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

Information Note on the Court's case-law

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Article 5 § 1 (a)

After conviction

Execution during several years of prison service imposed by a court "not established by law": *violation*

Yefimenko v. Russia - 152/04
Judgment 12.2.2013 [Section I]

Facts – In 2001 the applicant was arrested on suspicion of murder. His case was sent to the regional court for trial by a professional judge sitting with two lay judges. The applicant objected to the participation of the lay judges on

the grounds that they had served more than once a year between 1998 and 2002 in breach of the Lay Judges Act. His objection was dismissed and on 24 April 2003 he was convicted by the trial court. In September 2009 the Supreme Court quashed his conviction following supervisory-review proceedings and ordered a retrial after noting certain irregularities relating to the lists of lay judges sitting in the regional court at the material time. The Presidium of the Supreme Court later confirmed that decision, but on amended grounds after noting that since there was no indication that the lay judges in the applicant's case were on the list of lay assessors, the trial court had not been established by law. The applicant remained in detention pending his retrial, which ended with his being sentenced to nineteen and a half years' imprisonment.

In his application to the European Court, the applicant argued, *inter alia*, that the period of imprisonment he had served under the original trial judgment had not complied with the requirements of Article 5 § 1 of the Convention.

Law – Article 5 § 1 (a): It was common ground that the regional court had in principle had jurisdiction to take the decision in issue. However, both during and after the trial the applicant had sought to substantiate and obtain confirmation of his allegations of a breach of the Lay Judges Act in relation to the composition of that court. Having obtained no prompt and adequate redress in ordinary appeal proceedings in relation to those allegations, he had been required to serve the prison sentence imposed by the trial court on 24 April 2003. However, as had been acknowledged by the Supreme Court in the supervisory-review proceedings years after the trial, the composition of the trial court had not been "established by law" as regards two of the judges. There was no indication that they had received any authority to sit as lay judges in the applicant's case, which had ended with a heavy prison sentence. There had thus been a gross and obvious irregularity in respect of the period of the applicant's detention under the judgment of 24 April 2003. The court which convicted him was therefore not "competent" and his detention was not "lawful" within the meaning of Article 5 § 1 (a) of the Convention. In view of the gravity of the violation and noting the absence of adequate acknowledgment and redress, the Court concluded that the applicant's detention on the basis of the trial judgment had been in breach of Article 5 § 1.

Conclusion: violation (six votes to one).

The Court also found, unanimously, a violation of Articles 3, 8 and 13 of the Convention and a failure by the respondent State to comply with its obligation under Article 34.

Article 41: EUR 20,000 in respect of non-pecuniary damage.

ARTICLE 6

Article 6 § 1 (civil)

Civil rights and obligations
Access to court

Retrospective application of a change in the case-law with unforeseen consequences on proceedings already under way: *violation*

Petko Petkov v. Bulgaria - 2834/06
Judgment 19.2.2013 [Section IV]

Facts – Following the death of his father the applicant brought an action in 2003 against his uncle, who had inherited the entire estate and received lifetime gifts, for a reserved share under the Inheritance Act 1949. Section 30(2) of the Act required the claimant of a reserved share to produce an inventory of the estate where the defendant to the action was not an "heir-at-law". That term was not statutorily defined but had been the subject of an interpretative decision of the Supreme Court in 1964. In reliance on that interpretative decision the applicant did not produce an inventory in sup-

port of his claim. His action was ultimately dismissed after the Supreme Court reinterpreted the term "heir-at-law" in a new decision of 4 February 2005 in a way which meant that the applicant should have produced an inventory. This he was unable to do, as the time-limit had expired.

Law – Article 6 § 1: The requirement under the Inheritance Act 1949 for the claimant to prepare an inventory when the defendant to the claim was not an "heir-at-law" had to be seen not as qualifying a substantive right but as a procedural bar to the domestic courts' power to determine the right. The action brought by the applicant thus fell within the civil limb of Article 6.

Although the term "heir-at-law" was not statutorily defined, until 2005 it had been interpreted by the Supreme Court in such a way that, when bringing his claim in 2003, the applicant could reasonably have expected that the requirement for an inventory would not apply. However, the Supreme Court had reinterpreted the term in 2005. The new interpretation had not only prevented the applicant from having his claim determined by a court without an inventory, it had also become an insurmountable obstacle to any future attempts on his part to recover his reserved share, as the time-limit for preparing an inventory had long since expired. While case-law development was not, in itself, contrary to the proper administration of justice, in previous cases where changes in domestic jurisprudence had affected pending civil proceedings, the Court had been satisfied that the way in which the law had developed had been well known to the parties, or at least reasonably foreseeable, and that no uncertainty had existed as to their legal situation. In the instant case, however, while the restitution process and other legal developments which had led the Supreme Court to amend its interpretation of the term "heir-at-law" were known, it appeared that the side effect of that new interpretation on cases pending at the cassation level such as the applicant's had not been foreseen. Indeed, in later judgments the Supreme Court had found that the lower courts were in fact interpreting the formal requirement for an inventory too strictly when applying it to cases where the defendant had inherited the entire estate.

The Court was not convinced that the otherwise reasonable aim pursued by that requirement could not have been attained in an adversarial trial rather than by barring the applicant's claim altogether. It noted too that the Supreme Court's decision of 2005 did not contain provisions on its applicability to pending proceedings. Unlike the case of *Legrand v. France*, in which the new legal principle established by the French Court of Cassation had not had the effect of depriving the applicants in that case – even retrospectively – of their right to access to court, in the instant case the unforeseeability of the procedural requirement had applied retroactively to the pending proceedings and thus restricted the applicant's access to court to such an extent that its very essence had been impaired.

