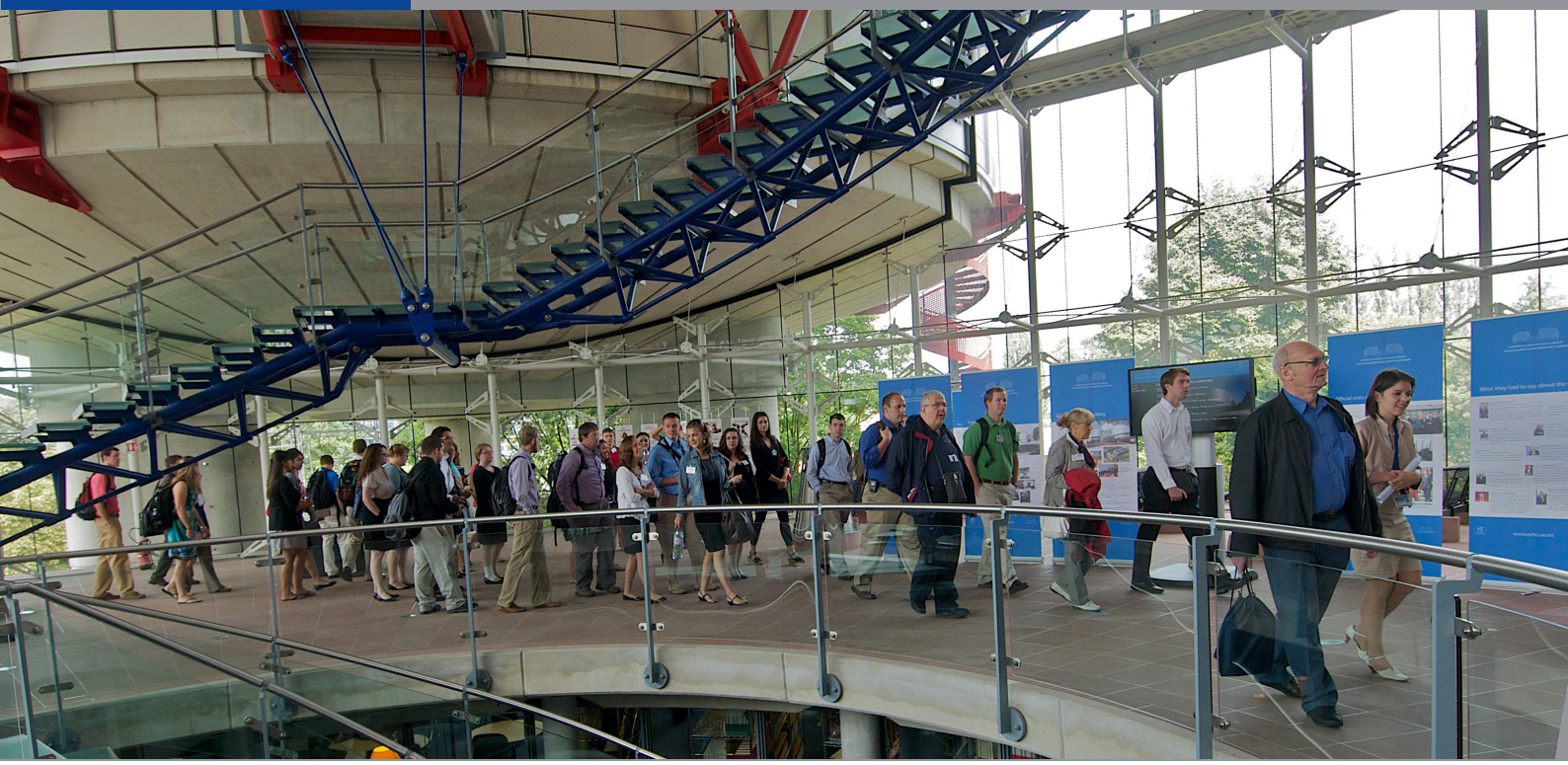
2017

FEBRUARY

INFORMATION NOTE 204

Case-law of the European Court of Human Rights



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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

English edition

ISSN 1996-1545

Anyone wishing to reproduce and/or translate all or part of the Information Note in print, online or in any other format should contact publishing@echr.coe.int for further instructions.

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

Layout: Publications Unit

Photographs: Council of Europe

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

© Council of Europe – European Court of Human Rights, 2017

Table of contents

ARTICLE 2

Expulsion

Proposed deportation to Syria: *deportation would constitute a violation*

S.K. v. Russia, 52722/15, judgment 14.2.2017 [Section III]

(See Article 13 below, page 15)

ARTICLE 3

Expulsion

Proposed deportation to Syria: *deportation would constitute a violation*

S.K. v. Russia, 52722/15, judgment 14.2.2017 [Section III]

(See Article 13 below, page 15)

Extradition

Risk of ill-treatment in and lack of reliability of assurances received from State requesting extradition: *extradition would constitute a violation*

Allanazarova v. Russia, 46721/15, judgment 14.2.2017 [Section III]

(See Article 13 below, page 13)

ARTICLE 5

ARTICLE 5 § 1

Deprivation of liberty

Imposition of preventive measures entailing restrictions on freedom of movement on individual considered to be a danger to society: *Article 5 not applicable*

De Tommaso v. Italy, 43395/09, judgment 23.2.2017 [GC]

(See Article 2 of Protocol No. 4 below, page 19)

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Civil rights and obligations, public hearing

Imposition of preventive measures without public hearing: *Article 6 applicable; violation*

De Tommaso v. Italy, 43395/09, judgment 23.2.2017 [GC]

(See Article 2 of Protocol No. 4 below, page 19)

ARTICLE 6 § 1 (CONSTITUTIONAL)

Civil rights and obligations, oral hearing

Absence of oral hearing in proceedings before Constitutional Court: *Article 6 applicable; violation*

Selmani and Others v. the former Yugoslav Republic of Macedonia, 67259/14, judgment 9.2.2017 [Section I]

Facts – The applicants were journalists covering a parliamentary debate when a commotion, provoked by a group of MPs, broke out, triggering the intervention of security staff. When the applicants refused to comply with an order to vacate the gallery, they were forcibly removed. The Constitutional Court, without holding an oral hearing, found that the security staff had considered that the journalists needed to be moved for their own protection.

In the Convention proceedings, the applicants complained under Article 6 of the lack of an oral hearing before the Constitutional Court and, under Article 10, about their forcible removal from the Parliament gallery.

Law – Article 6

(a) *Applicability* – Notwithstanding the absence of any objection by the Government, the Court considered it necessary to address the issue of the applicability of Article 6. The domestic law recognised the right of accredited journalists to report from the Parliament gallery. Such reporting was necessary for the applicants to exercise their profession and to inform the public. In such circumstances the Court considered that the right to report from the Parliament gallery, which fell within the applicants' freedom of expression, was a civil right for the purposes of Article 6 of the Convention.

(b) *Merits* – The applicants' case was examined before the Constitutional Court, acting as a court of first and only instance. Its findings regarding the necessity and proportionality of the impugned measure relied on issues of fact. Although the applicants' removal from the Parliament gallery, as such, was not disputed by the parties, the Constitutional Court's decision was based on facts which the applicant contested and which were relevant to

the outcome of the case. Those issues were neither technical nor purely legal. The applicants had therefore been entitled to an oral hearing and the Constitutional Court had not given any reasons why it considered that a hearing was not necessary.

Conclusion: violation (unanimously).

Article 10: The central issue was whether the interference complained of was necessary in a democratic society. The disorder in the parliamentary chamber and the way in which the authorities handled it were matters of legitimate public interest. The media therefore had the task of imparting information on the event and the public had the right to receive such information.

The media played a crucial role in providing information on the authorities' handling of public demonstrations and the containment of disorder. Any attempt to remove journalists from the scene of demonstrations had to be subject to strict scrutiny. That principle applied even more so when journalists exercised their right to impart information to the public about the behaviour of elected representatives in Parliament and about the manner in which authorities handled disorder that occurred during parliamentary sessions.

During the disturbance in the chamber, the applicants were passive bystanders who were simply doing their work and observing the events. They did not pose any threat to public safety, order in the chamber or otherwise. Their removal entailed adverse effects that instantaneously prevented them from obtaining first-hand and direct knowledge based on their personal experience of the events unfolding in Parliament. Those were important elements in the exercise of the applicants' journalistic functions, of which the public should not have been deprived.

Conclusion: violation (unanimously).

