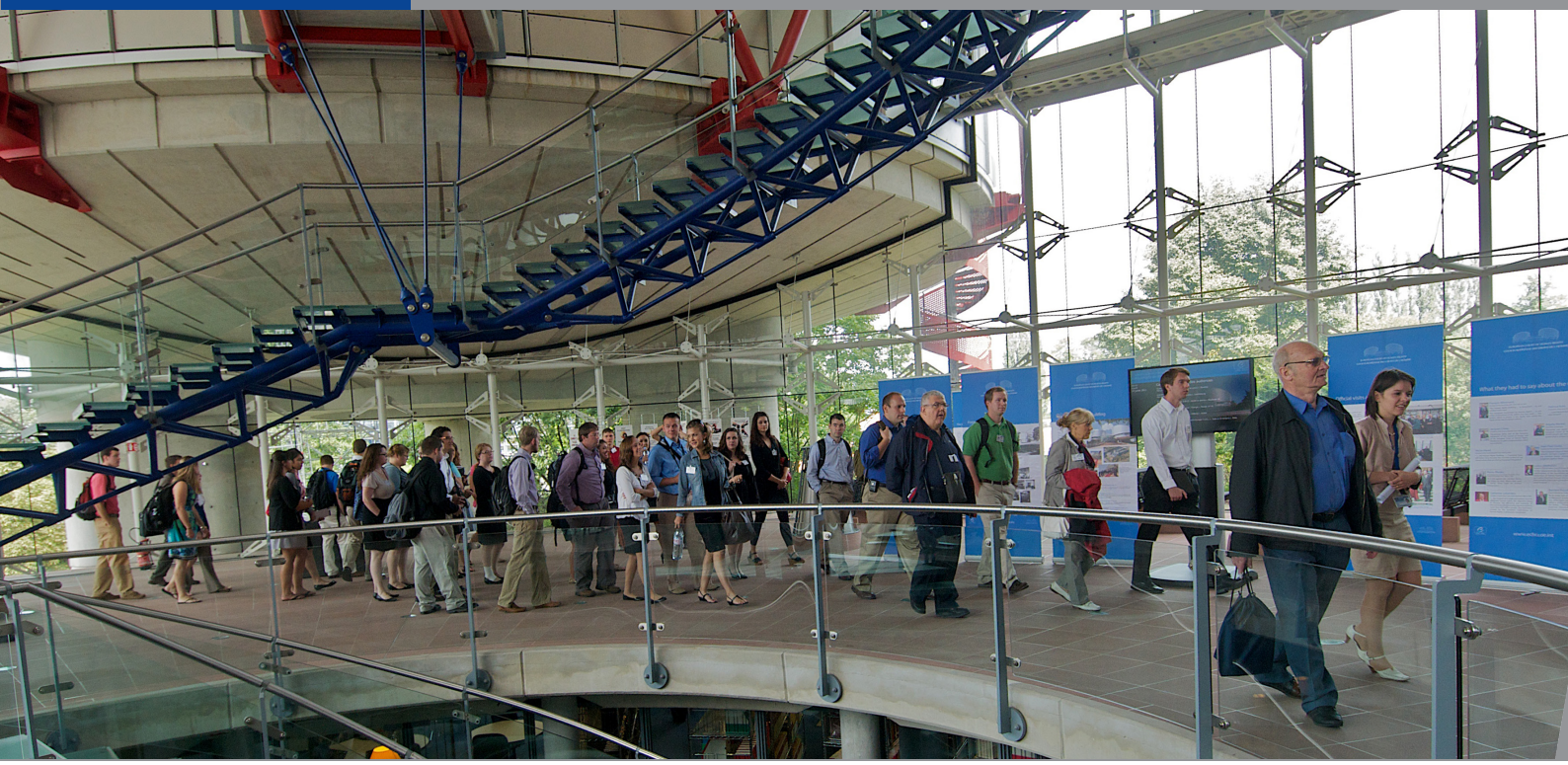
2016

DECEMBER

INFORMATION NOTE 202

Case-law of the European Court of Human Rights



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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

English edition

ISSN 1996-1545

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

Layout: Publications Unit

Photograph: Council of Europe

Cover: interior of the Human Rights Building (Architects: Richard Rogers Partnership and Atelier Claude Bucher)

Table of contents

OTHER JURISDICTIONS

COURT NEWS

RECENT PUBLICATIONS

ARTICLE 2

Positive obligations (substantive aspect), effective investigation

Alleged refusal of security forces to allow evacuation of wounded before shelling basement in which they had sought refuge: *communicated*

Yavuzel and Others v. Turkey, 5317/16 et al., decision 6.12.2016 [Section II]

Since August 2015 a number of curfews have been imposed in certain towns and cities in south-east Turkey by local governors with the stated aim of clearing the trenches dug up and the explosives planted by members of a number of outlawed organisations, and to protect civilians from violence.[1]

In December 2015 a curfew was imposed in the town of Cizre, prohibiting people from leaving their homes at any time of the day. The 24-hour curfew continued until March 2016, when it was modified.

In the instant case, the relatives pursuing the applications on behalf of the fourteen deceased applicants allege that the applicants were among some 170 people to have been killed by the security forces in February 2016 in the basements of three buildings in Cizre where they had taken refuge after being shot and injured. Although a number of calls had been made to the emergency services for ambulances to be dispatched, they say that none were sent and the security forces refused to allow anyone to go to help the injured but had instead shelled the building with heavy weapons. An application lodged by the applicant's representative with the Constitutional Court for interim measures allowing the applicants to be evacuated to hospital had been rejected in a decision of 29 January 2016 owing to uncertainty as to whether the applicants were in fact injured (and, if so, to what extent), whether they were armed and where they were located.

In their application to the European Court, the applicants' relatives complain under Article 2 of the Convention that the applicants were shot and injured by members of the security forces and that the national authorities, instead of providing them with medical assistance, killed them intentionally. Under the same provision they argue that no steps were taken by the prosecutors to investigate the deaths of their relatives. They also complain of violations of Articles 3, 5, 9 and 34 of the Convention. The complaint under Article 5 and a complaint under Article 34 in application no. 5628/16 were declared inadmissible as being manifestly ill-founded.

Communicated under Articles 2, 3, 9 and 34.

1. For information on other cases concerning the curfews in south-east Turkey, see press release ECHR 420 (2016) published by the Court on 15 December 2016.

ARTICLE 3

Degrading treatment, positive obligations (substantive aspect)

Failure to ensure twelve-year old child was looked after by an adult while his parents were held in police custody: *violation*

Ioan Pop and Others v. Romania, 52924/09, judgment 6.12.2016 [Section IV]

Facts – The first two applicants were the parents of the third. They were evicted by a judgment of November 2006, due to be enforced on 4 July 2007. On that day the first applicant strongly resisted the eviction but it went ahead. The first and second applicants were taken to the police station, while the third applicant allegedly remained alone for several hours without adult supervision.

Law – Article 3 (*substantive head*): On the day of the eviction, the third applicant, aged 12, had been left alone for several hours without being entrusted to the care of an adult. He had witnessed a police operation during which his father had been injected with a tranquiliser to restrain him and then handcuffed and both parents had been taken to the police station. His vulnerability should have been taken into account by the authorities.

The police intervention had been prepared in advance and the presence of the third applicant at the scene had not been a surprise for the authorities, but no measure concerning the boy had been envisaged. Law no. 272/2004 provided for a series of special protection measures for a child who found himself, temporarily or permanently, deprived of the supervision of his parents. While placement in an institution would have been unreasonable and disproportionate, the Government had not established with certainty that the authorities had actually considered entrusting the third applicant to the care of a private person whom he knew and who could have looked after him in his parents' absence.

In addition, there was no evidence to suggest that the authorities had made any effort to explain to the third applicant the reasons why the police had intervened and taken his parents to the police station, or what awaited them in the official proceedings. The authorities could not have been unaware of the psychological impact of the incident on the child, who had since been suffering from emotional disorders and had developed a stammer. Strong feelings of fear, anxiety and powerlessness capable of degrading individuals in their own eyes and in those of their relatives could be regarded as treatment in breach of Article 3.

The fact that the presence of the first applicant during the incident was also the responsibility of the first applicant, who had allegedly encouraged him or even used him as an accomplice, could not remove the obligation for the authorities to protect the child and to intervene to limit any risk of abuse.

Since the national authorities had not taken any measures to entrust the third applicant to an adult while his parents were at the police station or to explain to him his situation or that of his parents, the threshold of severity under Article 3 of the Convention had been attained, and the lack of appropriate measures amounted to degrading treatment.

Conclusion: violation (six votes to one).

The Court also found unanimously that there had been a violation of Article 5 § 1 of the Convention in respect of the second applicant, because her deprivation of liberty in July 2007 had no legal basis in domestic law.

Article 41: EUR 4,500 awarded to the second and third applicants for non-pecuniary damage.

(See also *Z and Others v. the United Kingdom* [GC], 29392/95, 10 May 2001)

Expulsion

Proposed deportation of person suffering from serious illness to his country of origin in face of doubts as to the availability of appropriate medical treatment there: *expulsion would have constituted a violation*

Paposhvili v. Belgium, 41738/10, judgment 13.12.2016 [GC]

Facts – The applicant, a Georgian national, arrived in Belgium via Italy in November 1998, accompanied by his wife and the latter's six-year-old child. The couple subsequently had two children. The applicant received several prison sentences for robbery. He suffered from tuberculosis, hepatitis C and chronic lymphocytic leukaemia (CLL). An asylum request by the applicant and his wife was refused in June 1999. The applicant then submitted a number of requests for regularisation of his residence status, but these were rejected by the Aliens Office. The applicant and his wife were subsequently issued with several orders to leave the country, including one in July 2010.

On 23 July 2010, relying on Articles 2, 3 and 8 of the Convention, the applicant applied to the European Court for an interim measure under Rule 39 of the Rules of Court, arguing that if he were removed to Georgia he would no longer have access to the health care he required and that in view of his very short life expectancy he would die even sooner, far away from his family. On 28 July 2010 the Court granted his request.

The order to leave Belgian territory was extended until 28 February 2011. On 18 February 2012 the Aliens Office issued an order to leave the country "with immediate effect" pursuant to the ministerial deportation order of 16 August 2007.