Conclusion: violation (unanimously).

Article 41: EUR 1,000 in respect of non-pecuniary damage.

(See *Legrand v. France*, no. 23228/08, 26 May 2011, Information Note no. 141)

Article 6 § 3 (d)

Examination of witnesses

Admission in evidence of statement by sole prosecution witness who could not be cross-examined because of post-traumatic stress disorder: *no violation*

Gani v. Spain - 61800/08
Judgment 19.2.2013 [Section III]

Facts – Following reports to the police by N., his former partner and the mother of his son, the applicant was arrested and charged with bodily harm, abduction and rape. N. testified at a hearing before the investigating judge which was not attended by the applicant's counsel, who gave no reasons for his absence. N.'s statement was written up and added to the case file. Subsequently, at the trial N. started to answer the questions put by the public prosecutor when her evidence had to be interrupted, as she was said to be suffering from post-traumatic stress symptoms that were hindering her from testifying. The symptoms were medically confirmed after the hearing. As a consequence, N. could not be cross-examined by the public prosecutor, the private prosecutor or the applicant's counsel. The court had already adjourned the hearing once before, following a similar reaction by N. As an alternative to having N. questioned by the parties, the court ordered that the statements which had been taken from her at the investigation stage should be read out. The applicant gave his alternative account of the facts, but was convicted and given a custodial sentence.

Law – Article 6 § 1 in conjunction with Article 6 § 3 (d): The investigating judge had held an

interview with N. in which the applicant's counsel could have put questions to her. The applicant had thus been given an opportunity to have her examined which his counsel had unjustifiably missed.

Regarding the possibility for the applicant to have examined N. at the trial, the trial court had stayed the hearing in the light of her incapacity to describe what had happened and, once it had been medically ascertained that she was suffering post-traumatic stress symptoms, had ordered that she be provided psychological support with a view to having her fully cross-examined at a public hearing. Only after countless unsuccessful efforts, including medical support, had been made to enable N. to continue with her statement, had the court decided that her pre-trial statements would be read out as an alternative to direct cross-examination by the parties. In so doing, it took into account the fact that N. would not be available for cross-examination within a reasonable time and that the applicant was in prison on remand. In the light of these circumstances, the trial court could not be accused of a lack of diligence in its efforts to provide the applicant with an opportunity to examine the witness. Nor had it unduly exempted N. from cross-examination.

As to whether the use of N.'s pre-trial statements by the domestic courts had been accompanied by sufficient counterbalancing factors, her cross-examination had proved impracticable owing to post-traumatic stress symptoms that had been medically confirmed. The applicant had been given the opportunity to put questions to her during the investigative stage of the proceedings but his counsel had failed to attend the hearing. In those circumstances, the interests of justice had obviously been in favour of admitting N.'s statements in evidence. Her statements had been read out before the trial court and the applicant had been allowed to challenge their truthfulness by giving his own account of the facts, which he had duly done. The domestic courts had carefully compared both versions of the facts, which partially coincided, particularly those aspects that did not involve the commission of any criminal offence or that had minor criminal implications. They had deemed the applicant's version weak and inconsistent, and that of N. logical and sufficiently detailed to eliminate any suspicion of simulation or revenge. The domestic courts had also taken into account the statement given by N. at the hearing which, although incomplete, had served to corroborate her pre-trial statements. The reliability of N.'s statements had further been supported by indirect evidence and by the medical opinions and reports confirming that her bodily injuries and psychological condition were consistent with her account of the facts. There had therefore been sufficient counterbalancing factors to conclude that the admission in evidence of N.'s statements had not resulted in a breach of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention.

Conclusion: no violation (unanimously).

ARTICLE 7

Article 7 § 1

Nullum crimen sine lege

Absence of retrospective effect of criminal law shortening limitation period: *inadmissible*

Previti v. Italy - 1845/08
Decision 12.2.2013 [Section II]

Facts – In 1996 the public prosecutor of Milan brought proceedings against the applicant on a charge of bribery. Those proceedings were discontinued in 2000. The prosecution appealed. In 2005 Parliament enacted a law which, among other things, reduced the statutory limitation period for the offence of bribery from fifteen to eight years. As the date on which the offence in question was committed could be fixed at 1992, the charges would thus have become time-barred in 2000. However, under a transitional provision, the applicant was unable to benefit from the changes to the limitation period as his case was pending before the Court of Cassation at the time the new law entered into force. In 2007 the applicant was convicted on remittal of the case. His last appeal on points of law was dismissed.

Law – Article 7: Under the Convention, provisions defining offences and the penalties for them were governed by specific rules on retrospectiveness, including the principle that more favourable criminal legislation should be applied retrospectively. However, as the Grand Chamber had confirmed in *Scoppola v. Italy (no. 2)*, it was reasonable for domestic courts to apply the *tempus regit actum* principle with regard to procedural laws. In its *Coëme and Others v. Belgium* judgment, the Court had classified rules on limitation periods as procedural laws. Such rules did not define the offences or corresponding penalties and could be construed as merely laying down a prior condition

for the examination of a case. Consequently, since the legislative amendment complained of by the applicant had concerned a procedural law, provided there was no arbitrariness, nothing in the Convention prevented the Italian legislature from regulating its application to proceedings that were pending at the time of its entry into force. The exception provided for by the transitional provision had been limited to pending appeal or cassation proceedings. The provision appeared neither unreasonable nor arbitrary. In those circumstances, no appearance of a violation of Article 7 of the Convention could be detected.

Conclusion: inadmissible (manifestly ill-founded).