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

(See *Pentikäinen v. Finland* [GC], 11882/10, 20 October 2015, Information Note 189)

ARTICLE 6 § 3 (c)

Defence in person

Complete rehearing of case held in accused's absence: *violation*

Hokkeling v. the Netherlands, 30749/12, judgment 14.2.2017 [Section III]

Facts – In May 2007 the applicant was found guilty of drug offences and causing grievous bodily harm resulting in death, and was sentenced to four years and six months' imprisonment. Both he and the prosecution appealed. In March 2009, while his appeal was still pending, the applicant was released from prison in the Netherlands. Soon thereafter he was arrested and detained in Norway for further drug offences. On 18 June 2010 the appeal court in the Netherlands, following a complete rehearing of the case, convicted the applicant in his absence and increased his sentence to eight years' imprisonment. In the Convention proceedings the applicant complained under Article 6 that he had been prevented from attending the hearing in the Netherlands in person.

Law – Article 6 § 1 and 3 (c): Where an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of the issue of guilt or innocence it should not determine the issue without a direct assessment of the evidence given in person by the accused. The refusal of the appeal court to consider measures that would have enabled the applicant to make use of his right to attend the hearing on the merits was all the more difficult to understand given that his sentence was increased to eight years, meaning that after returning to the Netherlands the applicant had to serve time in addition to the sentence that he had already completed. The Court agreed with the Government that the applicant's arrest in Norway had been a direct consequence of his own behaviour and recognised as legitimate the interests of the victim's surviving kin and of society as a whole in seeing that criminal proceedings against the applicant were brought to a timely conclusion. However, having regard to the prominent place which the right to a fair trial held in a democratic society, neither the applicant's presence at hearings during the first instance proceedings or the active conduct of the defence by counsel could compensate for the absence of the applicant in person before the second-instance court.

Conclusion: violation (six votes to one).

Article 41: finding of a violation constituted sufficient just satisfaction.

(See also *F.C.B. v. Italy*, 12151/86, 28 August 1991)

ARTICLE 8

Respect for private life, positive obligations

Comments made in television programme concerning singer's alleged sexual orientation and love life: *violation*

Rubio Dosamantes v. Spain, 20996/10, judgment 21.2.2017 [Section III]

Facts – The applicant was a professional pop singer. In various television programmes, comments had been made about certain aspects of her private life, mainly her sexual orientation or her allegedly stormy relationship with her partner, including the claim that she had humiliated him and encouraged him to take drugs.

Before the Court, the applicant complained that those comments had breached her right to her reputation and to respect for her private life.

Law – Article 8

(a) *The contribution of television programmes to a debate in the general interest and to the notoriety of the person concerned* – The domestic courts had based their decisions merely on the fact that the applicant was famous. The fact that she was a well-known public figure as a singer did not mean that her activities or conduct in her private life should be regarded as necessarily falling within the public interest. The television programmes in question did not have any public interest that could legitimise the disclosure of the information, in spite of her fame, as the public had no legitimate interest in knowing certain intimate details about her private life. The guests on the programmes had mentioned and discussed only the private life of the applicant. Any public interest, in parallel to the commercial interest of the television channels, was trumped by the applicant's individual right to the effective protection of her privacy.

(b) *The applicant's conduct before the broadcasting of the impugned television programmes* – The remarks made by the defendants in the three television programmes in question had not, according to the first-instance court, breached the applicant's right to respect for her private life, since they had concerned aspects of her life which were already in the public domain and the applicant herself had not previously objected to that disclosure. The commentators had merely talked about rumours that had been circulating for a long time in Latin America. Those claims had been relayed by many media outlets and there had been widespread reports of comments and opinions by third parties about the applicant's private life.

The fact that the applicant may have benefited from such media attention did not authorise the TV channels in question to broadcast unchecked and unlimited comments about her private life.

(c) *Content, form and repercussions of the impugned TV programmes* – Even though the case had been re-examined on an ordinary appeal, an appeal on points of law and an *amparo* appeal to the Constitutional Court, the domestic courts had merely found that the reports about the applicant's alleged homosexuality, or bisexuality, were not damaging in themselves and that it had not been suggested that she incited her ex-boyfriend to take drugs but only that their stormy love life had been the cause of the drug-taking, and that the applicant herself had not denied certain well-known rumours about her private life. On the one hand, as a result of their direct and constant contact with the situation in the country, the domestic courts were often better placed than an international court to assess the intention of the authors of such comments and the aims of the television programmes, together with the potential reactions to those comments among the general public. On the other hand, there had been no such analysis in the judgments delivered in the case and the national courts had not carefully weighed those rights and interests in the balance to establish whether the "necessity" of the restriction imposed on the applicant's right to respect for her private life had been established in a convincing manner. The domestic courts in question had merely taken the view that the comments had not impugned the applicant's honour. They had not examined the criteria to be taken into account in order to make a fair assessment of the balance between the right to respect for freedom of expression and the right to respect for a person's private life.

Lastly, the grounds set out by the domestic courts were not sufficient to protect the applicant's private life and she should have had, in the circumstances of the case, a "legitimate expectation" of protection.

In those circumstances, having regard to the margin of appreciation afforded to domestic courts in weighing up the various interests at stake, they had

failed in their positive obligations under Article 8 of the Convention.

Conclusion: violation (unanimously).

Article 41: no claim made in respect of damage.

ARTICLE 10

Freedom of expression

Forcible removal of journalists from press gallery of Parliament: *violation*

Selmani and Others v. the former Yugoslav Republic of Macedonia, 67259/14, judgment 9.2.2017 [Section I]

(See Article 6 § 1 (constitutional) above, page 6)

Freedom to impart information

Restriction on newspaper's freedom to impart information during election campaign: *violation*

Orlovskaya Iskra v. Russia, 42911/08, judgment 21.2.2017 [Section III]

Facts – The applicant NGO published a regional newspaper whose political affiliation was specified on the front page. During the 2007 election campaign for the lower chamber of Parliament, the newspaper published a number of articles criticising a candidate in those elections. The regional electoral committee examined the articles and concluded that, in breach of the relevant domestic provisions, they contained elements of electoral campaigning which had not been paid for from the official campaign fund of any party as required. The applicant was found guilty of an administrative offence and fined. On 27 December 2007 a district court dismissed its appeal. The applicant subsequently lodged two supervisory-review applications and a constitutional complaint, all of which were dismissed.

In the Convention proceedings, the applicant complained under Article 10 about the classification of the material it had published as election campaigning and the fine imposed for failing to indicate who had commissioned its publication.

Law – Article 10

(a) *Admissibility* – The application before the Court had been lodged more than six months after the appeal decision dated 27 December 2007. However, each of the two decisions at supervisory-review level and the decision of the Constitutional Court were taken and received by the applicant within the six month time-period. At the material time the Code of Administrative Offences ("CAO"), which governed the proceedings, did not provide for any time-limit for seeking supervisory review. The absence of time-limits for using a remedy created uncertainty, and in principle rendered nugatory the six-month rule. However, in 2006 the Constitutional Court had issued a decision stating that an application for supervisory review was to be lodged within three months of the date when the last impugned judgment entered into force. Given that the supervisory-review proceedings had been launched within the three-month time-limit, that those proceedings remained within the same chain of domestic remedies, and that those proceedings were, in principle, capable of dealing with the substance of the relevant Convention issue and to afford adequate redress, the applicant could reasonably have counted on the effectiveness of that remedy and had been required to pursue it before lodging an application before the Court.

(b) *Merits* – It was appropriate to consider the applicant's right to freedom of expression in the light of the rights guaranteed by Article 3 of Protocol No. 1, which were crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. Free elections and freedom of expression, particularly freedom of political debate, formed the bedrock of any democratic society. The two rights were inter-related and operated to reinforce each other. It was particularly important that in the period preceding an election, opinions and information of all kinds were permitted to circulate freely.

It had not been substantiated that the impugned publications were political advertisements, rather than ordinary journalistic work. The applicant organisation had clearly specified on the newspaper's front page its formal political affiliation. There was no reason to consider that any candidates or political parties were at the origin of the impugned articles. Therefore, the publication of the impugned articles constituted a fully-fledged exercise of freedom of expression, namely the choice to publish the articles, thus imparting information to the readers and potential voters.

