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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Inhuman treatment
Degrading treatment

Lack of antiretroviral therapy for prisoner whose HIV infection had not reached the threshold for such treatment under WHO guidelines: *inadmissible*

Fedosejevs v. Latvia - 37546/06
Decision 19.11.2013 [Section IV]

Facts – The applicant, who is suffering from HIV and Hepatitis C infections, had been in pre-trial detention and prison since 2005. On his admission into prison he underwent immunological testing, which established that his CD4 cell count was above 500 cells per mm^3. It was therefore decided that he did not require antiretroviral treatment in line with the 2006 Guidelines of the World Health Organisation. The tests were repeated every two to six months thereafter and the applicant's CD4 cell count never went below 200 cells per mm^3, which was the relevant threshold for starting therapy under the WHO Guidelines. Meanwhile, he received hepatoprotectives for his Hepatitis C infection on six occasions and vitamin courses on seven occasions.

Law – Article 3: The applicant had complained that he did not receive adequate treatment in prison, in particular for his HIV infection. Instead of ruling on matters lying exclusively within the field of expertise of medical specialists, the Court was called upon to determine whether the domestic authorities had provided the applicant with medical supervision capable of effectively assessing his condition and setting up an adequate course of treatment for his diseases. Given the nature and seriousness of the applicant's ailments, his condition required regular and specialised medical supervision for the monitoring of the progression rate of his diseases, timely prescription of the requisite HIV and hepatitis C therapies, and timely diagnosis and treatment of possible opportunistic infections. The applicant was subjected to a specific blood test – the CD4 cell count – which according to the 2006 WHO recommendations was the test required to identify whether patients with HIV clinical stage 1 or 2 disease needed to start antiretroviral treatment. This test was carried out every two to six months by doctors at a specialised centre for infectious diseases. On every occasion the doctors recorded that the applicant's HIV infection was at either clinical stage 1 or 2 and that the CD4 cell count had not yet dropped below the relevant threshold for commencement of antiretroviral treatment. In such circumstances, and in the absence of any medical evidence to the contrary, the Court could not but conclude that the national authorities had ensured proper medical supervision of the applicant's HIV infection. Lastly, the Court was satisfied that the applicant had also received adequate medical care for his Hepatitis C infection and other health problems.

Conclusion: inadmissible (manifestly ill-founded).

Expulsion

Risk of ill-treatment in Pakistan owing to applicant's conversion to Ahmadism: *deportation would constitute a violation*

N.K. v. France - 7974/11
Judgment 19.12.2013 [Section V]

Facts – The applicant, who was from a Sunni Muslim family in Pakistan, converted to the Ahmadiyya religion. In 2009 he arrived in France where his asylum application was rejected.

Law – Article 3: Concerning the general situation in Pakistan, the risk of inhuman or degrading treatment for members of the Ahmadi movement was well documented, both in the international reports consulted and in the country guidance of the UK Upper Tribunal. The authorities did not generally protect them and even frequently participated in their persecution, in particular on the basis of anti-blasphemy legislation. However, the Upper Tribunal's guidance specifically emphasised the risks incurred by the Ahmadis who preached their religion in public and engaged in proselytising, unlike those who practised their faith in private and were not bothered by the authorities. In the light of the latter, for the Article 3 protection to be engaged, the fact of belonging to the Ahmadi movement did not suffice. The applicant had to show that he openly practised this religion and that he was a proselytiser, or was at least perceived as such by the Pakistani authorities.

The applicant had presented a detailed account, supported by numerous documents. However, that material had been dismissed by the authorities with brief reasoning. Moreover, the Government had not adduced any evidence that manifestly cast doubt on the authenticity of the documents produced. Accordingly, there was no reason to doubt the applicant's credibility. He could not be expected to substantiate further the veracity of his account

or the authenticity of the evidence that he had adduced. As to the question whether he ran a risk of sustaining ill-treatment in the event of his return to Pakistan, the applicant had produced documents showing that he was perceived by the Pakistani authorities not as a mere follower of the Ahmadi movement but as a proselytiser and he therefore had a marked profile capable of drawing hostile attention on the part of the authorities should he return. Consequently, as the Government had failed to call seriously into question the reality of the applicant's fears and given his profile and the situation of Ahmadis in Pakistan, the applicant's return to his country of origin would expose him to a risk of ill-treatment in breach of Article 3 of the Convention.

Conclusion: removal would constitute a violation (unanimously).

Article 41: no claim made in respect of damage.

ARTICLE 5

Article 5 § 4

Review of lawfulness of detention

Failure to guarantee adequate review of lawfulness of detention: *violation*

Černák v. Slovakia - 36997/08
Judgment 17.12.2013 [Section III]

Facts – Between 2005 and 2007 the applicant was charged with seven counts of murder and conspiracy to murder, the offences having allegedly taken place in the Czech Republic. In December 2006 and March 2007 two European arrest warrants ("EAWs") were issued by a Slovak court in respect of the applicant. The Czech courts then consented to the applicant's trial taking place in Slovakia pursuant to the EAWs. On 2 February 2007 the applicant was remanded in custody following a *habeas corpus* hearing. At the hearing both he and the prosecution orally stated that they wished to appeal against the decision. On 12 February 2007 the regional court dismissed the defence's appeal without hearing the applicant or his counsel. The decision was taken prior to service of the detention order on the defence and, therefore, in the absence of the applicant's grounds for appeal. In the same decision, the regional court partially allowed the prosecution's appeal. On 10 July 2007, following a request by the prosecution to extend the applicant's detention by six months, the district court allowed the request without hearing representations from the applicant. On 18 July 2007 the applicant lodged written submissions containing an interlocutory appeal against the decision of 10 July 2007 and subsequently requested to be heard in person. On 25 July 2007 the regional court dismissed the interlocutory appeal. The applicant then lodged a complaint with the Constitutional Court alleging, *inter alia*, that his pre-trial detention under the order issued on 2 February 2007 had been in breach of the rule of speciality under the European Convention on Extradition 1957 ("the ECE"), and that the decision to extend his detention had violated his rights under Article 5 § 4 of the Convention. However, his complaints were declared inadmissible.