(See *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, 17 September 2009, Information Note no. 122; and *Coëme and Others v. Belgium*, nos. 32492/96 et al., 22 June 2000, Information Note no. 19.

ARTICLE 8

Positive obligations
Respect for private life
Respect for family life

Lack of adequate legal protection in a case concerning a mother's committal to a psychiatric institution and the placement of her children in care: *violations*

B. v. Romania (no. 2) - 1285/03
Judgment 19.2.2013 [Section III]

Facts – The applicant was assisted by the social services from 1996 onwards, having been classified as a disabled person unfit to work. In 2000 she was diagnosed with "paranoid schizophrenia". Two of her children were minors at the time. No measure of guardianship or administration was ever introduced for the applicant or her children. Since 2000 she has been admitted on numerous occasions to psychiatric institutions, after being taken there by the police. Her children have not been living with her; instead they were placed in residential care for abandoned children.

Law – Article 8

(a) *The applicant's confinement* – In most of the cases previously heard by the Court concerning "persons of unsound mind", the domestic proceedings concerning psychiatric confinement had been examined under Article 5 of the Convention. Consequently, in order to determine whether the confinement in the present case had complied with Article 8 of the Convention, the Court found it appropriate to refer, *mutatis mutandis*, to its case-law under Article 5 § 1 (e).

Despite the fact that the law on the protection of disabled persons imposed an obligation to introduce a legal protection measure, in the form of guardianship or administration, no such measure had been adopted in respect of the applicant, even though her state of health had been known to the authorities well before the beginning of her periods of confinement. Her vulnerability had also been noted and brought to the attention of the domestic courts by numerous reports of the social services. But neither the social services nor the courts had drawn any conclusions as regards the legal protection of the applicant herself. It was precisely the shortcomings of the authorities which had contributed to depriving her of the guarantees available under mental-health legislation, in particular the right for the patient to be assisted when giving consent or the obligation to notify the patient's legal representative of the measure of confinement and the reasons for its adoption. Recent amendments to mental-health legislation provided that if the patient had no legal representative and was unable to appoint one on account of mental incapacity, the hospital would be required to notify the relevant local authority promptly so that legal protection measures could be put in place. However, those new provisions had not benefited the applicant. The provisions of domestic law governing psychiatric confinement and the protection of persons unable to look after their own interests had not been applied to the applicant in the spirit of her right to respect for her private life under Article 8. The authorities had thus failed in their obligation to take appropriate measures for the defence of the applicant's interests.

Conclusion: violation (unanimously).

(b) *Placement of the applicant's children in care* – It was because of the lack of special protection for the applicant, who, in particular, was not assigned a lawyer during the placement proceedings or any guardian *ad litem*, that she had not been able to participate effectively in the proceedings concerning the placement of her children or to have her interests defended. In addition, her family situation had been examined on only two occasions in a period of twelve years. Lastly, there was no evidence that the social workers had maintained the regular

contact with the applicant that would have afforded a good opportunity to make her views known to the authorities. For those reasons, the decision-making process leading to the placement of the applicant's two minor children had not been conducted in compliance with her rights as guaranteed by Article 8 of the Convention.

Conclusion: violation (unanimously).

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

ARTICLE 9

Manifest religion or belief

Confiscation of cassette player used by prisoner to listen to religious tapes: *inadmissible*

Austrianu v. Romania - 16117/02
Judgment 12.2.2013 [Section III]

Facts – The applicant, who was of Baptist confession, was serving a lengthy prison sentence. After reacting to the confiscation of a small radio-cassette player he had received after obtaining good results on a "Christian moral education" programme, he was informed by the prison authorities that prisoners were only entitled to have battery-operated radios and television sets, but that he could listen to his audio cassettes on the cassette player belonging to the prison's cultural-educational department if he wished. In his application to the European Court, the applicant complained *inter alia* that the confiscation of his religious tapes and cassette player had infringed his freedom of religion.

Law – Article 9: This provision did not protect every act motivated or inspired by a religion or belief. Taking into account the State's margin of appreciation, confiscation of the cassette (assuming it constituted interference with the applicant's rights under Article 9) had not completely prevented the applicant from manifesting his religion. According to the Government the prison authorities had offered the applicant the use of a cassette player in the prison's cultural-educational department to listen to his religious cassettes and, although the applicant had contested the existence of such a facility, he did not appear to have raised any complaint in that respect with the prison authorities. Moreover, he had been allowed to attend religious seminars, and it had never been contested that he could read religious books in his cell. Taking these considerations into account, the Court considered that restricting the list of things prisoners could have in their cells by excluding items (such as cassette players) which were not essential for manifesting religion was a proportionate response to the necessity to protect the rights and freedoms of others and to maintain security in prison.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Kovaļkovs v. Latvia* (dec.), no. 35021/05, 31 January 2012)

The Court also found a complaint of discrimination on religious grounds (Article 14 in conjunction with Article 9) manifestly ill-founded. It upheld the applicant's complaints of violations of both the substantive and procedural limbs of Article 3 in respect of an incident in which he was hit with a truncheon on 9 December 1998, but found no violation of that provision in respect of an alleged lack of adequate medical treatment.