It was difficult, if not impossible, to ascertain whether the content in relation to a candidate should be perceived as a mere negative comment

or whether it had a campaigning goal. The domestic regulative framework restricted the activity of the print media on the basis of a criterion that was vague and conferred a very wide discretion on public authorities that were to interpret and apply it. It had not been convincingly demonstrated that the print media should be subjected to rigorous requirements of impartiality, neutrality and equality of treatment during an election period. The public watchdog role of the press was no less pertinent at election time. That role encompassed an independent exercise of freedom of the press on the basis of free editorial choice aimed at imparting information and ideas on subjects of public interest. In particular, discussion of the candidates and their programmes contributed to the public's right to receive information and strengthened voters' ability to make informed choices between candidates for office.

By subjecting the expression of comments to the regulation of campaigning and by prosecuting the applicant with reference to this regulation, there had been an interference with the applicant organisation's editorial choice to publish a text taking a critical stance and to impart information and ideas on matters of public interest. No sufficiently compelling reasons had been shown to justify the prosecution and conviction.

Conclusion: violation (six votes to one).

Article 41: EUR 5,500 in respect of pecuniary and non-pecuniary damage

(See *Tumilovich v. Russia* (dec.), 47033/99, 22 June 1999, Information Note 7; *Mathieu-Mohin and Clerfayt v. Belgium*, 9267/81, 2 March 1987; *Animal Defenders International v. the United Kingdom* [GC], 48876/08, 22 April 2013, Information Note 162)

ARTICLE 11

Freedom of peaceful assembly

Arbitrary and discriminatory power of authorities to propose changes in location, time or manner of conduct of a public event: *violation*

Lashmankin and Others v. Russia, 57818/09 et al., judgment 7.2.2017 [Section III]

Facts – The applicants had proposed various unrelated assemblies, *inter alia*, to commemorate a well-known human-rights lawyer and a journalist who had been shot dead in Moscow in 2009, to protest against a draft law prohibiting adoption of children of Russian nationality by US citizens and to promote rights of homosexuals. The authorities imposed various restrictions on the assemblies' location, time or manner of conduct. According to the applicants, these restrictions frustrated the purpose of the assemblies by making them invisible to their target audience. The applicants were unable to obtain a judicial remedy prior to the proposed events. In those cases where the applicants had attempted to assemble at the location and time chosen by them, the assembly was dispersed and the participants arrested and/or found liable for administrative offences.

In the Convention proceedings, the applicants complained, *inter alia*, under Articles 11 and 13 of a breach of their rights to freedom of assembly and the lack of an effective remedy in that respect.

Law

Article 13 in conjunction with Article 11: Russian law provided for time-limits for organisers to give notice of a public event. In contrast, there was no legally binding time-frame for the authorities to give their final decisions before the planned date of the public event. The judicial remedy available to the organisers of public events, which was of a *post-hoc* character, could not provide adequate redress in respect of the alleged violations of the Convention. Further, the scope of judicial review was limited to examining the lawfulness of the proposal to change the location, time or manner of conduct of a public event and the courts were not required by law to examine the issues of proportionality nor did they do so in practice.

The applicants did not therefore have at their disposal an effective remedy which would have allowed them to obtain an enforceable judicial decision on the authorities' refusal to approve the location, time or manner of conduct of a public event before its planned date.

Conclusion: violation (unanimously).

Article 11

(a) *Interference* – In cases where they were crucial to the participants, an order to change the time, place and manner of conduct of an assembly could constitute interference with the participants' right to freedom of assembly. The competent authorities had refused to approve the location, time or manner of conduct of public events planned by

the applicants, and had proposed alternatives. The applicants, considering that the authorities' proposals did not answer the purpose of their assembly, either cancelled the events altogether or decided to hold them as initially planned despite the risk of dispersal, arrest and prosecution. There had therefore been an interference with the applicants' right to freedom of assembly.

(b) *Justification for interference* – The relevant domestic legislation empowered the domestic authorities to make well-reasoned proposals to the organisers for changes in the location, time or manner of conduct of a public event. There was no requirement however for any assessment of the proportionality of such a measure and there was a clear risk of arbitrariness in the grant of such broad and uncircumscribed discretion to the executive authorities.

Indeed, the present case showed that the above powers were often used in an arbitrary and discriminatory way. There were ample examples of situations where opposition groups, human-rights defenders or gay-rights activists were not allowed to assemble at a central location and were required to go to the outskirts of town on the grounds that they might hinder traffic, interfere with the everyday life of citizens, or present a security risk, and were dispersed and arrested if they refused to comply, while pro-government public events were allowed to take place at the same location, traffic, everyday-life disturbances and security risks notwithstanding. The most telling example was the case of LGBT-rights activists who had proposed ten different locations in the town centre, all of which were rejected on various grounds, while an anti-gay public event was approved to take place at one of those same locations on the same day.

The facts of the case demonstrated the lack of adequate and effective legal safeguards against arbitrary and discriminatory exercise of the wide discretion left to the executive. Accordingly, the domestic legal provisions governing the power to propose a change of location, time or manner of conduct of public events did not meet the Convention quality-of-law requirement.

(c) *Prohibition on holding public events at certain locations* – A general ban on demonstrations could only be justified if there was a real danger of their resulting in disorder which could not be prevented by other less stringent measures. In Russia the prohibition on holding public events in the vicinity of court buildings was formulated in absolute terms. It was not limited to public assemblies held with the intention of obstructing or impeding the administration of justice. Some of the applicants were not allowed to hold a Gay Pride event in the town centre, on the ground that the location they chose was in the vicinity of the Constitutional Court building. It was significant that the event at issue was unrelated to any case being examined by the Constitutional Court; its purpose was to mark the anniversary of the start of the LGBT-rights movement back in the 1960s and to condemn homophobia and discrimination against homosexuals. The refusal to approve the applicants' public event by sole reference to the general ban, without any consideration of the specific circumstances of the case, could not be regarded as being necessary within the meaning of Article 11.

(d) *Time-limits for notification of assemblies* – The timing of public meetings held in order to voice certain opinions could be crucial for their political and social weight. If a public assembly was organised after a given social issue had lost its relevance or importance in a current social or political debate, the impact of the meeting could be seriously diminished. The time period during which it was possible to lodge a notification was six days: no earlier than fifteen days and no later than ten days before the public event, except for pickets, which could be notified three days before the planned date. The inflexible application of that provision made it impossible to hold a public event other than a picket during a number of days after the New Year and Christmas holidays in January each year. The applicants had been unable to hold a march and a meeting to commemorate the anniversary of the murders of a well-known human-rights lawyer and a journalist on 19 January. Although the applicants were able to hold a picket on that day, they had had to content themselves with a static event instead of a march, and had not been able to express themselves through public speeches. The authorities had not adduced relevant and sufficient reasons for the restrictions imposed on their freedom of assembly.

Further, the domestic legislation made no allowance for special circumstances, where an immediate response to a current event was warranted in the form of a spontaneous assembly. In such cases the delay caused by compliance with the ten-day notification time-limit could render that response obsolete. One of the applicants had wanted to protest against a draft law prohibiting the adoption of

Russian children by US citizens. The date of the parliamentary examination of the draft law had been announced two days before, making it impossible for the protesters to comply with the shorter three-day notification time-limit for pickets, let alone with the normal ten-day time-limit for other types of public event. When convicting the applicant for participating in a public event held without prior notification, the domestic courts had limited their assessment to establishing that the applicant had taken part in a picket which had not been notified within the statutory time-limit. They had not examined whether there were special circumstances justifying derogation from the strict application of the notification time-limits.

In conclusion, the authorities had not given relevant and sufficient reasons for their proposals to change the location, time or manner of conduct of the applicants' public events. The proposals were based on legal provisions which did not provide for adequate and effective legal safeguards against the arbitrary and discriminatory exercise of wide discretion left to the executive and which did not therefore meet the Convention's quality-of-law requirements. The automatic and inflexible application of the time-limits for notification of public events, without taking account of public holidays or the spontaneous nature of an event, was not justified. Further, the authorities had failed in their obligation to ensure that the official decision taken in response to a notification reached the applicants reasonably in advance of the planned event, in such a way as to guarantee a right to freedom of assembly which was practical and effective, not theoretical or illusory. By dispersing the applicants' public events and arresting participants, the authorities had failed to show the requisite degree of tolerance towards peaceful, albeit unlawful, assemblies, in breach of the requirements of Article 11 § 2.

Conclusion: violation (unanimously).

The Court also found, unanimously, violations of Articles 5 § 1 and 6 § 1 in respect of certain applicants.

Article 41: sums ranging between EUR 5,000 and EUR 10,000 to each applicant in respect of non-pecuniary damage.

