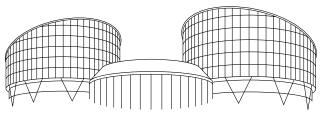

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law

No. 180 December 2014

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ARTICLE 2

Effective investigation

Alleged failure to conduct effective investigation into fatal shooting of person mistakenly identified as suspected terrorist: *relinquishment in favour of the Grand Chamber*

Armani Da Silva v. the United Kingdom - 5878/08
[Section IV]

The applicant is a relative of Mr Jean Charles de Menezes, who was mistakenly identified as a terrorist suspect and shot dead on 22 July 2005 by two special firearms officers in London. The shooting occurred the day after a police manhunt was launched to find those responsible for four unexploded bombs that had been found on three underground trains and a bus in London. It was feared that a further bomb attack was imminent. Two weeks earlier, the security forces had been put on maximum alert after more than fifty people had died when suicide bombers detonated explosions on the London transport network. Mr de Menezes lived in a block of flats that shared a communal entrance with another block where two men suspected of involvement in the failed bombings lived. As he left for work on the morning of 22 July, he was followed by surveillance officers, who thought he might be one of the suspects. Special firearms officers were dispatched to the scene with orders to stop him boarding any underground trains. However, by the time they arrived, he had already entered Stockwell tube station. There he was followed onto a train, pinned down and shot several times in the head.

The case was referred to the Independent Police Complaints Commission (IPCC), which in a report dated 19 January 2006 made a series of operational recommendations and identified a number of possible offences that might have been committed by the police officers involved, including murder and gross negligence. Ultimately, however, it was decided not to press criminal or disciplinary charges against any individual police officers in the absence of any realistic prospect of their being upheld. Subsequently, a successful prosecution was brought against the police authority under the Health and Safety at Work Act 1974. The authority was ordered to pay a fine of 175,000 pounds sterling plus costs, but in a rider to its verdict that was endorsed by the judge, the jury absolved the officer in charge of the operation of any "personal culpability" for the events. At an inquest in 2008 the jury returned an open verdict after the coroner had excluded unlawful killing from the range of possible verdicts. The family also brought a civil action in damages which resulted in a confidential settlement in 2009.

In her application to the European Court, the applicant complains about the decision not to prosecute any individuals in relation to Mr de Menezes' death. In particular, she alleges that the evidential test used by prosecutors to determine whether criminal charges should be brought is arbitrary and subjective, that decisions regarding prosecutions should be taken by a court rather than a public official or at least be subject to more intensive judicial scrutiny, and that the procedural duty under Article 2 of the Convention was not discharged by the prosecution of the police authority for a health and safety offence.

On 9 December 2014 a Chamber of the Court decided to relinquish its jurisdiction in the case in favour of the Grand Chamber.

ARTICLE 5

Article 5 § 1

Procedure prescribed by law

Absence of rules governing detention pending appearance before competent judicial authority of persons arrested overseas: *violation*

Hassan and Others v. France - 46695/10 and 54588/10
Judgment 4.12.2014 [Section V]

(See Article 5 § 3 below)

Article 5 § 3

Brought promptly before judge or other officer

48 hours' police custody following several days' deprivation of liberty following arrest on Somalian territory: *violation*

Ali Samatar and Others v. France - 17110/10 and 17301/10
Hassan and Others v. France - 46695/10 and 54588/10
Judgments 4.12.2014 [Section V]

Facts – These two cases concern nine applicants, who, in 2008, separately took possession of two

French-registered cruise ships and took their crews hostage with the intention of negotiating their release for a ransom. The applicants were arrested and held in the custody of French military personnel before being taken to France in a military aircraft. They had thus been under the control of the French authorities for four days and some twenty hours in one case (*Ali Samatar and Others*), and for six days and sixteen hours in the other (*Hassan and Others*), before being held in police custody for forty-eight hours and brought before an investigating judge, who placed them under judicial investigation. The charges included the hijacking of a vessel and the arrest and arbitrary confinement of a number of individuals as hostages with the aim of obtaining a ransom. Six of the applicants received prison sentences.

Law – Article 5 § 1 (*Hassan and Others*): There had been "plausible reasons" to suspect the applicants of committing offences and they had been arrested and detained for the purpose of being brought before the competent legal authority, within the meaning of Article 5 § 1 of the Convention. In addition, in the light of Resolution 1816 of the United Nations Security Council and its clear aim – to repress acts of piracy and armed robbery off the coast of Somalia – the French authorities' intervention in Somali territorial waters to arrest individuals suspected of committing acts of "piracy" on the high seas against a French vessel and French citizens had been "foreseeable". The applicants had been able to foresee, to a reasonable degree in the circumstances of the case, that by hijacking the French vessel and taking its crew hostage they might be arrested and detained by the French forces for the purposes of being brought before the French courts.

However, the law applicable at the relevant time to the situation of individuals arrested by French forces for acts of piracy on the high seas did not include any rule defining the conditions of deprivation of liberty that would subsequently be imposed on them pending their appearance before the competent legal authority. Consequently, the legal system in force at the relevant time did not provide sufficient protection against arbitrary interference with the right to liberty and security.

Conclusion: violation (unanimously).

Article 5 § 3 (*both cases*): The context in which the applicants had been arrested was out of the ordinary. The French authorities had intervened 6,000 km from mainland France, to repress acts of piracy of which vessels flying the French flag and a number of its citizens had been victims; acts committed by Somalis off the coast of Somalia in an area where piracy was becoming alarmingly rife, whilst the Somali authorities lacked the capacity to deal with such offences. It was understandable that, being aware that the Somali authorities would have been incapable of putting the applicants on trial, the French authorities could not have envisaged handing them over. Moreover, the length of time required for their transfer to France had largely been due to the need to obtain prior authorisation from the Somali authorities and the resulting delays caused by the shortcomings in the administrative procedures in that country. There was nothing to suggest that the transfer had taken longer than necessary. There had been some "wholly exceptional circumstances" which explained the length of the deprivation of liberty endured by the applicants between their arrest and their arrival on French soil.

On their arrival in France, however, the applicants had been taken into police custody for forty-eight hours rather than being brought immediately before an investigating judge. There had been nothing to justify that additional delay. At least eleven days in one case, and eighteen days in the other, had thus elapsed between the French authorities' decision to intervene and the applicants' arrival in France, and the French authorities could have made use of that time to prepare for them to be brought "promptly" before the competent legal authority.

As regards the French Government's argument that the applicants' period in police custody had been necessary for the purposes of the investigation, the Court's case-law to the effect that periods of two or three days before the initial appearance before a judge did not breach the promptness requirement under Article 5 § 3 was not designed to afford the authorities an opportunity to intensify their investigations for the purpose of gathering the requisite evidence on the basis of which the suspects could be formally charged by an investigating judge. It could not be inferred from that case-law that the Court sought to afford the domestic authorities an opportunity to build the case for the prosecution as they saw fit.

Consequently, there had been a violation of Article 5 § 3 of the Convention on account of the fact that on their arrival in France, the applicants, who had already been detained for long periods, had been taken into police custody rather than being brought "promptly" before a "judge or other officer authorised by law to exercise judicial power".

Conclusion: violation (unanimously).

Article 41: EUR 2,000 to each of the applicants in *Ali Samatar and Others* and EUR 5,000 to each of the applicants in *Hassan and Others* in respect of non-pecuniary damage.

(See also *Medvedyev and Others v. France* [GC], 3394/03, 29 March 2010, Information Note 128; *Rigopoulos v. Spain*, 37388/97, 12 January 1999, Information Note 2; and *Vassis and Others v. France*, 62736/09, 27 June 2013, Information Note 164)

ARTICLE 6

Article 6 § 1 (civil)

Civil rights and obligations

Complaints relating to parliamentary investigation into conduct of former Minister: *inadmissible*

Hoon v. the United Kingdom – 14832/11
Decision 13.11.2014 [Section IV]

(See Article 8 below, page 18)

Access to court

Inability of Supreme Court President to contest premature termination of his mandate: *case referred to the Grand Chamber*

Baka v. Hungary - 20261/12
Judgment 27.5.2014 [Section II]

The applicant, a former judge of the European Court of Human Rights, was elected President of the Supreme Court of Hungary for a six-year term ending in 2015. In his capacity as President of that court and of the National Council of Justice, the applicant expressed his views on various legislative reforms affecting the judiciary. The transitional provisions of the new Constitution (Fundamental Law of Hungary of 2011) provided that the legal successor to the Supreme Court would be the *Kúria* and that the mandate of the President of the Supreme Court would end following the entry into force of the new Constitution. As a consequence, the applicant's mandate as President of the Supreme Court ended on 1 January 2012. According to the criteria for the election of the President of the new *Kúria*, candidates were required to have at least five years' experience as a judge in Hungary. Time served as a judge in an international court was not counted. This led to the applicant's ineligibility for the post of President of the new *Kúria*.

In a judgment of 27 May 2014 (see Information Note 174), a Chamber of the Court held unanimously that there had been a violation of Article 6 § 1 of the Convention (right of access to court) because the applicant had been unable to contest the premature termination of his mandate. It also found a breach of the applicant's right to freedom of expression under Article 10 after finding that the premature termination of the applicant's mandate had been as a result of views expressed publicly in his professional capacity.

On 15 December 2014 the case was referred to the Grand Chamber at the Government's request.

Head of State's immunity against libel actions is not absolute: *violation*

Urechean and Pavlicenco v. the Republic of Moldova - 27756/05 and 41219/07
Judgment 2.12.2014 [Section III]

Facts – At the material time, both applicants were politicians and members of an opposition party. In 2004 and 2007 the then-president of the Republic of Moldova participated in two television programmes in which he stated that "during the ten years of activity as a Mayor of Chisinau, [the first applicant] did nothing but to create a very powerful mafia-style system of corruption" and that the second applicant "came straight from the KGB". Both applicants brought libel actions against the President, seeking retraction of the impugned statements and damages. However, their claims were dismissed on the grounds that the President enjoyed immunity and could not be held responsible for opinions expressed in the exercise of his mandate.

Law – Article 6 § 1: Under domestic law, the exclusion of libel proceedings against the President constituted an exception from the general rule of civil responsibility for defamatory or insulting opinions, limited to cases in which the President acted in the exercise of his functions. While it was acceptable that heads of State enjoyed functional immunity to protect their free speech in the exercise of their functions and to maintain the separation of powers, such immunity had to be regulated and interpreted in a clear and restrictive manner. In the present case, as the relevant domestic provisions did not define the limits of the immunity against libel actions, the domestic courts

should have assessed whether the impugned statements were made in the exercise of the President's official duties, but had not done so. Furthermore, as the immunity afforded to the President was perpetual and absolute, the applicants could not have brought an action even after the expiry of his mandate. The domestic courts had applied the rule of immunity without any enquiry into the existence of competing interests, thus conferring blanket immunity on the head of State, a situation which should be avoided. Finally, the applicants had not had at their disposal effective means of countering the accusations that had been made against them on national television. The manner in which the immunity rule had been applied in their case had therefore constituted a disproportionate restriction on their right of access to a court.

Conclusion: violation (four votes to three).

Article 41: EUR 3,600 to the second applicant in respect of non-pecuniary damage; no claim made by the first applicant.

(See, generally, the Factsheet on the Right to the protection of one's image; see also, with regard to the immunity conferred on members of parliament, *A. v. the United Kingdom*, 35373/97, 17 December 2002, Information Note 48; *Cordova v. Italy (no. 1)*, 40877/98, and *Cordova v. Italy (no. 2)*, 45649/99, both 30 January 2003 and summarised in Information Note 49; and *De Jorio v. Italy*, 73936/01, 3 June 2004)

Article 6 § 1 (criminal)

Fair hearing

Use in criminal prosecution for torture of statements made on confidential basis in asylum proceedings: *inadmissible*

H. and J. v. the Netherlands - 978/09 and 992/09
Decision 13.11.2014 [Section III]

Facts – The applicants, Afghan nationals, were high-ranking officers in the former military-intelligence service of the communist regime (KhAD/WAD). They requested asylum in the Netherlands shortly after the fall of that regime. In the course of the asylum proceedings, they were required to state the truth about their reasons for seeking asylum, including their careers in KhAD/WAD. Their requests for asylums were refused but they were not deported because they risked being subjected to treatment proscribed by Article 3 of the Convention in Afghanistan. They were, however, prosecuted for offences they had committed there. Both men were convicted of war crimes. H. was also convicted of complicity in torture.

In their applications to the European Court, the applicants complained under Article 6 § 1 of the Convention that they had been convicted on the basis of incriminating statements they had made in the asylum proceedings under coercion and in return for a promise of confidentiality, and that they had been confronted with their statements during the criminal investigation.

Law – Article 6 § 1: Although they were denied refugee status, neither applicant was deported or extradited. Instead, they were allowed to remain in the Netherlands and thus to enjoy the protection of the Netherlands State *de facto*. The Netherlands and Afghanistan were both parties to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War Conventions. Under the *aut dedere aut iudicare* principle[1] enshrined in these conventions, it was not merely the right but the bounden duty of the Netherlands to prosecute the applicants for any acts of torture which they might have committed elsewhere.

As regards the use in the criminal proceedings of the statements made by the applicants in the asylum proceedings, the applicants had entered the Netherlands of their own accord, asking for its protection. To that end, they had been required to satisfy the Netherlands Government that their stated fear of persecution was well-founded. Since they bore the burden of proof, there was nothing incongruous in the Government's demanding the full truth from them. The suggestion that their statements to the immigration authorities were extracted under coercion was therefore baseless.

The promise of confidentiality in asylum proceedings is intended to ensure that asylum-seekers' statements do not come to the knowledge of the very entities or persons from whom they needed to be protected. Conversely, a practice of confidentiality appropriate to the processing of asylum requests should not be allowed to shield the guilty from condign punishment. Consequently, once the applicants' statements were in the Government's possession the deputy minister had not been precluded by Article 6 of the Convention from

1. The requirement for States either to extradite or themselves prosecute individuals suspected of serious crimes such as torture or war crimes committed outside the jurisdiction.

transferring them to the public prosecution service, another subordinate Government body, to be used within its area of competence.

Finally, the fact that the applicants were confronted during the criminal investigation with the statements they had made during the asylum proceedings had no bearing on the fairness of the criminal proceedings. The applicants were heard under caution and enjoyed the right to remain silent and neither applicant ever admitted torture, or any other crimes, either during the asylum proceedings or during the criminal proceedings. It was not, therefore, the case that they were induced to make a confession that was afterwards used to ground their conviction (compare *Gäfgen v. Germany* [GC], 22978/05, 1 June 2010, Information Note 131).

Conclusion: inadmissible (manifestly ill-founded).

Impartial tribunal

Police officers' participation on jury in case where police evidence was undisputed:
no violation

Peter Armstrong v. the United Kingdom - 65282/09
Judgment 9.12.2014 [Section IV]

Facts – The applicant was convicted of murder by a jury which contained one retired police officer and one serving police officer. Both officers had informed the court of their status. The retired officer explained that he had been retired for many years and did not recognise the names of any of the police officers in the case. The serving officer mentioned that he recognised a man sitting at the back of the court as a police officer, but prosecuting counsel explained that the man would not be called as a witness. After being given an opportunity to make inquiries, defence counsel did not object to the participation of either officer on the jury.

Law – Article 6 § 1: The personal impartiality of a jury member is presumed until there is proof to the contrary. There being no evidence of actual partiality, the Court went on to examine whether there were sufficient guarantees to exclude any objectively justified doubts as to the police officers' impartiality.

Both jurors had drawn the trial judge's attention at an early stage of the trial to the fact that they were, or had been, police officers. The serving officer had also indicated that he recognised a police officer sitting in the courtroom. The trial judge had promptly invited submissions from counsel and appropriate investigations were made. A list of questions was put to the serving officer in order to identify the nature and extent of his knowledge of the officer in the courtroom and the police officer witnesses in the case. The applicant was fully involved in these proceedings and was informed of the proposed questions before they were put. Defence counsel had been given the opportunity to investigate and clarify the police officers' connections with the case and had not challenged the continued presence of the jurors throughout the proceedings. It was clear from the transparent inquiries into the two officers that the defence had every opportunity to object to their continued presence on the jury but chose not to do so.

As to the nature of the connection between the jurors and other participants at the trial, unlike *Hanif and Khan v. the United Kingdom*, this was not a case where a police officer who was personally acquainted with a police officer witness giving relevant evidence was a member of the jury. Nor did the applicant's defence depend to any significant extent – if at all – upon a challenge to the evidence of the police officer witnesses in his case. He admitted killing the victim and the only question for the jury was whether he had acted in self-defence. In these circumstances, and again in contrast to the position in *Hanif and Khan*, it could not be said that there was an important conflict or a clear dispute regarding police evidence in the case.

Accordingly, the safeguards present at the applicant's trial were sufficient to ensure the impartiality of the jury which tried the applicant's case.

Conclusion: no violation (unanimously).

(See *Hanif and Khan v. the United Kingdom*, 52999/08 and 61779/08, 20 December 2011, Information Note 147)

Article 6 § 3 (c)

Defence through legal assistance

Delayed access to a lawyer during police questioning owing to exceptionally serious and imminent threat to public safety:
no violation

Ibrahim and Others v. the United Kingdom - 50541/08 et al.
Judgment 16.12.2014 [Section IV]

Facts – On 21 July 2005, two weeks after 52 people were killed as the result of suicide bombings in

London, further bombs were detonated on the London public transport system but, on this occasion, failed to explode. The perpetrators fled the scene. The first three applicants were arrested but were refused legal assistance for periods of between four and eight hours to enable the police to conduct "safety interviews".[1] During the safety interviews they denied any involvement in or knowledge of the events of 21 July. At trial, they acknowledged their involvement in the events but claimed that the bombs had been a hoax and were never intended to explode. The statements made at their safety interviews were admitted in evidence against them and they were convicted of conspiracy to murder. The Court of Appeal refused them leave to appeal.

The fourth applicant was not suspected of having detonated a bomb and was initially interviewed by the police as a witness. However, he started to incriminate himself by explaining his encounter with one of the suspected bombers shortly after the attacks and the assistance he had provided to that suspect. The police did not, at that stage, arrest and advise him of his right to silence and to legal assistance, but continued to question him as a witness and took a written statement. He was subsequently arrested and offered legal advice. In his ensuing interviews, he consistently referred to his written statement, which was admitted as evidence at his trial. He was convicted of assisting one of the bombers and of failing to disclose information about the bombings. His appeal against conviction was dismissed.

In their applications to the European Court the applicants complained that their lack of access to lawyers during their initial police questioning and the admission in evidence at trial of their statements had violated their right to a fair trial under Article 6 §§ 1 and 3 (c) of the Convention.

Law – Article 6 §§ 1 and 3 (c): The Court reiterated that for the right to a fair trial to remain sufficiently practical and effective, access to a lawyer had to be provided, as a rule, from the first police interview of a suspect, unless it could be demonstrated that in the particular circumstances there were compelling reasons to restrict that right. Even where such compelling reasons did exist, the restriction should not unduly prejudice the rights of the defence, which would be the case where incriminating statements made during a police interview without access to a lawyer were used as a basis for a conviction (see *Salduz v. Turkey*).

Applying this test, the Court examined (a) whether compelling reasons had existed for denying the applicants' access to a lawyer and (b) if so, whether the rights of the defence had been unduly prejudiced.

(a) *Compelling reasons* – The police had been under substantial pressure and had to assume that the attempt to detonate devices on 21 July was an attempt to replicate the attacks of 7 July with the risk of further loss of life on a large scale. The need to obtain, as a matter of critical urgency, information on any further planned attacks and the identities of those potentially involved, while ensuring that the integrity of the investigation was not compromised by leaks, was clearly of the most compelling nature.

That compelling nature was borne out in the first three applicants' cases by the fact that their questioning by the police was focused on the threat posed to the public, rather than on establishing their criminality, and by the evident concern that access to legal advice would lead to the alerting of other suspects still at large. Although the position of the fourth applicant was somewhat different, in that he was being questioned as a witness, not a suspect, the decision not to arrest and caution him (which would have entitled him to legal assistance) was not unreasonable, as it was based on the fear that a formal arrest might lead him to stop disclosing information of the utmost relevance to public safety.

Accordingly there had been an exceptionally serious and imminent threat to public safety that provided compelling reasons justifying the temporary delay of all four applicants' access to lawyers.

(b) *Undue prejudice* – Importantly, unlike the position in cases such as *Salduz* and *Dayanan v. Turkey*, there had been no systemic denial of access to legal assistance in the applicants' cases. A detailed legislative framework was in place which set out a general right of access to a lawyer upon arrest, subject to exceptions on a case-by-case basis. The conditions for authorising a delay were strict and exhaustive. Once sufficient information had been obtained to avert an identified risk, questioning had to cease until the detainee had obtained legal advice. The legislation thus struck an appropriate balance between the importance of the right to legal advice and the pressing need in

1. A safety interview is an interview conducted urgently for the purpose of protecting life and preventing serious damage to property. Under the Terrorism Act 2000, such interviews can take place in the absence of a solicitor and before the detainee has had the opportunity to seek legal advice.

exceptional cases to enable the police to obtain information necessary to protect the public.

That legal framework had been carefully applied in the case of the first three applicants. Their access to a lawyer had been delayed by between four and eight hours only, well within the maximum 48 hours permitted and had been authorised by a superintendent. The reasons for the restriction on access had been recorded. As regards the fourth applicant, although he was not cautioned as soon as he became suspected of involvement in an offence as the applicable guidelines required, the clear legislation governing the admissibility of evidence obtained during police questioning had been carefully applied by the trial judge.

It was significant also that none of the applicants had alleged any coercion, compulsion or (apart from the lack of a caution in the fourth applicant's case) other improper conduct during their questioning. Indeed, the questions put to the applicants during the relevant interviews were directed not at their own involvement in the attempted bombings but on securing information about possible further bombings by persons at large. Although the fourth applicant made self-incriminating statements during his police interview, he did not retract them when later allowed access to a lawyer and he continued to build on them before finally deciding to request their exclusion at trial.

There had also been procedural opportunities at trial to allow the applicants to challenge the admission and use of their statements and the weight to be given to them. In the case of the first three applicants the trial judge had given rigorous consideration to the circumstances surrounding their safety interviews and had taken great care in explaining why he believed the admission of statements made in those interviews would not jeopardise their right to a fair trial. He had formulated careful directions to the jury explicitly telling them that they could draw adverse inferences only in respect of the interviews conducted after the safety interviews had ended. In the fourth applicant's case, his challenge to the admission at trial of his self-incriminating statements was carefully examined by the trial judge, who provided detailed reasons for concluding that there would be no unfairness if they were admitted in their entirety.

Lastly, the impugned statements were far from being the only incriminating evidence against the applicants. In each case there had been a significant body of independent evidence capable of undermining their defence at trial.

Taking the above-mentioned considerations cumulatively, the Court found that no undue prejudice had been caused to the applicants' right to a fair trial as a result of the failure to provide access to a lawyer before and during the first three applicants' safety interviews or to caution or provide access to a lawyer to the fourth applicant during his initial police interview, followed by the admission of the statements made during those interviews at trial.

Conclusion: no violation (six votes to one).

(See *Salduz v. Turkey* [GC], 36391/02, 27 November 2008, Information Note 113; and *Dayanan v. Turkey*, 7377/03, 13 October 2009, Information Note 123)

Article 6 § 3 (d)

Examination of witnesses

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

Horncastle and Others v. the United Kingdom - 4184/10
Judgment 16.12.2014 [Section IV]

Facts – In November 2007 the first and second applicants, Mr Horncastle and Mr Blackmore, were convicted of causing grievous bodily harm with intent by a unanimous jury verdict. Their victim had given a written statement to the police identifying his attackers but had died before trial from an unrelated illness. The statement was admitted in evidence against both applicants.

In May 2008 the third and fourth applicants, Mr Marquis and Mr Graham, were convicted of kidnapping a woman during a burglary. During the kidnapping they threatened to harm her. The victim and her husband initially made written statements to the police but later refused to appear as witnesses at trial because they feared for the safety of their families. The victim's statement was admitted in evidence against the two men but the judge refused to admit the statement of her husband.

All the applicants' appeals against conviction were dismissed.

Law – Article 6 § 1 in conjunction with Article 6 § 3 (d): The Court applied the principles set out in *Al-Khawaja and Tahery v. the United Kingdom*. The Grand Chamber ruled in that case that when the evidence of an absent witness is the sole or

decisive basis for a conviction, sufficient counterbalancing factors which permit an assessment of the reliability of the evidence are required. The Court must decide whether there was a good reason for the witnesses' non-attendance; whether the witness statements were "sole or decisive"; and, if so, whether there were nonetheless adequate counterbalancing measures to protect the applicants' right to a fair trial.

(a) *First and second applicants* – The victim's death had made it necessary to admit his witness statement as hearsay evidence.

As to whether the statement was sole or decisive, the starting point was the judgments of the domestic courts. The trial judge, in his summing up, said that the prosecution case depended upon the evidence of the victim. The Court of Appeal identified substantial evidence independent of the victim's statement but also accepted that the statement was "to a decisive degree" the basis of the applicants' convictions. However, in the Court's view, it was more than arguable that the strength of the other incriminating evidence in the case, in particular the first and second applicants' admissions that they were present at the victim's flat that night, meant that the victim's statement was not "decisive" in the sense of being determinative of the outcome of the case.

Even assuming, however, that the victim's statement was "decisive", there were sufficient counterbalancing factors to compensate for any difficulties caused to the defence by its admission, including the legislative framework regulating the circumstances in which hearsay evidence could be admitted and the possibility for the applicants to challenge its admission. The safeguards contained in the law were applied appropriately. The applicants were able to lead evidence to challenge the reliability of the statement and the victim's credibility. When taken with the strength of the other prosecution evidence in the case, the provisions of the law as applied in the applicants' case enabled the jury to conduct a fair and proper assessment of the reliability of victim's statement.

Conclusion: no violation (unanimously).

(b) *Third and fourth applicants* – The trial judge had undertaken appropriate enquiries concerning the level of the victim's fear to demonstrate the need to admit her written statement.

As to whether that statement was sole or decisive nature the Court considered it significant that the Court of Appeal did not consider the evidence of the victim to a decisive extent. Extensive independent evidence existed in the case including undisputed CCTV footage putting the third applicant outside the victim's home at the time of the kidnapping, undisputed telephone record data showing calls from the victim's phone and from the phone of the fourth applicant to the victim's partner on the night of the kidnapping and evidence that the two applicants had checked into a hotel with the stolen car in their possession. There was also other witness evidence including the victim's father and the police officer who had listened to the ransom calls.

Accordingly, in the light of the other strong incriminating evidence, it could not be said that the victim's statement was of such significance or importance as to be likely to determine the outcome of the case against the third and fourth applicants. It was therefore not the sole or decisive basis of their convictions. In these circumstances, it is not necessary to examine whether there were sufficient counterbalancing factors permitting a fair and proper assessment of the reliability of the statement).

Conclusion: no violation (unanimously).

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

ARTICLE 8

Respect for private and family life

Measure obliging mother and baby to return to hospital after birth: *violation*

Hanzelkovi v. the Czech Republic - 43643/10
Judgment 11.12.2014 [Section V]

Facts – The first applicant is the second applicant's mother. The second applicant was born in hospital on 26 October 2007. The birth was devoid of complications and the applicants were not found to have any health problems. In those circumstances the first applicant decided of her own accord to leave hospital that same day, which she did around noon, in spite of the medical team's opposition.

Doctor D., at the request of the social welfare authority, drafted a note observing that "given the short period of time since the birth, the health and potentially the very life of the child will be at risk if it is deprived of hospital care". The authority then asked the District Court to adopt an interim

measure under the Code of Civil Procedure with a view to entrusting the child to the care of the hospital. The court accepted the request that same day.

At 4.30 p.m. a court bailiff and a social worker accompanied by police officers went to the applicants' house. Having examined the child, the doctor in attendance observed that the child had no health problems, but he agreed with those concerned that for the purpose of implementing the interim measure, mother and child would be taken back to the hospital by ambulance. Once in the hospital, the second applicant was again examined but no health problems were found. The applicants were forced to stay at the hospital for two days, during which time they allegedly did not undergo any medical procedure. At the express request of the first applicant, who then signed a waiver of further care after being duly advised, the applicants were allowed to leave the hospital on 28 October 2007, some 50 hours after the birth.

Law – Article 8: The facts complained of by the applicants fell within Article 8, in that the decision to return the second applicant to hospital against the express wishes of his parents, with the result that the first applicant had also been re-admitted to hospital, because she did not want to leave her baby alone, concerned their private and family life. Neither the short duration of the stay in hospital, nor the fact that the applicants had not undergone any medical procedure at the hospital, affected the Court's finding that the situation complained of constituted an interference with their right to respect for their private and family life.

The applicants had been taken back to the hospital in accordance with an interim measure adopted by the District Court under the Code of Civil Procedure, the relevant provision of which concerned emergency situations where a child was left without care or there was a threat to its life or healthy development. The interference in question had in principle been guided by a legitimate aim, namely the protection of the health and rights of others, in this case the second applicant as a new-born baby.

The taking into care of a new-born baby at birth was an extremely harsh measure and there had to be unusually compelling reasons for a baby to be removed from the care of its mother against her will immediately after the birth and using a procedure which involved neither the mother nor her partner.

Doctor D. could not be criticised for having notified the social welfare authority, which in turn had approached the court, given that the first applicant's conduct might cause concern for the hospital staff responsible.

Concerning the court's assessment, the reasoning set out in the interim measure order was particularly laconic and simply referred to the short note drafted by Doctor D., who had indicated a general risk for the health and life of the new-born baby without giving any details. It did not appear from the order that the court had sought to find out more information about the case or had looked at whether it would be possible to use any less intrusive interference with the applicants' family life.

Accordingly, the Court was not convinced that there were unusually compelling reasons for the baby to be withdrawn from the care of its mother against her will. Without substituting its own opinion for that of the national authorities or engaging in speculation as to the health protection measures most recommended for a new-born baby in the particular case, the Court was obliged to note that when the court had envisaged such a radical measure as sending the second applicant back to hospital with the assistance of the police and a bailiff – a measure to be executed immediately – it should have first ascertained that it was not possible to have recourse to a less extreme form of interference with the applicants' family life at such a decisive moment in their lives.

Accordingly, the serious interference with the applicants' family life and the conditions of its implementation had overstepped the respondent State's margin of appreciation. It had had disproportionate effects on their prospects of enjoying a family life immediately after the child's birth. While there might have been a need to take precautionary measures to protect the baby's health, the interference with the applicants' family life caused by the interim measure could not be regarded as "necessary" in a democratic society.

Conclusion: violation (five votes to two).

The Court also found, by five votes to two, that there had been a violation of Article 13 on the ground that the applicants did not have an effective remedy by which they could submit their complaints about Convention breaches.

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

(See also *K. and T. v. Finland* [GC], 25702/94, 12 July 2001, Information Note 32; *P., C. and S.*

v. the United Kingdom, 56547/00, 16 October 2002, Information Note 44; *Glass v. the United Kingdom*, 61827/00, 9 March 2004, Information Note 62; and *Haase v. Germany*, 11057/02, 8 April 2004, Information Note 63)

Respect for private and family life
Positive obligations

Refusal to grant adoption of child placed in *kafala* care by her biological parents: *no violation*

Chbihi Loudoudi and Others v. Belgium - 52265/10
Judgment 16.12.2014 [Section II]

Facts – The first and second applicants are a married couple of Belgian nationality. The third applicant, a Moroccan national, is the second applicant's niece. The child was entrusted by her genetic parents to the first two applicants (as *khafils*) through a *kafala* arrangement, an institution under Islamic law defined as a voluntary undertaking to provide for the welfare, education and protection of an abandoned child. The Belgian couple attempted unsuccessfully to adopt the child in Belgium. Following her arrival in Belgium, the child was granted a temporary residence permit, which was renewed at regular intervals. After the second set of adoption proceedings had ended, she was left without a residence permit for seven months. In February 2011 she was again issued with a temporary residence permit, which was renewed several times. In April 2014 she was finally granted indefinite leave to remain.

Law – Article 8

(a) *Refusal to grant adoption of third applicant*

(i) *Applicability* – The first two applicants had been looking after the third applicant, as if they were her parents, since the age of seven, when she was entrusted to them under the *kafala* arrangement in 2002, and they had all been living together in a manner which could not be distinguished from "family life" in its ordinary meaning. Article 8 was thus applicable in its "family life" aspect. Moreover, the persistence of the ties between the child and its original family did not rule out the existence of family life with others.

(ii) *Merits* – As the first two applicants had complained about the consequences arising from the third applicant's residence status, the Court decided to examine the situation from the perspective of the question whether the Belgian State had a positive obligation to create a legal parent-child relationship between the applicants. It was true that the *kafala* arrangement, validly established in Morocco, had created a legal tie between the applicants, but as this institution did not exist in Belgium, the adoption they were seeking constituted a new legal situation.

The Belgian courts, in refusing to grant the adoption, found that the customary *kafala* arrangement could not be equated with an adoption and that the legal conditions for an adoption under domestic law, in a situation where the child's national law did not recognise such adoption, had not been met, on the grounds that the child had not been entrusted to the would-be adoptive parents by the competent "authority" of the State of origin.

The refusal to grant the applicants' request could be explained in part by a concern to respect the spirit and purpose of the protection of the child's "best interests", in accordance with the relevant international conventions. The domestic courts had carried out an assessment of the social and family situation, in the light of a number of factors on the basis of which the child's best interests could be established. The courts based their decision on a two-fold observation: first, the educational and emotional care of the child had been provided since 2003 by the *khafil* parents and second, the third applicant had a legal parent-child relationship with her genetic parents and had remained in contact with her mother's family in Morocco. That second finding weighed particularly heavily in the balance and, since the young girl ran the subsequent risk of not having the same personal status in Belgium as in Morocco, this was a ground for refusing to grant the adoption to the *khafil* parents in Belgium. The Belgian authorities had thus been entitled to consider that it was in the child's best interests to ensure the maintaining of a single parent-child relationship in both Belgium and Morocco.

However, that refusal had not deprived the applicants of all recognition of the relationship between them, because the procedure of unofficial guardianship was still open to them under Belgian law. In addition, there were no practical obstacles that they would have to overcome in order to enjoy, in Belgium, their right to respect for their "family life" and to live together. Lastly, the child had a legal parent-child relationship with her genetic parents and had only complained before the Belgian authorities and the Court about the uncertainty surrounding her residence status, not about any other consequences of the lack of recog-

nition in Belgium of a legal parent-child relationship with her *khafils*.

Consequently, there had been no breach of the applicants' right to respect for their family life or for the third applicant's right to respect for her private life.

Conclusion: no violation (four votes to three).

(b) *The third applicant's residence status* – After the Court of Appeal's judgment of 19 May 2010 bringing the second adoption procedure to a negative end, and for the following seven months – until the issuance of a residence permit in February 2011 – the girl had found herself without a residence permit at all and subsequently, for the next three years, the Belgian authorities had refused to issue her with a permit of unlimited duration, preferring to renew her temporary permit, in spite of the applicants' repeated requests. That situation had lasted until she was granted indefinite leave to remain in April 2014.

The underlying question, namely whether the Belgian authorities should have granted the third applicant the security of the residence status that she was seeking and thus her protection, in view mainly of her age, against instability and uncertainty, was to be addressed in terms of the State's positive obligations.

The third applicant had lived continuously in Belgium with her *khafils* since her arrival in Belgium in 2005. At no point had she really been threatened with removal from the country. The Belgian authorities had regularly renewed the girl's temporary residence permit such that, with the exception of a seven-month period between May 2010 and February 2011, she had lived there legally and had been able to travel freely to spend her summer holidays in Morocco. Additionally, she appeared to be perfectly integrated into Belgian society and had successfully completed her secondary-school studies without being impeded by her residence status.

However, the steps she had taken to renew her residence permit could have caused the girl stress and frustration, as she waited to receive an unlimited permit. But the only real obstacle encountered by her had been her inability to take part in a school trip, owing to the absence of a residence permit between May 2010 and February 2011, at the time when the travel formalities had to be completed. Even giving significant weight to the child's interests, it would be unreasonable to consider, merely on the basis of that consequence, that Belgium was required, in exercising its prerogatives in such matters, to grant her unlimited leave to remain in order to protect her private life. Accordingly, the Court found that there had been no breach of the third applicant's right to respect for her private life.

Conclusion: no violation (four votes to three).

The Court also found unanimously that there had been no violation of Article 14 taken together with Article 8, observing that the grounds which had led the Court to find no violation of Article 8 also constituted an objective and reasonable justification, for the purposes of Article 14, for the inability of the first two applicants to adopt the third on account of her personal status.

(See also *Harroudj v. France*, 43631/09, 4 October 2012, Information Note 156; *Wagner and J.M.W.L. v. Luxembourg*, 76240/01, 28 June 2007, Information Note 98; compare, on the subject of the importance for a person to have a single name, *Henry Kismoun v. France*, 32265/10, 5 December 2013, Information Note 169; lastly, see, more generally, the Factsheet on Parental rights)

Respect for private life

Legislation preventing health professionals assisting with home births: *no violation*

Dubská and Krejzová v. the Czech Republic
- 28859/11 and 28473/12
Judgment 11.12.2014 [Section V]

Facts – The applicants wished to give birth at home, but under Czech law health professionals are prohibited from assisting with home births. The first applicant eventually gave birth to her child alone at home while the second applicant delivered her child in a maternity hospital. The Constitutional Court dismissed the first applicant's complaint for failure to exhaust the available remedies. It nevertheless expressed doubts as to the compliance of the relevant Czech legislation with Article 8 of the Convention.

In their applications to the European Court, the applicants complained of a violation of Article 8 as mothers had no choice but to give birth in a hospital if they wished to be assisted by a health professional.

Law – Article 8: Giving birth was a particularly intimate aspect of a mother's private life encompassing issues of physical and psychological integrity, medical intervention, reproductive health and the protection of health-related information.

Decisions regarding the circumstances of giving birth, including the choice of the place of birth, therefore fell within the scope of the mother's private life for the purposes of Article 8.

The fact that it was impossible for the applicants to be assisted by midwives when giving birth at home had amounted to interference with their right to respect for their private lives. That interference was in accordance with law as, although it was not entirely clear, the legislation had nevertheless enabled the applicants to foresee with a degree that was reasonable in the circumstances that the assistance of a health professional at a home birth was not permitted by law. The interference had served a legitimate aim as it was designed to protect the health and safety of both the newborn child and, at least indirectly, the mother.

As to whether the interference had been necessary in a democratic society, the respondent State was entitled to a wide margin of appreciation on account of the need for an assessment by the national authorities of expert and scientific data concerning the relative risks of hospital and home births, the need for strong State involvement because of newborn children's vulnerability and dependence on others, the lack of any clear common ground among the member States on the question of home births and, lastly, general social and economic policy considerations, such as the allocation of resources to set up an adequate emergency system for home births.

While the situation in question had a serious impact on the applicants' freedom of choice, the Government had focused primarily on the legitimate aim of protecting the best interests of the child. Depending on their nature and seriousness, the child's interests could override those of the parent, who was not entitled under Article 8 to take measures that would harm the child's health and development. While there was generally no conflict of interest between mother and child, certain choices as to the place, circumstances or method of delivery could give rise to increased risks to the health and safety of the newborn child as the figures for perinatal and neonatal deaths attested.

Although a majority of the research studies before the Court on the safety of home births indicated that there was no increased risk compared to hospital births, this was true only if certain conditions were fulfilled, namely that the birth was low-risk, attended by a qualified midwife and close to a hospital in the event of an emergency. Thus, situations such as that in the Czech Republic, where health professionals were not allowed to assist mothers giving birth at home and where there was no special emergency aid available, actually increased the risk to the life and health of mother and newborn. At the same time, however, the Government had argued that the risk for newborn children was higher in respect of home births and it was true that even where a pregnancy seemed to be without complications, unexpected difficulties requiring specialised medical intervention could arise during delivery. In these circumstances, the mothers concerned, including the applicants, could not be said to have had to bear a disproportionate and excessive burden. Accordingly, in adopting and applying the policy relating to home births, the authorities had not exceeded the wide margin of appreciation afforded to them or upset the requisite fair balance between the competing interests.

Notwithstanding this finding, the Czech authorities should keep the relevant provisions under constant review, taking into account medical, scientific and legal developments.

Conclusion: no violation (six votes to one).

Publication of parliamentary investigation into conduct of former Minister: *inadmissible*

Hoon v. the United Kingdom - 14832/11
Decision 13.11.2014 [Section IV]

Facts – The case concerned the investigation by parliamentary authorities into the applicant, a former government minister, after he had been involved in an undercover 'sting' operation by a journalist posing as a prospective business associate. During the sting operation the applicant was recorded as stating that he was willing to use knowledge and contacts gained during his period as a minister and as a special advisor to the Secretary General of NATO for financial reward. Details were subsequently published by a newspaper and broadcast in a television documentary.

Following a formal complaint by an opposition member of parliament, the Parliamentary Commissioner for Standards issued a report on 22 November 2010 in which he found that the applicant had breached the Code of Conduct for Members of Parliament. The report was passed to the Standards and Privileges Committee, which agreed with the Commissioner and recommended that the applicant apologise to the House of Commons and that his entitlement to a House of Commons photo

pass be revoked for five years. The Committee's report was approved by resolution of the House of Commons. The matter received extensive attention from the media.

In his application to the European Court, the applicant alleged a number of violations of Article 6 § 1 of the Convention in respect of the decisions of the Commissioner, as endorsed by the Committee and the House of Commons, and complained that he had been denied access to a court to challenge the legality of the parliamentary proceedings and the sanctions imposed. He also complained under Article 8 that the widely publicised decision of the Commissioner had violated his private life.

Law – Article 6 § 1: It was well established under the Court's case-law that the right to stand for election and to keep one's seat was a political right and not a "civil" one within the meaning of Article 6 § 1. Disputes relating to the arrangements for the exercise of a parliamentary seat lay outside the scope of that provision. Accordingly, the parliamentary proceedings in the applicant's case, which were concerned with investigating possible breaches of the Code of Conduct of Members of Parliament, did not attract the application of Article 6 § 1, since they did not determine, or give rise to, a dispute as to his "civil" rights for the purposes of that provision.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 8: The damage caused to the applicant's reputation by the investigation and report constituted interference with his right to respect for his private life. Since it followed the procedure set out in the House of Commons' internal rules the interference was in accordance with law. Parliamentary immunity such as exists in the United Kingdom pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislative and the judiciary. In the specific circumstances of the case there was also a legitimate public interest for the public in knowing the outcome of the Parliamentary investigation into a complaint about the applicant's conduct as a member of parliament, which would have been undermined if the proceedings had not been public in nature and the reports disseminated. The procedure had allowed the applicant a fair opportunity to put his case and defend his interests both as a public-office holder, and as a private individual.

The reduced level of legal protection of the right to reputation resulting from the rule of parliamentary immunity under British law was consistent with and reflected generally recognised rules within Contracting States, the Council of Europe and the European Union and could not in principle be regarded as a disproportionate restriction on the right to respect for private life. In any event, the facts relative to the interference were already in the public domain as a result of the newspaper article and the television programme and the applicant could have challenged the factual allegation by bringing proceedings against the newspaper or the broadcaster.

Accordingly, in making public the findings of the parliamentary investigation and according immunity to the relevant proceedings in Parliament, the respondent State had remained within its margin of appreciation. The interference was thus not disproportionate.

Conclusion: inadmissible (manifestly ill-founded).

Respect for family life
Positive obligations

Failure to take all necessary measures to enable father and daughter to maintain and develop family life with each other in international abduction case: *violation*

Hromadka and Hromadkova v. Russia - 22909/10
Judgment 11.12.2014 [Section I]

Facts – The first applicant, a Czech national, married a Russian national in 2003. The couple settled in the Czech Republic and in 2005 had a daughter, the second applicant. Two years later the wife started divorce proceedings and both she and the first applicant sought custody of the child. In 2008, while the proceedings were still pending, the wife took the child to Russia without the first applicant's consent. Shortly afterwards a Czech city court granted the first applicant temporary custody, but his request to the Russian courts to recognise and enforce the Czech court's decision was rejected. His further application to the Russian courts for access was also discontinued. In 2011 a Czech district court issued a final judgment granting the first applicant custody. Shortly afterwards the applicants lost all contact with each other and at the time of the European Court's judgment the first applicant was still unaware of his daughter's whereabouts. In 2012 the first applicant's request

to a Russian court to recognise and enforce the final custody judgment was dismissed.

Law – Article 8: Since the second applicant had been "wrongfully" removed and retained in Russia by her mother, Article 8 of the Convention required the Russian authorities to "take action" and assist the applicant in being reunited with his child.

(a) *Lack of necessary legal framework in Russia for securing prompt response to international child abduction between removal of the child and termination of the child-custody proceedings* – The Czech court's decision granting temporary custody to the first applicant pending the outcome of the divorce proceedings had not been enforceable in Russia because of its interim nature. The first applicant had also been prevented from having the contact arrangements with his daughter formally determined by the Russian courts until the end of the proceedings before the Czech court. In the absence of an agreement between the parents, the regulatory legal framework in Russia at the material time had thus not provided practical and effective protection of the first applicant's interests in maintaining and developing family life with his daughter, with irremediable consequences on their relations. By failing to put in place the necessary legal framework to secure a prompt response to international child abduction at the time of the events in question, the respondent State had failed to comply with its positive obligation under Article 8 of the Convention.

Conclusion: violation (unanimously).

(b) *Refusal by the Russian court to recognise and enforce the final custody order* – The Court reiterated that the national authorities' duty to take measures to facilitate reunion was not absolute. A change in relevant circumstances, in so far as it had not been caused by the State, could exceptionally justify the non-enforcement of a final child-custody order. The second applicant had lived in the Czech Republic with both her parents for three years until her mother took her to Russia. Since her departure from the Czech Republic the child had had very limited contact with her father until they eventually lost all contact in 2011. Since 2008 she had settled in her new environment in Russia and her return to her father's care would have run contrary to her best interests, as the first applicant also admitted. Therefore, the Russian court's decision not to recognise and enforce the Czech court's judgment of 2011 had not amounted to a violation of Article 8.

Conclusion: no violation (unanimously).

(c) *Other measures taken by the Russian authorities after June 2011* – Since 2011 the mother had been in hiding with the second applicant. The Russian authorities had thus been required to establish the mother's whereabouts if the first applicant was to maintain family ties with his daughter, but the police had been slow to act and had not made full inquiries. The first applicant's attempts to involve other domestic authorities in assisting him to establish contact with his daughter had been thwarted by the impossibility of locating her. The Russian authorities had thus failed to take all the measures that could have been reasonably expected of them to enable the applicants to maintain and develop family life with each other.

Conclusion: violation (unanimously).

Article 41: EUR 12,500 to the first applicant in respect of non-pecuniary damage; finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage sustained by the second applicant.

(See also *Maumousseau and Washington v. France*, 39388/05, 6 December 2007, Information Note 103; *Hokkanen v. Finland*, 19823/92, 23 September 1994; *Kosmopoulou v. Greece*, 60457/00, 5 February 2004, Information Note 61; *X v. Latvia* [GC], 27853/09, 26 November 2013, Information Note 168; and see generally the Factsheet on International child abductions)

Respect for family life

Refusal of claim by grandparents for custody of their grandchildren: *inadmissible*

Kruškić and Others v. Croatia - 10140/13
Decision 25.11.2014 [Section I]

Facts – The first and second applicants were the grandparents of the third and fourth applicants, who were born in 2006 and 2005 respectively. In 2008 the children's mother and in 2011 their father left the household where they had lived with the four applicants. Litigation ensued between the grandparents and the father concerning custody of and access to the children. The domestic courts ultimately granted custody to the father, who had been living with the children since 2013.

Law

Article 34 (Locus standi *of the grandparents to lodge an application on behalf of the grandchildren*): The children's parents had never been deprived of parental responsibility nor were the children ever

placed under the guardianship of their grandparents or otherwise formally entrusted to them. Furthermore, as of December 2013 the children were represented in the domestic proceedings by a guardian *ad litem*. Given the findings of the domestic courts, the grandparents had, at least arguably, a conflict of interest with their grandchildren. Thus, in the particular circumstances of the case the grandparents were not entitled to lodge an application on behalf of their grandchildren.

Conclusion: inadmissible (incompatible *ratione personae*).

Article 8: There could be "family life" between grandparents and grandchildren where there were sufficiently close family ties between them. In the instant case, the grandparents had lived with their grandchildren for seven and eight years respectively and the relations between them thus constituted "family life" protected under Article 8. However, in normal circumstances the relationship between grandparents and grandchildren was different in nature and degree from the relationship between parent and child and thus by its very nature generally called for a lesser degree of protection. The right of grandparents to respect for their family life with their grandchildren primarily entailed the right to maintain a normal relationship through contacts between them. However, such contacts generally took place with the agreement of the person exercising parental responsibility and was thus normally at the discretion of the child's parents.

In situations where children were left without parental care, grandparents could under Article 8 also be entitled to have their grandchildren formally entrusted into their care. However, the circumstances of the present case could not give rise to such a right because it could not be argued that the grandchildren had been abandoned by their father, who was away for only a month and a half while leaving them in the care of their grandparents. Since Article 8 could not be construed as conferring any other custody-related right on grandparents, the decisions of the domestic courts in the custody proceedings had not amounted to interference with their right to respect for their family life.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Bronda v. Italy*, 22430/93, 9 June 1998; *G.H.B. v. the United Kingdom* (dec.), 42455/98, 4 May 2000; *Scozzari and Giunta v. Italy* [GC], 39221/98 and 41963/98, 13 July 2000, Information Note 20; and *Moretti and Benedetti v. Italy*, 16318/07, 27 April 2010, Information Note 129.

See also the Factsheets on Protection of minors, Children's rights, and Parental rights)

ARTICLE 9

Manifest religion or belief

Imposition of prison sentence for taking part in religious ceremony commemorating deaths of members of illegal organisation: *violation*

Güler and Uğur v. Turkey - 31706/10 and 33088/10
Judgment 2.12.2014 [Section II]

Facts – In 2006 both applicants took part in a religious service (*mevlût*)[1] on the premises of the Party for a Democratic Society in memory of three members of the PKK (Workers' Party of Kurdistan) who had been killed by the security forces. After an anonymous letter was sent informing the authorities of their participation in the religious service, they were prosecuted in the Assize Court. They pleaded before the court that they had taken part in the service in order to comply with their religious obligations. The Assize Court sentenced them to ten months' imprisonment under section 7(2) of the Anti-Terrorism Act (Law no. 3713). It found in particular that the persons in memory of whom the service had been organised were members of a terrorist organisation and that they had been killed by the security forces in the course of actions conducted by that organisation. It also found that the choice of venue for the service – the premises of a political party –, the fact that the PKK flag had been displayed on the tables and that photos of the members of the organisation had also been placed there were factors giving rise to serious doubts as to the real motives for the gathering advanced by the applicants' defence lawyers.

Law – Article 9: It was not disputed by the parties that the *mevlût* was a religious rite commonly practised by Muslims in Turkey. Furthermore, according to General Comment No. 22 adopted by the United Nations Human Rights Committee, the freedom to manifest religion or belief in worship, observance, practice and teaching encompassed a broad range of acts. Thus, the concept of rites extended to ritual and ceremonial acts giving direct expression to belief, including ceremonies

1. The *mevlût* is a common religious rite practised by Muslims in Turkey. It mainly consists of poetry readings about the birth of the Prophet.

following a death. In the Court's view, it mattered little whether or not the deceased had been members of an illegal organisation. The mere fact that the service in question had been organised on the premises of a political party where symbols of a terrorist organisation had been present did not deprive the participants of the protection guaranteed by Article 9 of the Convention. Accordingly, the prison sentence imposed on the applicants amounted to an interference with their right to freedom to manifest their religion.

The legal basis for the applicants' conviction had been section 7(2) of Law no. 3713. Under that provision, "it shall be an offence, punishable by two to five years' imprisonment, to spread propaganda in support of a terrorist organisation". However, neither the reasoning of the national courts nor the Government's observations showed that the applicants had had a role in choosing the venue for the religious service or been responsible for the presence of the symbols of an illegal organisation on the premises where the service in question had taken place. The criminal act of which the applicants had been convicted had been their participation in the service, which had been organised following the death of members of an illegal organisation. Having regard to the wording of the Anti-Terrorism Act and its interpretation by the courts when convicting the applicants of spreading propaganda, it had not been possible to foresee that merely taking part in a religious service could fall within the scope of application of that Act. The interference in the applicants' freedom of religion could not therefore be regarded as "prescribed by law", because it had not met the requirements of clarity and foreseeability.

Conclusion: violation (five votes to two).

Article 41: EUR 7,500 each in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

ARTICLE 10

Freedom of expression

Premature termination of Supreme Court President's mandate as a result of views expressed publicly in his professional capacity: *case referred to the Grand Chamber*

Baka v. Hungary - 20261/12
Judgment 27.5.2014 [Section II]

(See Article 6 § 1 above, page 9)

ARTICLE 11

Freedom of peaceful assembly

Arrest and conviction of political activists for allegedly holding an unauthorised march: *violation*

Navalnyy and Yashin v. Russia - 76204/11
Judgment 4.12.2014 [Section I]

Facts – The applicants were two political activists and opposition leaders. In 2011 they were arrested for failing to obey a police order to stop a spontaneous march they were alleged to have held after participating in an authorised demonstration. They were held in police custody before being brought to court the following day and sentenced to 15 days' administrative detention. Their appeals were dismissed.

Law – Article 11: The applicants' arrest, detention and sentence constituted an interference with their right under Article 11. It pursued the legitimate aim of maintaining public order. As regards proportionality, the Court noted that even if the applicants had not intended to hold a march, the appearance of a large group of protestors could reasonably have been perceived as such. However, the march had lasted for only 15 minutes, was peaceful and, given the number of participants, would not have been difficult to contain. The police had thus intercepted the applicants solely because the march was not authorised. The domestic courts had made no attempt to verify the extent of the risks posed by the protestors or whether it had been necessary to stop them. The applicants were subsequently arrested for disobeying police orders, but the Court was unable to establish whether the police had issued any such orders before effecting the arrests. Even assuming the applicants had disobeyed an order to end the march, there had been no reason to arrest them. Moreover, the sentence imposed did not reflect the relatively trivial nature of the alleged offence. Finally, the domestic authorities had expressly acknowledged that the applicants had been punished for holding a spontaneous peaceful demonstration and chanting anti-government slogans. The coercive measures taken had a serious potential to deter other opposition supporters and the public at large from attending demonstrations and, more generally, from participating in open political debate. The chilling effect of those sanctions had been further amplified by the fact that they had targeted well-known public figures, whose depri-

vation of liberty had attracted broad media coverage. Thus, the interference had not been necessary in a democratic society.

Conclusion: violation (unanimously).

The Court also found, unanimously, violations of Article 6 § 1 in respect of the administrative proceedings against the applicants, of Article 5 as regards their unjustified escorting to the police station, their unrecorded and unacknowledged six-hour-long detention in transit and the lack of reasons for remanding them in custody, of Article 13 as regards the lack of effective domestic remedies, and of Article 3 as regards the conditions in which the applicants were held at the police station.

Article 41: EUR 26,000 to each applicant in respect of non-pecuniary damage.

(See also *Bukta and Others v. Hungary*, 25691/04, 17 July 2007, Information Note 99; *Berladir and Others v. Russia*, 34202/06, 10 July 2012; *Fáber v. Hungary*, 40721/08, 24 July 2012, Information Note 154; *Malofeyeva v. Russia*, 36673/04, 30 May 2013; *Kasparov and Others v. Russia*, 21613/07, 3 October 2013, Information Note 167; see also the Factsheet on Detention conditions and treatment of prisoners)

ARTICLE 14

Discrimination (Article 8)

Woman dismissed from post of security officer on grounds of her sex: *violation*

Emel Boyraz v. Turkey - 61960/08
Judgment 2.12.2014 [Section II]

Facts – In 1999 the applicant, a Turkish woman, successfully sat a public-servant examination for the post of security officer in a branch of a State-run electricity company. The company initially refused to appoint her because she did not fulfil the requirements of "being a man" and "having completed military service", but that decision was annulled by the district administrative court and the applicant started work in 2001. In 2003 the Supreme Administrative Court quashed the lower court's judgment and in 2004 the applicant was dismissed. The district administrative court ruled that the dismissal was lawful in a decision that was upheld by the Supreme Administrative Court. The applicant's request for rectification was ultimately dismissed in 2008.

Law – Article 14 in conjunction with Article 8

(a) *Applicability* – The applicant had complained about the difference in treatment to which she had been subjected, not about the refusal of the domestic authorities to appoint her as a civil servant as such, which was a right not covered by the Convention. She had thus to be regarded as an official who had been appointed to the civil service and was subsequently dismissed on the ground of her sex. This constituted an interference with her right to respect for her private life because a measure as drastic as a dismissal from work on the sole ground of a person's sex must have adverse effects on his or her identity, self-perception and self-respect, and, as a result, his or her private life.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – The domestic authorities had sought to justify their initial refusal to hire the applicant and her subsequent dismissal on the ground that the tasks of security officers involved risks and responsibilities which they considered women were unable to assume. However, they had not substantiated that argument and in a similar case concerning another woman decided only three months before the judgment regarding the applicant another domestic court had held that there was no obstacle to the appointment of a woman to the same post in the same company. Moreover, the mere fact that security officers had to work night shifts and in rural areas and could be required to use firearms or physical force could not in itself justify the difference in treatment between men and women. Furthermore, the applicant had worked as a security officer between 2001 and 2004. She was only dismissed because of the judicial decisions. Nothing in the case file indicated that she had in any way failed to fulfil her duties as a security officer because of her sex. As it had not been shown that the difference in treatment suffered by the applicant pursued a legitimate aim, it amounted to discrimination on grounds of sex.

Conclusion: violation (six votes to one).

The Court also found, unanimously, a violation of Article 6 § 1 on account of the excessive length of the domestic proceedings and the lack of adequate reasoning in the Supreme Administrative Court's decisions but no violation of Article 6 § 1 on account of the conflicting decisions rendered by the Supreme Administrative Court.

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

(See *Konstantin Markin v. Russia* [GC], 30078/06, 22 March 2012, Information Note 150; and, more generally, the Factsheet on Work-related rights)

Discrimination (Article 9)

Refusal to grant exemption from electricity bills available to places of worship to Alevi premises: *violation*

Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfı v. Turkey - 32093/10
Judgment 2.12.2014 [Section II]

Facts – The applicant association is a religious foundation which runs, throughout Turkey, many *cemevis*, which are premises dedicated to the practice of Alevism, a minority and heterodox branch of Islam. In August 2006, submitting that a particular centre was a place of worship for the Alevi community, its director requested exemption from paying electricity bills, since the legislation provided that the electricity bills for places of worship would be paid from a fund administered by the Directorate of Religious Affairs. In a judgment of May 2008 the District Court dismissed the foundation's claims, basing its decision on the Directorate's opinion that Alevism was not a religion and that the *cemevis* were not places of worship. That judgment was upheld by the Court of Cassation and an application for rectification lodged by the applicant foundation was dismissed in 2009. The total amount of the Centre's unpaid bills came to about EUR 290,000.

Law – Article 14 taken together with Article 9: The coverage of electricity expenses by public funds to help places of worship pay their bills was sufficiently linked to the exercise of the right guaranteed by Article 9 of the Convention. Consequently, the complaint by the applicant foundation concerning the denial of its request for an exemption from payment of electricity bills fell within the scope of Article 9, such that Article 14 of the Convention was also engaged in the present case.

Under Turkish law the status of *cemevi* was different from that of places of worship recognised as such by the State. However, in view of the fact the Alevis' free exercise of the right to freedom of religion was protected under Article 9 of the Convention, that the centre in question included a room for the practice of *cem,* a basic part of the exercise of the Alevi religion, that it provided a funeral service, and that the activities performed there were not of a profit-making nature, the *cemevis* were premises intended for the practice of religious rituals, like the other recognised places of worship.

While freedom of religion did not imply that religious groups or believers had to be granted a particular legal status or a tax status different from that of the other existing entities, a special status for places of worship had been created under Turkish law by a decision of the Council of Ministers. Such status carried a number of significant consequences, including the coverage of electricity bills by a fund of the Directorate of Religious Affairs. The applicant foundation which ran the *cemevi* was thus in a situation comparable to other places of worship as regards the need for legal recognition and the protection of its status. In addition, the decision in question expressly reserved the coverage of electricity bills to recognised places of worship. Consequently, by tacitly excluding *cemevis* from the benefit of that status, the impugned measure introduced a difference in treatment on the ground of religion.

The refusal of the applicant foundation's request for exemption had been based on an assessment by the domestic courts, on the basis of an opinion issued by the authority for Islamic religious affairs, to the effect that Alevism was not a religion and could not therefore have its own place of worship. The Court took the view, however, that such an assessment could not be used to justify the exclusion of the *cemevis* from the benefit in question, as they were, like other recognised places of worship, premises intended for the practice of religious rituals. While a State might have other legitimate reasons to restrict the enjoyment of a specific regime to certain places of worship, the Government, in the present case, had not given any justification for the difference in treatment between the recognised places of worship and the *cemevis*.

As to the Government's argument that the applicant foundation was entitled to benefit, for the centre in question, from a reduced electricity rate granted to foundations, such a possibility was not capable of compensating for the payment exemption in respect of electricity bills granted to places of worship.

In the light of all those considerations, the difference in treatment sustained by the applicant foundation had no objective or reasonable justification. The system for granting exemptions from payment of electricity bills to places of worship

thus entailed discrimination on the ground of religion.

Conclusion: violation (unanimously).

Article 41: question reserved.

(Compare with the case of *The Church of Jesus Christ of Latter-Day Saints v. the United Kingdom*, 7552/09, 4 March 2014, Information Note 172)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies
Effective domestic remedy – Latvia

Constitutional complaint on retroactivity of criminal provision on genocide: *effective remedy; inadmissible*

Larionovs and Tess v. Latvia - 45520/04 and 19363/05
Decision 25.11.2014 [Section IV]

Facts – The applicants were former officials of the then Soviet Socialist Republic of Latvia. In 2003, pursuant to a provision inserted into the Latvian Criminal Code in 1993, they were convicted of crimes contrary to Article 68[1] of the Criminal Code for having actively participated in the large-scale deportation of wealthy farmers, known as *kulaks*, from the Baltic countries in March 1949. They were sentenced to prison terms of five and two years respectively, in consideration of their age and poor health. In their applications to the European Court, the applicants complained of a violation of Article 7 of the Convention as they had been convicted of a crime which had not existed in Latvian law at the time of the impugned acts. The Government objected that their complaints were inadmissible for failure to exhaust domestic remedies in that they had not lodged a complaint with the Constitutional Court.

Law – Article 35 § 1

(a) *Scope of review by the Latvian Constitutional Court* – In previous cases, the Court had noted that a complaint to the Latvian Constitutional Court was an effective remedy only if the alleged violation resulted from a statutory provision, not from the erroneous application or interpretation of the law by the judicial or administrative authorities. The applicants had been convicted of offences under the Criminal Code which transposed the relevant provisions of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which was directly applicable in Latvia. The Court therefore rejected the applicants' contention that their complaint could not be the subject of constitutional review.

As to whether the provisions under which the applicants had been convicted could be called into question as being incompatible with human rights enshrined in the Constitution, the Court noted that the Latvian Constitution, as interpreted by the Constitutional Court, included the principle of *nullum crimen, nulla poena sine lege* and required that criminal-law provisions be clear and foreseeable. Furthermore, Article 89 of the Constitution sought to ensure harmony of the constitutional provisions on human rights with international human-rights law and contained the principle of protection of human rights as such. It was also the practice of the Constitutional Court to examine the compatibility of legal provisions not only with the Constitution itself, but also with the Convention. Thus, the relevant domestic-law provisions concerning retroactive application of the criminal law and the scope of the crime itself could be challenged before the Constitutional Court as being contrary to human rights enshrined in the Constitution. Indeed, the fact that the applicants had lodged several constitutional complaints throughout their proceedings and requested the criminal courts to obtain preliminary rulings from the Constitutional Court indicated that they had actually considered it an effective remedy.

(b) *Form of redress provided by constitutional review* – Under the domestic law, a Constitutional Court ruling could abolish a legal provision binding on all domestic authorities and natural and legal persons which had been found incompatible with the Constitution, could invalidate the impugned legal provision from a particular date, and could define the scope of persons affected by such invalidation. The author of a successful constitutional complaint could then request the reopening or review of his case on the basis of newly discovered circumstances. Since in the fresh examination of the case the authorities would be bound by the Constitutional Court's judgment and interpretation of the impugned provision, the remedy envisaged under Latvian law could be considered capable of providing redress in the circumstances of the applicants' case. As to the prospects of success, if a question as to the constitutionality of a provision of criminal law were to arise, the Constitutional

Court could exercise its jurisdiction on that matter once properly seized of it. Furthermore, the guarantee enshrined in Article 7 of the Convention was an essential element of the principle of the rule of law, also an issue which could be examined by the Constitutional Court. The Court thus concluded that, by not lodging a constitutional complaint once their respective criminal trials had come to an end, the applicants had failed to exhaust an effective remedy provided for by Latvian law.

Conclusion: inadmissible (failure to exhaust domestic remedies).

(See, in particular, *Kononov v. Latvia* [GC], 36376/04, 17 May 2010, Information Note 130; *Liepājnieks v. Latvia* (dec.), 37586/06, 2 November 2010, Information Note 135; *Nagla v. Latvia*, 73469/10, 16 July 2013, Information Note 165; and, more generally, the Court's Practical Guide on Admissibility Criteria)

ARTICLE 41

Just satisfaction

Compensation award for lack of minimum guarantees for purchaser of flat off-plan in good faith

Ceni v. Italy - 25376/06
Judgment (just satisfaction)
16.12.2014 [Section II]

Facts – The applicant had signed a preliminary contract of sale for the off-plan purchase of a flat and had paid the sale price in full (approximately EUR 214,627) to the construction firm. However, the firm refused to sign the final contract of sale, and the applicant consequently brought an action against it seeking to have ownership of the property transferred to her by court order. While the court action was pending, the construction firm was declared insolvent and the liquidator decided to cancel the preliminary contract. The flat was sold at auction and the applicant's court action was dismissed. Having continued to occupy the flat even after it had been sold at auction, the applicant eventually bought it back at a price of EUR 190,000.

In a judgment of 4 February 2014 ("the principal judgment") the Court held, by six votes to one, that there had been a violation of Article 1 of Protocol No. 1 in that the applicant had been deprived of any effective protection against the loss of the flat and of the sums she had paid to purchase it, thus obliging her to bear an excessive and impracticable burden.

The Court also held, by six votes to one, that there had been a violation of Article 13 of the Convention in conjunction with Article 1 of Protocol No. 1 in that the applicant had been unable to secure a review of the measure taken by the court-appointed liquidator.

The Court reserved the question of just satisfaction.

Law – Article 41: The violation of Article 1 of Protocol No. 1 had been found on account of the lack of appropriate safeguards to protect the applicant, who had purchased a flat off-plan in good faith, against the risk of the construction firm being wound up. Nevertheless, the Court was unable to take the view that if the violation had not occurred, the applicant would have suffered no financial loss. Safeguards such as the requirement for construction firms to insure themselves against insolvency afforded increased protection to buyers, but could not cover all possible risks in all circumstances and did not necessarily ensure full reimbursement of all sums paid to the construction firm. With regard to the violation of Article 13, the Court could not speculate as to what the outcome of the domestic proceedings would have been had the Italian courts had the opportunity to examine whether the liquidator's decision had been necessary and proportionate.

That being so, the Court was unable to accept the applicant's argument that there was a direct causal link between the violations it had found and the expenses she had incurred, after the construction firm had been wound up, in buying back the flat she was occupying. However, the Court did not consider it unreasonable to find that the applicant had nevertheless suffered a loss of real opportunities as a result of the violations.

The damage sustained by the applicant resulted both from the lack of minimum guarantees for anyone who purchased property off-plan in good faith and from the inability to secure a review of whether the liquidator's decision to cancel the preliminary contract for the sale of the flat had been necessary and proportionate. In the particular circumstances of the present case, this type of damage did not lend itself to precise quantification of the sums needed to provide redress, and it was not the Court's task to indicate an amount of compensation equivalent to the "minimum guarantees" which the applicant should have been afforded

under domestic law. In making an equitable assessment of the amount of compensation to award by way of just satisfaction, the Court considered it appropriate to take account of the compensation payments already received and still outstanding at national level, as well as the non-pecuniary damage sustained.

Conclusion: EUR 50,000 in respect of non-pecuniary and pecuniary damage combined.

ARTICLE 2 OF PROTOCOL No. 4

Article 2 § 2

Freedom to leave a country

Prohibition on leaving territory owing to failure to pay child maintenance: *violation*

Battista v. Italy - 43978/09
Judgment 2.12.2014 [Section II]

Facts – The applicant was engaged in judicial separation proceedings from his wife, and a provisional residence order was made in favour of both parents jointly in respect of the couple's two children. In 2007 the applicant asked the guardianship judge to issue him with a new passport, in which the name of his son was to be entered. The guardianship judge rejected the applicant's request, holding that it was inappropriate to issue the passport, given the imperative of protecting the children's right to receive the maintenance payments. In this connection, he emphasised that the applicant, who was supposed to make a maintenance payment of EUR 600, was paying only a small proportion of that amount, and that there was a risk that he would shirk his obligation completely if he were to travel abroad. The following month the police commissioner ordered the applicant to hand in his passport to the police station and amended his identity card, making it invalid for foreign travel. In 2008 the applicant again applied for a passport. That request and the subsequent appeals were all dismissed on the same ground as the initial request.

Law – Article 2 of Protocol No. 4: The domestic courts' refusal to issue the applicant with a passport and the decision to invalidate his identity card for foreign travel constituted an interference with his right to leave any country for any other country of his choice to which he could be admitted. The interference clearly had a legal basis in national law. In this regard, the Constitutional Court had stated that the essence of the relevant provision was to "to ensure that parents fulfil their obligations towards their children". The impugned measure was intended to guarantee the interests of the applicant's children and in principle it pursued a legitimate aim, namely the protection of the rights of others – in the present case, the children's right to receive the maintenance payments.

However, the national courts had not considered it necessary to examine the applicant's personal situation or his ability to pay the amounts due, and had applied the impugned measure automatically. There seemed to have been no attempt to balance the rights at stake. The only factor that had been taken into consideration was the property interests of the maintenance recipients. Moreover, there had been civil-law cooperation at European and international level on the issue of the recovery of maintenance payments. There existed methods for obtaining recovery of debts outside national boundaries, in particular Council Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, and the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance. Those instruments had not been taken into account by the authorities when applying the contested measure. They had merely emphasised that the applicant could have travelled abroad using his passport and thus succeeded in evading his obligation. In addition, the restriction imposed on the applicant had not ensured payment of the sums due in maintenance.

It followed that the applicant had been subjected to measures of an automatic nature, with no limitation as to their scope or duration, and the domestic courts had not carried out any fresh review of the justification for and proportionality of the measure, having regard to the circumstances of the case, since 2008. In consequence, the automatic imposition of such a measure could not be described as necessary in a democratic society.

Conclusion: violation (unanimously).

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

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

Baka v. Hungary - 20261/12
Judgment 27.5.2014 [Section II]

(See Article 6 § 1 above, page 9)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Armani Da Silva v. the United Kingdom - 5878/08
[Section IV]

(See Article 2 above, page 7)

DECISIONS OF OTHER INTERNATIONAL JURISDICTIONS

Court of Justice of the European Union (CJEU)

Opinion of the CJEU on the draft agreement on EU accession to the Convention

Opinion - 2/13
CJEU (Full Court) 18.12.2014

At the request of the European Commission, the CJEU has delivered its Opinion[1] on the compatibility with EU law of the draft agreement on the accession of the European Union to the Convention.[2]

The CJEU noted that the problem it had identified in a previous opinion in 1996[3] of the lack of a legal basis for EU accession had been resolved by the Lisbon Treaty which had amended Article 6(2) of the EU Treaty to provide that fundamental rights, as guaranteed by the Convention and the constitutional traditions common to the EU Member States constitute general principles of EU law, and that the EU is to accede to the Convention.[4] However, by virtue of Protocol (No. 8)[5] such accession must take into account the particular characteristics of the EU.

As a result of accession, the Convention would be binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law. The EU and its institutions would thus be subject to the control mechanisms provided for by the Convention and, in particular, to the decisions and judgments of the European Court of Human Rights ('the Court').

For the CJEU, the draft accession agreement was not compatible with EU law owing to the following difficulties:

• There was no provision in the draft agreement to ensure coordination between the Convention and the Charter of Fundamental Rights of the European Union. In so far as the Convention gave the Contracting Parties the power to lay down higher standards of protection than those guaranteed by the Convention, the Convention should be coordinated with the Charter. Where the rights recognised by the Charter correspond to those guaranteed by the Convention, the power granted to EU Member States by the Convention must be limited to that which was necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law were not compromised.

• The draft agreement contained no provision to prevent the risk that accession would upset the underlying balance of the EU and undermine the autonomy of EU law. For the CJEU, the approach adopted in the draft agreement, which was to treat the EU as a State and to give it a role identical in

1. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the CJEU as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the CJEU is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.
2. This summary is based on CJEU Press Release no. 180/14 issued on 18 December 2014.
3. See Opinion of the CJEU of 28 March 1996 (2/94).
4. Article 6(2) of the Treaty on European Union.
5. Protocol (No. 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms. Among other things, Protocol (No. 8) requires the accession agreement to make provision for preserving the specific characteristics of the EU and EU law and to ensure that accession of the EU does not affect its competences or the powers of its institutions

every respect to that of any other Contracting Party, specifically disregarded the intrinsic nature of the EU, in particular, the fact that, as regards the matters covered by the transfer of powers to the EU, the EU Member States had accepted that their relations were governed by EU law to the exclusion of any other law. In requiring the EU and its Member States to be considered Contracting Parties not only in their relations with Parties which were not members of the EU but also in their relations with each other, the Convention would require each EU Member State to check that the other EU Member States had observed fundamental rights, even though EU law imposed an obligation of mutual trust between them.

• The draft agreement failed to make any provision in respect of the relationship between the advisory-opinion mechanism established by Protocol No. 16 to the Convention[1] and the preliminary-ruling procedure provided for by the Treaty on the Functioning of the European Union. There was a risk that the autonomy and effectiveness that the preliminary-ruling procedure could be affected, notably where rights guaranteed by the Charter corresponded to rights secured by the Convention. In particular, there was a risk that the preliminary-ruling procedure might be circumvented.

• The draft accession agreement did not expressly exclude the Court's jurisdiction for disputes between EU Member States, or between the EU and its Member States, regarding the application of the Convention in the context of EU law. This was not compatible with the exclusive jurisdiction enjoyed by the CJEU in this sphere by virtue of Article 344 of the Treaty on the Functioning of the European Union.[2] The draft agreement could be made compatible only if the Court's jurisdiction were expressly excluded in such cases.

The CJEU also noted problems relating to the co-respondent mechanism set out in the draft accession agreement in relation to intervening Contracting Parties as it risked adversely affecting the division of powers between the EU and its Member States,[3] to the procedure for the prior involvement of the CJEU and to the possibility that certain acts, actions or omissions on the part of the EU in the area of the common foreign and security policy ('CFSP') falling outside the ambit of judicial review by the CJEU under EU law would nevertheless be subject to judicial review by the Court.

As a result of the CJEU's findings that the draft agreement is not compatible with EU law, the agreement may not enter into force unless it is amended or the EU Treaties are revised.

Links to the CJEU Opinion and to CJEU press release (<http://curia.europa.eu>)

1. Protocol No. 16 to the European Convention on Human Rights permits the highest courts and tribunals of the Contracting Parties to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the Convention and its Protocols. The Protocol was opened for signature on 2 October 2013 and will come into force following ratification by ten Contracting Parties (see Information Note 165).

2. Article 344 provides that EU Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for by the EU Treaties.

Clarification of extent of the right of illegally staying third-country nationals under Directive 2008/115/EC to be heard before adoption of return order

Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques - C-249/13
CJEU (Fifth Chamber) 11.12.2014

This case[4] concerned a request by a French administrative court for a preliminary ruling on the interpretation of Directive 2008/115/EC.[5] The CJEU was asked to clarify the extent of the right to be heard in a case in which a former student, who was ordered to leave France after failing to renew his residence permit at the end of his studies, claimed that he had been denied the right to be heard effectively before the return decision was adopted. In particular, the information on which the French authorities relied was not disclosed to him beforehand, he was not allowed sufficient time to reflect before the hearing and the length of his police interview (30 minutes) was too short, especially bearing in mind he did not have legal assistance.

The right of third-country nationals to be heard before the adoption of a return decision was inherent in the rights of defence, which was a fundamental principle of EU law. Its purpose was

3. Under the draft agreement, it is the Court which determines whether the conditions are met for a Contracting Party to intervene.

4. This summary is based on CJEU Press Release no. 174/14 issued on 11 December 2014.

5. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals..

to enable persons concerned to express their views on the legality of their stay, on matters such as family life, health and the best interests of any children, and on the detailed arrangements for the return.

National authorities were not, however, required to warn third-country nationals that they were contemplating adopting a return decision, to disclose the information on which they intended to rely, or to allow a period of reflection before seeking their observations. EU law did not establish any such detailed arrangements for an adversarial procedure. It was therefore sufficient if the persons concerned had the opportunity effectively to submit their point of view on the subject of the illegality of their stay and the reasons which might justify the non-adoption of a return decision. An exception must however be admitted where third-country nationals could not reasonably suspect what evidence might be relied on against them or would objectively only be able to respond after certain checks or steps were taken with a view, in particular, to obtaining supporting documents. In addition, return decisions could always be challenged by legal action.

As to legal assistance, although the Directive only provided a right to such assistance at the appeals stage, illegally staying third-country nationals could always seek legal assistance earlier at their own expense, provided it did not affect the due progress of the return procedure or undermine the effective implementation of the Directive.

Lastly, the length of the interview had no decisive bearing on respect for the right to be heard, provided that the third-country national had the opportunity to be heard sufficiently on the legality of his stay and on his personal situation.

Links to the CJEU judgment and to CJEU press release (<http://curia.europa.eu>).

For an overview of the legal frameworks of both the European Union and the Council of Europe and of the key jurisprudence of the CJEU and European Court of Human Rights on immigration law, see the Handbook on European law relating to asylum, borders and immigration (<www.echr.coe.int> – Publications).

Further information on the Convention case-law on the right to a fair hearing in civil cases can be found in the Guide on Article 6 - Right to a fair trial (civil limb) (<www.echr.coe.int> – Case-law analysis).

Applicability of EU Data Protection Directive to video surveillance of public highway by private householder

František Ryneš v. Úřad pro ochranu osobních údajů - C-212/13
CJEU (Fourth Chamber) 11.12.2014

This case[1] concerned a request by the Czech Supreme Administrative Court for a preliminary ruling by the CJEU on the interpretation of the EU Data Protection Directive[2]. Under the Directive the processing of personal data is not as a general rule permitted unless the data subject has given his consent. However, the directive does not apply to data processing by natural persons in the course of purely personal or household activities. The question raised in the instant case was whether a video recording made by a surveillance camera installed on a family home that had come under attack from individuals firing projectiles from the public footpath outside came within this exception.

The CJEU found that the image of a person recorded by a camera constitutes personal data because it makes it possible to identify the person concerned. Similarly, video surveillance involving the recording and storage of personal data falls within the scope of the Directive, since it constitutes automatic data processing. Further, the exception in the case of data processing carried out by a natural person in the course of purely personal or household activities had to be narrowly construed. Accordingly, video surveillance which covers a public space and which is accordingly directed outwards from the private setting of the person processing the data cannot be regarded as an activity which is a "purely personal or household activity".

However, the national court must bear in mind that the Directive makes it possible to take into account the legitimate interest of the person who has engaged in the processing of personal data ('the controller') in protecting the property, health and life of his family and himself.

Specifically, one of the situations in which personal-data processing is permissible without the consent of the data subject is where it is necessary for the purposes of the legitimate interests pursued by the controller. Further, data subjects need not be told

1. This summary is based on CJEU Press Release no. 175/14 issued on 11 December 2014.
2. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

of the processing of their data where the provision of such information proves impossible or would involve a disproportionate effort. Lastly, EU Member States may restrict the scope of the obligations and rights provided for under the Directive if such a restriction is necessary to safeguard the prevention, investigation, detection and prosecution of criminal offences, or the protection of the rights and freedoms of others.

Links to the CJEU judgment and to CJEU press release (<http://curia.europa.eu>)

For an overview of the legal frameworks of both the European Union and the Council of Europe and of the key jurisprudence of the CJEU and European Court of Human Rights on data protection, see the Handbook on European data protection law (<www.echr.coe.int> – Publications).

Further information on the Convention case-law on data protection can be found in the Factsheet on Protection of personal data (<www.echr.coe.int> – Press).

Inter-American Court of Human Rights

Advisory Opinion on "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"

Advisory Opinion - OC-21/14
Inter-American Court 19.8.2014

In response to a request presented by the States of Argentina, Brazil, Paraguay and Uruguay, the Inter-American Court issued an Advisory Opinion[1] in August 2014 on "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection".[2] It indicated that the Opinion would be of specific usefulness in the context of a regional reality in which aspects relating to State obligations concerning migrant children had not been clearly and systematically established.

Based on its interpretation of the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man, and the Inter-American Convention to Prevent and Punish Torture, the Opinion determines a series of obligations which States must take into consideration when designing, adopting, implementing and applying immigration policies with respect to children associated with their parents' or their own migratory status. These are as follows:

• States must give priority to a human rights-based approach that takes into consideration the rights of the child and, in particular, its protection and comprehensive development; this should take priority over considerations of nationality or migratory status.

• Non-national children requiring international protection must be identified through an initial evaluation that affords guarantees of safety and confidentiality so they can be provided with necessary, suitable and individualised attention based on their age; special protective measures should be adopted if necessary in the best interest of the child.

• Administrative or judicial proceedings in which decisions are taken on the rights of migrant children must be adapted to the children's needs and be accessible.

• Immigration proceedings involving children must be covered by guarantees of due process. In particular, the child shall have rights to linguistic, consular and legal assistance and, if unaccompanied or separated, a guardian; decision must take into account the child's best interest and be duly reasoned and there must be a right of appeal with suspensive effect.

• Children must not be deprived of their liberty as a precautionary measure or to ensure family unity or because they are alone or separated from their family; instead, States must incorporate non-custodial measures into their domestic law to be implemented by competent administrative or judicial authorities.

• Accommodation for children should respect the principle of separation and the right to family unity: unaccompanied or separated children should be lodged separately from adults while accompanied children should be lodged with their family members unless this would not be in their best interest; if there is a risk of deprivation of liberty, States must respect the specific guarantees that become operational in such context.

• Children must not be expelled to a State where their life, security and/or liberty is at risk or where

1. The possibility of issuing Advisory Opinions is part of the advisory function of the Inter-American Court, in accordance with Article 64(1) of the American Convention and Articles 70 to 75 of the Court's Rules of Procedure. Under this function, the Court responds to the requests formulated by State members of the Organisation of American States or its entities in respect to: (a) the compatibility of domestic laws with the American Convention and (b) the interpretation of the Convention or of other treaties concerning the protection of human rights in the American States.
2. This summary is based on an English translation of the Inter American Court Press Release no. CP-19/2014 issued in Spanish on 11 September 2014.

they are at risk of torture or other cruel, inhuman or degrading treatment.

• Any decision on the return of a child to the country of origin or to a safe third country shall only be based on the requirements of her or his best interest, taking into account that the risk of violation of the child's rights may be manifested in particular and specific ways owing to age.

• The State obligation to establish and follow fair and efficient procedures in order to identify potential asylum applicants and to make a refugee-status determination through a suitable and individualised analysis, must include the specific components developed in light of the comprehensive protection due to all children, applying fully the guiding principles and, especially those referring to the child's best interest and participation.

• Any administrative or judicial body that is to make a decision on the separation of family members, due to expulsion based on the immigration status of one or both parents, must employ a weighting analysis that considers the particular circumstances of the case and guarantees an individualised decision, prioritising the best interests of the child. Where the child has a right to the nationality of the country from which one or both of her or his parents may be expelled, or the child complies with the legal conditions to reside there on a permanent basis, States may not expel one or both parents for administrative immigration offences, as the child's right to family life is sacrificed in an unreasonable or excessive manner.

Links to the Advisory Opinion and the press release (in Spanish only) (<www.corteidh.or.cr>).

For information on the rights of migrant children from a European perspective, with an overview of the legal frameworks of both the EU and the Council of Europe and of the key jurisprudence of the CJEU and European Court of Human Rights, see the Handbook on European law relating to asylum, borders and immigration, especially chapters 5, 6.7 and 9.1 (<www.echr.coe.int> – Publications).

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

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The third edition of the Practical Guide on Admissibility Criteria has now been printed. The Guide describes the conditions of admissibility which an application to the Court must meet. This new printed edition covers case-law up to 1 January 2014 and the stricter procedural conditions for applying to the Court which came into force on that date. It can be downloaded free of charge in PDF format from the Court's website (<www.echr.coe.int> – Case-Law). The print edition can be purchased from Wolf Legal Publishers (<www.wolfpublishers.com>).