ARTICLE 10

Freedom to receive information
Freedom to impart information

Conviction and order to pay damages for operating website allowing third parties to share files in breach of copyright: *inadmissible*

Neij and Sunde Kolmisoppi v. Sweden - 40397/12
Decision 19.2.2013 [Section V]

Facts – During 2005 and 2006 the two applicants were involved in different aspects of one of the world's largest file sharing services on the Internet, the website "The Pirate Bay" (TPB). The service provided by TPB made it possible for users to contact each other through torrent files and exchange digital material through file-sharing outside TPB's computers. In 2008 they and others were charged with complicity to commit crimes in violation of the Copyright Act on the grounds that they had furthered the infringement by the website's users of copyright in music, films and computer games. The applicants were convicted. On appeal the first applicant was sentenced to ten

months' imprisonment and the second applicant to eight months. They were also held jointly liable with the other defendants in damages of approximately EUR 3,300,000.

Law – Article 10: The applicants had put in place the means for others to impart and receive information within the meaning of Article 10. Their actions were afforded protection under that provision and, consequently, their convictions had interfered with their right to freedom of expression. Since they were convicted only in respect of material which was protected by copyright in accordance with the Copyright Act, the interference was "prescribed by law". It had pursued the legitimate aims of protecting the rights of others and preventing crime.

As to whether the interference had been necessary in a democratic society, the Court was called upon to weigh the applicants' interest in facilitating the sharing of the information against the interest in protecting the rights of the copyright-holders. As intellectual property, copyright was entitled to protection under Article 1 of Protocol No. 1 to the Convention. Accordingly, since it had to balance two competing interests which were both protected by the Convention, the respondent State had enjoyed a wide margin of appreciation. Indeed, that margin was particularly wide in the instant case as the type of material in respect of which the applicants were convicted was not entitled to the same level of protection as that afforded to political expression and debate. Further, since the Swedish authorities were under an obligation to protect the plaintiffs' property rights in accordance with the Copyright Act and the Convention, there were weighty reasons for the restriction of the applicants' freedom of expression. The Swedish courts had advanced relevant and sufficient reasons for finding that the applicants' activities within the commercially run TPB amounted to criminal conduct. Lastly, the prison sentence and award of damages could not be regarded as disproportionate in view in particular of the applicants' failure to take any action to remove the impugned torrent files, despite being urged to do so, and of their indifference to the fact that copyright-protected works had been the subject of file-sharing activities via TPB.

In conclusion, regard being had in particular to the nature of the information shared and the weighty reasons given, the interference with the applicants' freedom of expression had been necessary in a democratic society.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 14

Discrimination (Article 6 § 1)

Failure to enforce a judgment acknowledging gender discrimination against a working mother: *violation*

García Mateos v. Spain - 38285/09
Judgment 19.2.2013 [Section III]

Facts – In February 2003, relying on the labour regulations, the applicant asked her employer for a reduction in her working hours as she had custody of her son, who was under the six-year age-limit. When her employer refused, she brought proceedings before the Employment Tribunal, but her complaint was dismissed. In a judgment of 2007 the Constitutional Court upheld the applicant's *amparo* complaint. It found that the principle of non-discrimination on grounds of sex had been breached in respect of the applicant, as her employer had prevented her from reconciling her professional life with her family life. It remitted the case to the Employment Tribunal for a new judgment. In 2007 the Tribunal dismissed the applicant's case and she lodged a fresh *amparo* appeal. In 2009 the Constitutional Court found that its 2007 judgment had not been properly enforced and declared null and void the Employment Tribunal's judgment. It decided, however, that it would not be appropriate to remit the case to the Employment Tribunal for a further decision, as in the meantime the applicant's son had reached the age of six. It further ruled that it could not award compensation in lieu as this was not permitted by the Institutional Law on the Constitutional Court.

Law – Article 14 in conjunction with Article 6 § 1: The State was required to enable applicants to obtain due enforcement of decisions given by the national courts. The Constitutional Court had found, in its 2009 decision, that the applicant's right to the enforcement of its first judgment, acknowledging a violation of the non-discrimination principle, had been breached. A decision or measure in an applicant's favour did not deprive him or her of "victim" status unless the authorities had recognised, expressly or in substance, and then remedied the violation of the Convention. The violation found by the Constitutional Court had not to date been remedied in spite of two judgments by that court.

The applicant's initial intention had not been to obtain compensation but to seek recognition of

her right to reduced working hours so that she could look after her son when he was still under six. She subsequently submitted a compensation claim only because she no longer qualified for the reduction in working hours, as her child had passed the age-limit. The Constitutional Court, having refused her compensation in its decision of 2009, did not give her any indication about the possibility of taking her claim to any other administrative or judicial body. It was true that because of the child's age at the end of the proceedings it was no longer possible to grant alternative redress for the acknowledged breach of the applicant's right. Nor could the Court could indicate to the respondent State how redress in the context of *amparo* complaints should be provided. It simply observed that the protection provided by the Constitutional Court had proved ineffective. Moreover, the applicant's claim before the Employment Tribunal regarding the refusal to grant her a reduction in working hours had not been settled on the merits, even though the two unfavourable judgments of the Employment Tribunal had been declared null and void. In addition, her *amparo* appeal had proved meaningless, as the Constitutional Court had considered that the law did not provide for compensation as a means of redress for a breach of a fundamental right. Accordingly, the failure to restore to the applicant her full rights had rendered illusory the protection provided through the upholding of an *amparo* complaint by the Constitutional Court.

Conclusion: violation (unanimously).

Article 41: EUR 16,000 in respect of non-pecuniary damage.

Discrimination (Article 8)

Impossibility of second-parent adoption in same-sex couple: *violation*

X and Others v. Austria - 19010/07
Judgment 19.2.2013 [GC]

Facts – The first and third applicants are two women living in a stable homosexual relationship. The second applicant is the third applicant's minor son. He was born out of wedlock. His father had acknowledged paternity but the third applicant had sole custody. The first applicant wished to adopt the second applicant in order to create a legal relationship between them without severing the boy's relationship with his mother and an adoption agreement was concluded to that end. However, the domestic courts refused to approve the agreement after finding that under domestic law adoption by one person had the effect of severing the family-law relationship with the biological parent of the same sex, so that the boy's adoption by the first applicant would sever his relationship with his mother, the third applicant, not his father.

