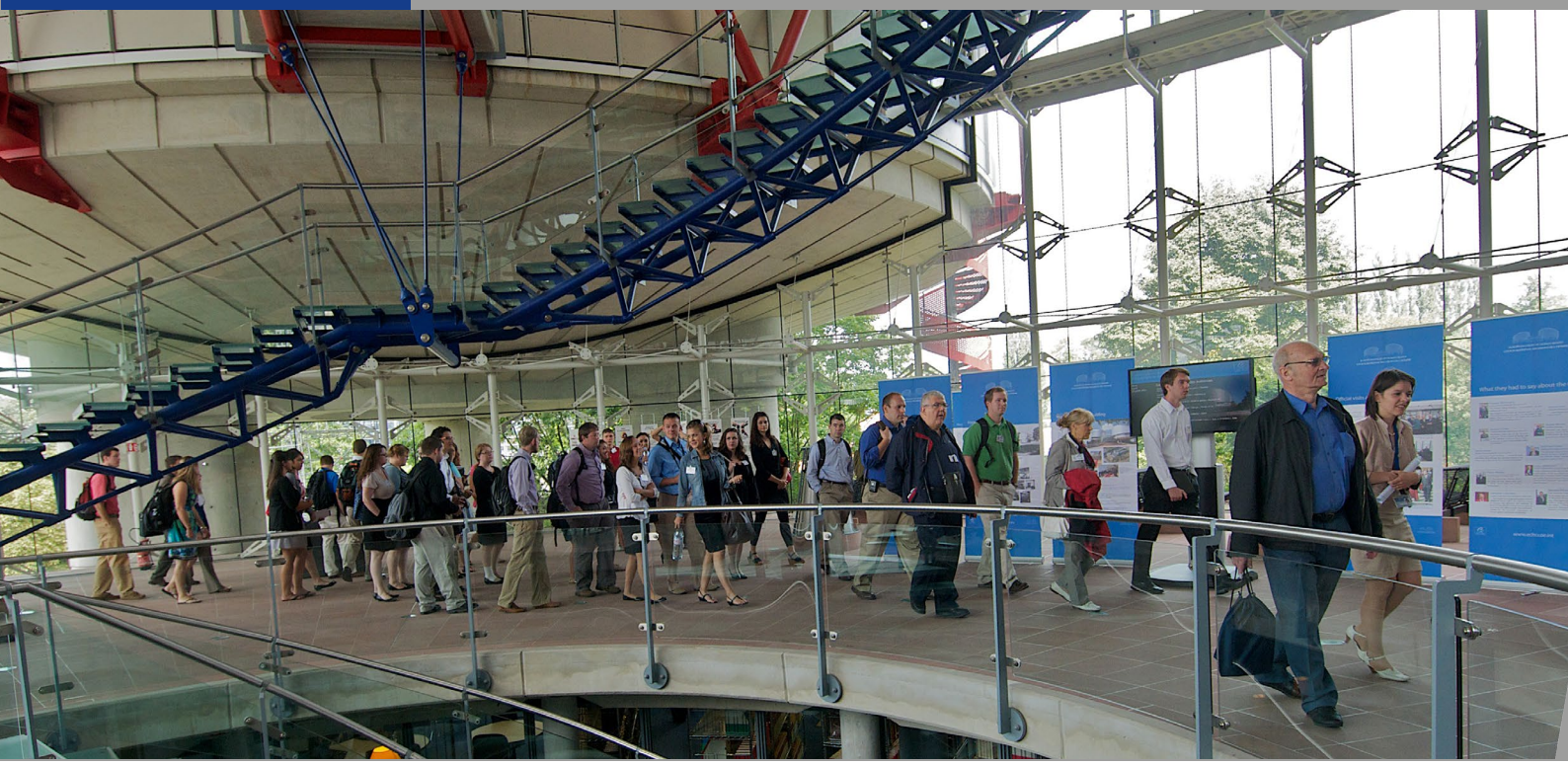
2017

DECEMBER

INFORMATION NOTE 213

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

ARTICLE 2

Positive obligations (substantive aspect)

Alleged medical negligence resulting in patient's death: *no violation*

Lopes de Sousa Fernandes v. Portugal, 56080/13, judgment 19.12.2017 [GC] 6

Positive obligations (procedural aspect)

Failure to conduct adequate and timely inquiry into death resulting from suspected medical negligence: *violation*

Lopes de Sousa Fernandes v. Portugal, 56080/13, judgment 19.12.2017 [GC] 8

Expulsion

Proposed expulsion to Iran of Christian convert: *deportation would not constitute a violation*

A. v. Switzerland, 60342/16, judgment 19.12.2017 [Section III] 8

ARTICLE 3

Inhuman or degrading treatment

Conditions of immigration detention of accompanied minors: *violation*

S.F. and Others v. Bulgaria, 8138/16, judgment 7.12.2017 [Section V] 8

Degrading treatment

Failure to ensure detainee's psychiatric care through an official language of the respondent State: *case referred to the Grand Chamber*

Rooman v. Belgium, 18052/11, judgment 18.7.2017 [Section II] 9

Expulsion

Proposed expulsion to Iran of Christian convert: *deportation would not constitute a violation*

A. v. Switzerland, 60342/16, judgment 19.12.2017 [Section III] 9

ARTICLE 5

ARTICLE 5 § 1 (e)

Persons of unsound mind

Psychiatric care impaired by linguistic barriers as opposed to institutional shortcomings: *case referred to the Grand Chamber*

Rooman v. Belgium, 18052/11, judgment 18.7.2017 [Section II] 9

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Civil rights and obligations

Injured party prevented from joining criminal proceedings as a civil party owing to length of preliminary investigations: *Article 6 applicable*

Arnoldi v. Italy, 35637/04, judgment 7.12.2017 [Section I] 10

ARTICLE 6 § 1 (CRIMINAL)

Fair hearing

Adequate procedural safeguards in place to enable defendant accused of acts of terrorism to understand reasons for verdict of specially composed Assize Court: *no violation*

Ramda v. France, 78477/11, judgment 19.12.2017 [Section V] ... 11

ARTICLE 6 § 3 (d)

Examination of witnesses

Inability of defence to examine prosecution witness: *violation*

Zadumov v. Russia, 2257/12, judgment 12.12.2017 [Section III] ... 13

ARTICLE 8

Respect for private and family life

Refusal to register same-sex marriages contracted abroad: *violation*

Orlandi and Others v. Italy, 26431/12 et al., judgment 14.12.2017 [Section I] ... 13

Respect for private life

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

Anchev v. Bulgaria, 38334/08 and 68242/16, decision 5.12.2017 [Section V] ... 14

ARTICLE 9

Manifest religion or belief

Punishment of witness for refusing to comply with court order to remove skullcap when giving evidence: *violation*

Hamidović v. Bosnia and Herzegovina, 57792/15, judgment 5.12.2017 [Section IV] ... 16

ARTICLE 14

Discrimination (Article 1 of Protocol No. 1)

Levy of high-wages tax surcharge on employers in response to sovereign debt crisis: *inadmissible*

P. Plaisier B.V. and Others v. the Netherlands, 46184/16 et al., decision 14.11.2017 [Section III] ... 17

ARTICLE 34

Victim

Association claiming domestic compensation award in length-of-proceedings case should have taken into account interests of its individual members: *absence of victim status*

Društvo za varstvo upnikov v. Slovenia, 66433/13, decision 21.11.2017 [Section IV] ... 17

ARTICLE 35

ARTICLE 35 § 1

Exhaustion of domestic remedies

Failure to bring individual action following dismissal of public interest action based on different factual situation: *inadmissible*

Kósa v. Hungary, 53461/15, decision 21.11.2017 [Section IV] ... 18

ARTICLE 35 § 3 (a)

Competence *ratione materiae*

Constitutional Referendum did not fall within scope of Article 3 of Protocol No. 1: *inadmissible*

Cumhuriyet Halk Partisi v. Turkey, 48818/17, decision 21.11.2017 [Section II] ... 19

ARTICLE 41

Just satisfaction

Aggregate award for pecuniary and non-pecuniary damage for individuals displaced in the context of the conflict over Nagorno-Karabakh

Sargsyan v. Azerbaijan, 40167/06,
Chiragov and Others v. Armenia, 13216/05, judgments (just satisfaction) 12.12.2017 [GC] ... 19

ARTICLE 46

ARTICLE 46 § 2

Execution of judgment – General measures

Not reasonable or practical to make any pronouncement on the necessity of general measures

Zadumov v. Russia, 2257/12, judgment 12.12.2017 [Section III] ... 23

ARTICLE 46 § 4

Execution of judgment – Individual measures, infringement proceedings

Infringement proceedings against Azerbaijan for alleged failure to abide by final judgment of the European Court

Ilgar Mammadov v. Azerbaijan, 15172/13 ... 24

ARTICLE 1 OF PROTOCOL No. 1

Secure the payment of taxes

Levy of tax surcharge on employers in response to sovereign debt crisis: *inadmissible*

P. Plaisier B.V. and Others v. the Netherlands, 46184/16 et al., decision 14.11.2017 [Section III] ... 25

ARTICLE 4 OF PROTOCOL No. 7

Right not to be tried or punished twice

Assize Court proceedings not based on same terrorist offences as had led to conviction in Criminal Court: *no violation*

Ramda v. France, 78477/11, judgment 19.12.2017 [Section V] ... 26

PENDING GRAND CHAMBER

Referrals

Rooman v. Belgium, 18052/11, judgment 18.7.2017 [Section II] ... 26

OTHER JURISDICTIONS

Inter-American Court of Human Rights (IACtHR)

State obligations with respect to the rights to labour stability, association and freedom of expression

Case of Lagos del Campo v. Peru, Series C No. 340, judgment 31.8.2017 ... 26

African Court on Human and Peoples' Rights

Criminal conviction for alleged minimisation of the Rwandan genocide

Case of Ingabire Victoire Umuhoza v. the Republic of Rwanda, No. 003/2014, judgment 24.11.2017 ... 27

COURT NEWS

Film on the ECHR: new versions ... 29

RECENT PUBLICATIONS

New Case-Law Guide ... 29

Commissioner for Human Rights ... 29

ARTICLE 2

Positive obligations (substantive aspect)

Alleged medical negligence resulting in patient's death: *no violation*

Lopes de Sousa Fernandes v. Portugal, 56080/13, judgment 19.12.2017 [GC]

Facts – In November 1997, following an operation for the extraction of nasal polyps, the applicant's husband developed bacterial meningitis, which was not detected until two days after he had been discharged from hospital. He was re-admitted to hospital several times, suffering from acute abdominal pain and diarrhoea. He died three months after the operation from the consequences of septicaemia caused by peritonitis and hollow viscera perforation.

In 1998 the applicant wrote a letter of complaint to the authorities stating that she had received no response from the hospitals to explain the sudden deterioration in her husband's health and his death. In response to her letter, the Inspector General for Health initiated an investigation and eventually, in 2006, ordered the opening of a disciplinary procedure against one of the doctors; however, those proceedings were stayed pending the outcome of criminal proceedings that had been started in 2002. The criminal proceedings ended in 2009 with the doctor's acquittal on a charge of homicide with gross negligence. In separate proceedings the Medical Association regional disciplinary council decided to take no further action after concluding that there was no evidence of misconduct or medical negligence. Lastly, a civil action for damages commenced by the applicant in 2003 was dismissed in a judgment of 2012 that was ultimately upheld by the Supreme Administrative Court in 2013.

In the Convention proceedings, the applicant complained under Article 2 about the death of her husband in hospital as a result of a hospital-acquired infection and of carelessness and medical negligence. She further complained that the disciplinary, criminal and civil authorities to which she had applied had failed to elucidate the precise cause of the sudden deterioration in her husband's state of health and about the duration and outcome of the domestic proceedings.

In a judgment of 15 December 2015 a Chamber of the Court held, by five votes to two, that there had been a violation of Article 2 (right to life) of the Convention, under its substantive head, and unanimously, a violation of Article 2 under its procedural head.

Law – Article 2

(a) *Substantive limb*

After reviewing its case-law in medical negligence cases, the Court considered it necessary to clarify its approach as follows.

In the context of alleged medical negligence, the States' substantive positive obligations relating to medical treatment are limited to a duty to regulate, that is to say, a duty to put in place an effective regulatory framework compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives.

Even in cases where medical negligence is established, the Court would normally find a substantive violation of Article 2 only if the relevant regulatory framework failed to ensure proper protection of the patient's life. Where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, matters such as an error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient cannot be considered sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life.

The question whether there has been a failure by the State in its regulatory duties calls for a concrete rather than an abstract assessment of the alleged deficiencies. In this regard, the Court's task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention. Therefore, the mere fact that the regulatory framework may be deficient in some respect is not sufficient in itself to raise an issue under Article 2. It must be shown to have operated to the patient's detriment.

It must, moreover, be emphasised that the States' obligation to regulate must be understood in a broader sense which includes the duty to ensure the effective functioning of that regulatory framework. The regulatory duties thus encompass necessary measures to ensure implementation, including supervision and enforcement.

On the basis of this broader understanding of the States' obligation to provide a regulatory framework, the Court has accepted that, in the very exceptional circumstances described at (a) and (b) below, the responsibility of the State under the substantive limb of Article 2 of the Convention may be engaged in respect of the acts and omissions of health-care providers, namely where:

(a) an individual patient's life is knowingly put in danger by denial of access to life-saving emergency treatment; this exception does not extend to circumstances where a patient is considered to have received deficient, incorrect or delayed treatment; or

(b) where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment and the authorities knew about or ought to have known about that risk and failed to take the necessary measures to prevent that risk from materialising, thus putting patients' lives, including that of the particular patient concerned, in danger.

The Court was aware that on the facts it may sometimes not be easy to distinguish between cases involving mere medical negligence and those where there is a denial of access to life-saving emergency treatment, particularly since there may be a combination of factors which contribute to a patient's death. For a case to fall in the latter category, the following factors, taken cumulatively, must be met: (i) the acts and omissions of the health-care providers must go beyond a mere error or medical negligence, in so far as those health-care providers, in breach of their professional obligations, deny a patient emergency medical treatment despite being fully aware that the person's life is at risk if that treatment is not given; (ii) the dysfunction at issue must be objectively and genuinely identifiable as systemic or structural in order to be attributable to the State authorities, and must not merely comprise individual instances where something may have been dysfunctional in the sense of going wrong or functioning badly; (iii) there must be a link between the dysfunction complained of and the harm which the patient sustained; and (iv) the dysfunction at issue must have resulted from the failure of the State to meet its obligation to provide a regulatory framework in the broader sense indicated above.

The Court found on the facts that there was not sufficient evidence of (i) a denial of healthcare, (ii) a systemic or structural dysfunction affecting the hospitals where the applicant's husband was treated or (iii) a fault attributable to the health-care professionals going beyond a mere error or medical negligence or failure by the health-care professionals to discharge their professional obligations to provide emergency medical treatment. The case thus concerned allegations of medical negligence, which meant that Portugal's substantive positive obligations were limited to the setting-up of an adequate regulatory framework compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. Having regard to the detailed rules and standards laid down in the domestic law and practice of the respondent State in the area under consideration, the Court considered that the relevant regulatory framework did not disclose any shortcomings as regards the State's obligation to protect the applicant's husband's right to life.

Conclusion: no violation (fifteen votes to two).

(b) Procedural limb – The Grand Chamber reiterated that the procedural obligation under Article 2 in the context of health care required, *inter alia*, that the proceedings be completed within a reasonable time. Apart from the concern for the respect of the rights inherent in Article 2 in each individual case, the prompt examination of cases concerning medical negligence in a hospital setting was also important for the safety of all users of health-care services. The length of all three sets of domestic proceedings in the applicant's case (disciplinary, criminal and civil) had been unreasonable.

In addition, for the purposes of the procedural obligation of Article 2, the scope of an investigation faced with complex issues arising in a medical context could not be interpreted as being limited to the time and direct cause of the individual's death. Where there was a prima facie arguable claim of a chain of events possibly triggered by an allegedly negligent act that may have contributed to the death of a patient, in particular if an allegation of a hospital-acquired infection is concerned, the authorities may be expected to conduct a thorough examination into the matter. No such examination had been conducted in the instant case in which the domestic courts, instead of carrying out an overall assessment, approached the chain of events as a succession of medical incidents, without paying particular attention to how they may have related to each other.

In sum, the domestic system as a whole, when faced with an arguable case of medical negligence resulting in the death of the applicant's husband, had failed to provide an adequate and timely response consonant with the State's obligation under Article 2.

Conclusion: violation (unanimously).

Article 41: EUR 23,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also the section on "Liability of health professionals" in the Factsheet on Health)

Positive obligations (procedural aspect)

Failure to conduct adequate and timely inquiry into death resulting from suspected medical negligence: *violation*

Lopes de Sousa Fernandes v. Portugal, 56080/13, judgment 19.12.2017 [GC]

(See above, page 6)

Expulsion

Proposed expulsion to Iran of Christian convert: *deportation would not constitute a violation*

A. v. Switzerland, 60342/16, judgment 19.12.2017 [Section III]

(See Article 3 below, page 9)

ARTICLE 3

Inhuman or degrading treatment

Conditions of immigration detention of accompanied minors: *violation*

S.F. and Others v. Bulgaria, 8138/16, judgment 7.12.2017 [Section V]

Facts – The applicants, three Iraqi minors who had fled Iraq accompanied by their parents, were intercepted by police at the Bulgarian-Serbian border and detained (with their parents) in a Border Police detention facility in the town of Vidin (Bulgaria). They were later transferred to an immigration detention facility in Sofia and subsequently granted asylum in Switzerland.

Before the European Court the applicants alleged that the conditions of their immigration detention in Vidin had subjected them to inhuman and degrading treatment contrary to Article 3.

Law – Article 3: The immigration detention of minors raised particular issues as children, whether accompanied or not, were extremely vulnerable and had specific needs.

The period under consideration in the case was between thirty-two and forty-one hours. That amount of time was considerably shorter than the periods at issue in recent cases where the Court had examined the conditions in which accompanied minors had been kept in immigration detention. However, the conditions in the border police's detention facility were considerably worse than in those cases. The cell in which the applicants had been kept, though relatively well ventilated and lit, was extremely run-down. It was dirty and contained worn out bunk beds, mattresses and bed linen, and there was litter and damp cardboard on the floor. There had been limited possibilities for accessing the toilet which had forced them to urinate onto the floor of the cell in which they were kept. The authorities had allegedly failed to provide the applicants with food and drink for more than twenty-four hours after taking them into custody and the Government did not dispute the allegation that the applicants' mother had only been given access to the baby bottle and the milk of the youngest applicant, who was one-and-a-half years old, about nineteen hours after they had been taken into custody.

The combination of the above-mentioned factors must have considerably affected the applicants, both physically and psychologically, and must have had particularly nefarious effects on the youngest applicant in view of his very young age. While it was true that in recent years the High Contracting States that sat on the European Union's external borders had had difficulties in coping with the massive influx of migrants, it could not be said that at the relevant time Bulgaria was facing an emergency of such proportions that it was practically impossible for its authorities to ensure minimally decent conditions in the short-term holding facilities in which they decided to place minor migrants immediately after their interception and arrest. In any event, in view of the absolute character of Article 3, an increasing influx of migrants could not absolve a High Contracting State of its obligations under that provision.

Conclusion: violation (unanimously).

Article 41: EUR 600 each in respect of non-pecuniary damage.

(See also *Khlaifia and Others v. Italy* [GC], 16483/12, 15 December 2016, Information Note 202; *Muskhadzhiyeva and Others v. Belgium*, 41442/07, 19 January 2010, Information Note 126; and *R.M. and Others v. France*, 33201/11, 12 July 2016)

Degrading treatment

Failure to ensure detainee's psychiatric care through an official language of the respondent State: *case referred to the Grand Chamber*

Rooman v. Belgium, 18052/11, judgment 18.7.2017 [Section II]

(See Article 5 § 1 (e) below)

Expulsion

Proposed expulsion to Iran of Christian convert: *deportation would not constitute a violation*

A. v. Switzerland, 60342/16, judgment 19.12.2017 [Section III]

Facts – The applicant entered Switzerland in 2009 and applied for asylum on the grounds that he had been imprisoned and tortured in his country of origin (Iran) after taking part in a demonstration there. His application was rejected after the Swiss authorities found that his account was not credible. The applicant subsequently lodged a request for his asylum application to be reconsidered followed by an application for temporary admission on the grounds, *inter alia*, that he had converted to Christianity while in Switzerland and therefore was at risk if returned to Iran, which applied the death penalty for apostasy. His claims were rejected on the grounds that a person could only face a real risk of ill-treatment upon a return to Iran if his or her Christian faith had been manifested in Switzerland in such a way as to make it visible to the outside.

Law – Articles 2 and 3: The general human rights situation in Iran did not, *per se*, prevent the deportation of any Iranian national. As to the applicant's personal circumstances, notably his conversion from Islam to Christianity in Switzerland, the domestic authorities had found that, even assuming his conversion to be genuine and lasting, Christian converts would, in any event, only face a real risk of ill-treatment upon return to Iran if they manifested their faith in a manner that would lead to them being perceived as a threat to the Iranian authorities. That required a certain level of public exposure, which was not the case for the applicant, who was an ordinary member of a Christian circle (contrast with the position in the Court of Justice of the European Union case of *Bundesrepublik Deutschland v. Y and Z* (C-71/11 and C-99/11, 5 September 2012), in which it was established that the persons concerned were deeply committed to their faith and considered public practice of it essential to preserve their religious identity).

In the instant case, the applicant had been examined in person by the domestic authorities with regard to his conversion to Christianity, his claim had been examined at two levels of jurisdiction in two sets of proceedings and there were no indications that those proceedings were flawed. Having regard to the reasoning advanced by the domestic authorities and the reports on the situation of Christian converts in Iran and in the absence of any fresh evidence or argument, the Court saw no grounds to consider that the assessment made by the domestic authorities was inadequate. Accordingly, the applicant's deportation to Iran would not give rise to a violation of Articles 2 and 3.

Conclusion: deportation would not constitute a violation (unanimously).

(Compare with *F.G. v. Sweden* [GC] (43611/11, 23 March 2016, Information Note 194), in which the domestic authorities were found not to have carried out a thorough examination of the applicant's conversion, the seriousness of his beliefs, the way he manifested his Christian faith in Sweden and how he intended to manifest it in Iran if the removal order were executed)

ARTICLE 5

ARTICLE 5 § 1 (e)

Persons of unsound mind

Psychiatric care impaired by linguistic barriers as opposed to institutional shortcomings: *case referred to the Grand Chamber*

Rooman v. Belgium, 18052/11, judgment 18.7.2017 [Section II]

The applicant, who suffers from a severe mental disorder making him incapable of controlling his actions, has been detained since 2004 in a specialised facility which has no German-speaking medical

staff, whereas he himself can only speak German (one of the three official languages in Belgium).

The Mental Health Board found on several occasions that because of the communication difficulties, the applicant was effectively deprived of treatment for his mental health problems (making it impossible to contemplate releasing him), but its recommendations were followed only to a limited extent or belatedly by the authorities. The competent judicial authority reached similar findings in 2014.

By a judgment of 18 July 2017 (see Information Note 209), a Chamber of the Court held: (i) unanimously, that there had been a violation of Article 3, finding that the applicant's continued detention without appropriate medical support for thirteen years constituted degrading treatment; (ii) by six votes to one, that there had been no violation of Article 5 § 1, considering that there still existed a link between the grounds for the applicant's detention and his mental illness, since the reasons for the failure to provide appropriate care had been unconnected with the actual nature of the detention facility.

On 11 December 2017 the case was referred to the Grand Chamber at the applicant's request.

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Civil rights and obligations

Injured party prevented from joining criminal proceedings as a civil party owing to length of preliminary investigations: *Article 6 applicable*

Arnoldi v. Italy, 35637/04, judgment 7.12.2017 [Section I]

Facts – In 1995 the applicant lodged a criminal complaint for forgery (in relation to witness statements made in the context of her attempts to oppose an unlawful construction on her property). After a preliminary investigation lasting seven years the proceedings were discontinued on the grounds that prosecution of the offence was time-barred. The applicant lodged an application under the Pinto Act complaining of the excessive length of the criminal proceedings. Her application was declared inadmissible on the grounds that she did not have the status of a civil party to the proceedings instituted in respect of her complaint, and that it had been open to her to assert her rights before the civil courts without awaiting the outcome of the preliminary investigation.

Under Italian law the injured party cannot join the proceedings as a civil party until the preliminary hearing. In the present case no preliminary hearing had been held at the time the offence was declared time-barred.

Law – Article 6 § 1

(a) *Applicability* – The civil limb of Article 6 § 1 was found to be applicable for the following reasons, linked in particular to the specific features of the Italian legal system.

(i) *Existence of a civil right on the part of the injured party* – The two criteria established by the Court's case-law were alternative, not cumulative. It was both necessary and sufficient for the person concerned to have acted either with a view to obtaining "reparation", even if only symbolic, or with a view to "protection of a civil right", whether by applying to join the proceedings as a civil party or simply by bringing a private prosecution. Consequently, the fact that no formal compensation claim was made did not preclude the applicability of Article 6. It was necessary to examine, on a case-by-case basis, whether the domestic legal system recognised that the person bringing the complaint had a civil interest to defend in the criminal proceedings.

In the present case it was common ground that both these criteria were met. Firstly, by lodging a criminal complaint, and as detailed at point (ii) below, the applicant had demonstrated her interest in obtaining redress in due course for the breach of a civil right to which she could claim entitlement on arguable grounds. Secondly, the case had concerned forgery proceedings in which the applicant sought recognition of the untruthful nature of the statements made by third parties, on the basis of which the domestic authorities had rejected her application for protection of her property rights.

(ii) *Decisive nature of the preliminary investigation stage for protection of the civil rights of the injured party* – This issue could not be examined in the abstract, as consideration had to be given to the particular features of the national legal system and the specific circumstances of the case.

Under the Italian Code of Criminal Procedure the injured party had a number of rights, including the right to carry out investigations independently of those conducted by the prosecution and the defence and the right to appeal against a decision

to discontinue proceedings. Moreover, the Italian system was governed by the principle of "legality of prosecution". This meant that where the national authorities became aware of acts liable to constitute an offence (for instance following a complaint), they were obliged, where applicable, to prosecute those responsible. Accordingly, having lodged a complaint, injured parties were entitled to expect, in the cases provided for by law, that proceedings would be commenced, which they could join as civil parties in order to seek redress for the damage sustained.

Accordingly, under Italian law, the position of an injured party who, while awaiting the opportunity to join the proceedings as a civil party, had exercised at least one of these rights and opportunities in the criminal proceedings, was not substantially different from that of a civil party. The outcome of the preliminary investigation was thus decisive for the civil right at issue.

In the present case the applicant had exercised at least one of the rights and opportunities granted to the injured party under domestic law, as she had submitted documents, had explicitly requested that she be notified if the proceedings were discontinued, and had repeatedly called for the prosecution to act and for the proceedings to be concluded swiftly.

(iii) *Objection concerning the existence of other remedies capable of protecting the applicant's civil interests* – The fact that other avenues had been open to the applicant (namely, an application to the civil courts) in order to argue that the statements in question were false was a circumstance which the Court was more apt to consider when assessing the proportionality of restrictions on access to a court, and was not relevant in the context of the applicability of Article 6.

Where the domestic legal system offered a remedy aimed at the protection of a civil right, the State was required to ensure that litigants enjoyed the fundamental safeguards of Article 6, even where the domestic rules allowed a different action to be brought.

Furthermore, since the applicant had not taken steps outside the criminal proceedings to secure protection of her civil right, she could not be considered to have waived her rights under Article 6.

Conclusion: Article 6 applicable (unanimously).

(b) *Merits* – In view of the specific features of Italian criminal procedure, the starting-point of the period to be taken into consideration was the date of the applicant's complaint (October 1995), and the finishing-point was that of the judge's decision to discontinue the proceedings (January 2003). That period of more than seven years, for the preliminary investigation alone, appeared excessive.

Conclusion: violation (unanimously).

Article 41: EUR 4,500 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Sottani v. Italy* (dec.), 26775/02, 24 February 2005, Information Note 72; and *Mihova v. Italy* (dec.), 25000/07, 30 March 2010, Information Note 128)

ARTICLE 6 § 1 (CRIMINAL)

Fair hearing

Adequate procedural safeguards in place to enable defendant accused of acts of terrorism to understand reasons for verdict of specially composed Assize Court: *no violation*

Ramda v. France, 78477/11, judgment 19.12.2017 [Section V]

Facts – Between July and October 1995 eight terrorist attacks were carried out in France by the *Groupement Islamique Armé* (G.I.A.).

In a judgment of March 2006 a criminal court found the applicant guilty of criminal association in connection with a terrorist conspiracy, and sentenced him to ten years' imprisonment. It also made an exclusion order, banning him from French territory for life. In a judgment of December 2006, which became final, the Court of Appeal upheld the initial judgment.

In 2001 the Investigations Division had issued three orders against the applicant and a number of other suspects committing them to stand trial. In October 2007 a special bench of the Assize Court made up of seven professional judges found the applicant guilty as charged for his part in three terrorist attacks that had been committed in July and October 1995 and sentenced him to life imprisonment, with a twenty-two-year minimum term. In September 2009, following an appeal by the applicant, the Assize Court of Appeal upheld the conviction after replying to sixty-three questions.

In June 2011 the Court of Cassation dismissed the applicant's appeal on points of law.

The applicant complained of a lack of reasoning in the judgment delivered by the special bench of the Assize Court of Appeal. He also complained that he had been prosecuted and convicted twice in respect of the same facts for which he had previously been convicted by the Court of Appeal in December 2006.

Law

Article 6 § 1 of the Convention: The present case concerned a lack of reasoning in a judgment delivered by a special Assize Court composed exclusively of professional judges without a lay jury. The Court considered the applicant's complaint in the light of the principles set out in *Taxquet v. Belgium* ([GC] judgment, no. 926/05, 16 November 2010, Information Note 135) in view of the similarity of the procedure in that case with the procedure in the present case.

As regards the combined impact of the committal orders and the questions put to the Assize Court in the instant case, the Court noted that the applicant was not the only defendant and the case was complex.

The three committal orders were limited in scope because they were issued before the trial which formed the main part of the proceedings. Nevertheless, each committal order related to a different terrorist attack and contained thorough reasoning in respect of the offences charged, presenting the events in a very detailed manner. Moreover, the applicant had already had an opportunity during the proceedings at first instance to examine the charges against him in detail and to set out his defence. In addition to the fact that the committal orders remained the basis of the charges before the Assize Court of Appeal, the proceedings at first instance had provided him with further information on the charges against him and the reasons for which he was liable to be convicted on appeal.

Sixty-three questions had been put concerning the applicant. Sixty-one were answered "yes, on a majority" and two were declared "devoid of purpose". In addition to providing further information on the relevant places and dates in each case, as well as listing the victims and their injuries, the questions were aimed in particular at ascertaining whether the applicant had acted with premeditation and incited others to commit certain acts, had aided and abetted terrorist attacks or had instructed others to carry out specific criminal acts. The number and precision of the questions had provided an appropriate framework for reaching the final decision. Although the applicant contested the wording of the questions, he had at no stage suggested amending or replacing them.

Accordingly, in the light of the combined examination of the three carefully reasoned committal orders, the arguments heard both at first instance and on appeal, as well as the many detailed questions put to the Assize Court, the applicant could not have been unaware of the reasons for his conviction.

In conclusion, the applicant had been afforded sufficient safeguards enabling him to understand the guilty verdict against him. Nevertheless, the Court welcomed the fact that a new reform introduced by Law No. 2011-939 of 10 August 2011, which now required the completion of a "statement of reasons form", also applied to the special benches of the Assize Courts.

Conclusion: no violation (unanimously).

Article 4 of Protocol No. 7: Since the *Sergei Zolotukhin v. Russia* ([GC] judgment, 14939/03, 10 February 2009, Information Note 116), Article 4 of Protocol No. 7 had to be read as prohibiting the prosecution or trial of a person for a second "offence" in so far as it arose from identical facts or facts which were substantially the same.

A comparison of the Court of Appeal's judgment of December 2006 convicting the applicant with the three orders issued by the Investigations Division committing him for trial by the special bench of the Assize Court showed that those decisions were based on a wide range of different, detailed facts. The three committal orders issued in 2001 made no mention of various factual matters that were referred to during the initial criminal proceedings before the ordinary courts; in addition, and above all, they concerned conduct and facts which were not mentioned during the original proceedings. Thus the applicant had not been prosecuted or convicted in the criminal proceedings in respect of facts that were substantially the same as those which had been the subject of his final criminal conviction by the ordinary courts.

Lastly, the Court observed that it was legitimate for the Contracting States to take a firm stance against persons involved in terrorist acts, which could in no

way be condoned. The Assize Court had convicted the applicant not only in respect of acts that were different from those for which he had been tried in the first set of proceedings, but also of crimes of complicity in murder and attempted murder, which constituted serious violations of the fundamental rights under Article 2 of the Convention, in respect of which States were required to pursue and punish the perpetrators, subject to compliance with the procedural guarantees of the persons concerned.

Conclusion: no violation (unanimously).

(See, on the issue of the reasoning of judgments, *Agnelet v. France*, 61198/08, 10 January 2013, Information Note 159; *Legillon v. France*, 53406/10, 10 January 2013, Information Note 159; *Marguš v. Croatia* [GC], 4455/10, 27 May 2014, Information Note 174; *Matis v. France* (dec.), 43699/13, 6 October 2015, Information Note 189; and *Lhermitte v. Belgium* [GC], 34238/09, 29 November 2016, Information Note 201; see also the Factsheets on the Right not to be tried or punished twice (the *non bis in idem* principle) and on Terrorism, as well as the video COURTalks-disCOURs on terrorism)

ARTICLE 6 § 3 (d)

Examination of witnesses

Inability of defence to examine prosecution witness: *violation*

Zadumov v. Russia, 2257/12, judgment 12.12.2017 [Section III]

(See Article 46 below, page 23)

ARTICLE 8

Respect for private and family life

Refusal to register same-sex marriages contracted abroad: *violation*

Orlandi and Others v. Italy, 26431/12 et al., judgment 14.12.2017 [Section I]

Facts – The applicants, same-sex couples who had contracted marriages abroad, sought registration of their marriages in Italy. Registration was refused on the basis that the Italian legal order did not allow for marriage between same-sex couples. Following the 2015 judgment in the case of *Oliari and Others v. Italy*, the Italian legislator provided for civil unions in Italy. By subsequent decrees it was provided that couples who had contracted marriage, civil union or any other corresponding union abroad could register their union as a civil union in terms of Italian law. The latter legislation came into being in 2017 and most of the applicants had recently benefited from it.

Before the European Court the applicants complained under Articles 8, 12 and 14 about the authorities' refusal to register their marriages contracted abroad.

Law – Article 8: States were still free, under Article 12 as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples. The same held true for Article 14 taken in conjunction with Article 12. Nevertheless, same-sex couples were in need of legal recognition and protection of their relationship. Civil unions provided an opportunity to obtain a legal status equal or similar to marriage in many respects. In principle, such a system would prima facie suffice to satisfy Convention standards. The new Italian legislation providing for civil unions (and registration of marriages contracted abroad as civil unions), also appeared to give more or less the same protection as marriage with respect to the core needs of a couple in a stable and committed relationship. At present it was open to the applicants to enter into a civil union, or have their marriage registered as a civil union. As such, the Court had to determine solely whether the refusals to register the applicants' marriage in any form with the result that they were left in a legal vacuum and devoid of any protection, prior to the new legislation coming into force, had violated their rights under Article 8.

The core issue was whether a fair balance had been struck between the competing interests involved. The Government had not put forward a prevailing community interest against which to balance the applicants' interests nor indicated any legitimate aim for the failure to register the marriages, save for a general phrase concerning "internal public order". Unlike other provisions of the Convention, Article 8 did not enlist the notion of "public order" as one of the legitimate aims in the interests of which a State might interfere with an individual's rights. However, bearing in mind that it was primarily for the national legislation to lay down the rules regarding validity of marriages and to draw the legal consequences, the Court had previously accepted that national regulation of the registration of marriage might serve the legitimate aim of the prevention of disorder. Thus, the Court could accept for the purposes

of the case that the impugned measures were taken for the prevention of disorder, in so far as the applicants' position was not provided for in domestic law. The crux of the case at hand was precisely that the applicants' position was not provided for in domestic law, specifically the fact that the applicants could not have their relationship – be it a *de facto* union or a *de jure* union recognised under the law of a foreign state – recognised and protected in Italy under any form.

Legal recognition of same-sex couples had developed rapidly in Europe. The same rapid development had been identified globally, showing the continuing international movement towards legal recognition. To date, 27 countries out of the 47 Council of Europe member States had enacted legislation permitting same sex couples to have their relationship recognised. The same could not be said about registration of same-sex marriages contracted abroad in respect of which there was no consensus in Europe. Apart from the member States of the Council of Europe where same-sex marriage was permitted, the comparative law information available to the Court (limited to 27 countries where same-sex marriage was not, at the time, permitted) showed that only 3 of those 27 other member States allowed such marriages to be registered, despite the absence (to date or at the relevant time) in their domestic law of same-sex marriage. Thus, that lack of consensus confirmed that the States had to in principle be afforded a wide margin of appreciation, regarding the decision as to whether to register, as marriages, such marriages contracted abroad.

As to the interests of the State and the community at large, in respect of the failure to register such marriages, to prevent disorder Italy might wish to deter its nationals from having recourse in other States to particular institutions which were not accepted domestically (such as same-sex marriage) and which the State was not obliged to recognise from a Convention perspective. Indeed the refusals in the present case were the result of the legislator's choice not to allow same-sex marriage – a choice not condemnable under the Convention. Thus, the Court considered that there was also a State's legitimate interest in ensuring that its legislative prerogatives were respected and therefore that the choices of democratically elected governments did not go circumvented.

The refusal to register the applicants' marriage did not deprive them of any rights previously recognised in Italy, and the applicants could still benefit, in the State where they contracted marriage, from any rights and obligations acquired through such marriage. However, the decisions refusing to register their marriage under any form, thus leaving the applicants in a legal vacuum (prior to the new laws), failed to take account of the social reality of the situation. Indeed, as the law stood before the introduction of the new laws, the authorities could not formally acknowledge the legal existence of the applicants' union. No prevailing community interests had been put forward to justify the situation where the applicants' relationship was devoid of any recognition and protection.

The Italian State could not reasonably disregard the situation of the applicants which corresponded to a family life within the meaning of Article 8 of the Convention, without offering them a means to safeguard their relationship. However, until recently, the national authorities had failed to recognise that situation or provide any form of protection to the applicants' union, as a result of the legal vacuum which existed in Italian law. It followed that the State had failed to strike a fair balance between any competing interests in so far as they failed to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex unions.

Conclusion: violation (five votes to two).

In view of the finding under Article 8, it was not necessary to examine whether there has also been a violation of Article 14 in conjunction with Article 8 or 12.

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

(See *Oliari and Others v. Italy*, 18766/11 and 36030/11, 21 July 2015, Information Note 187)

Respect for private life

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

Anchev v. Bulgaria, 38334/08 and 68242/16, decision 5.12.2017 [Section V]

Facts – By virtue of the Access to and Disclosure of Documents and Exposure of the Affiliation of Bulgarian Citizens to State Security and the Intelli-

gence 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 was 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 was a lawyer who had 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.

Law – Article 8: The interference with the applicant's private life had been in accordance with the law and pursued the legitimate aims of protecting national security and public safety, preventing disorder, and protecting the rights and freedoms of others.

The answer to the question whether the interference was "necessary in a democratic society" did not turn on whether less intrusive rules could have been put in place or whether the legitimate aims could have been attained in other ways but on whether, in adopting the exposure scheme, the Bulgarian authorities had acted within their margin of appreciation.

That margin was broad in the instant case both because Contracting States which had emerged from undemocratic regimes had to be afforded a broad margin in choosing how to deal with the legacy of those regimes and because the 2006 Act had been passed by the legislature with cross-party support after much debate, and had been carefully reviewed by the Constitutional Court in line with the principles flowing from the European Court's case-law and in full appreciation of the need to balance the conflicting interests at stake.

For the following reasons the chosen statutory scheme was not at the fringes of that margin.

(i) The only measure provided for was the exposure of those about whom a record of collaboration with the former security services was found; the Commission's decisions were purely declaratory. Exposure entailed no sanctions or legal disabilities and, as noted by the Constitutional Court, in Bulgaria it was not certain that it carried a universal social stigma either. For his part, the applicant had continued to be involved in business and public life and could hardly claim to have become an outcast.

(ii) The legislation did not affect all staff members or collaborators of the former security services but only those who, since the fall of the regime, had taken up posts of some importance in the public sector or in parts of the private sector deemed to have special importance for society at large.

(iii) The process of exposure was tightly circumscribed and surrounded by a number of safeguards In terms of guarantees against arbitrariness or abuse (for example, the process of exposure was entrusted to a special independent commission whose decisions were amenable to public judicial review proceedings at two levels of jurisdiction).

(iv) The fact that a large number of the files of the former security services were destroyed shortly after the fall of the regime had to be seen as a weighty reason for the legislature's choice not to provide for an individual assessment of the reliability of the evidence available with respect to each person featuring as a collaborator in the surviving records. The legislature chose to provide for the exposure of anyone found to feature in any of the surviving records even if there were no other documents showing that they had in fact collaborated. As the Constitutional Court had noted, had the

legislature opted for individual assessments, collaborators whose files had survived would unjustifiably have been treated less favourably.

Further, as a corollary to the lack of individual assessments, the chosen exposure scheme did not entail the moral censure attendant upon findings of collaboration under the lustration schemes put in place in some other States. Indeed, the domestic courts had made it clear that exposure by the Commission on the basis of surviving records was not to be taken as official confirmation that those concerned had in fact collaborated. The Commission's decisions were thus more a form of publication of the surviving records of the former security services rather than a way to express official opprobrium for the past conduct of the people exposed.

(v) The applicant had been able to access the records almost immediately and then to publicly contest their reliability by reference to concrete elements.

In sum, since exposure had not entailed any sanctions or legal disabilities, the interference had not exceeded the substantial margin of appreciation enjoyed by the Bulgarian authorities. Had they resorted to measures such as occupational disqualification or partial disenfranchisement, which entail a greater degree of intrusion into the personal sphere of those concerned, the conclusion might have been different.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 9

Manifest religion or belief

Punishment of witness for refusing to comply with court order to remove skullcap when giving evidence: *violation*

Hamidović v. Bosnia and Herzegovina, 57792/15, judgment 5.12.2017 [Section IV]

Facts – The applicant, who was a member of a local group that advocated the Wahhabi/Salafi version of Islam, was called to give evidence at the criminal trial of other members of the group who were charged with terrorist offences. He duly appeared at the trial as summoned, but refused to remove his skullcap when asked to testify arguing that it was his religious duty to wear it at all times. After being given time to reflect and warned of the consequences if he continued to disobey the order to remove his skullcap, he was found to be in contempt of court and ordered to pay a fine, which was subsequently converted into thirty days' imprisonment when he refused to pay.

Law – Article 9: The punishment imposed on the applicant for wearing a skullcap in a courtroom constituted a limitation on the manifestation of his religion. The restriction was based on the inherent power of the trial judge to regulate the conduct of proceedings in the State Court, it being noted that the applicant was informed of the applicable rule and of the consequences of disobeying. The restriction also pursued a legitimate aim as the Court had previously held[1] that secularism was a belief protected by Article 9 of the Convention and that an aim to uphold secular and democratic values could be linked to the legitimate aim of the "protection of the rights and freedoms of others".

As to whether the restriction had been necessary in a democratic society, the Court was aware that the presiding judge had had the difficult task of maintaining order and ensuring the integrity of the trial in a case in which a number of participants belonged to a religious group opposing the concept of a secular State and recognising only God's law and court. It also took note of the overall context at the time of the trial.

Nonetheless, it considered that the measure taken was not justified.

The applicant's case concerned a witness in a criminal trial, which was a completely different issue to and had to be distinguished from cases concerning the wearing of religious symbols and clothing at the workplace, notably by public officials exercising official authority. While Article 9 did not protect every act motivated or inspired by a religion or belief and did not always guarantee the right to behave in the public sphere in a manner dictated by one's religion or beliefs, and while there could be cases when it was justified to order a witness to remove a religious symbol, the authorities were required not to neglect the specific features of different religions. Freedom to manifest one's religion was a fundamental right: not only because a healthy democratic society needs to tolerate and sustain pluralism and diversity, but also because of the importance to an individual who has made

1. See *Lautsi and Others v. Italy* [GC], 30814/06, 18 March 2011, Information Note 139.

religion a central tenet of his or her life to be able to communicate that belief to others.

The Court saw no reason to doubt that the applicant's act was inspired by his sincere religious belief that it was his religious duty to wear a skullcap at all times, without any hidden agenda to make a mockery of the trial, incite others to reject secular and democratic values or cause a disturbance. Unlike some other members of his religious group, the applicant had appeared before the court as summoned and stood up when requested, thereby clearly submitting to the laws and courts of the country. There was no indication that he was not willing to testify or that he had a disrespectful attitude. In these circumstances, his punishment for contempt of court on the sole ground of his refusal to remove his skullcap was not necessary in a democratic society and the domestic authorities had exceeded their wide margin of appreciation.

Conclusion: violation (six votes to one).

Article 41: EUR 4,500 in respect of non-pecuniary damage.

(See also the Factsheet on Religious symbols and clothing)

ARTICLE 14

Discrimination (Article 1 of Protocol No. 1)

Levy of high-wages tax surcharge on employers in response to sovereign debt crisis: *inadmissible*

P. Plaisier B.V. and Others v. the Netherlands, 46184/16 et al., decision 14.11.2017 [Section III]

(See Article 1 of Protocol No. 1 below, page 25)

ARTICLE 34

Victim

Association claiming domestic compensation award in length-of-proceedings case should have taken into account interests of its individual members: *absence of victim status*

Društvo za varstvo upnikov v. Slovenia, 66433/13, decision 21.11.2017 [Section IV]

Facts – The applicant association was founded in August 1996 by a large group of creditors of a failed investment company who transferred their claims to the association so it could institute proceedings. In the event of success, the association was to transfer a proportionate share of the joint award, less costs and taxes, back to the creditors. The association instituted proceedings against the two owners of the investment company in 1997 and obtained judgment in 2007. An appeal by the second owner was dismissed in 2008. The association also lodged an application under the 2006 Act on Protection of the Right to a Trial without Undue Delay for compensation for the delays in the proceedings against the owners. This culminated in an award to the association of EUR 4,500 in respect of non-pecuniary damage for proceedings which had lasted more than eleven years at two levels of jurisdiction.

In the Convention proceedings, the association complained of the length of the domestic proceedings and submitted that it still had victim status as the domestic award was insufficient since it failed to take into account the fact that the association was actually representing 1,484 individuals, each of whose rights to a trial within a reasonable time had been violated.

Law – Article 34: The association's status depended on whether the award of EUR 4,500 was adequate and sufficient. In order to answer that question the Court first had to ascertain whether a case involving multiple claimants joined in an association which acts as a single party to the proceedings should be dealt with in the same manner as cases involving one individual claimant, or whether the interests of the individual members of the association should be taken into account.

The Court had held in *Arvanitaki-Roboti and Others v. Greece* and *Kakamoukas and Others v. Greece* that awards of compensation in length-of-proceedings cases involving multiple applicants had to take into account the manner in which the number of participants in such proceedings may influence the level of distress, inconvenience and uncertainty affecting each of them. However, contrary to the position in those cases, where all the applicants were parties first to the domestic proceedings and then to the proceedings before the Court, in the instant case the association had already been acting as one single legal entity separate from its members in the domestic proceedings and had remained a single party in the Convention proceedings. The Court thus had to be cautious in applying the principles applicable to multiple applicants to a situation where the affected individuals, instead of acting on

their own behalf in judicial proceedings, had established a legal entity to do so.

The association had argued that the particular features of the assignment agreements by which the individual creditors had transferred their claims to the association justified taking into account their individual interests. However, the Court could not overlook the fact that any particularities regarding the transfer of the claims concerned solely the internal relationship between the association and its members, while the association operated as a separate entity with its own legal rights and obligations in its relations with third parties and in judicial proceedings. The association could not be considered merely an aggregate of its members' individual interests. The very nature of its existence as a separate legal personality meant that the interests claimed in the civil and the ensuing compensation proceedings were perceived and decided by the domestic courts as its own interests. Accordingly, the association could not legitimately expect those same interests to be taken into account twice: once as its own interests, and once as the interests of its members.

In these circumstances, the fact that the domestic authorities had not taken into account the interests of individual members of the association when determining the level of non-pecuniary damage sustained had not contravened the requirements of Article 6 § 1 of the Convention. The sum awarded to the association could be considered sufficient and therefore appropriate redress for the violation suffered, and accordingly the association could no longer claim to be a "victim" within the meaning of Article 34 of the Convention.

Conclusion: inadmissible (incompatible *ratione personae*).

(See also *Arvanitaki-Roboti and Others v. Greece* [GC] and *Kakamoukas and Others v. Greece* [GC], 27278/03 and 38311/02 respectively, 15 February 2008, both summarised in Information Note 105)

ARTICLE 35

ARTICLE 35 § 1

Exhaustion of domestic remedies

Failure to bring individual action following dismissal of public interest action based on different factual situation: *inadmissible*

Kósa v. Hungary, 53461/15, decision 21.11.2017 [Section IV]

Facts – In the Convention proceedings the applicant, who was of Roma origin, complained under Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1 that the discontinuance of a school bus service between her home and her chosen primary school meant that, for over two years, her only option had been to attend a local Greek Catholic school which essentially catered for Roma children and provided inadequate education.

Since the applicant had not brought domestic proceedings to contest the lawfulness of the authorities' action on her personally, the Government objected that she had failed to exhaust domestic remedies. The applicant contended, however, that a public interest action had been launched by a non-governmental organisation (the Chance for Children Foundation – CFCF), but had ultimately been dismissed by the Supreme Court (*Kúria*). It would therefore have been futile and unreasonable for her to bring an individual action.

Law – Article 35 § 1: Since the domestic legislation explicitly allowed certain civil society organisations, such as the CFCF, to bring legal proceedings in defence of a larger group of people affected by a violation, or risk of a violation, of the requirements of equal treatment, in principle, it would be conceivable to accept the public interest litigation as a form of exhausting domestic remedies for the purposes of Article 35 § 1. Such a proposition would be especially justified in relation to alleged discrimination against a vulnerable group requiring special protection, such as Roma children. Access to justice for members of such groups should be facilitated so as to provide effective protection of rights. The legislation in question was a laudable example of that facilitative and protective approach.

However, although the judgment rendered in the public interest case concerned a subject matter which was closely related to the grievances the applicant had brought before the Court in the Convention proceedings, it did not correspond exactly to her individual situation. The domestic court's finding that there had been no segregation was based on the premise that the Greek Catholic school was the voluntary and informed choice of the pupils' parents and that the pupils had not been prejudiced with regard to the quality of education provided. However, the applicant had firmly contested the fulfilment of those preconditions in

relation to her particular situation. Her application was thus based on facts which were different from those established by the domestic authorities.

Accordingly, the CFCF's public interest litigation had not provided the national courts with the opportunity to address and thereby prevent or put right the particular Convention violation alleged and had not provided the Court with the views of the national courts concerning the applicant's grievances. The applicant had thus failed to exhaust domestic remedies.

Conclusion: inadmissible (failure to exhaust domestic remedies).

ARTICLE 35 § 3 (a)

Competence *ratione materiae*

Constitutional Referendum did not fall within scope of Article 3 of Protocol No. 1: *inadmissible*

Cumhuriyet Halk Partisi v. Turkey, 48818/17, decision 21.11.2017 [Section II]

Facts – In April 2017 a binding Constitutional Referendum was held in Turkey. Before the European Court, the applicant, a political party based in Ankara, complained under Article 3 of Protocol No. 1 that the Government had failed, *inter alia*, to ensure the free expression of the opinion of the people in the choice of legislature, the separation of powers, the independence of the judiciary and the rule of law.

Law – Article 3 of Protocol No. 1: The applicant party argued that the Constitutional Referendum should be considered to fall within the scope of Article 3 of Protocol No. 1 as a result of the far-reaching nature of the changes it introduced into the Turkish parliamentary system.

It was true that Article 3 of Protocol No. 1 enshrined a characteristic principle of an effective democracy and was accordingly of prime importance in the Convention system. Democracy constituted a fundamental element of the "European public order", and the rights guaranteed under Article 3 of Protocol No. 1 were crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.

However, the text of Article 3 of Protocol No. 1 clearly suggested that its ambit was limited to elections – held at reasonable intervals – determining the choice of the legislature, and its wording was a strong indication of the limits of an expansive, purposive interpretation of its applicability. The object and purpose of the provision had to be ascertained by reference to the wording used in the provision. Importantly, such a textual interpretation had recently been reconfirmed by the Court in *Moohan and Gillon v. the United Kingdom*, which concerned a secession referendum, where the Court held that "the choice of legislature" did not necessarily include "the type of legislature" and rejected the argument that the referendum, albeit of vital importance for an effective political democracy, fell within the scope of Article 3 of Protocol No. 1.

