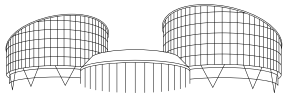

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law

No. 158 December 2012

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ARTICLE 2

Positive obligations
Life

Duty to adequately protect members of a witness protection scheme: *violation*

R.R. and Others v. Hungary - 19400/11
Judgment 4.12.2012 [Section II]

Facts – The first applicant was once active in drug-trafficking and, after being apprehended by the police in Hungary, entered into a plea bargain with the authorities. As he was required to testify in open court, he and the other applicants, his common-law wife and three children, were enrolled on the Witness Protection Scheme ("the Scheme").

The first applicant was subsequently imprisoned for his criminal activities. While in prison he was caught using unauthorised communications devices and the authorities concluded that he was still in touch with criminal circles. He and the other applicants were therefore removed from the Scheme, as he had breached its terms. The effect of the removal was that the applicants' original identities were reinstated. Security protection for the family was reduced to the provision of an emergency phone number and occasional visits by police officers.

Before the European Court, the parties disputed the level of threat facing the applicants at the time of removal from the Scheme.

Law – Article 2: As the only effect on the first applicant of the removal was that he was moved to a more secure prison facility and as there was no evidence that he ran any risk in that facility, his application was held to be manifestly ill-founded. The Court went on to consider the threat to the remaining applicants, the first applicant's family.

To establish a positive obligation under Article 2, it should be demonstrated, first, that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and, second, that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

Regarding the first limb, the Court accepted that the applicants' inclusion on the Scheme and the first applicant's collaboration with the authorities meant that the applicants' lives had been at risk when the measure was originally put in place. As the cancellation of the Scheme was not motivated by a reduction in that risk, but by a breach of the Scheme's terms, the Court was not persuaded that the authorities had proven that the risk had ceased to exist.

Regarding the second limb, it was not unreasonable to suppose that, following the withdrawal of the family's cover identities, their identities and whereabouts had become accessible to anyone wishing to harm them. In these circumstances, the availability of an emergency phone number and occasional visits by police officers could not be considered adequate protection. Taking this into account, as well the general importance of witness protection reflected by the Court's case-law and the Committee of Ministers' Recommendation Rec(2005)9 on the protection of witnesses and collaborators of justice, the authorities had potentially exposed the family to life-threatening danger.

Conclusion: violation in respect of the second to fifth applicants (unanimously).

Article 46: Respondent State to secure adequate protection for the second to fifth applicants, including proper cover identities if necessary, until such time as the threat could be proven to have ceased.

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

ARTICLE 3

Torture
Inhuman treatment
Degrading treatment
Effective investigation
Extradition

Torture and inhuman and degrading treatment during and following applicant's extraordinary rendition to CIA: *violation*

El-Masri v. "the former Yugoslav Republic of Macedonia" - 39630/09
Judgment 13.12.2012 [GC]

Facts – The applicant, a German national, alleged that on 31 December 2003 he boarded a bus for Skopje. At the Macedonian border a suspicion arose as to the validity of his passport. He was questioned by the Macedonian authorities about possible ties with several Islamic organisations and groups. Later he was taken to a hotel room in Skopje where he was held for twenty-three days. During his detention, he was watched at all times and interrogated

repeatedly. His requests to contact the German embassy were refused. On one occasion, when he stated that he intended to leave, a gun was pointed at his head and he was threatened. On the thirteenth day of his confinement, the applicant commenced a hunger strike to protest against his continued detention. On 23 January 2004, handcuffed and blindfolded, he was put in a car and taken to Skopje Airport.

There he was placed in a room, beaten severely by several disguised men, stripped and sodomised with an object. After a suppository had been forcibly administered, he was placed in a nappy and dressed in a dark blue short-sleeved tracksuit. Then, shackled and hooded, and subjected to total sensory deprivation, he was forcibly marched to a CIA aircraft, which was surrounded by Macedonian security agents who formed a cordon around the plane. When on the plane, the applicant was thrown to the floor, chained down and forcibly tranquillised. While in that position, the applicant was flown to Kabul (Afghanistan) where he was held captive for five months.

On 29 May 2004 the applicant was returned to Germany via Albania. In October 2008 the applicant lodged a criminal complaint with the Skopje public prosecutor's office, but this was rejected as being unsubstantiated.

Law – The applicant's allegations were contested by the respondent Government on all accounts. However, after drawing inferences from the available material and the authorities' conduct and in the absence of any satisfactory and convincing explanation from the Government, the Court found them established beyond reasonable doubt.

Article 3

(a) *Procedural aspect*: By filing the criminal complaint, the applicant had brought to the public prosecutor's attention his allegations that State agents had subjected him to ill-treatment and had been actively involved in his subsequent rendition by CIA agents. His complaints had been supported by the evidence which had come to light in the course of the international and other foreign investigations. He had thus laid the basis of a prima facie case of misconduct on the part of the security forces of the respondent State, which had warranted an investigation. However, almost two and a half months later the public prosecutor had rejected the complaint for lack of evidence. Apart from seeking information from the Ministry of the Interior, she had not taken any steps to examine the applicant's allegations. Moreover, although the applicant's allegations regarding the timing and manner of his transfer to Afghanistan had been strikingly consistent with the actual course of the aircraft concerned, the investigators had remained passive and had not followed up that lead, considering instead that no other investigatory measures were necessary. In view of the considerable, at least circumstantial, evidence available when the applicant submitted his complaint, such a conclusion fell short of what could be expected from an independent authority.