Law – Article 14 in conjunction with Article 8

(a) *Applicability* – The relationship between the three applicants amounted to "family life" within the meaning of Article 8. Article 14, taken in conjunction with Article 8, was therefore applicable.

(b) *Comparison with a married couple in which one spouse wished to adopt the other spouse's child* – The Court saw no reason to deviate from its findings in *Gas and Dubois v. France* and concluded that the first and third applicants in the instant case were not in a relevantly similar situation to a married couple.

Conclusion: no violation (unanimously).

(c) *Comparison with an unmarried different-sex couple in which one partner wished to adopt the other partner's child* – The Court accepted that the applicants were in a relevantly similar situation to an unmarried different-sex couple in which one partner wished to adopt the other partner's child. The Government had not argued that a special legal status existed which would distinguish an unmarried heterosexual couple from a same-sex couple and had conceded that same-sex couples could in principle be as suitable (or unsuitable) for adoption purposes, including second-parent adoption, as different-sex couples. Austrian law allowed second-parent adoption by an unmarried different-sex couple. In contrast, second-parent adoption in a same-sex couple was not legally possible. The relevant regulations of the Civil Code provided that any person who adopted replaced the biological parent of the same sex. As the first applicant was a woman, her adoption of her partner's child could only sever the child's legal relationship with his mother. Adoption could therefore not serve to create a parent-child relationship between the first applicant and the child *in addition* to the relationship with his mother.

The Court was not convinced by the Government's argument that the applicants' adoption request had been refused on grounds unrelated to their sexual orientation and that, therefore, the applicants were asking the Court to carry out an abstract review of the law. The domestic courts had made it clear that an adoption producing the effect desired by the

applicants was impossible under the Civil Code. They had not carried out any investigation into the circumstances of the case. In particular, they had not dealt with the question whether there were any reasons for overriding the refusal of the child's father to consent to the adoption. In contrast, the regional court had underlined that the notion of "parents" in Austrian family law meant two persons of the opposite sex and had stressed the interest of the child in maintaining contact with both those parents.

Given that the legal impossibility of the adoption had consistently been at the centre of their considerations, the domestic courts had been prevented from examining in any meaningful manner whether the adoption would be in the child's interests. In contrast, in the case of an unmarried different-sex couple they would have been required to examine that issue. The applicants had thus been directly affected by the legal situation of which they complained since the adoption request was aimed at obtaining legal recognition of the family life they enjoyed, all three could claim to be victims of the alleged violation.

The difference in treatment between the first and third applicants and an unmarried different-sex couple in which one partner sought to adopt the other partner's child had been based on their sexual orientation. The case was thus to be distinguished from *Gas and Dubois*, in which the Court had found that there was no difference of treatment based on sexual orientation between an unmarried different-sex couple and a same-sex couple as, under French law, second-parent adoption was not open to either.

There was no obligation under Article 8 to extend the right to second-parent adoption to unmarried couples. However, given that domestic law did allow second-parent adoption in unmarried different-sex couples, the Court had to examine whether refusing that right to (unmarried) same-sex couples served a legitimate aim and was proportionate to that aim.

The domestic courts and the Government had argued that Austrian adoption law was aimed at recreating the circumstances of a biological family. The protection of the family in the traditional sense was in principle a legitimate reason which could justify a difference in treatment. The same applied to the protection of the child's interests. However, in cases where a difference in treatment based on sex or sexual orientation was concerned, the Government had to show that the difference in treatment was necessary to achieve the aim. The Government had not provided any evidence to show that it would be detrimental to a child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes. Moreover, under domestic law, adoption by one person, including one homosexual, was possible. If he or she had a registered partner, the latter had to consent to the adoption. The legislature therefore accepted that a child might grow up in a family based on a same-sex couple and that this was not detrimental to the child. There was also force in the applicants' argument that *de facto* families based on a same-sex couple existed but were refused the possibility of obtaining legal recognition and protection. These considerations cast considerable doubt on the proportionality of the absolute prohibition on second-parent adoption in same-sex couples.

The Government had further argued that there was no consensus among European States regarding second-parent adoption by same-sex couples and that consequently the State had a wide margin of appreciation to regulate that issue. However, the issue before the Court was not the general question of same-sex couples' access to second-parent adoption, but the difference in treatment between unmarried different-sex couples and same-sex couples in respect of such adoptions. Consequently, only ten Council of Europe member States, which allowed second-parent adoption in unmarried couples, might be regarded as a basis for comparison. Within that group, six States treated heterosexual couples and same-sex couples in the same manner, while four adopted the same position as Austria. The narrowness of that sample did not allow conclusions to be drawn as to a possible consensus among European States.

The instant case did not concern the question whether the applicants' adoption request should have been granted, but the question whether the applicants had been discriminated against on account of the fact that the courts had had no opportunity to examine in any meaningful manner whether the requested adoption was in the second applicant's interests, given that it was in any case legally impossible.

The Government had failed to give convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child. The distinction was therefore discriminatory.

Conclusion: violation (ten votes to seven).