A medical certificate issued in September 2012 stated that failure to treat the applicant for his hepatitis and his lung disease could lead to organ damage and significant disability and that failure to treat his leukaemia (CLL) could result in death. A return to Georgia would expose the patient to inhuman and degrading treatment. The applicant was requested to report to the Aliens Office's medical service on 24 September 2012 for a medical check-up and to enable the Belgian authorities to "reply to the Court's questions". Referring to the Court's judgment in *N. v. the United Kingdom* ([GC], 26565/05, 27 May 2008, Information Note 108), the Aliens Office found in its report that the applicant's medical records did not warrant the conclusion that the threshold of gravity required by Article 3 of the Convention had been reached. The applicant's life was not directly threatened and no ongoing medical supervision was necessary in order to ensure his survival. Furthermore, his disease could not be considered to be in the terminal stages at that time.

On 29 July 2010 the applicant's wife and her three children were granted indefinite leave to remain. The applicant died in June 2016.

Law – Preliminary issue: Following the applicant's death his relatives had expressed the wish to pursue the proceedings. The Court noted that there were important issues at stake in the present case, notably concerning the interpretation of the case-law in relation to the expulsion of seriously ill aliens. The impact of this case therefore went beyond the particular situation of the applicant. Accordingly, special circumstances relating to respect for human rights as defined in the Convention and the Protocols thereto required the Court to continue the examination of the application in accordance with Article 37 § 1 *in fine* of the Convention.

Article 3: In the case of *N. v. the United Kingdom* the Court had stated that, in addition to situations of the kind addressed in *D. v. the United Kingdom* (30240/96, 2 May 1997) in which death was imminent, there might be other very exceptional cases where the humanitarian considerations weighing against removal were equally compelling. An examination of the case-law subsequent to *N. v. the United Kingdom* had not revealed any such examples. The application of Article 3 of the Convention only in cases where the person facing expulsion was close to death had deprived aliens who were seriously ill, but whose condition was less critical, of the benefit of that provision.

The Grand Chamber found in the present case that the "other very exceptional cases" which might raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds had been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. These situations corresponded to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.

It was for the applicants to adduce evidence capable of demonstrating that there were substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3.

Where such evidence was adduced it was for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it. The risk alleged had to be subjected to close scrutiny in the course of which the authorities in the returning State had to consider the foreseeable consequences of removal for the individual concerned in the receiving State, in the light of the general situation there and the individual's personal circumstances.

The impact of removal on the person concerned had to be assessed by comparing his or her state of health prior to removal and how it would evolve after transfer to the receiving State.

It was necessary to verify on a case-by-case basis whether the care generally available in the receiving State was sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3.

The authorities were also required to consider the extent to which the individual in question would actually have access to that care and those facilities in the receiving State.

Where, after the relevant information had been examined, serious doubts persisted regarding the impact of removal on the persons concerned, it was for the returning State to obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment would be available and accessible to the persons concerned so that they did not find themselves in a situation contrary to Article 3.

The applicant had been suffering from a very serious illness and his condition had been life-threatening. However, his condition had become stable as a result of the treatment he had been receiving in Belgium, aimed at enabling him to undergo a donor transplant. If the treatment being administered to the applicant had had to be discontinued his life expectancy, based on the average, would have been less than six months.

Neither the treatment the applicant had been receiving in Belgium nor the donor transplant had been available in Georgia. As to the other forms of leukaemia treatment available in that country, there was no guarantee that the applicant would have had access to them, on account of the shortcomings in the Georgian social insurance system.

The opinions issued by the Aliens Office's medical adviser regarding the applicant's state of health, based on the medical certificates he had provided,

had not been examined either by the Aliens Office or by the Aliens Appeals Board from the perspective of Article 3 of the Convention in the course of the proceedings concerning regularisation on medical grounds.

Likewise, the applicant's medical situation had not been examined in the context of the proceedings concerning his removal.

The fact that an assessment of this kind could have been carried out immediately before the removal measure was to be enforced did not address these concerns in itself, in the absence of any indication of the extent of such an assessment and its effect on the binding nature of the order to leave the country.

In conclusion, in the absence of any assessment by the domestic authorities of the risk facing the applicant in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, the information available to those authorities had been insufficient for them to conclude that the applicant, if returned to Georgia, would not have run a real and concrete risk of treatment contrary to Article 3 of the Convention.

Conclusion: The applicant's expulsion would have entailed a violation (unanimously).

Article 8: It was not disputed that family life had existed between the applicant, his wife and the children born in Belgium. The case was therefore examined from the perspective of "family life" and the complaint was considered from the standpoint of the Belgian authorities' positive obligations.

Having observed that the Belgian authorities had not examined the applicant's medical data and the impact of his removal on his state of health in any of the proceedings brought before them, the Grand Chamber had concluded that there would have been a violation of Article 3 of the Convention if the applicant had been removed to Georgia without such an assessment being carried out.

A fortiori, the Belgian authorities had likewise not examined, under Article 8, the degree to which the applicant had been dependent on his family as a result of the deterioration of his state of health. In the context of the proceedings for regularisation on medical grounds the Aliens Appeals Board, indeed, had dismissed the applicant's complaint under Article 8 on the ground that the decision refusing him leave to remain had not been accompanied by a removal measure.

If the Belgian authorities had ultimately concluded that Article 3 of the Convention as interpreted above did not act as a bar to the applicant's removal to Georgia, they would have been required, in order to comply with Article 8, to examine in addition whether, in the light of the applicant's specific situation at the time of removal, the family could reasonably have been expected to follow him to Georgia or, if not, whether observance of the applicant's right to respect for his family life required that he be granted leave to remain in Belgium for the time he had left to live.

Conclusion: The applicant's expulsion would have entailed a violation (unanimously).

Article 41: Claim for pecuniary damage dismissed; findings of a violation sufficient in respect of non-pecuniary damage.

(See also *Saadi v. Italy* [GC], 37201/06, 28 February 2008, Information Note 105)

ARTICLE 8

Respect for private life, positive obligations

Inability of man claiming to be biological father to contest paternity of child whose paternity had already been recognised by another man: *violation*

L.D. and P.K. v. Bulgaria, 7949/11 and 45522/13, judgment 8.12.2016 [Section V]

Facts – The applicant in each of these two cases was a man claiming (with a probability of 99.99%, according to the DNA test in one case) to be the biological father of a child whose paternity had already been recognised by another man. The domestic law did not allow an individual to challenge that paternity or to recognise the child as his own. Merely finding that the legal father-child relationship was already established, the courts denied the applicants any standing to bring a suit.

One of the applicants, who suspected that trafficking had taken place (the mother subsequently admitted that she had been put in touch with a couple wishing to adopt a child by the clinic which had monitored her pregnancy), persuaded the public prosecutor to bring proceedings in the appropriate court. Without giving any reasons, the prosecutor discontinued the proceedings, later seeking to reopen them in vain.

Law – Article 8: A comparative law study had been carried out by the Court in 2012, showing that a significant majority of member States allowed suits to challenge paternity but there was no consensus.

In view of that observation and other pertinent factors, the respondent State had a broad margin of appreciation. The examination of the case led to the Court to conclude, however, that this margin had been overstepped.

In the present case, referring to the relevant provisions of the Family Code, the domestic courts had rejected the applicants' suits for lack of standing.

The statutory ban on challenging a registered paternity did not appear to allow for any exception in domestic law. It stemmed from the intention of the Bulgarian legislator, with the aim of ensuring the stability of family relations, to give priority to the legal relationship already established rather than allowing claims by putative biological fathers.

In the Court's view, while it was of course reasonable on the part of the domestic authorities to take account of the fact that the child already had an established parent-child relationship, other factors should have been taken into account, such as the specific circumstances of each case, and in particular the situation of the various protagonists – the child, the mother, the father by law and the putative biological father. The courts had not taken those circumstances into consideration.

As to any other remedies available to the applicants in domestic law, the following reasons led the Court to take the view that they were not effective in the present situations.

(a) *Possibility of direct action under Article 8 of the Convention* – While a recent decision of the Supreme Court of Cassation seemed to suggest such a possibility, no example of any exercise of such an action had been demonstrated by the Government. An action brought by the first applicant on this basis had in fact been declared inadmissible.

(b) *Possibility of involving public prosecutor or welfare services* – Domestic law enabled the public prosecutor's office or the territorial social welfare unit to bring proceedings to challenge paternity, which could lead to a declaration that a recognition of paternity was null and void if it did not correspond to the genetic relationship (Article 66 § 5 of the Family Code). A man claiming to be the biological father could thus refer his claim to the above-mentioned authorities and ask them to initiate proceedings. That avenue, which seemed to have been used in practice, nevertheless had the following limitations.

(i) Neither the Family Code nor any other statutory instrument indicated the situations in which the authorities should take such an initiative. It transpired from domestic case-law and observations submitted by the Social Welfare Agency that such proceedings would be brought where there was a suspicion that the recognition had been used to circumvent the law on adoption or where there was a risk to the child.

(ii) Such a suit was not directly accessible to the applicants, as it remained subject to the decision of those public authorities, who had discretion as to its use in a particular case.

(iii) There was no statutory obligation to hear such a claimant (even though this was the case in practice in the context of the home study).

(iv) Any refusal to initiate proceedings, or any subsequent discontinuance, could not be appealed against before the courts. In both cases the authority was not required to give reasons for its decision.

(v) In order to decide whether or not to bring proceedings, the authorities in question were not required to examine the various interests at stake. Whilst they apparently took the child's best interests into account, particularly in a case where there was a risk to the child's health or well-being, or ensured compliance with adoption law, it did not appear that those interests were weighed against the other interests at stake, especially those of the biological father.

(vi) The aim of such a suit was not in fact to lead to the judicial establishment of the paternity of the biological father, but only the annulment of the legal parent-child relationship established by recognition. Such proceedings thus appeared to be reserved for exceptional situations concerning compliance with the law or a risk for the child, and not a mere conflict concerning the establishment of paternity.

(c) *Possibility of recognising paternity before birth* – The law admittedly allowed a child's paternity to be recognised before birth, from the time of its conception. However, that had not always been possible in reality, especially where the father had not been informed about the pregnancy; and in any event this was not common practice in Bulgaria. Even in the case of early recognition, the mother

had the possibility of rendering it ineffective merely by declaring her objection. If the mother then agreed to recognition by another man, before the man claiming to be the father who made the first declaration of recognition had been able to bring a paternity suit, the latter, even if he was the biological father, would be in the same situation as the present applicants, unable to establish his paternity. Accordingly, the possibility of recognising paternity before birth could not be regarded as an effective means of establishing paternity in the absence of agreement by the mother.

In those circumstances the Court could not reproach the applicants for failing to make a declaration of paternity before the birth. In both cases the applicants had in fact taken steps to establish their paternity as soon as they had become aware of the respective births.

It was concluded from the foregoing that the applicants did not have an effective possibility of challenging the legal parent-child relationship established by recognition or of directly establishing their own paternity. Accordingly, their right to respect for their private life had been breached.

Conclusion: violation (unanimously).

Article 41: EUR 6,000 awarded to each applicant for non-pecuniary damage.

(See also *Różański v. Poland*, 55339/00, 18 May 2006, Information Note 86)

Respect for private life

Public exposure of holders of public office as collaborators of communist regime on basis of former security-service records: *communicated*

Anchev v. Bulgaria, 38334/08 [Section V]

By virtue of the Access to and Disclosure of Documents and Exposure of the Affiliation of Bulgarian Citizens to State Security and the Intelligence Services of the Bulgarian People's Army Act 2006, as amended ("2006 Act"), anyone holding specified "public office" or engaging in a specified "public activity" at any point since 10 November 1989 – the date on which the communist regime in Bulgaria is deemed to have fallen – must be checked for affiliation with the former security services and exposed if found to have been so affiliated. The checks are carried out and exposure is made by a Commission on the basis of information contained in the former security services' records. The Supreme Administrative Court, which has reviewed more than a hundred cases of exposure, has consistently held that the Commission does not have to check the veracity of the information in the records, but must simply note it and make it public, having no discretion in the matter. The Commission's task is limited to documentary fact-finding and its decisions are purely declaratory. This is because the 2006 Act does not purport to sanction or lustrate staff members and collaborators of the former security services, but simply to reveal the available information about all publicly active people featuring in the records, with a view to restoring public confidence and preventing blackmail. In a decision of 26 March 2012 the Constitutional Court unanimously upheld the constitutionality of section 25(3) of the 2006 Act (which covers persons acceding to "public office" or engaging in "public activity" in the future).

The applicant is a lawyer who has occupied various positions in public office since the early 1990s, including in central government, with the Supreme Bar Council and at a bank. He was the subject of three investigations by the Commission in respect of each of those positions and exposed as a collaborator on the basis of the former security services' records.

In the Convention proceedings, the applicant complains under Article 8 of the Convention that the decision to expose him was arbitrary and disproportionate. He also complains under Article 13 of the lack of an effective domestic remedy as, in view of the administrative courts' case-law, judicial review of the decision to expose him would not enable him to refute the Commission's finding that he had been a collaborator.

Communicated under Articles 8 and 13 of the Convention.

Expulsion

Proposed deportation of person suffering from serious illness to his country of origin in face of doubts as to the availability of appropriate medical treatment there: *expulsion would have constituted a violation*

Paposhvili v. Belgium, 41738/10, judgment 13.12.2016 [GC]

(See Article 3 above, page 7)

ARTICLE 12

Right to marry

Undue delays in providing prisoner with divorce certificate required for remarriage: *violation*

Chernetskiy v. Ukraine, 44316/07, judgment 8.12.2016 [Section V]

Facts – The applicant complained to the Court under Article 12 of the Convention that between 2005 and 2008 he had been prevented from remarrying, as he was serving a fifteen-year prison sentence and did not have permission to attend the civil-status registry to obtain a divorce certificate following the dissolution of his previous marriage. Following the introduction of new legislation, the applicant was provided with a divorce certificate in prison in February 2009.

Law – Article 12: The Court reiterated that personal liberty was not a necessary pre-condition for the exercise of the right to marry. The fact that imprisonment deprives a person of his liberty and also, unavoidably or by implication, of some civil rights and privileges did not mean that persons in detention could not, or only very exceptionally, exercise their right to marry. Further, although a right to divorce could not be derived from Article 12, if national legislation allowed divorce, it secured for divorced persons the right to remarry without unreasonable restrictions.

The applicant had been unable to marry his new female partner between February 2005 and October 2008 because the authorities were unable to finalise the registration of his divorce and provide him with the divorce certificate in prison. That restriction on the applicant's right to remarry was considerable in duration having continued for more than three years and seven months. It was further aggravated by the fact that, until the new marriage was registered, the applicant was not entitled to long private meetings with his partner but only to short (four-hour) meetings in the presence of a prison officer. In the circumstances, the restriction had been unjustified and had impaired the very essence of the applicant's right to marry and found a family.

Conclusion: violation (unanimously).

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

(See also *Jaremowicz v. Poland*, 24023/03, and *Frasik v. Poland*, 22933/02, judgments of 5 January 2010 summarised in Information Note 126)

ARTICLE 13

Effective remedy

Lack of suspensive effect of remedy for alleged collective expulsion: *no violation*

Khlaifia and Others v. Italy, 16483/12, judgment 15.12.2016 [GC]

(See Article 4 of Protocol no. 4 below, page 20)

Alleged lack of effective remedy for holders of public office exposed as collaborators of communist regime on basis of former security-service records: *communicated*

Anchev v. Bulgaria, 38334/08 [Section V]

(See Article 8 above, page 11)

ARTICLE 35

ARTICLE 35 § 1

Exhaustion of domestic remedies

Possibility to challenge measures taken on the basis of legislative-decrees adopted under state-of-emergency regime: *inadmissible*

Zihni v. Turkey, 59061/16, decision 29.11.2016 [Section II]

Facts – Following the aborted *coup d'état* in July 2016, a state of emergency was declared in Turkey. Eleven legislative decrees were subsequently enacted in this specific legal context. More than 50,000 civil servants, including the applicant, were dismissed by virtue of one of these legislative decrees. The applicant, who complained of various breaches of the Convention, had not brought proceedings before any domestic courts and had submitted his complaints directly to the Court.

Law – Article 35 § 1: In support of his decision not to exhaust domestic remedies, the applicant explained that he did not have available an effective remedy which would have enabled him to challenge the imposed measure. He submitted the following arguments: (i) no appeal lay against the measures taken under a legislative decree in the context of the state of emergency; and (ii) In any event, the Constitutional Court would be incapable

of reaching an impartial decision, since several of its members had been arrested and placed in pre-trial detention.

(a) *The scope of the remedies available* – It was true that under Turkish law judicial review of legislative decrees enacted in the context of a state of emergency had always been a matter of debate both in legal theory and in the case-law. However, on the face of it several remedies were available to the applicant in this connection.

Firstly, in a recent judgment of 4 November 2016, the Supreme Administrative Court had examined an application for judicial review lodged by a judge who had been dismissed by decision of the Supreme Council of Judges and Public Prosecutors, under emergency legislative decree no. 667: while it admittedly found that it did not have jurisdiction to consider the merits, the Supreme Administrative Court nonetheless considered that it was appropriate to remit the case to the administrative court, as the first-instance court. The Court could not speculate as to the outcome of that application, which was still pending. For his part, the applicant had not shown that, at the relevant time, the same administrative remedy was not effectively accessible to him.

Secondly, the Turkish legal system had since 2012 included the possibility of an individual appeal to the Constitutional Court: the new Article 148 § 3 of the Constitution granted that court jurisdiction to examine appeals lodged, after exhaustion of the ordinary remedies, by individuals who considered that there had been a breach of their fundamental rights and freedoms protected under the Constitution or by the Convention and the Protocols thereto. Since the entry into force of this new appeal, the Court had declared a number of applications inadmissible for failure to exhaust domestic remedies, there being no basis for ruling out in advance the possibility that this appeal might have the required effectiveness.

(b) *Whether an individual application to the Constitutional Court stood a chance of success* – It was true that in four recent leading cases the Constitutional Court, reversing previous case-law, had decided that it did not have jurisdiction to examine the constitutionality of the legislative decrees issued under the state of emergency.

However, those judgments had been delivered in the context of an action for review of constitutionality. The fact that the Constitutional Court had ruled on the constitutionality of a law in the context of a (direct) action for constitutional review did not prevent members of the public from bringing an individual appeal before it against individual acts taken in application of the law in question. Thousands of individual appeals had thus been lodged against the measures taken on the basis of the above-mentioned legislative decrees by persons in the same situation as the applicant. Although the Constitutional Court had not yet ruled on the question of its jurisdiction to examine them, the Court could not speculate on the outcome. It had not been shown in the present case that the remedy of an individual appeal, like that of an appeal before the administrative courts, was not effectively available to the applicant.

(c) *The existence of other particular circumstances which could have exempted the applicant from the obligation to avail himself of the above-mentioned remedies* – The Court had held on many occasions that the existence of mere doubts as to the prospects of success of a particular remedy which was not obviously futile was not a valid reason for failing to pursue it. The same applied to the applicant's fears as to the impartiality of the Constitutional Court.

Conclusion: inadmissible (failure to exhaust domestic remedies).

(See *Vučković and Others v. Serbia* (preliminary objection) [GC], 17153/11 and 29 others, 25 March 2014, Information Note 172)

ARTICLE 41

Just satisfaction

Pecuniary damage incurred by the applicant shareholder as a result of the unlawful takeover of a bank

Reisner v. Turkey, 46815/09, judgment (just satisfaction) 1.12.2016 [Section II]

Facts – In a judgment[1] delivered on 21 July 2015 the Court held, unanimously, that there had been violations of Article 1 of Protocol No. 1 and Article 6 of the Convention after finding that the applicant, as a shareholder, had been made to bear a disproportionate individual burden as a result of the unlawful takeover of Demirbank by the Savings Deposit Insurance Fund. The question of just satisfaction under Article 41 was reserved.