Law – Article 5 § 4: The requirement of procedural fairness under Article 5 § 4 entailed that the procedure must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question. In particular, the proceedings had to be adversarial to ensure "equality of arms" between the parties. As for the applicant's case, the Government's submission and the findings of the Constitutional Court appeared to be inconsistent as to what had prompted the detention order of 2 February 2007 and, assuming it to have been an application by the prosecution, whether a copy had been served on the applicant. But whatever the position, the time and facilities made available to the applicant's lawyers for the preparation of his case had been limited.

Furthermore, the applicant's written pledge to live in accordance with the law and make himself available for the purposes of his prosecution had been disregarded by the domestic courts. While it appeared that the applicant's submissions had not reached the district court before the regional court determined the appeals, in view of the personal nature of the submission, the complexity of the issues regarding the rule of speciality and the fact that with the exception of the detention order of 2 February 2007 all the contested decisions had been taken without the presence of the applicant or his lawyer, the Court considered that it would have been advisable for the applicant's subsequent interlocutory appeal against the order for the extension of his detention to have been heard orally. Although the detention order had been given "together with the reasoning [behind it] and instructions as to an available remedy" at the remand hearing of 2 February 2007, the transcript of that hearing did not contain the reasoning. It was therefore only natural that the applicant should have awaited service of the written order in order to be

able to contest it properly. As neither the order nor the prosecution's written interlocutory appeal were served on the applicant before the determination of his orally announced appeal, any meaningful exercise of his right of appeal had thereby been practically reduced to a merely formal remedy. Furthermore, when dealing with the applicant's challenges to the detention and extension orders none of the domestic courts had taken any stance on the crucial argument concerning the lawfulness of his detention under the speciality rule.

In light of the combination of the above mentioned elements, the Court concluded that in relation to his interlocutory appeals against the detention order of 2 February 2007 and the extension order of 10 July 2007, the applicant had been denied proceedings for the review of the lawfulness of his detention within the meaning of Article 5 § 4 of the Convention.

Conclusion: violation (five votes to two).

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

(See also: *Černák v. Slovakia* (dec.), 67431/01, 1 March 2005; *Michalko v. Slovakia*, 35377/05, 21 December 2010; *Lutsenko v. Ukraine*, 6492/11, 3 July 2012, Information Note 154)

ARTICLE 6

Article 6 § 1 (criminal)

Fair hearing

Admission in evidence against person accused of membership of unlawful organisation of police testimony based on undisclosed sources: *no violation*

Donohoe v. Ireland - 19165/08
Judgment 12.12.2013 [Section V]

Facts – The case concerned the fairness of the applicant's trial and conviction before the Special Criminal Court in Ireland for being a member of the Irish Republican Army (IRA). His conviction was based, among other things, on the sworn testimony of a police chief superintendent, who testified in reliance on confidential information available to him from police and civilian sources that it was his belief that the applicant was a member of the IRA. When asked to identify the sources of his belief, the chief superintendent refused, claiming privilege on the grounds that disclosure would endanger lives and State security. The Special Criminal Court directed the chief superintendent to produce all relevant documentary sources forming the basis of his belief which it then reviewed in order to be satisfied as to the reliability of his belief. Neither the prosecution nor the defence had access to that confidential material. In his application to the European Court, the applicant complained that the non-disclosure had made his trial unfair as it seriously restricted his defence rights.

Law – Article 6 § 1: In accordance with the general principles articulated in *Al-Khawaja and Tahery v. the United Kingdom*[1], three questions had to be addressed: whether it was necessary to uphold the claim of privilege, whether the undisclosed evidence was the sole or decisive basis for the conviction and whether there were sufficient counterbalancing factors, including the existence of strong procedural safeguards, in place to ensure that the proceedings, when judged in their entirety, were fair.

On the first, the Court found that the justifications given for the grant of privilege – the effective protection of State security and of informers in danger of reprisals from the IRA, and the effective prosecution of serious and complex crime – were compelling and substantiated, so that the decision not to disclose the sources had therefore been necessary. As to the second, the undisclosed evidence was not the sole or decisive basis for the conviction, as the trial court had heard over fifty other prosecution witnesses and there had been "significant" other corroborative material before it.

As to whether sufficient safeguards had been in place to counterbalance the disadvantage the grant of privilege had caused the defence, the trial court had adopted a number of measures: it had reviewed the documentary material upon which the chief superintendent's sources were based in order to assess the adequacy and reliability of his belief that the applicant was a member of the IRA; it had explored whether the non-disclosed material was relevant or likely to be relevant to the defence and had been attentive to the requirements of fairness when weighing the public interest in concealment against the interest of the accused in disclosure; and, lastly, when deciding on the weight to be attached to the chief superintendent's evidence it had expressly excluded from its consideration any information obtained through its review of the documentary material and had confirmed that it

1. See *Al-Khawaja and Tahery v. the United Kingdom* [GC], 26766/05 and 22228/06, 15 December 2011, Information Note 147.

would not convict the applicant on the basis of the chief superintendent's evidence alone.

In addition to those measures taken by the trial court, the laws allowing the admission of "belief" evidence ensured that it could only be provided by high-ranking police officers, that it would be assessed by the court as a belief or opinion rather than as conclusive factual evidence, and that the defence could still cross-examine the chief superintendent in a range of ways – such as by asking the nature of his sources, whether he knew or had personally dealt with any of the informants and what was his experience in such intelligence gathering – in order to test his demeanour and credibility.

Overall, therefore, and bearing in mind that the Court's task was to ascertain whether the proceedings in their entirety were fair, the weight of the evidence other than the belief evidence, combined with the counterbalancing safeguards and factors, had to be considered sufficient to conclude that the grant of privilege as regards the sources of the chief superintendent's belief had not rendered the applicant's trial unfair.

Conclusion: no violation (unanimously).