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

(See *Gas and Dubois v. France*, no. 25951/07, 15 March 2012, Information Note no. 150)

Total removal of applicant's access rights on account of his attempts to transmit his religious beliefs to his child: *violation*

Vojnity v. Hungary - 29617/07
Judgment 12.2.2013 [Section II]

Facts – The applicant belonged to the religious denomination *Hit Gyülekezete* (Congregation of the Faith). In 2000 he divorced and his son, who was born in 1994, was placed with the mother. The applicant was granted access. He twice applied without success for custody or an order varying his rights of access. In 2006 the domestic courts withdrew custody from the mother and placed the boy with his older brother. It refused to give custody to the applicant after noting a comment in an expert psychologist's report that the applicant held unrealistic educational ideas hallmarked by religious fanaticism which rendered him unfit to provide the boy with a normal upbringing. Ultimately, in 2008, the courts removed the applicant's access rights altogether, on the grounds that he had abused them by imposing his religious convictions on his son.

Law – Article 14 in conjunction with Article 8: The decision to deprive the applicant of access rights in respect of his son had constituted an interference with his right to respect for family life. When deciding on the applicant's suitability to contribute to his son's development, the domestic authorities had added to their consideration the factor – that had evidently been decisive – of the applicant's religious convictions and its possible effects on the child. The applicant's religious convictions had thus had a direct bearing on the outcome of the matter in issue and there had been a difference of treatment between the applicant and other parents in an analogous situation. The aim pursued, namely the protection of the child's health and rights, was legitimate. However, the rights to respect for family life and religious freedom as enshrined in Articles 8 and 9 of the Convention, together with the right to respect for parents' philosophical and religious convictions in education, as provided in Article 2 of Protocol No. 1, conveyed on parents the right to communicate and promote their religious convictions in their children's upbringing. That would be an uncontested right in the case of two married parents sharing the same religious ideas or worldview and promoting them to their child, even in an insistent or overbearing manner, unless it exposed them to dangerous practices or physical or psychological harm. The Court saw no reason why the position of a separated or divorced parent who did not have custody of his or her child should be different *per se*. In the instant case there was no evidence that the applicant's religious convictions involved dangerous practices or exposed his son to physical or psychological harm. No convincing evidence had been presented to substantiate a risk of actual harm, as opposed to the mere unease, discomfort or embarrassment which the child might have experienced on account of his father's attempts to transmit his religious beliefs. The expert had not examined the applicant, nor had his suggestion that the applicant should be examined by a psychiatrist been followed up. The Government had not demonstrated the presence of exceptional circumstances which could justify a measure as radical as the total severance of contact between the applicant and his son. The domestic courts had decided to apply an absolute ban on the applicant's access rights without giving any consideration to the question whether the mere suspension of access for a certain period of time or any other less severe measure that existed under Hungarian law (such as the exercise of access rights in controlled circumstances) would have sufficed to allow the child to regain his emotional balance. For the Court, the approach adopted by the authorities had amounted to a complete disregard of the principle of proportionality that was requisite in this field and inherent in the spirit of the Convention. Consequently, the applicant had been discriminated against on the basis of his religious convictions in the exercise of his right to respect for family life.

Conclusion: violation (unanimously).

Article 41: EUR 12,500 in respect of non-pecuniary damage.

Discrimination (Article 1 of Protocol No. 1)

Difference in treatment of legitimate and illegitimate children for succession purposes: *violation*

Fabris v. France - 16574/08
Judgment 7.2.2013 [GC]

Facts – The applicant was born in 1943 of a liaison between his father and a married woman who was

already the mother of two children born of her marriage. In 1970 Mr and Mrs M. (the applicant's mother and her husband) divided their property *inter vivos* (*donation-partage*) between their two legitimate children, whilst keeping a life interest in the property until their death. Mr M. died in 1981 and Mrs M. in 1994. In 1983 the *tribunal de grande instance* declared the applicant to be Mrs M.'s "illegitimate" child. In 1998 the applicant brought proceedings against the two legitimate children in the *tribunal de grande instance*, seeking an abatement of the *inter vivos* division so that he could claim his share in his mother's estate. At that time the Law of 3 January 1972 provided that children born of adultery could claim a share in their father or mother's estate equal to half the share of a legitimate child. After the Court had found against France in 2000 in the case of *Mazurek v. France*, France enacted the Law of 3 December 2001 amending its legislation and granting children born of adultery identical inheritance rights to those of legitimate children. In a judgment of September 2004, the *tribunal de grande instance* declared the action brought by the applicant admissible and upheld his claim on the merits. Following an appeal by the legitimate children, the court of appeal set aside the lower court's judgment. The applicant unsuccessfully appealed on points of law.

In a judgment of 21 July 2011, a Chamber of the Court held, by five votes to two, that there had been no violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 on the ground that the domestic courts, in applying the transitional provisions of the 1972 and 2001 Laws, had struck a proper balance between the long-established rights of Mr and Mrs M.'s legitimate children and the pecuniary interests of the applicant.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1

(a) *Applicability of Article 14* – It was purely on account of his status as a child "born of adultery" that the applicant had been refused the right to request an abatement of the *inter vivos* division signed by his mother. But for that discriminatory ground, he would have had a right, enforceable under domestic law, in respect of the asset in question. Whilst *inter vivos* gifts had the immediate effect of transferring ownership, they did not become a division for inheritance purposes until the death of the donor (in 1994 in the present case). By that date the applicant's filiation had been established. It followed that the applicant's pecuniary interests fell within the scope of Article 1 of Protocol No. 1 and the right to peaceful enjoyment of possessions safeguarded by that provision. This was sufficient to render Article 14 of the Convention applicable.

(b) *Merits* – The applicant was deprived of a reserved portion and definitively placed in a different situation from that of the legitimate children regarding inheritance of their mother's estate. That difference in treatment derived from the 2001 Law, which restricted application of the new inheritance rights of children "born of adultery" to successions opened prior to 4 December 2001 that had not given rise to division before that date. In interpreting the transitional provision concerned, the Court of Cassation had considered that division for inheritance purposes had taken place in 1994, at the time of the applicant's mother's death, in line with long-standing case-law authority to the effect that in respect of *inter vivos* divisions the death of the donor triggered both the opening of the succession and the division. A legitimate child who had been omitted from the *inter vivos* division or not yet conceived when the deed was signed would not have been precluded from obtaining his or her reserved portion or share of the estate. It was therefore not disputed that the only reason for the difference in treatment suffered by the applicant was the fact that he had been born outside marriage.

The French State had amended the rules of inheritance law following the *Mazurek* judgment by repealing all the discriminatory provisions relating to children "born of adultery". However, according to the Government, it was not possible to undermine rights acquired by third parties – in the instant case by the other heirs – and that justified restricting the retroactive effect of the 2001 Law to those successions that were already open on the date of its publication and had not given rise to division by that date. The transitional provisions had accordingly been enacted in order to safeguard peaceful family relations by securing the rights acquired by beneficiaries where the estate had already been divided.

Subject to the statutory right to bring an action for abatement, the applicant's half-brother and half-sister had obtained property rights on the basis of the *inter vivos* division of 1970 by virtue of which their mother's estate had passed to them on her death in 1994. On that basis the present case was distinguishable from that of *Mazurek*, in which the estate had not yet passed to the beneficiaries. However, "protecting the 'legitimate expectation' of the deceased and their families must be sub-

ordinate to the imperative of equal treatment between children born outside and children born within marriage". In that connection the applicant's half-brother and half-sister knew – or should have known – that their rights were liable to be challenged. At the time of their mother's death in 1994 there had been a statutory five-year time-period for bringing an action for abatement of an *inter vivos* division. Their half-brother had had until 1999 to claim his share in the estate and such an action was capable of calling into question not the division as such, but the extent of the rights of each of the descendants. Moreover, the action for abatement that the applicant did finally bring in 1998 was pending before the national courts at the time of delivery of the judgment in *Mazurek*, which declared that inequality of inheritance rights on grounds of birth was incompatible with the Convention, and at the time of publication of the 2001 Law, which executed that judgment by incorporating the principles established therein into French law. Lastly, the applicant was not a descendant whose existence was unknown to them, as he had been recognised as their mother's "illegitimate" son in a judgment delivered in 1983. That was sufficient to arouse justified doubts as to whether the estate had actually passed. On that point, in the particular circumstances of the present case, in which European case-law and the national legislative reforms showed a clear tendency towards eliminating all discrimination regarding the inheritance rights of children born outside marriage, the action brought by the applicant before the domestic courts in 1998 and dismissed in 2007 was a weighty factor when examining the proportionality of the difference in treatment. The fact that that action was still pending in 2001 could not but relativise the expectation of Mrs M.'s other heirs that they would succeed in establishing undisputed rights to her estate. Consequently, the legitimate aim of protecting the inheritance rights of the applicant's half-brother and half-sister was not sufficiently weighty to override the claim by the applicant to a share in his mother's estate. Moreover, it appeared that, even in the eyes of the national authorities, the expectations of heirs who were the beneficiaries of an *inter vivos* division were not to be protected in all circumstances. Indeed, if the same action for an abatement of the *inter vivos* division had been brought at the same time by another legitimate child, born at a later date or wilfully excluded from the division, it would not have been declared inadmissible.

Accordingly, there had been no reasonable relationship of proportionality between the means employed and the legitimate aim pursued. There had therefore been no objective and reasonable justification for the difference in treatment regarding the applicant.

That conclusion did not call into question the right of States to enact transitional provisions where they adopted a legislative reform with a view to complying with their obligations under Article 46 § 1 of the Convention. However, whilst the essentially declaratory nature of the Court's judgments left it up to the State to choose the means by which to erase the consequences of the violation, it should at the same time be pointed out that the adoption of general measures required the State concerned to prevent, with diligence, further violations similar to those found in the Court's judgments. That imposed an obligation on the domestic courts to ensure, in conformity with their constitutional order and having regard to the principle of legal certainty, the full effect of the Convention standards, as interpreted by the Court. That had not been done in the present case, however.

Conclusion: violation (unanimously).

Article 41: reserved.

(See *Mazurek v. France*, no. 34406/97, 1 February 2000, Information note no. 15)

Alleged discrimination in payments to military reservists on grounds of place of residence: *case referred to the Grand Chamber*

Vučković and Others v. Serbia - 17153/11 et al.
Judgment 28.8.2012 [Section II]

The applicants were reservists who had been drafted by the Yugoslav Army in connection with the North Atlantic Treaty Organisation's intervention in Serbia. They remained in military service between March and June 1999 and were thus entitled to a *per diem*. However, following demobilisation the Government refused to honour their obligation to pay the *per diem*. Following protracted negotiations, the Government reached an agreement on 11 January 2008 with reservists residing in certain "underdeveloped" municipalities under the terms of which the reservists concerned were guaranteed payment in monthly instalments. The agreement did not extend to reservists such as the applicants who did not reside in those municipalities. In their applications to the European

Court the applicants alleged that they had been discriminated against on grounds of residence.

In a judgment of 28 August 2012, a Chamber of the Court held by six votes to one that there had been a violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1. It noted that the applicants' complaints concerned rights of a sufficiently pecuniary nature to fall within the ambit of Article 1 of Protocol No. 1 and that the applicants had allegedly been discriminated against on the grounds of their registered residence. Article 14 was therefore applicable. The payments referred to in the agreement of 11 January 2008 were clearly *per diems*, not social benefits awarded to persons in need. The agreement provided that reservists residing in certain named municipalities would be guaranteed gradual payment of part of their entitlements. These municipalities had apparently been chosen because of their "underdeveloped status", which implied that reservists resident in them were indigent. However, the reservists concerned had never not required to provide any proof of indigence. Conversely, the applicants and other reservists not resident in the municipalities were unable to benefit from the agreement, irrespective of their means. The arrangements put in place had thus been arbitrary and there had been no "objective and reasonable justification" for the difference in treatment.

The Chamber further noted that more than 3,000 applications raising the same discrimination issue were currently pending before the Court and directed the Government to take all appropriate measures to secure non-discriminatory payment of the *per diems* to all those entitled, within six months from the date on which the Court's judgment became final.[1]

On 11 February 2013 the case was referred to the Grand Chamber at the Government's request.

1. In view of the referral of the case to the Grand Chamber, the Chamber judgment will not become final (see Article 44 of the Convention).

ARTICLE 35

Article 35 § 1

Six-month period

Submission of original application form outside eight weeks allowed by Practice Direction on the Institution of Proceedings: *inadmissible*

Abdulrahman v. the Netherlands - 66994/12
Decision 5.2.2013 [Section III]

Facts – The applicant, an Iraqi national, complained of a refusal by the Netherlands authorities to grant him a residence permit. The final domestic ruling in respect of his first request for such a permit was sent to him on 24 April 2012 and the regional-court judgment in respect of his second request on 5 April 2012. On 5 October 2012 the applicant's representative sent a fax to the Court Registry stating that the applicant wished to lodge a complaint under Article 8 of the Convention. On 18 October 2012 the applicant's representative was notified by the Registry, pursuant to Rule 47 § 5 of the Rules of Court and paragraph 4 of the Practice Direction on the Institution of Proceedings, that he had to return the application form to the Court not later than 13 December 2012 (within eight weeks from the date of the Registry's letter) otherwise the date of submission of the completed application form would be taken as the date of introduction of the application. Under cover of a letter dated 13 December 2012 the applicant's representative submitted the original duly completed and signed application form of the same date, an original authority form duly

signed by both the applicant and the representative, and copies of relevant supporting documents. The envelope was postmarked 14 December 2012.

Law – Article 35 § 1: The date on which the envelope containing the original application form had been postmarked, namely 14 December 2012, should be considered as the date of introduction of the application in the instant case. Since the six-month period for submitting an application to the Court had started to run on 25 April 2012 in respect of the applicant's first request for a residence permit and on 6 April 2012 in respect of the second, the application had been submitted out of time.

Conclusion: inadmissible (out of time).

(See also *Kemevuako v. the Netherlands* (dec.), no. 65938/09, 1 June 2010, Information Note no. 131)

Submission of an application form signed by proxy by a person unknown: *inadmissible*

Ngendakumana v. the Netherlands - 16380/11
Decision 5.2.2013 [Section III]

Facts – The applicant, a Burundian national, complained of a refusal by the Netherlands authorities to grant him asylum. The final domestic ruling was sent to him on 24 August 2010. On 23 February 2011 the applicant's representative sent an application form to the Court signed "i.o." (*in opdracht*; the Netherlands equivalent of "*per procurationem*") by an unidentified person. On 14 March 2011 the representative was notified by the Court Registry that he had to return the completed application form and all relevant documents to the Court by 9 May 2011 and that failure to do so would result in the date of submission of the completed application form being taken as the date of introduction of the application. On 10 May 2011 by fax and on 24 May 2011 by post, the applicant's representative submitted an original authority for representation. The Registry subsequently pointed out that the application form the Court had received on 23 February 2011 had not been signed by the representative, but by a third person, and asked whether it should be considered the formal application form. On 12 August 2011 the applicant's representative sent a completed application form which he had signed. The accompanying letter did not contain any explanation for the delay or why the application form submitted to the Court on 23 February 2011 had not been signed by the applicant's representative.

Law – Article 35 § 1: Pursuant to Rule 45 § 1 of the Rules of Court an application had to be signed by the applicant or the applicant's representative. Accordingly, an application form – even if it contained all the data and documents set out in Rule 47 § 1 – could only be considered to have been validly introduced on the date it was signed by the applicant or the applicant's representative. Consequently, the application form that had been submitted on 23 February 2011 could not be accepted as a valid application but only as an introductory submission to the Court that interrupted the running of the six-month period. As the application form signed by the applicant's lawyer was not submitted until 12 August 2011 – after the expiry of the applicable time-limit – the application had been introduced out of time.

Conclusion: inadmissible (out of time).

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

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

Vučković and Others v. Serbia - 17153/11 et al.
Judgment 28.8.2102 [Section II]

(See Article 14 above, page 15)

COURT NEWS

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Guide on case-law

The Court has just published a guide on Article 4 of the Convention (prohibition of slavery and forced labour) as part the new series on the case-law relating to particular Convention Articles. A guide on Article 5 is already available. The guides can be be downloaded from the Court's Internet site (<www.echr.coe.int> – Case-law – Guide on case-law).

Factsheets in Turkish

Since September 2010, the Court has published on its website some forty factsheets giving an overview of its case-law on a number of issues, sorted by theme. With the aid of the Turkish Ministry of Justice, some of the factsheets have been now translated into Turkish. They can be downloaded from the Court's Internet site (<www.echr.coe.int> – Press – Information sheets – Factsheets).