In the light of the above considerations and its settled case-law on the applicability of Article 3 of Protocol No. 1, the wording of that provision – taking into account its ordinary meaning in context as well as its object and purpose – precluded the possibility of the Court's adopting an expansive interpretation of the provision which would include referendums. The purpose of the Constitutional Referendum in Turkey had been, in substance, to decide whether the President of Turkey should be accorded extensive powers within a new constitutional system of government. Accordingly, the Referendum did not amount to an "election" within the meaning of Article 3 of Protocol No. 1.

Conclusion: inadmissible (incompatible *ratione materiae*).

The Court also concluded that the applicant's complaint under Article 13 of the Convention taken in conjunction with Article 3 of Protocol No. 1 was inadmissible *ratione materiae* as the main complaint lay outside the material scope of the Convention.

(See *Moohan and Gillon v. the United Kingdom* (dec.), 22962/15 and 23345/15, 13 June 2017, Information Note 209)

ARTICLE 41

Just satisfaction

Aggregate award for pecuniary and non-pecuniary damage for individuals displaced in the context of the conflict over Nagorno-Karabakh

Sargsyan v. Azerbaijan, 40167/06, Chiragov and Others v. Armenia, 13216/05, judgments (just satisfaction) 12.12.2017 [GC]

Facts – In the case of *Sargsyan v. Azerbaijan* the applicant and his family were ethnic Armenians

who used to live in the village of Gulistan, in the present-day Goranboy region of Azerbaijan. The applicants in the case of *Chiragov and Others v. Armenia* were Azerbaijani Kurds who use to live in the district of Lachin, in Azerbaijan. The applicants had all been forced to flee their homes in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh.

In judgments delivered on 16 June 2015 ("the principal judgments"), the Grand Chamber found continuing violations of Article 8 and Article 13 of the Convention and Article 1 of Protocol No. 1. The question of the application of Article 41 of the Convention was reserved in both cases.

Law – Article 41

(a) *Introductory remarks* – These were exceptional cases, relating to an ongoing conflict situation. The active military phase in the Nagorno-Karabakh conflict had taken place in 1992-94 but, despite a ceasefire agreement concluded in May 1994 and negotiations conducted in the framework of the OSCE Minsk Group, no peace agreement had been reached. Twenty-three years later, breaches of the ceasefire agreement continued to occur. Violence had recently escalated along the Line of Contact, most notably during the military clashes in early April 2016.

The events which had led the applicants to flee their property and homes occurred in 1992. The respondent States had ratified the Convention ten years later, Azerbaijan on 15 April 2002 and Armenia on 26 April 2002. While having no jurisdiction *ratione temporis* over events pre-dating ratification, the Court had concluded in its principal judgments that the applicants still had valid proprietary rights and, from the date of entry into force of the Convention, found continuing violations of the applicants' rights.

The Court was thus dealing with a continuing situation which had its roots in the unresolved conflict over Nagorno-Karabakh and the surrounding territories and still affected a large number of individuals. More than one thousand individual applications lodged by persons who had been displaced during the conflict were pending before the Court, slightly more than half of them being directed against Armenia and the remainder against Azerbaijan. The applicants in those cases represented just a small portion of the persons, estimated to exceed one million, who had had to flee during the conflict and had since been unable to return to their properties and homes or to receive any compensation for the loss of their enjoyment.

Armenia and Azerbaijan had given undertakings prior to their accession to the Council of Europe committing themselves to the peaceful settlement of the conflict. Some fifteen years had passed since the ratification of the Convention by both States without a political solution in sight. It was the responsibility of the two States involved to find such a solution.

The Court was not a court of first instance. It did not have the capacity, nor was it appropriate to its function as an international court, to adjudicate on large numbers of cases which required the finding of specific facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions. It was precisely the Governments' failure to comply with their accession commitments as well as with their obligations under the Convention which had obliged the Court in the present cases to act as a court of first instance, establishing relevant facts some of which dated back many years, evaluating evidence in respect of property claims and finally assessing monetary compensation.

Without prejudice to any compensation to be awarded as just satisfaction in the present cases, the effective and constructive execution of the principal judgment called for the creation of general measures at national level. Guidance as to appropriate measures had been given in the principal judgments.

(b) *General principles on just satisfaction* – If the nature of the breach allowed for *restitutio in integrum*, it was for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, on the other hand, national law did not allow – or allowed only partial – reparation to be made, Article 41 empowered the Court to afford the injured party such satisfaction as appeared to it to be appropriate. Nevertheless, some situations – especially those involving long-standing conflicts – were not, in reality, amenable to full reparation.

As regards claims for pecuniary loss, there had to be a clear causal connection between the damage claimed by the applicant and the violation of the Convention. As regards losses related to real property, where no deprivation of property had taken place but the applicant had been denied access and

therefore the possibility to use and enjoy the property, the Court's general approach was to assess the loss suffered with reference to the annual ground rent, calculated as a percentage of the market value of the property, that could have been earned during the relevant period.

A precise calculation of the sums necessary to make reparation in respect of the pecuniary losses suffered by the applicant might be prevented by the inherently uncertain character of the damage flowing from the violation. An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved, the more uncertain the link became between the breach and the damage. The question to be decided in such cases was the level of just satisfaction, in respect of both past and future pecuniary losses, that it was necessary to award to the applicant, the matter to be determined by the Court at its discretion, having regard to what was equitable.

Furthermore the Court reiterated that there was no express provision for non-pecuniary or moral damage. Situations where the applicant had suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity could be distinguished from those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, was an appropriate form of redress in itself. In some situations, where a law, procedure or practice had been found to fall short of Convention standards, that was enough to put matters right. In other situations, however, the impact of the violation might be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements did not lend themselves to a process of calculation or precise quantification. Nor was it the Court's role to function akin to a domestic tort mechanism in apportioning fault and compensatory damages between civil parties. Its guiding principle was equity, which above all involved flexibility and an objective consideration of what was just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach had occurred. Its non-pecuniary awards served to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and to reflect in the broadest of terms the severity of the damage.

Finally, depending on the specific circumstances of the case, it might be appropriate to make an aggregate award for pecuniary and non-pecuniary damage.

(c) *Award of damages in* Sargsyan

(i) *Pecuniary damage* – The applicant had initially requested restitution of his property, including the right to return to his property and home in Gulistan, but had not upheld that claim following the principal judgment, noting the impossibility of a return to the village on account of the prevailing security situation. Thus, an award of compensation was the appropriate just satisfaction.

It was the finding that the applicant still had valid property rights in respect of his house and land in Gulistan that had brought the case within the Court's competence *ratione temporis* from 15 April 2002. It followed, firstly, that a period of almost ten years during which the continuing situation complained of existed, fell outside the Court's temporal jurisdiction and that any damage suffered by the applicant before 15 April 2002 was not directly related to the violations found and therefore could not be compensated under Article 41. Secondly, as the applicant had not been deprived of his property rights, compensation could not be awarded for the loss of his house and land as such, but only for the loss of use of his property.

The damage to the applicant's house, furniture, fruit trees and the loss of livestock had occurred prior to the entry into force of the Convention and therefore no awards could be made under those heads. Furthermore, no award could be made for compensation for loss of income from salaries and pensions for the period pre-dating 15 April 2002. As regards the period after the entry into force of the Convention, there was no causal link between the violations found in the principal judgment and the damage alleged. The losses claimed were not directly related to the impossibility for the applicant to have his property rights restored or to obtain compensation for the loss of their enjoyment, but were rather linked to his displacement from Gulistan in 1992 and to the overall consequences of the conflict.

An award in respect of pecuniary damage could therefore only be made under two heads, namely

the loss of income from the applicant's land and additional rental and living expenses. The assessment of pecuniary damage under those heads was burdened with many uncertainties and difficulties. Some of those difficulties were linked to the fact that the underlying conflict was still unresolved and to the particular situation of Gulistan. Since the entry into force of the Convention Gulistan had been a deserted village in which most buildings have been dilapidated, situated between the opposing forces in the conflict. In those circumstances it was not possible to obtain any valid data for the loss of use of the applicant's property. It did not appear appropriate either to assess the loss of use with reference to the annual ground rent, calculated as a percentage of the market value of the property that could have been earned in the period after the entry into force of the Convention.

Another difficulty, closely linked to the first, concerned the lack or inaccessibility of documentation. The main document submitted by the applicant in respect of his house and land in Gulistan was the technical passport of the house established in May 1991, still at the time of the Soviet Union. The technical passport contained no valuation in respect of the land. That could partly be explained by the fact that, at the time when the plot of land was allocated to the applicant, there was no private ownership of land under the Soviet legal system it being given to him instead with a "right of use". Concerning the period falling within the Court's competence *ratione temporis*, there was no documentation relating to the value of the property or any income to be derived from it.

While the Court accepted that the applicant, who had lived in his house in Gulistan and derived part of his income from farming his land, must have incurred additional living expenses in Armenia, the uncertainty as to the assessment of the loss of income from the applicant's land also prevented any precise calculation of the difference in living expenses. The assessment was further complicated by the fact that it involved comparing economic conditions in two different countries which must have evolved considerably over time. Having regard to all those elements, the pecuniary damage sustained by the applicant did not lend itself to precise assessment.

(ii) *Non-pecuniary damage* – The applicant had to have sustained non-pecuniary damage as a result of the protracted, unresolved situation, the insecurity about the fate of his house and other property and the graves of his relatives in Gulistan, and the ensuing emotional suffering and distress. The finding of a violation did not constitute in itself sufficient just satisfaction for the non-pecuniary damage suffered. So far, no property claims mechanism or other measures had been put in place by the Government which could benefit persons in the applicant's situation.

(d) *Award of damages in* Chiragov and Others

(i) *Pecuniary damage* – There was no realistic possibility for the applicants to return home and no such possibility had existed during the period under scrutiny. Thus, an award of compensation was the appropriate just satisfaction. Damage suffered by the applicants before 26 April 2002 was not directly related to the violations and therefore could not be compensated under Article 41. As the applicants had not been deprived of their property, compensation could not be given for the loss of land and houses as such, but only for the loss related to the applicants' inability to use and enjoy the property.

It was unclear whether the applicants' houses had been destroyed or were still partly or wholly intact. Having regard to all the imponderables, the submissions in the case did not sufficiently show that the applicants had houses which, in April 2002, still existed or, if so, existed in such a condition that they could be taken into account for the purposes of an award of compensation. It was very difficult to determine the value of the applicants' land. That was compounded by the fact that, at the start of the period that could be considered by the Court, the applicants' land had been located on occupied and largely ravaged territory for ten years and a further fifteen years, in similar circumstances, had passed since. Consequently, while pecuniary damages might be awarded in respect of loss of income from the applicants' land, including possible rent and proceeds from farming and stockbreeding, the Court's general approach to calculating loss did not appear appropriate or useful in the circumstances of the present case.

No evidence, except for statements of individuals, had been submitted in support of claims for the loss of household items, cars, fruit trees and bushes, and livestock. More importantly, all of those belongings must reasonably be presumed to have been destroyed or to have vanished during the military attack on the district of Lachin or the following ten-year period until April 2002. If any

items were still in existence at the latter date, they would at least have sustained such damage during years of decay that they were unlikely to have been in a usable state. In respect of those items, there was no causal connection between the damages claimed and the continuing violations found in the principal judgment. The loss of salaries and other income was not related to the lack of access to the applicants' property and homes but rather to their displacement from Lachin in 1992. It was not possible to speculate as to what employment or income the applicants could have had in Lachin in 2002, ten years after their flight.

An award in respect of pecuniary damage could therefore only be made under two heads, namely the loss of income from the applicants' land in Lachin and their increased living expenses in Baku. However, the assessment of the damage sustained was dependent on a large number of imponderables, partly because the claims were generally based on limited documentation and partly because no reliable method or data for evaluating the value of the land had been presented. Consequently, the pecuniary damage sustained by the applicants did not lend itself to precise calculation.

(ii) *Non-pecuniary damage* – The circumstances of the case must have caused the applicants emotional suffering and distress due to the protracted and unresolved situation which had separated them from their property and homes in the district of Lachin and constrained them to a life as internally displaced persons in Baku in presumably poorer living conditions. The finding of a violation did not constitute in itself sufficient just satisfaction for the non-pecuniary damage suffered.

(e) Overall conclusion – The applicants in both cases were entitled to compensation for certain pecuniary losses and for non-pecuniary damage, which were closely connected. The damage sustained did not lend itself to precise calculation and further difficulties in the assessment derived from the passage of time. The level of just satisfaction to be awarded had to be determined at the Court's discretion, having regard to what it found equitable.

The Court had regard to the respondent State's primary duty to make reparation for the consequences of a breach of the Convention and underlining once more the responsibility of the two States concerned to find a plausible resolution to the Nagorno-Karabakh conflict. Pending a solution on the political level, it considered it appropriate to award an aggregate sum for pecuniary and non-pecuniary damage to each of the applicants of EUR 5,000 covering all heads of damage, plus any tax that may be chargeable on that amount.

Conclusion: EUR 5,000 to each of the applicants in respect of pecuniary and non-pecuniary damage.

(See *Sargsyan v. Azerbaijan* [GC], 40167/06, 16 June 2015, Information Note 186; and *Chiragov and Others v. Armenia* [GC], 13216/05, 16 June 2015, Information Note 186)

ARTICLE 46

ARTICLE 46 § 2

Execution of judgment – General measures

Not reasonable or practical to make any pronouncement on the necessity of general measures

Zadumov v. Russia, 2257/12, judgment 12.12.2017 [Section III]

Facts – The applicant alleged, in particular, that his right to a fair trial had been violated on account of his inability to examine a prosecution witness and the use of her pre-trial testimony for his conviction for manslaughter.

Law – Article 6 §§ 1 and 3 (d): There had been no good reason for the witness's absence from the trial hearings and the reading out of her pre-trial statements as evidence, and that evidence had been "decisive" for the applicant's conviction.

As to whether there had been sufficient counterbalancing factors to compensate for the handicaps caused to the defence, in principle the Russian legal system offered robust procedural guarantees securing the right of an accused to examine witnesses testifying against him, ensuring that the reading out of absent witnesses' testimony was possible only as an exception. Those procedural arrangements, which could have been otherwise considered sufficient, were incapable of remedying the difficulties faced by the defence given the unexplained decision of the domestic court to forgo measures ensuring the witness' attendance. Accordingly, despite the existence in the Russian legal system of robust procedural guarantees securing the right of an accused to examine witnesses testifying against him, the domestic courts had failed to put in place sufficient safeguards. The lack of valid reasons for

the witness's absence and the lack of sufficient counterbalancing measures, despite their evident availability, as well as the superficial assessment of the reliability of her testimony, weighed heavily against consideration of the trial as fair judged as a whole.

Conclusion: violation (unanimously).

Article 46: The scope of the exceptional circumstances requiring consideration of a State's obligations under Article 46 of the Convention was necessarily narrow. The Court had to proceed with due caution in deciding whether the absence of prosecution witnesses at trial could be classified as a structural or systemic problem in Russia and whether the existing legal framework or practice called for an indication of any specific general measures.

In recent years over 250 applications lodged against Russia, in which a problem similar to the one in the present case was the primary issue, had been communicated to the Government. While the overall number of pending cases communicated to the Government was quite significant, it should not be overlooked that they had accumulated on the Court's docket over the period of more than ten years. As such the above figures did not indicate the existence in the past or in the present of a systemic or a structural problem.

At the material time the existing legislative framework for the use of absent witnesses' testimony, as well as the interpretative guidelines provided by the Supreme Court, offered robust procedural guarantees securing the right of an accused to examine witnesses testifying against him and ensuring that the reading out of absent witnesses' testimony was possible only as an exception. Furthermore, without prejudice to any future assessment of the 2016 amendments to the Code of Criminal Procedure, which were not applicable at the time the facts in this case occurred, those amendments appeared to further strengthen the rights of the defence. In that regard, the Court considered that it would not be appropriate for it to give any indication of possible, general measures in cases such as the present one, where the facts pre-dated the most recent legislative amendments.

At the same time the present judgment would benefit from general measures aimed at national authorities' awareness raising and capacity building in the manner already set out in the Recommendations of the Committee of Ministers CM/Rec(2002)13 of 18 December 2002, CM/Rec(2004)4 of 12 May 2004 and CM/Rec(2008)2 of 6 February 2008. The Court maintained that position, taking into account also the fact that those Recommendations reflected the well-established practice of the member States in implementation of the Court's judgments and, therefore, formed a core and habitual part of the steps taken within the execution process.

In those circumstances, it was not reasonable or practical to make any pronouncement on the necessity of general measures, in addition to those already undertaken by the Russian authorities, to prevent future similar violations. Any decision on the scope or sufficiency of the general measures had to remain the responsibility of the Committee of Ministers, discharging its supervisory functions under Article 46 of the Convention.

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

(See also *Schatschaschwili v. Germany* [GC], 9154/10, 15 December 2015, Information Note 191)

ARTICLE 46 § 4

Execution of judgment – Individual measures, infringement proceedings

Infringement proceedings against Azerbaijan for alleged failure to abide by final judgment of the European Court

Ilgar Mammadov v. Azerbaijan, 15172/13

In 2013 the applicant, an opposition politician, was charged with criminal offences and remanded in custody after commenting on political issues on his personal internet blog. In a judgment of 22 May 2014 (see Information Note 174) the European Court found that his rights under Article 5 §§ 1 (c) and 4, Article 6 § 2 and Article 18 of the Convention had been violated.

The Committee of Ministers of the Council of Europe, which is responsible under Article 46 of the Convention for supervising the execution of the Court's judgments, issued a series of decisions and interim resolutions calling – in view of the fundamental flaws in the criminal proceedings revealed by the Court's conclusions under Article 18 of the Convention combined with Article 5 – for the immediate and unconditional release of the applicant, who is still in prison.

On 5 December 2017 the Committee of Ministers decided[2] to refer to the Court, in accordance with Article 46 § 4 of the Convention, the question whether the Republic of Azerbaijan has failed to fulfil its obligation under Article 46 § 1 to abide by final judgments of the Court. In accordance with Rule 96 of the Rules of Court, the question will be examined by the Grand Chamber.

ARTICLE 1 OF PROTOCOL No. 1

Secure the payment of taxes

Levy of tax surcharge on employers in response to sovereign debt crisis: *inadmissible*

P. Plaisier B.V. and Others v. the Netherlands, 46184/16 et al., decision 14.11.2017 [Section III]

Facts – In 2012, against the backdrop of the sovereign debt crisis in Europe, the Netherlands Parliament introduced a high-wages tax surcharge to help ensure compliance with the State's European Union obligations on budget deficit. The surcharge was intended as a temporary measure for 2013 (although it was in fact renewed once in 2014) and was levied only on employers who had paid employees wages in excess of EUR 150,000 pre-tax during the previous tax year (2012).

The three applicant companies were liable to the surcharge. In the Convention proceedings, they complained under Article 1 of Protocol No. 1 that they had been subjected to a tax that had retrospective effects, and that the surcharge had been imposed without regard for possible individual hardship, had been targeted at an unaccountably small group of employers and was disproportionate in relation to the tax revenue actually raised. They also complained under Article 14 of the Convention that the surcharge had been applied arbitrarily to only a small proportion of taxpayers.

Law – Article 1 of Protocol No. 1: The sole issue before the Court was the proportionality of the measure. There could be no doubt that the Netherlands was entitled in principle to take far-reaching measures to bring the economy back into line with its international obligations, as indeed were the other Member States whose measures had been the object of applications to the Court. That entitlement was however subject to the proviso that no "individual and excessive burden" be imposed on any person.

Taking into account the States' margin of appreciation in taxation matters, the Court considered that the measure taken had not upset the balance which had to be struck between the demands of the public interest and the protection of the applicant companies' rights. In particular:

(i) Retrospective tax legislation was not as such prohibited by Article 1 of Protocol No. 1. Provided there were specific and compelling reasons, the public interest could override the interest of the individual in knowing his or her tax liabilities in advance. The considerations that had guided the Netherlands legislature in the applicant companies' case were not "merely budgetary": in common with other Member States of the EU, the Netherlands had been concerned to meet its obligations under EU law without delay, in circumstances aggravated by a financial and economic crisis of a magnitude seldom seen in peacetime.

(ii) Although one of the applicant companies (Feyenoord Rotterdam N.V.) had submitted that the surcharge had endangered its standing as a professional club football employer, the domestic court had considered the implications of the measure on the company's overall financial situation in detail before rejecting that submission. It could not therefore be said that an individual assessment had been excluded.

(iii) Although only a relatively small proportion of taxpayers were affected by the surcharge, that legislative choice had not been devoid of reasonable foundation given the temporary nature of the measure and the expected increased difficulty of attracting new businesses if other options, such as bringing in an additional tax bracket, were followed.

(iv) The Court could not accept that the surcharge had affected so few taxpayers that its impact on the State budget was minimal and that other measures would have resulted in more meaningful revenue. In that connection, it reiterated that, provided that the legislature chose a method that could be regarded as reasonable and suited to achieving the legitimate aim being pursued, it was not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.

Conclusion: inadmissible (manifestly ill-founded).

2. Interim Resolution CM/ResDH(2017)429.

Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: This complaint, in essence, coincided with the complaint that the surcharge affected only a very small group of employers. As such, it had already been adequately addressed under Article 1 of Protocol No. 1 taken alone.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Koufaki and Adedy v. Greece* (dec.), 57665/12 and 57657/12, 7 May 2013, Information Note 163; *Mamatas and Others v. Greece*, 63066/14 et al., 21 July 2016, Information Note 198; and the other cases mentioned in the Factsheet on Austerity measures)

ARTICLE 4 OF PROTOCOL No. 7

Right not to be tried or punished twice

Assize Court proceedings not based on same terrorist offences as had led to conviction in Criminal Court: *no violation*

Ramda v. France, 78477/11, judgment 19.12.2017 [Section V]

(See Article 6 § 1 (criminal) above, page 11)

PENDING GRAND CHAMBER

Referrals

Rooman v. Belgium, 18052/11, judgment 18.7.2017 [Section II]

(See Article 5 § 1 (e) above, page 9)

OTHER JURISDICTIONS

Inter-American Court of Human Rights (IACtHR)

State obligations with respect to the rights to labour stability, association and freedom of expression

Case of Lagos del Campo v. Peru, Series C No. 340, judgment 31.8.2017

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

Facts – The applicant, Mr Alfredo Lagos del Campo, was the elected President of the General Assembly of the Electoral Committee of a private company. During a magazine interview, he made several statements denouncing irregularities within the directorate of the company during the elections. He was subsequently dismissed due to work misconduct on 1 July 1989. He submitted a complaint to the Labour Tribunal, which ruled the dismissal "inadmissible and unjustified". However, the Court of Second Instance overturned that decision and confirmed that his dismissal was lawful and justified. All the subsequent remedies filed by the applicant were declared inadmissible or denied on the merits.

Law

(a) *Articles 13(2) (freedom of thought and expression) and 8(2) (right to fair trial) of the American Convention on Human Rights (ACHR), in conjunction with Article 1(1) of the ACHR* – The Inter-American Court stressed the applicability of the right to freedom of thought and expression to the labour sphere, with the State having a duty to respect and guarantee that right so that workers and their representatives could exercise it. In cases where a general and public interest was involved, a higher standard of protection was required, especially for those exercising representative elected positions. The Court determined that the statements expressed by the applicant in his capacity as a representative of the workers referred to matters of public interest. It concluded that the State had endorsed the restriction placed on the applicant´s right to freedom of thought and expression through an unnecessary sanction that was not adequately reasoned. In the circumstances of the case, there had been no imperative need that could justify his dismissal.

Conclusion: violation (unanimously).

(b) *Article 26 (right to labour stability), in conjunction with Articles 1(1) (obligation to respect and guarantee rights without discrimination), 13 (freedom of thought and expression), 8 (right to fair trial) and 16 (freedom of association) of the ACHR* – The Inter-American Court asserted its jurisdiction, in accordance with the ACHR and the principle of *iura novit curiae*, to analyse the initial petition and the impact on the applicant´s labour rights. In this regard, the Court reiterated its position on the interdependence of and indivisibility between civil and political rights, and economic, social and cultural rights. Both sets of rights had to be understood integrally as human

rights, without any hierarchical distinction between them and enforced by the competent authorities.

For the first time, the Inter-American Court went on to analyse Article 26 of the ACHR, which establishes economic, social and cultural rights in this treaty. It found a specific violation of the right to work, in particular, of the rights to labour stability and association. The Court derived the scope and content of the right to labour stability under Article 26 of the ACHR from the Charter of the Organisation of American States and the American Declaration of the Rights and Duties of Man, the rules of interpretation established in Article 29 of ACHR, the international and regional *corpus iuris,* and from Peruvian legislation. It determined that the protection of the right to labour stability in the private sphere translated into specific duties for the State, such as adequate regularisation and audit; the protection of workers against unjustified dismissal; the provision of remedies in case of unjustified dismissal; and the stipulation of effective claim mechanisms.

The Court concluded that the State had not adopted adequate measures to protect the applicant from the violation of his right to work by third parties because it had endorsed the improper dismissal through its judicial authorities. The applicant had not been reinstated in his position and had not received any compensation or the corresponding social benefits. He had thus lost his job, as well as access to a retirement pension, and lost the ability to exercise his rights as a workers´ representative. Therefore, the State had not ensured his right to labour stability.

Conclusion: violation (five votes to two).

(c) *Articles 16 (freedom of association) and 26 (right to labour stability), in conjunction with Articles 1(1) (obligation to respect and guarantee rights without discrimination), 13 (freedom of thought and expression), and 8 (right to fair trial) of the ACHR* – The Inter-American Court stated that freedom of association does not apply only to trade unions but also to any organisation intended to represent the legitimate interests of workers. It reiterated that freedom of association entails an individual and a social dimension. On the one hand, it includes the right to freely associate and to use any appropriate means to exercise this freedom. On the other, it is a mechanism that allows the members of a labour community or group to achieve certain objectives together and to obtain benefits for themselves. In the instant case, the applicant's irregular dismissal had prevented him from continuing in his position as a representative of the workers and from attending the meeting of the Electoral Committee. Therefore, taking into account the dual scope of the right of association, the Court found that the violation of the applicant´s rights as a workers' representative could also have had an intimidating and chilling effect on the other workers, given that he was dismissed as a reprisal for his statements in that capacity.

Conclusion: violation (five votes to two).

(d) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered the State to: (i) publish the judgment and its official summary, and (ii) pay compensation in respect of pecuniary damage (including loss of earnings, retirement pension and social benefits) and non-pecuniary damage, and to pay costs and expenses.

African Court on Human and Peoples' Rights

Criminal conviction for alleged minimisation of the Rwandan genocide

Case of Ingabire Victoire Umuhoza v. the Republic of Rwanda, No. 003/2014, judgment 24.11.2017

Facts – The applicant, the leader of an opposition political party in Rwanda, returned to the country in 2010, having spent nearly seventeen years abroad. She was arrested soon after and in October 2012 was convicted of terrorism offences and the offence of the minimisation of the genocide. Her appeal to the Supreme Court was unsuccessful. In her application to the African Court, the applicant alleged various violations of the African Charter on Human and Peoples' Rights.

Law – Article 9 of the Charter (*freedom of expression*): The right to freedom of expression was one of the fundamental rights protected by international human rights law. However, it was not an absolute right and under some circumstances might be subject to restrictions. There was no question that the applicant's conviction and sentence constituted a restriction on her freedom of expression. The question was whether the restriction was provided for in law, served a legitimate purpose and was necessary and proportionate in the circumstances of the case.

The African Court noted that some of the provisions in the relevant legislation were couched in broad and general terms and could be subject to various interpretations. However, taking into consideration the nature of the offences, which were difficult to specify with precision, and the margin of appreciation that the Respondent State enjoyed in defining and prohibiting criminal acts in its domestic legislation, it took the view that the impugned laws did provide adequate notice for individuals to foresee and adapt their behaviour to the rules. The crimes for which the applicant had been convicted were serious in nature with potentially grave repercussions on State security and as such the restriction served the legitimate aim of protecting national security and public order. Restrictions made on the exercise of freedom of expression had to be strictly necessary in a democratic society and proportionate to the legitimate purposes pursued. Some forms of expressions, such as political speech, in particular when they were directed towards the government and government officials, or were spoken by persons of special status, such as public figures, deserved a higher degree of tolerance than others.

Rwanda had suffered the most atrocious genocide in the recent history of mankind and that was recognised internationally. As such, it was warranted that the government should adopt all measures to promote social cohesion and concordance among the people and prevent similar incidents from happening in the future. The State had a responsibility to ensure that the laws in that respect were respected. While it was entirely legitimate for the State to have introduced laws on the minimisation, propagation or negation of genocide, the laws in question should not be applied at any cost to the rights and freedoms of individuals in a manner which disregarded international human rights standards. It was important that restrictions made on the fundamental rights and freedoms of citizens were warranted by the particular context of each case and the nature of the acts that were alleged to have necessitated such restrictions.

The applicant's statements that were alleged to have been made on different occasions were of two natures: those remarks made in relation to the Genocide[3] and those directed against the government.

As in any country where there was a history of genocide, the issue was very sensitive and opinions or comments made in relation to the genocide could not be treated in a similar manner as opinions expressed on other matters. Statements that denied or minimised the magnitude or effects of the genocide or that unequivocally insinuated the same fell outside the domain of the legitimate exercise of the right to freedom of expression and should be prohibited by law. Concerning the allegation that the applicant's remarks had propagated the theory of 'double genocide'[4] there was nothing in her remarks suggesting that she advanced that view. It was clear that the applicant admitted the genocide against the Tutsis and had not claimed that genocide had been committed against the Hutus. The domestic judgment acknowledged that her statements did not refer to genocide against the Hutus but relied on the context in which they were made. In that connection, the context in which statements were made might imply a different meaning to the ordinary message that they conveyed. Nevertheless, the applicant's statements were unequivocally clear and in such circumstances putting severe restrictions such as criminal punishments merely on the basis of context would create an atmosphere where citizens could not freely enjoy their right to freedom of expression.

The second group of statements made by the applicant contained severe criticism against the government and public officials. While some of her remarks might be seen as offensive they were of a kind that was expected in a democratic society and should thus be tolerated, especially when they originated from a public figure such as the applicant. There was no evidence showing that the statements caused strife, public outrage or any other particular threat to the security of the State or public order.

Conclusion: violation.

The African Court also found no violation of Article 7 (right to a fair trial).

Reparations – reserved.

3. For example, "We are honoring at this Memorial the Tutsis victims of Genocide, there are also Hutus who were victims of crimes against humanity and war crimes, not remembered or honored here.".

4. The National Commission for the Fight against Genocide, intervening as Amicus Curiae, argued that the theory of "double genocide" was a way of the applicant denying the genocide perpetrated in 1994 against Tutsis in Rwanda and that the theory of double genocide was intended to transform the 1994 genocide against Tutsis into an inter-ethnic massacre, exonerating the perpetrators, their accomplices and their sympathisers.

COURT NEWS

Film on the ECHR: new versions

The film presenting the Court is now also available in Chinese, Irish, Latvian and Slovenian. The videos are accessible via the Court's Internet site (www.echr.coe.int – The Court) and its YouTube channel (https://www.youtube.com/user/EuropeanCourt).

RECENT PUBLICATIONS

New Case-Law Guide

The English translation of the Guide on Article 1 of the Convention (obligation to respect human rights: concepts of "jurisdiction" and imputability) is now available on the Court's Internet site (www.echr.coe.int – Case-law), completing the French version published earlier.

Guide on Article 1 of the Convention (eng)

Guide sur l'article 1 de la Convention (fre)

Commissioner for Human Rights

The third quarterly activity report 2017 of the Council of Europe's Commissioner for Human Rights is available on the Commissioner's Internet site (www.coe.int – Commissioner for Human Rights – Activity reports).

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