(See *Kudrevičius and Others v. Lithuania* [GC], 37553/05, 15 October 2015, Information Note 189; and *Alekseyev v. Russia*, 4916/07 et al., 21 October 2010, Information Note 134)

ARTICLE 13

Effective remedy

Lack of response to concerns raised by an accused about the legality of phone-tapping measure: *violation*

İrfan Güzel v. Turkey, 35285/08, judgment 7.2.2017 [Section II]

Facts – The applicant was tried by an Assize Court in 2008 and 2009. The prosecution based its case on phone tapping carried out on the applicant's telephone. The case file transmitted to the applicant contained a transcription of the tapped calls, but no information on any judicial authorisation of the tapping. In his defence the applicant asked about this absence of authorisation, in vain: his question remained unanswered during the hearings and in the judgment convicting him.

Law

Article 8: The applicant's complaints concerning the lawfulness of the tapping of his telephone calls were unfounded. The documents provided showed that the tapping had indeed been authorised by judicial decision and that the necessity of the measure had been assessed by the courts. There had been nothing of an arbitrary or unreasonable nature.

Conclusion: no violation (unanimously).

Article 13 in conjunction with Article 8: During his trial the applicant had attempted to challenge the lawfulness of the phone tapping, but his concerns had been ignored.

Under the domestic legislation, where an investigation was shelved, the Principal State Prosecutor was required to inform the person in question within a fortnight of the termination of investigations and destroy all the data obtained through the telephone tapping.

However, the same legislation appeared to be silent on cases which had been brought to court.

Admittedly, the applicant had been able to contest, in adversarial proceedings, the content of the phone calls tapped on the basis of the judicial authorisations issued. But the right to contest the transcriptions, which was part of the assessment of the applicant's criminal responsibility for the offences charged, was a totally separate issue from

that of his ability to challenge the decisions to authorise the phone tapping.

The case file did not show that the applicant was informed of the existence of the judicial decisions authorising the phone tapping in question. The Assize Court which tried the applicant never referred to those decisions or replied to his allegation of the lack of judicial authorisation for the tapping.

Moreover, the Government had failed to produce any examples showing that in similar cases an authority had been empowered to assess retrospectively the compatibility of phone tapping with the criteria of Article 8 of the Convention, in order to provide complainants with appropriate redress where relevant.

Conclusion: violation (unanimously).

Article 41: finding of a violation sufficient in itself in respect of non-pecuniary damage; claim for pecuniary damage dismissed.

(See also *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015, Information 191; and *Cevat Özel v. Turkey*, 19602/06, 7 June 2016, Information Note 197)

Lack of effective remedy allowing an enforceable judicial decision against authorities' refusal to approve the location, time or manner of conduct of a public event before its planned date: *violation*

Lashmankin and Others v. Russia, 57818/09 et al., judgment 7.2.2017 [Section III]

(See Article 11 above, page 10)

Remedies in extradition cases not affording automatic suspensive effect or thorough assessment of risk of ill-treatment: *violation*

Allanazarova v. Russia, 46721/15, judgment 14.2.2017 [Section III]

Facts – The applicant, a Turkmen national, left Turkmenistan in 2012 to go and live in Russia. She was arrested there and taken into custody in July 2014 on the basis of an arrest warrant issued against her by the Turkmen authorities on fraud charges.

In August 2014 the Prosecutor-General of Turkmenistan issued an extradition request to the Russian authorities, giving assurances about procedural safeguards including to the effect that the applicant would not be subjected to torture or to inhuman or degrading treatment.

The applicant sought refugee status but it was denied. The extradition request was granted by Russia in May 2015. The applicant appealed in vain, and ultimately sought temporary asylum on humanitarian grounds.

In September 2015, after the applicant had lodged an application with the Court, it granted her request for an interim measure (Rule 39 of the Rules of Court), indicating to the Russian authorities that her extradition had to be suspended. She was granted temporary asylum in October 2015.

Law – Article 3: The applicant had alleged that to return her to her country of origin, Turkmenistan, would expose her to ill-treatment.

(a) *Existence of a real risk of ill-treatment* – The Court had previously found a violation of Article 3 on account of such a risk in a certain number of cases where the applicant was to be returned to Turkmenistan, in particular when facing criminal proceedings there, as various sources had shown that the general human rights situation in that country was alarming. The situation had hardly changed since.

In the knowledge that, in the present case, the applicant's detention on her return had already been ordered and the charge identified in the extradition request carried a sentence of up to fifteen years' imprisonment, the risk of ill-treatment in the event of her extradition was genuine.

(b) *Whether the assurances given were reliable* – A number of criteria had to be taken into account to assess the reliability of the assurances given by the Prosecutor-General of Turkmenistan:

– the existence of supervisory systems enabling objective verification of the assurances in practice;

– the capacity of the Turkmen prosecution service to commit Turkmenistan;

– whether previous assurances of the same kind had been respected.

The respondent Government had failed to adduce any evidence in that connection. The willingness of the Turkmen authorities to cooperate with international supervisory mechanisms or with human rights NGOs had proven extremely limited. That

reticence to cooperate could also be seen at a bilateral level.

Thus the assurances given by the department of the Turkmen Prosecutor-General were not reliable; consequently, they did not remove any real risk of ill-treatment for the applicant in the event of her return to Turkmenistan.

Conclusion: violation in the event of extradition to Turkmenistan (unanimously).

Article 13 taken together with Article 3: The applicant had complained that the risk of ill-treatment in the event of her extradition to Turkmenistan, as she had claimed in all the relevant proceedings in Russia, had not been duly examined by the Russian authorities.

According to the Court's case-law, where a risk of that nature was alleged arguably, a remedy would only be effective for the purposes of Article 13 if it fulfilled the following two criteria: it must have an automatic suspensive effect and entail independent and rigorous scrutiny of the risk.

(a) *Extradition procedure*

(i) *"Automatic suspensive effect"* – This criterion was fulfilled: according to the Russian Code of Criminal Procedure, any decision by the Prosecutor-General or his deputy concerning the extradition of an individual could be appealed against with automatic suspensive effect; and that suspension had been applied in the present case.

(ii) *"Independent and rigorous scrutiny"* – This criterion had not been fulfilled. Even though, according to Instruction no. 11 (2012) of the Russian Supreme Court on extradition, the courts were required to ascertain whether the person being extradited faced a risk of torture or inhuman or degrading treatment in the requesting State, that examination had not been rigorous enough in the present case.

Firstly, while the applicant had produced material to substantiate the alleged risks, her complaint had been dismissed as being based on "mere suppositions". Such an approach did not fulfil the condition of a rigorous examination: the fact of demanding that a person provide "indisputable" evidence of a risk of ill-treatment in the destination country was tantamount to asking for proof of a future event, which was impossible, and this had imposed a disproportionate burden.

Secondly, the courts had taken note of the assurances received without examining them in the light of the relevant criteria, because they had not sought to ascertain whether the supervisory systems were sufficient for an objective verification of the fulfilment, in practice, of the assurances given by the Prosecutor-General of Turkmenistan, or of whether the latter had the capacity to commit Turkmenistan, or of compliance by that country with similar assurances in the past.

(b) *Other procedures*

According to the case-law of the Supreme Court, the granting of refugee status or temporary asylum precluded extradition. As the applicant had had access to the relevant procedures, it was necessary to examine whether they could have remedied the shortcomings of the extradition procedure.

(i) *Procedure for obtaining refugee status* – As followed in practice by the national authorities, this procedure had not satisfied any of the criteria of effectiveness mentioned above.

(α) In accordance with the law, this procedure was supposed to establish, in respect of the person concerned, whether or not there was a "justified fear" of persecution in the country of his or her habitual residence or nationality, "on account of race, religion, nationality, ethnic origin, association with a social group or political opinions". However, the Court had already noted that the Russian authorities interpreted these provisions strictly, ruling out refugee status where the risk of ill-treatment was related to reasons other than those enumerated; they had followed this practice in the present case.

Consequently, this procedure had not entailed a rigorous examination of the alleged risk, because that risk was not related to reasons of the type mentioned above but to the prospect of detention.

(β) The judicial review procedure available to failed asylum seekers did not have an automatically suspensive effect either. For a remedy to be regarded as "automatically" suspensive, such effect had to be attached to it clearly and unequivocally in domestic law: it was not sufficient for there merely to be a possible administrative or other practice consisting in suspending the extradition pending the outcome of an appeal against the rejection of refugee status.

(ii) *Temporary asylum procedure* – If refugee status was denied, it was still possible to apply for temporary asylum on "humanitarian grounds". However, even supposing that this procedure enabled thorough scrutiny and a rigorous examination of the risk of treatment in breach of Article 3, it neverthe-

less appeared to be devoid of automatic suspensive effect.

In the present case, it could be seen from the decision of the Russian authorities on temporary asylum that this asylum had been granted to the applicant not because of the request to that effect but following the indication by the Court of the interim measure under Rule 39.

In conclusion, even combined with procedures for the granting of refugee status and then temporary asylum, the judicial review of the extradition decision had not constituted an "effective remedy" in respect of the alleged risk of ill-treatment in Turkmenistan.

Conclusion: violation (unanimously).

Article 41: finding of a violation sufficient in itself for non-pecuniary damage.

(See also *S.K. v. Russia*, 52722/15, 14 February 2017, Information Note 204, summary below)

Lack of effective remedy in respect of both administrative and temporary asylum proceedings: *violation*

S.K. v. Russia, 52722/15, judgment 14.2.2017 [Section III]

Facts – The applicant, a Syrian national, arrived in Russia in October 2011. In February 2013 he was found guilty of an administrative offence of remaining in Russia after the expiry of his visa and sentenced to a penalty of forcible administrative removal. In March 2015 the Supreme Court of the Dagestan Republic upheld that judgment and the applicant was placed in immigration detention. The administrative removal was not enforced and in May 2015 he applied for temporary asylum. His application was dismissed and that decision was upheld on review. He sought judicial review of the decision which was refused and his appeal against that refusal was dismissed in June 2016.

On 26 October and 12 November 2015 the Court decided to indicate to the Russian Government, under Rule 39 of the Rules of Court that the applicant should not be expelled to Syria for the duration of the proceedings before the Court.

In the Convention proceedings the applicant complained, *inter alia*, that his administrative removal to Syria would entail a violation of Articles 2 and 3 and that he had no effective remedy under Article 13.

Law

Articles 2 and 3: The applicant's complaint had been made in the context of the continuing hostilities in Syria, and in particular in his home town of Aleppo, as well as on account of the possibility that he would be drafted into active military service, thus intensifying the risks to his life and limb. The security and humanitarian situation and the type and extent of hostilities in Syria had deteriorated dramatically between the applicant's arrival in Russia and the refusal of his temporary asylum application. The available information contained indications that, despite the agreement on the cessation of hostilities signed in February 2016, various parties to the aggressions were employing methods and tactics of warfare that increased the risk of civilian casualties. The available material disclosed reports of indiscriminate use of force and attacks against civilians.

Conclusion: deportation would constitute a violation (unanimously).

Article 13 in conjunction with Articles 2 and 3: Any claim that there existed substantial grounds for fearing a real risk of treatment contrary to Articles 2 and 3 required that the person concerned should have access to a remedy with automatic suspensive effect and that there should be independent and rigorous scrutiny.

(a) *Administrative proceedings* – An ordinary appeal against a removal imposed by a first-instance court had an automatic suspensive effect, in the sense that by operation of the law the removal was not to be carried out until the statutory time-limit for appeal had expired or until the appeal decision had been delivered. The applicant was therefore protected from removal until March 2015, when the Supreme Court of the Dagestan Republic upheld the administrative removal. Although Article 13 did not compel Contracting States to set up a further level of appeal in this type of case, Russian domestic law provided for review of final judgments. In such a case, suspension was not automatic since only a prosecutor could request it. Consequently, the review procedure was not an effective remedy for the purposes of Article 13 in the context of a complaint arising under Articles 2 and 3. Moreover, independent and thorough scrutiny required under Article 13 implied that the remedy was capable of offering protection against removal where such scrutiny disclosed substantial grounds to believe that there was a real risk of ill-treatment in the

case of the penalty of removal being imposed and enforced. At the time the applicant was found guilty of the offence, the domestic courts had no choice but to impose the mandatory penalty of administrative removal, irrespective of the validity of the arguments relating to Article 2 or 3 of the Convention.

(b) *Temporary asylum procedure* – While a successful application for temporary asylum would be capable of suspending enforcement of a penalty of administrative removal, in the present case the applicant had been refused temporary asylum and thus there was no suspensive effect. The Court did not rule out that the temporary asylum procedure was, in theory, capable of ensuring a thorough assessment of the risks arising under Articles 2 and 3 and noted that the granting of temporary asylum prevented a foreigner's removal from Russia, albeit for a limited period of time. However, in the present case, the national authorities had considered without any justification that the situation of ongoing hostilities in Syria did not justify temporary asylum and had based their decision on considerations that fell outside the scope of the thorough scrutiny required.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been a breach of Article 5 § 1 (applicant's removal was not practicable) and Article 5 § 4 (no procedure at the applicant's disposal for judicial review of the lawfulness of his detention).

Article 46: The applicant's continued detention did not comply with Article 5 § 1 and was not accompanied by the requisite procedural guarantees. General measures were expected from the respondent State in order to correct the situation (see *Kim v. Russia*, 44260/13, 17 July 2014, Information Note 176). The appropriate way to deal with the matter would be to release the applicant without delay and no later than on the day following notification that the present judgment had become final.

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

(See *L.M. and Others v. Russia*, 40081/14, 40088/14 and 40127/14, 15 October 2015, Information Note 189; and *Allanazarova v. Russia*, 46721/15, 14 February 2017, Information Note 204, summary above, page 13)

ARTICLE 35

ARTICLE 35 § 1

Six-month period

Supervisory-review proceedings as an effective remedy: *admissible*

Orlovskaya Iskra v. Russia, 42911/08, judgment 21.2.2017 [Section III]

(See Article 10 above, page 9)

ARTICLE 57

Reservations, law then in force

Failure to update reservation following introduction of new legislation making no substantive change to relevant pre-existing law: *reservation applicable*

Benavent Díaz v. Spain, 46479/10, decision 31.1.2017 [Section III]

Facts – When Spain deposited its instrument of ratification of the Convention in 1979, it formulated, under current Article 57 (former Article 64) of the Convention, a reservation concerning Articles 5 and 6 of the Convention on account of their incompatibility with the provisions of the Military Code of Justice on disciplinary regulations in the armed forces. That reservation was updated in 1986 on the entry into force of Implementing Law no. 12/1985, which replaced the aforementioned provisions. Subsequently, Organic Law no. 12/1985 was in turn replaced by Organic Law no. 8/1998 on disciplinary regulations in the armed forces, which came into force in 1999. However, the Spanish reservation concerning Articles 5 and 6 of the Convention was not updated in the light of the latter Act until 2007, when the Spanish Ministry of Foreign Affairs informed the Council of Europe that the reservation had been updated.

In 2006 the applicant, a soldier at the time, was penalised by his superior officers with a disciplinary sanction of six day's detention pursuant to Law no. 8/1998. He decided to contest that sanction under Articles 5 and 6 of the Convention (complaining of the lack of prior court involvement), but was prevented from proceeding by the above-mentioned reservation after the Supreme Court rejected his argument that the reservation had lapsed because Spain had not informed the Council of Europe of

the change in legislation until 2007, that is to say after the applicant had served his penalty.

Law – Article 57: The question raised by the present case was whether the legislation on which the domestic authorities had based the impugned sanction (Organic Law no. 8/1998) was covered by the Spanish reservation.

(a) *Applicability to the new Act of the initial reservation* – Under the terms of Article 57 of the Convention, only laws "then in force" in the territory of a Contracting State may be the subject of a reservation.

However, Organic Law no. 8/1998 was in force neither in 1979, when the reservation was formulated, nor in 1986, the year of the last update of the Law before the six days' detention was imposed on the applicant.

Nevertheless, the relevant parts of Organic Law no. 8/1998 applied in the present case had merely faithfully reproduced the provisions of Organic Law no. 12/1985, which was covered by the 1986 update of the reservation. Furthermore, those provisions had had the same personal scope as the provisions of the previous Laws covered by the reservation, that is to say the members of the armed forces (unlike in the case of *Dacosta Silva v. Spain*, 69966/01, 2 November 2011, Information Note 91, where the new Law covered members of the Civil Guard). Insofar as those provisions could not be deemed to have extended the scope of the reservation formulated in 1979 and updated in 1986, it was clear that the initial reservation had remained applicable.

(b) *Ex post facto update of the reservation with the Council of Europe* – The applicant considered that the Spanish State's delay in communicating the formal amendment of the reservation to the Council of Europe justified the conclusion that the 1979 reservation was non-existent or inapplicable between the date of entry into force of the impugned 1999 Law and the date of the update of the reservation in 2007.

