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

Information Note on the Court's case-law

No. 191 December 2015

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Legal summaries published in the Case-law Information Notes are also available in HUDOC under Legal Summaries.

The Information Note, compiled by the Court's Case-Law Information and Publications Division, contains summaries of cases examined during the month in question which the Registry considers as being of particular interest. The summaries are not binding on the Court. In the provisional version the summaries are normally drafted in the language of the case concerned, whereas the final single-language version appears in English and French respectively. The Information Note may be downloaded at <www.echr.coe.int/NoteInformation/en>. For publication updates please follow the Court's Twitter account at <twitter.com/echrpublication>.

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

European Court of Human Rights
(Council of Europe)
67075 Strasbourg Cedex
France
Tel: 00 33 (0)3 88 41 20 18
Fax: 00 33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int

ISSN 1996-1545

TABLE OF CONTENTS

ARTICLE 2

Life

Responsibility of authorities for death of a man who was tortured while in unrecorded detention: *violation*

Lykova v. Russia - 68736/11
Judgment 22.12.2015 [Section III]

(See Article 3 below)

ARTICLE 3

Torture

Humiliating and intense ill-treatment inflicted to extract a confession during unrecorded detention: *violation*

Lykova v. Russia - 68736/11
Judgment 22.12.2015 [Section III]

Facts – The applicant's son ("the victim") and a friend of his were taken to a police station on suspicion of theft. A few hours later the victim threw himself out of a window on the fifth floor. He died in hospital the next day.

The victim's cousin, not having heard from him, finally found his body at the morgue. Noting multiple bodily injuries, she sought the opening of an investigation, but was unsuccessful. The district investigator found that the death and physical injuries had been caused by the fall. Another investigator from the same department also refused to open a criminal investigation against the police officers in question. The applicant unsuccessfully appealed against that decision.

In the meantime, a criminal investigation was opened in respect of the victim's friend ("the witness"). He indicated during an interview that he had witnessed the ill-treatment of the victim and accused one of the police officers, in particular, of being responsible.

Law – Article 3 (*substantive aspect*): Relying on the witness's statements, the applicant presented a consistent and precise story of the ill-treatment her son had allegedly sustained. In addition, the autopsy report showed numerous injuries that had not been seen on his arrival at the police station.

The Government interpreted the pathologist's report as attributing all the injuries to the fall from the fifth floor and thus as refuting the allegations of ill-treatment. The report showed, however, that the injuries in question had nothing to do with the fall. Moreover, the Court did not see any reason to call into doubt the witness's testimony, which was consistent with the nature and position of the injuries identified on the victim's body. In addition, the witness had given the competent national authorities, before the filing of the autopsy report, several possibilities of verifying her allegations. But her complaints and offers of testimony had each time been ignored by the authorities.

Lastly, the applicant's version was all the more credible as the authorities had never explained the cause of the victim's injuries, other than those related to the fall.

Moreover, the decision relating to the closure of the investigation was based on statements containing clear contradictions, especially with regard to the chronology of events.

In those circumstances, the Government's explanations had not been sufficient in suggesting that the injuries not attributable to the fall had a cause other than ill-treatment inflicted in the police station. Consequently, the Court found it established that the victim had been subjected to treatment in breach of Article 3 of the Convention.

As regards the intensity of the acts of violence, according to the witness's version the police had beaten the victim by banging his head against hard surfaces several times. That had been accompanied by sessions of asphyxiation, also causing acute pain and suffering. The victim had, lastly, been humiliated, sustaining this treatment in a state of undress and with his hands and feet tied.

The treatment complained of had taken place during a period of unrecorded detention, which could only have worsened the vulnerability of the victim, who was held in the police station and deprived for several hours of the procedural safeguards normally afforded to persons in custody.

In addition, the ill-treatment had been inflicted with the aim of forcing him to confess.

Having regard to the foregoing, the Court was convinced that the acts of violence inflicted on the victim, taken as a whole, had provoked "acute" pain and suffering and had been particularly serious and cruel in nature. Such acts had to be regarded as acts of torture within the meaning of Article 3 of the Convention.

Conclusion: violation (unanimously).

Article 2 (*substantive aspect*): The present case did not contain anything to show, beyond reasonable doubt, that the victim's death had been caused intentionally by agents of the State. It had been established that he had thrown himself out of the window. It remained to be determined whether the authorities could be held liable for his fall.

The Court took the view that it was not necessary to establish whether or not the authorities who had arrested the victim had information on the existence of personal circumstances that might drive him to suicide – information which should, if so, have made them take steps to prevent such an act. The victim's vulnerability at the time of his fall was related above all to the torture being inflicted on him by the police officers. The Court had already established that the victim had been tortured in the presence of the witness. It could not be excluded that the victim had been tortured afterwards as well, since the witness testified that he had heard him screaming in the ensuing hour. During that time, moreover, the victim had confessed, and had then jumped out of the window. The victim had entered the building alive and had died after falling from the fifth floor of the police station. The Court found, first, that the Government's version of suicide for personal reasons was not satisfactory, as it had not taken account of the established fact that the applicant was being tortured or of his unrecorded detention. Secondly, the Court could not draw any decisive conclusion from the investigation, which it had found to be ineffective. Accordingly, having found that neither the Government nor the national investigation had provided a satisfactory explanation for the victim's death, the Court took the view that the Russian authorities had been responsible for the victim's fatal fall.

It was not for the Court, in this case, to discuss the individual liability of any police officers present for negligence in view of their insufficient supervision of the victim's conduct. The Court was thus of the view that the Russian authorities had to be held responsible, having regard to the Convention, for the death of the victim, who had been tortured during a period of unrecorded detention, when he was deprived of all the rights normally afforded to persons in custody.

Conclusion: violation (unanimously).

The Court also found, unanimously, that there had been a violation of Article 5 § 1 of the Convention on account of the deprivation of the victim's liberty, and a violation of Articles 2 and 3 in their procedural aspect, given that the criminal investigation conducted following the victim's death and the allegations of ill-treatment had not fulfilled the requisite condition of "effectiveness".

Article 41: EUR 45,000 in respect of non-pecuniary damage; EUR 8,500 in respect of pecuniary damage.

Inhuman or degrading treatment

Prolonged failure to provide adequate medical care to seriously ill detainee: *violation*

Ivko v. Russia - 30575/08
Judgment 15.12.2015 [Section III]

Facts – The applicant, who was suffering from hepatitis C and tuberculosis, was detained from October 2007 to May 2013 in relation to a drug-trafficking offence. After his release, he spent two months in a civilian hospital receiving treatment for his tuberculosis, before being rearrested in July 2013 on further drug-trafficking charges. He died in detention in October 2014. In his application to the European Court, lodged in 2008, he complained in particular of a lack of adequate medical care in detention (Article 3 of the Convention). Following his death, his partner, Ms Yusupova informed the Court of her wish to pursue the application on his behalf.

Law – Article 34 (*victim status*): The evidence before the Court convincingly showed that the applicant and Ms Yusupova were in a close relationship equating to "family ties". The circumstances of the applicant's case were similar to those in *Koryak v. Russia* (24677/10, 13 November 2012), in which the Court had allowed the next of kin to continue proceedings before it after the death of the direct victim. Both cases concerned the quality of medical assistance provided to a seriously ill detainee coupled with the question of the existence of effective domestic remedies. The Court therefore considered that Ms Yusupova had a legitimate interest in pursuing the application on the applicant's behalf and that respect for human rights as defined in the Convention and the Protocols required a continuation of the examination of the case.

Conclusion: victim status upheld (unanimously).

Article 3: In the absence of any documents from the Government relating to the applicant's treatment during the period from October 2007 to October 2009, the Court accepted the applicant's

allegations that he had been denied regular medical examinations and anti-relapse treatment. This in itself cast serious doubts on the authorities' fulfilment of their obligations under Article 3 towards the applicant, who, in view of his hepatitis C infection and history of tuberculosis, had required special medical attention.

The Court went on to look more closely at the quality of the treatment the applicant received in institution no. LIU-15 following his admission to that facility in October 2012. On arrival, he was subjected to a number of basic clinical tests and examinations and placed on a drug regimen. However, despite the authorities' knowledge of his long-term affliction with tuberculosis and the fact that he had remained tuberculosis-active for an unusually long period, it was not until February 2013, that is to say over five years after his arrest and the authorities' resultant responsibility to address the applicant's health issues, that a drug susceptibility test was performed for the first time. That test is the primary requirement established by the World Health Organization (WHO) for the correct diagnosis and treatment of all previously treated tuberculosis patients, given the particularly high risk they run of suffering from drug-resistant tuberculosis. The test would not only have allowed the efficient finalising of diagnostic procedures and allocation of the applicant's case to a standard treatment category, but would also have guided the choice of appropriate regimen adjustments in line with the results of the test. The delay in conducting the applicant's test was a breach of the WHO's recommendations and risked depriving the treatment the applicant received of its major therapeutic effects.

In addition, although aware the applicant was suffering from hepatitis C, the authorities took no steps to consider whether his treatment regimen was compatible with his liver disease. The first liver function test was not performed until February 2013, more than three months after the initiation of the new chemotherapy regimen and more than five years after the authorities became aware of his medical condition. The applicant was prescribed hepatoprotectors at the end of October 2013. Such reluctance on the part of the authorities ran counter to the WHO recommendation to perform liver function tests at the start of and during tuberculosis treatment, and to give fewer hepatotoxic drugs to patients with serious liver diseases.

The Court further noted that, following his re-arrest in July 2013, the applicant – who by then was suffering from a severe and extremely advanced stage of tuberculosis requiring comprehensive and complex in-patient treatment – had spent a further three months in detention with no access to the requisite medical aid. For the Court, leaving him for that period without vital medical assistance that might have enabled him to fight the illnesses that were threatening his life was unacceptable.

There had thus been serious deficiencies in the applicant's treatment during the major part of his detention. As a result, the applicant had been exposed to prolonged mental and physical suffering that diminished his human dignity. The authorities' failure to provide him with the medical care he needed amounted to inhuman and degrading treatment within the meaning of Article 3.

Conclusion: violation (unanimously).

The Court also found unanimously a violation of Article 13 of the Convention in view of the absence of an effective domestic remedy to deal with the applicant's complaints of inadequate medical care in detention.

Article 41: EUR 20,000 to be paid to Ms Yusupova; claim in respect of pecuniary damage dismissed.

Inhuman or degrading treatment
Inhuman or degrading punishment

Imposition of exclusion order rendering failed asylum-seeker who could not return home liable to prosecution for overstaying: *inadmissible*

Nzapali v. the Netherlands - 6107/07
Decision 17.11.2015 [Section III]

Facts – The applicant, a national of the Democratic Republic of the Congo and former high-ranking member of the military fled what was then still Zaire following the overthrow of the Mobutu regime in 1997. He and members of his family applied for asylum in the Netherlands, but his application was rejected under Article 1F of the 1951 Geneva Convention relating to the Status of Refugees, as amended, on the grounds that he had been guilty of torture in Zaire. However, he was not expelled as the Netherlands authorities accepted that he faced a real risk of ill-treatment in the event of a return. In April 2004 he was convicted of torture by a Netherlands court and in September 2004 the Minister for Immigration and Integration issued an exclusion order on public-order grounds. After serving his sentence the applicant remained in the Netherlands. He was subsequently rearrested and convicted under Article 197 of the Criminal Code of staying in the

Netherlands while aware that he was subject to an exclusion order. He was given a two-month suspended prison sentence. In upholding that conviction and sentence after the case was remitted to it by the Supreme Court, the court of appeal noted that the applicant had been at fault for staying in the Netherlands illegally as he had not made proper efforts to leave the country. In 2008 the applicant received a Belgian residence permit.

In the Convention proceedings, the applicant complained, *inter alia*, that subjecting him to an exclusion order which caused him to commit a criminal offence simply by being in the Netherlands in a situation where he was unable to travel to any other country had amounted to inhuman or degrading treatment or punishment, contrary to Article 3 of the Convention.

Law – Article 3: Subjecting a person who could not be returned to his or her country of origin to an exclusion order did not, by itself and without more, constitute treatment or punishment contrary to Article 3, even if the person's continued stay in the country concerned in defiance of the exclusion order rendered him or her liable to criminal prosecution and conviction. However, an issue under Article 3 could arise if several sets of criminal proceedings were brought against a person subject to an exclusion order and/or if, despite making reasonable efforts to find a third country prepared to admit him or her, that person continued to face the risk of an interminable series of prosecutions and criminal convictions and was helpless to prevent such a predicament.

Between his being made subject to an exclusion order in September 2004 and his relocation to Belgium in 2008, criminal proceedings had been instituted against the applicant just once. Although he was convicted of the offence of being in the Netherlands while subject to an exclusion order, the sentence was suspended. The reasoning of the domestic courts strongly suggested that a suspended sentence was imposed in recognition of the difficult situation in which the applicant found himself and that the applicant might not have been found criminally liable had he made certain efforts to comply with his obligation to leave the Netherlands. Accordingly, and while account had thus been taken of the applicant's particular situation, it also appeared that he had been in a position to affect the outcome of the criminal proceedings.

The treatment complained had thus not attained the requisite level of severity to engage Article 3.

Conclusion: inadmissible (manifestly ill-founded).

Degrading treatment

Family of asylum-seekers with children, including a baby and a disabled child, left homeless and with no means of subsistence for three weeks: *case referred to the Grand Chamber*

V.M. and Others v. Belgium - 60125/11
Judgment 7.7.2015 [Section II]

Facts – The applicants are a couple and their five children. They are of Roma origin. Their eldest daughter, who had a neuromotor disability from birth, died after the lodging of the application. The family, who come from Serbia, travelled first to Kosovo and then to France, where they lodged an asylum application on grounds of discrimination. Their application was rejected in a final decision of June 2010. The family returned to Serbia and then travelled to Belgium, where they lodged a further asylum request in April 2011. Under the Dublin II Regulation[1] they were served with a decision refusing them leave to remain together with an order to leave the country for France, the country responsible for examining their asylum application. The Belgian authorities stated in particular that there was no evidence that the applicants had left the territory of the European Union Member States for more than three months. The validity of the orders to leave the country was subsequently extended by four months because the mother was pregnant and about to give birth. The applicants appealed against the decision refusing them leave to remain and the orders to leave the country. The proceedings concluded with, among other findings, an acknowledgement by the Aliens Appeals Board that Belgium was responsible for the examination of their asylum application. At the same time, the applicants commenced proceedings seeking regularisation of their immigration status on account of their eldest daughter's medical condition. It was only during the proceedings before the European Court that they learnt of the decision to declare their request inadmissible.

During the asylum proceedings in Belgium the applicants were accommodated in two reception centres. They were expelled from there on 26 September 2011 when the time-limit for enforcement of the orders to leave the country expired. They

1. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

travelled to Brussels, where voluntary associations directed them to a public square where other homeless Roma families were staying. They remained there from 27 September to 5 October 2011. The accommodation centres for asylum seekers took the view that they could not take in the applicants because the appeal against the decision refusing them leave to remain and ordering them to leave the country did not have suspensive effect. Following the intervention of the Children's Commissioner for the French-speaking Community, the applicants were taken care of for a few days. After allegedly reporting to a reception centre 160 km away – an assertion contested by the Government – the applicants ended up in a Brussels railway station where they remained, homeless and without any means of subsistence, for three weeks until a charity arranged for their return to Serbia in October 2011. After they had returned to Serbia the eldest daughter's condition deteriorated and she died of a pulmonary infection in December 2011.

In the proceedings before the European Court the applicants complained in particular of the failure, during the period between their eviction from the accommodation centre on 26 September 2011 and their departure for Serbia on 25 October 2011, to provide them with reception facilities to meet their essential needs.

In a judgment of 7 July 2015 (see Information Note 187) a Chamber of the Court held, in particular, that there had been a violation of Article 3 of the Convention on account of the family's living conditions combined with the lack of any prospect of an improvement in their situation, and a violation of Article 13 on account of the lack of an effective remedy in respect of the asylum proceedings.

On 14 December 2015 the case was referred to the Grand Chamber at the Government's request.

Insufficient separation of sanitary facilities from remainder of prison cell: *no violation*

Szafrański v. Poland - 17249/12
Judgment 15.12.2015 [Section IV]

(See Article 8 below, page 22)

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Applications against Ukraine concerning non-enforcement of domestic decisions: *relinquishment in favour of the Grand Chamber*

Burmych and Others v. Ukraine - 46852/13 et al.
[Section V]

The applicants were unable to obtain the enforcement of domestic decisions rendered in their own or their deceased family members' favour because of the authorities' failure to take specific budgetary or regulatory measures and thus to adopt the measures that had been indicated by the European Court in the *Yuriy Nikolayevich Ivanov* pilot judgment.

In 2015 the Government submitted to the Court unilateral declarations in 817 cases in which they expressed their readiness to inforce the judgments that remained unenforced and to pay each applicant EUR 1,000 in compensation.

In their applications to the Court the applicants essentially complain about the national authorities' failure to enforce the domestic decisions in their favour or about excessive delays in their enforcement. They also complain about the lack of effective domestic remedies in respect of those complaints. The case was communicated under Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1.

On 8 December 2015 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber.

(See *Yuriy Nikolayevich Ivanov v. Ukraine*, 40540/04, 15 October 2009, Information Note 123 and Information Note 149)

Supreme Court ruling that civil courts had no jurisdiction to hear pastor's claim for wrongful dismissal by church: *no violation*

Károly Nagy v. Hungary - 56665/09
Judgment 1.12.2015 [Section II]

Facts – The applicant was a pastor in a Calvinist parish. In 2005 he was dismissed for a comment he had made in a local newspaper. He brought a

compensation claim against his employer, the Hungarian Calvinist Church, in a labour court but the proceedings were discontinued for want of jurisdiction, since the applicant's relationship with his employer was regulated by ecclesiastical law. The applicant subsequently lodged a claim in the civil courts, but this too was ultimately discontinued after the Supreme Court ruled, following an analysis of the contractual relationship, that the civil courts had no jurisdiction either.

Before the European Court the applicant contended that the Supreme Court's ruling that the State courts had no jurisdiction had deprived him of access to a court, in breach of Article 6 § 1.

Law – Article 6 § 1: The applicant had not been prevented from bringing his claim before the domestic courts. Indeed, the case had been litigated up to the Supreme Court, which had examined whether the Calvinist Church owed him any contractual obligation pursuant to the relevant domestic law provisions, before concluding that the pastoral relationship between the applicant and the Calvinist Church was not regulated by civil law, but by ecclesiastical law. The Court could not conclude that the Supreme Court's decision was arbitrary or manifestly unreasonable and it was not its task to decide whether the domestic law provisions should have been extended to the applicant's engagement with the Calvinist Church, since it could not substitute its own views for those of the domestic courts as to the proper interpretation and content of domestic law.

Thus, the inability of the applicant to obtain an adjudication of his claim against the Calvinist Church did not flow from immunity, either *de facto* or in practice, of the Church, or any another procedural obstacle, but from the applicable principles governing the substantive right to fulfilment of contractual obligations and to compensation for breach of contract, as defined by the domestic law.

In conclusion, although the Supreme Court held that the State courts had no jurisdiction to examine the applicant's claim, it had in fact examined the claim in the light of the relevant domestic legal principles of contract law. The applicant could not, therefore, argue that he had been deprived of the right to a determination of the merits of his claim.

Conclusion: no violation (four votes to three).

(See the Factsheet on Work-related rights)

Article 6 § 1 (criminal)

Impartial tribunal

Presence on jury of juror who knew the victim and commented on her character: *violation*

Kristiansen v. Norway - 1176/10
Judgment 17.12.2015 [Section V]

Facts – In his application to the European Court, the applicant complained under Article 6 § 1 of the Convention that in criminal proceedings in which he was convicted of attempted rape, one of the members of the jury had lacked impartiality. During the proceedings the juror in question informed the presiding judge that she had prior knowledge of the victim. Despite noting that she "had formed a picture [*bilde*] of the victim from many years ago where she at the time had experienced her as a quiet and calm person", the High Court considered that it was not capable of influencing her assessment of the question of guilt.

Law – Article 6 § 1: The Court endorsed the domestic courts' view that previous sporadic contact between the victim and the juror could not, on their own, disqualify the juror, as they had not involved personal knowledge and had occurred several years previously. Although the exact relevance of the juror's depiction of the victim as "a quiet and calm person" had given rise to different interpretations at the domestic level, the Court did not find it necessary to determine its exact meaning. However, it noted that the statement was clearly not negative and could actually convey a positive portrait of the victim, susceptible of influencing the juror's evaluation and/or that of other members of the jury to the defendant's disadvantage. That possibility was reinforced by the fact that the juror's value judgment had been expressed at a time when it could be perceived as a comment or reaction to the oral evidence just given by the victim and the applicant respectively.

In these circumstances, the applicant had a legitimate reason to fear that the juror might have had preconceived ideas capable of having a bearing on his innocence or guilt. Moreover, the applicant's lawyer had requested that the juror be disqualified on grounds of lack of impartiality, the victim's assistant lawyer had supported the motion, and the public prosecutor had expressed understanding for it, albeit without taking a stance. Whilst none of these objections and comments was by itself decisive, when considered together they did provide a

strong indication of the importance of appearances in the present case. However, despite these indications that the juror might lack impartiality, the domestic court had neither discharged her not sought to redirect the jury, for instance by inviting the jurors to rely on evidence presented in court alone and stressing that they must not allow any other factor to influence their decision.

Having regard to the cumulative effect of these circumstances, there were justifiable grounds on which to doubt the trial court's impartiality.

Conclusion: violation (unanimously).

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

(See also *Ekeberg and Others v. Norway*, 11106/04, 31 July 2007, Information Note 99; *Peter Armstrong v. the United Kingdom*, 65282/09, 9 December 2014, Information Note 180; and *Hanif and Khan v. the United Kingdom*, 52999/08 and 61779/08, 20 December 2011, Information Note 147)

Article 6 § 3 (d)

Examination of witnesses

Inability to examine absent witnesses, whose testimonies carried considerable weight in applicant's conviction: *violation*

Schatschaschwili v. Germany - 9154/10
Judgment 15.12.2015 [GC]

Facts – The applicant was convicted of aggravated robbery in conjunction with aggravated extortion and sentenced to nine and a half years' imprisonment. As regards one of the offences, the trial court relied in particular on witness statements made by the two victims of the crime to the police at the pre-trial stage. The statements were read out at the trial as the two witnesses had gone back to Latvia and refused to testify as they continued to be traumatised by the crime.

In a judgment of 17 April 2014 a Chamber of the Court found, by five votes to two, that there had been no violation of the applicant's rights under Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention. On 8 September 2014 the case was referred to the Grand Chamber at the applicant's request (see Information Note 177).