Another aspect of the inadequate character of the investigation was its impact on the right to the truth regarding the relevant circumstances of the case. The case was of great importance not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened. The issue of "extraordinary rendition" had attracted worldwide attention and triggered inquiries by many international and intergovernmental organisations, including the UN human rights bodies, the Council of Europe and the European Parliament. The concept of "State secrets" had often been invoked to obstruct the search for the truth. State secret privilege had also been asserted by the US Government in the applicant's case before the US courts. Despite the undeniable complexity of the circumstances surrounding the present case, the respondent State should have endeavoured to undertake an adequate investigation in order to prevent any appearance of impunity in respect of certain acts. Therefore, the summary investigation that had been carried out in this case could not be regarded as effective.

Conclusion: violation (unanimously).

(b) *Substantive aspect*

(i) *Treatment in the hotel* – The applicant had undeniably lived in a permanent state of anxiety owing to his uncertainty about his fate during the interrogation sessions to which he had been subjected. Furthermore, such treatment had intentionally been meted out with the aim of extracting a confession or information about his alleged ties with terrorist organisations. The applicant's suffering had also been increased by the secret nature of the operation and the fact that he had been kept incommunicado for twenty-three days in a hotel, an extraordinary place of detention outside any judicial framework. Therefore, the treatment to which the applicant had been subjected while in the hotel had amounted on various counts to inhuman and degrading treatment.

Conclusion: violation (unanimously).

(ii) *Treatment at the airport* – The same pattern of conduct applied in similar circumstances had already been found to be in breach of Article 7 of the UN International Covenant on Civil and Political Rights. Although the applicant had been in the hands of the special CIA rendition team, the acts concerned had been carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State had to be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities. The applicant had not posed any threat to his captors. Thus, the physical force used against him at the airport had been excessive and unjustified in the circumstances. The measures had been used in combination and with premeditation, with the aim of causing severe pain or suffering in order to obtain information, inflict punishment or intimidate the applicant. Such treatment amounted to torture. It followed that the respondent State must be considered directly responsible for the violation of the applicant's rights under this head since its agents had actively facilitated the treatment and failed to take any necessary steps to prevent it from occurring.

Conclusion: violation (unanimously).

(iii) *Removal of the applicant* – There was no evidence that the applicant's transfer into the custody of CIA agents had been pursuant to a legitimate request for his extradition or any other legal procedure recognised in international law for the transfer of a prisoner to foreign authorities. Nor had any arrest warrant been shown to have existed at the time authorising the applicant's delivery into the hands of US agents. Further, the evidence suggested that the Macedonian authorities had had knowledge of the destination to which the applicant would be flown from Skopje Airport. They were also aware or ought to have been aware that there was a real risk that the applicant would be subjected to treatment contrary to Article 3, as various reports had been published at the time concerning practices resorted to or tolerated by the US authorities that were manifestly contrary to the principles of the Convention. Lastly, the respondent State had not sought any assurances from the US authorities to avert the risk of the applicant being ill-treated. Accordingly, having regard to the manner in which the applicant had been transferred into the custody of the US authorities, the Court considered that he had been subjected to "extraordinary rendition", that is, an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment.

Conclusion: violation (unanimously).

Article 5

(a) *Substantive aspect*

(i) *Detention in Skopje* – The applicant's confinement in the hotel had not been authorised by a court or substantiated by any custody record. The applicant had not had access to a lawyer, or been allowed to contact his family or a representative of the German Embassy and he had been deprived of any possibility of being brought before a court to test the lawfulness of his detention. It was wholly unacceptable that in a State subject to the rule of law a person could be deprived of his or her liberty in an extraordinary place of detention outside any judicial framework. The applicant's unacknowledged and incommunicado detention in such a highly unusual location as a hotel had added to the arbitrariness of the deprivation of liberty. This constituted a particularly grave violation of his right to liberty and security.

(ii) *Subsequent detention* – In the present case, the applicant had been subjected to "extraordinary rendition", which entailed detention outside the normal legal system and which, by its deliberate circumvention of due process, was anathema to the rule of law and the values protected by the Convention. Furthermore, the detention of terrorist suspects within the "rendition" programme run by the US authorities had already been found to have been arbitrary in other similar cases. In such circumstances, it should have been clear to the Macedonian authorities that, having been handed over into the custody of the US authorities, the applicant had faced a real risk of a flagrant violation of his rights under Article 5. The Macedonian authorities had not only failed to comply with their positive obligation to protect the applicant from being detained in contravention of that provision, they had also actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they had been aware or ought to have been aware of the risk of that transfer.

Having regard to the above, the applicant's abduction and detention had amounted to "enforced disappearance" as defined in international law. The respondent Government was to be held responsible for violating the applicant's rights under Article 5 of the Convention during the entire period of his captivity.

Conclusion: violation (unanimously).

(b) *Procedural aspect*: The Court had already found under Article 3 that the respondent State had not conducted an effective investigation into the applicant's allegations of ill-treatment. For the same reasons, it found that no meaningful investigation had been conducted into the applicant's credible allegations that he had been detained arbitrarily.

Conclusion: violation (unanimously).

The Court also found violations of Articles 8 and 13 of the Convention.

Article 41: EUR 60,000 in respect of non-pecuniary damage.

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Detention during and following operation involving extraordinary rendition to CIA: *violation*

El-Masri v. "the former Yugoslav Republic of Macedonia" - 39630/09
Judgment 13.12.2012 [GC]

(See Article 3 above, page 5)

ARTICLE 8

Respect for private life
Respect for correspondence

Obligation on lawyers to report suspected money laundering by clients unless suspicions based on information obtained when acting for client in court proceedings: *no violation*

Michaud v. France - 12323/11
Judgment 6.12.2012 [Section V]

Facts – In July 2007 the National Bar Council decided to adopt a professional regulation intended, *inter alia*, to secure the implementation of obligations imposed on the legal profession in the context of the fight against money laundering, pursuant to European Directive 2005/60/EC. In consequence, lawyers were obliged in certain circumstances to report to the national financial intelligence unit (Tracfin) sums of money belonging to their clients where they suspected that these had been obtained through a criminal activity such as money laundering. In October 2007 the applicant, a lawyer, applied to the *Conseil d'Etat* to have the Bar Council's decision set aside. On 23 July 2010 his application was dismissed.

Law – Article 8: The obligation placed on lawyers to report suspicions constituted an interference with their right to respect for their correspondence, in that they were required to transmit to an administrative authority information concerning another person obtained through exchanges with him or her. It also amounted to an interference with their right to respect for their private life, which covered activities of a professional or business nature. Admittedly, the applicant had not had reason to report such suspicions, nor had he been sanctioned pursuant to the impugned regulations for having omitted to do so. However, either he complied with the regulations if the circumstances in question arose, or, should he fail to do so, he would be exposed to disciplinary sanctions, including disbarment. Thus, the obligation to report suspicions represented a "continuing interference" with the applicant's exercise, in his capacity as a lawyer, of the rights safeguarded by Article 8 in respect of professional exchanges with his clients.

The obligation placed on lawyers to report suspicions was in accordance with the law as set out in the Monetary and Financial Code. The law was accessible and clear in its description of the activities to which it was applicable. The impugned interference was intended to combat money laundering and related criminal offences, thus pursuing the legitimate aim of the prevention of disorder and the prevention of crime.

The obligations of vigilance and reporting of suspicions resulted from the transposition of European directives into the Monetary and Financial Code that France had been required to carry out on account of the legal obligations arising from its membership of the European Union. Referring to the judgment in *Bosphorus Airways*, the Government considered that France should be presumed to have complied with the requirements of the Convention, given that it had merely discharged those obligations and that it had been established that the European Union afforded fundamental rights equivalent protection to that guaranteed by the Convention. However, the present case differed from the *Bosphorus Airways* case in two main ways. It concerned France's implementation of directives which bound the member States with regard to the result

to be attained, but left them free to choose the method and form. The issue of whether, in complying with the obligations resulting from its membership of the European Union, France had in consequence sufficient discretion to thwart application of the presumption of equivalent protection was not therefore irrelevant. Further and most importantly, the *Conseil d'Etat*, in deciding not to request a preliminary ruling from the European Court of Justice although that court had not yet examined the question concerning Convention rights that was before it, had ruled before the relevant international machinery for supervision of fundamental rights, in principle equivalent to that of the Convention, had been able to demonstrate its full potential. Having regard to that decision and the importance of what was at stake, the presumption of equivalent protection was not applicable. The Court was therefore required to determine whether the interference had been necessary within the meaning of Article 8 of the Convention.

The Court concurred with the *Conseil d'Etat*'s analysis in its judgment of 23 July 2010, which, after noting that Article 8 protected the fundamental right of professional privilege, held that subjecting lawyers to an obligation to report suspicions did not constitute an excessive interference in view of the public interest attached to the fight against money laundering and the guarantee represented by the exclusion from its scope of information received or obtained by lawyers when acting for clients in court proceedings, and information received or obtained in the context of providing legal advice (except where the legal adviser played, through his or her acts, an active role in the money laundering). Legal professional privilege was not inviolable. It had to be weighed against steps to combat the laundering of proceeds of unlawful activities, themselves likely to be used in financing criminal activities. The European directives followed that logic. Even if any lawyer implicated in a money-laundering operation were to be liable to criminal proceedings, this could not invalidate the decision to provide for punitive sanctions in a measure that had a specifically preventive aim. Finally, two elements were decisive in assessing the proportionality of the impugned interference. The first was related to the fact that lawyers were subject to the obligation to report suspicions only in two cases: firstly, where, in the context of their professional duties, they took part for and on behalf of their clients in financial or property transactions or acted as trustees; and, secondly, where, still in the context of their professional duties, they assisted their clients in preparing or carrying out transactions concerning certain defined operations.[1] Thus, the obligation to report suspicions concerned only activities which were remote from the role of defence entrusted to lawyers and which resembled those carried out by the other professionals who were also subject to the above obligation. The second element was the fact that the legislation had introduced a filter which protected professional privilege: lawyers did not transmit reports directly to Tracfin but, as appropriate, to the president of the Bar of the *Conseil d'Etat* and the Court of Cassation or to the president of the Bar of which they were members. Thus, the information was shared with a professional who was not only subject to the same rules of conduct but was also elected by his or her peers to ensure compliance with them, thus ensuring that professional privilege was not breached. The president of the relevant Bar transmitted the disclosure of suspicions to Tracfin only after ascertaining that the conditions laid down by the Monetary and Financial Code had been met.

Thus, as implemented and having regard to the legitimate aim pursued and the latter's particular importance in a democratic society, the obligation to report suspicions did not constitute a disproportionate interference with legal professional privilege.

Conclusion: no violation (unanimously).

(See *Bosphorus Hava Yolları Turizm Anonim Şirketi v. Ireland* [GC], no. 45036/98, 30 June 2005, Information Note no. 76)

ARTICLE 10

Freedom of expression

Interim court order incidentally blocking access to host and third-party websites in addition to website concerned by proceedings: *violation*

Ahmet Yıldırım v. Turkey - 3111/10
Judgment 18.12.2012 [Section II]

Facts – The applicant owns and runs a website on which he publishes material including his academic

1. These operations were: (1) buying and selling of real property or business entities; (2) managing of client money, securities or other assets; (3) opening of bank, savings or securities accounts; (4) organisation of contributions necessary for the creation of companies; (5) creation, operation or management of companies; (6) creation, operation or management of foreign-law trusts or similar structures.

work. It was set up using the Google Sites website creation and hosting service. On 23 June 2009 the Criminal Court of First Instance ordered the blocking of another Internet site under the Law on regulating publications on the Internet and combating Internet offences. The order was issued as a preventive measure in the context of criminal proceedings. Later that day, under the same Law, a copy of the blocking order was sent to the Telecommunications Directorate for execution. On 24 June 2009, further to a request by the Telecommunications Directorate, the Criminal Court of First Instance varied its decision and ordered the blocking of all access to Google Sites. As a result, the applicant was unable to access his own site. On 1 July 2009 he applied to have the blocking order set aside in respect of his own site, which had no connection with the site that had been blocked because of its illegal content. On 13 July 2009 the Criminal Court dismissed the applicant's application. In April 2012 he was still unable to access his own website even though, as far as he understood, the criminal proceedings against the owner of the offending site had been discontinued in March 2011.

Law – Article 10: Following the blocking of another website as a preventive measure, the court had subsequently, further to a request by the Telecommunications Directorate, ordered the blocking of all access to Google Sites, which also hosted the applicant's site. This had entailed a restriction amounting to interference with the applicant's right to freedom of expression.

The blocking of the offending site had a basis in law but it was clear that neither the applicant's site nor Google Sites fell within the scope of the relevant law since there was insufficient reason to suspect that their content might be illegal. No judicial proceedings had been brought against either of them. Furthermore, although Google Sites was held responsible for the content of a site it hosted, the law made no provision for the wholesale blocking of access to the service. Nor was there any indication that Google Sites had been informed that it was hosting illegal content or that it had refused to comply with an interim measure concerning a site that was the subject of pending criminal proceedings. Furthermore, the law had conferred extensive powers on an administrative body, the Telecommunications Directorate, in implementing a blocking order since it had been able to request an extension of the scope of the order even though no proceedings had been brought in respect of the site or domain concerned and no real need for wholesale blocking had been established. Such prior restraints were not, in principle, incompatible with the Convention, but they had to be part of a legal framework ensuring both tight control over the scope of bans and effective judicial review to prevent possible abuses. However, in ordering the blocking of all access to Google Sites, the Criminal Court of First Instance had simply referred to the Telecommunications Directorate's opinion that this was the only possible way of blocking the offending site, without ascertaining whether a less severe measure could be taken. In addition, one of the applicant's main arguments in his application of 1 July 2009 to set the blocking order aside was that to prevent other sites from being affected by the measure in question, a method should have been chosen whereby only the offending site became inaccessible. However, there was no indication that the judges considering his application had sought to weigh up the various interests at stake. This shortcoming was merely a consequence of the wording of the law itself, which did not lay down any obligation for the domestic courts to examine whether the wholesale blocking of Google Sites was necessary, having regard to the criteria established and applied by the Court under Article 10 of the Convention. Such wholesale blocking had rendered large amounts of information inaccessible, thus substantially restricting the rights of Internet users and having a significant collateral effect. The interference had therefore not been foreseeable and had not afforded the applicant the degree of protection to which he was entitled by the rule of law in a democratic society. The measure in issue had had arbitrary effects and could not be said to have been designed solely to block access to the offending site. Furthermore, the judicial-review procedures concerning the blocking of Internet sites were insufficient to meet the criteria for avoiding abuses; domestic law did not provide for any safeguards to ensure that a blocking order concerning a specified site was not used as a means of blocking access in general.

Conclusion: violation (unanimously).

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

ARTICLE 13

Effective remedy

Enforcement of deportation order within fifty minutes after court application for stay of execution was lodged: *violation*

De Souza Ribeiro v. France - 22689/07
Judgment 13.12.2012 [GC]

Facts – The applicant, a Brazilian national, lived in French Guiana with his family from 1988, when he was seven years old, until January 2007. On 25 January 2007 he was stopped at a road check. Unable to show proof that his presence on French soil was legal, he was arrested and served with administrative orders for his removal and detention pending removal. At 3.11 p.m. the next day he applied to an administrative court for judicial review of the removal order. He made an urgent request for a stay of execution suspension of the removal order and expressed serious doubts as to its validity. At 4 p.m., barely fifty minutes after lodging his application with the administrative court, the applicant was removed to Brazil. That evening the administrative court declared his application for judicial review devoid of purpose as he had already been deported. In February 2007 the applicant lodged an urgent application for protection of a fundamental freedom (*requête en référé liberté*) with the administrative court, which was dismissed. In August 2007 he returned to French Guiana illegally. On 18 October 2007 the administrative court examined the applicant's application of 25 January 2007 for judicial review of the initial removal order, which it declared illegal and set aside. In June 2009 the applicant was issued with a "visitor's" residence permit, which was renewed until June 2012. He now has a renewable residence permit for "private and family life".

In a judgment of 30 June 2011, a Chamber of the Court unanimously declared the complaint under Article 8 inadmissible for lack of victim status on the grounds that the administrative court had acknowledged the unlawfulness of the measure on the basis of which the applicant had been deported to Brazil and the applicant had subsequently been able to return to France and obtain a renewable residence permit. As to the complaint that the appeal against the deportation order did not have suspensive effect, the Court held by four votes to three that, having regard to the States' margin of appreciation in this sphere, there had been no violation of Article 13 taken in conjunction with Article 8 as the consequences of interference with the rights secured under Article 8 were in principle reversible, as the applicant's case showed, since the family ties had not been severed for any length of time as he had been able to return to France a short time after his deportation.

Law – Article 13 in conjunction with Article 8 : The Court noted, firstly, that the applicant had made use of the remedies available to him under the system in force in French Guiana prior to his removal. However, the prefect had effected only a cursory examination of his situation. The applicant had been removed from the territory less than thirty-six hours after his arrest pursuant to a administrative removal order that was succinct and stereotyped and was served on the applicant immediately after his arrest.

Furthermore, regardless of the reason for the applicant's illegal situation at the time of his arrest, he was protected under French law against any form of expulsion. That was the conclusion reached by the administrative court, which had proceeded to declare the removal order illegal. Thus, by 26 January 2007 the French authorities were in possession of evidence that the applicant's removal was not in accordance with the law and might therefore constitute an unlawful interference with his rights. Accordingly, at the time of his removal to Brazil a serious question arose as to the compatibility of his removal with Article 8 of the Convention and he therefore had an "arguable" complaint in that regard for the purposes of Article 13.

The applicant had been able to apply to the administrative court. That court fulfilled the requirements of independence, impartiality and competence to examine the applicant's complaints, which complaints contained clearly explained legal reasoning. However, the brevity of the period between the applicant's application to the administrative court and his removal had excluded any possibility that the court had seriously examined the circumstances and legal arguments for and against finding a violation of Article 8 in the event of the removal order being enforced. It followed that no judicial examination had been made of the merits or of the applicant's urgent application for interim measures. While the urgent proceedings could in theory have enabled the administrative court to examine the applicant's arguments and, if necessary, to stay execution of the removal order, any possibility of that actually happening had been extinguished because of the excessively short time between his application to the court and his removal. In fact, the urgent-applications judge had been powerless to do anything but declare the application devoid of purpose. The applicant had thus been deported solely on the basis of the prefect's order. Consequently, the haste with which the removal order was executed had had the effect of rendering the available remedies ineffective in practice and therefore inaccessible and the applicant had had no chance of having the lawfulness of the removal order examined sufficiently thoroughly by a national authority offering the requisite procedural guarantees.

Neither French Guiana's geographical location and the strong pressure of immigration there, nor the danger of overloading the courts and adversely affecting the proper administration of justice, justified the exception to the ordinary legislation or the manner in which it was applied. The discretion the States were afforded regarding the manner in which they conformed to their obligations under Article 13 could not be exercised in a way that deprived applicants of the minimum procedural safeguards against arbitrary expulsion.

In the light of all the foregoing, the applicant had not had access in practice to effective remedies in respect of his complaint under Article 8 of the Convention when he was about to be deported. That situation had not been remedied by the eventual issue of a residence permit. The Court therefore dismissed the Government's preliminary objection concerning the applicant's loss of "victim" status within the meaning of Article 34 of the Convention, and found a violation of Article 13 in conjunction with Article 8.

Conclusion: violation (unanimously).

Article 41: EUR 3,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

ARTICLE 14

Discrimination (Article 2 of Protocol No. 1)

Failure to provide schooling for and subsequent placement in special classes of 98 Roma children: *violation*

Sampani and Others v. Greece - 59608/09
Judgment 11.12.2012 [Section I]

Facts – The applicants were ninety-eight children aged between five and a half and fifteen who were of school age between 2008 and 2010, and some of their parents or guardians. In January 2008, following the *Sampanis and Others v. Greece* judgment in which the Court found a violation of Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1, the 12th school was opened on the premises of the 10th school, where preparatory classes had previously been given for Roma children only. The new school was designed to admit Roma and non-Roma children alike. However, only Roma children attended the school. During the year it opened, the prefect decided that because of damage to the buildings, the school should temporarily use the prefabricated building adjacent to the 10th school, which had formerly housed the support classes criticised in the *Sampanis and Others* judgment. In addition, the head teacher of the 12th school and the Ombudsman alerted the authorities on a number of occasions to the problems the school was facing, particularly as regards the school bus route, the building of a playground, the installation of heating and additional toilets, the building of two additional classrooms, the setting up of a kindergarten, textbooks that were inappropriate for Roma whose mother tongue was not Greek and the fact that some pupils had dropped out of lessons from April 2009 onwards. Before the Court, the applicants complained that they had suffered discrimination on account of the conditions in which they were taught.

Law – Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1: There had been no significant changes in the situation that had given rise to the *Sampanis and Others* judgment, other than the intention expressed by the Ministry of Education to integrate Roma pupils into the ordinary education system as illustrated by the opening of the 12th school, which, for various reasons relating to the policy pursued by the municipal authorities and the prefect, had been unable to operate as planned; as a result, the Roma community continued to suffer a difference in treatment. There was therefore *prima facie* evidence of a practice of discrimination.

The 12th school had been attended exclusively by Roma pupils between 2008 and 2010. There were also a number of factors suggesting that during the 2008/09 school year, the material conditions in which the pupils had been taught had made it impossible, or at least very difficult, to pursue their education. The use of the annexe to the 10th school as a classroom for the children concerned – originally intended as a temporary measure owing to lack of space – had continued throughout the period from 2009 to 2010. A further aspect was the attitude of the municipal authorities and the prefect's office, which, fearing renewed incidents on the part of local residents who were hostile towards Roma, had failed to respond to calls by the head teacher and the Ombudsman to integrate Roma pupils into ordinary schools and to provide them with lessons appropriate to their level of education and linguistic ability. It was therefore apparent that the measures taken to educate Roma children had not been accompanied by sufficient guarantees to ensure that the State, while exercising its margin of appreciation in the education sphere, paid due regard to the particular needs of such children as

members of a disadvantaged group. Furthermore, the Court was compelled to note that the Government had not given any convincing explanation of why there had been no non-Roma pupils at the 12th school, apart from making a vague reference to their being "enrolled elsewhere". Accordingly, the conditions in which the 12th school had operated between 2008 and 2010 had ultimately resulted in further discrimination against the applicants.

Conclusion: violation (unanimously).

Article 46: Certain specific measures – which had been recommended not only by the applicants but also by the Government in their observations in reply – were likely to put an end to the violation found by the Court. For example, those of the applicants who were still of school age could be enrolled at another State school by the West Attica Primary Education Department and those who had reached the age of majority could enrol at "second chance schools" or adult education institutes set up by the Ministry of Education under the Lifelong Learning Programme.

Article 41: EUR 1,000 to each of the applicant families in respect of non-pecuniary damage.

(See *Sampanis and Others v. Greece*, no. 32526/05, 5 June 2008, Information Note no. 109)

ARTICLE 34

Victim

Loss of victim status following settlement in widely publicised proceedings: *inadmissible*

Chagos Islanders v. the United Kingdom - 35622/04
Decision 11.12.2012 [Section IV]

Facts – The applicants, several thousand former inhabitants, or descendants of such, of the Chagos Islands, in what is now known as British Indian Ocean Territory (BIOT), were effectively expelled from or barred from returning to their homes between 1967 and 1973 by the United Kingdom Government to facilitate the construction of a military base on Diego Garcia operated by the USA. Some islanders were prevented from returning after visits elsewhere while others were transferred to Mauritius and the Seychelles. No force was used but the islanders were told that the company which owned the coconut plantations where they worked was closing down and that, unless they accepted transportation elsewhere, they would be left without supplies. The islanders suffered miserable conditions on being uprooted, having lost their homes and livelihoods.

Three immigration ordinances were enacted, prohibiting the islanders' return. The first in April 1971 made it unlawful, and a criminal offence, for anyone to enter or remain in the BIOT islands without a permit. The second in 2000 mainly repeated the provisions of the 1971 ordinance but contained a new section lifting the bar – except entry to Diego Garcia which remained subject to permit – as concerned British Dependent Territories Citizens (that is, the Chagos islanders) by virtue of their connection with BIOT. This ordinance was then repealed in 2004, and anyone without a permit from the immigration officer was prohibited from entering the territory. During the four years when the bar was lifted, a few of the islanders made visits to the outer islands to tend family graves and or see former homes, but none actually went to live there.

A number of proceedings were brought by the islanders concerning the expulsion and the damage that this inflicted on their lives. The first set were brought in 1975 (the *Ventacassen* case) which were settled in 1982 on payment of 4,000,000 pounds sterling (GBP) by the United Kingdom and provision of land worth GBP 1,000,000. In settling, the islanders agreed to give up their claims. In the later *Chagos Islanders* case (involving 4,466 claimants), the High Court struck out the action in October 2003, finding that an attempt to claim further compensation and make further claims arising out of the expulsion and exclusion from the islands was an abuse since the claims had been renounced by the islanders. The most recent proceedings (*Bancoult 2* case) involved an unsuccessful challenge by the applicants by way of judicial review of legislative measures imposing immigration control on the islands which barred entry without leave. In rejecting that claim, the House of Lords held that in the context of the present day, rather than 1968, any right of abode on the outer islands was purely symbolic, none of the islanders having gone to live on the islands in the four-year period when this had been permitted under the ordinance then in force.

Law – Article 34 (*victim status*): The Court reiterated that where applicants accept a sum of compensation in settlement of civil claims and renounce further use of local remedies, they will generally no longer be able to claim to be a victim in respect of those matters. Having accepted and received compensation in the *Ventacassen* litigation and thus having effectively renounced bringing any further claims, the applicants could no longer claim to

be victims of a violation of the Convention. The islanders could have pursued their claims and obtained the domestic courts' findings as to whether the expulsion and exclusion from their homes had been unlawful and breached their rights. They chose, however, to settle their claims without obtaining such a determination. It was not for the Court, in that event, to undertake the role of a first-instance tribunal of fact and law.

The argument that not all the applicants had signed the waiver forms in the settlement or had not realised that the settlement was final was rejected. In the *Chagos Islanders* case the High Court judge had rejected those arguments after having heard extensive evidence and, in any case, the islanders had been represented by lawyers in the litigation which settled. Furthermore, any other islanders – not part of the 471 islanders involved in the settlement – had to have been aware of the proceedings, which were widely known, and could have made claims and thus taken advantage of the settlement offer put forward or, if they preferred, pursued their claims in the domestic court proceedings. Those applicants who were not party to the proceedings but who could at the relevant time have brought their claims before the domestic courts had failed to exhaust domestic remedies.

As to the applicants who were not born at the time of the settlement, they had never had a home on the islands and could therefore have no claim to victim status arising out of the expulsions and their immediate aftermath.

As regards the prohibition on the applicants' return to the islands imposed by the 2004 ordinance, the House of Lords had held that in the context of the present day, rather than 1968, any right of abode on the outer islands was purely symbolic, none of the islanders having gone to live there in the four year period when this had been permitted under the previous ordinance. While it remained open to the applicants to apply for permits for transient visits, there was no prospect of their being able to live on the islands in the foreseeable future without funding which the Government were not willing to provide and which was not likely to be forthcoming from any other source. In these circumstances, the 2004 ordinance could not be said to have amounted to an interference with the applicants' right to respect for their homes.

Recent events did not disclose any developments relevant to the applicants' victim status. The heart of the applicants' claims under the Convention was the callous and shameful treatment which they or their antecedents had suffered during their original removal from the islands from 1967 to 1973. Those claims had been raised in the domestic courts and settled definitively. The applicants' attempts to pursue matters further in more recent years had to be regarded as part of an overall campaign to bring pressure to bear on Government policy rather than disclosing any new situation giving rise to fresh claims under the Convention.

Conclusion: inadmissible (absence of victim status).

Article 35 § 3 (*compatibility* ratione loci): The United Kingdom had at no time made a declaration extending the right of individual petition to BIOT. The fact that many of the applicants now lived within the United Kingdom did not bring their complaints within the Court's competence either and, as an overseas Crown territory, BIOT could not be regarded as part of metropolitan United Kingdom. Nor did the fact that the ultimate decision-making authority lay with politicians or officials within the United Kingdom constitute a sufficient ground on which to base competence under the Convention for an area otherwise outside the Convention space.[1] In so far as the applicants complained of the decisions of the United Kingdom domestic courts under Article 6, the Court's examination would be limited to the procedural rights guaranteed under that provision.

As to the applicants' contention that the United Kingdom had jurisdiction over BIOT under Article 1 of the Convention under the doctrine of extraterritorial responsibility, the Court could not agree that any possible basis of jurisdiction under Article 1 as set out in the *Al-Skeini* judgment had to take precedence over Article 56 of the Convention on the grounds that that provision should be set aside as an objectionable colonial relic and to prevent a vacuum in protection offered by the Convention: the meaning of Article 56 was plain on its face and could not be ignored merely because of a perceived need to right an injustice. It remained in force and could not be abrogated at will by the Court in order to reach a purportedly desirable result. As to whether, in the light of *Al-Skeini*, jurisdiction could be founded on "State agent authority and control" or "effective control" even where a Contracting State had not made a declaration extending application of the Convention to the overseas territory in issue, the Court noted that such an interpretation would render Article 56

1. See *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, 12 December 2001; and *Quark Fishing Ltd v. the United Kingdom* (dec.), no. 15305/06, 19 September 2006, Information Note no. 89.

largely purposeless and devoid of content. However, it was unnecessary to decide that point in view of the Court's finding that the applicants did not, in any event, have victim status (see above).

Conclusion: unnecessary to decide.

Article 6 (*access to court and fair trial issues*): The Court perceived no appearance of the applicants' having been deprived of the benefit of a final, enforceable decision and no indication of arbitrariness or unfairness in the proceedings before the national courts which could be construed as a denial of access to court.

Conclusion: inadmissible (manifestly ill-founded).

(See *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 7 July 2011, Information Note no. 143)

ARTICLE 46

Execution of a judgment – General measures

Respondent State required to take measures to resolve systemic problems with criminal investigations into missing persons

Aslakhanova and Others v. Russia - 2944/06 et al. Judgment 18.12.2012 [Section I]

Facts – The cases concerned five joined applications lodged by families who complained about the disappearance of their eight male relatives in Grozny or the Grozny District between March 2002 and July 2004. The facts of the cases were similar in both the style of the abductions, which were conducted in a manner resembling a security operation, and the resulting criminal investigations, which remained pending without having produced any tangible results. The parties disputed the level of State involvement in the disappearances as well as whether the abducted men could be presumed dead.

Law – Following an analysis of the disputed facts, the Court found it established that the applicants' family members must be presumed dead following their unacknowledged detention by State agents. Accordingly, a substantive violation of Article 2 was found. The Court also found a procedural violation of Article 2 on account of the failure to carry out effective investigations into the disappearances. In doing so, it noted that the criminal investigations in these cases had suffered similar defects to those in other cases concerning disappearances in Chechnya and Ingushetia. The Court also found a violation of Article 3 on account of the distress and anguish suffered by the families of the abducted men and a "particularly grave" violation of Article 5 as the applicants' relatives had been held in detention by State agents without legal grounds or acknowledgement. Lastly, the Court held that there had been a violation of Article 13 as, while the Russian Code of Criminal Procedure provided for the possibility of judicial review of investigators' decisions, the Court was not satisfied that this provided an adequate remedy where, as in this case, the investigations were repeatedly adjourned and reopened.

Article 46: Violations of the same rights had regularly been found in similar cases against the Russian Federation, the majority of which concerned disappearances in Chechnya and Ingushetia between 1996 and 2006. More than 120 judgments had been adopted by September 2012 with more applications communicated or pending.

The Court stressed that Article 2 rights would be rendered illusory if an applicant's victim status were to be remedied by damages alone. There is a clear obligation to conduct effective investigations capable of leading to the identification and punishment of those responsible. In cases of missing persons, there arises an additional obligation of investigating in order to locate the missing person or find out what happened to him or her. Article 3 also requires that the State should be compassionate and respectful to relatives of deceased or missing persons and that it should assist in obtaining information and uncovering facts.

With regard to the number of applications before the Court concerning similar issues, the Court found that the Russian Federation had systemic problems with investigating disappearances. This was attested in particular by reports of the Council of Europe Committee of Ministers which showed that the problems remained largely unresolved. The Court was therefore compelled to provide some guidance on certain measures that had to be taken, as a matter of urgency, to address these systemic failures. These measures fall into two principal groups:

(a) *Situation of the victims' families* – This was the more pressing group of measures as ineffective criminal investigations resulted in a sense of acute helplessness and confusion on the part of the victims' families. A key proposal of the Court was for the State to establish a single, sufficiently high-level body responsible for solving disappearances in the region, which would enjoy unrestricted access to

all relevant information, would work on the basis of partnership with the families, and could compile a unified database of disappearances.

In addition, the Court stated that greater resources should be allocated to the forensic and scientific work necessary for the investigations.

The Court welcomed the State's developments towards better compensating victims' families. It noted that substantial compensation, coupled with a clear and unequivocal admission of State responsibility for the relatives' frustrating and painful situation, could resolve Article 3 issues.

(b) *Effectiveness of the investigation* – Even where Article 3 concerns were resolved, there was a continuing obligation to investigate the situations of known or presumed deaths of individuals, where there was at least prima facie evidence of State involvement. The Court reaffirmed its position in *Varnava and Others* where it was noted that, *inter alia*: insufficient evidence resulting from delay in investigating could not absolve the State from making the requisite investigative efforts; a preference for a "politically-sensitive" approach to avoid drawing attention to the circumstances of the disappearances could have no bearing on the application of the Convention; and investigations should be prompt, independent, under public scrutiny, and capable of leading to a determination of whether the death was caused unlawfully and, if so, to the identification and punishment of those responsible.

While the Court recognised the problem of illegal militant groups facing the Russian Federation, it also considered it possible to ensure accountability of the anti-terrorist and security services without compromising the legitimate need to combat terrorism. In view of the similar patterns surrounding the cases, it was held to be vital to form a general strategy to help elucidate a number of questions common to the cases as well as to review the adequacy of current existing legal definitions of relevant criminal acts.

Additionally, the Court judged that there should be stronger cooperative efforts between investigating authorities and the military and security agencies. This would demand that the investigators be given the power to identify the agencies responsible for capturing insurgents and to retrieve important records including details of personnel involved in operations concerning the subject matter of the investigation and of the passage of service vehicles through security roadblocks. More generally, investigators should be given unhindered access to the relevant data of the military and security agencies and it was necessary to ensure that the investigation and its supervision was not entrusted to persons or structures potentially implicated in the events at issue.

It was stressed that relatives should have better access to case files, particularly where the cases had been suspended. It was also found that invoking the statute of limitations as a bar to investigation would be contrary to the State's Article 2 obligations.

Considering the serious and continuous nature of the alleged violations, the Court declined to adjourn similar cases.

Article 41: Sums ranging between EUR 14,000 and EUR 16,000 in respect of pecuniary damage. Sums ranging between EUR 60,000 and EUR 120,000 in respect of non-pecuniary damage.

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

Execution of a judgment – Individual measures

Respondent State required to adequately protect members of a witness protection scheme

R.R. and Others v. Hungary - 19400/11
Judgment 4.12.2012 [Section II]

(See Article 2 above, page 5)

Respondent State invited to enrol applicant pupils in a different State school

Sampani and Others v. Greece - 59608/09
Judgment 11.12.2012 [Section I]

(See Article 14 above, page 12)