However, accepting that argument would mean attributing to the failure to notify the Council of Europe of an amendment to the Law initially covered by the reservation the same effects as to a formal withdrawal of the reservation. The Court had already had occasion to point out that a reservation formulated pursuant to Article 57 of the Convention remained valid until withdrawn by the respondent State. In fact, that practice was in conformity with the Vienna Convention on the Law of Treaties, which provided that withdrawal of a reservation should be formulated in writing and be formal in nature.

The applicant's argument therefore had to be rejected.

The Court nevertheless emphasised that formal notification to the Council of Europe of an amendment to a reservation resulting from legislative reform by a Contracting State helped to promote legal certainty. Such notification was intended to enable the Council to ascertain that subsequent legislative changes by that State did not extend the scope of the initial reservation and that the reservation was valid and complied with the requirements of Article 57 of the Convention.

(c) *Other validity criteria* – Lastly, the Spanish reservation satisfied the other criteria for validity set out in Article 57 of the Convention.

– It referred to particular provisions of the Convention, namely Articles 5 and 6.

– It was never alleged that the reservation was of a "general" nature; it sufficiently clearly stated that its *raison d'être* was the possible incompatibility of those provisions with disciplinary regulations in the armed forces.

– The initial 1979 reservation had contained a "brief statement of the law concerned". The 1986 update of the reservation explained that Organic Law no. 12/1985 reduced the duration of the custodial sanctions that could be imposed without the involvement of a court and improved the safeguards for individuals at the investigation stage. Both texts, and also the 2007 update, explicitly mentioned the particular provisions (parts and chapters of the Law) concerned.

The reservation had therefore contained a safeguard against any interpretation which might have unduly extended its scope.

In conclusion, the reservation formulated by Spain in connection with Articles 5 and 6 of the Convention was applicable to the impugned provisions of Organic Law no. 8/1998. Accordingly, there was no need to assess the complaint concerning the custodial sanction imposed on the applicant on the basis of a decision taken by his superior officers without the prior involvement of a court.

Conclusion: inadmissible (incompatible *ratione materiae*).

ARTICLE 1 OF PROTOCOL No. 1

Possessions

Dismissal without compensation of managing director of State-owned company pursuant to statutory provision ruled constitutional by Court of Cassation: *inadmissible*

Karachalios v. Greece, 67810/14, decision 24.1.2017 [Section I]

Facts – The applicant was appointed managing director of a State-owned company (the "company") by ministerial decision. In August 2003 he signed a contract of appointment for a statutory term of five years. However, following the legislative elections of 2004, Law no. 3260/2004 automatically terminated the contracts of board members, officers, chairmen and managers of public-law entities and State corporations. The applicant's contract was thus terminated in accordance with section 10(2) of the law in question.

Having been dismissed without severance pay on 23 November 2004, even though his contract was not due to expire until 5 August 2008, the applicant took his case to the domestic courts seeking the annulment of his dismissal and, failing that, the payment of salaries and allowances due to him. Both the first-instance court and the Court of Appeal upheld his claim, finding that he was entitled to receive remuneration for the entire contractual term.

The company appealed on points of law. The Court of Cassation quashed the judgment of the Court of Appeal, ruled that section 10(2) was compliant with the constitution, and referred the case back to the Court of Appeal, which had not yet delivered its judgment at the time of the present decision.

Law – Article 1 of Protocol No. 1: The subject matter of the proceedings before the domestic courts had not concerned an "existing possession", as the applicant had already received his remuneration until the end of his term of office, together with wages for about four additional months, until his dismissal, and an award ensuing from the decision of the Court of Cassation.

However, his alleged "legitimate expectation" had depended on the outcome of the decision of the Court of Cassation on the issue of the constitutionality of section 10(2) of Law no. 3260/2004 under which the contracts of directors and managers of State-owned companies, such as that of the applicant, had been terminated.

In June 2014 the Court of Cassation had found that section to be compliant with the constitution and had referred the case back to the Court of Appeal. By so ruling, the Court of Cassation had aligned its case-law with that of the Supreme Administrative Court in such matters.

Following that decision of the Court of Cassation, the prospect that a fresh decision of the Court of Appeal would be favourable to the applicant appeared to be seriously in doubt. The Court could not find a "legitimate expectation" where there was a dispute as to how domestic law should be interpreted and applied, and where the arguments advanced by the applicant in this connection were ultimately rejected by the national courts.

Accordingly, the applicant had failed to show that he was entitled to receive an amount that was sufficiently certain as to be considered due, and he could not therefore avail himself of the right to a "possession" for the purposes of Article 1 of Protocol No. 1.

Conclusion: inadmissible (incompatible *ratione materiae*).

(See also *Kopecký v. Slovakia* [GC], 44912/98, 28 September 2004, Information Note 67, and *Béláné Nagy v. Hungary* [GC], 53080/13, 13 December 2016, Information Note 202)

Peaceful enjoyment of possessions

Cancellation of shareholding and personal liability for company's debts after it was struck off the register for failure to comply with statutory requirements: *no violation*

Lekić v. Slovenia, 36480/07, judgment 14.2.2017 [Section IV]

Facts – The applicant was a minority shareholder and former managing director of a company that was struck off the court register of companies pursuant to the Financial Operations of Companies Act (FOCA) after a lengthy period of insolvency and inactivity. As a result of the striking off, the applicant's shareholding in the company was cancelled and, as an active member of the company, he became personally liable (jointly and severally with

other active members) for the company's debts. He paid more than EUR 30,000 from his own assets to settle a claim by the company's main creditor.

In the Convention proceedings, the applicant complained, *inter alia*, that his right to the peaceful enjoyment of his possessions had been violated in breach of Article 1 of Protocol No. 1.

Law – Article 1 of Protocol No. 1

(a) *Applicability* – Two questions arose regarding the applicability of Article 1 of Protocol No. 1 to the applicant's case: (i) whether measures relating to the company could be regarded as directly affecting the rights of the applicant as a shareholder and (ii) whether the applicant's shareholding, which was of questionable economic value given the company's insolvency, could still be considered a "possession".

As to the first question – whether the applicant had been directly affected – the dissolution of the company meant that his shareholding was cancelled and that he incurred personal liability for the company's debts. The dissolution had therefore entailed consequences which affected the applicant's financial interests as a former member of the company and were thus directly decisive for his individual rights.

As to whether the shareholding could be considered a "possession", ownership of a share implied a bundle of corresponding rights in addition to the right to a share of the company's assets in the event of a winding up. These included voting rights and the right to influence the company's conduct. Thus, although in the period between the cessation of the company's activities and the strike-off the applicant could not extract any pecuniary benefits from the company, he was still entitled to exercise a number of rights which allowed him and other members of the company to engage in a commercial activity, and were thus of a pecuniary nature.

Article 1 of Protocol No. 1 was therefore applicable.

(b) *Compliance* – The strike-off had complex and diverse legal implications which could not readily be classified in any specific category within Article 1 of Protocol No. 1. The case would therefore be examined in the light of the general rule – enunciating the principle of the peaceful enjoyment of property – set out in that provision.

The domestic legislation, as interpreted by the Constitutional Court regarding the issue of which company members engaged personal liability, was adequately accessible and foreseeable, so the interference complained of had a sufficient legal basis in Slovenian law. The legislation had constituted an attempt to restore stability in the commercial market and there was no reason to doubt that this approach to ensuring a better functioning of the market was "in the public interest".

As to the proportionality of the interference, the measure striking off the company from the register had not represented an excessive individual burden for the applicant. The company's disregard for company law and the principles of good corporate governance, which consisted of (a) inadequate capitalisation, (b) failure to observe the law and good business practices, (c) a prolonged state of insolvency, and (d) inactivity on the part of the company's management, had warranted a strong response by the authorities, including the imposition of personal liability on any member who was found to be responsible for the irregularities in the operation of the company. Furthermore, the irregularities were to a large extent attributable to the applicant himself, as he had been employed by the company for more than four years and was involved in its management, first as its acting director and later as managing director. The domestic courts' finding that the applicant was an active member of the company and thus liable for the payment of its debts was thus reasonable.

Conclusion: no violation (unanimously).

ARTICLE 2 OF PROTOCOL No. 4

ARTICLE 2 § 1

Freedom of movement

Lack of clarity of Italian legislation regarding imposition of "special police supervision" orders on persons considered a danger to society: *violation*

De Tommaso v. Italy, 43395/09, judgment 23.2.2017 [GC]

Facts – Italian law provides for the possibility of imposing "preventive" measures – involving restrictions of various freedoms – on "persons presenting a danger for security and public morality" (Act no. 1423 of 27 December 1956).