Law – Article 6 § 1 in conjunction with Article 6 § 3 (d): In order to assess whether the overall fairness of the applicant's trial had been impaired by the use of the statements previously made by witnesses who did not attend the trial, the Court applied and further clarified the test laid down in its Grand Chamber judgment in *Al-Khawaja and Tahery v. the United Kingdom* ([GC], 26766/05 and 22228/06, 15 December 2011, Information Note 147). In particular, while it was clear that each of the three steps of the test had to be examined if the questions in steps one (whether there was a good reason for the non-attendance of the witness) and two (whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction) were answered in the affirmative, it remained uncertain whether all three steps of the test had to be examined in cases in which either the question in step one or that in step two was answered in the negative, as well as in what order the steps were to be examined. The Court considered that:

(i) The absence of good reason for the non-attendance of a witness, while it could not of itself be conclusive of the unfairness of a trial, was nevertheless a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which could tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d).

(ii) The existence of sufficient counterbalancing factors had to be reviewed not only in cases in which the evidence given by an absent witness had been the sole or the decisive basis for the conviction, but also in those cases where it had carried significant weight and its admission could have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness.

(iii) It would, as a rule, be pertinent to examine the three steps of the *Al-Khawaja* test in the order defined in that judgment. However, all three steps were interrelated and, taken together, served to establish whether the criminal proceedings at issue had, as a whole, been fair. It could therefore be appropriate, in a given case, to examine the steps in a different order, in particular if one of the steps proved to be particularly conclusive as to either the fairness or the unfairness of the proceedings.

The Court went on to apply the *Al-Khawaja* test to the facts of the applicant's case:

(a) *Whether there was good reason for the non-attendance of the witnesses at the trial* – The Court noted at the outset that the trial court had considered that the witnesses had not sufficiently substantiated their refusal to testify and had not

accepted their state of health or fear as justification for their absence at the trial. After contacting the witnesses individually and proposing different solutions, the trial court had also repeatedly asked the Latvian courts to either have the witnesses' state of health and ability to testify examined by a public medical officer or to compel them to attend the hearing in Latvia. Since these efforts proved futile the trial court had admitted the records of the witnesses' examination at the investigation stage as evidence in the proceedings. Thus, the witnesses' absence was not imputable to the trial court. Accordingly, there had been good reason, from the trial court's perspective, for the non-attendance of the witnesses at the trial and for admitting the statements they had made at the pre-trial stage in evidence.

(b) *Whether the evidence of the absent witnesses was the sole or decisive basis for the applicant's conviction* – The domestic courts did not clearly indicate whether they considered the witness statements in question as "decisive" evidence, that is, as being of such significance as to be likely to be determinative of the outcome of the case. After assessing all the evidence that had been before the domestic courts, the Court noted that the two victims of the crime were the only eyewitnesses to the offence in question. The only other available evidence was either hearsay or merely circumstantial technical and other evidence that was not conclusive. In these circumstances, the evidence of the absent witnesses had been "decisive", that is, determinative of the applicant's conviction.

(c) *Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured* – In its reasoning, the trial court had made it clear that it was aware of the reduced evidentiary value of the untested witness statements. It had compared the content of the statements made by the victims at the investigation stage and found that they had given detailed and coherent descriptions of the circumstances of the offence. It had further observed that the witnesses' inability to identify the applicant showed that they had not testified with a view to incriminating him. Moreover, in assessing the witnesses' credibility the trial court had also addressed different aspects of their conduct in relation to their statements. The trial court had therefore examined the credibility of the absent witnesses and the reliability of their statements in a careful manner.

Furthermore, it had had before it additional incriminating hearsay and circumstantial evidence supporting the witness statements. In addition, during the trial the applicant had had the opportunity to give his own version of the events and to cast doubt on the credibility of the witnesses also by cross-examining the witnesses who had given hearsay evidence. However, he had not had the possibility to question the two victims indirectly or at the investigation stage.

In fact, even though the prosecution authorities could have appointed a lawyer to attend the witness hearing before the investigating judge, these procedural safeguards were not used in the applicant's case. In this connection, the Court agreed with the applicant that the witnesses were heard by the investigating judge because, in view of their imminent return to Latvia, the prosecution authorities considered that there was a danger of their evidence being lost. In this context, and bearing in mind that under domestic law the written records of a witness's previous examination by an investigating judge could be read out at the trial under less strict conditions than the records of a witness examination by the police, the authorities had taken the foreseeable risk, which subsequently materialised, that neither the accused nor his counsel would be able to question them at any stage of the proceedings.

In view of the importance of the statements of the only eyewitnesses to the offence of which the applicant was convicted, the counterbalancing measures taken by the domestic court had been insufficient to permit a fair and proper assessment of the reliability of the untested evidence. Therefore, the absence of an opportunity for the applicant to examine or have examined the two witnesses at any stage of the proceedings had rendered the trial as a whole unfair.

Conclusion: violation (nine votes to eight).

Article 41: no award in respect of damage.

ARTICLE 8

Respect for private life

Shortcomings in legal framework governing secret surveillance of mobile telephone communications: *violation*

Roman Zakharov v. Russia - 47143/06
Judgment 4.12.2015 [GC]

Facts – The applicant, who was the editor-in-chief of a publishing company, brought judicial proceed-

ings against three mobile network operators, complaining of interference with his right to privacy of his telephone communications. He claimed that pursuant to the relevant domestic law, the mobile network operators had installed equipment which permitted the Federal Security Service (FSB) to intercept all telephone communications without prior judicial authorisation. He sought an injunction ordering the removal of the equipment and ensuring that access to telecommunications was given to authorised persons only.

The domestic courts rejected the applicant's claim, finding that he had failed to prove that his telephone conversations had been intercepted or that the mobile operators had transmitted protected information to unauthorised persons. Installation of the equipment to which he referred did not in itself infringe the privacy of his communications.

In the Convention proceedings the applicant complained that the system of covert interception of mobile telephone communications in Russia did not comply with the requirements of Article 8 of the Convention. On 11 March 2014 a Chamber of the Court relinquished jurisdiction to the Grand Chamber.

Law – Article 8

(a) *Victim status* – The Court's approach in *Kennedy v. the United Kingdom* was best tailored to the need to ensure that the secrecy of surveillance measures does not result in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities and the Court. Accordingly, an applicant can claim to be the victim of a violation occasioned by the mere existence of secret surveillance measures or of legislation permitting such measures, if the following conditions are satisfied:

(i) *Scope of the legislation* – The Court will take into account the scope of the legislation permitting secret surveillance measures by examining whether the applicant can possibly be affected by it, either because he or she belongs to a group of persons targeted by the contested legislation or because the legislation directly affects all users of communication services by instituting a system where any person can have his or her communications intercepted.

(ii) *Availability of remedies at national level* – The Court will take into account the availability of remedies at the national level and will adjust the degree of scrutiny depending on the effectiveness of such remedies. Where the domestic system does not afford an effective remedy, widespread suspicion and concern among the general public that secret surveillance powers are being abused cannot be said to be unjustified. In such circumstances the menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8. There is therefore a greater need for scrutiny by the Court and an exception to the rule which denies individuals the right to challenge a law *in abstracto* is justified. In such cases the individual does not need to demonstrate the existence of any risk that secret surveillance measures were applied to him. By contrast, if the national system provides for effective remedies, a widespread suspicion of abuse is more difficult to justify. In such cases, the individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures only if he is able to show that, due to his personal situation, he is potentially at risk of being subjected to such measures.

In the instant case, the contested legislation directly affected all users of the mobile telephone services, since it instituted a system of secret surveillance under which any person using the mobile telephone services of national providers could have their mobile telephone communications intercepted, without ever being notified of the surveillance. Furthermore, the domestic law did not provide for effective remedies for persons suspecting they had been subjected to secret surveillance. An examination of the relevant legislation *in abstracto* was therefore justified. The applicant did not need to demonstrate that due to his personal situation he had been at risk of being subjected to secret surveillance. He was thus entitled to claim to be the victim of a violation of the Convention.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – The mere existence of the contested legislation amounted in itself to an interference with the exercise of the applicant's rights under Article 8. The interception of mobile telephone communications had a basis in the domestic law and pursued the legitimate aims of the protection of national security and public safety, the prevention of crime and the protection of the economic well-being of the country. It remained to be ascertained whether the domestic law was accessible and contained adequate and effective safeguards and guarantees to meet the requirements of "foreseeability" and "necessity in a democratic society".

(i) *Accessibility* – It was common ground that almost all the domestic legal provisions governing secret surveillance had been officially published and were accessible to the public. Although there was some dispute over the accessibility of further provisions, the Court noted that they had been published in an official ministerial magazine and could be accessed through an internet legal database, and so did not find it necessary to pursue the issue further.

(ii) *Scope of application of secret surveillance measures* – The nature of the offences which could give rise to an interception order was sufficiently clear. However, it was a matter of concern that the domestic law allowed secret interception of communications in respect of a very wide range of offences. Furthermore, interception could be ordered not only in respect of a suspect or an accused, but also in respect of persons who might have information about an offence. While the Court had found in a previous case[1] that interception measures in respect of a person possessing information about an offence might be justified under Article 8, it noted in the instant case that the domestic law did not clarify who might fall into that category in practice. Nor did the law give any indication of the circumstances under which communications could be intercepted on account of events or activities endangering Russia's national, military, economic or ecological security. Instead, it left the authorities an almost unlimited discretion in determining which events or acts constituted such a threat and whether the threat was serious enough to justify secret surveillance. This created possibilities for abuse.

(iii) *Duration of secret surveillance measures* – While the domestic law contained clear rules on the duration and renewal of interceptions providing adequate safeguards against abuse, the relevant provisions on discontinuation of the surveillance measures did not provide sufficient guarantees against arbitrary interference.

(iv) *Procedures for,* inter alia*, storing and destroying intercepted data* – Domestic law contained clear rules governing the storage, use and communication of intercepted data, making it possible to minimise the risk of unauthorised access or disclosure. However, although the Court considered reasonable the six-month time-limit applicable to the storage of intercept material if the person concerned was not charged with a criminal offence, it deplored the lack of a requirement to destroy immediately any data that were not relevant to the purpose for which they were obtained. The automatic storage for six months of clearly irrelevant data could not be considered justified under Article 8.

Further, in cases where the person under surveillance was charged with a criminal offence the trial judge had unlimited discretion under the domestic law to decide whether to order the further storage or destruction of intercept material used in evidence. Ordinary citizens thus had no indication as to the circumstances in which intercept material could be stored. The domestic law was, therefore, not sufficiently clear on this point.

(v) *Authorisation of interceptions* – As regards the authorisation procedures, any interception of telephone or other communications had to be authorised by a court. However, judicial scrutiny was limited in scope. In particular, materials containing information about undercover agents or police informers or about the organisation and tactics of operational-search measures could not be submitted to the judge and were therefore excluded from the court's scope of review. Thus the failure to disclose the relevant information to the courts deprived them of the power to assess whether there was a sufficient factual basis for suspecting persons in respect of whom operational-search measures were requested of a criminal offence or of activities endangering national, military, economic or ecological security. Indeed, Russian judges were not instructed to verify the existence of "reasonable suspicion" against the person concerned or to apply the "necessity" and "proportionality" tests.

In addition, the relevant domestic law did not contain any requirements with regard to the content of interception requests or authorisations. As a result, courts sometimes authorised the interception of all telephone communications in an area where a criminal offence had been committed, without mentioning a specific person or telephone number. Some authorisations did not mention the duration for which interception was authorised. Such authorisations granted a very wide discretion to the law-enforcement authorities as to which communications to intercept and for how long.

Furthermore, in cases of urgency it was possible to intercept communications without prior judicial authorisation for up to 48 hours. However, the urgent procedure did not provide sufficient safeguards to ensure that it was used sparingly and only in duly justified cases. The domestic law did not limit the use of the urgent procedure to cases involving immediate serious danger and so gave the authorities unlimited discretion to determine the

1. *Iordachi and Others v. Moldova*, 25198/02, 10 February 2009, Information Note 116.

situations in which it was used, thus creating possibilities for abuse. Furthermore, although under domestic law a judge had to be immediately informed of each instance of urgent interception, the judge's power was limited to authorising the extension of the interception measure beyond 48 hours. Russian law thus did not provide for an effective judicial review of the urgent procedure.

In sum, the authorisation procedures provided for by Russian law were not capable of ensuring that secret surveillance measures were not ordered haphazardly, irregularly or without due and proper consideration.

An added difficulty was that law-enforcement authorities generally had no obligation under the domestic law to show judicial authorisation to the communications service provider before obtaining access to communications, while for their part the service providers were required to install equipment giving the authorities direct access to all users' mobile telephone communications. The system was therefore particularly prone to abuse.

(vi) *Supervision* – The prohibition set out in domestic law on logging or recording interceptions made it impossible for the supervising authority to discover interceptions carried out without proper judicial authorisation. Combined with the authorities' technical ability to intercept communications directly, this provision rendered any supervisory arrangements incapable of detecting unlawful interceptions and was therefore ineffective.

Where interceptions were carried out on the basis of proper judicial authorisation, judicial supervision was limited to the initial authorisation stage. Subsequent supervision was entrusted to the President, Parliament, the Government, the Prosecutor General and competent lower-level prosecutors. The domestic law did not set out the manner in which the President, Parliament and the Government were to supervise interceptions. There were no publicly available regulations or instructions describing the scope of their review, the conditions under which it could be carried out, or the procedures for reviewing the surveillance measures or remedying breaches.

While a legal framework provided, at least in theory, for some supervision by prosecutors, it was not capable in practice of providing adequate and effective guarantees against abuse. In particular:

– there were doubts about the prosecutors' independence as they were appointed and dismissed by the Prosecutor General after consultation with the regional executive authorities and had overlapping functions as they both approved requests for interception and then supervised their implementation;

– there were limits on the scope of their supervision (prosecutors had no information about the work of undercover agents and surveillance measures related to counter-intelligence escaped their supervision as the persons concerned would be unaware they were subject to surveillance and were thus unable to lodge a complaint);

– there were limits on their powers, for example, even though they could take measures to stop or remedy breaches and to bring those responsible to account, there was no specific provision requiring destruction of unlawfully obtained intercept material;

– their supervision was not open to public scrutiny and knowledge as their reports were not published or otherwise accessible to the public;

– the Government had not submitted any inspection reports or decisions by prosecutors ordering the taking of measures to stop or remedy a detected breach of law.

(vii) *Notification of interception and available remedies* – Persons whose communications were intercepted were not notified. Unless criminal proceedings were opened against the interception subject and the intercepted data was used in evidence, the person concerned was unlikely ever to find out if his or her communications had been intercepted.

Persons who did somehow find out could request information about the data concerned. However, in order to lodge such a request they had to be in possession of the facts of the operational-search measures to which they were subjected. Access to information was thus conditional on a person's ability to prove that his or her communications had been intercepted. Furthermore, interception subjects were not entitled to obtain access to documents relating to the interception of their communications: they were at best entitled to receive "information" about the collected data. Such information was provided only in very limited circumstances, namely if the person's guilt had not been proved in accordance with law and the information did not contain State secrets. Since, under Russian law, information about the facilities used in operational-search activities, the methods employed, the officials involved and the data collected constituted a State secret, the possibility of obtaining information about interceptions appeared ineffective.

The judicial remedies referred to by the Government were available only to persons in possession of information about the interception of their communications. Their effectiveness was therefore undermined by the absence of a requirement to notify the interception subject or of an adequate possibility to request and obtain information about interceptions from the authorities. Accordingly, Russian law did not provide an effective judicial remedy against secret surveillance measures in cases where no criminal proceedings were brought against the interception subject.

In sum, the domestic legal provisions governing the interception of communications did not provide adequate and effective guarantees against arbitrariness and the risk of abuse. The domestic law did not meet the "quality of law" requirement and was incapable of keeping the "interference" to what was "necessary in a democratic society".

Conclusion: violation (unanimously).

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

(See *Weber and Saravia v. Germany* (dec.), 54934/00, 29 June 2006, Information Note 88; *Kennedy v. the United Kingdom*, 26839/05, 18 May 2010, Information Note 130; see, more generally, the Handbook on European data protection law)

Absence of procedural safeguards or effective judicial review of decision to override lawyer's privilege against disclosure of her bank statements in criminal proceedings: *violation*

Brito Ferrinho Bexiga Villa-Nova v. Portugal
- 69436/10
Judgment 1.12.2015 [Section IV]

Facts – Having failed to pay value-added tax on fees received, the applicant, who is a lawyer, was asked by the tax authorities to produce her personal bank statements. She refused to do so, on grounds of professional confidentiality and bank secrecy.

The prosecuting authorities opened an investigation against the applicant for tax fraud. After being charged and giving evidence, the applicant acknowledged that the payments of her fees had been made into her personal bank account. However, she refused to produce the bank statements. The prosecuting authorities requested the criminal investigating judge to lodge an interlocutory application for professional confidentiality to be lifted. The Court of Appeal granted the request. The applicant appealed against the Court of Appeal's judgment to the Supreme Court, which declared her appeal inadmissible.

Law – Article 8: Consultation of the applicant's bank statements had amounted to an interference, in accordance with the law, with her right to respect for professional confidentiality, which fell within the scope of private life under Article 8 of the Convention.

That interference had pursued a legitimate aim, namely, "the prevention of crime", as the purpose had been to search for evidence and proof in the context of an investigation against the applicant for tax fraud.

In the ensuing criminal proceedings a request to lift professional confidentiality had been made by the prosecuting authorities following the applicant's refusal to produce the bank statements requested. Those criminal proceedings had been conducted before a judicial body but without the applicant's participation. Accordingly, she had not been involved at any time and had therefore been unable to submit her arguments. Furthermore, she had not been able to reply to the request made by the prosecuting authorities to the criminal investigating judge or to the opinion of the deputy prosecutor attached to the Court of Appeal.

The relevant legislation provided that the Lawyers Association had to be consulted in proceedings to have professional confidentiality lifted. In the present case, however, the Lawyers Association had not been consulted. Even if, having regard to the domestic law, an opinion from the Lawyers Association would not have been binding, the Court considered that an opinion from an independent body should have been sought in the present case because the information requested had been covered by professional confidentiality.

With regard to an "effective review" for the purposes of challenging the disputed measure, the applicant's appeal to the Supreme Court against the Court of Appeal's decision had not been examined on the merits as the Supreme Court had considered that the applicant had not had a right of appeal against the Court of Appeal's judgment. Without substituting itself for the domestic courts, the Court found that the mere fact that the applicant's appeal had been declared inadmissible by the Supreme Court had not satisfied the requirement of an "effective review" inherent in Article 8 of the Convention. Accordingly, the applicant had

not had a remedy by which to challenge the measure complained of.

Regard being had to the lack of procedural guarantees and effective judicial review of the measure in question, the Portuguese authorities had failed to strike a fair balance between the demands of the general interest and the requirements of the protection of the applicant's right to respect for her private life.

Conclusion: violation (unanimously).

Article 41: EUR 3,250 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Michaud v. France*, 12323/11, 6 December 2012, Information Note 158, and *Sérvulo & Associados - Sociedade de Advogados, RL, and Others v. Portugal*, 27013/10, 3 September 2015, Information Note 188)

Disclosure of banking information to tax authorities of another State pursuant to bilateral agreement: *no violation*

G.S.B. v. Switzerland - 28601/11
Judgment 22.12.2015 [Section III]

Facts – In 2008 the US tax authorities (Inland Revenue Service - IRS) discovered that thousands of US taxpayers were holders of bank accounts with the Swiss bank UBS SA (UBS) in Geneva which had not been declared to their national authorities or were the beneficial owners of such accounts. In 2009 the IRS brought civil proceedings to order UBS to hand over the identities of its 52,000 US customers and data on the accounts held by the latter. Switzerland was concerned that the dispute between the US authorities and UBS might give rise to a conflict between Swiss and US law should the IRS obtain that information, and the civil proceedings were therefore suspended pending an extra-judicial agreement. With a view to identifying the taxpayers in question, the Government of the Swiss Confederation and the United States concluded an agreement concerning the IRS's request for information relating to UBS ("Agreement 09"). Switzerland undertook to deal with the US request for administrative cooperation concerning the UBS's American customers according to the criteria set out in the agreement. In response to a request from the IRS, the Swiss Federal Tax Administration (AFC) instigated an administrative cooperation procedure and invited the bank UBS to supply detailed files on the customers mentioned in the appendix to Agreement 09.

This was the background against which UBS transmitted the applicant's file to the AFC in 2010. An initial decision by the AFC was set aside by the Swiss Federal Administrative Court on procedural grounds. After receiving the applicant's observations, the AFC stated that all the conditions had been met for affording administrative cooperation to the IRS and for ordering the requested documents to be handed over to the latter. The applicant's appeals to the Federal Administrative Court were dismissed. In December 2012 his bank details were transmitted to the US tax authorities. During the examination of the present case the US authorities were still carrying out their investigations and the applicant had not yet been charged with any criminal offence.

Law – Article 8: The applicant had suffered an interference with his right to respect for his private life on account of the transmission of his bank details to the US tax authorities. There can be no doubt that information on bank accounts constitutes personal data protected under Article 8 of the Convention.

As regards the alleged lack of foreseeability concerning the retroactive application of the treaties at issue, the Swiss Federal Administrative Court had well-established case-law to the effect that the provisions on administrative and criminal-law cooperation requiring third parties to provide specific information were procedural in nature and therefore applied, in principle, to all current or future proceedings, including those relating to any tax years pre-dating their adoption. Moreover, it could not be held that the former restrictive practice of the Swiss authorities in matters of administrative cooperation in the tax field created a possible legitimate expectation on the applicant's part that he could continue to invest his assets in Switzerland free of any supervision by the relevant US authorities, or even free simply of the possibility of retroactive investigations.

Since the banking sector is an economic branch of great importance to Switzerland, the impugned measure, which formed part of an all-out effort by the Swiss Government to settle the conflict between the UBS bank and the US tax authorities, could validly be considered as conducive to protecting the country's economic well-being. In this context, the US tax authorities' allegations against Swiss banks could have jeopardised the very survival of UBS, a major player in the Swiss economy employing a large number of persons, which explains Switzerland's interest in finding an effective legal solution in cooperation with the US.

By concluding a bilateral agreement Switzerland averted a major conflict with the US. The measure therefore pursued a legitimate aim.

As regards the necessity of the measure, it should be noted that it only concerned the applicant's bank account details, that is to say purely financial information. No private details or data closely linked to his identity, which would have deserved enhanced protection, had been transmitted. It follows that Switzerland had had an extensive margin of appreciation in this regard. Concerning the effect of the impugned measure on the applicant, his bank details had been forwarded to the relevant US authorities so that they could ascertain whether the applicant had in fact honoured his tax obligations, and if not, take the requisite legal action. The commencement of criminal proceedings remained a matter of sheer speculation. Moreover, the applicant had benefited from various procedural safeguards against the transfer of his data to the US tax authorities. First of all, he had been able to lodge an appeal with the Federal Administrative Court against the AFC's decision. That Court had subsequently set aside the said decision on the grounds of a violation of the applicant's right to a hearing. The AFC had consequently invited the applicant to submit any comments within a given time. The applicant had availed himself of that right. The AFC had then given a fresh, duly reasoned decision finding that all the conditions had been met for affording administrative cooperation. The applicant had subsequently lodged a second appeal with the Federal Administrative Court, which dismissed it. The applicant had thus benefited from several effective and genuine procedural guarantees to challenge the disclosure of his bank details and obtain protection against the arbitrary implementation of the agreements concluded between Switzerland and the United States.

Regard being had to all the circumstances of the case, particularly the fact that the data disclosed had been relatively impersonal in nature, it had not been unreasonable for Switzerland to have prioritised the general interest of an effective and satisfactory settlement with the United States over the applicant's private interests. That being the case, Switzerland had not exceeded its margin of appreciation.

Conclusion: no violation (unanimously).

The Court also unanimously concluded that there had been no violation of Article 14 read in conjunction with Article 8 of the Convention.

Respect for private life
Respect for correspondence

Alleged mass surveillance of human-rights organisations: *communicated*

10 human-rights organisations v. the United Kingdom - 24960/15 et al.
[Section I]

The applicants are ten human-rights organisations. They communicate on a regular basis with a range of groups and individuals, both nationally and internationally, as part of their human-rights activities. The information contained in their communications frequently includes material which is sensitive, confidential and, in some cases, legally privileged.

Because of the nature of their activities, the applicants believe that it is very likely that the content of their private communications and their communications data have been obtained by the United Kingdom intelligence services via interception powers exercised pursuant to the Regulation of Investigatory Powers Act 2000 (RIPA), under the domestic interception and collection programme, Tempora, or by way of the Prism or Upstream programmes operated by the United States National Security Agency (NSA).

Between June and December 2013 the applicants lodged complaints with the Investigatory Powers Tribunal (IPT) alleging that the intelligence services and the UK Home and Foreign Secretaries had acted in violation of Articles 8, 10, and 14 of the Convention. In the absence of any confirmation or denial by the Government that the applicants' communications had actually been intercepted, the IPT determined the legal issues on the basis that they had, the question being whether, on that assumption, the interception, retention, storage and sharing of the applicants' data were in accordance with the law under Articles 8 and 10, taken alone and together with Article 14. The internal arrangements regulating the conduct and practice of the intelligence services were examined in a closed hearing at which the applicants were neither present nor represented. Following that hearing the Government disclosed information about the arrangements to the applicants in a note of 9 October 2014.

The IPT considered the applicants' complaints in three judgments of 5 December 2014, and 6 February and 22 June 2015. It found in relation to the receipt of intercept material from Prism and

Upstream that the internal arrangements had since the 9 October 2014 disclosure by the Government been sufficiently signposted and that they were also subject to appropriate oversight. The arrangements had thus contravened Articles 8 or 10 of the Convention prior to the disclosure, but no longer did so.

As regards interceptions of external communications pursuant to a warrant issued under section 8(4) RIPA, the IPT found that the regime and safeguards were sufficiently compliant with the requirements the European Court had laid down in *Weber and Saravia* for the interference to be "in accordance with the law" for the purposes of Article 8 of the Convention. It did, however, find two "technical" breaches of Article 8 concerning in one instance the retention for longer than permitted of lawfully intercepted material and in the other a failure to follow the proper selection-for-examination procedure. It made no award of compensation.

In their applications to the European Court the applicants argue that the legal framework governing the interception of communications content and data is incompatible with Articles 8 and 10 of the Convention and that the interference resulting from the Tempora programme is not "necessary in a democratic society" as communications are intercepted and retained without any reasonable suspicion and there is no judicial oversight or authorisation for interception. The applicants also complain under Article 6 that the proceedings before the IPT violated their right to a fair hearing, in particular in that the IPT had wrongly held closed hearings, failed to ensure they were effectively represented in those hearings and failed to order the disclosure of documents. Finally, the applicants complain under Article 14 in conjunction with Articles 8 and 10 that the RIPA framework is indirectly discriminatory on grounds of nationality and national origin since it grants additional safeguards to people known to be in the British islands but denies them to those abroad.

Communicated under Articles 6, 8 and 10 and under Article 14 in conjunction with Articles 8 and 10.

(See also *Roman Zhakarov v. Russia* [GC], 47143/06, 4 December 2015, Information Note 191; *Weber and Saravia v. Germany* (dec.), 54934/00, 29 June 2006, Information Note 88; and *Kennedy v. the United Kingdom*, 26839/05, 18 May 2010, Information Note 130; see, more generally, the Handbook on European data protection law)

Respect for family life

Removal of husband under Dublin Convention following refusal to recognise his alleged marriage to 14-year-old bride: *no violation*

Z.H. and R.H. v. Switzerland - 60119/12
Judgment 8.12.2015 [Section III]

Facts – The applicants, who were Afghan nationals, requested asylum in Switzerland after previously registering as asylum-seekers in Italy. They presented themselves to the Swiss asylum authorities as a married couple, saying they had been married at a religious ceremony in Iran when the first applicant was 14 and her husband, the second applicant, 18. They did not produce a marriage certificate. Their request for asylum was rejected. The second applicant was removed to Italy, but managed to return illegally three days later and was allowed to remain. In the appeal proceedings against the refusal, the domestic courts found, among other things, that the applicants' marriage was incompatible on grounds of public policy given that sexual intercourse with a child under the age of 16 was a criminal offence under Swiss law. The applicants could not therefore claim any right to family life under Article 8 of the Convention.

In the Convention proceedings, the applicants alleged that the second applicant's expulsion to Italy in 2012 had violated Article 8 of the Convention and that there would be a further violation if he was expelled again.

Law – Article 8: The Court saw no reason to depart from the Swiss Federal Administrative Court's findings that the applicants' religious marriage was invalid under Afghan law and was in any case incompatible with Swiss *ordre public* owing to the first applicant's young age. Article 8 of the Convention could not be interpreted as imposing on any State party to the Convention an obligation to recognise a marriage, religious or otherwise, contracted by a 14-year-old child. Nor could such obligation be derived from Article 12 of the Convention. Article 12 expressly provided for regulation of marriage by national law and given the sensitive moral choices concerned and the importance to be attached to the protection of children and the fostering of secure family environments, the Court should not rush to substitute its own judgment for that of the national authorities.

The national authorities had therefore been justified in considering that the applicants, who had taken no steps to seek recognition of their religious marriage in Switzerland, were not married.

In any event, even if their relationship had qualified as "family life" under Article 8, the second applicant had returned to Switzerland just three days later and had been allowed to remain in Switzerland and to request a re-examination of his asylum application, which had eventually succeeded. Nor was the first applicant ever prevented from joining the second applicant after his expulsion to Italy.

Bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance had been struck between, on the one hand, the personal interests of the applicants in remaining together in Switzerland while awaiting the outcome of the first applicant's asylum application, and, on the other, the Swiss Government's interests in controlling immigration.

Conclusion: no violation (unanimously).

Positive obligations

Insufficient separation of sanitary facilities from remainder of prison cell: *violation*

Szafrański v. Poland - 17249/12
Judgment 15.12.2015 [Section IV]

Facts – In his application to the European Court the applicant complained that his condition of detention in Wronki Prison were inadequate. In particular, he complained that in seven of the ten cells where he was detained the sanitary facilities were separated from the rest of the cell only by a 1.20 metre-high fibreboard partition and had no doors.

Law

Article 3 (*substantive aspect*): In previous cases where insufficient partitioning between sanitary facilities and the rest of the cell had been at issue, the Court had found a violation of Article 3 only where other aggravating factors were present and as a result of their cumulative effect. However, in the present case the only hardship the applicant had had to bear was the insufficient separation of the sanitary facilities from the rest of the cell. Apart from that, the cells were properly lit, heated and ventilated and he had access to various activities outside the cells. Therefore, the overall circumstances of his detention could not be found to have caused distress and hardship which exceeded the unavoidable level of suffering inherent in detention or went beyond the threshold of severity under Article 3.

Conclusion: no violation (unanimously).

Article 8: Under the Court's case-law the domestic authorities had a positive obligation to provide access to sanitary facilities separated from the rest of the prison cell in such a way as to ensure a minimum of privacy. According to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), a sanitary annex which was only partially separated off was not acceptable in a cell occupied by more than one detainee. In addition, the CPT had recommended that a full partition in all the in-cell sanitary annexes be installed. Despite this, the applicant had been placed in cells in which the sanitary facilities were not fully separated off, and had had to use the toilet in the presence of other inmates. The domestic authorities had thus failed to discharge their positive obligation of ensuring a minimum level of privacy for the applicant.

Conclusion: violation (unanimously).

Article 41: EUR 1,800 in respect of non-pecuniary damage.

(See also the Factsheet on Detention conditions and treatment of prisoners)

ARTICLE 10

Freedom of expression

Penalty imposed on defence counsel for accusing investigating judges of complicity in torture: *violation*

Bono v. France - 29024/11
Judgment 15.12.2015 [Section V]

Facts – The applicant, who was a lawyer, acted for a terrorism suspect arrested in Syria. Through a letter of request, executed by an investigating judge who travelled to that country in person, certain documents were obtained for the file including records of interviews allegedly conducted under torture. The applicant's client was subsequently extradited to France.

The applicant asked that the records which, according to him, had been obtained through the use of torture by the Syrian secret services should be excluded from the file, and argued in that

connection that the French investigating judges had been complicit in the torture in Syria. The court excluded the documents obtained as a result of the international letter of request, but found the applicant's client guilty. On appeal the applicant again sought the exclusion of certain documents and reiterated his comments about the judges. The Court of Appeal granted the exclusion request but rejected his submissions about the judges' conduct and reproached him for using excessive language. The Chairman of the Bar informed the Principal Public Prosecutor, who had sent him a copy of the appeal submissions, that he did not intend to take the matter further. The prosecutor, however, formally called upon the Bar Association body to bring disciplinary proceedings against the applicant. The Bar Council's disciplinary board cleared the applicant of all charges, but the prosecutor appealed. The Court of Appeal then overturned the Bar Council's decision and issued the applicant with a reprimand, together with his disqualification from professional bodies for five years. The applicant and the Chairman of the Bar appealed on points of law but were unsuccessful.

Law – Article 10: The sanction complained of had constituted an interference with the applicant's right to freedom of expression. It was provided for by law and pursued the legitimate aims of protecting the reputation or rights of others and maintaining the authority of the judiciary, to which the investigating judges in the present case belonged.

The remarks in question, being particularly harsh, clearly showed some contempt for the investigating judges. The proper functioning of the courts would not be possible without relations based on consideration and mutual respect between the different stakeholders in the justice system, and first and foremost between judges and lawyers. The applicant's submissions accusing the investigating judges of being complicit in torture were not necessary to fulfil the aim pursued, namely to have statements obtained by torture excluded, especially as the first-instance judges had already accepted that request. Nevertheless, it had to be ascertained whether the disciplinary sanction had struck a fair balance in the context of the proper administration of justice.

The offending remarks had been made in a judicial context, because they had been included in written submissions filed by the defence in the Court of Appeal. Their aim was to obtain, before the defence on the merits, the exclusion by that court of statements made by the applicant's client under torture in Syria. The remarks relied on by the prosecutor did not refer to the judges personally but concerned the manner in which they had carried out the investigation. The applicant had complained in particular about their decision to issue an international letter of request when they should have known that the interrogation methods of the Syrian secret services did not respect human rights and in particular breached Article 3 of the Convention. His accusation thus focused on the judges' procedural choice. Moreover, the national courts had accepted the request for the withdrawal from the case file of the procedural documents drawn up in breach of Article 3, even though that ground of nullity had not been raised during the investigation, neither by the investigating judges themselves nor by the public prosecutor. In that procedural context, the pleadings had contributed directly to the applicant's defence of his client. The remarks amounted more to value judgments, since they referred essentially to a general assessment of the investigating judges' conduct during the investigation. But they had a factual basis. In that connection, while the investigating judge had not been able to take part in the interrogation, he had followed it simultaneously, in Damascus. It had been based on the questionnaire in the international letter of request and the additional questions to which he required answers, in addition to those already recorded. The methods of the Syrian police were notorious, as shown by the testimony submitted in the domestic proceedings and more generally by all the international reports on the subject. Moreover, the applicant's criticisms did not leave the courtroom because they were contained in his written submissions. They were not therefore capable of damaging or threatening the proper functioning of the courts or the reputation of the judiciary in the minds of the general public. However, neither the Court of Appeal nor the Court of Cassation had taken that contextual aspect into account, nor had they considered the limited audience to which the remarks had been addressed.

Having regard to the foregoing, the disciplinary sanction inflicted on the applicant had not been proportionate. In addition to the negative repercussions of such a sanction on the professional career of a lawyer, any *ex post facto* scrutiny of words spoken or written by a lawyer called for particular prudence and moderation. In the present case, the President of the Court of Appeal bench before which the applicant's client had appeared had already asked the applicant during the hearing to use more moderate language, and then, considering his remarks excessive, the court had mentioned in the operative part of the judgment that his

submissions on this point were rejected on the ground that they were dishonourable. Considering the reproach at the hearing to be sufficient, those judges had not seen fit to ask the Principal Public Prosecutor to initiate a disciplinary procedure. The prosecutor had not referred the matter to the disciplinary body until several months after the filing of the pleadings and the Court of Appeal's judgment. In the light of the circumstances as a whole, going beyond the firm and measured position of the Court of Appeal by inflicting a disciplinary sanction on the applicant, the authorities had excessively interfered with the lawyer's mission of defence.

Conclusion: violation (unanimously).

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

(See also *Morice v. France* [GC], 9369/10, 11 July 2013, Information Note 184; and *Nikula v. Finland*, 31611/96, 21 March 2002, Information Note 40)

Freedom to impart information

Order restraining mass publication of tax information: *case referred to the Grand Chamber*

Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland - 931/13
Judgment 21.7.2015 [Section IV]

The first applicant company (Satakunnan) published a magazine providing information on the taxable income and assets of Finnish taxpayers. The information was, by law, public.[1] The second applicant company (Satamedia) offered a service supplying taxation information by SMS text message. In April 2003 the Data Protection Ombudsman requested the Data Protection Board to restrain the applicant companies from processing taxation data in the manner and to the extent they had in 2002 and from passing such data to an SMS-service. The Data Protection Board dismissed the Ombudsman's request on the grounds that the applicant companies were engaged in journalism and so were entitled to a derogation from the provisions of the Personal Data Act. The case subsequently came before the Supreme Administrative Court, which in February 2007 sought a preliminary ruling from the Court of Justice of the European Union (CJEU) on the interpretation of the EU Data Protection Directive.[2] In its judgment of 16 December 2008[3] the CJEU ruled that activities relating to data from documents which were in the public domain under national legislation could be classified as "journalistic activities" if their object was to disclose to the public information, opinions or ideas, irrespective of the medium used to transmit them. In September 2009 the Supreme Administrative Court directed the Data Protection Board to forbid the processing of taxation data in the manner and to the extent carried out by the applicant companies in 2002. Noting that the CJEU had found that the decisive factor was to assess whether a publication contributed to a public debate or was solely intended to satisfy the curiosity of readers, the Supreme Administrative Court concluded that the publication of the whole database collected for journalistic purposes and the transmission of the information to the SMS service could not be regarded as journalistic activity.

In the Convention proceedings the applicant companies complained, among other matters, of a violation of Article 10 of the Convention.

In a judgment of 21 July 2015 a Chamber of the Court held, by six votes to one, that there had been no violation of Article 10 of the Convention. It found that the domestic authorities had relied on relevant and sufficient reasons in their decisions and had struck a fair balance between the competing interests at stake. It noted, in particular, the Supreme Administrative Court's finding that the publication of the whole database could not be regarded as journalistic activity and that the public interest had not required such extensive publication of personal data. In the Chamber's view, the Supreme Administrative Court had balanced the applicant companies' right to freedom of expression against the right to privacy, interpreting the applicant companies' freedom of expression strictly in order to protect the right to privacy. That reasoning was acceptable.

The Chamber also held unanimously that there been a violation of Article 6 § 1 of the Convention in respect of the length of the proceedings before the domestic courts.

On 14 December 2015 the case was referred to the Grand Chamber at the applicants' request.

1. See section 5 of the Act on the Public Disclosure and Confidentiality of Tax Information.

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.

3. *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, C73/07, judgment of 16 December 2008.

Freedom to receive information
Freedom to impart information

Wholesale blocking of access to YouTube without legal basis: *violation*

Cengiz and Others v. Turkey
- 48226/10 and 14027/11
Judgment 1.12.2015 [Section II]

Facts – In May 2008 an Ankara court, finding that the content of ten pages on the YouTube website infringed the prohibition on insulting the memory of Atatürk, imposed a blocking order on the entire website. The applicants, who are active users of the website, appealed against that decision. Their appeal was dismissed on the ground that they were not parties to the investigation procedure and therefore did not have standing to challenge the blocking order.

The legislation on which the court's decision had been based was amended following the facts of the case in such a way as to enable a blanket blocking order to be made in respect of an entire Internet site and no longer just the content in issue.

Law – Article 10: The applicants had lodged their applications with the Court as active users of YouTube, complaining in particular about the repercussions of the blocking order on their academic work and underscoring the important features of the website in question. They stated, in particular, that via their YouTube accounts they used the platform not only to access videos relating to their professional sphere but also, actively, to download and share these materials. Some of them also pointed out that they published recordings about their academic activities. Furthermore, not only did YouTube publish artistic and musical works, it was also a very popular platform for political speeches and political and social activities. The material published by YouTube included, among other things, information that could be of particular interest for everyone. The blocking order blocked access to a website containing specific information of interest to the applicants that was not easily accessible by other means. The website also constituted an important source of communication for the applicants. Furthermore, YouTube was also a video website via which users could send, watch and share videos and was undoubtedly an important means of exercising freedom to receive or impart information and ideas. In particular, political information not conveyed by the traditional media was often imparted through YouTube, which had fostered the emergence of citizen journalism. In that sense the platform was unique in terms of its features, its level of accessibility and above all its potential impact, and there had been no equivalent at the material time.

Consequently, although not directly targeted by the decision to block access to YouTube, the applicants could legitimately claim that the blocking order had affected their right to receive and impart information or ideas. Whatever the legal basis had been, such a measure was designed to affect access to the Internet. Accordingly, it engaged the responsibility of the respondent State for the purpose of Article 10.

With regard to the lawfulness of the interference, it had to be noted that the legislation in question had not authorised the imposition of a blanket blocking order on an entire Internet site on account of the content of one of the web pages hosted by it. A blocking order could only be imposed on a specific publication where there were grounds for suspecting that on account of its content that publication amounted to an offence stipulated in the legislation. Consequently, when the court had imposed the blocking order on YouTube there had been no statutory provision giving the courts power to do so. The URL filtering technology for websites based abroad was not available in Turkey. Accordingly, in practice, an administrative body would decide to block all access to the entire website in question in implementation of judicial decisions concerning particular content. The authorities should have taken account of the fact that such a measure, which blocked access to a large quantity of information, would inevitably considerably affect the rights of Internet users and have a substantial collateral effect. Accordingly, the blocking order had not satisfied the condition of lawfulness.

Conclusion: violation (unanimously).

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

Article 46: After the introduction of the present case the legislation in question had been amended. Access to an entire Internet site could now be blocked where the statutory conditions were fulfilled. These amendments had been introduced after the facts of the present case. It was not for the Court to rule *in abstracto* on the compatibility with the Convention of the legal provisions for blocking access to Internet sites in force in Turkey at the material or the present time but to ascertain *in concreto* what effect the application in this case of the provisions in question had on the applicants'

right to freedom of expression. It was therefore not necessary, in the circumstances of the present case, to rule on the applicants' request for an indication under Article 46 of the Convention.

(See also *Ahmet Yıldırım c. Turquie*, 3111/10, 18 December 2012, Note d'information 158, and the factsheet New technologies)

Alleged mass surveillance of human-rights organisations: *communicated*

10 human-rights organisations v. the United Kingdom - 24960/15 et al.
[Section I]

(See Article 8 above, page 20)

ARTICLE 11

Freedom of association

Refusal to grant wine growers licence to produce wine owing to exclusive rights of union of wine producing cooperatives: *violation*

Mytilinaios and Kostakis v. Greece - 29389/11
Judgment 3.12.2015 [Section I]

Facts – The applicants are winegrowers and members of the Samos Union of Vinicultural cooperAtives ("the Union"), which was created in 1934 and has exclusive rights to produce and sell Samos muscat wine. All the local vinicultural cooperatives have compulsory membership of the Union.

Being unable to freely dispose of and sell their muscat wine production, the applicants sought permission from the Union on a number of occasions to withdraw their membership of it.

In November 2005 the applicants lodged an application with the Supreme Administrative Court for judicial review of the tacit refusal by the authorities to issue them with a winemaking licence. That refusal was based on the provisions of "Compulsory Law" no. 6085/1934 which precluded the granting of a winemaking licence to isolated individuals. The Union intervened in the proceedings, seeking to have the application for judicial review dismissed. In November 2010 the Supreme Administrative Court dismissed it.

Law – Article 11

(a) *Applicability* – Two of the criteria established in the Court's case-law for determining whether an association had to be regarded as private or public were not met in the present case, namely, integration within the structures of the State and the existence of administrative, rule-making or disciplinary prerogatives. Accordingly, the Union could not be regarded as a public association for the purposes of the Convention and Article 11 was applicable in the present case.

(b) *Merits* – The tacit refusal of the national authorities, upheld by the Supreme Administrative Court, to grant the applicants a winemaking licence on the grounds that the Union had exclusive rights to produce and market Samos muscat wine was an "interference" with their "negative" freedom of association.

That interference had been prescribed by Law no. 6085/1934 and pursued the "legitimate aim" of protecting, in the general interest of the island of Samos, the quality of a unique wine in Greece and the revenue of the island's winegrowers, and thus the rights and freedoms of others.

The Court found that the distinction made by the Supreme Administrative Court in its judgment of November 2010 between winegrowing, which was unrestricted, and producing and marketing wine, for which membership of a cooperative was compulsory, was an artificial one and in reality excluded any form of autonomy or independence of the winegrowers concerned.

In 1934 the winegrowers from the island of Samos had been keen to form cooperatives of compulsory membership in order to protect the quality of the grape variety and develop cultivation of the grapevines. Those reasons appeared of little relevance, however, in the current context. The total number of winegrowers was now 2,847; Samos muscat wine had received the controlled designation of origin and the label of quality wine produced in a specific region; and the export market was very buoyant, amounting to 80% of annual production which was approximately 7,000 metric tons.

The minority of the Supreme Administrative Court judges had observed in the judgment of November 2010 that the aims pursued by Law no. 6085/1934 could be achieved by other means, such as quality controls carried out by State or other certification bodies.

Furthermore, in 1993 provision had been made in Law no. 2169/1993 for the possibility for cooperatives with compulsory membership to become –

on their initiative – free cooperatives. Accordingly, the national authorities had considered that the quality of the wine produced on the island of Samos and the concern to guarantee winegrowers fair and reasonable prices for the grapes produced was not likely to suffer in the event that the nature of the membership changed. The introductory report to Law no. 4015/2011 indicated that an independent and autonomous agriculturalist, who as owner and producer asserted his or her right to prosperity, was not incompatible with the idea of a cooperative association.

Consequently, by obliging winegrowers to hand their entire production of wine over to the cooperatives Law no. 6085/1934 had made the most restrictive choice regarding negative freedom of association.

Regard being had to the particular circumstance of the case, the refusal by the national authorities to grant the applicants a winegrowing licence went beyond what was necessary to strike a fair balance between the conflicting interests and could not be regarded as proportionate to the aim pursued.

Conclusion: violation (unanimously).

Article 41: EUR 6,000 each in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Chassagnou and Others v. France* [GC], 25088/94, 28331/95 and 28443/95, 29 April 1999, Information Note 5)

ARTICLE 13

Effective remedy

Alleged lack of domestic remedy in respect of non-enforcement of domestic decisions: *relinquishment in favour of the Grand Chamber*

Burmych and Others v. Ukraine - 46852/13 et al.
[Section V]

(See Article 6 (civil) above, page 11)

Lack of effective remedy in asylum proceedings: *case referred to the Grand Chamber*

V.M. and Others v. Belgium - 60125/11
Judgment 7.7.2015 [Section II]

(See Article 3 above, page 10)

ARTICLE 14

Discrimination (Article 5)

Alleged discrimination in provisions governing liability to life imprisonment: *relinquishment in favour of the Grand Chamber*

Khamtokhu and Aksenchik v. Russia - 60367/08 and 961/11
[Section I]

Article 57 of the Russian Criminal Code provides that a sentence of life imprisonment may be imposed for certain particularly serious offences. However, such a sentence cannot be imposed on women, persons under 18 when the offence was committed or over 65 when the verdict case was delivered. The Russian Constitutional Court has repeatedly declared inadmissible complaints of alleged incompatibility of that provision with the constitutional protection against discrimination, *inter alia*, on the grounds that any difference in treatment is based on principles of justice and humanitarian considerations and allows age, social and physiological characteristics to be taken into account when sentencing.

In their applications to the European Court, the applicants, who are both adult males serving life sentences for criminal offences, complain under Article 14 of the Convention read in conjunction with Article 5 of discriminatory treatment *vis-à-vis* other categories of convicts who are exempt from life imprisonment as a matter of law.

On 1 December 2015 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber.

Discrimination (Article 1 of Protocol No. 1)

Difference in treatment between publicly and privately employed retirees and between various categories of civil servants as regards payment of old-age pension: *violation*

Fábián v. Hungary - 78117/13
Judgment 15.12.2015 [Section IV]

Facts – In 2012 the applicant, who was already in receipt of an old-age pension, took up employment as a civil servant. In 2013 an amendment to the Pension Act 1997 entered into force suspending the payment of old-age pensions to persons simultaneously employed in certain categories of the public sector. As a consequence, the payment of the applicant's pension was suspended. His

administrative appeal against that decision was unsuccessful. The restriction did not apply to pensioners working in the private sector. In the Convention proceedings, the applicant complained of an unjustified and discriminatory interference with his property rights, in breach of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: The applicant's pension right was a pecuniary right within the ambit of Article 1 of Protocol No. 1 and his status as a pensioner simultaneously employed in the public sphere could be considered "other status" for the purposes of Article 14 of the Convention. Article 14 was therefore applicable.

The difference in treatment pursued the legitimate aim of reducing public expenditure. There were in fact two forms of difference in treatment: one between different categories of employees in the public sphere, and the other between persons employed in the private and public spheres. As regards the former, the Court could see no justification from the perspective of reducing public expenditure for the difference in treatment between different categories of employees in the public sector and accepted that the exempted State employees were in a situation analogous to that of the applicant. As to the difference in treatment between the public and private spheres, while it was true that only public employees received two sets of income from public sources, the Government's core argument – that no State pension should be paid to those who did not need a substitute for salary as they were already employed – applied equally to retired persons employed in the private sphere because, from that perspective, pensions paid to them could also be regarded as redundant public expenditure. These two groups were thus also in an analogous situation.

The Government's arguments to justify the difference in treatment between publicly and privately employed retirees on the one hand, and between various categories of civil servants on the other, were unpersuasive and thus not based on any "objective and reasonable justification".

Conclusion: violation (unanimously).

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

(See also *Gaygusuz v. Austria*, 17371/90, 16 September 1996; and *Carson and Others v. the United Kingdom* [GC], 42184/05, 16 March 2010, Information Note 128)

ARTICLE 34

Victim

User of mobile phone complaining of system of secret surveillance without effective domestic remedies: *victim status upheld*

Roman Zakharov v. Russia - 47143/06
Judgment 4.12.2015 [GC]

(See Article 8 above, page 14)

Wholesale blocking of access to YouTube of which applicants were active users: *victim status upheld*

Cengiz and Others v. Turkey - 48226/10 and 14027/11
Judgment 1.12.2015 [Section II]

(See Article 10 above, page 25)

Detainees awarded insufficient sums by domestic courts in respect of inadequate conditions of detention: *victim status upheld*

Mironovas and Others v. Lithuania - 40828/12 et al.
Judgment 8.12.2015 [Section IV]

Facts – The applicants, who were serving their sentences at correctional homes, complained about the conditions of their detention before the domestic courts, which found in all seven cases that domestic norms had been violated. The domestic courts awarded five of the applicants sums between the equivalent of EUR 60 and EUR 2,300 in compensation and made no award to the other two, considering that pecuniary compensation was not indispensable in order to protect their rights.

In the Convention proceedings, all seven applicants complained that the conditions of their detention in the various correctional facilities in which they had been held had fallen short of standards compatible with Article 3 of the Convention. The Government argued that they could no longer be considered victims of the alleged violations as their cases had been reviewed by the domestic courts and decisions in the applicants' favour had been adopted.

Law – Article 34

(a) *Acknowledgement of a violation* – In all seven cases the domestic courts had admitted a violation of the domestic legal norms setting out specific aspects pertinent to the conditions of detention. In most of the cases they had taken into account the principles laid down in the Court's case-law under Article 3.

Nonetheless, their decisions raised problems concerning the manner in which claims about conditions of detention were being dealt with. Thus in at least one case, the administrative court had ignored the essence of the applicant's complaint by splitting his claims into the particular aspects of detention affecting him, instead of adopting a cumulative approach. Considering each element of the conditions of detention as a separate issue could easily lead to the conclusion that none of the complaints was, in itself, serious enough to call for compensation, even in cases where the general impact on the prisoner had reached the threshold of Article 3. Furthermore, in two of the cases the domestic courts had considered that a person's suffering decreased with time. The Court was neither convinced by this line of argument, nor shared the view that the lack of intent to debase a prisoner alleviated the State's responsibility for improper conditions of detention.

In the light of these considerations, in spite of certain limited shortcomings, under the domestic law as interpreted and applied by the domestic courts, a claim for damages could in principle have secured a remedy in respect of the plaintiff's allegations of poor conditions of past detention, in that it offered a reasonable prospect of success.

(b) *Compensation awards* – In the case of one of the applicants, the domestic court had awarded EUR 2,300 for improper conditions of detention. While still lower than the amount the Court had awarded in similar cases the administrative court had analysed the applicant's complaints constructively in accordance with the standards flowing from the Court's case-law under Article 3. The award had thus been sufficient. Moreover, the applicant's complaints to both the domestic courts and the Court were confined to the conditions of an earlier period of detention and did not concern conditions at the correctional home. Thus the applicant could no longer be considered to be a victim of a violation of Article 3.

In the case of two of the applicants, the domestic courts had made no award and had not allowed them to recover damages on proof of their allegations of inhuman or degrading conditions of detention for non-pecuniary damage. In the case of the other four applicants the sums awarded by the domestic courts were incommensurably small and not even approaching the awards usually made by the Court in comparable circumstances.

In sum, the compensatory remedy for the conditions in which the six applicants concerned had been held was plainly insufficient. They therefore retained their victim status under Article 34.

(c) *Preventive remedies* – As regards to the Government's argument that the applicants' removal from inadequate prison conditions could be considered an effective remedy, the prison authorities' decisions on the transfer of inmates between prisons had been to a great extent discretionary, based either on the inmate's state of health, or on other "exceptional circumstances". It was unlikely that either of those criteria had been triggered by issues such as cramped or insalubrious prison conditions. Furthermore inmates did not have a right to be transferred if they so requested.

Given the financial difficulties of the prison administration, any attempt to seek an improvement of the conditions of detention from within the penal system would not have sufficient prospects of success. Even in the event of a judicial or administrative decision requiring the prison authorities to redress a violation of the applicants' right to adequate living space and sanitary conditions, their personal situation in an already overcrowded facility could have been improved only at the expense and to the detriment of other detainees. Moreover, the prison authorities would not have been in a position to grant a large number of simultaneous requests, given the structural nature of the prison overcrowding problem and the absence of reforms to tackle it.

Moreover, the new legislative measures in force since 1 July 2012 could not have benefited the applicants, as their complaints to the Court about the conditions of their detention mostly precede the date of the new legislation.

As to the Parliamentary Ombudsman, his powers were restricted solely to making proposals and recommendations, without the possibility of issuing binding orders to the prison authorities to improve a prisoner's situation. Furthermore, it had not been shown that the Ombudsman's recommendations and proposals were capable of providing relief within reasonably short time-limits, which was another condition for a preventive remedy to be effective. Thus a complaint to the

Parliamentary Ombudsman fell short of the requirements of an effective remedy because its capacity to have a preventive effect in practice had not been convincingly demonstrated.

Thus the six applicants' complaints about their conditions of detention were not manifestly ill-founded and were not inadmissible on any grounds.

Conclusion: preliminary objection dismissed in respect of six applicants (unanimously).

As regards the applications which were declared admissible the Court went on to find violations of Article 3 of the Convention in respect of four applicants and no violation of that provision in respect of the remaining two.

Article 41: awards ranging from EUR 6,500 to EUR 10,000 in respect of non-pecuniary damage.

(See also *Scordino v. Italy (no. 1)* [GC], 36813/97, 29 March 2006, Information Note 85)

Partner of deceased detainee who had allegedly been denied adequate medical care: *victim status upheld*

Ivko v. Russia - 30575/08
Judgment 15.12.2015 [Section III]

(See Article 3 above, page 8)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies
Effective domestic remedy – Turkey

Domestic remedies made accessible only as a result of unforeseeable change in the case-law after the application was lodged: *preliminary objection dismissed*

Yavuz Selim Güler v. Turkey - 76476/12
Judgment 15.12.2015 [Section II]

Facts – In 2011 the applicant, a non-commissioned officer, was given a sanction of two days' detention by his military superior. Before the European Court he complained that the custodial sanction had not been decided by an independent and impartial tribunal.

Subsequently the Military Administrative High Court ruled for the first time on such custodial sentences in the context of applications for annulment (24 May 2012) and for compensation (22 February 2013). It took the view that, even though they were compliant with domestic law, the sanctions were in breach of Article 5 § 1 of the Convention. The applicant did not make use of the remedies.

Law – Article 35 § 1: As regards, first, the possibility of lodging an application for annulment, the applicant could not reasonably have foreseen that this remedy would be available and appropriate. At the material time, the law in force expressly prohibited the exercise of any judicial scrutiny over disciplinary sanctions inflicted by superiors for breaches of military discipline. In that connection, according to the well-established case-law in such matters of the Military Administrative High Court, such applications were systematically rejected. That court's judgment of 24 May 2012 was thus a departure from precedent. But it had not been legally foreseeable for the applicant. A six-month period was normally necessary for a case-law development to acquire publicity and a sufficient degree of legal certainty at domestic level. It was thus from 24 November 2012 that applicants could be required to use that remedy for the purposes of Article 35 § 1 of the Convention. The present application had been lodged on 22 October 2012. Consequently, the applicant did not have to make use of a remedy which was theoretically inaccessible.

As regards the application for compensation, it was noteworthy that the applicant's detention had been perfectly legal under domestic law, but that it was nevertheless in breach of Article 5 § 1 (a) of the Convention. It followed from the judgment of the Military Administrative High Court that its interpretation (as to the hierarchy of norms and the primacy of the Convention over statute law) opened the way to pecuniary reparation for army personnel deprived of freedom following a custodial sanction imposed by their superior. That situation corresponded precisely to that of the applicant. The compensatory remedy was thus appropriate as it enabled the existence of interference with the right to liberty and security to be established and could secure compensation. However, that remedy had only recently been introduced. The relevant decision of the court in question was delivered on 22 February 2013, so it post-dated the lodging of the present application. At the material time, neither the letter of the law nor its interpretation by the Military Administrative High Court allowed military personnel who

had been given a disciplinary sanction by their superior to obtain reparation on the ground that such sanction was in breach of Article 5 of the Convention. Whilst the remedy had become an effective one, there was nothing to show that it already was at the time the application was lodged. The applicant could not therefore be criticised for failing to use it.

Conclusion: preliminary objection rejected (unanimously).

The Court also found, unanimously, that there had been a violation of Article 5 § 1 of the Convention.

ARTICLE 1 OF PROTOCOL No. 1

Possessions

Applications against Ukraine concerning non-enforcement of domestic decisions: *relinquishment in favour of the Grand Chamber*

Burmych and Others v. Ukraine - 46852/13 et al. [Section V]

(See Article 6 (civil) above, page 11)

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

V.M. and Others v. Belgium - 60125/11
Judgment 7.7.2015 [Section II]

(See Article 3 above, page 10)

Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland - 931/13
Judgment 21.7.2015 [Section IV]

(See Article 10 above, page 24)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Burmych and Others v. Ukraine - 46852/13 et al. [Section V]

(See Article 6 (civil) above, page 11)

Khamtokhu and Aksenchik v. Russia - 60367/08 and 961/11
[Section I]

(See Article 14 above, page 27)

DECISIONS OF OTHER INTERNATIONAL JURISDICTIONS

Inter-American Court of Human Rights

Obligations of the States Parties to the American Convention in the context of extradition proceedings

Case of Wong Ho Wing v. Peru - Series C No. 297
Judgment 30.6.2015[1]

Facts – The applicant was a national of the People's Republic of China who was wanted by the authorities of Hong Kong (China) for smuggling ordinary merchandise, money-laundering and bribery. On 27 October 2008 the Peruvian authorities arrested him at Lima airport in compliance with an Interpol Red Notice. He was held on "provisional or pre-extradition arrest" before being put on house arrest on 10 March 2014.

On 14 November 2008 Peru received an extradition request from China. On 10 December 2008 a public hearing was held during which the applicant and his representative mentioned that the smuggling offence was punishable by the death penalty. On 20 January 2009 the Second Transitory Chamber of the Peruvian Supreme Court of Justice issued the first advisory decision in the extradition proceedings, declaring the extradition request admissible for the offences of evasion of customs duty or smuggling and bribery. Following that decision, on 26 January 2009, the applicant's brother filed an application for habeas corpus. On 24 April 2009 the 56th Criminal Court of Lima considered well-founded the application for habeas corpus and declared invalid the advisory decision of 20 January 2009, because it was insufficiently substantiated.

On 11 December 2009 China informed Peru that its Supreme Court had decided not to impose the death penalty if the applicant was extradited and convicted. On 27 January 2010 the Peruvian Supreme Court issued another advisory decision

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

in which it ruled in favour of extradition in view of the Chinese Supreme Court's decision. Following that decision, on 9 February 2010 the applicant´s representative filed an application for habeas corpus which was declared inadmissible. The representative filed an appeal based on constitutional injury.

On 1 May 2011 the Eighth Amendment to the Chinese Criminal Code entered into force annulling the death penalty for the smuggling offence in respect of which the applicant's extradition had been requested. On 24 May 2011 the Peruvian Constitutional Court decided the constitutional appeal and ordered the Executive Branch to refrain from extraditing the applicant considering that the diplomatic assurances offered by China were insufficient to ensure that the death penalty would not be imposed. On 9 June 2011 it issued a further decision clarifying that the diplomatic assurances offered by China were not included in the case file. The Executive Branch has since filed various judicial remedies to clarify the way in which the decision should be executed, all of which have been unsuccessful. A final decision by the Executive Branch regarding the extradition request was still pending at the date of the Inter-American Court's judgment.

Law

(a) *Preliminary objection* – The State raised the objection of non-exhaustion of domestic remedies, on the grounds that: (i) when the initial petition was lodged, domestic remedies had not been exhausted, and (ii) when adopting its decision on admissibility, the Commission did not take into account that other applications for habeas corpus were pending.

The Inter-American Court rejected the first point, considering that according to Article 46 of the American Convention on Human Rights (ACHR) exhaustion of remedies is required when deciding on the admissibility of the petition and not when it is lodged. On the second point, the Court noted that the application for habeas corpus was not part of the regular extradition proceedings in Peru, and thus need not be exhausted.

(b) *Article 4(1) (right to life) in relation to Article 1(1) (obligation to respect and ensure rights) of the ACHR and Article 14(4) of the Inter-American Convention to Prevent and Punish Torture (ICPPT) (Non-refoulement)* – The Court established that States have the obligation not to expel, by extradition, any individual under their jurisdiction when there are substantial grounds for believing that he will face a real, foreseeable and personal risk of suffering treatment contrary to his right to life and the prohibition of torture or cruel, inhuman or degrading treatment. Consequently, when an individual alleges before a State a risk in the event of a return, the competent authorities of that State must, at least, interview him and make a preliminary assessment in order to determine whether or not that risk exists in the event of his being expelled. This implies that certain basic judicial guarantees should be respected as part of the opportunity afforded to the individual to explain the reasons why he should not be expelled and, if the risk is verified, the individual should not be returned to the country where the risk exists.

The Court acknowledged that the death penalty had been abolished for one of the crimes for which the applicant was being requested. Thus, there was no real risk for his right to life.

It established that to determine whether there is a risk of torture or other forms of cruel, inhuman or degrading treatment, the following must be examined: (i) the alleged situation of risk in the requesting State, including the relevant conditions in the requesting State as well as the specific circumstances of the applicant, and (ii) any diplomatic assurances provided. Following the case-law of the European Court of Human Rights, the Inter-American Court considered that the quality and reliability of diplomatic assurances should be assessed. The Court determined that the information on which both the Commission and the representative relied in the instant case referred to the general situation of human rights in China. This was deemed to be insufficient by the Court in order to conclude that the applicant's extradition would expose him to a real, foreseeable and personal risk of being subject to treatment contrary to the prohibition of torture or other cruel, inhuman or degrading treatment.

Conclusion: extradition would not constitute violation of Peru's obligation to ensure his rights to life and to personal integrity (Articles 4 and 5, in relation to Article 1(1) of the ACHR), or the obligation of non-refoulement (Article 13(4) of the ICPPT) (five votes to one).

(c) *Articles 8(1) (right to a fair trial) and 25(1) (right to judicial guarantees and judicial protection) in relation to Article 1(1) of the ACHR* – In relation to the alleged failure to comply with the Constitutional Court's decision, the Inter-American Court considered that Peru had to decide how to proceed with the request to extradite the applicant, bearing in mind that, for the time being, there

would be no risk to his rights to life and personal integrity if he was extradited, but that there was a Constitutional Court decision that prima facie could not be amended and was, in principle, binding on the Executive Branch. In addition, the Court took into account the fact that the Executive Branch's discretionary acts may be subject to subsequent constitutional control.

Regarding the duration of the extradition proceedings, the Court analysed four elements to determine whether the duration had been reasonable: (i) the complexity of the matter; (ii) the procedural activity of the interested party; (iii) the conduct of the judicial authorities, and (iv) the effects on the legal situation of the person involved in the proceedings. It concluded that the State authorities had not acted with due diligence and in respect of the obligation of promptness required by the applicant's detention. Thus, the extradition proceedings had exceeded a reasonable time. Concerning the other guarantees of due process, the Court considered that insofar as the applicant had taken part in the judicial stage of the proceedings and retained the possibility of obtaining judicial control of the final decision on extradition, the State had not failed to comply with its obligation to guarantee the applicant's right to be heard.

Conclusion: violation of the guarantee of a reasonable time (Article 8(1) in relation to Article 1(1) of the ACHR – three votes in favour, three against, with deciding vote of the President); no violation of the right to be heard and of the right of defence (Article 8(1) in relation to Article 1(1) – five votes to one); not necessary to issue a ruling on the alleged failure to comply with the right to judicial protection recognised in Article 25 (five votes to one).

(d) *Articles 5 (right to personal integrity) and 7 (right to personal liberty), in relation to Article 1(1) of the ACHR* – In this case, the holder of the rights whose situation was examined was an alien detained owing to the existence of an international warrant for his arrest and a subsequent extradition request. However, regardless of the reason for his detention, insofar as it relates to a deprivation of liberty executed by a State Party to the Convention, it must be strictly in keeping with the relevant provisions of the ACHR and domestic law.

With regard to the right to personal liberty, the Court concluded that: (i) the applicant had been subjected to an arbitrary deprivation of liberty, which had extended excessively; (ii) certain habeas corpus remedies were not effective; and (iii) the State had failed to decide those remedies within a reasonable time.

Finally, in relation to the alleged violation of the applicant's right to personal integrity as a consequence of his deprivation of liberty, the Court concluded that the arguments referred to a "collateral effect of the detention".

Conclusion: violation of Articles 7(1), 7(3), 7(5) and 7(6) in relation to Article 1(1) of the ACHR (five votes to one); no violation of Article 7(2), in relation to Article 1(1) of the ACHR (four votes to two); no violation of Article 7(2) in relation to Article 1(1) of the ACHR (four votes to two); and no violation of Article 5, in relation to Article 1(1) of the ACHR (five votes to one).

(e) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered the State to: (i) adopt as soon as possible the final decision in the extradition proceedings concerning the applicant; (ii) immediately review the applicant's deprivation of liberty; (iii) publish the judgment and its official summary; and (iv) pay the amount stipulated in the judgment as compensation for pecuniary and non-pecuniary damage and the reimbursement of costs and expenses.

RECENT PUBLICATIONS

Translation of the Case-Law Information Note into Turkish

The first three issues for 2015 of the Court's Case-Law Information Note have just been translated into Turkish, thanks to the Turkish Ministry of Justice. Further issues will be added progressively. The Notes in Turkish can be downloaded from the Court's Internet site (<www.echr.coe.int> – Publications).

Factsheets

The Court has launched five new factsheets on its case-law concerning the following themes: derogation in time of emergency, life imprisonment, extradition and life imprisonment, protection of reputation, and sport.

All factsheets can be downloaded from the Court's Internet site (<www.echr.coe.int>– Press).

Case-Law Overview: translation into Russian

The Court's case-law overview for the first six months (January-June) of 2015 has just been translated into Russian, thanks to the Ukrainian Helsinki Human Rights Union. It can be downloaded from the Court's Internet site (<www.echr.coe.int> – Case-law).

Обзор прецедентного права Суда (январь-июнь 2015 года) (rus)