1. See *Reisner v. Turkey*, 46815/09, 21 July 2015.

Law – Article 41: In view of the considerable difference between the parties' submissions, in order to determine pecuniary compensation for the damage suffered by the applicant, the Court had to come to its own conclusions, on the basis of the documents in the file and the submissions of the parties.

The Government had alleged that the applicant had suffered no pecuniary damage because the book value of the bank was negative when it was taken over. The Court noted that the market value and the book value of a company could vary considerably. While the market value concerned the value of a company on the stock exchange, the book value pertained to the net asset value of a company, which was determined by subtracting liabilities from its total assets. The Court observed that the applicant, as a minor shareholder, had no involvement in the management of the bank and was not responsible for its debts. In such circumstances, the book value was not the correct basis to rely on when calculating the applicant's pecuniary loss. It was clear that a day prior to the takeover, the bank's shares had a certain monetary value. It was the average market value of a share on that date that was to be taken into account when determining the pecuniary loss.

Conclusion: EUR 514 in respect of pecuniary damage; finding of a violation constituted sufficient just satisfaction in respect of non-pecuniary damage (unanimously).

(See also *Brumărescu v. Romania* (just satisfaction) [GC], 28342/95, 23 January 2001, Information Note 26; and *Papamichalopoulos and Others v. Greece* (Article 50), 14556/89, 31 October 1995)

ARTICLE 46

Execution of judgment, general measures

Respondent State required to take further measures to eliminate structural problems relating to pre-trial detention

Ignatov v. Ukraine, 40583/15, judgment 15.12.2016 [Section V]

Facts – On 21 February 2013, following the Court's judgment in *Kharchenko v. Ukraine* (40107/02, 10 February 2011, Information Note 138) identifying shortcomings in the Ukrainian system of detention on remand, the Ukrainian Government submitted a Revised Action Plan in which they stated that the legislative shortcomings had largely been eliminated with the coming into force of the new Code of Criminal Procedure 2012.

The Council of Europe's Committee of Ministers, which was responsible for supervising the execution of the *Kharchenko* judgment under Article 46 § 2 of the Convention, subsequently noted that, while the new Code largely improved the procedure for detention on remand, it had not resolved certain violations of Article 5, particularly as regards the period between the end of the investigation and the beginning of the trial (see *Chanyev v. Ukraine*, 46193/13, 9 October 2014, Information Note 178). The Committee of Ministers insisted on the urgency of rapidly bringing about the remaining necessary legislative reforms and on the necessity of ensuring in the meantime that all possible practical measures are taken by courts and prosecutors to prevent further violations of Article 5 with regard to detention on remand. It continued to keep the execution of the *Kharchenko* judgment under "enhanced supervision".

In the instant case, the applicant, who was held in pre-trial detention for over two years before his prosecution was ultimately discontinued for lack of evidence, complained to the European Court of the unlawfulness and length of his detention and of inadequate review procedures (Article 5 §§ 1, 3 and 4 of the Convention).

Law – The Court found, unanimously, violations of Article 5 § 1 (lack of reasons given by the domestic courts for prolonging pre-trial detention), Article 5 § 3 (length of pre-trial detention) and Article 5 § 4 (failure to examine requests for release with due expedition).

Article 46: The violations of Article 5 found in the applicant's case could be said to be recurrent in the case-law concerning Ukraine. Those issues had been considered to stem from legislative lacunae, and the respondent State had been invited to take urgent action to bring its legislation and administrative practice into line with the Court's conclusions in respect of Article 5. As the present case demonstrated, however, neither the new legislation nor the practice had remedied the situation (see also the conclusions of the Committee of Ministers).

The Court therefore considered that the most appropriate way to address the violations was to amend the relevant legislation without delay and to adjust the judicial and administrative practice accordingly, in order to ensure that domestic crim-

inal procedure complied with the requirements of Article 5.

Article 41: EUR 6,000 in respect of non-pecuniary damage.

ARTICLE 1 OF PROTOCOL No. 1

Possessions

Payment of partial compensation rather than full expropriation value for land encumbered by material and legal restrictions owing to nearby construction of hydraulic dam: *violation*

Kutlu and Others v. Turkey, 51861/11, judgment 13.12.2016 [Section II]

Facts – The applicants were the owners of several plots of land near which a hydraulic dam had been built. Two of the plots were situated within the maximum protection zone around the dam, while the third was within the inner protection zone. This proximity entailed a number of restrictions, both physical (difficult access, destruction of telephone and electricity wires, etc.) and legal (ban on construction work and limitations on agricultural activities).

With a view to obtaining compensation for the damage sustained, the applicants brought several court actions requesting that their land be expropriated. The courts refused to make expropriation orders but awarded financial compensation.

Law – Article 1 of Protocol No. 1

(a) *Plots nos. 84/72 and 84/76* – Use of the plots had been affected by extremely stringent physical and legal restrictions: the plots could only be accessed by non-motorised vessels, no construction was permitted and agriculture was prohibited.

The law imposed expropriation where a plot of land in the neighbourhood of a dam was "no longer usable". The regulations, to which the law referred, specified that plots situated within the maximum protection zone around a reserve of drinking water "shall be expropriated". In view of the use of the verb "to be" and not of the modal verb "may", this text did not grant any discretionary margin of appreciation to the authorities, who did not have the freedom to choose between expropriation and the payment of a lower rate of compensation. On the contrary, the regulations removed all discretionary power from the authorities by obliging them to acquire the land, and thus granted the owners of plots situated within the maximum protection zone a genuine right of abandonment, that is, a "right to be expropriated".

This right of abandonment, provided for in the domestic regulations, amounted to a "proprietary interest" for the purposes of Article 1 of Protocol No. 1. The right to be expropriated and to obtain the payment of compensation corresponding to the value of the plots of land constituted a "possession".

By refusing to expropriate the plots of land concerned and opting for the payment of compensation for the damage arising from the restrictions on the use of the possessions, the authorities had infringed this proprietary interest, conferred by domestic law and protected by the Convention.

Such an infringement could not be considered compatible with the requirements of Article 1 of Protocol No. 1, given not only that it had no legal basis, but also that there was no real justification for it. The courts had given insufficient reasons for their decision to order the payment of compensation corresponding to the depreciation in the value of the land, rather than to give effect to the applicant's right of abandonment by making an expropriation order and awarding compensation corresponding to the value of the land. In this respect, it had to be observed that the domestic courts had not taken a position on the above-mentioned regulation. Nor had the Government put forward any good reason for this interference.

Conclusion: violation (six votes to one).

(b) *Plot no. 81/44* – This plot, which was situated in the inner protection zone, was subject to a number of restrictions that were intended to protect water quality in the dam. Thus, all construction was prohibited on it. In addition, agricultural activities were authorised only with the approval of the relevant ministry and subject to the condition that no artificial fertiliser or other chemical product was used.

The national regulations did not lay down a "right to be expropriated" for this plot.

The law linked the requirement to expropriate land situated in the proximity of a dam to the condition that they were "no longer usable". However, the national courts had never held that the property in question had become unusable within the meaning of that provision. It could not therefore be stated that in the present case the applicants had a right to be expropriated under that Article. As to the regulations, these did not stipulate that the restrictions

affecting land located in an inner protection zone automatically rendered the land unusable and did not otherwise provide for a requirement to expropriate. Consequently, in the absence of a "right to be expropriated" recognised under domestic law and likely to represent a proprietary interest protected by the Convention and thus a "possession, the payment of compensation corresponding to the damage arising from the regulatory restrictions was appropriate in order to strike a fair balance between the applicants' rights and those of society.

The court-appointed expert had estimated the depreciation in the value of the land resulting from the restrictions on its use at 40%. Yet the court had set the compensation at 25% of the value of the possessions with a mere reference to the criteria that had to be taken into account. This could not be considered as sufficient reasoning, given that the court had not indicated why and how the application of those criteria ought to result in the depreciation value being limited to 25%.

The manner in which the amount of the compensation had been determined did not enable the Court to conclude that it was reasonably related to the damage sustained.

Without requiring a detailed answer to each and every argument raised by the claimant, the obligation on the courts to adequately state the reasons on which they based their decisions implied that the injured party could expect his or her principal claims to be dealt with attentively and carefully.

In consequence, there was nothing to support the conclusion that the necessary fair balance between the general interest and the requirements of the protection of the applicants' rights had been struck.

Conclusion: violation (unanimously).

Article 41: EUR 455,000 in respect of pecuniary damage, jointly to all of the applicants; EUR 1,500 each in respect of non-pecuniary damage.

Peaceful enjoyment of possessions

Loss of disability benefits due to newly introduced eligibility criteria: *violation*

Béláné Nagy v. Hungary, 53080/13, judgment 13.12.2016 [GC]

Facts – In 2001 the applicant was granted a disability pension, which was withdrawn in 2010 after her degree of disability was re-assessed at a lower level using a different methodology. She underwent further examinations in the following years and was eventually assessed at the qualifying level. However, new legislation which had entered into force in 2012 introduced additional eligibility criteria which the applicant did not fulfil and which related to the duration of the social-security cover. As a consequence, although her degree of disability would otherwise have entitled her to a disability allowance under the new system, her applications were refused. The applicant complained that she had lost her means of support, guaranteed only by a disability allowance, as a result of legislative changes applied by the authorities without equity, in spite of the fact that there had been no improvement in her health.

In a judgment of 10 February 2015 (see Information Note 182) a Chamber of the Court held, by four votes to three, that there had been a violation of Article 1 of Protocol No. 1. In particular, it held that the applicant had been totally divested of her disability care due to a drastic and unforeseeable change in the conditions of her access to disability benefits.

On 1 June 2015 the case was referred to the Grand Chamber at the Government's request.

Law – Article 1 of Protocol No. 1

(a) *Applicability* – In certain circumstances a legitimate expectation of obtaining an asset could enjoy the protection of Article 1 of Protocol No. 1. A legitimate expectation had to be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision. At the same time, a proprietary interest recognised under domestic law – even if revocable in certain circumstances – could constitute a possession.

Amendments to social-security legislation may be adopted in response to societal changes and evolving views on the categories of people who need social assistance. Where the domestic legal conditions for the grant of any particular form of benefit or pension have changed and where the person concerned no longer fully satisfies them due to a change in these conditions, careful consideration of the individual circumstances of the case – in particular, the nature of the change in the requirement – may be warranted in order to verify the existence of a sufficiently established, substantive proprietary interest under the national law.

The applicant fulfilled all the conditions of eligibility for receiving a disability pension as of right for almost ten years. The decision granting her a disability pension in accordance with the provisions of the relevant act and which formed the basis of her original entitlement could thus be regarded as representing an existing possession. Throughout that period, she could, on the basis of the act, entertain a certain legitimate expectation of continuing to receive disability benefits should her disability persist to the requisite degree.

The question was whether, at the time of entry into force of the new legislation in 2012, the applicant still had a legitimate expectation of receiving disability benefit. The change in the law effectively imposed on a certain category of insured persons, including the applicant, a condition which had not been foreseeable during the relevant potential contributory period and which they could not possibly satisfy once the new legislation entered into force. During the intervening period between the discontinuation of the applicant's disability pension in 2010 and the legislature's introduction of the new contribution requirement in 2012, the applicant not only continued to be part of the social-security system but also continued to fulfil the relevant length-of-service requirements for disability benefits. As such, while not in receipt of a pension, she continued to entertain a legitimate expectation covered by the notion of possession in Article 1 of Protocol No. 1.

The applicant's right to derive benefits from the social-insurance scheme in question was infringed in a manner that resulted in the impairment of her pension rights. Article 1 of Protocol No. 1 was thus applicable.

(b) *Compliance with Article 1 of Protocol No. 1* – The Court was satisfied that the interference complied with the requirement of lawfulness and pursued the communal interest of protecting the public purse, by means of rationalising the system of disability-related social-security benefits. Article 1 of Protocol No. 1 required that any interference be reasonably proportionate to the aim sought to be realised. The requisite fair balance would not be struck where the person concerned bore an individual and excessive burden. The applicant had been subjected to a complete deprivation of entitlement, rather than to a commensurate reduction in her benefits. She did not have any other significant income on which to subsist and she had difficulties in pursuing gainful employment and belonged to a vulnerable group of disabled people.

The disputed measure, albeit aimed at protecting the public purse by overhauling and rationalising the scheme of disability benefits, consisted in legislation which, in the circumstances, failed to strike a fair balance between the interests at stake. Such considerations could not justify legislating with retrospective effect and without transitional measures corresponding to the particular situation, entailing as it did the consequence of depriving the applicant of her legitimate expectation that she would receive disability benefits. Such a fundamental interference with the applicant's rights was inconsistent with preserving a fair balance between the interests at stake. There was no reasonable relation of proportionality between the aim pursued and the means applied. Despite the State's wide margin of appreciation, the applicant had had to bear an excessive individual burden.

Conclusion: violation (nine votes to eight).

Article 41: EUR 5,000 in respect of non-pecuniary damage; EUR 10,000 in respect of pecuniary damage.

(See *Kopecky v. Slovakia* [GC], 44912/98, 28 September 2004, Information Note 67; *Stec and Others v. the United Kingdom* (dec.) [GC], 65731/01 and 65900/01, 6 July 2005; *Kjartan Ásmundsson*, 60669/00, 12 October 2004, Information Note 68; *Klein v. Austria*, 57028/00, 3 March 2011, Information Note 139; *Moskal v. Poland*, 10373/05, 15 September 2009, Information Note 122; see also, the Factsheet on Persons with disabilities and the European Convention)

Deprivation of property

Failure to pay interest on final instalment of compensation for expropriation despite the owner being deprived of possession after payment of the provisional instalment: *violation*

Dökmeci v. Turkey, 74155/14, judgment 6.12.2016 [Section II]

Facts – Mr Dökmeci was the owner of farmland. In 2006 the planned construction of a dam and a hydroelectric power-station was declared to be a public-interest project. In 2009 it was decided that the land concerned by the project would be subject to the urgent expropriation procedure (section 27 of the Expropriation Act, Law no. 2942), allowing

provisional compensation to be fixed after a site inspection without the expropriated owner being present. The authority immediately paid the sum thus fixed and was authorised to take possession of the land. In 2010 the authority applied to the court for determination of the compensation that would result, this time, from the "ordinary" procedure (section 10 of the Expropriation Act), providing for the owner's participation in the site inspection. In 2012 the court fixed the final compensation amount, of which the provisional amount covered slightly less than half (45%); the balance was paid later that year and the title to the land was then transferred. The applicant appealed in vain to the Court of Cassation and then to the Constitutional Court. In his view, the method applied for the calculation of the interest did not sufficiently compensate for inflation.

Law – Article 1 of Protocol No. 1: The deprivation of property had been lawful. The proportionality of the burden remained to be examined.

The additional sum allotted to the applicant after the second procedure did not include interest. In view of the inflation rate during the period in question – from the date of the application to the court until the judgment –, that part of the compensation had lost about 14% in value.

Like the Constitutional Court, the Court was of the opinion that the depreciation of the second part of the compensation had to be looked at in terms of the total amount awarded. The urgent and ordinary procedures in fact formed a single procedure; they had to be assessed as a whole. The depreciation to be taken into account was thus 7.7%.

The Constitutional Court did not see this as a disproportionate and excessive burden, noting moreover that the applicant had been able to use, spend or invest part of the compensation about eleven months before the start of the normal procedure.

The Court did not agree with that conclusion. The present case had to be distinguished from other cases that it had dealt with concerning the same subject matter against Turkey.

(i) In its decisions in *Güleç and Armut* (25969/09, 16 November 2010) or *Bucak and Others* (44019/09, 18 January 2011), the Court had accepted that depreciation of compensation for expropriation rising to 10.74% had not imposed a disproportionate and excessive burden. But the applicants had continued to use their property during the period in question; this had partly but sufficiently compensated for the depreciation of their award. In the present case, however, the applicant had been deprived of his land from the end of the urgent procedure and thus had not been able to use it during the period in question.

(ii) In its decisions in *Arabacı* (65714/01, 7 March 2002) and *Kurtuluş* (24689/06, 28 September 2010), the depreciation in question was significantly lower than that in the present case (5% and 3.67% respectively).

In the Court's view the Constitutional Court and the Government had erroneously argued as follows.

(a) *That the applicant had been able to use, spend or invest part of the compensation about eleven months before the start of the ordinary procedure*; this argument was speculative and ill-founded, since the applicant had lost possession of his land at the same time as receiving the first payment.

(b) *That the first part of the compensation was deducted from the final award only for its nominal value and not for its updated value on the date of the application to the court*; the benefit of this for the applicant was minimal, especially in view of his inability to use his property during the period in question and to obtain the whole award corresponding to the value of his land from the time he lost possession.

(c) *That the final compensation had been increased by the rise in value of the expropriated property in the meantime*; this argument was speculative, there being no certainty in this respect. In any event, the Government could not take advantage of a situation that the authorities had themselves created by introducing with some delay the procedure provided for by section 10 of the Expropriation Act.

Thus the discrepancy between the value of the compensation at the time of the application to the court and its value when actually paid had to be regarded as attributable to the lack of interest.

In the Court's view, the applicant had borne a disproportionate and excessive burden, which had upset the requisite fair balance between the safeguarding of the right of property and the demands of the general interest.

Conclusion: violation (unanimously).

Article 41: EUR 11,700 for pecuniary damage; finding of a violation sufficient for non-pecuniary damage.

(See *Yetiş and Others v. Turkey*, 40349/05, 6 July 2010, Information Note 132)

Control of the use of property

Confiscation of revenue for period in which company continued, without requisite permits, activity affecting environment: *no violation*

S.C. Fiercolect Impex S.R.L. v. Romania, 26429/07, judgment 13.12.2016 [Section III]

Facts – The applicant company was engaged in collecting and recycling scrap iron. In January 2005 it applied for the renewal of the requisite operating and environmental permits, which were due to expire on 7 March 2005. It was informed by the authorities that under new legislation (Order no. 876/2004) its activity was considered to have a significant impact on the environment and that it should therefore follow the authorisation procedure set out in that order. The company submitted additional documents as requested and a new environmental permit was issued on 24 March followed by a new operating permit on 14 April 2005. Throughout the period between the expiry of the operating permit on 7 March and its renewal on 14 April 2005 the applicant company continued to carry on its activity. The authorities subsequently imposed a fine equivalent to EUR 694 on it for operating without a permit and confiscated a sum equivalent to EUR 21,347 representing the market value of the scrap iron collected for recycling during the relevant period.

In the Convention proceedings, the applicant company complained under Article 1 of Protocol No. 1 that the sum confiscated in addition to the fine had been excessive and that the authorities had been responsible for its having to operate without a permit as they had failed to issue the necessary permits in time.

Law – Article 1 of Protocol No. 1: The interference with the applicant company's right to peaceful enjoyment of its possessions was prescribed by law and pursued the legitimate aim of controlling the conditions under which activities with an environmental impact were carried out.

However, the confiscation of the unlawfully obtained revenue as a sanction in addition to the fine was not disproportionate, as it had not imposed an "individual and excessive burden" on the applicant company. So finding, the Court noted as follows.

(i) The applicant company had continued to carry out its activity without an environmental permit even though that activity was considered to have a significant impact on the environment. It could have asked the authorities what to do and should have suspended its activity until it had obtained the requisite permits and then brought proceedings to recover any damages, as the domestic courts had indicated.

(ii) The issue whether such conduct should be punished by a financial penalty with a deterrent effect such as a fine and the confiscation of the unlawfully obtained revenue came within the Contracting States' wide margin of appreciation in the sphere of environmental protection.

(iii) The pecuniary penalties imposed were not excessive: allowing the company to keep the revenue obtained over the relevant period would encourage other commercial companies to carry out their activity without complying with the relevant legal provisions, in particular, those protecting the environment.

(iv) Unlike cases such as *Ismayilov v. Russia* (30352/03, 6 November 2008, Information Note 113) and *Gabrić v. Croatia* (9702/04, 5 February 2009) in which the cumulative effect of a fine and a confiscation measure had been found to be disproportionate, the legislation in the applicant company's case did not provide for confiscation of an amount unrelated to the severity of the crime but had instead focused specifically on the profits earned during the period during which it had not held the relevant permits.

Conclusion: no violation (unanimously).

