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TABLE OF CONTENTS

ARTICLE 14

Discrimination (Article 2)

Presidential pardon and release of convicted murderer following his transfer to Azerbaijan to serve remainder of sentence imposed in Hungary for ethnically motivated crimes: *communicated*

Discrimination (Article 8)

Method of calculation of invalidity benefits which in practice was discriminatory against women: *violation*

Discrimination between unmarried same-sex couples and unmarried different-sex couples in obtaining family reunification: *violation*

Discrimination (Article 2 of Protocol No. 1)

Refusal by academy of music to enrol blind person despite her having passed competitive entrance examination: *violation*

ARTICLE 18

Limitation on use of restrictions on rights

Allegedly improper restriction of rights under Articles 6 and 7 of the Convention: *inadmissible*

ARTICLE 34

Victim

Standing of mother to make Article 3 complaint on behalf of her son who died while in detention: *victim status upheld*

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies
Effective domestic remedy – Republic of Moldova

Application for compensation under Law no. 1545 (1998) in Moldova not effective remedy in respect of unlawful detention in separatist region: *preliminary objection dismissed*

ARTICLE 1

Jurisdiction of States

Jurisdiction of Moldovan and Russian Governments in relation to person detained within separatist region of the Republic of Moldova

Mozer v. the Republic of Moldova and Russia - 11138/10
Judgment 23.2.2016 [GC]

(See Article 5 § 1 below, page 15)

ARTICLE 2

Life
Positive obligations (procedural aspect)

Presidential pardon and release of convicted murderer following his transfer to Azerbaijan to serve remainder of sentence imposed in Hungary: *communicated*

Makuchyan and Minasyan v. Azerbaijan and Hungary - 17247/13
[Section IV]

The first applicant and the second applicant's nephew were members of the Armenian military. In 2004, while they were attending a course in Budapest, the second applicant's nephew was killed by R.S., a member of the Azerbaijani military who also tried to break into the first applicant's room before being arrested by the Hungarian police. R.S. was convicted of premeditated murder and preparation for murder and sentenced to life imprisonment by the Hungarian courts, with a possibility of conditional release after 30 years. In 2012 R.S. was transferred to Azerbaijan to serve the remainder of his sentence after the Azerbaijan Ministry of Justice informed the Hungarian authorities that the sentence would be enforced. However, shortly after arriving in Azerbaijan, R.S. was granted a presidential pardon and released. He was also promoted and paid salary arrears. Although the Hungarian Government issued a statement expressing its disapproval of the pardon, a report issued by the Hungarian Ombudsman on 7 December 2012 observed that the transfer had been approved (though not enforced) before any assurances had been received from the Azerbaijani authorities.

In their application to the European Court the applicants complain of substantive and procedural violations of Article 2 of the Convention by Azerbaijan in that the attack was carried out by an Azerbaijani military officer and the grant of a pardon prevented the full enforcement of his sentence. They further complain under Article 14 in conjunction with Article 2 that the crimes were ethnically motivated hate crimes and had been acknowledged and endorsed by the grant of a presidential pardon and a promotion. Finally, the applicants complain that Hungary violated its positive obligations under Article 2 of the Convention by granting and executing the request for R.S.'s transfer without obtaining adequate binding assurances that he would complete his prison sentence in Azerbaijan.

Communicated under Article 2 and Article 14 in conjunction with Article 2.

Positive obligations (substantive aspect)
Positive obligations (procedural aspect)

Absence of State responsibility for injuries caused to holidaymaker in boating accident: *Article 2 applicable; no violation*

Cavit Tınarlıoğlu v. Turkey - 3648/04
Judgment 2.2.2016 [Section II]

Facts – One evening in August 1998 at around 7 p.m. the applicant was swimming in a bathing area that was not cordoned off when he was struck by a motor boat operated by Y.Ç, who ran the water sports centre of the holiday village ("the Club") where the applicant was holidaying. The applicant survived but was left with lasting injuries.

Law – Article 2

(a) *Applicability* – The accident, which had happened in a holiday village, close to a public bathing area, and had been caused by a motor boat used for water sports, had occurred in the context of an activity that posed a potential danger to human life if it was not properly regulated.

Article 2 could apply in situations where the person concerned survived a serious accident that had placed his or her life in danger. The decisive factors included the severity of the injuries and the lasting physical effects, which in the applicant's case had been significant.

Hence, notwithstanding the fact that the applicant had survived his injuries, his complaint came within the ambit of the first sentence of Article 2 of the Convention, which was therefore applicable in the present case.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits*

(i) *Positive measures to protect life* – There were no grounds for finding that the town's sports tourism board or the other local authorities had known or should have known that at the time of the events the water sports activities organised by the Club posed a real and immediate risk to the applicant's life or the lives of other holidaymakers. Accordingly, the administrative authorities could not be criticised for omitting to take more stringent measures in relation to the Club, which was just one of numerous such establishments in the region.

While it was mindful of the tragic dimension to the circumstances of the case, the Court was not convinced that the regulations in question had been inadequate and deficient to the extent that the State had failed in its positive obligation to protect life under Article 2 of the Convention. The lack of safety markings at the actual scene of the accident and the criticism of the town council with regard to the supervision of the Club's activities were not sufficient to engage the State's responsibility in terms of an obligation to take preventive measures at national level. To find otherwise would amount to imposing a disproportionate burden on the national authorities whilst overlooking the actions of the Club and Y.Ç. and the applicant's own conduct.

Although the applicant had known that it was late, that he was the only swimmer and that a motor boat was manoeuvring in the vicinity of the holiday village's mooring area, he had nevertheless chosen to swim away from the shore and had not been paying attention to his surroundings. However, the Court was not persuaded in the present case that the applicant's conduct had been imprudent to the point of being a decisive factor in the events.

Instead, the cause of the accident and the injuries complained of in this case had been the combined actions of the Club and of Y.Ç., although those actions were not capable of leading to a finding that the State had failed to fulfil its positive obligations.

Conclusion: no violation (six votes to one).

(ii) *The courts' response* – The serious accident in which the applicant had been involved had resulted from the unintentional and unforeseeable actions of a private individual – Y.Ç. – who had been tried and convicted following adversarial criminal proceedings to which the applicant had had full access, in particular through his lawyer, and in which he had intervened as a third party.

Given that the accident could not be said to have occurred in "suspicious" circumstances or to have resulted from a failure by the national authorities to respond to a real and immediate risk to the lives of individuals of which they could not have been unaware, the positive obligations in issue had not required the authorities to institute criminal proceedings of their own motion against the Ministry officials accused by the applicant; likewise, the collapse of the criminal proceedings did not in itself amount to a violation of Article 2.

Accordingly, viewed as a whole, the administrative court proceedings brought by the applicant against the ministerial authorities did not disclose any bias or prejudice in examining the applicant's allegations, nor was there any evidence to substantiate the claim that the administrative courts had sought to avoid finding that the respondent authorities were liable.

Consequently, the applicant could not claim that the respondent State had failed, in breach of its positive obligations, to put in place an adequate and effective judicial system.

Conclusion: no violation (six votes to one).

The Court also held unanimously that there had been no violation of Article 8, bearing in mind that it had already ruled on the same facts that there had been no violation of the substantive or procedural aspect of Article 2.

Positive obligations (substantive aspect)
Effective investigation

Lack of adequate medical care for HIV-positive detainee who died in detention and lack of effective investigation into his death: *violations*

Karpylenko v. Ukraine - 15509/12
Judgment 11.2.2016 [Section V]

(See Article 34 below, page 39)

Positive obligations (substantive aspect)

Authorities' failure to protect life of domestic-violence victim: *violation*

Civek v. Turkey - 55354/11
Judgment 23.2.2016 [Section II]

Facts – The applicants' mother was a victim of domestic violence. In 2009 she was residing with her three children in a reception centre for battered women. On 15 October 2010, further to her complaint, the applicants' father was remanded in custody and charged with inflicting grievous bodily harm on his wife. On 12 November 2010 the latter withdrew her complaint and he was released. This release was accompanied by a judicial supervision measure requiring him to report to the police or gendarmerie station at 5 p.m. every Tuesday and Friday. He was also ordered to refrain from any violent or threatening behaviour against his wife, and to leave the marital home immediately and stay away for a period of three months. Those measures were accompanied by a warning that he would be arrested and imprisoned if he failed to comply with the obligations imposed by the court. On 23 November and 17 December 2010 the applicants' mother lodged fresh complaints against her husband for harassment and death threats. The latter was charged with insult, threats and non-compliance with the protective measures ordered. On 26 December 2010 the applicants were heard as witnesses and confirmed their mother's submissions. On 14 January 2011 the applicants' mother was murdered in the street by her husband, who stabbed her 22 times. He was found guilty of murder and sentenced to life imprisonment.

Law – Article 2: Domestic violence is a phenomenon which may take a variety of forms – including physical attacks, psychological violence and insults – and which is not confined to the present case. It is a widespread problem confronting all member States, and is particularly alarming in contemporary European societies. It does not always come out into the open because it is frequently takes place in the framework of personal relationships or restricted circles. Moreover, it does not exclusively affect women: men too can be victims of domestic violence, as can children, who often suffer such violence directly or indirectly. The Court had regard to the seriousness of this problem in examining the facts of the case.

The police were aware of the acts of violence committed by the applicants' father against his wife. Moreover, they had been informed of the likelihood of the murder by the numerous complaints lodged by the applicants' mother and the applicants' witness statements. Consequently, the authorities knew, or ought to have known, that she was likely to suffer a lethal assault. In view of the circumstances, that risk could be considered real and imminent. However, although the authorities did take some action, they failed to adopt sufficiently practical measures to prevent the murder of the applicants' mother as from 12 November 2010, the date of her husband's release. The police merely registered a further complaint from the victim without taking any further action against her husband, even though he was already known to the police services. The prosecution at no stage adopted any practical, targeted measures to effectively protect the applicants' mother, whereas they could legally have arrested her husband for failing to comply with the court orders. The authorities therefore failed to take the steps which they could reasonably have taken in order to prevent the implementation of a definite and imminent threat to the life of the applicant's mother.

Conclusion: violation (unanimously).

Article 41: 50,000 EUR jointly in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Positive obligations (procedural aspect)

Excessive formalism in application of rule that accused cannot be convicted in absence without first being questioned: *violation*

Öztünç v. Turkey - 14777/08
Judgment 9.2.2016 [Section II]

Facts – Criminal proceedings initiated in 1984 were still pending before the Assize Court thirty years after the fatal shooting of four brothers. In June 2006 the Court of Cassation found that the Assize Court could not convict the defendants without rehearing their evidence following the Court of Cassation's initial decision. However, as the defendants were still evading justice, the Assize Court was unable to reach a verdict on the merits.

Law – Article 2: The Court did not doubt that the authorities had actively sought to find the defen-

dants. It noted further that although they did not appear to have been successful, they were under an obligation of means only. Nevertheless, the State was not exempted from all responsibility for the inability to complete the judicial process. Beyond the fact that the defendants had absconded, the deadlock in the proceedings was largely due to the domestic legal rules on criminal litigation and their interpretation by the Court of Cassation.

The Court of Cassation considered that the Code of Criminal Procedure prohibited the conviction of fugitive defendants if they had not been heard by the trial court after remittal of the case by the Court of Cassation, even if they had already been heard previously.

The fact that proceedings were conducted in the absence of the accused was not in itself incompatible with Article 6 of the Convention. However, the Court of Cassation's decision to require the presence of the defendants owing to the nature of the remittal – even though they had been notified of the proceedings, were represented by a lawyer and were in all likelihood seeking to evade justice – was excessively formalistic.

No incontrovertible argument could justify such preferential treatment for a fugitive defendant: such treatment risked undermining the imperatives of protection contained in Article 2 and rendering nugatory the procedural obligation flowing from the right to life.

The impact on the procedural protection of the right to life was particularly serious: the right afforded fugitive defendants did not merely result in short delays in the proceedings, but in the proceedings becoming paralysed indefinitely. This went far beyond what was justified in order to ensure a fair balance between the rights of the accused and the rights of the victims.

In sum, the legislative framework established by the State, and in particular the rules of criminal procedure as interpreted by the domestic courts, had prevented the proceedings from being sufficiently effective to meet the requirements of Article 2 of the Convention and, in particular, the obligation to act with due expedition.

Conclusion: violation (unanimously).

Article 41: EUR 30,000 each in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

ARTICLE 3

Torture
Effective investigation
Extradition

Torture and inhuman and degrading treatment resulting from applicant's extraordinary rendition under CIA programme: *violations*

Nasr and Ghali v. Italy - 44883/09
Judgment 23.2.2016 [Section IV]

Facts – The applicants are a married couple. The first applicant, an Egyptian national, lived in Italy and obtained refugee status there. He was suspected of terrorist offences, and in February 2003 was abducted in a Milan street and handed over to CIA agents in an "extraordinary rendition" operation. He was subsequently moved to Egypt, where he was detained in secret and subjected to violent interrogation. He was not heard of again until his release in April 2004. He was rearrested by the Egyptian authorities some twenty days later and was detained until February 2007. Three days after her husband's abduction the second applicant reported his disappearance to the police. Although the prosecuting authorities reacted promptly, the withholding of information by the Italian intelligence agency (SISMi) meant that they were unable to obtain any information until April 2004. As a result of the investigation, twenty-six United States nationals and two Italian citizens were found to be responsible and were convicted. However, the convictions of the Italian nationals were quashed on grounds of State secrecy. As to the US citizens, only one of them was made the subject of an extradition request. Those proceedings were still pending at the time of adoption of the European Court's judgment.

Law

(a) *Admissibility* – The Government raised a preliminary objection of failure to exhaust domestic remedies. The Court noted that the domestic courts had ordered twenty-six US citizens and two Italian citizens, jointly and severally, to pay damages to the applicants. However, the criminal convictions of the SISMi agents had been quashed on grounds of State secrecy, which could also have been invoked in possible civil proceedings. Accordingly, in practice, none of the Italian agents implicated in the events could have been found liable in the

Italian civil courts for the damage sustained by the applicants.

The only persons legally liable from whom it would have been possible to claim the sums already awarded, or the damages awarded subsequently, were the twenty-six convicted US nationals, who had left Italy on unspecified dates and had since been declared by the Italian authorities to be "untraceable" and then to have "absconded". Despite the requests of the prosecuting and judicial authorities to that effect, the Minister of Justice had decided not to seek the extradition of those twenty-six individuals or to have a wanted notice issued concerning them. To date, only one of the persons convicted had been arrested for a short period, and the extradition proceedings were still pending at the time of adoption of the Court's judgment.

The attitude of the Italian executive authorities towards the convicted US citizens had substantially compromised – or even reduced to nothing – the applicants' prospects of obtaining compensation from the persons responsible.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – Article 3

(i) *Procedural aspect with regard to the first applicant* – In contrast to the cases previously examined by the Court, the domestic courts had conducted an in-depth investigation in the present case which had made it possible to reconstruct the events. Tribute had to be paid to the work of the courts, which had done their utmost to "establish the truth". Hence, the present case essentially raised two issues: the quashing of the convictions of the Italian SISMi agents and the lack of adequate measures to enforce the sentences passed against the US agents.

The evidence that was ultimately disregarded by the courts on the ground that the Constitutional Court had found it to be covered by State secrecy had been sufficient to convict the accused. Given that the information implicating the SISMi agents had been widely circulated in the press and on the Internet and had therefore been in the public domain, it was difficult to discern how invoking State secrecy had been apt to preserve the confidentiality of the events once the information in question had been disclosed. The executive's decision to invoke State secrecy had resulted in the SISMi agents avoiding conviction. Accordingly, despite the high calibre of the work carried out by the Italian investigators, judges and prosecutors, the investigation had not satisfied the Convention requirements in this regard.

With regard to the US agents who had been convicted, the Government conceded that only one extradition request had been made in relation to them, which had yielded no results. Furthermore, the President of the Republic had pardoned three of the persons concerned, including the agent who had been the subject of extradition proceedings. Here again, despite the efforts of the Italian investigators, judges and prosecutors, the convictions handed down had remained ineffective owing to the attitude of the executive. The legitimate principle of "State secrecy" had clearly been invoked in order to ensure that those responsible did not have to answer for their actions. As a result, the investigation, despite being effective and thorough, and the trial – which had identified the persons responsible and had convicted some of them – had not produced their natural outcome, namely "the punishment of those responsible". Ultimately, therefore, those concerned had acted with impunity. This was all the more deplorable in a situation such as that in the present case, which concerned two countries that had signed an extradition treaty. On this point also, the domestic investigation had failed to satisfy the requirements of the Convention.

Conclusion: violation (unanimously).

(ii) *Substantive aspect with regard to the first applicant* – It was not necessary to examine every aspect of the treatment meted out to the applicant during his abduction, his transfer abroad and his ensuing detention, or the physical conditions in which he had been held. The cumulative effects of the treatment to which he had been subjected – as described in detail in his written statements, confirmed by a medical certificate and deemed credible by the Italian courts – were sufficient to find that the treatment had attained the degree of severity required by Article 3.

It had at the very least been foreseeable for the Italian authorities, who had cooperated with the CIA agents, that the applicant's abduction by the CIA would be the prelude to serious ill-treatment. Moreover, the SISMi had been informed, by May 2003 at the latest, of the fact that the applicant was being held in Egypt and being interrogated by the Egyptian intelligence services. Accordingly, the Italian authorities had known or ought to have known that this operation would expose the applicant to a real risk of treatment proscribed by Article 3. In those circumstances, the likelihood of a violation of that Article had been particularly

high and should have been considered as inherent in the applicant's transfer. The Italian authorities had therefore had a duty to take the appropriate measures to ensure that the applicant, who came within their jurisdiction, was not subjected to acts of torture or to inhuman or degrading treatment or punishment. However, they had not done so.

These findings were all the more valid given that the applicant had been granted refugee status in Italy.

Conclusion: violation (unanimously).

(iii) *Substantive aspect with regard to the second applicant* – The second applicant had received no news of her husband until April 2004, that is to say, more than fourteen months after his abduction. She had thus been left in a state of anguish, as she was aware that her husband had been detained and had received no official information concerning him. It was true that the police and the prosecuting authorities had reacted promptly. Nevertheless, they had initially been misled by the CIA agents as to the applicant's whereabouts and what had become of him. Furthermore, it was clear that the Italian security services had been informed from the outset about what had happened to the applicant; however, they had kept that information from the police and the public prosecutor's office. The relevant document had come to light following a search of the SISMi premises ordered by the public prosecutor. As a result of this deliberate manipulation of crucial information concerning the applicant's abduction, and the obstructive tactics of the SISMi agents acting in cooperation with their CIA counterparts, the second applicant had been left for a prolonged period without any explanations as to what had become of her husband. The uncertainty, doubt and apprehension experienced by the second applicant over a lengthy and continuous period had caused her severe mental suffering and distress.

Conclusion: violation (unanimously).

The Court also found, unanimously, violations of Articles 5 and 8 of the Convention and of Article 13 taken in conjunction with Articles 3, 5 and 8 with regard to the first applicant. In the case of the second applicant it found, unanimously, a violation of the procedural aspect of Article 3, a violation of Article 8 and a violation of Article 13 taken in conjunction with Articles 3 and 8.

Article 41: EUR 70,000 to the first applicant and EUR 15,000 to the second applicant in respect of non-pecuniary damage.

(See *Husayn (Abu Zubaydah) v. Poland*, 7511/13, and *Al Nashiri v. Poland*, 28761/11, judgments of 24 July 2014 summarised in Information Note 176; and *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], 39630/09, 13 December 2012, Information Note 158; see also the Factsheets on Secret detention sites and Terrorism)

Inhuman or degrading treatment

Conditions of detention and lack of medical assistance in separatist region of the Republic of Moldova: *no violation; violation*

Mozer v. the Republic of Moldova and Russia - 11138/10
Judgment 23.2.2016 [GC]

(See Article 5 § 1 below, page 15)

Acute mental suffering and anxiety caused by extraordinary rendition of applicant's husband under CIA programme: *violation*

Nasr and Ghali v. Italy - 44883/09
Judgment 23.2.2016 [Section IV]

(See Article 3 above, page 12)

ARTICLE 4

Article 4 § 3 (a)

Work required of detainees

Continuing obligation on prisoner to work after reaching retirement age: *no violation*

Meier v. Switzerland - 10109/14
Judgment 9.2.2016 [Section III]

Facts – The applicant was sentenced to a term of imprisonment. He submitted a request for exemption from the work he was required to do in prison (colouring mandalas, cleaning his cell and making sculptures), but it was refused. In May 2012 a stricter prison regime was imposed on him confining him to his cell and his TV set and computer were removed for a fortnight on account of his refusal to work. That decision was subsequently cancelled.

Before the European Court the applicant complained that he had been forced to work as part of his punishment and measures, even though he had reached retirement age.

Law – Article 4: This was the first case in which the Court had to examine the issue of an obligation to perform prison work after retirement age.

If the applicant refused to perform the work assigned to him he rendered himself guilty of insubordination and had to face the consequences, as attested by the imposition of a stricter prison regime and the removal of his TV set and computer for two weeks. Even though that decision was subsequently cancelled, the penalty appeared relatively harsh. At all events, using the definition of forced or compulsory labour set out in Convention No. 29 of the International Labour Organization (ILO) as the basis for interpreting Article 4 § 2 of the European Convention, there could be no doubt that the applicant had performed work "under the menace of [a] penalty and for which [he had] not offered himself voluntarily".

The question remained whether the work performed by the applicant was work of a type habitually required of a person subject to incarceration under the conditions set out in Article 5 of the Convention. That question should be examined in the light of the aim, nature and extent of the work imposed and the manner and means of its execution.

A prisoner's duty to continue working even after retirement age could be considered to comply with the aim of reducing the harmful effects of imprisonment. Appropriate and reasonable work could help structure everyday life and preserve useful activity, goals which were important to the well-being of a long-term prisoner. As regards the nature of the work carried out by prisoners who have reached retirement age, the obligation was not applicable to all prisoners to the same extent but was suited, depending on circumstances, to their capacities and especially their fitness for work and state of health. Moreover, persons suffering from mental disorders were only assigned light work, usually less intensively. In the event of unfitness for work certified by a doctor, the prisoner was exempted from compulsory work. The work assigned to the applicant appeared to comply with these guidelines as he was only required to take part in supervised work, including colouring mandalas, cleaning his cell and carving driftwood sculptures. Such activities were wholly appropriate to his age and physical capacities. Furthermore, he only worked about three hours a day, was integrated in the "dependant and retired persons wing" and was paid for his work.

The lack of a sufficient consensus among member States on requiring prisoners to work after reaching retirement age meant that the national authorities enjoyed a wide margin of appreciation. Rule No. 105.2 of the European Prison Rules was not necessarily to be interpreted as completely prohibiting member States from requiring prisoners who had reached retirement age to work. Consequently, the work performed by the applicant during his incarceration, including that carried out after he reached retirement age, could be considered "work required to be done in the ordinary course of detention", within the meaning of Article 4 § 3 (a) of the Convention and did not amount to "forced or compulsory labour". In view of the foregoing considerations and the fact that the applicant had not complained of the arrangements for performing the work assigned to him, there had been no violation of Article 4 of the Convention.

Conclusion: no violation (unanimously).

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Detention ordered by "courts" of separatist region of the Republic of Moldova:
no violation; violation

Mozer v. the Republic of Moldova and Russia
- 11138/10
Judgment 23.2.2016 [GC]

Facts – In November 2008 the applicant, a Moldovan national belonging to the German ethnic minority, was arrested by the authorities of the self-proclaimed "Moldavian Republic of Transdniestria" (the "MRT"), which has not been recognised by the international community, on suspicion of defrauding the company he worked for. He was held in custody until his trial before the "Tiraspol People's Court", which in July 2010 convicted him and sentenced him to seven years' imprisonment, suspended for five years. It ordered his release subject to an undertaking not to leave the city. The applicant later left for treatment in Chișinău (Republic of Moldova) before travelling to Switzerland.

In his application to the European Court, the applicant, who suffered from bronchial asthma, respiratory deficiency and other conditions, complained that he had been deprived of medical assistance and held in inhuman conditions by the "MRT authorities" (Article 3 of the Convention), that his arrest and detention were unlawful (Article 5 § 1), that his right to meet his parents and a pastor had been unduly restricted (Articles 8 and 9) and that he had no effective domestic remedy available (Article 13). He submitted that both Moldova and Russia were responsible for the alleged violations of his Convention rights.

In May 2014 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber.

Law

(a) *Admissibility*

Article 1

(i) *Jurisdiction of Moldova* – There was no reason to distinguish the present case from previous cases (such as *Ilaşcu and Others v. Moldova and Russia* and *Catan and Others v. Moldova and Russia*) concerning Moldovan jurisdiction in respect of events in the territory controlled by the "MRT". Although Moldova had no effective control over the acts of the "MRT" in Transdniestria, the fact that the region was recognised under public international law as part of Moldova's territory gave rise to an obligation, under Article 1 of the Convention for Moldova to use all the legal and diplomatic means available to it to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention to those living there.

Conclusion: within the jurisdiction of Moldova (unanimously).

(ii) *Jurisdiction of Russia*: In the absence of new information to show that the situation had changed during the relevant period (November 2008 to July 2010), the Court maintained its previous findings that the "MRT" was only able to continue to exist, and to resist Moldovan and international efforts to resolve the conflict and bring democracy and the rule of law to the region, because of Russian military, economic and political support. The "MRT's" high level of dependency on Russian support provided a strong indication that Russia continued to exercise effective control and a decisive influence over the "MRT" authorities.

Conclusion: within the jurisdiction of Russia (sixteen votes to one).

Article 35 § 1 (*exhaustion of domestic remedies in Moldova*) – The Court dismissed the Moldovan Government's objection that, in order to exhaust Moldovan domestic remedies, the applicant should have applied for compensation under Law no. 1545 (1998). It noted that Law no. 1545 did not appear to apply to the unlawful actions of authorities created by the "MRT", that no examples of an individual obtaining compensation from Moldova after the quashing of an "MRT court" conviction had been submitted, and that nothing in Law no. 1545 allowed the applicant to claim compensation for the delayed use or failure by the Moldovan authorities to make use of diplomatic or other means at the State level.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits*

Article 5 § 1: The Court reiterated that decisions taken by the courts, including the criminal courts, of unrecognised entities may be considered "lawful" for the purposes of the Convention provided they form part of a judicial system operating on a constitutional and legal basis compatible with the Convention. It was in the first place for Russia, as the Contracting Party with effective control over the unrecognised entity, to show that the "MRT" courts satisfied that test. In *Ilaşcu and Others* the Court had found that the test was not satisfied in view, in particular, of the patently arbitrary nature of the circumstances in which the applicants in that case were tried and convicted. In the absence of information from the Russian Government and in view of the scarcity of official information concerning the legal and court system in the "MRT", the Court was not in a position to verify whether the "MRT" courts and their practice now fulfilled the requirements. What was, however, clear was that the "MRT" legal system created in 1990 had not undergone the thorough analysis to which Moldovan law was subjected before Moldova joined the Council of Europe in 1995. Accordingly, there was no basis for assuming that the "MRT" legal system reflected a judicial tradition considered compatible with Convention principles. That conclusion was reinforced by, among other things, the circumstances of the applicant's arrest and detention (especially the order for his detention for an undefined period and the examination of his appeal in his absence) and media reports which raised concerns about the independence and quality of the "MRT" courts. Neither the "MRT" courts nor any other "MRT" authority had thus been able to order the applicant's "lawful arrest or

detention" within the meaning of Article 5 § 1 (c) of the Convention.

(i) *Responsibility of Moldova* – The Court had held in *Ilaşcu and Others* that Moldova's positive obligations to take appropriate and sufficient measures to secure the applicant's rights under Article 5 § 1 related both to measures needed to re-establish its control over the Transdniestrian territory, as an expression of its jurisdiction, and to measures to ensure respect for individual applicants' rights.

As regards the obligation to re-establish control, there was nothing to indicate that the Moldovan Government, which had taken all measures in its power to re-establish control over Transdniestrian territory, had changed their position during the period of the applicant's detention. As to the obligation to ensure respect for the applicants' rights, the Moldovan Government had made considerable efforts to support the applicant, in particular, through appeals to various intergovernmental organisations and foreign countries including Russia, a decision of the Moldovan Supreme Court of Justice quashing the applicant's conviction and an investigation into the allegations of unlawful detention. Moldova had thus fulfilled its positive obligations.

Conclusion: no violation by Moldova (unanimously).

(ii) *Responsibility of Russia* – While there was no evidence that persons acting on behalf of the Russian Federation had directly participated in the measures taken against the applicant, Russia's responsibility under the Convention was nevertheless engaged by virtue of its continued military, economic and political support for the "MRT", which could not otherwise survive.

Conclusion: violation by Russia (sixteen votes to one).

Article 3: The applicant complained of a lack of medical assistance and of the conditions of his detention.

It was indisputable that the applicant suffered greatly from his asthma attacks. Although the doctors considered the applicant's condition to be deteriorating and the specialists and equipment required to treat him to be lacking, the "MRT" authorities had not only refused to transfer him to a civilian hospital for treatment but had also exposed him to further suffering and a more serious risk to his health by transferring him to an ordinary prison. In view of the lack of any explanation for the refusal to offer him appropriate treatment, the Court found that the medical assistance received by the applicant was not adequately secured.

The Court further found on the basis notably of reports of the European Committee for the Prevention of Torture (CPT) and the United Nations Special Rapporteur on torture that the conditions of the applicant's detention amounted to inhuman and degrading treatment, in particular on account of severe overcrowding, a lack of access to daylight and a lack of working ventilation which, coupled with cigarette smoke and dampness in the cell, had aggravated the applicant's asthma attacks.

For the reasons set out under Article 5 § 1, the Court found that responsibility for the violation lay solely with Russia.

Conclusions: no violation by Moldova (unanimously); violation by Russia (sixteen votes to one).

Article 8: The applicant complained that he had been unable to meet his parents for a considerable length of time and that during the meetings that had eventually been authorised they had not been allowed to speak their native German.

The Court noted that no reasons for refusing family meetings were apparent from the file and it was clear that the applicant had been unable to meet his parents for six months after his initial arrest. No explanation was given as to why it had been necessary to separate the applicant from his family for such a considerable length of time. Likewise, it was unacceptable in principle that a prison guard was present during family visits. It was clear that the guard was there specifically to monitor what the family discussed, given that they were at risk of having the meeting cancelled if they did not speak a language he understood. No explanation was given as to why the meetings had to be monitored so closely. Thus, regardless of whether there had been a legal basis for the interference with the applicant's rights, the restriction of prison visits from his parents did not comply with the other conditions set out in Article 8 § 2 of the Convention.

For the reasons set out under Article 5 § 1 (see above), the Court found that responsibility for the violation lay solely with Russia.

Conclusions: no violation by Moldova (unanimously); violation by Russia (sixteen votes to one).

Article 9: The applicant complained that he had also been prevented from seeing his pastor. The Court reiterated that a refusal to allow a prisoner to meet a priest constitutes interference with the rights guaranteed under Article 9. It was not clear whether there was a legal basis for the refusal and no reasons had been advanced to justify it. The Court considered that it had not been shown that

the interference with the applicant's right pursued a legitimate aim or was proportionate to that aim.

For the reasons set out under Article 5 § 1 (see above), the Court found that responsibility for the violation lay solely with Russia.

Conclusions: no violation by Moldova (unanimously); violation by Russia (sixteen votes to one).

Article 13: The applicant had been entitled to an effective domestic remedy within the meaning of Article 13 in respect of his complaints under Articles 3, 8 and 9 of the Convention. The Court had already found when considering the Moldovan Government's preliminary objection that a claim for compensation before the Moldovan courts under Law no. 1545 (1998) could not be considered an effective remedy. The Russian Government had not claimed that any effective remedies were available to the applicant in the "MRT". The applicant thus did not have an effective remedy in respect of his complaints under Articles 3, 8 and 9 of the Convention.

(i) *Responsibility of Moldova* – The nature of the positive obligations to be fulfilled by Moldova did not require the payment of compensation for breaches by the "MRT". Accordingly, the rejection of the preliminary objection concerning the non-exhaustion of domestic remedies did not affect the Court's analysis concerning the fulfilment of Moldova's positive obligations.

The positive obligation incumbent on Moldova was to use all the legal and diplomatic means available to continue to guarantee to those living in the Transdniestrian region the enjoyment of the rights and freedoms defined in the Convention. Accordingly, the "remedies" which Moldova was required to offer the applicant consisted in enabling him to inform the Moldovan authorities of the details of his situation and to be kept informed of the various legal and diplomatic actions taken. Moldova had created a set of judicial, investigative and civil service authorities which worked in parallel with those created by the "MRT". While the effects of any decisions taken by these authorities could only be felt outside the Transdniestrian region, they had the function of enabling cases to be brought in the proper manner before the Moldovan authorities, which could then initiate diplomatic and legal steps to attempt to intervene in specific cases, in particular by urging Russia to fulfil its obligations under the Convention in its treatment of the "MRT" and the decisions taken there.

Moldova had made procedures available to the applicant commensurate with its limited ability to protect the applicant's rights. It had thus fulfilled its positive obligations.

(ii) *Responsibility of Russia* – For the reasons set out under Article 5 § 1 (see above), Russia's responsibility was engaged.

Conclusions: no violation by Moldova (unanimously); violation by Russia (sixteen votes to one).

Article 17: The applicant complained of a breach of Article 17 of the Convention by both respondent States on account of their tolerance of the unlawful regime installed in the "MRT".

The Court considered that the complaint as formulated by the applicant fell outside the scope of Article 17. In any case, there was no evidence to suggest that either of the respondent States had set out to deliberately destroy any of the rights relied on by the applicant, or to limit any of those rights to a greater extent than was provided for in the Convention.

Conclusion: inadmissible (manifestly ill-founded).

Article 41: EUR 20,000 in respect of non-pecuniary damage; EUR 5,000 in respect of pecuniary damage.

(See *Ilaşcu and Others v. Moldova and Russia* [GC], 48787/99, 8 July 2004, Information Note 66; *Ivanţoc and Others v. Moldova and Russia*, 23687/05, 15 November 2011, Information Note 146; *Catan and Others v. Moldova and Russia* [GC], 43370/04, 8252/05 and 18454/06, 19 October 2012, Information Note 156; see also, *Cyprus v. Turkey* [GC], 25781/94, 10 May 2001)

ARTICLE 6

Article 6 § 1 (civil)

Fair hearing

Detainees' inability to attend hearings in civil proceedings to which they were parties: *violation*

Yevdokimov and Others v. Russia - 27236/05 et al.
Judgment 16.2.2016 [Section III]

Facts – The domestic courts refused the applicants, who were detainees at the material time, the possibility to attend the hearings in the civil proceedings to which they were parties, on the

ground that there was no domestic legal provision enabling detainees to be brought to court.

Law – Article 6 § 1: The rules of Russian civil procedure required courts to hold an oral hearing in all categories of cases without exception. Whenever an oral hearing was held, the parties had the right to attend and to make submissions. Indeed, the right to appear in person before a court was in principle unrestricted in Russian civil proceedings. However, there was no legally established procedure for bringing prisoners to the place where their civil claim was being heard. The Court had found a violation of Article 6 in a large number of cases in which Russian courts had refused to secure the attendance of imprisoned applicants wishing to take part in the hearing of their civil claims, finding their approach excessively formalistic. Just as no provision of domestic law should be interpreted and applied in a manner incompatible with the State's obligations under the Convention, a lacuna in the domestic law could not be a justification for failing to give full force to the Convention standards.

Before embarking on an analysis of the instant cases, the Court considered it useful to set out the way in which it analysed alleged violations of the right to a fair trial. The Court had first to examine the manner in which the domestic courts had assessed the question whether the nature of the dispute required the applicants' personal presence. It then had to determine whether the domestic courts had put in place procedural arrangements aiming at guaranteeing their effective participation in the proceedings.

(a) *Whether the domestic courts had weighed the necessity of the applicant's personal presence* – In establishing a universal right for parties to civil proceedings to have an oral hearing, the domestic law endowed them with a legitimate expectation that they would be given an opportunity to appear before the judge. That approach went beyond the requirements of Article 6, which did not guarantee the right to an oral hearing or the right to appear before a court in person, but rather enshrined a more general principle of procedural fairness. The Court had previously accepted that in civil proceedings concerning claims of a technical nature, the parties' presence was of lesser significance. Where the claim was not based on the applicant's personal experiences, his appearance at the hearing was not considered to be indispensable for the proceedings to be recognised as having been "fair". Nevertheless, where an applicant was incarcerated and could not freely decide whether or not to attend a hearing, in order for the proceedings to be considered "fair" it was not sufficient that the applicant's absence should coincide with the absence of the procedural adversary, for such coincidence was merely fortuitous. It was therefore incumbent on the domestic courts, once they became aware that a litigant was in custody, to verify, prior to embarking on the examination of the merits, whether the nature of the case was such as to require the incarcerated litigant's personal testimony and whether he had expressed a wish to attend. If the domestic courts were contemplating dispensing with the litigant's presence, they had to provide specific reasons why they believed his absence would not be prejudicial to the fairness of the proceedings as a whole. It fell to them to examine all the arguments for and against holding a hearing in the absence of one of the parties, taking into account, in particular, the Court's case-law in similar cases and the nature of the contentious issues, and to apprise the incarcerated litigant in good time of their decision and the reasons for it. The decision had to be communicated to the litigant sufficiently in advance so that he had adequate time to decide on a further course of action. It was essentially on the basis of the reasons in the domestic decisions that the Court would determine whether or not the exclusion of an applicant undermined the fair-hearing principle. A lack or deficiency of reasons in the domestic decisions could not be supplemented *ex post facto* in the proceedings before the Court.

(b) *Procedural arrangements* – The second limb of the Court's analysis concerned the counterbalancing measures that needed to be put in place to guarantee that incarcerated litigants could participate in court proceedings effectively. Concrete practical solutions consistent with the fairness requirement needed to be found with regard to the local situation, the technical equipment available in the courthouse and the detention facility, the accessibility of legal aid services, and other relevant elements. Having considered such arrangements, the domestic courts had to inform the detainee accordingly and in good time, so that he had adequate time and facilities to decide on a course of action to defend his rights.

If the claim was based largely on the detainee's personal experience, his oral submissions to the court would be an important part of his presentation of the case and virtually the only way to ensure adversarial proceedings. Only by testifying in person could the detainee substantiate his claims and answer any questions from the judges. In those circumstances, obvious solutions would be to conduct the proceedings at the place of detention

or to use a video link. As regards the use of a video link or videoconferencing equipment, it was important to ensure that the detainee was able to follow the proceedings, see the persons present and hear what was being said. The detainee also had to be seen and heard by the other parties, the judge and witnesses without technical impediment. Organising a court session outside the courtroom was, by contrast, a time-consuming exercise. In addition, holding it in a place such as a detention facility, to which the general public in principle had no access, was attended by the risk of undermining its public character. In such cases, the State was under an obligation to take compensatory measures to ensure that the public and the media were duly informed of the place of the hearing and granted effective access. The taking of evidence on commission was also consistent with the notion of a fair trial. Authority to hear the detainee could be delegated to a judge or a court at a location closer to the custodial facility. Combined with oversight by the trial judge throughout the proceedings to ensure that the detainee was at all times aware of the arguments of the opposing party and able fully and properly to answer them, the questioning of the detainee outside the courtroom would not be contrary to the principle of a fair trial.

In cases where the domestic court determined that it was less important for the detainee to testify in person, the right to a fair trial could be guaranteed by some form of representation. The Russian Legal Aid Act established the criteria for eligibility for legal aid based on the litigant's income and the type of dispute. The list of dispute types was exhaustive and did not include, for instance, a claim for compensation for degrading conditions of detention. In cases involving such claims, the Court was not satisfied that the Russian legal aid system offered applicants sufficient protection of their rights. If a detainee could not afford the costs of professional legal representation, he had the option of appointing a relative, friend or acquaintance to represent him. In such situations the domestic courts had to ascertain, firstly, that the detainee had sufficient time to find and instruct a person willing to represent him and, secondly, that the detainee's chances of having a fair hearing were not prejudiced on account of non-professional representation.

Lastly, whenever domestic courts opted for procedural arrangements aimed at compensating for the handicap which a detainee's absence from the courtroom created, they were expected to verify whether the chosen solution would respect the absent party's right to present his case effectively before the court and would not place him at a substantial disadvantage *vis-à-vis* his opponent. It would then fall to the European Court to judge whether the safeguards put in place to ensure that the detainee could participate fully in the proceedings were sufficient and whether the proceedings as a whole were fair in terms of Article 6.

As regards the instant cases, the domestic courts had failed to properly assess the nature of the civil claims brought by the applicants with a view to deciding whether their presence was indispensable and had focused instead on deficiencies in the domestic law. They had also failed to consider appropriate procedural arrangements to enable the applicants to be heard. They had therefore deprived the applicants of the opportunity to present their cases effectively and failed to meet their obligation to ensure respect for the principle of a fair trial.

Conclusion: violation (unanimously).

Article 41: awards in respect of non-pecuniary damage ranging from EUR 1,000 to EUR 1,500; claims in respect of pecuniary damage dismissed.

Article 6 § 1 (criminal)

Fair hearing

Manifestly unreasonable conviction of political activist and his alleged accomplice: *violation*

Navalnyy and Ofitserov v. Russia - 46632/13 and 28671/14
Judgment 23.2.2016 [Section III]

Facts – The first applicant was a lawyer, political activist, opposition leader, anti-corruption campaigner and popular blogger and the second applicant a company director. In 2012 the applicants and a third party, X, were formally charged with fraud related offences. X entered into a plea bargain and was tried and convicted in separate, accelerated proceedings. He subsequently appeared as a witness in the applicants' trial, which ended in their conviction.

In the Convention proceedings the applicants complained in particular under Article 6 of the Convention that the criminal proceedings against them had been arbitrary and unfair, notably on account of prejudicial comments that were made in the proceedings against X and of their own trial

court's failure to examine their allegations of political persecution.

Law

Article 6 § 1: It was undeniable that any facts and legal findings established in the proceedings against X were directly relevant to the applicants' case. In such circumstances, safeguards should have been in place to ensure that the procedural steps and decisions taken in the proceedings against X would not undermine the fairness of the hearing in the subsequent proceedings against the applicants, especially as the applicants were legally precluded from any form of participation in X's trial.

Neither of the two guarantees that had to be secured when co-accused were tried in separate sets of proceedings – namely that courts refrain from statements that may have a prejudicial effect on pending proceedings and that *res judicata* should not attach to facts admitted in a case to which the individuals were not party – were complied with by the domestic courts.

As to the first guarantee, the court that tried X worded its judgment in a way that left no doubt about the applicants' identities or their involvement in the offence and expressed its findings of fact and opinion in terms which could not be defined as anything but prejudicial. As to the second requirement, at the material time the Code of Criminal Procedure afforded the force of *res judicata* to judgments even if issued in accelerated proceedings and laid down that circumstances established in a judgment must be accepted without additional verification. Although the trial court in the applicants' case had been obliged to base its assessment exclusively on the material and testimony presented at the hearing before it, the Court considered that the risk of issuing contradictory judgments was a factor that discouraged the judges from finding out the truth and diminished their capacity to administer justice, thus causing irreparable damage to their independence, impartiality and ability to ensure a fair hearing.

In addition, the separation of the cases and X's conviction through the use of plea-bargaining and accelerated proceedings compromised his competence as a witness in the applicants' case as he was compelled to repeat the statements he had made as an accused as otherwise he ran the risk that the judgment issued on the basis of his plea-bargaining agreement would be reversed.

The Court further observed that the questions of interpretation and application of national law by the domestic courts in the applicants' case had gone beyond a regular assessment of the applicants' individual criminal responsibility or the establishment of *corpus delicti*. In fact, the acts described as criminal fell entirely outside the scope of the provision under which the applicants were convicted and were not concordant with its intended aim. The criminal law had thus been arbitrarily and unforeseeably construed to the applicants' detriment, leading to a manifestly unreasonable outcome of the trial.

In addition, the domestic courts had failed, by a long margin, to ensure a fair hearing in the applicants' criminal case, and the suggestion was they did not even care about appearances. It was noteworthy too that they dismissed without examination the applicants' allegations of political persecution, which were at least arguable. As to the first applicant, his anti-corruption campaign had gained momentum in 2010 and it was becoming evident that he was aiming to reach out to a wider public as a politician at the national level. Since his conviction he had been ineligible to stand for election, his freedom of movement had been restricted, and he had been banned from making public statements. It was noticeable too that the dates on which his prosecution began coincided with the publication of some of his articles in the media. There had therefore been an obvious link between the first applicant's public activities and the domestic authorities' decision to press charges, a link the domestic courts had failed to consider. The same applied to the second applicant, who had an arguable claim that he was targeted only in order to bring the first applicant into the orbit of the criminal case, a reason equally unrelated to the true purposes of a criminal prosecution. By their failure to address these allegations the domestic courts had heightened the concerns that the real reason for the applicants' prosecution and conviction was political.

The criminal proceedings against the applicants, taken as a whole, thus constituted a violation of their right to a fair hearing under Article 6 § 1 of the Convention.

Conclusion: violation (unanimously).

Article 18 in conjunction with Articles 6 and 7: The applicants had alleged that their prosecution and criminal conviction had been for reasons other than bringing them to justice, in particular in order to prevent the first applicant from pursuing his public and political activities. The Court noted, however, that the provisions of Articles 6 and 7 of the Convention, in so far as relevant to the present case, did not contain any express or implied restric-

tions that could form the subject of the Court's examination under Article 18 of the Convention.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 41: EUR 8,000 each in respect of non-pecuniary damage; claims in respect of pecuniary damage dismissed.

Independent and impartial tribunal

Alleged influence of parliamentary commission of inquiry and media coverage on a criminal trial: *no violation*

Rywin v. Poland - 6091/06, 4047/07 and 4070/07
Judgment 18.2.2016 [Section I]

Facts – In December 2002 a leading national daily newspaper published an article on corruption in connection with the legislative procedure for the amendment of the Broadcasting Act. The article criticised the applicant, a well-known film producer, and a number of high-ranking State officials. Following the revelations in the press, the prosecutor's office at the Court of Appeal instituted proceedings against the applicant for trading in influence. A few days later the lower house of Parliament adopted a resolution setting up a parliamentary commission of inquiry. The case was the subject of widespread media coverage. Among other actions, the applicant brought an action against a weekly newspaper complaining of a breach of his right to be presumed innocent. His action was dismissed. Most of the sittings of the commission of inquiry were held in public and broadcast live on radio and television. The minutes of the commission's meetings were systematically posted on the Parliament's website and were the subject of extensive comment in the media. The commission worked in close cooperation with the public prosecutor's office in charge of the criminal investigation against the applicant. The chair of the commission requested the prosecutor's office to carry out certain investigative steps, and several exchanges of information took place. In April 2004, a few days after the commission had adopted its final report, the applicant was found guilty of attempted fraud. In May 2004 the lower house of Parliament approved a shadow report written by one of the members of the commission. In December 2004 the Court of Appeal sentenced the applicant to a prison term for aiding and abetting trading in influence.

In the proceedings before the Court, the applicant alleged a violation of the principle of presumption of innocence and of his right to be tried by an independent and impartial tribunal, on account of the proceedings of the parliamentary commission of inquiry, which had been conducted in parallel with his trial and had related to the same facts and circumstances and made use of the same evidence as the criminal proceedings. The applicant complained both of the wording of the resolution adopted by the lower house of Parliament setting up the commission of inquiry and of the findings set out in the commission's final report. He further alleged that the press coverage of both sets of proceedings had aggravated the unfair nature of the criminal proceedings against him.

Law – Article 6 §§ 1 and 2

(a) *Observance of the principle of presumption of innocence* – The remarks of which the applicant complained were made prior to his final conviction by the Court of Appeal. The authorities concerned had therefore been under a duty to observe the principle of presumption of innocence.

The relevant domestic legislation made clear that the work of a parliamentary commission of inquiry was of a political nature. The purpose of the commission's report had been to act as a starting point for, or contribute to, a possible parliamentary debate concerning the irregularities identified on the part of the public authorities and institutions subject to parliamentary scrutiny. The conduct of individuals not acting in an official capacity could be examined by the commission only to the extent necessary to uncover shortcomings in the public institutions and authorities. The commission had been bound to refrain from making findings concerning the criminal responsibility of persons not acting in an official capacity. Any such "finding" in a parliamentary resolution or in the report of a parliamentary commission of inquiry would be in breach of the Polish Constitution. Furthermore, the relevant domestic legislation allowed the commission's inquiries to be carried out at the same time as any criminal proceedings concerning the same facts and circumstances. In such a case, the commission was required to ensure that its findings and conclusions did not infringe the rights of the persons who were the subject of the criminal proceedings being conducted at the same time, with particular regard to their right to be presumed innocent.

The remarks in question had been made against a background of widespread media coverage, which was precisely what had led to the setting-up of the commission, tasked with investigating allegations of corruption and unlawful interference by high-ranking State figures in the legislative process. There had therefore been compelling reasons in the public interest for the proceedings before the commission to be conducted publicly and transparently and for public opinion to be informed about the findings of its report.

According to the applicant, the wording of the parliamentary resolution, and in particular the reference to his supposed "attempt to extort financial and political advantages", made clear that the members of Parliament had preconceived ideas as to his guilt. The Court took the view, on the contrary, that the remarks in question, seen in the light of the resolution as a whole, were to be viewed as a means of indicating to the commission the factual circumstances it should be investigating. Accordingly, in so far as it referred to the applicant's conduct as reported in certain press publications at the time, the resolution in question did not contain any remarks that could be deemed to constitute a finding of guilt.

As to the report of the parliamentary commission of inquiry, its findings, read in the light of the report as a whole and the context in which they had been made, were to be understood as a means for the commission to inform Parliament that, on the basis of the evidence gathered, the highranking public officials identified therein were strongly suspected of committing the offence of corruption. Even though the report had described the applicant as the "agent" of the individuals in question, it had not accused him directly or passed any judgement on his conduct. The report's conclusions had not included any findings as to whether criminal proceedings should have been brought against the applicant, or any comment on his possible criminal liability for aiding and abetting corruption. The commission's report had not contained any reference to the criminal proceedings against the applicant or to the offences for which he had been prosecuted. Consequently, taking into account their real meaning and their context, neither the impugned wording of the parliamentary resolution setting up the parliamentary commission of inquiry nor the findings of the commission's report had concerned the issue of the applicant's guilt – an issue which clearly fell outside the remit of such a commission.

(b) *Observance of the applicant's right to be tried by an independent and impartial tribunal* – In accordance with the principle of separation of powers, the commission was debarred from interfering in the exercise of judicial power. Therefore, where judicial proceedings were instituted in relation to the same facts as those being examined by the commission, the latter had to maintain the requisite distance between its own inquiries and those proceedings. In particular, it had to refrain from any comment on the merits of the decisions taken by the courts or the way in which they were conducting the investigation. In such cases, the commission was not legally bound to suspend its activities pending the outcome of the judicial proceedings, but nevertheless had the option of so doing. Furthermore, the underlying aims of the two sets of proceedings had been different. The commission had been set up to investigate alleged shortcomings on the part of the public authorities or persons acting in an official capacity in connection with the procedure to amend the Broadcasting Act. It had not addressed the issue of the applicant's criminal liability and had made no finding that breached his right to be presumed innocent.

Under Polish law, a parliamentary commission had no powers to influence possible criminal proceedings being conducted in parallel with its own proceedings concerning the same facts and circumstances. Firstly, the statements made by the members of such a commission and the findings of its report did not entail any legal consequences for the courts examining the criminal aspects of the case. Secondly, a commission of inquiry could not intervene as a third party in the criminal proceedings, nor could it influence the outcome of those proceedings, the implementation of the rules of procedure or the composition of the bench trying the case. Cooperation between the commission and the judicial authorities was permitted, and even in certain circumstances required, by domestic law; however, it had to comply with the domestic legal framework, which was aimed precisely at ensuring independence and impartiality. The exchanges that had taken place between the parliamentary commission and the criminal justice authorities had led the commission to bring the information it had gathered to the attention of the public prosecutor's office and the courts. Moreover, the defence itself had requested that the minutes of the commission proceedings be added to the criminal file. There was nothing to suggest that the use of the information in question as evidence in

the criminal proceedings had taken place in breach of the relevant legal rules.

The present case undoubtedly concerned an important question of general interest in connection with which the press had been entitled, and even obliged, to report the information in its possession. The importance of the case in the eyes of public opinion was explained by its unprecedented nature and by the serious nature of the facts in which the applicant, himself a very well-known figure, was suspected of being involved. It had therefore been inevitable that the press would voice sharp criticism concerning such a sensitive case, which cast doubt on the morals of senior public figures and the relationship between politics and business. The opinions expressed in the publications in question had not emanated from the State authorities and had in no sense been inspired or led by the representatives of the domestic authorities, but had simply been the journalists' own opinions. Moreover, the action brought by the applicant against a weekly newspaper had been dismissed by a judgment against which he had not appealed. Although it had been open to him to do so, the applicant had not complained to the domestic authorities either about the article appearing in another publication or about the remarks made by the members of the commission.

The courts hearing the case had been made up entirely of professional judges, whose experience and training usually enabled them to disregard any suggestions from external sources. Moreover, the applicant had not adduced any evidence showing that the press statements could have influenced the formation of the judges' opinion or the outcome of the deliberations in the criminal proceedings against him.

The applicant had been convicted following adversarial proceedings in which it had been open to him to submit any arguments he deemed useful for his defence. The reasoning of the judgments did not reveal anything to suggest that, in their interpretation of domestic law or their assessment of the parties' arguments and the evidence for the prosecution, the judges had been influenced by the statements of the members of the commission or the findings contained in its report.

In sum, the fairness of the criminal proceedings against the applicant had not been impaired, with particular reference to his right to be tried by an independent and impartial tribunal.

Conclusion: no violation (four votes to three).

The Court also held that there had been no violation of Article 3 of the Convention regarding the compatibility of the applicant's state of health with detention.

Article 6 § 2

Presumption of innocence

Alleged influence of parliamentary commission of inquiry and media coverage on a criminal trial: *no violation*

Rywin v. Poland - 6091/06, 4047/07 and 4070/07
Judgment 18.2.2016 [Section I]

(See Article 6 § 1 (criminal) above, page 22)

ARTICLE 7

Article 7 § 1

Nullum crimen sine lege

Juror's committal for contempt of court for disobeying judge's instructions to jury not to conduct Internet research into case they were trying: *no violation*

Dallas v. the United Kingdom - 38395/12
Judgment 11.2.2016 [Section I]

Facts – The applicant was a juror sitting in a criminal trial. Before the trial commenced the jurors were warned – in a video, by the court's jury officer and by notices in the jury's waiting room – not to use the internet to research cases in which they were sitting. During the course of the trial, the judge also warned the jurors not to go on the Internet or try to do any research of their own. Before the jury returned its verdict it came to the trial judge's attention that the applicant had conducted research on the Internet and shared prejudicial information she had discovered about the defendant with her fellow jurors. The jury was discharged and the Attorney General applied for the applicant's committal for contempt of court. In her defence the applicant argued that while it was true that she had conducted some research

which had resulted in her coming across a newspaper report about the defendant, she had not possessed the "specific intent" required under the domestic law of contempt to impede or create a real risk of prejudicing the due administration of justice. The domestic courts rejected that argument, holding that intent in a case such as the applicant's did not have to be separately established but could be inferred from foresight of the consequences of deliberately disobeying an order of the judge. The applicant was found guilty of contempt by the Divisional Court and given a custodial sentence.

In the Convention proceedings, she contested the accessibility and foreseeability of the law of contempt of court as it had been applied in her case.

Law – Article 7 § 1: The Court deemed it appropriate to examine the applicant's allegations solely under Article 7 § 1 of the Convention. There was no dispute between the parties that, under the domestic law, two elements had to be shown to establish common-law contempt, namely, an act creating a "real risk" of prejudice to the administration of justice, and an intention to create that risk.

As to the first element (an act creating a "real risk" of prejudice) the Court rejected the applicant's argument that the Divisional Court had lowered the threshold of the test for contempt by omitting the word "real" from its description of the risk: the Divisional Court had in fact held that the applicant had caused "actual prejudice" to the due administration of justice, not merely a risk of such prejudice.

As to the question of intent, the Court considered that it must have been quite evident to any juror that deliberately introducing extraneous evidence into the jury room contrary to an order of the trial judge amounted to intending to commit an act that at the very least carried a real risk of being prejudicial to the administration of justice. In deciding that specific intent could be derived from the foreseeability of the consequences of certain actions, the Divisional Court was not replacing the specific intent test with a test of "breach of an order" or with a more basic intent test. Rather, it was finding the specific intent test to be met in the circumstances of the applicant's case. This approach to proof of specific intent had clear precedent. By stating that intent could be demonstrated by the foreseeability of consequences, the Divisional Court had not overstepped the limits of what could be regarded as an acceptable clarification of the law.

The Court also rejected the applicant's argument that the judge's direction had lacked clarity. It could not be considered ambiguous, especially when taken in the context of the other information provided to the applicant by the jury officer, the notices posted around the court building and the applicant's oath of affirmation at the start of the trial. The jury members were clearly told not to "go on the internet", not to "try and do any research of [their] own" and not to deal with the case in any way after leaving the courtroom. On any interpretation of the judge's direction, going on the Internet to conduct research into the defendant's previous conviction was clearly prohibited.

The test for contempt of court applied in the applicant's case had thus been both accessible and foreseeable. The law-making function of the domestic courts had remained within reasonable limits with the judgment in her case being, at most, a step in the gradual clarification of the rules of criminal liability for contempt of court through judicial interpretation. Any development of the law had been consistent with the essence of the offence and could have reasonably been foreseen.

Conclusion: no violation (unanimously).

ARTICLE 8

Respect for private and family life

Restrictions on visits by family members and on right to converse in own language in prison in separatist region of the Republic of Moldova: *no violation; violation*

Mozer v. the Republic of Moldova and Russia - 11138/10
Judgment 23.2.2016 [GC]

(See Article 5 § 1 above, page 15)

Court order for children's return to their father against their will: *violation*

N.Ts. and Others v. Georgia - 71776/12
Judgment 2.2.2016 [Section IV]

Facts – The applicants were a maternal aunt and her three minor nephews. Following the death of their mother in November 2009, the boys went to live with their mother's relatives as their father, who

had a previous conviction for drug abuse, was undergoing treatment for drug addiction.

In early 2010 the father sought a court order for the return of his sons. At first instance, although asked to appoint a representative to protect the boys' interests, the Social Service Agency was not involved in the proceedings. The proceedings ended in an order for the boys' return to their father, despite an expert report recommending that no change be made to their living environment as they suffered from separation anxiety disorder and showed a negative attitude towards their father. Although the order for the boys' return was ultimately upheld following a series of appeals, it remained unenforced, as the boys refused to move in with their father and two attempts to hand them over were unsuccessful.

In the Convention proceedings the aunt complained, on behalf of her nephews, that the boys' right to respect for their private and family life (Article 8 of the Convention) had been violated on account of the domestic courts' decision to return them to their father. In a preliminary objection, the Government argued that the aunt did not have the necessary standing to act on behalf of her nephews as the father had become their sole legal guardian after their mother's death and the boys had never been placed under the guardianship of their aunt.

Law – Article 8

(a) *Locus standi of the aunt* – As minors who had lost their mother and had a complicated, if not hostile, relationship with their father, the three boys were in a vulnerable position. There was no doubt that their aunt had a sufficiently close link with them to complain on their behalf, as she had cared for and provided a home for them, and they had been living with their maternal family for more than two years by the time the application was lodged with the Court. Moreover, in view of their alienation from their father, there was no closer next of kin who could complain on their behalf. As for potential institutional alternatives, the Social Service Agency was itself the subject of criticism in the present case and it would not be realistic to expect it to facilitate the complaint before the Court on behalf of the boys.

In the absence of any conflict of interest regarding the subject matter of the application and in view of the important interests at stake for the boys, the aunt had standing to lodge the case on their behalf.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – The essence of the case lay in the applicants' complaint that the procedures followed by the domestic authorities were not in compliance with the requirements of Article 8 and disregarded the best interests of the children. Two fundamental aspects had to be examined: whether the boys were duly involved in the proceedings, and whether the decisions taken by the domestic courts were dictated by the boys' best interests.

(i) *The right to be represented and heard* – Although the first-instance court had requested the appointment of a representative for the boys, the Court had reservations as to the specific role played by the representative in the course of the domestic proceedings. Firstly, the Social Service Agency had become formally involved in the proceedings only from the appeal stage and then only as an "interested party", a status for which the Code of Civil Procedure made no provision. It was therefore unclear how the Agency could have effectively represented the children's interests while lacking a formal procedural role. Secondly, it remained ambiguous what such representation implied exactly, as the relevant legislation did not spell out the functions and powers of the representative. In practice, during the period of more than two years the proceedings in the applicants' case had lasted, representatives of the Agency had met the boys only a few times with the purpose of drafting reports on their living conditions and their emotional state of mind, but no regular contact had been maintained in order to monitor the boys and establish a trustful relationship.

In that context, the Court referred to the recommendations of several international bodies, including the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, which sought to ensure that in cases where there were conflicting interests between parents and children either a guardian *ad litem* or another independent representative was appointed to represent the child's views and keep it informed about the proceedings. The Court did not see how the Social Service Agency's drafting of reports and attending court hearings without the requisite status could be considered adequate representation by those standards. Moreover, contrary to the relevant international standards, the national courts had failed to consider the possibility of directly involving the oldest boy (who was born in 2002) in the proceedings.

(ii) *Assessment of the children's best interests* – The domestic courts' decision was mainly based on two reasons: that it was in the boys' best interest to be

reunited with their father and that the maternal family had a negative influence on the boys. While the Court accepted that motivation, it noted that the domestic courts had failed to give adequate consideration to the important fact that the boys did not want to return to their father. Whatever manipulative role the maternal family may have played in alienating the boys from their father the evidence before the domestic courts concerning the boys' hostile attitude towards him was unambiguous. Moreover, there had been several reports by psychologists who had warned of the potential risks to the boys' psychological health if they were forcefully returned to their father. In those circumstances, ordering such a radical measure without considering a proper transition and preparatory measures to assist the boys and their estranged father to rebuild their relationship appeared to be contrary to the boys' interests.

The Court concluded that the flawed representation and consequential failure to duly present and hear the boys' views had undermined the procedural fairness of the decision-making process and been exacerbated by an inadequate and one-sided consideration of the boys' best interests in which their emotional state of mind was simply ignored, in breach of their right to respect for their family and private life.

Conclusion: violation (unanimously).

Article 41: EUR 10,000 jointly to the three boys in respect of non-pecuniary damage (sum to be held by the aunt).

(See, on the question of standing, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], 47848/08, 17 July 2014, Information Note 176; *Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania*, 2959/11, 24 March 2015, Information Note 183; see also, sections 6.1 and 6.2 (alternative care) in the Handbook on European law relating to the rights of the child)

***De facto* discrimination against women arising out of method of calculation of invalidity benefits:** *Article 8 applicable*

Di Trizio v. Switzerland - 7186/09
Judgment 2.2.2016 [Section II]

(See Article 14 below, page 36)

Respect for private life

Transfer of deputy prefect to less important post on account of his religious convictions: *violation*

Sodan v. Turkey - 18650/05
Judgment 2.2.2016 [Section II]

Facts – At the material time the applicant was deputy governor of Ankara. In June 1998 an inspector in the governor's office was instructed to carry out an investigation into the applicant's general conduct, in particular on the basis of two circulars, one concerning separatism and the other fundamentalism, among senior officials in the governor's office. The inspector's report mentioned the applicant's well-known religious beliefs and stated that the applicant's wife wore the Islamic veil. Drawing in particular on a decision by the National Security Council relating, *inter alia*, to fundamentalist activities, it proposed transferring him to another department or to a post in central administration not entailing any public role. In July 1998 the applicant was transferred to a post of deputy governor in a less important town. His appeals were dismissed.

Law – Article 8: The central question in the case was whether the applicant was transferred solely on account of his qualifications and the requirements of the post, as the Government argued, or rather, as the applicant submitted, of his religious beliefs and private life.

It should be noted at the outset that the internal investigation concerning the applicant was ordered on the basis of a decision which had no bearing on the capacity of senior officials to embody authority and show initiative when discharging their duties. It related exclusively to the place of religion in society and within the institutions and to how people dressed. Moreover, although the inspector's report did mention certain aspects of the applicant's character, it attached considerable importance to his religious beliefs and the fact that his wife wore an Islamic veil. If the applicant's transfer had been exclusively or primarily based on his qualifications, it would be difficult to understand why the authorities placed so much emphasis on his religious beliefs, his wife's clothing and, more broadly, the decision by the National Security Council. The facts of the case as a whole suggested that there was an evident causal link between the applicant's private life and beliefs, on the one hand, and his transfer, on the other. The applicant's transfer amounted to a kind of disguised penalty. It therefore constituted interference in his private life.

However, the Government had failed to provide any legal basis or to mention any legitimate aim or reasons to explain why that interference might be considered necessary in a democratic society.

As the inspector's report itself acknowledged, the applicant had been impartial in the performance of his duties, and no activities relating to religious fundamentalism had ever been noted. The mere actual or assumed proximity to or membership of a religious movement could not constitute sufficient grounds in itself for adopting an unfavourable measure unless it had been clearly demonstrated that the applicant did not act impartially or received instructions from members of that movement, or that the movement in question represented a genuine threat to national security. Furthermore, even supposing that that were actually the case, it would be difficult to understand how that threat could be countered by merely transferring the applicant to another town rather than removing him from office. As regards the fact that the applicant's wife wore the Islamic veil, the concern to preserve the neutrality of the public service did not justify taking that fact into account in the decision to transfer the applicant, since that was a private matter for those concerned and was not covered by any legislative or statutory provision.

Conclusion: violation (unanimously).

The Court also found a violation of Article 6 § 1 of the Convention on account of the length of the impugned proceedings.

Article 41: EUR 9,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Ivanova v. Bulgaria*, 52435/99, 12 April 2007, Information Note 96)

Respect for family life

Imposition of immediate custodial sentence on mother for preventing father from seeing their child: *no violation*

Mitrova and Savik v. the former Yugoslav Republic of Macedonia - 42534/09
Judgment 11.2.2016 [Section I]

Facts – The applicants are mother and daughter. Following her parents' divorce in May 2007, the daughter, three months old at the time, was placed in her mother's custody. The contact rights of her father were determined by a social welfare centre ("the Centre"). Following her repeated refusals to allow the father to meet their daughter, the mother was twice convicted and given a suspended prison term. However, she continued to prevent the father from seeing the daughter and, as a result, was convicted a third time and on this occasion given an immediate three months' custodial sentence. The daughter was placed with the father from 30 July 2009, when the mother started serving her prison sentence. Following her release on 8 October 2009, the Centre decided on arrangements for her contact with the daughter and they met for the first time on 19 February 2010. The Centre gradually increased the amount of contact between the applicants until the mother eventually regained custody of the daughter after February 2011 when the father's custody claim before the civil courts was finally dismissed. However, in March 2012 the Supreme Court overturned the lower courts' judgments, the decisive reasons being the mother's refusal to allow the father to see the daughter and that it was in the child's best interests for the father to be given custody. Following that judgment, the Centre determined new living arrangements based on an agreement between the parents, under which the daughter was to live with her mother during the week and with her father at the weekend.

The applicants complained about the mother's custodial sentence, the Centre's failure to determine the mother's contact rights for several months during and immediately after her imprisonment, and the Supreme Court's judgment revoking custody of her daughter.

Law – Article 8: The mother's conviction and custodial sentence were "in accordance with the law" and aimed at enabling the father and the daughter to enjoy each other's company, deterring the mother from reoffending and helping crime prevention as a whole.

As to whether the custodial sentence was "necessary in a democratic society", the Court had to look at it in the light of the case as a whole. In this connection it could not overlook the fact that the sentence was imposed after the mother had already been convicted of the same offence on two previous occasions and sentenced to a suspended prison term. Despite those convictions and sentences, the mother had remained uncooperative and continued to prevent the father from seeing the daughter. The trial court had been reasonably guided by the best interests of the child as determined in the Centre's orders. Whereas the custodial sentence had had short-term effects on the applicants' rights, in the long run it had as a primary consideration the child's best interests, namely to enable her to benefit from the company of both parents. The

domestic authorities had therefore carried out an acceptable assessment of the relevant facts and taken a measure which could not be considered disproportionate to the legitimate aims pursued. The likelihood of family reunification would be progressively diminished and eventually destroyed if the biological father and the child were not allowed to see each other at all, or only so rarely that no natural bonding between them was likely to occur.

During the mother's detention, which had lasted two months and nine days, there had been no direct contact between the applicants. However, it was not alleged, nor was any evidence adduced, that during her detention the mother had made a proper request to the authorities, including the Centre, to allow her to contact the child. In the absence of any such request, the Centre was not empowered to determine of its own motion the applicants' rights in that respect. Immediately before her release (on 6 October 2009) and afterwards (on 4 January 2010), the mother lodged two contact requests with the Centre, which could not be examined because she refused to take part in interviews with officials from the Centre. On the basis of a fresh request made on 29 January 2010 the Centre had decided on the arrangements for contact with the daughter. That order had been issued within a reasonable time (on 10 February 2010) and had allowed the applicants to meet each other at the first scheduled meeting on 19 February 2010. In those circumstances, the State could not be held responsible for the fact that the applicants had not seen each other between 30 July 2009 and 19 February 2010.

As regards the Supreme Court's judgment granting the father custody of the daughter, it had given primary consideration to the child's best interests in enjoying the company of both parents. That assessment was within the State's margin of appreciation and the reasons given were relevant and sufficient.

Conclusion: no violation (five votes to two).

Placement of children for adoption on grounds of mother's poverty and refusal to undergo sterilisation: *violations*

Soares de Melo v. Portugal - 72850/14
Judgment 16.2.2016 [Section IV]

Facts – From 2005 the authorities were repeatedly notified that the applicant, a Cape Verdean national, and her ten children were living in precarious conditions as she was unemployed and the children's father was polygamous and often absent from the family home. In January 2007 proceedings before the Child and Youth Protection Commission led to a protection agreement for the children below the age of majority being signed with the applicant and her husband. As there was no improvement in the situation, the Family Court initiated child protection proceedings in September 2007, on the grounds that the applicant's living conditions were inadequate and she was neglecting her children. The family was monitored by the court's social services team. In June 2009 the court inserted additional clauses in the protection agreement, including a requirement for the applicant to prove that she was attending hospital sessions with a view to undergoing sterilisation by tubal ligation. In May 2012, in view of the couple's failure to abide by their undertakings, the Family Court ruled, among other things, that the applicant's seven youngest children should be taken into care with a view to adoption and that the parents should be deprived of parental responsibility in respect of those children and denied all contact with them. None of the applicant's subsequent appeals against that judgment were successful. At the time of the European Court's judgment, her appeal before the Constitutional Court was still pending. In November 2014 the European Court allowed a request from the applicant for an interim measure granting her a right of contact with her children. Since March 2015 she has made weekly visits to see her children in the three separate institutions in which they have been placed.

Law – Article 8: The placement order with a view to adoption, the deprivation of parental responsibility and the prohibition of all contact constituted "interferences" with the exercise of the applicant's right to respect for her family life. The interferences had had a basis in law and had pursued the legitimate aim of protecting the rights and freedoms of others.

(a) *The order for the applicant's seven youngest children to be taken into care with a view to their adoption*

(i) *The applicant's precarious circumstances* – The applicant had ten children to bring up on her own. She lived on a monthly family allowance of EUR 393 and relied on food banks and donations. Despite observing her situation of manifest material deprivation, the domestic authorities had not made any attempt to compensate for such inadequacies through additional financial support to meet the family's basic needs and to cover the costs

of admitting the youngest children to a crèche so that the applicant could take up paid employment. The social services had expected the applicant to submit a formal application setting out her needs, even though they themselves had already noted and reported those needs. However, the authorities should first have taken practical steps to allow the children to live with their mother before it placed them in care and initiated an adoption procedure. Furthermore, the role of the social welfare authorities was precisely to help people in difficulty, to offer them guidance and to advise them. Special vigilance and increased protection were essential in the case of vulnerable individuals.

In addition, at no time during the procedure had there been any mention of violent conduct, mistreatment or sexual abuse in respect of the children, or of any emotional deficiencies, health concerns or mental disturbance on the part of the parents. On the contrary, the Family Court had observed that the emotional ties between the applicant and her children were especially strong. There was no indication in the file at domestic level that any examination of the children, at least the oldest ones, had ever been carried out.

(ii) *The applicant's undertaking to be sterilised as part of the protection agreement* – The insertion in the protection agreement signed with the social services of an undertaking by the applicant to be sterilised was a particularly serious matter. The social services could have recommended contraceptive methods of a less intrusive nature. Even assuming that the applicant had willingly agreed to this initiative, she had ultimately refused to undergo the operation and her refusal had clearly been held against her by the domestic courts. Moreover, recourse to a sterilisation procedure should never be a condition for retaining parental rights. Accordingly, the mother's failure to honour her undertaking to undergo such an operation should on no account be held against her, even in the case of a voluntary and informed undertaking on her part.

(b) *Prohibition of all contact between the applicant and her seven youngest children* – Despite the lack of any signs of violent conduct or abuse against the children, the applicant had been deprived of all contact rights even though her children were between 7 months and 10 years old and her appeal against the Family Court's judgment was still pending. Furthermore, the children had been placed in three different institutions. This had broken up not only the family but also the siblings as a unit and had been contrary to the children's best interests.

(c) *The decision-making process* – In reaching their decisions, the domestic courts had mainly relied on reports drawn up on the applicant in previous years. It had not ordered any psychological assessment of the applicant and her children by an independent expert. Nor had the Court of Appeal considered the material submitted by the applicant in support of her appeal to show that she had attempted to find solutions to her problems after having her children taken from her. On the contrary, it had simply reproduced the single judge's decision verbatim without carrying out an effective review of the situation.

In addition, the applicant had not been represented by counsel in the proceedings before the Family Court, although on account of the complexity and subject matter of proceedings for the protection of children at risk and the extremely serious and delicate consequences of such proceedings both for the children and for the parents, additional precautions and steps should have been taken to ensure not only that the applicant understood exactly what was at stake in the proceedings but also that she could take part effectively in them.

(d) *Conclusions* – There had been a violation of Article 8 of the Convention i. on account of the order for six of the applicant's children to be taken into care with a view to their adoption; ii. because the placement and adoption order had taken into account the applicant's failure to honour her undertaking to be sterilised by means of tubal ligation; iii. on account of the prohibition of all contact between her and her children, and iv. because the decision-making process that had led to the children being placed in care with a view to their adoption had been unfair on account of the applicant's lack of effective involvement.

Conclusion: violations (unanimously).

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

(See also the Factsheet on Parental rights)

ARTICLE 9

Freedom of religion

Refusal by prison authorities in separatist region of the Republic of Moldova to allow prisoner to see pastor: *no violation; violation*

Mozer v. the Republic of Moldova and Russia
- 11138/10
Judgment 23.2.2016 [GC]

(See Article 5 § 1 above, page 15)

ARTICLE 10

Freedom of expression
Freedom to impart information

Objective liability of Internet portals for third-party comments: *violation*

Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary - 22947/13
Judgment 2.2.2016 [Section IV]

Facts – The first applicant was a self-regulatory body of internet content providers and the second applicant the owner of an Internet news portal. Both applicants allowed users to comment on publications appearing on their portals. Comments could be uploaded following registration and were not edited or moderated by the applicants before publication. The applicants' portals contained disclaimers stating that the comments did not reflect the applicants' own opinion, and a notice-and-take-down system, which allowed readers to request the deletion of comments that caused concern.

In February 2010 the first applicant published an opinion about two real-estate management websites the full text of which was subsequently also published on the second applicant's portal. The opinion attracted user comments some of which criticised the real-estate websites in derogatory terms. As a result, the company operating the websites brought a civil action against the applicants alleging damage to its reputation. The applicants immediately removed the offending user comments. They were nevertheless found by the domestic courts to bear objective liability for their publication, and ordered to pay procedural fees.

Law – Article 10: The Court had to assess whether an appropriate balance between the applicants' right to freedom of expression under Article 10 and the plaintiff company's right to reputation under Article 8 had been struck. This assessment had to be carried out following the criteria established by the Court in the leading case of *Delfi AS v. Estonia* ([GC], 64569/09, 16 June 2015, Information Note 186).

(a) *Context in which the comments were posted* – The article under which the comments were posted concerned the allegedly unethical and misleading business practice of two real estate websites which had already prompted various proceedings against the company operating them before consumer-protection bodies. The comments triggered by the article could therefore be regarded as going to a matter of public interest. The article was not devoid of a factual basis or liable to provoke gratuitously offensive comments. For their part, the domestic courts appeared to have paid no attention to the role, if any, played by the applicants in generating the comments.

(b) *Content of the comments* – The domestic courts had found the comments unreasonably offensive, injurious and degrading. However, the Court observed that the use of vulgar phrases in itself was not decisive and that it was necessary to have regard to the specificities of the style of communication on certain Internet portals. The expressions used in the comments, albeit belonging to a low register of style, were common in communication on many Internet portals, so the impact that could be attributed to them was thus reduced.

(c) *Liability of the authors of the comments* – The domestic courts had found the applicants liable for "disseminating" defamatory statements without embarking on a proportionality analysis to ascertain the respective liability of the authors of the comments and of the applicants. Furthermore, even accepting the domestic courts' analysis, holding the applicants liable for third-party comments was difficult to reconcile with the Court's case-law requiring "particularly strong reasons" before envisaging the punishment of a journalist for assisting in the dissemination of statements made by a third party.

(d) *Measures taken by the applicants and conduct of the injured party* – The applicants had removed the comments in question as soon as they were notified of the initiation of civil proceedings. They also had general measures in place to prevent or remove defamatory comments on their portals, including a disclaimer, a team of moderators, and a notice-and-take-down system. Despite this, the domestic courts held them liable for allowing unfiltered comments to be posted. For the Court, that finding amounted to requiring excessive and impracticable forethought capable of undermining the freedom to impart information on the Internet. The Court further noted that the domestic courts had not taken into account the fact that the plaintiff company at no stage requested the applicants to remove the comments but went directly to court.

(e) *Consequences for the injured party and the applicants* – The Court noted that what was at stake in the instant case was the commercial reputation of a private company rather than the reputation of a natural person, which enjoyed greater protection. Moreover, the comments were hardly capable of making any additional and significant impact on

the attitude of consumers as inquiries into the plaintiff company's business conduct had already started when the article was published. In any event, the domestic courts did not seem to have evaluated whether the comments reached the requisite level of seriousness and whether they were made in a manner that actually caused prejudice. As for the impact of the judgments on the applicants, although they had not been required to pay compensation for non-pecuniary damage, it could not be excluded that the finding against them might form the basis for further legal action resulting in such an award. In any event, the decisive issue was that objective liability for third-party comments could have foreseeable negative consequences for an Internet portal, for example by requiring it to close the commenting space altogether. This in turn could have a chilling effect on freedom of expression on the Internet, which could be particularly detrimental for a non-commercial website such as that operated by the first applicant.

In conclusion and given the absence of hate speech or direct threats to physical integrity in the user comments, the Court found that there was no reason to hold that, if accompanied by effective procedures allowing for a rapid response, the notice-and-take-down-system could not have provided a viable avenue to protect the plaintiff company's commercial reputation in the present case.

Conclusion: violation (unanimously).

Article 41: no claim made in respect of damage.

(See also the factsheets on the Right to the protection of one's image and on Hate speech)

Freedom of expression

Civil award of damages against journalist for comments criticising quality of medical care received by Prime Minister: *violation*

Erdener v. Turkey - 23497/05
Judgment 2.2.2016 [Section II]

Facts – The applicant was at the relevant time a member of parliament belonging to a party chaired by the Turkish Prime Minister.

In August 2002 a national daily newspaper published an article on the Prime Minister's state of health. The journalist reported a discussion she had had with two MPs, one of whom was the applicant. Among other things the applicant was reported to have said about the doctors of the university hospital in question: "They nearly drove him to his death".

The administration of the university filed a civil suit against the applicant and the other MP seeking compensation for damage to its reputation.

In June 2003 the applicant was ordered to pay about EUR 1,200 in compensation. The court found that she had expressed a personal opinion, consisting of an accusation against the hospital, and that in itself this constituted damage to the hospital's reputation.

The applicant's appeals against the civil judgment were unsuccessful.

Law – Article 10: The judgment against the applicant ordering her to pay damages had constituted an interference with her right to freedom of expression, as prescribed by law.

The applicant had expressed her opinion both as an MP and as a member of the Prime Minister's party on a subject of general interest which had received wide media coverage, concerning, in particular, the right of citizens to be informed of any allegations about the Prime Minister's state of health.

Her remarks especially concerned rumours which had been circulating for a long time in the National Assembly. The offending expression, "They nearly drove him to his death", seen in the context of the remarks as a whole, and notwithstanding its polemical undertone, amounted to a personal opinion criticising the Prime Minister's medical treatment at the university hospital. Having regard to the documents submitted by the applicant to the domestic courts, that opinion had a sufficient factual basis and was closely linked to the circumstances of the case.

In addition, the District Court had disregarded the manner in which the applicant had made her remarks. It had been a private conversation and there was no evidence to suggest that she had intended to use it to publicly wage a defamatory campaign against the hospital.

The domestic court had considered the offending remark out of its context, concluding that it had, in itself, been sufficient to damage the university's reputation. Such an expression should have been placed in the specific context of the circumstances of the case. For the same reasons, the Court could not agree with the conclusion that it had been sufficient "in itself" to damage the university's reputation.

Thus, the judicial authorities had not struck a fair balance between the need to protect the applicant's right to freedom of expression and the need to safeguard the university's reputation. Even supposing that the reasoning given by the District Court in finding against the applicant had been relevant, it had not been sufficient to justify the interference with her freedom of expression.

Lastly, even though the damages awarded against the applicant had ultimately not been very high, the judgment had certainly had a deterrent effect on the free public discussion of questions which were of interest to the wider community.

Consequently, the upholding of the defamation claim against the applicant had constituted a disproportionate interference with her right to freedom of expression and one that had not been "necessary in a democratic society" within the meaning of Article 10 of the Convention.

Conclusion: violation (unanimously).

Article 41: EUR 7,500 in respect of non-pecuniary damage; EUR 2,340 in respect of pecuniary damage.

Court order to black out photograph of captive and tortured person in magazine on sale: *no violation*

Société de Conception de Presse et d'Édition v. France - 4683/11
Judgment 25.2.2016 [Section V]

Facts – A magazine published by the applicant company printed a photograph of a man wearing shackles and showing visible signs of ill-treatment, together with an article on the opening of the criminal trial of his torturers. The applicant company was sued by the family of the victim, who had died in the meantime from his injuries, and was ordered, on pain of a penalty for non-compliance, to black out the photograph in question in all the copies of the magazine on sale or in circulation. The company was also ordered to pay EUR 20,000 in compensation to the victim's mother and EUR 10,000 to each of his sisters. It lodged an appeal against that decision, which was dismissed.

Law – Article 10: The article, which concerned a court case and crimes that had been committed, had concerned information apt to contribute to a debate of general interest. However, the subject of the photograph had been an ordinary member of the public. Furthermore, there had been no reason why the domestic courts should not make a distinction, as they had done, between publication of the article and of the photograph.

As to the means by which the photograph had been obtained, the courts had noted that it had not been taken in a public place but rather by the victim's torturers while he was being held captive, that it had belonged to the family and to the investigation file in the case, that it had not been intended for publication and that it had been published without the permission of the deceased's relatives. The courts also rejected the argument that the picture had previously been shown – of necessity fleetingly – during a television programme. In the Court's view, therefore, the photograph had not been public.

With regard to the content, form and repercussions of publication, the Court also agreed with the domestic courts' findings that the photograph in question, which was suggestive of submission and torture, infringed human dignity and that its publication had shown a grave disregard for the grief of the victim's mother and sisters, in other words for their privacy. The passage of time was not a relevant argument in this regard: not only had the photograph never previously been published, its publication also coincided with the opening of the trial of the perpetrators, whom the deceased's relatives would have to face. Given that the victim's death had occurred in circumstances that were particularly violent and traumatic for his family, the journalists had had a duty to display prudence and care. The publication of the photograph, on the cover and in four places inside a magazine with a very wide circulation, had exacerbated the trauma experienced by the relatives.

As to the severity of the measure, the applicant company had not been ordered to withdraw the magazine altogether, but merely to black out the offending photograph; hence, no restrictions had been imposed on the article itself or the other photographs accompanying it. The measure had been an appropriate response to the infringement of the family's privacy, imposing only proportionate restrictions on the exercise of the applicant company's rights. The applicant company had not demonstrated how the measure was liable to have a chilling effect on the way in which the magazine had exercised, and continued to exercise, its freedom of expression. Likewise, the award of compensation to the deceased's relatives had not been deemed excessive.

The measure in issue, for which the domestic courts had given relevant and sufficient reasons, had therefore been proportionate to the legitimate aim pursued.

Conclusion: no violation (unanimously).

ARTICLE 11

Freedom of peaceful assembly

Administrative conviction and detention of opposition members aimed at preventing them from participating in a demonstration and punishing them for their political activity: *violation*

Huseynli and Others v. Azerbaijan - 67360/11, 67964/11 and 69379/11
Judgment 11.2.2016 [Section V]

Facts – The year 2011 was marked by an increased number of opposition demonstrations in Azerbaijan, mainly in Baku. The applicants, who were members of the main opposition parties or groups, had participated in the demonstrations and had been arrested and convicted a number of times as a result. They had intended to attend a demonstration scheduled for 2 April 2011 and one of the applicants was involved in its organisation. The municipal authority refused to allow the demonstration to be held at the place indicated by the organisers, and proposed that it be held at another location on the outskirts of Baku. The Ministry of Internal Affairs warned the public that attempts to hold a protest rally in central Baku would be prevented. Nevertheless, the organisers decided to hold the demonstration in central Baku, and information about it was disseminated via Facebook and the press. Two days before the scheduled demonstration, all three applicants were arrested, convicted of public-order offences and sentenced to seven days' administrative detention. They appealed unsuccessfully.

Before the European Court, the applicants alleged that the true reason behind their arrest and conviction had been to punish them for their political activity and to prevent them from attending the demonstration of 2 April 2011.

Law – Article 11: According to a number of international and domestic reports, at the material time the authorities had resorted to various seemingly arbitrary measures to quell support for the opposition and to prevent people from participating in demonstrations, such as pre-emptive and/or retaliatory arrests and convictions, police warnings not to attend a protest rally, closing down organisations working on human rights and democracy or demolishing buildings where they were located.

A number of elements in the instant cases led the Court to conclude that the administrative proceedings against the applicants had sought to deter them from demonstrating and to punish them for doing so. Firstly, the applicants' affiliation with the opposition was generally known. One of them held a high position in his party. Two of the applicants had been candidates in parliamentary elections. All three had actively participated in various protests held by the opposition. Secondly, two days before the scheduled demonstration all three applicants had been sentenced to seven days' administrative detention on dubious grounds and in similar circumstances. One was accused of disobeying an order to show an identity document after allegedly being mistaken for a person on a wanted list. The other two applicants had been accused of swearing aloud at no one in particular and for no apparent reason. It was remarkable that neither of those charges, which were practically identical, provided sufficient details of the acts of which the applicants were accused. They were couched in standardised and vague terms and remained unclear and unexplained at the trial. The findings of fact in the applicants' cases had been reached by the domestic court following brief trials, were based solely on the materials provided by the police and, like those materials, lacked any details and were strikingly succinct. The resulting court decisions appeared to have been a mere unquestioned recapitulation of the circumstances and the charges as presented in the relevant police reports and did not appear to have been reached as a result of an objective and thorough judicial examination.

There were cogent elements that prompted the Court to doubt the credibility of the administrative proceedings against the applicants and to draw strong, clear and concordant inferences to the effect that the applicants' conviction and ensuing detention were aimed at preventing them from participating in the demonstration and punishing them for having participated in opposition protests in general. Those measures, imposed in reliance on legal provisions which had no connection with their intended purpose, had amounted to an interference with the applicants' right to freedom of peaceful assembly and could only be characterised as arbitrary and unlawful. They had had a chilling effect on the applicants and a serious potential to deter other opposition supporters and the public

at large from attending demonstrations and, more generally, from participating in open political debate.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 6 §§ 1 and 3 and a violation of Article 5 § 1 in respect of all three applicants.

Article 41: EUR 12,000 each in respect of non-pecuniary damage.

ARTICLE 13

Effective remedy

Lack of effective domestic remedies to complain of breach of Convention rights for person detained in separatist region of the Republic of Moldova: *no violation; violation*

Mozer v. the Republic of Moldova and Russia - 11138/10
Judgment 23.2.2016 [GC]

(See Article 5 § 1 above, page 15)

Lack of suspensive effect of remedy for collective expulsions: *case referred to the Grand Chamber*

Khlaifia and Others v. Italy - 16483/12
Judgment 1.9.2015 [Section II]

(See Article 4 of Protocol No. 4 below, page 42)

Effectiveness of "Pinto" remedy for length of administrative proceedings where no application for expedited hearing was made: *violation*

Olivieri and Others v. Italy - 17708/12 et al.
Judgment 25.2.2016 [Section I]

Facts – In August 1990 the applicants lodged separate applications with the Regional Administrative Court. They applied jointly for the case to be set down for hearing. In February 2008 the registry notified them of the requirement to lodge a fresh application for the case to be set down for hearing, failing which the proceedings would lapse. The applicants complied. At the same time they lodged applications with the Court of Appeal on the basis of the "Pinto Act", complaining of the excessive length of the administrative proceedings. Between February and April 2009 their applications were declared inadmissible on the grounds that, during the administrative court proceedings, the applicants had not requested an urgent hearing as required by a new condition for the admissibility of "Pinto" applications which had come into effect on 25 June 2008.

Law – Article 13: On 25 June 2008 the legislature had introduced a new procedure for complaints concerning the excessive length of administrative court proceedings. The procedure comprised two stages. The first stage consisted in making an application during the administrative proceedings for the case to be set down for an urgent hearing. The second stage, governed by the "Pinto" Act, allowed individuals to lodge a claim for just satisfaction with the competent Court of Appeal.

The President of the Administrative Court simply had the option of setting the case down for an urgent hearing. Furthermore, the domestic legislation did not appear to lay down detailed provisions governing the examination of applications for a case to be set down for an urgent hearing, and specifically the criteria to be applied in order to reject or grant such requests and the implications, where the courts found in the applicant's favour, in terms of the conduct of the proceedings. In view of these factors and of the courts' practice, an application for the case to be set down for an urgent hearing did not appear to be an effective means of speeding up the court's decision. It had no significant impact on the length of proceedings, as it did not result in their being speeded up or prevent them from exceeding a duration that might be deemed reasonable. The outcome of such an application was therefore uncertain. Furthermore, in the absence of transitional arrangements, the new provision applied automatically to all "Pinto" applications, irrespective of the length of the main administrative proceedings. This meant that the parties were obliged to lodge a series of applications aimed at the conclusion of proceedings whose duration was already unreasonable. This condition of admissibility was apparently a formal condition which had the effect of impeding access to the "Pinto" procedure and thus rendering it ineffective for the purposes of Article 13. Since failure to comply with this condition automatically resulted in "Pinto" applications being declared inadmissible, the applicants had been deprived of the opportunity of obtaining appropriate and sufficient redress.

Furthermore, the legislature had amended the provision in question in 2010, confirming the doubts expressed by the Court in its *Daddi* deci-

sion. The findings expressed at that time also applied to the new wording of the legislation. In other words, if the legislation were interpreted by the Italian courts in such a way that periods prior to 25 June 2008 were not taken into account in determining the period giving rise to compensation, certain categories of applicants were liable to be systematically denied the possibility of obtaining appropriate and sufficient redress under the "Pinto" Act.

Conclusion: violation (unanimously).

The Court also found a violation of Article 6 § 1 of the Convention on account of the unreasonable length of the proceedings in issue.

Article 41: EUR 22,000 each in respect of non-pecuniary damage.

(See *Daddi v. Italy* (dec.), 15476/09, 2 June 2009, Information Note 120)

ARTICLE 14

Discrimination (Article 2)

Presidential pardon and release of convicted murderer following his transfer to Azerbaijan to serve remainder of sentence imposed in Hungary for ethnically motivated crimes: *communicated*

Makuchyan and Minasyan v. Azerbaijan and Hungary - 17247/13
[Section IV]

(See Article 2 above, page 9)

Discrimination (Article 8)

Method of calculation of invalidity benefits which in practice was discriminatory against women: *violation*

Di Trizio v. Switzerland - 7186/09
Judgment 2.2.2016 [Section II]

Facts – The applicant worked full time. In 2002 she was obliged to stop work because of back problems. In October 2003 she applied for a disability allowance on account of lower back and spinal pain. In February 2004 she gave birth to twins, following a pregnancy during which her back pain had worsened. In 2005, during a household assessment carried out at her home, the applicant stated in particular that she would have to work half time because her husband's income alone was insufficient. She was granted a disability allowance for the period from 2002 to May 2004. As of May 2004, however, the "combined" method was applied, on the grounds that even if she had not had a disability the applicant would not have worked full time after the birth of her children. The decision to apply this method was based, among other considerations, on the applicants' statements to the effect that she felt able to work half time only and wanted to devote the remainder of her time to her household and children. As a result of the application of this means of calculation, the applicant did not receive any disability allowance.

In the proceedings before the Court the applicant complained that the application of the combined method discriminated against those concerned in comparison with persons who were not in paid employment and with those who did not have a household or children to care for and could therefore work full time, since the combined method did not apply in either of those cases.

Law – Article 14 taken in conjunction with Article 8

(a) *Applicability* – Measures enabling one parent to stay at home to look after the children promoted family life and thus had an impact on the way it was organised; such measures therefore came within the ambit of Article 8. The present case also concerned issues relating to the organisation of family life, albeit in a different manner. The available statistics demonstrated that the combined method, in the great majority of cases, concerned women who wished to work part time after the birth of their children. In its judgment in the applicant's case, the Federal Court had acknowledged that the combined method could in some cases result in the loss of the allowance, especially for women who worked part time following the birth of their children. The application of the combined method to the applicant had been apt to influence her and her husband in deciding how they divided up tasks within the family and, accordingly, to have an impact on the organisation of their family life and careers. Furthermore, the Federal Court had explicitly recognised that the combined method could have negative repercussions for individuals working part time for family reasons, if they became disabled. These considerations were sufficient for the Court to find that the complaint came within the ambit of Article 8, under the heading of "family life". The "private life" aspect of Article 8 also came into play in so far as it guaranteed the right to personal development and autonomy. To the extent that the com-

bined method placed persons wishing to work part time at a disadvantage compared with those in full-time paid employment and those who did not work at all, it could not be ruled out that this method of calculating disability benefits would limit the first category of persons in their choice as to how to divide their private life between work, household tasks and caring for their children.

The overwhelming majority of people affected by the combined method were women who wished to reduce their working hours after the birth of a child. Accordingly, the applicant could claim to be the victim of discrimination on grounds of gender. It followed that Article 14 taken in conjunction with Article 8 was also applicable. It was not necessary to ascertain whether the refusal to grant the applicant a disability allowance also amounted to discrimination on grounds of disability.

(b) *Compliance with Article 14 taken in conjunction with Article 8 of the Convention*

(i) *Existence of a presumption of indirect discrimination in the present case* – In 2009 the combined method had been applied in 7.5% of all decisions on disability benefit. Of those cases, 97% had concerned women. These figures could be considered sufficiently reliable and telling to give rise to a presumption of indirect discrimination.

(ii) *Whether there had been an objective and reasonable justification for the difference in treatment* – The aim of disability insurance was to insure individuals against the risk of becoming unable, owing to a disability, to engage in paid employment or perform routine tasks which they had been able to perform previously and which they would still be able to carry out had they remained in good health. This constituted a legitimate aim capable of justifying the differences observed. In itself, it was consistent with the essence and constraints of such an insurance scheme, which had limited resources and one of whose guiding principles therefore had to be the control of expenditure. Nevertheless, this goal had to be assessed in the light of gender equality. Very weighty reasons would have to be put forward before a difference in treatment based on this ground could be regarded as compatible with the Convention. The authorities' margin of appreciation had therefore been very narrow.

If the applicant had worked full time or had devoted her time entirely to household tasks she would have received a partial disability allowance. It followed clearly that the decision refusing her entitlement to the allowance had been based on her assertion that she wished to reduce her working hours in order to take care of her children and her home. In practice, for the great majority of women wishing to work part time following the birth of their children, the combined method was a source of discrimination.

Furthermore, the application of the combined method had been the subject of criticism for some time from certain domestic authorities and commentators. These were clear indications of a growing awareness that the combined method was no longer consistent with efforts to achieve gender equality in contemporary society, in which women legitimately sought increasingly to reconcile family life and career. Moreover, alternative methods of calculation were possible which would take greater account of women's choice to work part time following the birth of a child. This would make it possible to pursue the aim of greater gender equality without jeopardising the purpose of disability insurance.

In addition to these general considerations, the refusal to grant the applicant even a partial disability allowance had significant practical repercussions for her, even assuming that she could work part time. In view of the foregoing, there had been no reasonable justification for the difference in treatment to which the applicant had been subjected.

Conclusion: violation (four votes to three).

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

(See also the judgment of the Court of Justice of the European Union in *Lourdes Cachaldora Fernández* v *Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS),* C-527/13, 14 April 2015, Information Note 184)

Discrimination between unmarried same-sex couples and unmarried different-sex couples in obtaining family reunification: *violation*

Pajić v. Croatia - 68453/13
Judgment 23.2.2016 [Section II]

Facts – The applicant, a national of Bosnia and Herzegovina, had a stable same-sex relationship with a woman living in Croatia, Ms D.B. In 2011 the applicant lodged a request for a residence permit in that country on the grounds of family reunification with her partner. Her request was

refused as the relevant domestic law excluded such a possibility for same-sex couples whereas it allowed it for unmarried different-sex couples. Her further appeals were unsuccessful.

Law – Article 14 in conjunction with Article 8

(a) *Applicability* – There was no doubt that the relationship of a same-sex couple like the applicants' fell within the notion of "private life" under Article 8 of the Convention. As to whether it also fell within the scope of "family life", it was undisputed that the applicant had maintained a stable relationship with her partner since 2009, travelling regularly to Croatia and sometimes spending three months living with her, which was the only possibility they had to stay together due to the relevant immigration restrictions. Moreover, the couple had expressed a serious intention of living together in the same household in Croatia and of starting a common business. In these circumstances, the fact of not cohabiting with D.B. because of the State's impugned immigration policy did not deprive the applicant's relationship of the stability required to bring her situation within the scope of family life. Therefore, the facts of the case fell within the notion of "private life" and "family life" within the meaning of Article 8, and Article 14 was thus applicable.

(b) *Difference of treatment* – The Croatian domestic law recognised both extramarital relationships of different-sex couples and same-sex couples and thus the possibility that both categories of couples were capable of forming stable committed relationships. Therefore, a partner in a same-sex relationship who applied for a residence permit for family reunification to pursue intended family life in Croatia was in a comparable situation to a partner in a different-sex extramarital relationship pursuing the same aim. However, the domestic law expressly reserved the possibility of applying for a residence permit for family reunification to different-sex couples, whether married or living in an extramarital relationship. Accordingly, by tacitly excluding same-sex couples from its scope, the legislation in question introduced a difference in treatment based on the sexual orientation of the persons concerned.

(c) *Objective and reasonable justification* – Immigration control measures, which may be found to be compatible with Article 8 § 2, could nevertheless amount to unjustified discrimination in breach of Article 14 read in conjunction with Article 8. In cases in which the margin of appreciation afforded to States was narrow, as where there was a difference in treatment based on sex or sexual orientation, the principle of proportionality did not merely require the measure chosen to be suitable in principle for the achievement of the aim pursued, the State also had to show that it was necessary, in order to achieve that aim, to exclude certain categories of people – in this instance persons in a same-sex relationship – from the scope of application of the relevant provisions of domestic law. This applied also to immigration cases. However, the domestic authorities had not advanced any justification or convincing and weighty reasons to justify the difference in treatment between same-sex and different-sex couples in obtaining family reunification. Indeed, a difference in treatment based solely or decisively on considerations regarding the applicant's sexual orientation amounted to a distinction which was not acceptable under the Convention. The difference in treatment was thus incompatible with the provisions of Article 14 read in conjunction with Article 8.

Conclusion: violation (unanimously).

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

(See the Factsheet on Sexual orientation issues)

Discrimination (Article 2 of Protocol No. 1)

Refusal by academy of music to enrol blind person despite her having passed competitive entrance examination: *violation*

Çam v. Turkey - 51500/08
Judgment 23.2.2016 [Section II]

Facts – The applicant, who was blind, passed the entrance examination for a music academy after having successfully taken the practical tests for mastery of the Turkish lute. According to a report drawn up by a medical board and transmitted to the music academy, she could attend lessons in the sections of the academy where eyesight was not required. At the request of the director of the music academy, the report was amended to mention the fact that the applicant "could not receive education or training". The academy rejected the applicant's request for enrolment. Her appeal against that decision was dismissed by the domestic courts. The applicant submitted to the European Court that the rejection of her request for enrolment in the music academy had been discriminatory because it had been based on her blindness.

Law – Article 14 in conjunction with Article 2 of Protocol No. 1: The fact that the academy in question primarily provided teaching in the artistic

field did not justify precluding from the scope of Article 2 of Protocol No. 1 scrutiny of the criteria for acceding to that institution.

Various legislative provisions in force at the material time enshrined the right of children with disabilities to education without discrimination. Therefore, the origin of the applicant's exclusion from education in the music academy lay not in the legislation but in the academy's rules, which required all applicants for enrolment to provide a medical certificate of physical ability. The Court could not overlook the effects of such a requirement on persons like the applicant with a physical disability. Noting the ease with which the music academy had secured a revision of the medical report provided by the applicant, there could be no doubt that her blindness had been the sole reason for refusing to enrol her. At any event the applicant would have been unable to meet the physical ability requirement, as the definition of the latter had been left to the academy's discretion.

Although the domestic authorities undeniably enjoyed a margin of discretion in defining the skills required of applicants to music academies, that argument did not apply to the present case. By passing the entrance examination before requesting enrolment, the applicant had demonstrated that she was fully qualified for such enrolment.

As regards the alleged lack of appropriate infrastructures to accommodate students with disabilities, Article 14 of the Convention had to be read in the light of such international instruments as the European Social Charter and the UN Convention on the Rights of Persons with Disabilities, as regards the reasonable accommodation which persons with disabilities were entitled to expect.

All children had their own specific educational needs, and this applied particularly to children with disabilities. In the educational sphere, reasonable accommodation could take a variety of forms, whether physical, non-physical, educational or organisational, or in terms of the architectural accessibility of schools and colleges, teacher training, curricular adaptation or the provision of appropriate amenities. However it was not the Court's task to define the manner and means of meeting the educational needs of children with disabilities, because the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries were in principle better placed than an international court to evaluate local needs and conditions in this area.

Nevertheless, the Court considered it important for States to take special care in making their choices in this field because of the impact such choices have on children with disabilities, whose particular vulnerability cannot be overlooked. The Court consequently held that discrimination based on disability extended to any refusal to provide reasonable accommodation.

In the present case the competent national authorities made no effort to identify the applicant's needs and failed to explain how or why her blindness could impede her access to musical education. Nor did they attempt to consider new amenities to meet the specific educational needs arising from the applicant's blindness. The music academy had never made any attempt since 1976 to adjust its educational approach in order to make it accessible to blind students. Therefore the applicant had been denied, without objective and reasonable justification, the benefit of education in the music academy solely on account of her visual disability.

Conclusion: violation (unanimously).

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

ARTICLE 18

Limitation on use of restrictions on rights

Allegedly improper restriction of rights under Articles 6 and 7 of the Convention: *inadmissible*

Navalnyy and Ofitserov v. Russia - 46632/13 and 28671/14
Judgment 23.2.2016 [Section III]

(See Article 6 § 1 (criminal) above, page 20)

ARTICLE 34

Victim

Standing of mother to make Article 3 complaint on behalf of her son who died while in detention: *victim status upheld*

Karpylenko v. Ukraine - 15509/12
Judgment 11.2.2016 [Section V]

Facts – The applicant was the mother of K., a former detainee who died of HIV-related illnesses in 2010 while in detention. In her application to the European Court the applicant complained

under Article 2 of the Convention that the authorities had been responsible for her son's death as they had not provided him with adequate medical care in detention and that they had failed to conduct an effective investigation into his death. She further complained under Article 3 that her son had been ill-treated while in custody and that there had been no effective domestic investigation into that issue either.

Law – Article 2

(a) *Medical care provided by the authorities* – Despite the fact that K. was diagnosed with HIV while in detention, the authorities had not carried out an immunological assessment of his condition or provided him with treatment. Instead, though aware that tuberculosis was the most widespread AIDS-related disease in Ukraine at the time, they had left him without medical supervision for some ten months. Even though K. had not complained, it was the authorities' duty to ensure proper monitoring of his health, given the seriousness of his diagnosis and inherent risk of concomitant illnesses. Furthermore, although K. was diagnosed with pulmonary tuberculosis in 2011, he was not even considered for antiretroviral therapy, despite a WHO recommendation that patients infected with both HIV and tuberculosis should begin such therapy as soon as possible after starting tuberculosis treatment. The authorities had thus failed to discharge their positive obligation to protect K.'s health and life, regardless of whether or not their efforts could have prevented the fatal outcome.

Conclusion: violation (unanimously).

(b) *Effective investigation* – The investigative measures taken by the police following K.'s death completely disregarded the key fact that he had died of a number of HIV-related diseases, despite the applicant's substantiated complaint in that respect. As a result, the authorities failed to conduct an assessment of the quality of the medical treatment which had been provided to him. They had thus failed to carry out a thorough and effective investigation into the allegations that the death was caused by inadequate medical treatment following almost two years in detention.

Conclusion: violation (unanimously).

Article 3

(a) *Locus standi* – The Court noted at the outset that, some eight months after his alleged ill-treatment, K. had signed an authority form authorising a lawyer to represent him in the Convention proceedings. He died shortly afterwards and four months later his mother lodged an application in her own name before the Court. In the absence of a clear causal link between the alleged ill-treatment and K.'s death, the Court had to examine whether the applicant had demonstrated a strong moral interest or shown that there were other compelling reasons for it to examine her Article 3 complaints.

The Court attached weight to a number of circumstances. The applicant had been seeking an effective investigation into her son's ill-treatment for several years at domestic level and was granted status as his successor in the criminal investigation into the matter immediately after his death. Moreover, as established by unequivocal medical evidence, in April 2010 the applicant's son had sustained serious injuries necessitating a surgical intervention which was performed about twelve hours later. Although K. consistently denied ill-treatment, it was clear that his injuries had been sustained while in police custody. Moreover, after his discharge from hospital he was returned to the same detention facility without the perpetrators of his ill-treatment having been identified. At the time he was already seriously ill and he eventually died of numerous illnesses, having been left without proper medical care. The circumstances of the present case indicated that the applicant's son was particularly vulnerable during his detention, at least from the moment he sustained and was recovering from the serious injuries inflicted in 2010. The effective investigation of alleged ill-treatment inflicted or tolerated by prison staff was a matter of general interest which required an examination of the case. In the light these considerations the Court accepted the applicant's *locus standi* in respect of her complaints under Article 3.

(b) *Alleged ill-treatment of the applicant's son in detention* – It was an established fact that the applicant's son had sustained serious injuries in detention. The absence of any explanation by the Government for those injuries constituted sufficient grounds to conclude that they were the result of ill-treatment while in detention.

Conclusion: violation (unanimously).

(c) *Effective investigation* – Although confronted with the established fact that the applicant's son had sustained serious injuries in a detention facility, the domestic investigation failed to establish what had happened to him and dismissed the applicant's allegation of ill-treatment as unsubstantiated. Although K. had denied being ill-treated, the accuracy of that denial was undermined by several forensic medical expert reports. Despite this, the authorities did not try to make sure that no pressure

had been put on K. or, in the event that it had, to protect him. Nor did they establish with whom he had had contact at the time of his injuries, limiting themselves instead to initiating a criminal investigation into the infliction of injuries by unidentified individuals. The domestic authorities had therefore failed to ensure an effective and independent investigation into the circumstances in which the applicant's son had sustained serious injuries while in detention.

Conclusion: violation (unanimously).

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

(See *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], 47848/08, 17 July 2014, Information Note 176; see also the Factsheets on Prisoners' health-related rights and on Detention conditions and treatment of prisoners)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies
Effective domestic remedy – Republic of Moldova

Application for compensation under Law no. 1545 (1998) in Moldova not effective remedy in respect of unlawful detention in separatist region: *preliminary objection dismissed*

Mozer v. the Republic of Moldova and Russia - 11138/10
Judgment 23.2.2016 [GC]

(See Article 5 § 1 above, page 15)

ARTICLE 2 OF PROTOCOL No. 4

Article 2 § 1

Freedom to choose residence

Policy imposing length-of-residence and type of income conditions on persons wishing to settle in inner-city area of Rotterdam: *no violation*

Garib v. the Netherlands - 43494/09
Judgment 23.2.2016 [Section III]

Facts – The Inner City Problems (Special Measures) Act, which entered into force on 1 January 2006, empowered a number of named municipalities, including Rotterdam, to take measures in certain designated areas, including the granting of partial tax exemptions to small business owners and the selecting of new residents based on their sources of income.

In 2005 the applicant moved to the city of Rotterdam and took up residence in a rented property in the Tarwewijk district. Following the entry into force of the Inner City Problems (Special Measures) Act Tarwewijk became a designated area under a Rotterdam by-law. After being asked by her landlord to move to another property he was letting in the same district, the applicant applied for a housing permit as required by the new legislation. However, her application was rejected on the grounds that she had not been resident in the Rotterdam Metropolitan Region for the requisite period and did not meet the income requirement. Her subsequent appeals were unsuccessful. In 2010 the applicant moved to the municipality of Vlaardingen, which was also part of the Rotterdam Metropolitan Region.

Law – Article 2 of Protocol No. 4: The case fell to be considered under the fourth paragraph of Article 2 of Protocol No. 4. The housing-permit requirement was "in accordance with law", as it was based on the Inner City Problems (Special Measures) Act and the 2003 Housing By-law of the municipality of Rotterdam (2006 version). As to whether it was "justified by the public interest in a democratic society", the pursued aim – reversing the decline of impoverished inner-city areas and improving quality of life generally – was undoubtedly legitimate.

In determining whether it was also proportionate, the Court was required to weigh the individual's right to choose his or her residence against the implementation of a public policy that purposely overrode it. The principles relevant here are derived from the Court's case-law under Article 8 of the Convention and Article 1 of Protocol No. 1. They can be summarised as follows: (a) States enjoy a wide margin of appreciation in implementing social and economic policies and the Court will respect the legislature's judgment as to what is in the "public" or "general" interest unless that judgment is manifestly without reasonable foundation; (b) where rights of central importance to the individual are at stake, the scope of the margin will depend on context, with particular significance attaching to the extent of the intrusion into the applicant's personal sphere; (c) procedural safeguards are especially material in determining whether the respondent State has remained within

its margin of appreciation; and (d) the possibilities of alternative housing are also relevant to proportionality.

As to the legislative and policy background of the case, the domestic authorities had found themselves called upon to address increasing social problems in particular inner-city areas of Rotterdam resulting from impoverishment caused by unemployment and a tendency for gainful economic activity to be transferred elsewhere. They had sought to reverse these trends by favouring new residents whose income was related to gainful economic activity of their own. Following a five-year review, the measures were considered successful and were subsequently extended. Nevertheless the restriction on taking up residence remained subject to temporal as well as geographical limitation, the designation of particular areas being valid for no more than four years at a time, and safeguard clauses in the Act required the local council to make sufficient housing available locally for those who did not qualify for a housing permit and to grant a permit in cases of individual hardship. Although the legislative measures had been criticised during the legislative process, the objections raised had been addressed, notably by the introduction of the safeguard clauses. Thus, the policy decisions taken by the domestic authorities did not appear to have been manifestly without reasonable foundation.

The availability of alternative solutions did not in itself render the measure in issue unjustified as, provided it could be regarded as reasonable and suited to achieving the legitimate aim pursued (which the Court was satisfied it was), it was not for the Court to say whether it represented the best solution or whether the State's discretion should have been exercised in another way. The respondent State had thus, in principle, been entitled to adopt the impugned legislation and policy.

As to the applicant's specific circumstances, she was refused a housing permit on the grounds that she did not fulfil the statutory requirements since she had not completed six years' residence in the Metropolitan Region and her income consisted exclusively of social welfare benefits. Since her personal situation was not such as to trigger the application of the hardship clause, the refusal was consonant with the applicable law and policy. In any event, the applicant had not been prevented from taking up residence in areas of Rotterdam not covered by the legislation. She had given no reasons for not wanting to reside in other areas of the city and it was significant that she had remained in Vlaardingen, the municipality to which she had moved in 2010, despite being eligible for a housing permit since May 2011. Although the Court had no reason to doubt that the applicant was of good behaviour and constituted no threat to public order, this could not by itself suffice to outweigh the public interest pursued by the consistent application of legitimate public policy.

In these circumstances, the Court could not find that the domestic authorities had been under an obligation to accommodate the applicant's preferences.

Conclusion: no violation (five votes to two).

ARTICLE 4 OF PROTOCOL No. 4

Prohibition of collective expulsion of aliens

Alleged collective expulsion of migrants to Tunisia: *case referred to the Grand Chamber*

Khlaifia and Others v. Italy - 16483/12
Judgment 1.9.2015 [Section II]

In September 2011 the applicants left Tunisia with other individuals on makeshift vessels heading for the Italian coast. After several hours at sea they were intercepted by the Italian Coastguard, which escorted them to a port on the island of Lampedusa. The applicants were placed in a reception centre. After the centre was gutted in a revolt, they were transferred to ships moored off Palermo. The Tunisian Consul recorded their identifies. Refusal-of-entry orders were issued against the applicants, although they deny having been notified of them. They were subsequently flown to Tunis, where they were released.

In a judgment of 1 September 2015 (see Information Note 188), a Chamber of the Court found, among other things, that there had been a violation of Article 4 of Protocol No. 4 to the Convention on account of a lack of sufficient guarantees demonstrating that the personal circumstances of each of the migrants concerned had been genuinely and individually taken into account, together with a violation of Article 13 of the Convention concerning the lack of suspensive effect of the appeals by which they could have challenged the collective nature of their expulsions.

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

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

Khlaifia and Others v. Italy - 16483/12
Judgment 1.9.2015 [Section II]

(See Article 4 of Protocol No. 4 above, page 42)

DECISIONS OF OTHER INTERNATIONAL JURISDICTIONS

Court of Justice of the European Union (CJEU)

Detention of asylum-seeker on grounds of national security or public order

J.N. v. Staatssecretaris van Veiligheid en Justitie
- C-601/15 PPU
Judgment (Grand Chamber) 15.2.2016

This case concerns a preliminary reference from the *Raad van State* (Council of State, the Netherlands) about the conditions of validity of Directive 2013/33/EU,[1] which authorises the placement in detention of an asylum-seeker when protection of national security or public order so requires, in the light of the European Union's Charter of Fundamental Rights and the case-law of the European Court of Human Rights (*Nabil and Others v. Hungary*, 62116/12, 22 September 2015).

The appellant in the main proceedings J.N., having committed numerous offences in the Netherlands, was ordered to leave the EU and a ten-year entry ban was imposed on him. His three asylum applications were rejected. He was placed in detention at a time when his fourth asylum application was pending. His appeals against the detention decision went up to the *Raad van State*, the referring court.

The CJEU found that the detention was provided for by law, as it derived from the directive in question, and genuinely met an objective of general interest recognised by the European Union. In particular, the protection of national security and public order also contributed to the protection of the rights and freedoms of others. The EU's Charter of Fundamental Rights stated in that regard that everyone had the right not only to liberty but also to security of person.

As to the proportionality of the interference observed, the possibility of detaining an asylum applicant for reasons relating to the protection of national security or public order was subject to compliance with a series of conditions whose aim was to create a strictly circumscribed framework in which such a measure might be used. Firstly, an applicant could be detained only when the protection of national security or public order so required. Secondly, the Member States' power to detain a person was subject to significant limitations. Detention could be ordered only when it proved necessary and on the basis of an individual assessment of each case, if other less coercive alternative measures could not be applied effectively. An applicant was to be detained only for as short a period as possible.

The strict circumscription of the power of the competent national authorities to detain an applicant in that context was also ensured by the interpretation which the case-law of the CJEU gave to the concepts of "national security" and "public order". The CJEU had thus found that the concept of "public order" entailed, in any event, the existence – in addition to the disturbance of the social order which any infringement of the law involved – of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. As to the concept of "national security", it covered both the internal security of a Member State and its external security. Consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, might affect public security. The Directive in question could not form the basis for detention measures without the competent national authorities having previously determined, on a case-by-case basis, whether the threat that the persons concerned represented to national security or public order corresponded at least to the gravity of the interference with the liberty of those persons that such measures would entail. The EU legislature had thus struck a fair balance between, on the one hand, the applicant's right to liberty and, on the other, requirements relating to the protection of national security and public order.

1. Article 8, § 3, sub-paragraph (e), of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

The fact that J.N., after being issued with an order to leave the Netherlands and with a ten-year entry ban, had made a fresh application for international protection was not an obstacle to the adoption of a measure ordering his detention.

The *Raad van State* had pointed out to the CJEU that, in accordance with its own case-law, the introduction of an asylum application by a person who was subject to a return decision automatically caused all return decisions that might previously have been adopted to lapse. In any event, the principle that Directive 2008/115/EC[1] must be effective required that a procedure opened thereunder, in the context of which a return decision, possibly accompanied by an entry ban, had been adopted, could be resumed at the stage at which it had been interrupted, as soon as the application for international protection which interrupted it had been rejected at first instance.

Lastly, in authorising Member States to adopt detention measures for reasons relating to national security or public order, Directive 2013/33 did not disregard the level of protection afforded by Article 5 § 1 (f) of the European Convention on Human Rights, which permitted detention for as long as deportation proceedings against the person were "in progress". In particular, the judgment in *Nabil and Others v. Hungary* of the European Court of Human Rights did not exclude the possibility of a Member State's ordering — in such a way that the guarantees provided for by Article 5 § 1 were observed — the detention of a third-country national in respect of whom a return decision accompanied by an entry ban had been adopted prior to the lodging of an application for international protection. The European Court of Human Rights had also stated that the existence of a pending asylum case did not as such imply that the detention of a person who had made an asylum application was no longer "with a view to deportation" — since an eventual rejection of that application might open the way to the enforcement of removal orders that had already been made. Accordingly, a return procedure was to be resumed at the stage at which it had been interrupted, as soon as the application for international protection which interrupted it had been rejected at first instance, such that action under that procedure was still "being taken" for the purposes of Article 5 § 1 (f).

The validity of Directive 2013/33, in so far as it authorised such detention measures, whose scope was strictly circumscribed in order to satisfy the requirements of proportionality, could not be called into question.

Inter-American Court of Human Rights

Rights of judges *vis-à-vis* their removal or dismissal for actions against a *coup d'état*

Case of López Lone et al. v. Honduras - Series C
No. 302
Judgment 5.10.2015[2]

Facts – In June 2009 a *coup d'état* took place in Honduras. Army troops deprived President José Manuel Zelaya Rosales of his liberty after the Attorney General filed a detention request with the Supreme Court for alleged crimes against the form of government, treason, abuse of authority and abuse of power. These accusations stemmed from President Zelaya's attempts to amend the constitution of Honduras. On the day of his capture a "supposed letter of resignation by [President] Zelaya" was read in Congress, which subsequently named its President as the Constitutional President. The Supreme Court of Honduras described these events as a constitutional succession.

However, these facts were considered a *coup d'état* by the General Assembly and the Permanent Council of the Organisation of American States (OAS), as well as by the General Assembly of the United Nations. In July 2009 the General Assembly of the OAS, using Article 1 of the Inter-American Democratic Charter for the first time, decided to "suspend the State of Honduras from the exercise of its right to participate in the Organisation." After several negotiations, in October 2009 the Tegucigalpa/San José Agreement was signed to achieve national reconciliation and a Truth and Reconciliation Commission was established to "clarify the events before and after 28 June 2009". In November 2009 elections were held and subsequently, on 22 May 2011, an Agreement for National Reconciliation was signed, after which the suspension from the OAS was lifted.

The instant case concerned disciplinary proceedings against judges Adan Guillermo López Lone, Luis

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

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

Alonso Chévez de la Rocha, Ramón Enrique Maldonado Barrios and Tirza del Carmen Flores Lanza. These proceedings were initiated due to the applicants' actions in defence of democracy and the rule of law in response to the *coup d'état.* Mr López Lone participated in a demonstration against the *coup*; Mr Chévez de la Rocha was allegedly involved in a demonstration against the *coup* for which he was briefly detained and he also criticised the judiciary in front of colleagues; Ms Flores Lanza filed a criminal complaint against the military officials that participated in the *coup* and a writ of *amparo* in favour of the deposed President, and Mr Barrios Maldonado gave a lecture, which was later reproduced in a newspaper article, in which he expressed his opinion about the *coup*. Also, all four judges were members of the Association of Judges for Democracy (AJD), which publicly criticised the *coup* and called for the restoration of the rule of law. As a result of these proceedings the four judges were dismissed and three of them, whose dismissals were confirmed on appeal, were removed from the judiciary.

Law

(a) *Preliminary objection* – The State filed a preliminary objection for the alleged failure to exhaust two domestic remedies. The Inter-American Court rejected the objection because it considered part of Honduras' argument (regarding an administrative appeal) time-barred and because the State had failed to demonstrate the availability of the other alleged remedy (an *amparo* appeal).

(b) *Merits*

As a preliminary finding, the Inter-American Court emphasised that representative democracy is one of the foundations of the entire system of the American Convention on Human Rights (ACHR). It found that the events of June 2009 in Honduras constituted an internationally wrongful act. During this situation the *de facto* government had initiated disciplinary proceedings against the applicants for behaviour that, at its core, constituted actions against the *coup* and in favour of the rule of law and democracy. The Court held that the applicants' conduct in response to the *coup* constituted not only the exercise of a right but also compliance with the duty to defend democracy.

Articles 23 (right to participate in government), 13 (freedom of expression), 15 (right of assembly) and 16 (freedom of association) in relation to Articles 1(1) (obligation to respect and ensure rights) and 2 (obligation to adopt domestic measures) of the ACHR: The Inter-American Court emphasised the strong relationship between political rights, freedom of expression, the right of assembly and freedom of association, and how these rights, taken together, are central to democracy. It considered that in situations of institutional breakdown, for example after a *coup*, the relationship between these rights is even more important; particularly when exercised together in order to protest a breach of the constitutional order and democracy. The Court noted that statements or actions in favour of democracy must have the maximum possible protection and, depending on the circumstances, could have an impact on some or all of these rights. The right to defend democracy is part of the right to participate in public affairs, which also involves the exercise of other rights such as freedom of expression and the right of assembly.

In ruling on the right to participate in politics, freedom of expression and the right of assembly of persons exercising judicial functions, the Court noted that there was a regional consensus on the need to restrict the participation of judges in partisan political activities, especially, considering that in some States in the region, any participation in politics, except voting in elections, was prohibited in broader terms. The Court stressed that restricting the participation of judges, in order to protect their independence and impartiality, was compatible with the ACHR. Similarly, it noted that the ECHR had held that certain restrictions on the freedom of expression of judges are necessary in all cases where the authority and impartiality of the judiciary may be challenged (citing *Wille v. Liechtenstein* [GC], 28396/95, § 64, 28 October 1999, Information Note 11; and *Kudeshkina v. Russia*, 29492/05, § 86, 26 February 2009, Information Note 116).

However, the Inter-American Court held that the power of States to regulate or restrict these rights is not discretionary. Any limitations on the rights enshrined in the ACHR must be interpreted restrictively. A restriction on judges' participation in partisan political activities should not prevent judges from participating in all discussions of political issues. In this regard, there could be situations where a judge, as a citizen of society, believes he has a moral duty to express himself.

Accordingly, the Court established that restrictions that ordinarily limit the right of judges to participate in partisan political activities do not apply to situations of serious democratic crisis, such as that in the instant case. It would be contrary to the independence inherent in State powers to deny judges the right to speak up against a *coup*. More-

over, the mere fact that disciplinary proceedings had been initiated against the judges for their actions against the *coup* could have a chilling effect and thus constitute an undue restriction of their rights.

Therefore, the disciplinary proceedings against Mr López Lone and Mr Chévez de la Rocha constituted a violation of their freedom of expression, right of assembly and political rights, while the proceedings against Ms Flores Lanza and Mr Barrios Maldonado constituted a violation of their freedom of expression and political rights. The Court also concluded that, due to their removal from the judiciary, Mr López Lone, Mr Chévez de la Rocha and Ms Flores Lanza were no longer able to participate in the AJD, and thus their dismissal also constituted an undue restriction on their freedom of association.

Conclusion: violation (unanimously).

Articles 8 (right to a fair trial), 25 (right to judicial protection) and 23 in relation to Articles 1(1) and 2 of the ACHR: The Inter-American Court recalled that judges, unlike other public officials, enjoy specific guarantees due to the necessary independence of the judiciary. In this regard, it established that: (i) respect for judicial guarantees involves respecting judicial independence; (ii) the dimensions of judicial independence are translated into the subjective right of the judge to be removed from office solely on the basis of permitted grounds and either through proceedings that satisfy all judicial guarantees or due to the completion of their term in office, and (iii) when a judge is arbitrarily removed from office, the right to judicial independence, as well as the right to enter and remain on general terms of equality in public office, are affected.

The guarantee of stability of judges, in addition to ensuring that a judge can only be removed under the conditions described above, implies that: (i) judges can only be dismissed for serious disciplinary offences or incompetence, and (ii) any disciplinary proceedings against judges shall be resolved in accordance with established standards of judicial conduct in fair procedures to ensure objectivity and impartiality under the Constitution or the law.

The judges in the instant case had been subjected to disciplinary proceedings where a first decision of dismissal was adopted by the Supreme Court, while the appeals were reviewed by the Judicial Council, a subordinate and accessory organ to the Supreme Court. The Inter-American Court found that (i) the judges were subjected to disciplinary procedures that were not established by law; (ii) their appeals were heard by a Judicial Council that not only was legally incompetent but lacked independence and impartiality to review decisions by the Supreme Court; and (iii) the Supreme Court did not provide objective guarantees of impartiality to rule on the alleged disciplinary offences committed by the applicants, to the extent that such offences related to actions in response to the *coup d'état*.

The Inter-American Court concluded that the State had violated the judicial guarantees of the four judges in the case, as well as the right to remain in office of the three judges whose dismissal was confirmed on appeal.

Regarding the right to judicial protection, the Court considered that the context in which the facts of the case had taken place and the fact that any *amparo* appeal against a decision by the Judicial Council had to be filed before the Supreme Court had rendered such remedy ineffective. Therefore, it concluded that the State had violated the right to judicial protection of all four judges.

Conclusion: violation (unanimously).

Article 9 (freedom from *ex post facto* laws) in relation to Articles 1(1) and 2 of the ACHR: The Inter-American Court found that the disciplinary rules that had been applied to the applicants granted too much discretion to the disciplinary judge in determining their sanctions. It stressed that dismissal or removal from office is the most restrictive and severe measure that can be taken in disciplinary matters and must thus comply with the principle of maximum severity. The possibility of its application must be predictable, either because it is expressly and clearly stated in the law, or because the law delegates its assignment to a judge or an *infra* legal norm under objective criteria in order to limit the scope of such discretion.

In addition, the Court noted that the applicants had been punished under a multiplicity of rules. The lack of an adequate motivation in the decisions prevented the Court from distinguishing the normative grounds or unlawful conduct for which they were dismissed, as well as analysing their legal certainty. However, the Court did warn against the use of indeterminate concepts such as the "dignity of the administration of justice" or "decorum of the office" to codify punishable infractions, without the establishment of objective criteria, through normative regulations or judicial interpretation, that limit the scope of a judge's discretion and

separate such terms from personal and private opinions.

For the aforementioned reasons, the Court concluded that the State had violated the principle of legality against all four judges.

Conclusion: violation (unanimously).

(c) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered the State to: (i) reinstate Mr López Lone, Ms Flores Lanza and Mr Chévez de la Rocha to similar positions to those they had at the time of their dismissal, with the same pay, benefits and rank for which they would qualify if they had been reinstated at the time. If that was not possible, the State was to pay the amount established in the judgment; (ii) publish the judgment and its official summary, and (iii) pay the amounts stipulated in the judgment as compensation for pecuniary and non-pecuniary damages, as well as reimbursement of costs and expenses.

COURT NEWS

European Moot Court Competition

On 18 February 2016 the Court welcomed the Grand Final of the 4th European Human Rights Moot Court Competition, in English, organised by the European Law Students' Association (ELSA) in co-operation with the Council of Europe. The moot was won by students from the University of Cambridge (United Kingdom) who beat a team from the Sofia University "St. Kliment Ohridski" (Bulgaria) in the final round.

The Moot Court Competition aims at giving law students, who are future legal professionals, practical experience on the European Convention on Human Rights and its implementation. More information can be found on the ELSA Internet site (<http://elsa.org/>).

Joint ECHR/ESIL lecture

On 26 February 2016, the Court, in conjunction with the European Society of International Law (ESIL), organised a lecture entitled "The European Convention on Human Rights and the crimes of the past".

The webcast of the lecture is available on the Internet sites of the Court (<www.echr.coe.int> – The Court – Events) and of the ESIL (<http://www.esil-sedi.eu>).

RECENT PUBLICATIONS

Guide on Article 5: translation into Azerbaijani

With the help of the Council of Europe's Directorate General Human Rights and Rule of Law, a translation into Azerbaijani of the Guide on Article 5 (right to liberty and security) has now been published on the Court's Internet site (<www.echr.coe.int> – Case-law).

Konvensiyanin 5-ci maddə üzrə təlimat – Azadliq və toxunulmazliq hüququ (aze)

Research report: translation into Russian

With the help of the Ukrainian Helsinki Human Rights Union, a translation into Russian of the Research Report on National security and the Court's case-law (2013) has now been published on the Court's Internet site (<www.echr.coe.int> – Case-law).

Национальная безопасность и практика Европейского суда по правам человека (rus)

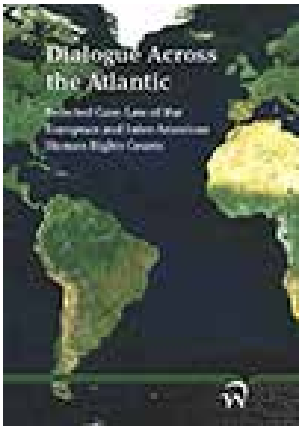
Joint ECHR/IACtHR publication

The European and Inter-American Human Rights Courts have jointly published, for the first time, a selection of the leading decisions delivered by each court in 2014.

Available in English and Spanish, this book can be downloaded from the Court's Internet site (<www.echr.coe.int> – Publications). A print edition can be purchased from Wolf Legal Publishers (the Netherlands) at <www.wolfpublishers.nl> – <sales@wolfpublishers.nl>.

Dialogue across the Atlantic: Selected Case-Law of the European and Inter-American Human Rights Courts (eng)

Diálogo transatlántico: selección de jurisprudencia del Tribunal Europeo y la Corte Interamericana de Derechos (spa)



Quarterly activity report of the Commissioner for Human Rights

The fourth quarterly activity report 2015 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).

4th quarterly activity report 2015 (eng)

4e rapport trimestriel d'activité 2015 (fre)