The applicant had several previous convictions for offences including drug trafficking and unlawful

possession of weapons. In 2007 the public prosecutor recommended, on the basis of continuing suspicions as to the applicant's behaviour and source of income, that he be placed under "special police supervision" in accordance with the above-mentioned Act. In 2008 a district court imposed the measure sought, entailing the following set of obligations for a period of two years: to report once a week to the police authority responsible for the supervision; to look for work within a month; not to change the place of residence; to lead an honest and law-abiding life and not give cause for suspicion; not to associate with persons who had a criminal record and who were subject to preventive or security measures; not to return home later than 10 p.m. or to leave home before 6 a.m., except in case of necessity and only after giving notice to the authorities in good time; not to keep or carry weapons; not to go to bars, nightclubs, amusement arcades or brothels and not to attend public meetings; not to use mobile phones or radio communication devices; and to carry at all times the document setting out these obligations (*carta precettiva*) and present it to the police authority on request.

Seven months later, that decision was quashed by the Court of Appeal, which held that at the time the measure had been imposed, the danger posed by the applicant had not been substantiated by any persistent criminal activity on his part.

Law

Article 5 § 1: Article 5 was not concerned with mere restrictions on liberty of movement, which were governed by Article 2 of Protocol No. 4. As an exception, in *Guzzardi v. Italy* (7367/76, 6 November 1980) the Court had nevertheless held that measures of this nature could be said to amount to deprivation of liberty in view of the extremely small size of the area where the applicant had been confined, the almost permanent supervision to which he had been subjected and the fact that it had been almost completely impossible for him to make social contacts. In all subsequent cases, the Court had not found that there were comparable special circumstances, including where applicants had been prohibited from leaving home at night.

In the present case, the following reasons prompted the Court to find that the measures in issue did not amount to deprivation of liberty: (a) the applicant had not been forced to live within a restricted area; (b) as he remained free to leave home during the day, he had been able to have a social life and maintain relations with the outside world; (c) the prohibition on leaving home at night except in case of necessity (between 10 p.m. and 6 a.m.) could not be equated to house arrest; and (d) he had never sought permission from the authorities to travel away from his place of residence.

Article 5 was therefore not applicable.

Conclusion: inadmissible (majority).

Article 2 of Protocol No. 4: The measures in issue had had a legal basis, namely Act no. 1423/1956, as interpreted in the light of the Constitutional Court's judgments.

In the Court's view, however, the imposition of preventive measures on the applicant had not been sufficiently foreseeable and had not been accompanied by adequate safeguards against the various possible abuses. The Act in question had been couched in vague and excessively broad terms, being insufficiently clear and precise as regards both the individuals to whom preventive measures were applicable (section 1 of the Act) and the content of certain of these measures (sections 3 and 5 of the Act).

(a) *Persons targeted by the measures* – On the basis of the following considerations, the Court reached the conclusion that, owing to the lack of a clear definition of the scope and manner of exercise of the very wide discretion conferred on the courts, the Act had not afforded sufficient protection against arbitrary interferences and had not enabled the applicant to regulate his conduct and foresee to a sufficiently certain degree the imposition of the preventive measures.

(i) In its recent case-law, the Italian Constitutional Court had held, in response to the contention that the relevant provisions were insufficiently precise, that simply belonging to one of the categories of individuals referred to in section 1 of the Act was not sufficient to justify the imposition of a preventive measure, and that preventive measures could therefore not be adopted on the basis of mere suspicion.

Notwithstanding those indications, the fact remained that neither the Act nor the Constitutional Court had clearly identified the "factual evidence" or the specific types of behaviour which had to be taken into consideration in order to assess the danger to society posed by the individual.

(ii) In the present case, the District Court had based its decision on the existence of "active" criminal tendencies on the applicant's part, yet had not attributed any specific behaviour or criminal activity to him.

Furthermore, the court had mentioned as grounds for the preventive measure the fact that the applicant had no "fixed and lawful occupation" and that his life was characterised by regular association with prominent local criminals (*malavita*) and the commission of offences.

In other words, it had based its reasoning on the assumption of "criminal tendencies", a criterion that the Constitutional Court had already identified as insufficient.

(b) *Content of the measures*

(i) *Imprecise definition of certain obligations* – As well as allowing the courts to impose "any other measures deemed necessary" in view of the requirements of protecting society, the Act provided for the imposition of vague and unclear obligations, such as to "lead an honest and law-abiding life" and "not give cause for suspicion".

The case-law of the Constitutional Court had not compensated for those shortcomings; by referring to equally indeterminate concepts or to the entire Italian legal system, the Constitutional Court had provided no further clarification as to the specific norms whose non-observance would be a further indication of the person's danger to society.

(ii) *Prohibition on attending public meetings* – The measures provided for by law and imposed on the applicant had also included a prohibition on attending public meetings. This had in effect been an absolute prohibition. The Act did not specify any temporal or spatial limits as to the possibility of restricting this fundamental freedom, leaving the matter entirely to the discretion of the judge without indicating with sufficient clarity the scope of such discretion and the manner of its exercise.

Conclusion: violation (unanimously).

Article 37 § 1: The Government had submitted a unilateral declaration acknowledging that the applicant had suffered a violation of Article 6 § 1 of the Convention on account of the lack of a public hearing, and undertaking to pay him a sum of money in respect of procedural costs (but not in respect of non-pecuniary damage).

However, unlike in the case of preventive measures concerning property, there were no previous decisions on the question whether Article 6 § 1 was applicable to proceedings for the application of preventive measures concerning individuals, such as those imposed in the present case, and, if so, whether hearings on such matters should be held in public.

Conclusion: request for striking out rejected (unanimously).

Article 6 § 1

(a) *Applicability* – The criminal aspect of Article 6 § 1 was not applicable, since special supervision was not comparable to a criminal sanction, given that the proceedings concerning the applicant had not involved the determination of a "criminal charge".

However, there had been a shift in the Court's case-law towards applying the civil aspect of Article 6 to cases which might not initially appear to concern a civil right but might have direct and significant repercussions on a private right belonging to an individual (see *Alexandre v. Portugal*, 33197/09, 20 November 2012, Information Note 157, and *Pocius v. Lithuania*, 35601/04, 6 July 2010).

In the present case, the obligations entailing not leaving the district of residence, not leaving home between 10 p.m. and 6 a.m., not attending public meetings and not using mobile phones or radio communication devices fell undoubtedly within the sphere of personal rights and were therefore civil in nature (see, *mutatis mutandis*, *Enea v. Italy* [GC], 74912/01, 17 September 2009, Information Note 122, and *Ganci v. Italy*, 41576/98, 30 October 2003, Information Note 57).

A "genuine and serious dispute" had arisen in relation to those rights when the District Court had placed the applicant under special supervision, dismissing his arguments. The dispute had then been conclusively settled by the judgment of the Court of Appeal, which had acknowledged that the preventive measure imposed on the applicant had been unlawful.

Conclusion: admissible (unanimously).

(b) *Merits (lack of a public hearing)* – The applicant had not had the opportunity to challenge the measure at a public hearing. The Court reiterated that the obligation to hold a public hearing was not absolute since the circumstances that could justify dispensing with a hearing depended essentially on the nature of the issues to be determined by the domestic courts.

The circumstances of the present case had *dicta*ted that a public hearing should be held, bearing in mind that the domestic courts had had to assess aspects such as the applicant's character, behaviour and dangerousness, all of which had been decisive for the imposition of the preventive measure.

Conclusion: violation (unanimously).

The Court also held, by fourteen votes to three, that there had been no violation of Article 6 § 1 in terms of the fairness of the proceedings, particularly as regards the assessment of the evidence at first instance, and, by twelve votes to five, that there had been no violation of Article 13 in conjunction with Article 2 of Protocol No. 4.