ARTICLE 3 OF PROTOCOL No. 1

Stand for election

House arrest of candidate politician during parliamentary elections: *no violation*

Uspaskich v. Lithuania, 14737/08, judgment 20.12.2016 [Section IV]

Facts – In 2006 the Lithuanian authorities opened a criminal investigation on suspicion of financial fraud by the Labour party. The applicant, the founder and chairman of the party, fled to Russia. In 2007 he was confirmed as a candidate for that party

in parliamentary elections. He returned to Lithuania and was arrested and placed under house arrest. Whilst he made it to the second round, he was ultimately not elected to parliament.

The applicant complained under Article 3 of Protocol No. 1 that he had been unable to effectively take part in parliamentary elections due to his house arrest.

Law – Article 3 of Protocol No. 1: The applicant was entitled under Article 3 of Protocol No. 1 to stand for election in fair and democratic conditions, regardless of whether ultimately, he won or lost. When he was named as a candidate in the parliamentary elections, the applicant must have been clearly aware that he was a suspect in a criminal investigation. He must also have known that a court order for his arrest and detention had been issued. Accordingly, he could not have reasonably expected to take part in those elections without any constraints, on equal terms with any other candidate, who was not an object of criminal proceedings.

Following the applicant's return to Lithuania, he was placed under house arrest. It was not unreasonable to say that he was therefore permitted to run his electoral campaign from his home. Taking into account that he was a well-known politician and that the members of his political party took part in meetings with the voters in person, the restriction was not particularly burdensome on his right to participate in the elections to the extent that it would have been decisive for the ultimate result.

As to the applicant's ability to challenge the remand measure in the context of his complaint under Article 3 of Protocol No. 1, the existence of a domestic system for effective examination of individual complaints and appeals in matters concerning electoral rights was one of the essential guarantees of free and fair elections. Such a system ensured an effective exercise of individual rights to vote and to stand for election, maintained general confidence in the State's administration of the electoral process and constituted an important device at the State's disposal in achieving the fulfilment of its positive obligation under Article 3 of Protocol No. 1 to hold democratic elections. The applicant had made full use of the system of examination of individual election-related complaints and appeals provided for by Lithuanian law. There was nothing to indicate that in assessing the reasonableness of the remand measure of house arrest, the domestic authorities had acted arbitrarily.

The applicant had held a number of posts during his political career and the Government's argument that he sought each time to take part in elections to a different elected body and then moved on once he lost immunity in order to avoid prosecution did not appear to be without basis. The applicant's political party had shielded him from prosecution by systematically presenting him as a candidate in municipal, parliamentary and European Parliament elections, all of which meant that at least for a certain time he could enjoy immunity from prosecution.

There were no irregularities capable of thwarting the applicant's rights to stand for election effectively.

Conclusion: no violation (unanimously).

(See *Namat Aliyev v. Azerbaijan*, 18705/06, 8 April 2010, Information Note 129)

ARTICLE 4 OF PROTOCOL No. 4

Prohibition of collective expulsion of aliens

Removal to Tunisia of large group of Tunisian sea-migrants after each had been identified individually and allowed to raise any personal objections: *no violation*

Khlaifia and Others v. Italy, 16483/12, judgment 15.12.2016 [GC]

Facts – The applicants, who were Tunisian nationals, were part of a group of migrants who had set off by boat from Tunisia in September 2011 heading for Italy. Their makeshift vessels were intercepted by the Italian Coastguard, which escorted them to a port on the island of Lampedusa, where they were placed in an early reception centre (CSPA). The centre was gutted by fire during a riot and the applicants were then taken to ships moored in Palermo harbour. They were issued with refusal-of-entry orders. Before being put on planes bound for Tunisia they were received by the Tunisian Consul, who recorded their identities. Once in Tunis they were released. The whole series of events lasted about twelve days. In 2012 a judge dismissed complaints by a number of associations for abuse of power and arbitrary arrest.

In a judgment of 1 September 2015 (see Information Note 188), a Chamber of the Court found a violation of Article 4 of Protocol No. 4 to the Convention on account of the lack of adequate safeguards of a genuine and specific examination of the

individual situation of each applicant; a violation of Article 13 of the Convention, on account of the lack of suspensive effect of the relevant remedies; a violation of Article 5 § 1 (lack of legal basis for the deprivation of liberty), and of Articles 5 § 2 and 5 § 4; a violation of Article 3 for the conditions of detention in the centre and no violation of Article 3 for the detention on the ships; and a violation of Article 13 for the lack of remedies in that connection.

On 1 February 2016 the case was referred to the Grand Chamber at the Government's request.

Law

Article 4 of Protocol No. 4: Article 4 of Protocol No. 4 did not guarantee the right to an individual interview in all circumstances; the requirements of this provision might be satisfied where each alien had a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments were examined in an appropriate manner by the authorities of the respondent State.

In the present case, the applicants, who could reasonably have expected to be returned to Tunisia, had remained for between nine and twelve days in Italy. Even assuming that they had encountered objective difficulties in the CSPA or on the ships, during that not insignificant period of time they had had the possibility of drawing the attention of the national authorities to any circumstance that might affect their status and entitle them to remain in Italy.

Firstly, the applicants had undergone two identity checks:

(a) The first identity check, according to the respondent Government, took place after the applicants' arrival in the reception centre and involved taking photographs of them and recording their fingerprints. While the Government had failed to produce the applicants' personal records, they had plausibly attributed that failure to the fire in the centre. As to the alleged lack of communication and mutual understanding between the migrants and the Italian authorities, it was reasonable to assume that the difficulties had been alleviated by the undisputed presence in the centre of some one hundred social operators, including social workers, psychologists and about eight interpreters and cultural mediators.

(b) A second identity check took place before the applicants boarded the planes for Tunis: they had been received by the Tunisian Consul, who had recorded their identities. Even though the check was carried out by the representative of a third State, this subsequent check enabled verification of the migrants' nationality and provided them with a last chance to present arguments against their expulsion, on grounds such as age or nationality (some of the migrants had thus not been returned).

Secondly, while the refusal-of-entry orders had been drafted in comparable terms, only differing as to the personal data of each migrant, the relatively simple and standardised nature of the orders could be explained by the fact that the applicants did not have any valid travel documents and had not alleged either that they feared ill-treatment in the event of their return or that there were any other legal impediments to their expulsion. It was therefore not unreasonable in itself for those orders to have been justified merely by the applicants' nationality, by the observation that they had unlawfully crossed the Italian border, and by the absence of any of the situations provided for in the relevant law (political asylum, granting of refugee status or the adoption of temporary protection measures on humanitarian grounds).

Thirdly, it was not decisive that a large number of Tunisian migrants had been expelled at the relevant time or that the three applicants had been expelled virtually simultaneously. This could be explained as the outcome of a series of individual refusal-of-entry orders. Those considerations sufficed for the present case to be distinguished from the cases of *Čonka v. Belgium* (51564/99, 5 February 2002, Information Note 39), *Hirsi Jamaa and Others v. Italy* (27765/09, 23 February 2012, Information Note 149), *Georgia v. Russia (I)* [GC] (13255/07, 3 July 2014, Information Note 176) and *Sharifi and Others v. Italy and Greece* (16643/09, 21 October 2014, Information Note 178).

In addition, the applicants' representatives had been unable to indicate the slightest factual or legal ground which, under international or national law, could have justified their clients' presence on Italian territory and preclude their removal. That called into question the usefulness of an individual interview in the present case.

To sum up, the applicants had undergone two identity checks, their nationality had been established, and they had been afforded a genuine and effective possibility of submitting arguments against their expulsion.

Conclusion: no violation (sixteen votes to one).

Article 13 of the Convention taken together with Article 4 of Protocol No. 4: In the present case, the refusal-of-entry orders indicated expressly that the individuals concerned could appeal against them to the Agrigento Justice of the Peace within a period of sixty days.

There was no reason to doubt that, in that context, the Justice of the Peace would also be entitled to examine any complaint about a failure to take account of the personal situation of the migrant concerned and based therefore, in substance, on the collective nature of the expulsion.

As to the fact that this appeal did not have suspensive effect, an in-depth analysis of the *De Souza Ribeiro v. France* judgment ([GC], 22689/07, 13 December 2012, Information Note 158), compared with the judgments in *Čonka* and *Hirsi Jamaa and Others,* cited above, led the Court to the following conclusions.

Where an applicant had not alleged that he would face violations of Articles 2 or 3 of the Convention in the destination country, removal from the territory of the respondent State would not expose him to harm of a potentially irreversible nature. In such cases the Convention thus did not impose an absolute obligation on a State to guarantee an automatically suspensive remedy, but merely required that the person concerned should have an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum. In the present case, the remedy available satisfied those requirements.

Moreover, the fact that the remedy available to the applicant did not have suspensive effect had not been a decisive consideration for the conclusion reached in the *De Souza Ribeiro* case. That conclusion had been based on the fact that the applicant's "arguable" complaint under Article 8 of the Convention had been dismissed extremely hastily (his removal to Brazil had been implemented less than an hour after his appeal to the Administrative Court).

Conclusion: no violation (sixteen votes to one).

Article 3: The applicants had complained about the conditions in which they had been held.

After reiterating that the factors related to an increase in the arrival of migrants could not release the member States from their obligations, the Court took the view that it would be artificial to examine the facts of the case outside the context of the humanitarian emergency.

The year 2011 had been marked by a major migration crisis. The arrival *en masse* of North African migrants (over 50,000 during the year) on Lampedusa and Linosa had undoubtedly created organisational, logistical and structural difficulties for the Italian authorities.

In addition to that general situation there had been some specific problems just after the applicants' arrival which contributed to exacerbating the existing difficulties and creating a climate of heightened tension: a revolt among the migrants at the reception centre; an arson attack which gutted the centre; a demonstration by 1,800 migrants through the streets of Lampedusa; clashes between the local community and a group of aliens threatening to explode gas canisters; and acts of self-harm and vandalism.

Those details showed that the State had been confronted with many problems as a result of the arrival of exceptionally high numbers of migrants and that the authorities had been burdened with a large variety of tasks, as they had to ensure the welfare of both the migrants and the local people and to maintain law and order.