Article 6 § 1 (disciplinary)

Public hearing

Lack of public hearing owing to classification of some of the documentary evidence as "secret": *violation*

Nikolova and Vandova v. Bulgaria - 20688/04
Judgment 17.12.2013 [Section IV]

Facts – Following the prosecution of the first applicant, disciplinary proceedings were started against her and she was dismissed in February 2002 under an order issued by the Minister of the Interior. She lodged an application with the Supreme Administrative Court for judicial review of the order for her dismissal and instructed a lawyer, the second applicant, to represent her. The Ministry of the Interior forwarded to the Supreme Administrative Court the documents relating to the applicant's dismissal but requested that the case be considered *in camera* on the grounds that some of the documents were classified. Following this request, the Supreme Administrative Court case file was classified as "secret". In June 2003 the Supreme Administrative Court upheld the decision to dismiss the applicant, who appealed unsuccessfully. As the file had been classified, the first applicant was unable at first to obtain a copy of the judgments, which were not published on the Supreme Administrative Court's website. She was given permission to consult the text of the judgments at the court's registry. The case was declassified on 6 July 2009 on expiry of the statutory five-year period.

Law – Article 6 § 1

(a) *Lack of a public hearing*

(i) *Applicability* – In view of the nature of the acts that were the subject of the proceedings for the applicant's dismissal, namely breaches of discipline, their classification in domestic law and the sanction which the applicant had risked incurring and which had been imposed, the proceedings in question did not relate to a "criminal charge" falling within the scope of Article 6 in its criminal aspect. The civil limb of Article 6 § 1 was applicable to proceedings concerning a genuine and serious dispute over civil rights which could be said, at least on arguable grounds, to be recognised under domestic law. The result of the proceedings had to be directly decisive for the right in question. Disputes between the State and its civil servants fell in principle within the scope of Article 6 except where the State in its national law had expressly excluded access to a court for the post or category of staff in question and the exclusion was justified on objective grounds in the State's interest. In the instant case, far from excluding access to a court for the post or category in question, domestic law made express provision for judicial review of the decision to dismiss an Interior Ministry official; furthermore, the appeal lodged by the applicant had actually been examined by the Supreme Administrative Court. It followed that Article 6 was applicable in its civil aspect.

(ii) *Merits* – The proceedings concerning the first applicant had been conducted *in camera* in spite of her objections. The lack of a public hearing had stemmed from a specific decision taken by the court at the request of one of the parties, the Ministry of the Interior, on the ground that some of the documents produced by the latter had been classified and were marked "secret". The authorities could be said in principle to have a legitimate interest in keeping the documents confidential. However, before excluding the public from a particular set of proceedings, courts had to consider whether such exclusion was necessary in the specific circumstances in order to protect a public interest, and had to confine the measure to what was strictly necessary in order to attain the objective pursued.

The Supreme Administrative Court had based its decision on the mere fact that the case file had contained classified documents. It had not considered whether the documents in question were linked to the subject matter of the proceedings and were therefore indispensable, nor had it contemplated taking measures to counterbalance the effects of the lack of a public hearing, for instance by restricting access to certain documents only or holding some but not all of the sessions in camera, to the extent necessary to preserve the confidentiality of the documents in question. That situation appeared to have resulted from the automatic application of the rules on the classification of court proceedings where even one of the documents in the file was classified. Under domestic law, the court with jurisdiction was not required to give detailed and specific reasons for excluding the public in the case concerned. In those circumstances, it did not appear to have been strictly necessary to exclude the public in order to preserve the confidentiality of the documents in question.

Lastly, with regard to the nature of the proceedings – a factor which might in certain cases justify the lack of any hearing or of a public hearing – the matters under discussion in the proceedings at issue, namely the disciplinary sanction imposed on a police official for acts connected to corruption charges, had not been of a highly technical nature and had required a hearing open to public scrutiny.

Conclusion: violation (unanimously).

(b) *Lack of publicity of the judgments*: Owing to the classification of the first applicant's case as secret, not only had the Supreme Administrative Court examined the case in camera, the judgments had also not been delivered in public and had not been available at the registry of the court or on its Internet site, nor had the first applicant herself been able to obtain a copy. The file had not been declassified until after the expiry of the statutory time-limit in July 2009, that is to say, more than five years after the final judgment of the Supreme Administrative Court had been delivered. The restrictions on publication of the judgment had resulted from the automatic classification of the entire file as secret, without the domestic courts having conducted an assessment of the necessity and proportionality of such a measure in the specific case.

Conclusion: violation (unanimously).

Article 41: EUR 2,400 to the first applicant in respect of non-pecuniary damage.

ARTICLE 8

Respect for private life
Respect for family life
Positive obligations

Refusal to permit change of name requested with a view to unifying family surname: *violation*

Henry Kismoun v. France - 32265/10
Judgment 5.12.2013 [Section V]

Facts – The applicant was listed in the civil status register under his mother's surname, Henry. He has dual nationality, Algerian through his father and French through his mother; both of his parents are now deceased. He was abandoned by his mother at the age of three, together with his brother and sister. The father took them in, and in 1961 moved them to Algeria. The applicant was always called Kismoun by his father, family and friends. It was under this surname that he was educated in Algeria from 1963 to 1970 and that he carried out his military service there from 1975 to 1977. It is also under this name that he is currently listed in the Algerian civil status register. In 1977 the applicant attempted to re-establish contact with his mother through the French Consulate in Algiers, which informed him that she did not wish to make contact. He also learned on that occasion that he was registered in France as Christian Henry, and not Cherif Kismoun, as in Algeria. The applicant sought to rectify that situation, but his appeals were unsuccessful, including one to the Minister of Justice, who dismissed his request by a decision of December 2003.

Law – Article 8

(a) *Applicability* – The issue of the choice or change of the surnames and forenames of natural persons fell within the scope of this provision, given that the surname and forename concerned the individual's private and family life.

(b) *Merits* – The Minister of Justice's decision amounted to a refusal to change a surname which was perfectly consistent with the applicant's identification under French law, and to replace it with a very different surname. It followed that this case concerned the issue of the State's positive obligations.

The Minister of Justice had partly based his decision in respect of the applicant's request to change the surname "Henry" on a lack of evidence concerning

the mother's absence of interest. However, no examination had been conducted into the applicant's specific reasons for wishing to use the surname "Kismoun". The applicant had merely been informed that his possible use of that surname, which, he submitted, reflected his origins, was insufficient to denote the requisite legal interest. The national courts had subsequently never explained how the applicant's request, which contained personal and individual reasons capable of being taken into consideration in examining the merits of an affective argument, conflicted with a public order necessity.

The reasoning put forward by the Minister of Justice in relation to the surname Henry did not constitute an adequate response to the applicant's request, in that it attached no weight to the fact that he was seeking to be known under a single surname. In reality, the applicant was asking the national authorities to recognise the identity he had developed in Algeria, of which the surname Kismoun was one of the key elements. He wished to be registered under only one surname, namely that which he had used since childhood, in order to put an end to the inconvenience caused by his registration under two different identities in the French and Algerian civil status registers. The surname, as the principle means of identifying an individual within society, was part of the core considerations relevant to the right to respect for private and family life. The Court also emphasised, as the Court of Justice of the European Union had done, the importance for an individual of having a single surname. However, it was to be noted that it appeared from the reasoning in the decisions by which the national authorities had rejected the applicant's request that they had not taken into account the identity-related aspect of his request, and, in so doing, had failed to balance the public interest at stake against the applicant's overriding interest. In those circumstances, the decision-making process concerning the change in surname had not afforded the protection of the applicant's interests safeguarded by Article 8 of the Convention.

Conclusion: violation (unanimous).

Article 46: The national authorities had not given appropriate weight to the applicant's interest in having a single name. The Court consider that it was not required to indicate to the respondent State the measures to be taken, given that various methods could be envisaged to remedy the violation of Article 8 of the Convention.

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

Respect for private life
Positive obligations

State's failure to ensure that essential information regarding risks associated with use of decompression tables were available to divers: *violation*

Vilnes and Others v. Norway - 52806/09 and 22703/10
Judgment 5.12.2013 [Section I]

Facts – The applicants were former divers engaged in diving operations, including test dives, in the North Sea. They were recruited by diving companies used by oil companies drilling in the Norwegian Continental Shelf during the so-called "pioneer period" from 1965 to 1990. As a result of their professional activities they suffered damage to their health resulting in disabilities. They received a disability pension and *ex gratia* compensation from the State; some applicants received compensation from other sources, such as the oil company Statoil, which awarded compensation regardless of whether the divers had been employed by it. The applicants brought proceedings against the State for compensation on grounds of negligence, violations of Norway's obligations under international human rights instruments and strict liability. The Supreme Court found that the State could not be held strictly liable in the absence of a sufficiently close connection between the State and the alleged harmful activity. Nor was it liable under the law on employer's liability having regard to the measures taken by the authorities to ensure the adoption of relevant safety regulations backed up by effective implementation, inspection and supervisory mechanisms. The Supreme Court also found that the circumstances of the case did not amount, *inter alia*, to a breach of Articles 2, 3, 8 or 14 of the Convention.

Law – Article 8 (*obligation to ensure that the applicants received essential information enabling them to assess the risks to their health and lives*): There was a strong likelihood that the applicants' health had significantly deteriorated as a result of decompression sickness, amongst other factors. That state of affairs had presumably been caused by the use of too-rapid decompression tables. Standardised tables had not been achieved until 1990. Decompression sickness had since then become an extremely rare occurrence. Thus, with hindsight at least, it seemed probable that had the authorities intervened to forestall the use of rapid decompression tables earlier, they could have removed what appeared to have been a major cause of excessive risk to the applicants' safety and health sooner.

Since the core problem related to the long-term effects on human health of the use of the tables, not to sudden changes in pressure with potentially lethal effects, it seemed more appropriate to deal with the matter from the angle of the State's positive obligations under Article 8. The "public's right to information" should not be confined to information concerning risks that had already materialised, but should count among the preventive measures to be taken, including in the sphere of occupational risks.

Decompression tables could suitably be viewed as essential information for divers to assess the health risks involved. The question therefore arose whether, in view of the practices related to the use of rapid decompression tables, the divers had received the essential information they needed to be able to assess the risk to their health and whether they had given informed consent to the taking of such risks.

Neither the Labour Inspection Authority nor the Petroleum Directorate had required the diving companies to produce the diving tables in order to assess their safety before granting them authorisation to carry out individual diving operations. The diving companies had apparently been left with little accountability *vis-à-vis* the authorities and for a considerable period had enjoyed a wide latitude to opt for decompression tables that offered competitive advantages serving their business interests.

The assessment of what could be regarded as a justifiable risk had to be based on the knowledge and perceptions at the time. It was known that sudden changes in pressure could have a great impact on the body but it was widely believed that diving did not have serious long-term effects in the absence of decompression sickness. Scientific research into the matter not only required considerable investment but was also very complex and time-consuming. At the same time, the prevailing view had been that decompression tables contained information that was essential for the assessment of risk to personal health involved in a given diving operation. The Petroleum Directorate had gone through most of the diving tables available and found the differences between the slowest and fastest tables disturbing. However, a considerable period had elapsed without the authorities requiring the companies to assume full openness about the tables and they did not appear to have informed divers of their concerns about the differences between the tables or the problems they posed to health and safety.

In the light of the authorities' role in authorising diving operations and protecting divers' safety, and of the uncertainty and lack of scientific consensus at the time regarding the long-term effects of decompression sickness, a very cautious approach had been called for. It would have been reasonable for the authorities to take the precaution of ensuring that companies observed full transparency about the diving tables and that divers received the information on the differences between the tables and on the concerns for their safety and health they required to enable them to assess the risks and give informed consent. The fact that these steps were not taken meant that the respondent State had not fulfilled its obligation to secure the applicants' right to respect for their private life.

Conclusion: violation (five votes to two).

Articles 2 and 8 (*remainder of the applicants' complaints*): As regards the applicants' general complaints concerning the authorities' failure to prevent their health and lives being put at risk, the Court mainly agreed with the assessments of both the Supreme Court and the High Court that the regulatory framework put in place by the Norwegian authorities had sought to protect divers' safety responsibly and that the public funded supervision had not been organised in an irresponsible manner. All the applicants had had the possibility to have the merits of their compensation claims heard by national courts. Moreover, the Norwegian authorities and Statoil had also set up special compensation schemes under which divers had been eligible to apply for substantial amounts of compensation, which all seven applicants had done successfully. The Norwegian authorities had, through a wide range of measures, put significant effort into securing the protection of the divers' health and safety, thus complying with their obligations under both Articles 2 and 8.

Conclusion: no violation (unanimously).

The Court unanimously found no violation of Article 3.

Article 41: EUR 8,000 each in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also: *Budayeva and Others v. Russia*, 15339/02 et al., 20 March 2008, Information Note 106; *Guerra and Others v. Italy*, 14967/89, 19 February 1998; *Kolyadenko and Others v. Russia*, 17423/05 et al., 28 February 2012; *McGinley and Egan v. the United Kingdom*, 21825/93 and 23414/94, 9 June 1998; *Öneryıldız v. Turkey* [GC], 48939/99, 30 November 2004, Information Note 69; *Roche v. the United Kingdom* [GC], 32555/96, 19 October 2005, Information Note 79)

ARTICLE 10

Freedom of expression

Lawyer's conviction for complicity with a newspaper in the defamation of investigating judges: *case referred to the Grand Chamber*

Morice v. France - 29369/10
Judgment 11.7.2013 [Section V]

In 2000 a general meeting of the judges sitting at the Paris *tribunal de grande instance* was held in Paris, to examine, among other business, the situation of judge M. The press had announced that the Minister of Justice had submitted to the High Council of the Judiciary a file concerning the Church of Scientology, which she was investigating and in which there had been irregularities. The applicant was acting for one of the parties. A few months later the applicant and one of his colleagues sent a letter to the Minister of Justice in connection with the investigation into the death of Judge Borrel, whose widow the applicant was also representing. They stated that they were again complaining to the Minister of Justice about the "conduct of judges M. and L.L., [which was] entirely contrary to the principles of impartiality and loyalty" and asked for an investigation to be carried out by the General Inspectorate of Judicial Services into "the numerous problems which had been brought to light in the context of the judicial investigation". The next day *Le Monde* published an article stating that Mrs Borrel's lawyers had "vigorously" challenged judge M. before the Minister of Justice. It was specified that judge M. was accused by the applicant and his colleague of, *inter alia*, "conduct that was completely contrary to the principles of impartiality and loyalty" and that she seemed "to have omitted to number and transmit an item from the proceedings to her successor". The two judges in question lodged a complaint for public defamation of a civil servant against the editor-in-chief of *Le Monde*, the journalist who had written the article and the applicant. The applicant was convicted of being an accessory to public defamation of a civil servant, ordered to pay a fine of EUR 4,000 and, jointly and severally with his two co-defendants, EUR 7,500 in damages to each of the judges.

By a judgment of 11 July 2013, a Chamber of the Court concluded, by six votes to one, that there had been no violation of Article 10. In particular, the Court noted that the applicant had publicly attacked, in a widely-read daily newspaper, the investigating judge and the functioning of the judicial system only one day after having written to the Minster of Justice, and without awaiting the outcome of his complaint. Even if his purpose had been to alert the public to possible problems in the functioning of the judicial system, which the Court acknowledged to be a matter of public interest, the applicant had done so in particularly virulent terms, and in taking the risk not only of influencing the Minister of Justice, but also the investigation chamber to which his complaint concerning the Church of Scientology case had been submitted. It went without saying that lawyers were entitled to freedom of expression too, and to comment in public on the administration of justice, provided that their criticism did not overstep certain bounds. Regard being had to the key role of lawyers in this field, it was legitimate to expect them to contribute to the proper administration of justice and thus to maintain public confidence therein. In the light of all these circumstances, the Court concluded that, in expressing himself as he had, the applicant had behaved in a manner which exceeded the limits that lawyers had to respect in publicly criticising the justice system. That finding was confirmed by the seriousness of the accusations made in the article. Thus, in the circumstances of the case, the domestic courts could have been satisfied that the comments in question were serious and insulting to judge M., that they were capable of unnecessarily undermining public confidence in the judicial system – given that the investigation had been assigned to another judge several months previously – and that there were sufficient grounds to convict the applicant.

On 9 December 2013 the case was referred to the Grand Chamber at the applicant's request.

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

Award of damages against a historian and a publisher for alleging that a public official had collaborated with the state security services during the Communist era: *violation*

Ungváry and Irodalom Kft. v. Hungary - 64520/10
Judgment 3.12.2013 [Section II]

Facts – In 2007 a literary and political weekly owned by Irodalom Kft (the second applicant) published a study by a historian, Mr Ungváry (the first applicant). The article stated that a named judge of the Constitutional Court had worked during the Communist era as an official contact of the State-security service, written reports for the

service, and advocated hard-line policies. After being sued by the judge the second applicant printed a rectification. However, the first applicant repeated his allegations in interviews and in a book he co-authored. The judge then brought a civil action in defamation against both applicants, which resulted in a judgment of the Supreme Court in 2010 in which the applicants were held jointly and severally liable in damages in the sum of EUR 7,000, and the first applicant was ordered to pay an additional EUR 3,500.

Law – Article 10: The interference with the applicants' rights had been prescribed by law and pursued the legitimate aim of protecting the judge's reputation. The Court went on to consider whether the interference had been necessary in a democratic society.

(a) *As regards the first applicant* – The Supreme Court had not assessed the impact of the allegations on the judge's personality rights in the light of the role of the press or considered the fact that many of the allegations regarding his involvement in the actions directed against a student peace movement in the 1980s (*Dialógus*) had been proved true. It was undisputed that the judge had had local responsibilities in the Communist party and as a party secretary had produced reports on the *Dialógus* affair. The Supreme Court had understood those activities as belonging to his responsibilities within the party, without considering their relation to the goals of the State security service. Such a selective interpretation of the impugned statements, with the resultant burden of proof incumbent on the first applicant, was hardly compatible with the demands of the "most careful scrutiny" applicable in the instant case.

Furthermore, the first applicant's statements concerned Hungary's recent history and sought to shed new light on the functioning of the secret service and, in particular, its reliance on public and party officials. Various issues related to the Communist regime still appeared to be open to ongoing debate between researchers, in the general public as well as in Parliament, and as such should be a matter of general interest in contemporary Hungarian society. The publication had been based on research by the first applicant, a known historian, who had relied on material available in the security services' historical archives. It had therefore deserved the high level of protection guaranteed to political discourse and the press, but those considerations were absent from the Supreme Court's judgment.

Moreover, the personal moral integrity of holders of high office was a matter of public scrutiny in a democratic society. The publication did not concern the judge's personal life but his public behaviour, a matter which was to some extent related to his position as a member of the Constitutional Court in 2007-08. Although the article had asserted that the judge had cooperated as an "official contact" with the security services of the previous regime, that criticism had been limited to his role as a Communist party official in the 1980s and had not focused on his contemporary professional conduct as a Constitutional Court judge. The judge had not concealed his past position within the Communist Party and as a public figure had to tolerate stronger criticism by the first applicant acting in his capacity as a historian.

The impugned article had presented a scholarly position and, although it used excessive language, it was not sensationalist. The judge had had the opportunity to comment on the allegations and a further rectification had been published in the magazine. He had not been accused of criminal wrongdoing, and there was no indication that he had suffered any negative consequences in his professional activities.

While the first applicant had been subjected to civil-law, rather than criminal, sanctions, he had been ordered to pay a considerable amount of money in damages and legal costs. This had affected his professional credibility as a historian and been capable of producing a chilling effect. Since rectification of the statement of facts had already been ordered, the subsequent sanctions had not been strictly necessary.

Accordingly, the domestic courts had not convincingly established a proper balance between the personality rights of a public figure and the first applicant's right to freedom of expression and the reasons relied on could not be regarded as sufficient and relevant justification for the interference with that right.

Conclusion: violation (four votes to three).

(b) *As regards the second applicant* – The findings regarding the lack of a proper balance between the competing rights also held true in respect of the second applicant, even if the sanction imposed on it was not a matter of concern *per se*. The second applicant had published the judge's comments on the first applicant's statements in its next weekly edition, thus enabling readers to form their own opinion.

Publishers were understandably motivated by considerations of profitability and holding them responsible for publications often resulted in proprietary

interference in the editorial process. In order to enable the press to exercise its "watchdog" function, it was important that the standards of liability of publishers for publication be such that they should not encourage censorship of publications by the publisher. The consideration of liability-related chilling effect was of relevance in the finding of the proper standard of care.

Since access to the State security archives was restricted, the information that had served as the factual basis for the allegations had, in all likelihood, not been accessible for verification. Moreover, since the use of the archives required special professional knowledge, there had been no reason for the second applicant to call into question the accuracy of an article written by a historian who specialised in state security affairs. The second applicant had thus acted in accordance with the rules governing journalistic ethics.

Conclusion: violation (unanimously).

Article 41: EUR 7,000 to the first applicant in respect of pecuniary damage; EUR 3,000 to the second applicant in respect of non-pecuniary damage plus, in respect of pecuniary damage, any sums it had paid pursuant to the domestic judgment.

Criminal conviction for rejecting legal characterisation of atrocities committed by Ottoman Empire against the Armenian people from 1915 as "genocide": *violation*

Perinçek v. Switzerland - 27510/08
Judgment 17.12.2013 [Section II]

Facts – The applicant is a doctor of laws and the Chairman of the Turkish Workers' Party. In 2005 he participated in various conferences in Switzerland during which he publicly denied that the Ottoman Empire had perpetrated the crime of genocide against the Armenian people in 1915 and the following years. In particular, he described the idea of an Armenian genocide as an "international lie". The association Switzerland-Armenia filed a complaint against the applicant for the comments he had made. The applicant was sentenced, with a two-year suspension, to ninety day-fines of 100 Swiss francs (CHF), and fined CHF 3,000, for which thirty days' imprisonment could be substituted, and was ordered to pay CHF 1,000 in damages to the complainant association.

Law

Article 17: The Court accepted that some of the applicant's comments were provocative. The applicant's motives for committing the offence had been described as "nationalistic" and "racist" by the domestic courts. In speaking of the events in question, the applicant had referred in his conferences to the notion of "international lie". However, ideas which offended, shocked or disturbed were also protected by Article 10. It was noteworthy that the applicant had never questioned the existence of the massacres and deportations perpetrated during the years in question and that his denial concerned only the legal characterisation of those events as "genocide". The Court took the view that the rejection of the legal characterisation as "genocide" of the 1915 events was not *per se* such as to incite hatred against the Armenian people. In any event, the applicant had never been prosecuted or convicted for seeking to justify genocide or for inciting hatred, which was a separate offence. Nor had he expressed contempt for the victims of the events in question. Therefore the Court did not need to apply Article 17 of the Convention.

Conclusion: Article 17 not applicable (unanimously).

Article 10: The impugned conviction unquestionably constituted an "interference" with the applicant's exercise of his right to freedom of expression. As to whether that interference was prescribed by law, the applicant's conviction had been based on an accessible statutory provision. It might be questioned whether the term "genocide", as used in the Swiss Criminal Code, was consonant with the precision required by Article 10 § 2 of the Convention. However, as the applicant was a doctor of laws and a well-informed political figure, and as the Swiss National Council had recognised the existence of the Armenian genocide in 2002, the criminal sanction was foreseeable for the applicant. As regards the legitimate aim, the impugned measure had sought to protect the rights of others, namely the honour of the relatives of victims of the atrocities perpetrated by the Ottoman Empire against the Armenian people from 1915 onwards.

Lastly, as to whether the impugned measure had been necessary in a democratic society, it was important to clarify at the outset that the Court was not called upon to address either the veracity of the massacres and deportations perpetrated against the Armenian people by the Ottoman Empire from 1915 onwards or the appropriateness of legally characterising those acts as "genocide", within the meaning of the Swiss Criminal Code. Its task was only to examine, under Article 10 of the Convention, the decisions given by the competent domestic courts in the exercise of their discretionary power.

(a) *Nature of the applicant's speech and the domestic courts' margin of appreciation* – It was not in dispute that the issue whether the events of 1915 and thereafter should be characterised as "genocide" was one of major interest for the public. The essence of the applicant's statements and positions could be situated within a historical context. In addition, the applicant had also expressed his views as a politician on a question which affected relations between two States, Turkey and Armenia, a country whose people had been the victims of massacres and deportations. Concerning as it did the characterisation of a crime, that question also had a legal connotation. Accordingly, the applicant's speech was historical, legal and political in nature. Having regard to the foregoing, and in particular the public interest of the applicant's speech, the domestic authorities' margin of appreciation was reduced.

(b) *Method adopted by domestic courts to convict the applicant* – As to the notion of "consensus", only about twenty States (out of over 190 in the world) had officially recognised the Armenian genocide. Moreover "genocide" was a well-defined legal notion. In any event, it was even doubtful that there could be a general consensus as to events such as those in issue, given that historical research was by definition open to discussion and a matter of debate, without necessarily giving rise to final conclusions or to the assertion of objective and absolute truths. In that connection the present case could be clearly distinguished from cases concerning the negation of the crimes of the Holocaust. The method used by the domestic courts to secure the conviction was thus questionable.

(c) *Whether there was a pressing social need* – A study by the Swiss Comparative Law Institute adduced by the Swiss Government revealed that among the sixteen companies analysed, only two made it a criminal offence to negate genocide, without limiting its scope to Nazi crimes. None of the other States had apparently seen a "pressing social need" for such legislation. Switzerland had failed to show how there was a stronger social need than in other countries to punish an individual for racial discrimination on the basis of statements challenging the legal characterisation as "genocide" of acts perpetrated on the territory of the former Ottoman Empire in 1915 and the following years. Two developments since the publication of that study also had to be taken into account. Firstly, the Spanish Constitutional Court had found unconstitutional the offence of "negation" of genocide. Secondly, the French Constitutional Council had declared unconstitutional a law which made it a criminal offence to deny the existence of the genocides recognised by the law. Even though those decisions did not strictly constitute binding precedent, the Court could not ignore them. It pointed out that France had expressly recognised the Armenian genocide in a law of 2001. It thus observed that the decision of the French Constitutional Council showed that there was in principle no contradiction between the official recognition of certain events as genocide and the conclusion that it would be unconstitutional to impose criminal sanctions on persons who questioned the official view. Other States which had recognised the Armenian genocide had not found it necessary to enact laws introducing criminal sanctions, being mindful that one of the main aims of freedom of expression was to protect minority points of view capable of fostering debate on questions of general interest that were not firmly established. Lastly, it was noteworthy that the present case represented the first conviction of an individual on that legal basis in the context of the Armenian question. Moreover, the applicant, together with eleven other Turkish nationals, had been acquitted by the District Court on charges of genocide denial, as no intent to discriminate had been found. In view of the foregoing, the Court doubted that the applicant's conviction had been required by a "pressing social need".

(d) *Proportionality of measure to aim pursued* – Even though the sanctions imposed on the applicant, including one that could be converted into a term of imprisonment, were not particularly harsh, they were nevertheless capable of having chilling effects.

In view of the foregoing and particularly in the light of the comparative law material, the Court took the view that the grounds given by the domestic authorities to justify the applicant's conviction were not all pertinent and that, taken as a whole, they proved insufficient. The domestic authorities had not shown, in particular, that the applicant's conviction met a "pressing social need" or that it was necessary in a democratic society for the protection of the honour and feelings of the descendants of the victims of the atrocities which dated back to 1915 and the following years. The domestic authorities had thus overstepped the margin of appreciation afforded to them in the present case, which had arisen in the context of a debate of undeniable public interest.

Conclusion: violation (five votes to two).

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

ARTICLE 46

Execution of a judgment – General measures

Respondent State required to provide genuine effective relief for violations of the right to trial within a reasonable time

Barta and Drajkó v. Hungary - 35729/12
Judgment 17.12.2013 [Section II]

Facts – In 2006 and 2008, respectively, the applicants were interrogated as suspects on charges of tax fraud. In 2008 criminal proceedings were initiated against them for tax fraud and other related crimes. The first hearing was held in 2011. Two further hearings were held in the same year and one in 2012. In 2012 a district court found the applicants guilty as charged and fined them, respectively, approximately EUR 2,000 and EUR 1,000. Before the European Court the applicants complained that the criminal proceedings against them had been excessively long.

Law – Article 6 § 1

(a) *Admissibility*

(i) *Exhaustion of domestic remedies* – The Government argued that the applicants had failed to exhaust domestic remedies as they had not made a complaint under section 262/B of the Code of Criminal Procedure to expedite the proceedings. The Court recalled that, as the effectiveness of a remedy to accelerate proceedings could depend on whether it had a significant effect on the length of proceedings as a whole, where proceedings included a substantial period during which there was no possibility of accelerating them, such remedy could not be considered effective. In the applicant's case, criminal proceedings included a substantial period during which, according to the law in force, there had been no possibility to accelerate them by making a complaint. Furthermore, the Code of Criminal Procedure did not provide specific time-limits for the key phases of criminal proceedings, with the exception of cases of particular importance. Moreover, as the Government had not demonstrated that the legal avenue referred to was indeed capable of accelerating the proceedings or securing compensation for delays already occurred, the effectiveness of the remedy in question remained uncertain. Finally, since a complaint for accelerating the proceedings had no binding effect on the court concerned, nor was its eventual rejection subject to an appeal, it could not have any significant effect on expediting the proceedings as a whole. In light of the above, the remedy suggested by the Government could not be regarded as an effective one to be exhausted in cases of protracted criminal proceedings.

Conclusion: preliminary objection dismissed (unanimously).

(ii) *Victim status* – The Government referred to the fact that the district court had taken the long duration of the proceedings into consideration as a mitigating circumstance in sentencing the applicants. In this regard, the Court noted that the district court's judgment had not stated the elements that had been taken into consideration in sentencing or whether – and if so, how – the duration of the proceedings had been taken into account as a mitigating factor. Therefore, even assuming that the imposition of mere fines had corresponded to the undue length of the criminal proceedings, the measure did not fulfil the other requirement for removal of the applicants' victim status, namely the acknowledgement of a breach of Article 6 § 1 of the Convention. Consequently, the applicants could still claim to be victims of an alleged violation of Article 6 § 1.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits*: The Court observed that the applicants' proceedings had lasted, respectively, six years and three months and four years and three months for one level of jurisdiction. Having regard to its case-law on the subject, the Court considered that the length of the proceedings had been excessive and failed to meet the "reasonable time" requirement.

Conclusion: violation (unanimously).

Article 46: The violation of the applicants' right to a trial within a reasonable time constituted a systemic problem in Hungary resulting from inadequate legislation and inefficiency in the administration of justice. Although it was in principle not for the Court to determine what remedial measures could be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it had identified, general measures at national level, which must take into account the large number of persons affected, were undoubtedly called for in execution of the present judgment. In this regard, in order to assist the respondent State to comply with its obligations under Article 46, the Court reiterated that it had already clarified States' obligations with regard to the characteristics and effectiveness of legal avenues created to remedy complaints concerning excessive length of judicial

proceedings.[1] To prevent future violations of the right to a trial within a reasonable time, the respondent State was therefore encouraged to take all appropriate steps, preferably by amending the existing range of legal remedies or creating new ones, to secure genuinely effective redress for violations similar to the present one.

Article 41: EUR 3,000 to the first applicant and EUR 2,000 to the second applicant in respect of non-pecuniary damage.

ARTICLE 1 OF PROTOCOL No. 1

Positive obligations

Inability to claim additional compensation in respect of depreciation of compensation award through inflation: *inadmissible*

Köksal v. Turkey - 30253/06
Decision 26.11.2013 [Section II]

Facts – The applicant obtained a judgment debt against a privately owned bank together with interest which, though high, nevertheless remained below the annual inflation rate. He subsequently brought an action under Article 105 of the former Code of Obligations for additional compensation in respect of the disparity between the interest and inflation rates and, after four years' litigation, received a further award, which was paid. He then brought a second action under Article 105 to cover the erosion in the value of the additional compensation award by the time it was paid. This claim failed, however, as the Court of Cassation ruled that the Article 105 remedy was only available in respect of the principal debt.

Law – Article 1 of Protocol No. 1: The applicant did not contest the availability of a judicial mechanism to submit his claims against the bank, which had allowed their contractual dispute to be adjudicated effectively and fairly in full respect of procedural guarantees. Furthermore, despite the absence of any general obligation on States to prevent loss of value of a private claim as a result of market factors, the respondent State had introduced a safeguard under Article 105 of the former Code of Obligations to protect creditors against the effects of inflation where interest awarded on a judgment debt failed to cover additional loss arising from depreciation. This had enabled the applicant to bring an action for compensation – with interest at the highest rate – in respect of the losses he had incurred on the judgment debt because of the disparity between the interest and inflation rates. In view of these remedies and the absence of an obligation under Article 1 of Protocol No. 1 to apply an inflation-proofed default interest rate to private claims, the additional loss the applicant had incurred as a result of the failure of his second action under Article 105 could not be considered to engage the State's responsibility under Article 1 of Protocol No. 1.

Conclusion: inadmissible (manifestly ill-founded).

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

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

Morice v. France - 29369/10
Judgment 11.7.2013 [Section V]

(See Article 10 above, page 12)

COURT NEWS

Entry into force of new Rule 47 of the Rules of Court

Stricter conditions for lodging an application with the European Court of Human Rights will apply from 1 January 2014, with the entry into force of the new Rule 47 of the Rules of Court. This amendment to the Rules, designed to enhance the Court's efficiency and speed up the examination of applications, introduces two major changes which will determine whether an application is allocated to a judicial formation or is rejected without being considered by the Court.

The first change concerns the information and documents supplied to the Court to enable it to examine applications and hence perform its mission

1. *Scordino v. Italy (no. 1)* [GC], 36813/97, 29 March 2006, Information Note 85; *Martins Castro and Alves Correia de Castro v. Portugal*, 33729/06, 10 June 2008, Information Note 109; *Dimitrov and Hamanov v. Bulgaria*, 48059/06 and 2708/09, 10 May 2011, Information Note 141; and *Ümmühan Kaplan v. Turkey*, 24240/07, 20 March 2012, Information Note 150.

as effectively as possible. Any form sent to the Court must in future be completed in full and accompanied by copies of the relevant documents. All incomplete applications will be rejected by the Court.

The second change concerns the interruption of the period within which an application must be made to the Court, that is, within six months from the final decision of the highest domestic court with jurisdiction; for the period to be interrupted, the application will now have to fulfil the conditions set out in Rule 47. The form must be sent to the Court, duly completed and accompanied by the relevant documents, within the period laid down by the Convention. Incomplete files will no longer be taken into consideration for the purpose of interrupting the running of the six-month period.

To help applicants comply with the new rules the Court will be expanding its range of information materials, in both written and multimedia form, not only in the official languages of the Council of Europe (English and French) but also in the official languages of the States Parties to the Convention. A new and simplified application form will be available on the Court's website from 1 January 2014, together with information documents designed to assist applicants in filling out the application form and complying with the new rules (www.echr.coe.int – Applicants).

RECENT PUBLICATIONS

Handbook on European non-discrimination law

Two new translations into Armenian and Georgian of the Handbook – published jointly by the Court and the European Union Agency for Fundamental Rights (FRA) in 2011 – have been produced, thanks to a joint European Union/Council of Europe programme. The twenty-seven linguistic versions can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law).

Չեռնարկ Խտրականության դեմ եվրոպական իրավունքի վերաբերյալ (HYE)

სახელმძღვანელო დისკრიმინაციის აკრძალვის ევროპული სამართლის შესახებ (KAT)

Case-law research report

The research report entitled "Overview of the Court's case-law on freedom of religion" has just been updated. It can be downloaded from the Court's Internet site (<www.echr.coe.int> – Publications).