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

OTHER JURISDICTIONS

Inter-American Court of Human Rights (IACtHR)

Freedom from *ex post facto* laws and the non-criminalisation of medical acts

Case of Pollo Rivera et al. v. Peru, Series C No. 319, judgment 21.10.2016

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

Facts – Between 1992 and 1994 Mr Luis Williams Pollo Rivera, a physician, was detained on charges of terrorism in the context of the Peruvian armed conflict. He was subjected to acts of torture and other cruel, inhumane and degrading treatment in anti-terrorist police and military facilities. He was then prosecuted in the military courts for the crime of treason and in the ordinary courts for the crime of terrorism. After the military courts declined jurisdiction in favour of the ordinary courts, he was found not guilty. In 2003 he was detained again on charges of collaboration with terrorism with regard to other events. He was prosecuted and convicted in the ordinary courts for the crime of collaboration with terrorism due to an alleged practice of giving medical care to members of the terrorist group Shining Path (*Sendero Luminoso*). The final judgment issued by the Peruvian Supreme Court of Justice found that Article 321 of the Criminal Code was applicable even if medical acts were not expressly listed as acts of collaboration in the relevant provisions. He served a prison sentence but was transferred to a public hospital in 2005 on health grounds. Between 2006 and 2011 he submitted three requests for pardon on humanitarian grounds but these were refused. He died in February 2012.

Law

(a) *Article 9 (freedom from* ex post facto *laws or "principle of legality"), in relation to Article 1(1) (obligation to respect and ensure rights without discrimination) of the American Convention on Human Rights (ACHR)* – The respondent State had argued that the applicant, through the provision of medical care to persons allegedly linked to the Shining Path terrorist organisation, had collaborated and/or was effectively part of an "apparatus" of that organisation. In other words, in that historical context, those who performed such medical acts were considered to have a link with the terrorist organisation, to share its purposes or to seek to collaborate with it.

In assessing these arguments, the Inter-American Court first reiterated that States have the right and duty to guarantee their own security and that terrorism is a menace to democratic values and to international peace and security. At the same time, it recalled that the prevention and repression of crime must be ensured within the limits and procedures set forth to preserve public safety and full respect of human rights.

The classification of an act as an offence required a clear definition of the criminalised act that established its elements and allowed it to be distinguished from acts that were either not punishable or that were punishable but not with imprisonment or other punitive measures. The sphere of application of each offence had to be previously delimited as clearly and precisely as possible, in an explicit, precise, and strict manner. Also, the establishment of its legal effects had to pre-exist the defendant's acts.

Although respect for strict legality had to be observed when defining any criminalised act, lawmakers had to be extremely careful when defining offences of a terrorist nature, not only because of the harsher prison sentences and ancillary penalties usually attributed to such crimes, but also to avoid any temptation to cover ordinary or political offences with those of terrorism. Also, it was incumbent upon the judge, when applying criminal law,

to strictly abide by the provisions thereof and to be extremely rigorous when assessing the adequacy of the accused person's conduct to the criminal definition, so as not to punish someone for acts that were not punishable under the legal system.

Mr Pollo Rivera was convicted under Article 321 of the Peruvian Criminal Code 1991, which criminalised collaboration with terrorism. The Supreme Court of Justice's final judgment in his case affirmed that even though medical acts were not of a criminal nature, repeated medical acts allegedly performed to provide medical care to members of a terrorist group indicated the physician's will to cooperate with the criminal organisation. In other words, in the specific circumstances of the case, such acts constituted a crime because the physician knew that he was cooperating with the terrorist group and its actions and so became part of it.

The Inter-American Court went on to ascertain whether the definition of the crime in itself or the interpretation by the Peruvian Supreme Court of Justice clashed with the principle of strict legality. It noted that even though the drafting of the provision was not precise enough, it allowed for a valid interpretation of the term "collaboration" under the technical meaning of "participation" or "complicity" in the crime. Consequently, notwithstanding its poor technicity, in so far as it was compatible with a strict interpretation, Article 321 was not to be considered as an infringement of the principle of legality. However, in its interpretation the Supreme Court of Justice opted for the non-technical sense of the use of the language, with a latitude incompatible with the necessity for a clear delimitation of the prohibited conduct.

The Inter-American Court further analysed whether the charges brought against Mr Pollo Rivera were to be characterised as complicity in the crime of terrorism. In this respect, it recalled that the prohibition on criminalising medical acts has been recognised by international jurisprudence and declarations by medical associations. It thus held that strict legality was breached by the Peruvian Supreme Court of Justice's interpretation of the offence. It appeared from the Supreme' Court's judgment that in order to avoid prosecution, Mr Pollo Rivera should have abstained from providing medical care to persons he knew belonged to a criminal organisation. In other words, he should have refrained from acts that were not illegal. That interpretation gave rise to the contradiction of considering medical acts as criminal while at the same time regarding the provision of medical care as non-criminal conduct. In conclusion, the State was responsible for having criminalised the medical act, which was not only legal but also a duty borne by the physician, in violation of Article 9 of the ACHR.

Conclusion: violation (unanimously).

(b) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered the State: (i) to continue and conclude, with due diligence and in a reasonable time, the ongoing investigation at the national level for the acts of torture and other cruel, inhumane or degrading treatment to which Mr Pollo Rivera was subjected and, if applicable, to prosecute and sanction those responsible; (ii) to publish the judgment and its official summary; and (iii) to pay compensation in respect of pecuniary and non-pecuniary damages, as well as costs and expenses.

COURT NEWS

Film on the ECHR: new versions

The film presenting the Court is now available in Italian, Polish, Romanian, Spanish and Turkish. This film explains how the Court works, describes the challenges faced by it and shows the scope of its activity through examples from the case-law.

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

European Moot Court Competition

On 16 February 2017 the Court welcomed the Grand Final of the 5th 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 National University of "Kyiv-Mohyla Academy" (Ukraine) who beat a team from Sofia University (Bulgaria) in the final round.

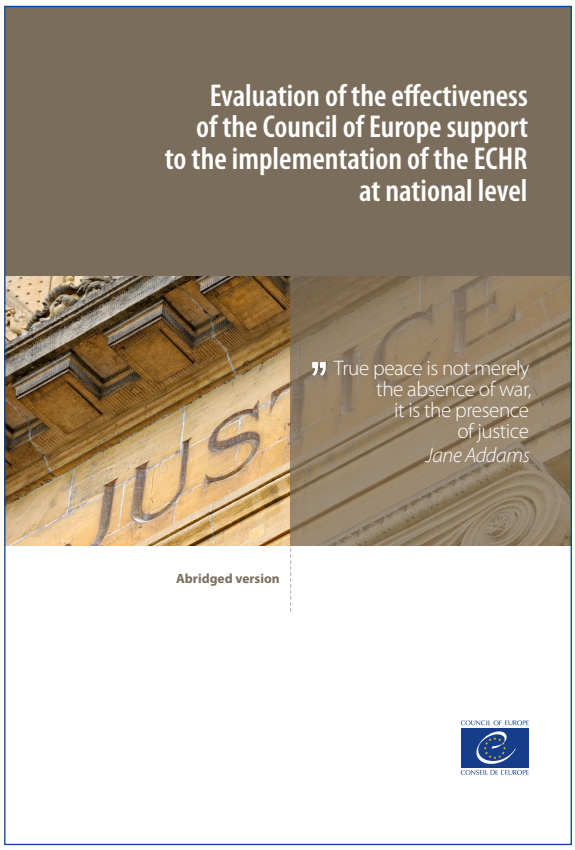
The Moot Court Competition aims to give law students, who are future legal professionals, practical experience of the European Convention on Human Rights and its implementation. More information can be found on the ELSA Internet site (http://elsa.org).

RECENT PUBLICATIONS

Implementation of the Convention

A report entitled *Evaluation of the Council of Europe support to the implementation of the European Convention on Human Rights at national level* has just been published by the Council of Europe's Directorate of Internal Oversight. It was prepared as a follow-up to the Brussels Conference, which encouraged the Secretary General to evaluate cooperation and assistance activities relating to the implementation of the Convention. The abridged final report can be downloaded from the Council of Europe's Internet site (www.coe.int – Internal Oversight).

Abridged final report (eng)



Commissioner for Human Rights

The fourth quarterly activity report 2016 of the Council of Europe's Commissioner for Human rights is available on the Commissioner's Internet site (www.coe.int – Commissioner for Human Rights – Activity reports).

The Information Note, compiled by the Court's Case-Law Information and Publications Division, contains summaries of cases examined during the month in question which the Registry considers as being of particular interest. The summaries are not binding on the Court.

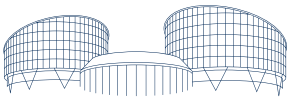
In the provisional version the summaries are normally drafted in the language of the case concerned, whereas the final single-language version appears in English and French respectively. The Information Note may be downloaded at www.echr.coe.int/NoteInformation/en. For publication updates please follow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

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

ENG

www.echr.coe.int

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



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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE