen or heard her. Having regard to that direction, and the evidence offered by the prosecution in support of ST's statement, the Court considered that the jury had been able to conduct a fair and proper assessment of the reliability of ST's allegations against the first applicant. Against this background, and viewing the fairness of the proceedings as a whole, there had been sufficient factors to counterbalance the admission in evidence of ST's statement.

Conclusion: no violation (fifteen votes to two).

(b) *The second applicant's case* – Appropriate enquiries had been made to determine whether there were objective grounds for T's fear and the trial judge was satisfied that special measures would not allay it.

T was the only witness who had claimed to see the stabbing and his uncorroborated eyewitness statement was, if not the sole, at least the decisive evidence against the applicant. It was obviously evidence of great weight without which the chances of a conviction would have significantly receded. Neither the trial judge's conclusion that no unfairness would be caused by admitting T's statement since the applicant was in a position to challenge or rebut it himself or by calling other witnesses, nor the judge's warning to the jury to approach T's evidence with care, could be a sufficient counterbalance to the handicap under which the defence had laboured. Even though he had given evidence denying the charge, the applicant had been unable to test the truthfulness and reliability of T's evidence through cross-examination and, since T was the sole witness apparently willing or able to say what he had seen, the applicant was not able to call any other witness to contradict his testimony. Further, no matter how clearly or forcibly expressed, a warning by the judge in his direction to the jury of the dangers of relying on untested evidence could not be a sufficient counterbalance where an untested statement of the only prosecution eyewitness was the only direct evidence against the applicant.

The decisive nature of T's statement in the absence of any strong corroborative evidence in the case meant the jury were unable to conduct a fair and proper assessment of the reliability of T's evidence. Examining the fairness of the proceedings as a whole, the Court concluded that there had not

1. These included specific rules defining the circumstances in which an absent witness's statement could be admissible in evidence, a requirement to consider alternative measures to allow a witness absent through fear to give live evidence, discretion to exclude an absent witness's statement and an obligation to stop the proceedings if the case against the accused was based "wholly or partly" on a hearsay statement so unconvincing that a conviction would be unsafe. In addition, the trial judge was required to give the jury the traditional direction on the burden of proof and direct them as to the dangers of relying on a hearsay statement.

been sufficient counterbalancing factors to compensate for the difficulties to the defence which resulted from the admission of T's statement.

Conclusion: violation (unanimously).

Article 41: EUR 6,000 to the second applicant in respect of non-pecuniary damage.

ARTICLE 8

Family life

Inability of a father to exercise his contact rights in relation to his son during the course of divorce proceedings: *violation*

Cengiz Kılıç v. Turkey - 16192/06
Judgment 6.12.2011 [Section II]

Facts – The applicant has a son who was born in 2001. He is divorced from the child's mother, who was awarded parental responsibility by a court order. Relying on Article 8 of the Convention, he complained before the European Court that the authorities had failed to take the necessary steps to allow him to maintain relations with his son and had not removed the obstacles created by the child's mother to the exercise of his right to contact despite the court decisions in which he had been granted that right.

Law – Article 8: What was decisive in this case was whether the national authorities had taken all the steps that could reasonably have been expected of them in the proceedings concerning the applicant's exercise of staying and visiting contact, with a view to reuniting him with his son. According to the documents in the case file, throughout the two sets of divorce proceedings, and in particular between 2005 and 2008, the applicant had applied to the court at least ten times, either seeking an order enabling him to maintain his personal relations with his son or informing the court that his visiting contact had been hindered by the child's mother. The applicant had had no contact, or very limited contact, with his son for periods of up to two years. The psychological assessment of the parents and the child had not been completed until late 2008, more than seven years after the couple had separated and the applicant had first filed for divorce and applied to be granted parental responsibility. The experts' reports had found that the period that had elapsed without adequate contact between the applicant and his son had played a decisive role in the child's attitude of rejection towards his father. While acknowledging that situations involving failure to enforce orders granting parental responsibility and visiting and staying contact were particularly difficult to resolve by judicial means, the Court noted that there was no indication in the file that the family-affairs judge had made any efforts to reconcile the parties' respective demands or taken any steps to facilitate the voluntary execution of court decisions. It had to be recognised that the ordinary rules on execution of court decisions, as applied in the present case, were hardly appropriate for resolving the type of situation encountered here, concerning the non-enforcement of the right to respect for family life. Furthermore, the national courts appeared to have refrained from taking any sanctions against the child's mother, other than ordering her to comply on one occasion. The Court also noted that the national legal system made no provision for civil mediation, an option which would have been desirable as a means of promoting cooperation between all persons concerned. In this connection the Court referred to Recommendation No. R (98) 1 of the Committee of Ministers of the Council of Europe on family mediation, which stated that recourse to family mediation could "improve communication between family members, reduce conflict between parties in dispute, produce amicable settlements, provide continuity of personal contacts between parents and children, and lower the social and economic costs of separation and divorce for the parties themselves and states". In conclusion, by failing to take all the practical measures that could reasonably have been expected of it in the circumstances of the case, the respondent State had fallen short of its obligations under Article 8.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been a violation of Article 6 § 1 of the Convention, taken separately and in conjunction with Article 13.

Article 41: EUR 17,000 in respect of non-pecuniary damage.

Lack of in-depth examination of all relevant factors when deciding to return applicant's child under the Hague Convention on the Civil Aspects of International Child Abduction: *violation*

X v. Latvia - 27853/09
Judgment 13.12.2011 [Section III]

Facts – The applicant lived in Australia and in 2005 gave birth to a daughter while living with her partner T. The child's birth certificate did not state

the father's name and no paternity test was ever carried out. In 2008 the applicant left Australia with her daughter and returned to Latvia. T. then filed a claim with the Australian courts seeking to establish his parental rights in respect of the child. He stated that he had submitted false documents to the social-security services in order for the applicant to receive the single-parent benefit and that she had fled Australia taking the child without his consent, contrary to the Hague Convention on the Civil Aspects of International Child Abduction. The Australian court decided that T. and the applicant had joint custody of the child and that the case would be further reviewed once the child was returned to Australia. Once the competent Latvian authorities received notification from the Australian authorities, they heard representations from the applicant, who contested the applicability of the Hague Convention claiming that she had been the child's sole guardian. The Latvian courts granted T.'s request concluding that it was not up to them to challenge the conclusions reached by the Australian authorities concerning his parental responsibility. Consequently, the applicant was ordered to return the child to Australia within six weeks. On appeal, the applicant claimed that the child was well integrated in Latvia and submitted a psychologist's report stating that the child should not be separated from her mother. Her appeal was dismissed. In March 2009 T. met the applicant, took the child and returned with her to Australia. Ultimately, the Australian courts ruled that T. was the sole guardian and that the applicant was only allowed to visit the child under supervision and was not allowed to speak to her in Latvian.

Law – Article 8: The Court was called upon to assess whether the decision-making process leading to the interference with the applicant's Article 8 rights had been fair and such as to afford due respect to her interests safeguarded by that provision. Such an interference could not be regarded as "necessary in a democratic society" if, among other things, the persons concerned were prevented from being sufficiently involved in the decision-making process and if the domestic courts failed to conduct an in-depth examination of the entire family situation and of factors of an emotional, psychological and medical nature. In this connection, the Court reiterated that the concept of the child's "best interests" was a primary consideration in the procedures provided for in the Hague Convention.

Before the Latvian courts the applicant had relied on several grounds in order to establish that the child's return to Australia would not serve the child's best interests, in particular the psychologist's report which indicated that the child would be exposed to psychological harm if she was separated from her mother. However, the Latvian courts had failed to consider the clear conclusions of that report, despite the fact that the requirement for procedural fairness enshrined in Article 8 obliged the national courts to pay due respect to the arguable claims brought by the parties in order to ensure that the child's return would be ordered only in his or her best interests and not as a purely procedural measure. In that connection, the Hague Convention had to be seen as an instrument of a procedural nature and not as a human-rights treaty. The Latvian courts had further omitted to assess the child's material well-being if returned to Australia, or the mother's ability to follow and maintain contact with her there. They had thus failed to carry out an in-depth examination of the entire family situation and all relevant factors, and had rendered the interference disproportionate.

Conclusion: violation (five votes to two).

Article 41: EUR 9,000 in respect of non-pecuniary damage.

(See also *Maumousseau and Washington v. France*, no. 39388/05, 6 December 2007, and *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, 6 July 2010)

Home

Failure by State authority to assess proportionality when evicting bona fide purchaser from flat fraudulently acquired by previous owner: *violation*

Gladysheva v. Russia - 7097/10
Judgment 6.12.2011 [Section I]

(See Article 1 of Protocol No. 1 below, page 29)

ARTICLE 10

Freedom of expression

Lawyer's conviction for comments to press on confidential expert report prepared in criminal investigation: *violation*

Mor v. France - 28198/09
Judgment 15.12.2011 [Section V]

Facts – In November 1998 the applicant, a lawyer, lodged a criminal complaint alleging manslaughter and an application to join the proceedings as a civil

party on behalf of the parents of a twelve-year-old child who had died from an illness contracted after being vaccinated against hepatitis B. A judicial investigation was opened. In November 2002 a doctor specialising in drug safety and pharmacoepidemiology submitted a 450-page expert report to the investigating judge. On 14 November 2002 the daily newspaper *Le Parisien* published an article with the heading "B vaccine: the report that points the finger", in which it described the report as "explosive" and "damning" for the French health authorities. The applicant later made statements to the press in reply to questions from journalists who had already seen the expert report. In September 2003 she was charged with breaching the confidentiality of the investigation and a breach of professional confidence. In May 2007 the Criminal Court found the applicant guilty of a breach of professional confidence but dispensed her from serving sentence. It ordered her to pay one euro in damages to the claimant company. The appeals lodged against that decision were unsuccessful.

Law – Article 10: The applicant had been convicted for having made comments, in her capacity as the lawyer of a number of victims who had joined the proceedings as civil parties, on the expert report, although the latter had been covered by the confidentiality of the investigation and the judicial investigation had been in progress. Her criminal conviction constituted interference with the exercise of her right to freedom of expression. The interference had been prescribed by the law, which made it an offence for persons acting in their capacity as lawyers to disclose confidential information. Lawyers were required to respect the confidentiality of criminal investigations by refraining from communicating any information from the file, except to their clients for the purposes of the latter's defence, and from publishing letters or other documents concerning an ongoing investigation. As to the aim of the interference, they lent special protection to the confidentiality of the investigation in view of what was at stake in criminal proceedings with regard to both the administration of justice and the right of persons under investigation to be presumed innocent.

The applicant had not been penalised for divulging the expert report to the media but for having disclosed information contained therein. When she had replied to the journalists' questions the press had already been in possession of all or part of the expert report. The applicant's comments had formed part of a debate of general interest. The facts had been of direct relevance to a public-health issue and had concerned the liability of pharmaceutical laboratories and representatives of the State. The issue had therefore been of undoubted interest to the general public. In that connection there was little scope under Article 10 § 2 for restrictions on debate on questions of public interest. The disclosure of information to the media was apt to safeguard the public's right to be informed of the activities of the judicial authorities. With the exception of the allegations that the expert had been subjected to pressure, the applicant had confined herself to commenting on information already widely disseminated in the article preceding her interview which had been taken up in other sections of the media. However, while the fact that persons not involved in the criminal proceedings – in this case, journalists – had knowledge of information covered by the rules of professional confidence necessarily undermined its confidentiality, this did not in itself dispense lawyers from their obligation to exercise caution with regard to the secrecy of ongoing investigations when making comments in public. Nevertheless, in view of the media coverage of the case owing to the seriousness of the facts and the persons implicated, the Court queried the interest in prohibiting the applicant from commenting on information already known to the journalists. Accordingly, the need to protect confidential information did not constitute sufficient grounds for finding the applicant guilty of a breach of professional confidence. In particular, the case-law of the Court of Cassation, according to which the fact that other persons had knowledge of information covered by professional confidence did not mean that the information was not confidential and secret, did not dispense the domestic courts from giving relevant and sufficient reasons for any infringement of a lawyer's right to freedom of expression. The protection of that freedom had to take account of the provision made for exceptional cases in which the exercise of the rights of the defence might make a breach of professional confidence necessary.

As to the allegations that pressure had been exerted on the expert, which had not been mentioned in the article in question, the applicant's comments had related more to the conditions in which the expert had had to compile the report than to the content of the report itself. The Court accepted the applicant's argument that she had wished to alert the public and comment on the content of the report in the interests of the defence, given that the families of the victims, whom she was representing, had a clear interest, both for their defence and for the dispassionate and independent investigation of their complaint, lodged four years earlier,

in informing the public of any external pressure exerted on the expert, the importance of whose findings was not in dispute in the instant case. The applicant's statements could not be said to have been liable to hamper the proper administration of justice or to breach the right of those implicated to be presumed innocent. On the contrary, giving an interview to the press was a legitimate part of her clients' defence, given that the case had aroused interest in the media and among the general public.

The applicant had been dispensed from sentence and had merely been ordered to pay a symbolic sum of one euro in damages. Although that had been the most lenient measure possible, it nonetheless constituted a criminal sanction. However, that did not suffice in itself to justify the interference.

Accordingly, the interference complained of had not responded to a pressing social need and had been disproportionate in the circumstances of the case.

Conclusion: violation (unanimously).

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

ARTICLE 11

Freedom of peaceful assembly

Detention aimed at preventing participation in demonstration: *violation*

Schwabe and M.G. v. Germany - 8080/08 and 8477/08
Judgment 1.12.2011 [Section V]

(See Article 5 § 1 above, page 15)

ARTICLE 13

Effective remedy

Failure to carry out careful and rigorous examination of situation of alien at advanced stage of HIV infection when assessing risk of ill-treatment in country of origin: *violation*

Yoh-Ekale Mwanje v. Belgium - 10486/10
Judgment 20.12.2011 [Section II]

(See Article 3 above, page 13)

ARTICLE 14

Discrimination (Article 8)

Unjustified difference in treatment of remand prisoners compared to convicted prisoners as regards visiting rights and access to television: *violation*

Laduna v. Slovakia - 31827/02
Judgment 13.12.2011 [Section III]

Facts – The applicant was detained pending trial from 1 September 2001 to 9 February 2006, when he began a nine-year prison sentence. In his application to the European Court, he complained that at the material time remand prisoners did not have the same visiting rights as convicted prisoners and that, unlike convicted prisoners, they had no access to television.

Law – Article 14 in conjunction with Article 8: Prison restrictions on family visits and on watching television came within the ambit of private and family life under Article 8. Article 14 was therefore applicable. Detention on remand fell within the notion of "other status" within the meaning of that provision as, even though it could be imposed involuntarily and generally for a temporary period, it constituted a distinct legal situation that was inextricably bound up with the individual's personal circumstances and existence. Further, as a remand prisoner the applicant was in a relevantly similar situation to the comparator group of convicted prisoners since his complaints concerned visiting rights and access to television in prison which were issues of relevance to all prisoners.

At the material time, remand prisoners were allowed to receive visits for a minimum of thirty minutes a month compared to the two hours allowed convicted prisoners. Moreover, for much of the relevant period the frequency of visits and the type of contact which convicted prisoners were allowed depended on the security level of the prison in which they were being held, whereas remand prisoners were all subject to the same regime, regardless of the reasons for their detention and the security considerations.

The Court was not satisfied that there had been any objective and reasonable justification for these differences in treatment. The provisions of the Detention Act 1993 requiring any restrictions on detainees' rights to be justified by the purpose of the detention and the need to ensure order, the safety of others and the protection of property did not justify restricting remand prisoners' rights to

a greater extent than those of convicted prisoners and the arrangements had been criticised by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) in its reports on visits to Slovakia in 1995, 2000 and 2005. Furthermore, while particular restrictions on a prisoner's visiting rights might in some instances be justified for security reasons or to protect the legitimate interests of an investigation, those aims could be attained by other means which did not affect all detained persons regardless of whether they were actually required. For example, different categories of detention could be used, or particular restrictions imposed if necessary in an individual case. International instruments such as the International Covenant on Civil and Political Rights and the European Prison Rules of 1987[1] stressed the need to respect the remand prisoner's status as a person who is to be presumed innocent, while the European Prison Rules 2006, which were adopted shortly before the applicant's detention on remand ended, provided that unless there was a specific reason to the contrary untried prisoners should receive visits and be allowed to communicate with family and other persons in the same way as convicted prisoners. In the light of these considerations, the visiting restrictions imposed on the applicant had been disproportionate.

As regards the lack of access to television, the Government had failed to put forward any objective justification for treating remand prisoners differently to convicted prisoners, for whom television was considered part of their cultural and educational activities.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1: Making the applicant's right to buy additional food and other products in the prison shop conditional on his applying at least the same amount of money to the reimbursement of his registered debts constituted interference with his right to the peaceful enjoyment of his possessions. That interference had a legal basis and securing the reimbursement of debt was undoubtedly in the general interest. As to proportionality, the interference had limited but not deprived the applicant of the ability to use the money in his prison account to buy food and other products in the prison shop. Furthermore, the requirement to reimburse his debts did not apply to medicine, indispensable sanitary items, materials for correspondence, or taxes and fees. Accordingly, regard being had to the wide margin of appreciation afforded to the Contracting States in the debt-recovery sphere, the interference was not disproportionate to the aim pursued.

Conclusion: no violation (unanimously).

Article 13: The Court notes that it declared admissible and examined the applicant's complaints under the substantive provisions of the Convention only to the extent that the alleged breach stemmed from the alleged deficiencies in the relevant law. Article 13 could not be interpreted as requiring a remedy against the state of domestic law.

Conclusion: no violation (unanimously).

Article 41: EUR 9,000 in respect of non-pecuniary damage.

ARTICLE 33

Inter-State cases

Alleged pattern of official conduct by Russian authorities resulting in multiple breaches of Georgian nationals' Convention rights: *admissible*

Georgia v. Russia (II) - 38263/08
Decision 13.12.2011 [Section V]

As in the case of *Georgia v. Russia (I)*, which is currently pending before the Grand Chamber (application no. 13255/07, Information Note nos. 120 and 125), the application was lodged in the context of the armed conflict between Georgia and the Russian Federation in August 2008 following an extended period of ever-mounting tensions, provocations and incidents that opposed the two countries.

The applicant Government submitted that, in the course of indiscriminate and disproportionate attacks by Russian forces and/or by the separatist forces under their control, hundreds of civilians were injured, killed, detained or went missing, thousands of civilians had their property and homes destroyed and over 300,000 people were forced to leave Abkhazia and South Ossetia. In their submission, these consequences and the subsequent lack of any investigation engaged Russia's responsibility under Articles 2, 3, 5, 8 and 13 of the Convention, Articles 1 and 2 of Protocol No. 1 and Article 2 of Protocol No. 4.

1. Recommendation No. R (87) 3 of the Committee of Ministers of the Council of Europe on the European Prison Rules adopted on 12 February 1987, replaced with Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe on the European Prison Rules adopted on 11 January 2006.

The respondent Government denied the allegations and argued that the Russian armed forces had acted in defence of the civilian population of South Ossetia. They also raised a series of preliminary objections: that the alleged violations did not fall within the "jurisdiction" of the Russian Federation for the purposes of Article 1 of the Convention; that the application was incompatible *ratione materiae* with the Convention as it concerned an international armed conflict more appropriately governed by the rules of international humanitarian law; that the Court was precluded from examining the application because the Georgian Government had already lodged a similar application with the International Court of Justice (ICJ); that domestic remedies available in Russia had not been exhausted; and that the six-month time-limit had not been complied with in respect of certain complaints.

The Court, by a majority, dismissed the Russian Government's objection concerning the allegedly similar application lodged with the ICJ, after noting that that court had declined jurisdiction in a judgment of 1 April 2011 and that, in any event, the Convention rule precluding the Court from dealing with applications already submitted to another international body applied only to individual, not Inter-State, applications. The Court also dismissed the objection relating to the six-month time-limit after noting that the application had been lodged less than six months from the start of the impugned events on 7 August 2008.

Also by a majority, the Court joined to the merits the questions whether the alleged violations fell within Russia's "jurisdiction" and whether the application was compatible *ratione materiae* with the Convention. The questions of the application of and compliance with the rule on exhaustion of domestic remedies were so closely related to that of the alleged existence of an administrative practice that they too were joined to the merits.

Conclusion: admissible (majority).

ARTICLE 35

Article 35 § 1

Six-month period

Preliminary objection that application concerning alleged property rights of displaced persons had been lodged out of time: *preliminary objection dismissed*

Chiragov and Others v. Armenia - 13216/05
Sargsyan v. Azerbaijan - 40167/06
Decisions 14.12.2011 [GC]

(See Article 1 of Protocol No. 1 below, page 27)

ARTICLE 37

Article 37 § 1

Striking out applications
Respect for human rights

Unilateral declaration acknowledging breach of right to fair hearing but without undertaking to reopen domestic proceedings: *strike out refused*

Rozhin v. Russia - 50098/07
Judgment 6.12.2011 [Section I]

Facts – In his application to the European Court the applicant complained that he had been denied a fair hearing in proceedings he had brought against the authorities concerning his conditions of detention. The Government lodged a unilateral declaration with the Court acknowledging a breach of the applicant's right to a fair hearing and offering an *ex gratia* payment of EUR 500 in just satisfaction. They invited the Court to strike the application out of its list.

Law – Article 37 § 1: The Government had acknowledged in their unilateral declaration that the civil proceedings in the applicant's case had not complied with the requirement of fairness and had offered EUR 500 in settlement. However, they had not undertaken to reopen the domestic proceedings even though the nature of the alleged violation was such that it would not otherwise be possible to eliminate the effects of the infringement of the applicant's right to a fair hearing. Nor had they undertaken to ensure that any new proceedings would meet all the fairness requirements of Article 6 of the Convention. It was also relevant that the domestic law allowed the reopening of proceedings in the event of a finding of a violation of the Convention, but not where the case was struck out of the list. The Government had thus failed to establish a sufficient basis for a finding that respect for human rights as defined in the Convention and its Protocols did not require the Court to continue its examination of the case.

Conclusion: not struck out (unanimously).

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Alleged loss of homes and possessions by persons fleeing Nagorno-Karabakh conflict: *admissible*

Chiragov and Others v. Armenia - 13216/05
Sargsyan v. Azerbaijan - 40167/06
Decisions 14.12.2011 [GC]

Facts – These two cases concern individuals who allegedly lost their homes and possessions when fleeing the fighting during the conflict in the Nagorno-Karabakh region in 1992.

Under the Soviet system of territorial administration, Nagorno-Karabakh was an autonomous province of the Azerbaijan Soviet Socialist Republic. Its population was approximately 75% ethnic Armenian and 25% ethnic Azeri. Armed hostilities started in 1988, coinciding with an Armenian demand for the incorporation of the province into Armenia. Azerbaijan became independent in 1991. In September 1991 the Nagorno-Karabakh Soviet announced the establishment of the "Nagorno-Karabakh Republic" (the "NKR") and in January 1992 the "NKR" parliament declared independence from Azerbaijan. The conflict gradually escalated into full-scale war before a ceasefire was agreed in 1994. Despite negotiations for a peaceful solution under the auspices of the Organization for Security and Co-operation in Europe (OSCE) and the Minsk Group, no political settlement of the conflict has been reached. The self-proclaimed independence of the "NKR" has not been recognised by any State or international organisation.

The applicants in the case of *Chiragov and Others v. Armenia* are Azerbaijani nationals of Kurdish origin who, until 1992, lived in the district of Lachin, which is located between Nagorno-Karabakh and the Republic of Armenia. Its population was largely composed of Azeris and Kurds. The applicants allege that they were forced by the escalating military conflict to flee to Baku (Azerbaijan) in 1992 and have been unable to return as Lachin is under the effective control of Armenia. They further allege that they have lost all control over their properties and homes and have been victims of discrimination as a result of their ethnic origin and religious affiliation.

The applicant in the case of *Sargsyan v. Azerbaijan* has died since lodging his application and is now represented by his widow and children. He was an ethnic Armenian who, until 1992, lived in a village in the Shahumyan district in what was formerly the Azerbaijan Soviet Socialist Republic on the northern border of Nagorno-Karabakh. Shahumyan was included in the territory claimed by the "NKR" when it declared independence from Azerbaijan in January 1992 and according to the applicant, 82% of the population of Shahumyan at the time were ethnic Armenians like himself. In his application to the European Court, the applicant alleged that he and his family were forced to flee their home and move to Armenia after their village was bombed by Azerbaijani forces in 1992. He complained of his forced displacement and subsequent inability to use his home and property and visit his relatives' graves. He also complained of discrimination on the basis of his ethnic origin and religious affiliation.

Law – In both cases the respondent Governments raised a series of preliminary objections to the applicants' complaints.

The Court joined to the merits the Governments' objections that the properties concerned were not within their "jurisdiction" for the purposes of Article 1 of the Convention, that the applicants had not shown that they were "victims" of some or all of the alleged violations for the purposes of Article 34, and that they had failed to exhaust domestic remedies within the meaning of Article 35 § 1.

As regards the remaining objections, the Court found as follows:

(a) Article 35 § 3 (a) (*temporal jurisdiction*): While the applicants' displacement in 1992 in the context of an armed conflict was to be considered as resulting from an instantaneous act falling outside the Court's competence *ratione temporis*, their ensuing lack of access to their alleged property and homes was to be considered as a continuing situation, which the Court had had competence to examine since 2002 when both respondent States ratified the Convention.

Conclusion: preliminary objection dismissed (majority).

(b) Article 35 § 1 (*six-month time-limit*): The respondent Governments submitted that the applications had been lodged out of time as they had not been lodged within six months after the dates the respondent States had ratified the Convention or, in the alternative, "without undue delay" after such ratification.

The Court observed that in the case of *Varnava and Others v. Turkey*[1] it had not laid down the application of a strict six-month time-limit for disappearance cases, let alone for continuing situations (such as in the present cases) in general. However, in the interests of legal certainty, it had imposed a duty of diligence and initiative on applicants and an applicant who failed to comply with that duty ran the risk that his or her application would be rejected as being out of time.

While there were important differences between *Varnava*-type cases concerning the failure to investigate disappearances and the applicants' cases, which concerned the denial of access to properties and homes, there were also similarities. Both types of case concerned complaints about continuing violations in a complex post-conflict situation affecting large groups of persons. In such situations there would often be no adequate domestic remedies, or if there were, their accessibility or functioning might be hampered by practical difficulties. It could therefore be reasonable for applicants in such situations to await the outcome of political processes such as peace talks and negotiations that might offer the only realistic hope of a solution. Nevertheless, applicants should not remain passive in the face of an unchanging situation indefinitely: once they were aware or should have been aware that there was no realistic hope of regaining access to their property and home in the foreseeable future, unexplained or excessive delay in lodging an application could lead to its rejection. While the Court did not consider it appropriate to indicate general time-frames in such cases, it accepted that in complex post-conflict situations time-frames had to be generous in order to allow the situation to settle and to permit applicants to collect comprehensive information on the chances of obtaining a solution domestically.

The earliest time the applicants in the instant cases could have applied to the Court had been on ratification by the respondent States in 2002. However, in the context of their accession to the Council of Europe, Armenia and Azerbaijan had given a joint undertaking to seek a peaceful settlement of the Nagorno-Karabakh conflict and a period of intensified contacts and negotiations had followed, so that the applicants could for some time have reasonably expected that a solution to the conflict would eventually be achieved. Furthermore, their personal situations also had to be taken into account and, as displaced persons, they were members of a particularly underprivileged and vulnerable population. The applicants in the *Chiragov and Others* case had applied to the Court about three years after Armenian ratification of the Convention. Mr Sargysan had lodged his application some four years and four months after Azerbaijan ratified the Convention. In these circumstances, the Court considered that the applicants had acted without undue delay and that their applications were not out of time.

Conclusion: preliminary objection dismissed (majority).

In the case of *Chiragov and Others* the Court also dismissed by a majority an objection by the Armenian Government under Article 35 § 2 (b) that the application was substantially the same as the matter submitted to the OSCE. Noting that the applicants were not parties to the interstate talks conducted within the OSCE and that that body had no power to examine whether the applicants' individual rights had been violated, the Court found that the OSCE proceedings did not constitute a "procedure of international investigation or settlement" of the matters which were the subject of the present application.[2]

In the *Sargsyan* case the Court dismissed unanimously an objection by the Azerbaijani Government that a declaration Azerbaijan had deposited with its instrument of ratification in 2002 had made it clear that it was unable to guarantee the application of the Convention in the territories occupied by the Republic of Armenia. In line with its decisions in previous cases[3] the Court held that the declaration was not capable of restricting the territorial application of the Convention to certain parts of the internationally recognised territory of the Republic of Azerbaijan. Nor could it be equated with a reservation complying with the requirements of Article 57 of the Convention as that provision did not allow for "reservations of a general character". The declaration by Azerbaijan did not refer to any particular provision of the Convention or specific law in force in Azerbaijan, but was of general scope whose effect would be that persons on the territories concerned would be wholly deprived of the protection of the Convention for an indefinite period. It was, therefore, invalid.

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1. *Varnava and Others v. Turkey* [GC], nos. 16064/90 et al, 18 September 2009, Information Note no. 122.

2. See also *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, 20 September 2011, Information Note no. 144.

3. *Ilaşcu and Others v. Moldova and Russia* (dec.) [GC], no. 48787/99, 4 July 2001, and *Loizidou v. Turkey* (preliminary objections), no. 15318/89, 23 March 1995.

The applications in both cases were declared *admissible* under Articles 8, 13, 14 of the Convention and Article 1 of Protocol No. 1.

Revocation of bona fide purchaser's title to flat on account of a previous owner's fraudulent acquisition from State authority: *violation*

Gladysheva v. Russia - 7097/10
Judgment 6.12.2011 [Section I]

Facts – In 2005 the applicant bought a flat in Moscow and started living there with her son. The flat had previously been owned by the City of Moscow before being acquired under a privatisation scheme by a certain Y, the alleged wife of a deceased occupier M to whom it had been allocated for social housing. Y had sold the flat to a third party, who had then sold it to the applicant. In 2008 the Moscow Housing Department brought an action against the applicant and the previous owners of the flat claiming that it had been fraudulently acquired by Y. It requested the court to annul the privatisation and all the ensuing transactions. The court upheld the Housing Department's claim, after finding that Y had actually never been married to M and could not therefore have acquired the flat after his death. It further revoked the applicant's title to the flat and declared the City of Moscow the lawful owner.

Law – Article 1 of Protocol No.1: The Government had claimed that the case fell outside the scope of Article 1 of Protocol No. 1 as it concerned a private-law dispute. However, it was clear from the domestic proceedings that it was a public authority, rather than a private party, who had brought the claim against the applicant. Moreover, the issues which had arisen during the proceedings – such as the grant of a social tenancy and fraud concerning residential registration – fell within the domain of public law and implicated the State in its regulatory capacity rather than as a private party to a civil-law transaction. Article 1 of Protocol No. 1 was therefore applicable. The case fell to be examined under the general rule guaranteeing the right to peaceful enjoyment of possessions and, despite certain doubts on the question of legality, the Court assumed that the interference with the applicant's rights had been lawful and pursued the public interest in that it catered for the needs of persons on the waiting list for social housing.

However, it was unclear why the fraudulent facts had not been discovered in 2004/05 when the relevant authorities had dealt with Y's request: a simple enquiry of the competent civil registry, whose stamp had been used to produce a forged marriage certificate between Y and M, would have enabled the authorities to verify whether their marriage actually existed at the material time. There had been nothing to prevent the authorities from authenticating Y's documents before granting her requests for registration, a social tenancy and privatisation. Moreover, the subsequent transactions in respect of the flat had also been subject to legalisation by the competent State authorities. In such circumstances, the risk of any mistake by a State authority should have been borne by the State and the errors were not to be remedied at the expense of the individual concerned. The applicant, who had been stripped of ownership without compensation and had no prospects of receiving replacement housing from the State, had thus borne an excessive individual burden that was not sufficiently justified by the public interest at stake.

Conclusion: violation (unanimously).

Article 8: Given the central importance of the rights guaranteed under Article 8 to the individual's identity, self-determination and physical and moral integrity, the margin of appreciation in housing matters was narrower in respect of those rights compared to those protected under Article 1 of Protocol No. 1. After stripping the applicant of her ownership, the domestic courts had automatically made an order for her eviction, without any further analysis of the proportionality of that measure or the particular circumstances of her case. It was also of particular relevance that the applicant's home had been repossessed by the State and not another private party whose interests in the flat might have been at stake. The alleged intended beneficiaries on the social-housing waiting list were not sufficiently individualised to allow their personal circumstances to be balanced against those of the applicant. Finally, the applicant's circumstances did not make her eligible for substitute housing, nor had any goodwill been shown by the authorities in providing her with permanent, or even temporary, accommodation following her eviction.

Conclusion: violation (unanimously).

Article 41: Full restitution of the applicant's title to the flat, annulment of the eviction order against her and EUR 9,000 in respect of non-pecuniary damage.

(See also *Gashi v. Croatia*, no. 32457/05, 13 December 2007, and *Orlić v. Croatia*, no. 48833/07, 21 June 2011)

Amendment, with retrospective effect, of statutory time-limit applicable to claims for restitution of land in the former GDR: *violation*

Althoff and Others v. Germany - 5631/05
Judgment 8.12.2011 [Section V]

Facts – The Law on the resolution of outstanding property issues (the Property Act) was passed in the context of German reunification in 1990 with a view to settling conflicts relating to property situated on the territory of the former German Democratic Republic (GDR) in order to ensure long-term legal certainty. It covered property expropriated at the time of the GDR or which had been lost by forced sale, expropriation or other means under the National-Socialist regime. People who had been deprived of their property under these regimes were entitled to seek restitution. Claims had to be lodged by no later than 31 December 1992. In the event of competing claims for restitution in respect of the same property, the party who was "first" injured took precedence.

The applicants' case concerned land that had originally belonged to Jewish owners who had been forced to sell it under the National-Socialist regime. The land was subsequently purchased by a shopkeeper before being expropriated in 1953 for use as "people's property" in the GDR. Following German reunification in 1990, the applicants, who were the shopkeeper's heirs, had filed a claim for restitution under the Property Act before the 31 December 1992 deadline. However, their claim was rejected in July 2001 on the grounds that the German State had paid compensation in 1997, *inter alia*, to the US heir of one of the original Jewish owners under an agreement made on 13 May 1992 between Germany and the United States on the settlement of property claims ("the German-US Agreement"). Under the terms of that Agreement, the heir had transferred her rights in the land to the German State and since, for the purposes of the Property Act, the original Jewish owners were the "first" injured party, those rights took precedence over the applicants' rights. The applicants appealed arguing that the State's right to restitution had lapsed as neither the heir nor Germany had made a claim for restitution under the Property Act within the statutory time-limit of 31 December 1992, but their argument was rejected on the grounds that a statutory amendment introduced in 1998 stipulated that the time-limit did not apply to rights held by Germany under the German-US Agreement. In their application to the European Court, the applicants complained that the amendment of the Property Act with retrospective effect had infringed their right to the peaceful enjoyment of their possessions.

Law – Article 1 of Protocol No. 1

(a) *Applicability* – On the expiry of the statutory time-limit, in the absence of any restitution claim by the Federal Republic of Germany (FRG), which as sole successor to the heirs of the original Jewish owners had a prior claim, the applicants had had a "legitimate expectation" of being able to exercise a right to restitution of the property. That "legitimate expectation" was also based on the Federal Administrative Court's finding that the law of 21 December 1992 by which the German-US Agreement was incorporated into domestic legislation did not contain any specific provisions exempting the FRG from filing a claim, and on the Federal Constitutional Court's view that it could be assumed that the applicants' rights benefited from the protection of Article 14 § 1 of the Basic Law. In the light of the very particular circumstances of the case, the applicants therefore had a "possession" and Article 1 of Protocol No. 1 was applicable.

(b) *Merits* – The 1998 amendment had stipulated, with retrospective effect, that the original 31 December 1992 deadline for submitting claims under the Property Act did not apply to rights stemming from the German-US Agreement. As a result, the applicants had lost any entitlement they might otherwise have had to the restitution of the properties or to the proceeds of sale. The amendment had, therefore, interfered with their right to the peaceful enjoyment of their possessions. The interference was provided for by law. There was no reason to doubt that the aim of the legislative amendment – to clarify a legal situation that was uncertain in the eyes of the German legislature and to secure the State's property rights stemming from the German-US Agreement – was in the public interest.

Turning to the question of proportionality, the Court reiterated that while, in principle, the legislature was not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair hearing enshrined in Article 6 precluded any interference by the legislature – other than on compelling grounds of general interest – with the administration of justice designed to influence the judicial determination of a dispute. In the instant case, the retro-

spective amendment to the legislation had created an inequality to the State's advantage and the applicants' detriment. A decisive factor here was that the initial statutory time-limit had applied to all property claims, including those arising from the German-US Agreement, and there had been no special provisions exempting the German State from the requirement to file a claim. Moreover, the State had been aware of the situation and had had more than seven months in which to file a claim before the expiry of the time-limit. It was relevant, too, that the retrospective amendment had not been introduced until some eight years after German reunification became effective and six years after the expiry of the initial time-limit, and that it had taken ten and a half years for the applicants' restitution claim to be considered (and rejected) by the Office of the *Land*. Lastly, even though the applicants were entitled, as the heirs of owners whose property was expropriated by the former GDR, to claim compensation under the Compensation Act, the amount did not appear proportionate to the seriousness of the interference; indeed, it was not even certain that the applicants would be able to obtain any compensation at all, as the Government alleged that they had not filed their claim in time.

In the very particular circumstances of the case, and in spite of both the wide margin of appreciation afforded the State in the exceptional context of German reunification and the legitimate aim of the German legislature to secure the State's assets under the German-US Agreement, the legislative amendment in question had upset the "fair balance" required between the protection of property and the demands of the general interest.

Conclusion: violation (unanimously).

Article 41: reserved.

(See also *Göbel v. Germany*, page 32 below)

Suspension of pension payments following change in legislation regarding the right to do part-time work: *violation*

Lakićević and Others v. Montenegro and Serbia - 27458/06 et al.
Judgment 13.12.2011 [Section IV]

Facts – The four applicants, who are all Montenegrin nationals and retired legal practitioners in receipt of a pension, resumed work on a part-time basis at different dates between 1996 and 2002, as permitted by the pension rules then in force. However, following the entry into force of the Pension and Disability Insurance Act 2003, the Pension Fund issued a series of decisions between April 2004 and November 2005 suspending the payment of their pensions until such time as they ceased their professional activities. These decisions were deemed applicable from 1 January 2004 and were upheld by the Ministry of Labour and Social Welfare and the domestic courts.

Law – Article 1 of Protocol No. 1

(a) *Admissibility* – Since the entire proceedings had been conducted solely within the competence of the Montenegrin authorities, which also had exclusive competence to deal with the subject matter, the applicants' complaints were compatible *ratione personae* with the Convention and Protocol No. 1 solely in so far as they concerned Montenegro, not Serbia.

Conclusion: admissible as regards Montenegro, inadmissible as regards Serbia (unanimously).

(b) *Merits* – The suspension of payment of the applicants' pensions amounted to an interference with the peaceful enjoyment of their possessions. In view of its conclusion on the question of proportionality (see below), the Court did not consider it necessary to decide whether that interference was lawful. It accepted that it pursued the legitimate aims of social justice and the State's economic well-being.

As regard proportionality the Court noted that, in accordance with the pension rules then applicable and encouraged by the pension system to which they had contributed over a number of years, the applicants had reopened their private practices on a part-time basis while continuing to receive a full pension. The decision to suspend the pensions had not been due to any changes in the applicants' circumstances, but to changes in the law. It had particularly affected the applicants as it entirely suspended the payment of the pensions they had been receiving for a number of years and which must have constituted a considerable part of their gross monthly income. Furthermore, the first, second and third applicants had also been obliged to pay back the amounts they had received after 1 January 2004. The applicants had thus been made to bear an excessive and disproportionate burden which, even having regard to the wide margin of appreciation enjoyed by the State in the area of social legislation, could not be justified by the legitimate public interest relied on by the

Montenegrin Government. It could have been otherwise had the applicants been obliged to endure a reasonable and commensurate reduction rather than the total suspension of their entitlements or if the legislature had afforded them a transitional period within which to adjust to the new scheme.

Conclusion: violation (unanimously).

Article 41: EUR 8,000 to the first and third applicants, EUR 6,000 to the second applicant and EUR 4,000 to the fourth applicant in respect of pecuniary damage, and EUR 4,000 to each of the applicants in respect of non-pecuniary damage.

Deprivation of property

Loss of shares in land without full compensation in context of German reunification: *no violation*

Göbel v. Germany - 35023/04
Judgment 8.12.2011 [Section V]

Facts – The instant case concerned land that was purchased in 1938 from two Jewish brothers by an industrialist while the National-Socialists were in power. In 1948 the industrialist's widow entered into a friendly settlement with an administrator under the terms of which she retained two-thirds of the property while the remaining third was returned to the brothers. On her death, she left her two-third share to a community of heirs, who in 1992 sold part of their share to the applicant under a notarial agreement that indicated that the applicant had been informed of the property's history. The applicant acquired a further share in January 1997 and then agreed to sell both shares to a third party for DEM 600,000. The sale fell through, however, when the authorities upheld a claim under the Law on the resolution of outstanding property issues (the Property Act)[1] by the two brothers' heirs for restitution of the two-thirds share the widow had retained under the friendly settlement in 1948. The friendly settlement was not a bar to restitution and, under the terms of the Act, the applicant was entitled only to consideration calculated by reference to the original (1938) sale price (giving him a total of DEM 1,250) or alternatively to compensation (estimated at DEM 15,000 by the Government) under the Compensation Act 1994. In his application to the European Court, the applicant complained that he had been deprived of his shares in the land without fair compensation.

Law – Article 1 of Protocol No. 1: The restitution of the land to the heirs of the original owners constituted interference with the applicant's right to the enjoyment of the two shares he had acquired and had to be regarded as a "deprivation" of possessions, within the meaning of the second sentence of Article 1 of Protocol No. 1. The deprivation was provided for by law and, being intended to return the property to the heirs of victims of persecution under the National-Socialist regime, was "in the public interest".

As regards proportionality, the applicant had not complained of the restitution *per se*. Indeed, he had taken the risk of acquiring the property knowing that a restitution claim could be, or in the case of the second share had been, made. Instead, his complaint related to the amount of reparation to which he was entitled (either consideration of DEM 1,250 under the Property Act or compensation under the Compensation Act, estimated at DEM 15,000). In this connection, two crucial factors came into play: firstly, the aim of the Property Act, which was to afford a priority right of restitution to the heirs of those despoiled at the time of the National-Socialist regime and, secondly, the applicant's full knowledge when he acquired the shares of the risk of a claim for restitution by the heirs of the original owners. The fact that the applicant was entitled to claim compensation also distinguished his case from the case of *Jahn and Others*,[2] where no such right was provided.

In view of the foregoing, and in particular the exceptional circumstances related to German reunification, the respondent State had not overstepped its margin of appreciation and had not failed to strike a "fair balance" between the interests of the applicant and the general interest of German society.

Conclusion: no violation (unanimously).

(See also *Althoff and Others v. Germany*, page 30 above)

1. The Property Act was passed in the context of German reunification in 1990 and enabled people whose land had been lost by forced sale, expropriation or other means under the National-Socialist regime to seek restitution.

2. *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, 30 June 2005, Information Note no. 76.

REFERRAL TO THE GRAND CHAMBER

Article 43

Note on the general practice followed by the panel of the Grand Chamber when deciding requests for referral

The aim of this Note is to assist the parties in assessing the prospects of success of a referral request. Since its creation with the entry into force, in November 1998, of Protocol No. 11 to the Convention, the Panel has examined more than 2,000 referral requests. It has therefore developed a series of guiding principles that have come to be accepted by it over the years.

Cases that will be sent to the Grand Chamber are likely to belong to the following categories: cases affecting case-law consistency; cases which may be suitable for development of the case-law; cases which are suitable for clarifying the principles set forth in the existing case-law; cases in which the Grand Chamber may be called upon to re-examine a development in the case-law endorsed by the Chamber; cases concerning "new" issues, i.e. issues which have not previously been examined by the Court, and/or which are socially and politically sensitive; cases raising a "serious issue of general importance" and, finally, "high-profile" cases raising complex legal issues and having serious implications for the State concerned.

The Panel has developed the practice of systematically rejecting referral requests which challenge decisions by the Chamber to declare a complaint inadmissible; awards made by the Chamber under Article 41 of the Convention; the Chamber's assessment of the facts and the application of well-established case-law.

Link to the Note available on the Court's website (www.echr.coe.int) under "The Court / Grand Chamber".

COURT'S RECENT PUBLICATIONS

1. Practical Guide on Admissibility Criteria

An update on the Practical Guide on Admissibility Criteria, a handbook intended mainly for lawyers who wish to bring a case before the Court, has been published online in English and French. It covers developments in the case-law between January 2010 and March 2011.

A translation of the original version of the Guide into Spanish has been provided by the Spanish Ministry of Justice. Translations into Bulgarian, German, Greek and Italian are already available.

2. Publications in non-official languages

A number of new translations of Court publications into non-official languages have been prepared. The following publications are now available on the Court's website (www.echr.coe.int):

Print versions of the Convention

The text of the European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, is available in booklet form in German and Turkish. Dutch, Italian, Russian and Spanish versions were printed in December and can be ordered on the Court's website (following the "Contact" link).

Convenzione europea dei Diritti dell'Uomo (ita)

Verdrag tot Bescherming van de Rechten van de Mens (nld)

Конвенция по правам человека (rus)

Convenio europeo de Derechos Humanos (spa)

The Court in 50 questions

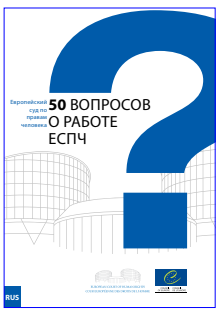
This booklet provides general information about the Court. It is now available in Czech, Italian, Russian and Turkish having previously been translated into Chinese, Estonian, German and Ukrainian. Print versions can be ordered on the Court's website (following the "Contact" link).

ESPL v 50 otázkách (cze)

La CEDU in 50 Domande e Risposte (ita)

50 вопросов о работе ЕСПЧ (rus)

50 Soruda AİHM (tur)



Handbook on European non-discrimination law

The Handbook has now been translated into seven further languages in addition to the existing translations in German and Italian. The translations into Bulgarian, Czech, Hungarian, Polish, Romanian and Spanish have been published as part of the joint project between the Court and the European Union Fundamental Rights Agency. A version in Catalan, produced on the initiative of the Municipality of Barcelona, has also recently been published.

Наръчник по европейско право в областта на дискриминацията (bul)

Manual de legislació europea contra la discriminació (cat)

Kézikönyv az európai megkülönböztetésmentességi jogról (hun)

Podręcznik europejskiego prawa o niedyskryminacji (pol)

Manual de drept european privind nediscriminarea (rum)

Manual de legislación europea contra la discriminación (spa)

Příručka evropského antidiskriminačního práva (cze)