The decision to concentrate the initial reception of the migrants on Lampedusa could not be criticised in itself. As a result of its geographical situation, it was not unreasonable to transfer the survivors to the closest reception facility.

(a) *Conditions in the reception centre* – The Court found, noting the following points, that the conditions in which the applicants had been held in the centre did not reach the threshold of severity required for them to be characterised as inhuman or degrading.

(i) While certain reports by parliamentary committees or NGOs showed that there was overcrowding in the centre, together with a lack of hygiene, privacy and outside contact, their findings were, however, counterbalanced by a report of the Council of Europe's Parliamentary Assembly covering a period that was closer to that of the applicants' stay there, so the conditions in question could not be compared to those which had led the Court to find a violation of Article 3 in other cases.

(ii) Even though the number of square metres per person in the centre's rooms had not been established, and even supposing that the centre's

maximum capacity had been exceeded by a percentage of between 15% and 75%, the freedom of movement enjoyed by the applicants in the centre must have alleviated the constraints.

(iii) Although the applicants had been weakened because they had just made a dangerous sea-crossing, they did not have any specific vulnerability (they were not asylum-seekers, did not claim to have endured traumatic experiences in their country of origin, belonged neither to the category of elderly persons nor to that of minors, and did not claim to be suffering from any particular medical condition).

(iv) They had not lacked food or water or medical care and had not been exposed to abnormal weather-related conditions.

(v) In view of the short duration of their stay (3-4 days), their lack of contact with the outside world had not had any serious individual consequences.

(vi) While the authorities had been under an obligation to take steps to find other satisfactory reception facilities with enough space and to transfer a sufficient number of migrants to those facilities, in the present case the Court could not address the question whether that obligation had been fulfilled, because only two days after the arrival of the last two applicants, the Lampedusa CSPA had been gutted by fire during a revolt.

(vii) Generally speaking, situations that the Court had sometimes found to be in breach of Article 3 had been more intense or longer in duration.

Conclusion: no violation (unanimously).

(b) *Conditions on board the two ships* – The threshold of severity had not been reached on the ships either.

First, the applicants had failed to produce any documents or third-party testimony certifying any signs of the alleged ill-treatment or confirming their version of the facts (overcrowding, insults, lack of hygiene), so there was no reason to reverse the burden of proof.

Second, it could be seen, by contrast, from a judicial decision (based on a press agency note and there being no reason to doubt that it had been taken with the requisite procedural safeguards) that an MP had boarded the ships and had observed that the migrants were accommodated in satisfactory conditions.

Conclusion: no violation (unanimously).

The Court also found, unanimously, that there had been a violation of Article 5 § 1 (and consequently of Articles 5 § 2 and 5 § 4) on account of the lack of legal basis for the applicants' deprivation of liberty. Their *de facto* detention without any formal decision had deprived them of the constitutional *habeas corpus* guarantees afforded to individuals held in a removal centre and, even in the context of a migration crisis, this could not be compatible with the aim of Article 5 of the Convention. There had also been a violation of Article 13 taken together with Article 3, in respect of the detention conditions.

Article 41: EUR 2,500 to each of the applicants for non-pecuniary damage.

OTHER JURISDICTIONS

Court of Justice of the European Union (CJEU)

Eligibility of non-resident students for financial aid dependent on parent's having worked in aid-providing member State for a continuous period of at least five years

Maria do Céu Bragança Linares Verruga and Others v. Ministre de l'Enseignement supérieur et de la Recherche, C-238/15, judgment (Second Chamber) 14.12.2016

In the context of main proceedings between a family and the State with regard to a study grant, the Administrative Court (Luxembourg) asked the CJEU for a preliminary ruling on whether European Union law was incompatible with the imposition, through the legislation of a member State and for the purpose of encouraging an increase in the proportion of residents with a higher education decree, the condition of a minimum and continuous period of work of five years by at least one of the parents in that member State before non-resident students were entitled to a study grant, without such a condition being imposed in respect of students resident on the territory. The requested interpretation concerned Article 7 (2) of Regulation (EU) no. 492/2011 of 5 April 2011 on freedom of movement for workers within the Union, according to which a worker who was a national of another member State was to enjoy the same social and tax advantages as national workers.

The applicants in the main proceedings were a couple of frontier workers and their son, who was a student in Belgium and lived with his parents in France. Both parents had been working in Luxembourg for about eight years, save for a recent break of two and a half months for the mother and a break of a little over two years for the father. As a student, their son had applied to the Luxembourg authorities for financial assistance for the 2013/2014 university year. The relevant minister had refused to grant this assistance, on the ground that neither of the parents had worked continuously in Luxembourg in the five years preceding the application, as required by the legislation. Taking the view that the impugned condition amounted to unjustified discrimination, the family complained about those decisions to the referring court.

The CJEU replied in the affirmative to the question submitted to it, on the following grounds.

(a) *The existence of discrimination* – As set out in the *Giersch e.a.* judgment of 20 June 2013 (C-20/12), which concerned a previous version of the same Luxembourg law, a condition such as that in issue constituted indirect discrimination on the ground of nationality.

(b) *The existence of a legitimate objective* – Referring to the same *Giersch e.a.* judgment, the CJEU noted that an action undertaken by a Member State in order to ensure that its resident population was highly educated pursued a legitimate objective which could justify indirect discrimination on grounds of nationality.

(c) *Appropriateness of the condition requiring a minimum and continuous period of work* – It seemed legitimate for the State providing the aid to seek to ensure that the frontier worker did in fact have a link of integration with Luxembourg society, by requiring a sufficient attachment in order to combat the risk of "study-grant forum shopping".

In this connection, the condition of a minimum period of work in Luxembourg on the part of the frontier worker parent in order for the children of frontier workers to be able claim financial aid from the State for higher education studies was of such a kind as to establish such a connection on the part of those workers to Luxembourg society and a reasonable probability that the student would return to Luxembourg after completing his studies.

(d) *Necessity for the condition* – In the opinion of the CJUE, by laying down the condition of a minimum and continuous period of five years' employment, without permitting the competent authorities to grant that aid where, as in the main proceedings, the parents, notwithstanding a few short breaks, had worked in Luxembourg for a significant period of time, in this case for almost eight years, in the period preceding that application, the national legislation had created a restriction that went beyond what was necessary in order to attain the legitimate objective of increasing the number of residents holding a higher education degree. Such breaks were not liable to sever the connection between the applicant for financial aid and the Member State concerned.

In conclusion, Regulation (EU) no. 492/2011 on freedom of movement for workers within the Union precluded legislation by a Member State which, with the aim of encouraging an increase in the proportion of residents with a higher education degree, made the grant of financial aid for higher-education studies to a non-resident student conditional on at least one of that student's parents having worked in that Member State for a minimum and continuous period of five years, but which did not lay down such a condition in respect of a resident student.

Incompatibility with EU law of national legislation imposing general obligation on providers of electronic communications services to retain data

Tele2 Sverige AB v. Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson and Others, C-203/15 and C-698/15, judgment (Grand Chamber) 21.12.2016

The case concerned two requests for a preliminary ruling regarding the compatibility with EU law of national rules requiring providers of electronic communications services to retain and give the national authorities access to certain data.

The requests were made in the wake of the CJEU's judgment of 8 April 2014 in *Digital Rights Ireland and Seitlinger and Others* (C-293/12 and C-594/12) which invalidated the Data Retention Directive 2006/24[1] on the grounds that it did not lay down clear and precise rules and entailed a wide-rang-

1. Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

ing and particularly serious interference with the fundamental rights to respect for privacy and the protection of personal data (Articles 7 and 8 of the Charter of Fundamental Rights) that was not precisely circumscribed by provisions to ensure that it was actually limited to what was strictly necessary.

The requests for a preliminary ruling in the present case were made by the Administrative Court of Appeal, Stockholm, Sweden and the Court of Appeal (England and Wales). The CJEU was requested to state whether national rules that imposed on providers of electronic communications services a general obligation to retain data and which made provision for access by the competent national authorities to the retained data, where, *inter alia*, the objective pursued by that access was not restricted solely to fighting serious crime and where access was not subject to prior review by a court or an independent administrative authority, were compatible with EU law (in particular Directive on Privacy and Electronic Communications 2002/58, as amended,[1] read in the light of the Charter).

Swedish law requires providers of electronic communications services to retain, systematically and continuously, and with no exceptions, all the traffic data and location data of all their subscribers and registered users, with respect to all means of electronic communication. The provision of United Kingdom law in issue (section 1 of the Data Retention and Investigatory Powers Act 2014) empowers the Secretary of State to adopt, without any prior authorisation from a court or an independent administrative body, a general regime requiring public telecommunications operators to retain all data relating to any postal service or any telecommunications service for a maximum period of 12 months if he or she considers that such a requirement is necessary and proportionate to achieve the purposes stated in the United Kingdom legislation. The data concerned does not include the content of a communication.

The CJEU found, firstly, that the national measures at issue fell within the scope of Directive 2002/58 on privacy and communications. The protection of the confidentiality of electronic communications and related traffic data guaranteed by the directive applied to the measures taken by all persons other than users, whether by private persons or bodies, or by State bodies.

It went on to rule that EU law precluded national legislation that prescribed general and indiscriminate retention of data.

(i) *Retention of data* – The retained data, taken as a whole, was liable to allow very precise conclusions to be drawn concerning the private lives of the persons whose data had been retained. The interference by national legislation that provided for the retention of traffic data and location data with that right must therefore be considered to be particularly serious. The fact that the data was retained without the users of electronic communications services being informed of the fact was likely to cause the persons concerned to feel that their private lives were the subject of constant surveillance. Consequently, only the objective of fighting serious crime was capable of justifying such interference.

Legislation prescribing a general and indiscriminate retention of data did not require there to be any relationship between the data which must be retained and a threat to public security and was not restricted to, *inter alia*, providing for retention of data pertaining to a particular time period and/or geographical area and/or a group of persons likely to be involved in a serious crime. Such national legislation therefore exceeded the limits of what was strictly necessary and could not be considered to be justified within a democratic society, as required by the directive, read in the light of the Charter.

The CJEU noted, however, that the directive did not preclude national legislation from imposing a targeted retention of data for the purpose of fighting serious crime, provided that such retention was, with respect to the categories of data to be retained, the means of communication affected, the persons concerned and the retention period adopted, limited to what was strictly necessary. Any national legislation to that effect had to be clear and precise and provide for sufficient guarantees of the protection of data against risks of misuse. It had to indicate in what circumstances and under which conditions a data retention measure could, as a preventive measure, be adopted, thereby ensuring that the scope of the measure was, in practice, actually limited to what was strictly necessary. In particular, such legislation had to be based

1. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009.

on objective evidence which made it possible to identify the persons whose data was likely to reveal a link with serious criminal offences, to contribute to fighting serious crime or to preventing a serious risk to public security.

(ii) *Access of the competent national authorities to the retained data* – The national legislation concerned could not be limited to requiring that access should be for one of the objectives referred to in the directive, even if that objective was to fight serious crime, but also had to lay down the substantive and procedural conditions governing the access of the competent national authorities to the retained data. The legislation had to be based on objective criteria in order to define the circumstances and conditions under which the competent national authorities were to be granted access to the data. Access could, as a general rule, be granted, in relation to the objective of fighting crime, only to the data of individuals suspected of planning, committing or having committed a serious crime or of being implicated in one way or another in such a crime. However, in particular situations, where for example vital national security, defence or public-security interests were threatened by terrorist activities, access to the data of other persons might also be granted where there was objective evidence from which it could be inferred that that data might, in a specific case, make an effective contribution to combating such activities.

It was essential that access to retained data should, except in cases of urgency, be subject to prior review carried out by either a court or an independent body. In addition, the competent national authorities to whom access to retained data was granted had to notify the persons concerned of that fact.

Given the quantity of retained data, the sensitivity of the data and the risk of unlawful access to it, the national legislation had to make provision for the data to be retained within the EU and for the irreversible destruction of the data at the end of the retention period.

In conclusion, Article 15(1) of Directive 2002/58 on privacy and electronic communications, as amended, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, had to be interpreted as precluding:

(1) national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication.

(2) national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union.

(See also the ECHR cases of *Roman Zhakarov v. Russia* [GC], 47143/06, 4 December 2015, Information Note 191, and *Szabó and Vissy v. Hungary*, 37138/14, 12 January 2016, Information Note 192, both cited in the CJEU judgment; the ECHR's Factsheet on Personal data protection; and, for a general overview of both EU and Convention law on the subject, the Handbook on European data protection law)

Inter-American Court of Human Rights (IACtHR)

Discrimination based on perceived sexual orientation in military disciplinary proceedings

Case of Flor Freire v. Ecuador, Series C No. 315, judgment 31.8.2016

[This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. It relates only to the merits and reparations aspects of the judgment. A more detailed, official abstract (in Spanish only) is available on that Court's website: www.corteidh.or.cr.]

Facts – The applicant, Mr Homero Flor Freire, was a member of the Ecuadorian Armed Forces when he was dismissed from his position as lieutenant for allegedly engaging in homosexual acts inside military quarters with another soldier. However, he continuously denied such acts and did not identify as homosexual.

After the alleged acts, his commander released him from his functions and responsibilities. Disciplinary proceedings were initiated on the basis of Article 117 of the Regulations on Military Discipline, which provided for the dismissal of members of the armed forces, *inter alia*, when caught in homosexual acts inside or outside military facilities. Article 67 of the Regulations provided for the temporary arrest or suspension of members of the armed forces

engaging in non-homosexual acts inside military facilities.

During the disciplinary proceedings, the commander acted as judge and, after finding that the applicant had engaged in homosexual acts, recommended his dismissal. This recommendation was accepted by the Council of Officers. A subsequent constitutional complaint filed by the applicant was found inadmissible on the grounds that the judgment rendered in the disciplinary proceedings was in accordance with the rule of law.

Law

(a) *Articles 24 (right to equal protection) of the American Convention on Human Rights (ACHR), in conjunction with Articles 1(1) (obligation to respect and ensure rights without discrimination) and 2 (domestic legal effects)* – The Inter-American Court stressed that a person's sexual orientation depends entirely on his or her self-identification. Discrimination based on perception has the effect and purpose of hindering and nullifying the recognition, enjoyment and exercise of a person's human rights and fundamental freedoms, irrespective of whether the person identifies with a certain category or not. As a consequence, the person is reduced to the only characteristic attributed to him or her regardless of other personal conditions.

In this context, sexual orientation is a category protected under Article 1(1) of the ACHR, whether real or perceived. The prohibition of discrimination based on sexual orientation is not limited to the fact of being a homosexual *per se*, but includes its expression and the ensuing consequences in a person's life project. The prohibition of discrimination based on sexual orientation in the armed forces has been recognized in international instruments and jurisprudence, including that of the European Court of Human Rights.

The Inter-American Court acknowledged the reasonableness and legitimacy of restrictions on sexual acts inside military facilities or during active duty with the purpose of preserving military discipline. Nevertheless, in the case at hand, it found that there had been an unjustified difference between the sanction of non-homosexual acts and homosexual acts, with the latter receiving a much harsher punishment. The Court ruled that the State had the burden to provide an objective and reasonable justification for the more severe punishment assigned to homosexual acts. Since the State had failed to provide such a justification, it was responsible for a violation of the right to equal protection before the law and the prohibition of discrimination.

Conclusion: violation (unanimously).

(b) *Articles 9 (principle of legality) and 11(1) (right to have honour respected and dignity recognised) of the ACHR, in conjunction with Article 1(1)* – The applicant argued that the conduct for which he had been punished was not established by law. The Inter-American Court noted that the sanction imposed on the applicant was not exclusively based on an administrative regulation, but also on the Law of Personnel of the Armed Forces. It held that in matters of disciplinary sanctions, certain undetermined legal concepts could be specified, in terms of their interpretation and content, through infra-legal regulations or jurisprudence in order to avoid an excessive discretion in their application.

There was no conventional obligation prohibiting conduct not considered as a criminal offence from being sanctioned through disciplinary procedures. Therefore, the decriminalisation of homosexuality in Ecuador did not imply a general prohibition on sanctioning the applicant for engaging in sexual acts inside military facilities.

However, the applicant´s honour and reputation had been harmed by the discriminatory disciplinary proceedings he had been subjected to, which had led to a distortion of public opinion regarding his person.

Conclusion: no violation of Article 9; violation of Article 11(1) in conjunction with Article 1(1) (unanimously).

(c) *Articles 8(1) (right to a fair trial) and 25(1) (right to judicial protection) of the ACHR in conjunction with Articles 1(1) (obligation to respect and ensure rights) and 2 (domestic legal effects)* – With regard to the guarantee of impartiality, the mere fact that the applicant´s superior was the one who exercised disciplinary power over him was not contrary to the ACHR. However, the fact that the same commander who had released the applicant from his functions and responsibilities had later acted as a judge in the disciplinary proceedings, implied a prior judgment of the facts. It was therefore not possible to affirm that his approximation to the facts lacked prejudice or preconceived notions with respect to the incident, in a way that could have allowed him to form an opinion solely based on the evidence gathered during the proceedings.

Finally, Ecuador had demonstrated that the applicant could have lodged a contentious administrative appeal to challenge the disciplinary decisions leading to his dismissal. However, even if this remedy may have been adequate to obtain an effective judicial protection, the applicant had not used it so the Court could not assess its suitability and effectiveness in the present case.

Conclusion: violation of Article 8(1) in conjunction with Article 1(1); no violation of Article 25(1) in conjunction with Articles 1(1) and 2 (unanimously).

(d) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered the State, *inter alia*, to: (i) give the applicant the status of a military officer in retirement with the corresponding rank and social benefits of his colleagues; (ii) eliminate the reference to the disciplinary proceedings from his military résumé; (iii) publish the judgment and its official summary; (iv) implement training programmes for members of the armed forces about the prohibition of discrimination based on sexual orientation, and (v) pay compensation in respect of pecuniary and non-pecuniary damage, as well as costs and expenses.

COURT NEWS

Elections

On 12 December 2016 the Court elected a new Vice-President – Angelika Nußberger (Germany). She has been elected for a three-year term. It also elected Helena Jäderblom (Sweden), Linos-Alexandre Sicilianos (Greece) and Ganna Yudkivska (Ukraine) as Section Presidents for a two-year term. All four judges will take up their respective duties on 1 February 2017.

Court's videos: new translations

Some of the videos produced by the Court have been translated into Azerbaijani, Lithuanian and Serbian (video on admissibility conditions), Albanian (video on lodging an application) and German (film on the Court).

All the videos are available on the Court's Internet site (www.echr.coe.int – The Court) and its YouTube channel (https://www.youtube.com/user/EuropeanCourt).

RECENT PUBLICATIONS

Factsheets: new translations

The Factsheet on Trafficking in human beings has just been translated into Greek and the Factsheet on Interim measures into Spanish. All factsheets can be downloaded from the Court's Internet site (www.echr.coe.int – Press).

Εμπορία ανθρώπων (ell)

Medidas cautelares (spa)

Handbook on access to justice: new translations

The Handbook on European law relating to access to justice – which was published jointly by the Court, the Council of Europe and the European Union Agency for Fundamental Rights (FRA) in 2016 – has been translated into Croatian, Dutch, Finnish and Hungarian. All FRA/ECHR Handbooks on European law can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law).

Oikeussuojan saatavuus Euroopan oikeudessa – käsikirja (fin)

Priručnik o europskom pravu u području pristupa pravosuđu (hrv)

Kézikönyv az igazságszolgáltatáshoz való hozzáférésre vonatkozó európai jogról (hun)

Handboek betreffende Europese wetgeving inzake de toegang tot het recht (nld)

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.

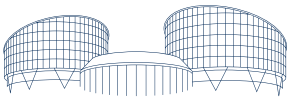
In the provisional version the summaries are normally drafted in the language of the case concerned, whereas the final single-language version appears in English and French respectively. The Information Note may be downloaded at www.echr.coe.int/NoteInformation/en. For publication updates please follow 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).

ENG

www.echr.coe.int

The European Court of Human Rights is an international court set up in 1959 by the member States of the Council of Europe. It rules on individual or State applications alleging violations of the rights set out in the European Convention on Human Rights of 1950.



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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE