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Positive obligations (substantive aspect)

Failure by authorities to provide timely protection to minor who had been subjected to prostitution and rape: *violation*

V.C. v. Italy, 54227/14, judgment 1.2.2018 [Section I]

Facts – Between April and June 2013 the applicant, aged fifteen, was apprehended at a party where alcohol and drugs were being consumed; her parents then stated, among other things, that their daughter suffered from psychiatric disorders and had been approached to pose for pornographic photographs.

The authorities had launched a criminal investigation as soon as they became aware of the applicant's vulnerable circumstances and the real and immediate risk she was facing. However, although the public prosecutor applied in July 2013 to have urgent proceedings instituted and to have the applicant admitted to a specialist institution and placed in the care of social services, more than four months elapsed before the Youth Court reached a decision in December 2013; in the intervening period, however, the applicant was a victim of sexual exploitation.

Following the Youth Court's decision, the social services took more than four months to implement the order for the applicant's placement in care, despite requests to that effect by her parents and two urgent requests from the Youth Court for information. During that time, the applicant was raped and a criminal investigation into alleged gang rape was opened on that account; the suspects were identified and the proceedings against them are currently pending in the District Court.

Lastly, although the applicant had refused to be taken into care in December 2013, she consented to such a measure in January 2014, three months before being admitted to an institution.

Law – Articles 3 and 8

(a) *Applicability* – The applicant belonged to the category of "vulnerable individuals" who were entitled to State protection. As she had been the victim of sexual exploitation and rape, the bodily harm and psychological pressure to which she had been subjected were sufficiently serious to reach the level of severity required to fall within the scope of Article 3. Furthermore, such violent acts, which had interfered with the applicant's right to respect for her physical integrity, had caused disruption to her daily life and had an adverse effect on her private life. In addition, an individual's physical and psychological integrity were included in the concept of private life, which extended to the sphere of relations between individuals. Accordingly, Articles 3 and 8 of the Convention were both applicable.

(b) *Merits* – It had taken the Youth Court four months, from the date on which it had become aware of the difficult and dangerous situation in which the applicant had found herself, to adopt the protective measures provided for by law and requested by the public prosecutor, despite the fact that the applicant had faced a known risk of sexual exploitation, given that a criminal investigation was under way and her parents had informed the authorities.

The fact that at one point in time the applicant had not given her consent to being admitted to an institution had not in itself exempted the State from having to take appropriate and sufficient measures to protect a minor in such a way as to ensure compliance with the positive obligations imposed by Articles 3 and 8 of the Convention.

In addition, the conduct of the social services indicated a lack of real commitment to implementing the Youth Court's decision, as they had failed to attend the hearings and had taken an excessively lengthy time to select an institution to house the applicant.

Unlike the criminal courts, which had acted promptly, the competent authorities – namely the Youth Court and the social services – had in practice taken no protective measures in the immediate term, even though they had been aware that the applicant was physically and psychologically vulnerable, that proceedings concerning her sexual exploitation were still pending and that an investigation into the alleged gang rape was ongoing. By acting in this way, the authorities had not carried out any assessment of the risks faced by the applicant.

In those circumstances, the authorities could not be said to have displayed the necessary diligence. They had therefore not taken all reasonable measures in good time to prevent the abuses suffered by the applicant.

Conclusion: violation (unanimously).

Article 41: EUR 30,000 in respect of non-pecuniary damage.

(See also the Factsheet on Protection of minors)

Expulsion

Removal to Algeria of person convicted by French courts of terrorist offence: *violation*

M.A. v. France, 9373/15, judgment 1.2.2018 [Section V]

(See Article 34 below, page 20)

ARTICLE 4

ARTICLE 4 § 2

Forced labour, compulsory labour

Unremunerated work performed by doctor for local authority outside working hours over ten-year period: *Article 4 not applicable; inadmissible*

Adıgüzel v. Turkey, 7442/08, decision 6.2.2018 [Section II]

Facts – The applicant was a civil servant working in a municipal authority as an occupational doctor and forensic pathologist. His daily work included drawing up burial certificates, which required a series of acts relating to certificates of death. He had carried out 769 such operations between 1993 and 2003, outside standard working hours, sometimes at night, on public holidays or during his vacations. He had never been remunerated for that work or had the corresponding costs refunded. The administrative courts dismissed the applicant's claim for monetary compensation for the overtime which he had worked.

Law – Article 4: The municipal services relating to issuing the burial certificates in question amounted to "work" under Article 4 § 2 of the Convention, in the knowledge that the present case centred exclusively on the lack of remuneration for such services.

On taking up his medical post with the municipal authorities the applicant should have known that his status required him to intervene in cases of deaths in order to draw up the requisite burial certificates. Since a death could occur at any time, the applicant could not have been unaware that he might be called on to intervene outside working hours, at night or even at the weekend; this was necessary in order to ensure the continuity of the service in question and to protect the public interest.

Taking up the post in question therefore involved accepting a specific civil service status for occupational doctors employed in municipalities, and although such prior consent is not, in and of itself, decisive, the applicant ought to have known, on taking up the post, that he might be asked to work outside standard working hours without remuneration.

Furthermore, although there was no provision enabling the applicant to be paid monetary compensation (a fact of which he could not claim to have been unaware), the law nonetheless entitled him to apply for a day's leave for every eight hours' overtime. The applicant had probably never applied for such compensation, nor explained what might have prevented him from doing so.

In the light of the foregoing, the additional services in question had not amounted to "forced or compulsory labour" imposed on the applicant against his will. Having failed to apply for any compensatory leave, he could not claim that a disproportionate burden had been inflicted on him. That being the case, the fact that the applicant had risked losing salary or even his job if he had refused to provide the said services did not suffice for a finding that that work had been exacted from him "under the menace of any penalty", in accordance with the Court's case-law.

The facts complained of in this case therefore fell within the scope neither of Article 4 nor, consequently, of Article 14 read in conjunction with that provision.

Conclusion: inadmissible (incompatible *ratione materiae*).

(See also the Factsheet on Slavery, servitude, and forced labour)

ARTICLE 6

ARTICLE 6 § 1 (CRIMINAL)

Fair hearing

Failure by trial court to afford defence opportunity to question arresting officers in public order case: *violation*

Butkevich v. Russia, 5865/07, judgment 13.2.2018 [Section III]

Facts – The applicant, a journalist, was arrested by two police officers at an anti-globalism march in St Petersburg, where he was taking photographs. He was subsequently prosecuted for disobeying police orders and brought before a court in an expedited procedure under the Code of Administrative Offences. According to the applicant, the court refused to hear the arresting officers, the officers who had compiled the initial and amended administrative-offence records or anyone mentioned in the record. It did, however, hear a witness who was present in the courtroom. The applicant was convicted and sentenced to three days' detention, reduced to two days on appeal.

Law – Article 6 § 1: The Court reiterated that recourse to an expedited procedure when a "criminal charge" must be determined was not in itself contrary to Article 6 of the Convention as long as the procedure provided the necessary safeguards and guarantees.

There had been some safeguards in the applicant's case. In particular, there had been an oral hearing, the applicant had been assisted by his lawyer, the trial court had heard representations from the applicant and his lawyer and had granted a request by the defence to examine a witness present in the courtroom.

However, central to the applicant's case that there were insufficient procedural safeguards in place was the use of the pre-trial reports produced by the two arresting officers and the lack of an opportunity to question them. The Court considered that there was no good reason for the non-attendance of the two officers at the trial. Despite their classification as neither witnesses nor victims under the domestic law, the officers had to be regarded as witnesses for the purposes of Article 6 § 3 (d) of the Convention. Their adverse testimony was, at the very least, decisive. They were at the origin of the proceedings against the applicant and belonged to the authority which had initiated them. They were eyewitnesses to the applicant's alleged participation in an unlawful public event and his alleged refusal to comply with their related orders.

The Court was thus not satisfied that the applicant's conviction was the result of a fair hearing, as it was based on untested evidence produced by the police officers who were at the origin of the proceedings and belonged to the authority initiating the case. The counterbalancing factors (the questioning of the defence witness at the trial) were not sufficient.

Conclusion: violation (unanimously).

The Court also found, unanimously, violations of Article 5 § 1 and Article 10 of the Convention and a further violation of Article 6 § 1 (on account of the absence of a prosecuting party in the proceedings – see *Karelin v. Russia*, 926/08, 20 September 2016, Information Note 199).

Article 41: EUR 7,000 in respect of non-pecuniary damage.

(See also *Kasparov and Others v. Russia*, 21613/07, 3 October 2013, Information Note 167)

ARTICLE 6 § 1 (ADMINISTRATIVE)

Access to court

Inability to access court in region no longer controlled by the Government: *no violation*

Tsezar and Others v. Ukraine, 73590/14 et al., judgment 13.2.2018 [Section IV]

Facts – In 2014 following an outbreak of conflict in eastern Ukraine affecting the Donetsk and Luhansk regions, jurisdiction of the courts in the non-controlled areas was transferred to the relevant courts in neighbouring regions on territory controlled by the Government. Subsequently all social benefit payments in the settlements of the Donetsk and Luhansk regions that were outside the control of the Government were suspended.

In the Convention proceedings, the applicants complained under Article 6 § 1 and/or Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 that they could not challenge the suspension of their social benefits before the domestic courts, since the latter had been removed from the areas of hostilities.

Law

Article 6 § 1 of the Convention: The Court examined the complaints solely under Article 6 § 1 of the Convention. It noted that it was impossible, for the tribunals located in the city where the applicants resided to adjudicate their claims as a result of the hostilities. In the absence of any intentional restriction or limitation on the exercise of the applicants' right of access to court the question was whether the Ukrainian State authorities had taken all the

measures available to organise their judicial system in the specific situation of ongoing conflict in a way that would render the rights guaranteed in Article 6 effective in practice concerning the applicants.

The Court reiterated that, in order for the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his or her rights. The fact that the courts in Donetsk had become inoperative meant that the applicants were prevented from filing claims with them and constituted a limitation on the applicants' right of access to a court. However, such limitations on the right of access were deemed permissible under Article 6 § 1 if they did not impair the very essence of the right, pursued a legitimate aim and were not disproportionate.

The Court noted that Ukraine had introduced amendments to the law authorising courts in the neighbouring regions to consider cases which would have otherwise been considered by courts on the occupied territory and had later relocated the operations of the relevant courts to the territory controlled by the Government. These courts would have had jurisdiction over the applicants' administrative cases at the time they brought the application before the European Court.

The Court invoked the principles it had laid down in *Khlebik v. Ukraine*, namely that if the domestic authorities had taken the steps reasonably expected of them to ensure the proper functioning of the judicial system by making it accessible to the residents of the territories currently outside the control of the Government then the rights guaranteed under Article 6 would be rendered effective.

The absence of any evidence that the applicants' personal situation had precluded them from making use of the system led the Court to conclude that the applicants' inability to bring their claims before the courts in their city of residence had not impaired the very essence of their right of access to court. The limitation of that right was due to the objective fact of the hostilities in the areas the Government did not control and, taking into account the objective obstacles that the Ukrainian authorities had to face, was not disproportionate.

Conclusion: no violation (unanimously).

Article 1 of Protocol No. 1: On the basis of finding that none of the applicants were disproportionately restricted in their right of access to a court guaranteed under Article 6, the Court concluded that by failing to raise their complaints before the domestic courts they had not provided the national authorities with an opportunity to prevent or put right Convention violations through their own legal system.

Conclusion: inadmissible (failure to exhaust domestic remedies).

Article 14 in conjunction with Article 6 of the Convention and Article 1 of Protocol No. 1: The first three applicants had complained that they had been discriminated against on the grounds of their place of residence. The Court found, however, that the fact that they were residing in a region where the hostilities had forced the Government to adopt remedial measures which were not needed elsewhere meant that they were not in an "analogous situation" compared to persons residing on the Government controlled territory.

Conclusion: inadmissible (manifestly ill-founded).

(See *Khlebik v. Ukraine*, 2945/16, 25 July 2017, Information Note 209)

ARTICLE 8

Respect for private life

Customs control's power to search and copy individuals' electronic data without reasonable suspicion of wrongdoing: *violation*

Ivashchenko v. Russia, 61064/10, judgment 13.2.2018 [Section III]

Facts – The applicant, a Russian photojournalist, had travelled to Abkhazia to prepare a report. Upon returning to Russia he was stopped at a customs checkpoint and told there was a need to verify the information contained in his customs declaration by way of an "inspection procedure" in respect of the items in his bag and backpack.

The customs officials under the authority of domestic legislation examined data contained on the applicant's laptop and first copied the data to a mobile or external hard drive and then recopied to six DVDs. Subsequently, the applicant was informed that a report had been commissioned from a criminal forensics expert to determine whether the data copied from his laptop had any prohibited "extremist" content (the results proved negative). The applicant sought judicial review of the customs officials' acts but to no avail.

In the Convention proceedings, the applicant complained, *inter alia*, under Article 8 of the Convention that the customs authorities had unlawfully and without any valid reasons examined and copied the electronic data contained on his laptop.

Law – Article 8: There being insufficient elements to conclude that the applicant's "correspondence" had been adversely affected by the customs officers' actions, the Court considered it more appropriate to focus on the notion of "private life".

Distinguishing *Gillan and Quinton v. the United Kingdom*, the Court noted that the search of the applicant's laptop (allegedly without any reasonable suspicion of any offence or unlawful conduct), the copying of his personal and professional data followed by its communication for a specialist assessment, and the retention of his data for some two years had gone beyond what could be perceived as procedures that were "routine", relatively non-invasive and for which consent was usually given. The applicant had not able to choose whether he wanted to present himself and his belongings to customs and a possible customs inspection.

The case concerned the context of customs controls for "goods" carried by a person arriving at customs to declare items rather than the context of security checks, in particular checks carried out in relation to a person and his or her effects prior to admission to an aircraft, train or the like. In the Court's view, by submitting his effects to customs controls a person does not automatically and in all instances waive or otherwise forgo the right to respect for his or her "private life" or, as the case may be, "correspondence". It was thus open to the applicant to rely on the right to respect for his private life and there had been an interference under Article 8 of the Convention.

The Court went on to consider whether the interference was justified. Having regard to the reasoning of the domestic decisions, the Court was not satisfied that the combined reading of the relevant provisions of the Customs Code and other legal rules constituted a foreseeable interpretation of national law and provided a legal basis for the copying of electronic data contained in electronic documents located in "container" such as a laptop.

In addition, the safeguards provided by Russian law had not constituted an adequate framework for the wide powers afforded to the executive which could offer individuals adequate protection against arbitrary interference.

Firstly, the Court was not satisfied that there was a clear requirement at the authorisation stage that the inspection and, first and foremost, the copying be subjected to a requirement of any assessment of the proportionality of the measure. It was evident that the usual approach to the sampling by customs of "goods" was not adequate as regards electronic data.

Secondly, it did not appear that the comprehensive measure used in the applicant's case had to be based on some notion of a reasonable suspicion that someone making a customs declaration had committed an offence. That apparent lack of any need for reasonable suspicion relating to an offence was exacerbated by the fact that the domestic authorities, ultimately the courts on judicial review, did not attempt to define and apply notions from the relevant domestic legislation[1] such as "propaganda for fascism" or "social, racial, ethnic or religious enmity" to any of the ascertained facts.

Thirdly, the Court was not convinced that the fact that the applicant was returning from a disputed area (Abkhazia) constituted in itself a sufficient basis for proceeding with the extensive examination and copying of his electronic data on account of possible "extremist" content.

Lastly, although the exercise of the powers to inspect and sample was amenable to judicial review, the width of those powers was such that the applicant faced formidable obstacles in showing that the customs officers' actions were unlawful, unjustified or otherwise in breach of Russian law. The Court had noted in the freedom of assembly case of *Lashmankin and Others v. Russia* that the scope of judicial review was limited and failed to apply the requisite "proportionality" and "necessary in a democratic society" tests. That assessment was applicable in the context of the adverse decisions and actions taken by the customs authorities in the instant case in relation to the copying of electronic data, as challenged by the applicant in the judicial review proceedings.

1. See Presidential Decree no. 310 of 23 March 1995 "on measures for ensuring consolidated actions by public authorities in the fight against manifestations of fascism and other forms of political extremism in the Russian Federation".

There were thus deficiencies in the domestic regulatory framework as the domestic authorities, including the courts, were not required to give relevant and sufficient reasons for justifying the interference in the present case and did not consider it relevant, at any stage or in any manner, that the applicant was carrying journalistic material.

In sum, the respondent Government had not convincingly demonstrated that the relevant legislation and practice afforded adequate and effective safeguards against abuse in a situation where the sampling procedure was used in relation to electronic data stored on an electronic device. The interference was not, therefore, "in accordance with the law".

Conclusion: violation (unanimously).

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

(See *Gillan and Quinton v. the United Kingdom*, 4158/05, 12 January 2010, Information Note 126; and *Lashmankin and Others v. Russia*, 57818/09 et al, 7 February 2017, Information Note 204)

Respect for private life

Dismissal for using work computer to store large volume of pornographic material: *no violation*

Libert v. France, 588/13, judgment 22.2.2018 [Section V]

Facts – The applicant, an employee at the French national railway company (SNCF), was dismissed in 2008 following the discovery, in his absence, of 1,562 pornographic images (totalling 787 megabytes) on his work computer. The applicant regarded this as a disproportionate and unlawful infringement of his private life, given that he had added the adjective "personal" to the default name of the hard disk in question ("D:/data").

In dismissing his appeals the courts held as follows: the employer's "user charter" provided that private information had to be clearly identified as such; the generic term "personal data" did not unequivocally designate information covered by privacy, particularly as an employee could not use the whole of a hard disk, which was supposed to contain professional data, for private purposes; and dismissal was not a disproportionate measure in view of the applicant's "massive" breach of the company's internal rules.

Law – Article 8

(a) *Applicability* – The Court could accept that in some circumstances non-professional data, for example data clearly identified as being private, stored by an employee on a computer supplied by his employer in order to discharge his duties, might be deemed to relate to his "private life". In the case at issue, the SNCF allowed its staff occasionally to use the computer facilities placed at their disposal for private purposes, subject to compliance with specific rules.

(b) *Merits*

(i) *Negative obligation or positive obligation: existence of "interference by a public authority"* – Given that files belonging to the applicant had been opened on his work computer without his knowledge and in his absence, the Court was prepared to accept that there had been an interference with his right to respect for private life. The question whether those files had been clearly identified as personal is examined below in the framework of the proportionality of the measure.

The Court rejected the Government's objection that the SNCF could not be regarded as a "public authority" for the purposes of Article 8: even though its activity was "industrial and commercial" and its staff had a private-law relationship with it, the SNCF was nonetheless a legal entity established under public law which was placed under the supervision of the State, whose directorship was appointed by the latter, and which provided a public service, held a monopoly and benefited from an implicit State guarantee.

Consequently, unlike in the case of *Bărbulescu v. Romania* [GC] (61496/08, 5 September 2017, Information Note 210) – in which the interference was carried out by a strictly private-sector employer – the complaint had to be analysed from the angle not of the State's positive obligations but of its negative obligations.

(ii) *Prescribed by law* – Clearly, the relevant articles of the Labour Code merely stated, in a general manner, that any restrictions on employees' rights and freedoms had to be "justified by the nature of the task to be executed" and "proportionate to the aim pursued". Equally clearly, at the material time the case-law of the Court of Cassation stated that unless there was a serious risk or in exceptional circumstances, employers could only open files

identified by an employee as being personal on the hard disk of a computer supplied for that employee's use in the presence of the latter (or after calling him or her to their office).

However, the Court of Cassation had added that files created by an employee by means of the computer equipment supplied to him or her were deemed professional unless the employee had identified them as personal. Positive law thus sufficiently specified the circumstances and conditions in which the employer could open files stored in an employee's work computer.

(iii) *Legitimate aim* – The interference had been intended to safeguard the protection of "the rights of others", that is to say, in this case, those of the employer, who might legitimately wish to ensure that his employees were using the computer facilities which they had placed at their disposal in line with their contractual obligations and the applicable regulations.

(iv) *Necessity in a democratic society* – French positive law comprised a mechanism for protecting private life by laying down that files identified as being personal could only be opened in the presence of the person concerned. As regards the courts, the grounds on which they had dismissed the applicant's appeal regarding respect for his private life seemed relevant and sufficient.

Clearly, by using the word "personal" rather than "private" the applicant had opted for the term used in the Court of Cassation's relevant case-law. However, the employer's Computer Charter specifically used the word "private" to refer to such messages and files, which employees should so identify. The amount of storage space used for the impugned purposes could also have justified a degree of severity. In sum, the domestic authorities had not overstepped their margin of appreciation.

Conclusion: no violation (unanimously).

(See also the Factsheets on New technologies and Surveillance at workplace)

Respect for private life

Dismissal of claim for damages and for final order blocking publication of Internet pages containing defamatory material: *inadmissible*

Oktar v. Turkey, 59040/08, decision 30.1.2018 [Section II]

Facts – In 2005 the applicant requested an interim order blocking certain pages of a community website on the grounds that they contained remarks that infringed his personality rights. The first-instance judge granted the request. The applicant subsequently applied to the Court of First Instance to have the pages in question blocked permanently, and submitted a claim for damages. The court dismissed his claims in 2006 on the grounds that the applicant had not succeeded in proving his allegations regarding the publication of the offending material by the website. In 2008 the Court of Cassation upheld that judgment.

Law – Article 8: The applicant had had the benefit of adversarial proceedings, he had been able to adduce evidence in support of his claims and present his case freely, and his arguments had been duly examined. The domestic courts had given adequate reasons for their decisions and their assessment of the circumstances submitted to them for examination could not be considered arbitrary, manifestly unreasonable or apt to undermine the fairness of the proceedings.

That being said, assuming that at the time of the request for an interim order insulting or defamatory remarks concerning the applicant had existed on the website, they had probably been removed by the moderators of the site before the applicant had instituted the main proceedings.

The Court observed in that regard that, in the case of *Delfi AS v. Estonia* [GC] (64569/09, 16 June 2015, Information Note 186), in which the comments posted by third parties on a news portal had taken the form of hate speech and direct threats to a person's physical integrity, it had found that, in order to protect the rights and interests of individuals and of society as a whole, Contracting States could be entitled to impose liability on Internet news portals, without contravening Article 10 of the Convention, if the portals in question failed to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties. However, in many other cases a notice-and-take-down system, accompanied by effective procedures allowing for a rapid response, could serve as an appropriate tool for balancing the rights and interests of all those involved.

In the instant case the procedure put in place by the website in question, whereby the moderators withdrew undesirable comments without even awaiting notice, could not be regarded as an inap-

propriate tool for the protection of individuals' reputations. Hence, assuming that some persons had posted possibly defamatory remarks concerning the applicant on the website and that these had been removed by the site's moderators after the first-instance judge's decision imposing an interim order had been served, or even before, the Court could not find that there had been interference with the applicant's right to respect for his private life. Consequently, in rejecting the applicant's requests for the relevant pages of the website to be blocked permanently, and his claim for damages, the domestic courts could not be said to have failed to protect his right to respect for his private life.

Conclusion: inadmissible (manifestly ill-founded).

(See also the Factsheet on Hate speech)

Respect for family life, positive obligations

Refusal of Greek father to comply with court order requiring him to return child to mother in France: *no violation*

M.K. v. Greece, 51312/16, judgment 1.2.2018 [Section I]

Facts – The present case concerned the inability of the applicant, a Romanian national divorced from her Greek husband and living and working in France, to be reunited with one of her sons following a judgment of the Greek courts in September 2015 awarding her permanent custody. The situation arose from the refusal of the child's father to return her son to her.

Law – Article 8: The non-enforcement of the decision awarding her custody had deprived the applicant of the opportunity to be with her son and therefore constituted interference with the exercise of her right to respect for her family life.

In view of the final nature of the judgment, it had been incumbent on the judicial and administrative authorities and the social workers to take steps to ensure its enforcement. After the mother had applied to the public prosecutor in July 2016, the social workers had taken action to trace the father in order to secure enforcement of the judicial decision. However, having traced him, the authorities had observed that the child wished to remain living with his father and his brother and that he felt more secure with them. In September 2016 the child had reiterated to the psychologist at the psychiatric clinic that he wanted to stay in Greece.

Article 7 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction required the Central Authorities of the Contracting States to cooperate with each other and promote cooperation amongst the competent authorities in their respective States to secure the voluntary return of the child or to bring about an amicable resolution. Nevertheless, given the circumstances of the present case and in particular the highly confrontational relationship between the applicant and her ex-husband and the fact that she lived in France, it would have been difficult for the authorities to prioritise cooperation and negotiation between the parents, or mediation as advocated by Recommendation No R (98) 1 of the Committee of Ministers of the Council of Europe on family mediation. Furthermore, the child had reached the age of understanding and his clearly expressed wish to remain in Greece was bound to carry significant weight when the authorities considered the various options. As a general rule, children's best interests precluded any coercive measures concerning them. Moreover, Article 13 of the Hague Convention provided that the judicial or administrative authorities could refuse to order the return of a child if the child objected to being returned and had attained an age and degree of maturity at which it was appropriate to take account of his or her views. Referring to that Article, the Brussels IIa Regulation[2] allowed the requested State to take the child's interests into consideration, as the Greek authorities had done in the present case.

In any event, the Greek authorities, besides complying with Article 8 of the European Convention, appeared also to have acted in keeping with the spirit of the Hague Convention and the Brussels IIa Regulation. In that regard it had to be borne in mind that the 2015 judgment had been based on information dating back to 2013, when the same judge had ruled that the child should have his residence in France. That judgment had not taken into consideration the fact that the child had a brother who had remained in Greece and that the two were very close. In other words, the judgment had not taken account of the overall family situation. Moreover,

2. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

the situation had changed radically over the years, to the point where the child no longer wanted to follow his mother to France and had expressed a wish to remain with his father and brother, with whom he felt secure.

The wishes expressed by a child who had sufficient understanding were a key factor to be taken into consideration in any judicial or administrative proceedings concerning him or her.

Having regard to the foregoing and to the respondent State's margin of appreciation in the matter, the Court held that the Greek authorities had taken the measures that could reasonably be expected of them to comply with their positive obligations under Article 8 of the Convention.

Conclusion: no violation (five votes to two).

(See also the Factsheet on International child abductions)

Positive obligations

Failure to ensure fourteen-year old girl was looked after while her parents were held in police custody: *violation; no violation*

Hadzhieva v. Bulgaria, 45285/12, judgment 1.2.2018 [Section V]

Facts – The applicant, then aged fourteen, was alone at home on 4 December 2002 when police officers arrived to arrest her parents following an extradition request by Turkmenistan. Her parents, who were out at the time, were arrested on their return and taken into custody. The applicant remained alone in the flat. She was reunited with her parents on 17 December 2002 following their release on bail. The applicant subsequently sought compensation for the stress and suffering she had endured on account of the authorities' failure to organise support and care for her during her parents' detention. Dismissing her claim, the court of appeal found that, even if she had been left alone after her parents' arrest, responsibility for that could not be attributed to the police, the prosecuting authorities or the court, as her mother had stated at a court hearing on 6 December 2002, two days after her arrest, that there was someone to take care of her.

Law – Article 8

(a) *Initial period between arrest and first court hearing* – The situation clearly presented risks for the applicant's well-being as she was fourteen-years of age when her parents were arrested. Under the relevant domestic legal provisions the authorities had the responsibility, seemingly from the moment the applicant's parents were taken into custody, either to enable them to arrange for her care or to enquire into her situation of their own motion; they were also required to provide the applicant with assistance, support and services as needed, in either her own home, a foster family or a specialised institution. The Government had not submitted that any of this was done by the relevant authorities at any point prior to the court hearing two days after the parents' arrest. For the initial two-day period, therefore, the authorities had failed to comply with their positive obligation to ensure that the applicant was protected and provided for in her parents' absence.

Conclusion: violation (four votes to three).

(b) *Period from court hearing till the parents' release* – The competent authorities had had no reason to assume, or suspect after the court hearing on 6 December 2002 that the applicant had been left alone and was not provided for in her parents' absence. In these circumstances, their obligation under domestic law to take detained persons' children into care, if no care was available, was not relevant after the hearing. The parents were educated, professional persons of apparent means who cared for their daughter. Neither parent had alerted any authority at any stage that their daughter had been left alone or voiced any concerns about her care in their absence. Indeed, the mother had apparently stated in court that there was someone to care for her. In addition, the parents were legally represented by a lawyer of their own choosing who had taken part in the court hearing when the judge had inquired into the applicant's care. The lawyer had continued to represent them throughout their detention and was a neighbour of the applicant's family.

Accordingly, in the absence of any steps by or on behalf of the parents at the material time, the domestic courts' reliance on the record of the detention hearing and their conclusion that neither the police, the prosecution or the courts had needed to enquire further about the applicant's situation did not amount to a failure to act appropriately in the context of their Article 8 obligations.

Conclusion: no violation (unanimously).

Article 41: EUR 3,600 in respect of non-pecuniary damage.

(See also, for a similar case decided under Article 3 of the Convention, *Ioan Pop and Others v. Romania*, 52924/09, 6 December 2016, Information Note 202)

Positive obligations

Failure by authorities to provide timely protection to minor who had been subjected to prostitution and rape: *violation*

V.C. v. Italy, 54227/14, judgment 1.2.2018 [Section I]

(See Article 3 above, page 6)

ARTICLE 10

Freedom of expression, freedom to impart information

Refusal of broadcasting licence on undisclosed national security grounds without adequate review procedure: *violation*

Aydoğan and Dara Radyo Televizyon Yayıncılık Anonim Şirketi v. Turkey, 12261/06, judgment 13.2.2018 [Section II]

Facts – The applicants were a broadcasting company and the Chair of its Board of Directors. In 2000 the applicant company applied for national security clearance (a prerequisite for obtaining a broadcasting licence). After a security investigation the Prime Minister's Office informed the applicant company that its application would be examined subject to the replacement of three members of its board, including its Chair, without giving any further explanations. The Administrative Court obtained from the authorities the secret results of the security investigation, but dismissed the applicants' appeal without disclosing those results to them. As the company had been unable to obtain clearance, the High Council for Radio and Television Broadcasting (RTÜK) denied it permission to broadcast.

Law – Article 10: The Court's task consisted here of ascertaining: (i) whether the administrative authorities had established, in a convincing manner and based on relevant and sufficient reasons, the need to refuse the security clearance required for a broadcasting licence; and (ii) whether the applicants had enjoyed adequate safeguards in the national proceedings.

The judgment of the Administrative Court had not contained any assessment going to the merits of the question and was based on documents that had been withheld from the applicants, not even provided to them in summary form.

Where the State's security concerns led to a reduction in certain procedural rights, it was necessary to ascertain whether the proceedings nevertheless afforded adequate safeguards (see *Regner v. the Czech Republic* [GC], 35289/11, 19 September 2017, Information Note 210, where the Court found that there had been no violation of Article 6 § 1 even though the applicant had been refused access to decisive evidence, classified as confidential, in the context of an administrative dispute, taking the view that the restrictions on the rights afforded to him in accordance with the principles of adversarial proceedings and equality of arms had been offset by other factors).

Unlike the situation in *Regner*, the reasons given for the judgments in the present case did not show that the courts had examined: (i) whether the documents and information relied on by the administration were actually confidential; (ii) whether the three individuals in question could reasonably be regarded as presenting risks for national security; and (iii) whether the grounds relied on by the administration could not be disclosed to the applicants, at least in summary form.

While it could be seen as a positive step, the court's action in obtaining the production of the confidential documents by the administration had not altered the fact that the main reason for the refusal remained totally unknown to the applicants, thus completely preventing them from presenting any meaningful defence. Therefore in contrast, once again, to the *Regner* case, they had received no response to their argument that the three board members whose withdrawal was requested by the administration had been targeted because they belonged to a human rights association.

Even supposing that the national security imperatives had precluded the disclosure to the applicants of certain sensitive information, the Administrative Court did not seem to have taken any measure capable of compensating for the total lack of rea-

soning in the impugned rejection or for the applicants' complete lack of access to the underlying data. Moreover, the Supreme Administrative Court had not cured that deficiency.

As they had been unable to confront the veracity of the observations thus produced by the administration with any observations by the applicants, the domestic courts had not been in a position to fulfil: (i) either their task of balancing the various interests at stake; or (ii) their obligation to prevent any unfairness on the part of the administration. In any event, they had not provided any indications to the contrary.

The same deficiencies had also prevented the Court from exercising its European supervision effectively, because it had no other way of knowing the main reason for the restriction on the applicants' freedom of expression and access to information, or of assessing how the domestic courts had performed their task.

In sum, the judicial review of the impugned measure had not been sufficient.

Conclusion: violation (unanimously).

Article 41: EUR 1,500 jointly in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Freedom of expression

Covert surveillance of public figure for journalistic purposes: *violation; no violation*

Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece, 72562/10, judgment 22.2.2018 [Section I]

Facts – The applicant company is the owner of a Greek television channel ALPHA which broadcast two television shows in which three videos that had been filmed with a hidden camera were shown. In the first video, A.C., then a member of the Hellenic Parliament and chairman of the inter-party committee on electronic gambling, was shown entering a gambling arcade and playing on two machines. The second video showed a meeting between A.C. and associates of the television host during which the first video was shown to A.C. The third video showed a meeting between A.C. and the television host in the latter's office.

In response to the broadcasts the National Radio and Television Council ordered the applicant company to pay EUR 100,000 for each of the television shows during which the videos were shown and to broadcast the Council's decision for three consecutive days in its main news show. That decision was upheld by the Minister of Press and Media. The Supreme Administrative Court subsequently dismissed an application by the applicant company for annulment of the decision.

In the Convention proceedings, the applicant company complained that the sanctions imposed on it by the National Radio and Television Council had violated its right to freedom of expression, in breach of Article 10 of the Convention.

Law – Article 10: The sanctions imposed on the applicant company for broadcasting the videos constituted an interference with its freedom of expression, however, the interference was "prescribed by law" and served the legitimate aim of protecting the rights and reputation of others, specifically A.C.'s right to respect for his image, words and reputation.

Assessing whether the interference was "necessary in a democratic society" the Court considered the report as a whole and agreed with the domestic authorities' assessment that the subject concerned a matter of public interest. The Court noted that AC was a prominent political figure and, although the subject of the report focused on A.C.'s behaviour and not on a general discussion of electronic gambling, it could be legitimately broadcast.

(a) *First video* – The first video was filmed in a public space in which anyone could have taken a photograph or filmed a video. The domestic authorities should therefore have included in their assessment that, by entering a gambling arcade, A.C. could legitimately have expected his conduct to have been closely monitored and even recorded on camera, especially in view of the fact that he was a public figure. The domestic authorities had, therefore, not struck a reasonable balance of proportionality between the measures restricting the applicant company's right to freedom of expression and the legitimate aim pursued.

Conclusion: violation (unanimously).

(b) *Second and third videos* – Unlike the position with the first video, A.C. had been entitled to have an expectation of privacy as regards the second and third videos (having entered private spaces with a view to discussing the recorded incidents)

and an expectation that his conversations would not be recorded without his explicit consent.

In the Court's view, the domestic authorities' conclusion that the applicant company had overstepped the limits of responsible journalism was not unreasonable in so far as the second and third videos were concerned. Distinguishing *Haldimann and Others v. Switzerland*, the Court noted that the applicant company had made no effort to compensate for the intrusion into A.C.'s private life; on the contrary, the conduct of the journalists in fact suggested that the breach of the Code on Journalistic Ethics and of the Criminal Code was deliberate. The Court also distinguished the applicant company's case from *Radio Twist a.s. v. Slovakia* as it was the applicant company's employees rather than third parties who were responsible for the deployment of illegal means with a view to capturing on film A.C.'s gambling and his reaction to the contents of the first video.

The reasons given by the Greek authorities were thus "relevant" and "sufficient" to justify the interference in respect of the second and third videos.

Conclusion: no violation (unanimously).

The Court also unanimously found a violation of Article 6 of the Convention on account of the length of the proceedings before the Supreme Administrative Court.

Article 41: EUR 7,000 in respect of non-pecuniary damage; EUR 33,000 in respect of pecuniary damage, it being noted that the applicant company had paid only EUR 100,000 of the EUR 200,000 fine.

(See *Haldimann and Others v. Switzerland*, 21830/09, 24 February 2015, Information Note 182; and *Radio Twist a.s. v. Slovakia*, 62202/00, 19 December 2006, Information Note 92)

Freedom of expression

Conviction for protest at a war memorial: *no violation*

Sinkova v. Ukraine, 39496/11, judgment 27.2.2018 [Section IV]

Facts – The applicant belonged to an artistic group and together with three other members went to a Second World War Memorial to make an "act of performance". The applicant took a frying pan, broke some eggs into it and fried them over the Eternal Flame at the Tomb of the Unknown Soldier. Two others fried sausages on skewers over the flame whilst the final member of the group filmed the event.

On the same day the applicant posted the video on the Internet on behalf of the group with an accompanying statement condemning the burning of natural gas to maintain the Eternal Flame at the taxpayers' expense.

Following the events the applicant was arrested and remanded in custody pending trial before being released. She was subsequently found guilty of desecrating the Tomb of the Unknown Soldier following a prior conspiracy and sentenced to three years' imprisonment, suspended for two years. All her appeals were dismissed.

In the Convention proceedings, the applicant complained of a violation of her right to freedom of expression under Article 10.

Law – Article 10: It was not disputed that the applicant's conviction constituted an interference with her right to freedom of expression. However, the Court held it was neither possible nor reasonable for the Criminal Code to specify the behaviour that might be considered as amounting to desecration of a tomb and therefore the interference complied with the requirement of lawfulness. The measure also pursued the legitimate aim of protecting the morals and rights of others.

Assessing whether the interference was "necessary in a democratic society" the Court noted that the applicant was criminally prosecuted and convicted only on account of frying eggs over the Eternal Flame, which the domestic courts considered to have amounted to desecration of the Tomb of the Unknown Soldier. The charge against her concerned neither the subsequent distribution of the video nor the contents of the text accompanying the video. Therefore, the applicant was not convicted for expressing the views that she did or even for expressing them in strong language. Her conviction was a narrow one in respect of particular conduct in a particular place based on a general prohibition forming part of ordinary criminal law.

There was nothing to suggest that the domestic courts had erred in their assessment of the relevant facts or incorrectly applied domestic law. The applicant's conduct could be reasonably interpreted as contemptuous towards those in whose honour the memorial had been erected. It was emphasised there were many suitable opportunities for

the applicant to express her views or participate in genuine protests in respect of the State's policy on the use of natural gas or responding to the needs of war veterans, without breaking the criminal law and without insulting the memory of soldiers who perished and the feelings of veterans, whose rights she had ostensibly meant to defend.

In assessing the nature and severity of the penalty, the Court emphasised the applicant was given a suspended sentence and did not serve any of it. Therefore, having regard to all the circumstances of the case the restriction complained of was held to be reconcilable with the applicant's freedom of expression.

Conclusion: no violation (four votes to three).

The Court also found, unanimously, a violation of Article 5 in respect of the applicant's arrest and detention.

Article 41: EUR 4,000 in respect of non-pecuniary damage.

Freedom of expression

Conviction for personal attack on judge in electoral campaign speech: *inadmissible*

Meslot v. France, 50538/12, decision 9.1.2018 [Section V]

Facts – The applicant is a politician who was a Member of Parliament several times between 2002 and 2017. In 2006 he was formally charged by investigating judge D., who had been investigating a complaint of electoral fraud. In June 2007, at a campaign rally, he delivered a virulent speech which included the following expressions and passages: "I have no respect for judge D.", who had "turned into a political commissar", "acted *ultra vires*" and "sullied the judiciary", and was a person who "could not be trusted". In purported contrast, the speech went on to denounce the recent release (imputed to the same judge) of two robbers by "leftie judges" who "would rather attack right-wing MPs than criminals". Further to a complaint lodged by judge D., the applicant was fined EUR 1,000 for contempt of court.

Law – Article 10: The Court examined the proportionality of the interference in the light of its well-established criteria.

The applicant had made the impugned comments in his capacity as an MP at a political rally during the election period, in a speech to a crowd of two hundred people. Therefore, his words had not been directly addressed to judge D., and had in fact had some bearing on the subject of security since the applicant had mentioned a specific case in order to denounce the judiciary's lax attitude to persons suspected of having committed offences. His comments had also concerned the legal case in which he had been personally involved and which had attracted extensive media coverage.

As regards the nature of the impugned comments, the Court saw no cogent reason to question the duly reasoned decision of the domestic courts to the effect that the content of the comments had reflected a desire to inveigh personally against the judge: the applicant had not criticised the manner in which judge D. had discharged his duties as an investigating judge in the electoral fraud case, but had presented him and the judiciary as being guided by purely political and ideological considerations; all the comments had come down to his personal dispute with the investigating judge, whom he had already attempted to disparage by publishing tracts a few months previously, when the debate had centred exclusively on that judge and his behaviour.

The factual basis for the applicant's charge of laxity against the judge (the decision to release two robbers) had been erroneous since the latter had not taken the decision in question. As regards the other comments, which might be described as value judgments rather than factual statements, in view of their general tone and context, they had been based on the single fact that the applicant had been formally charged by judge D. and the former's animosity against that judge, and had had nothing to do with any intention on the applicant's part to critique the functioning of the judicial system.

Therefore, in the absence of any wider debate which could objectively have been useful in terms of public information, and which might have taken the statements made by an MP as credible and reliable data, it had not been at all unreasonable to conclude that the comments and statements made had amounted to a gratuitous personal attack and could be deemed deceptive, given the lack of any objective explanation from the applicant.

The impugned comments had also undermined citizens' trust in the integrity of the judiciary, given that the applicant had alleged that the judge had behaved like a "political commissar" opposing his

own political action – requesting the judge's transfer, in breach of the independence of the judiciary.

The applicant wrongfully compared his case to that of *Roland Dumas v. France* (34875/07, 15 July 2010, Information Note 132): in the judgment in the latter case, which had concerned a conviction not for contempt of court but for defamation arising from passages of a book comprising insulting comments about a judge, the Court had not substituted its assessment for that of the domestic courts on whether the passages had impugned the honour of the judge in question, but had held that the literary context of the impugned passages had not been sufficiently taken into account. In the present case, on the other hand, the reasons given for the judgments delivered had been relevant and sufficient.

As regards the EUR 1,000 fine paid by the applicant, not only had it involved a modest sum, but also it had had no impact on the applicant's political career, since he had been re-elected as an MP in 2007 and 2012.

In conclusion, the applicant's comments had exceeded the degree of exaggeration or provocation which was permitted in the context of political discourse; they had not therefore merited the enhanced protection accorded to the expression of political opinions. His conviction of contempt of court and the fine imposed on him had not been disproportionate to the legitimate aims pursued, that is to say protecting the reputation of others and safeguarding the authority and impartiality of the judiciary.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 14

Discrimination (Article 3 of Protocol No. 1)

Exclusion of political party from by-election for failing to reach electoral threshold at last general election: *no violation*

Cernea v. Romania, 43609/10, judgment 27.2.2018 [Section IV]

Facts – In January 2010, after a parliamentary seat had fallen vacant, the applicant applied to stand in the by-election in the constituency in question on a *Partidul Verde* ticket (an ecologist party which had not passed the electoral threshold at the previous general elections). Owing to a recent change to the Electoral Law, the election was open exclusively to parties represented in Parliament, and his candidature was therefore rejected. The Constitutional Court ruled that the exclusion of parties not represented in Parliament was adequately justified, in respect of the implementation of the electoral threshold, by compliance with the choice of the electorate at the general elections. On the other hand, it ruled the exclusion of independent candidates unconstitutional.

Law – Article 14 of the Convention read in conjunction with Article 3 of Protocol No. 1

(a) *Existence and lawfulness of differential treatment* – The restriction on independent candidatures was not covered by the present assessment because the applicant had attempted to stand for his party and not as an independent candidate. The differential treatment to be considered therefore exclusively concerned the fact that as the candidate of a party not represented in Parliament, the applicant had not been allowed to stand in the by-election, whereas he would have been permitted to do so if his party had already been represented in Parliament.

In the present case, the legislative procedure for amending the Electoral Law had been initiated in August 2008 and completed with the enactment of Law No. 323/2009 of 20 October 2009, while the by-election in question had taken place in January 2010. The impugned difference in treatment was therefore prescribed by law.

Complaining of the apparent proximity in date between the enactment of the impugned law and the by-election in question, the applicant relied on the "Code of Good Practice in Electoral Matters" drawn up by the Venice Commission, which recommends: (i) either avoiding amending the electoral law less than a year before any elections; (ii) or writing such amendments "in the constitution or at a level higher than ordinary law".

That criticism was unfounded. First of all, the impugned amendment had been effected under an organic law. Under the Romanian legal system, organic laws were enacted on a majority vote by the members of both Chambers of Parliament, whereas ordinary legislation was enacted by a majority of members present.

Secondly, by-elections constituted a special case: they were not intended to be held at regular, fore-

seeable intervals: they were random events which depended on parliamentary seats falling vacant.

(b) *Legitimacy of the aim pursued* – The applicant submitted that it was illegitimate to apply rules and principles to by-elections different from those which applied to general elections.

Article 3 of Protocol No. 1 did not specify or restrict the aims to be pursued by a given measure. Accordingly, the Court was prepared to accept that the new electoral law had had the aim of enhancing the expression of the people's views on the choice of the legislature – and more specifically of preserving the structure of Parliament and preventing the fragmentation of the political spectrum represented there following general elections.

(c) *Proportionality of the differential treatment* – In the first place, the Constitutional Court had justified the restriction imposed during the by-election with the fact that political parties had to pass an electoral threshold in order to enter Parliament (considering that by-elections were not designed to provide parties with a means of circumventing that threshold). The applicant did not explicitly contest the setting of electoral thresholds under the Romanian electoral system: in fact he submitted that the same rules and principles should apply to all elections, covering both general elections and by-elections.

In the second place, since the by-election in issue had been intended to fill only one parliamentary seat which had fallen vacant in one constituency, the restriction on the applicant's right should be put in perspective, especially since he had stood in the 2008 general elections, when his party had failed to pass the electoral threshold.

Consequently, the impugned restriction had been based on an objective and reasonable justification and had not impaired the very essence of the people's right to freedom of expression. Nor had it been disproportionate to the legitimate aim pursued.

Conclusion: no violation (unanimously).

ARTICLE 34

Hinder the exercise of the right of application

Expedited execution of expulsion order before interim measure restraining it could be notified to the authorities: *failure to comply with Article 34*

M.A. v. France, 9373/15, judgment 1.2.2018 [Section V]

Facts – In 2006 the applicant, an Algerian national, was sentenced to seven years' imprisonment for involvement in a criminal conspiracy to commit acts of terrorism (the offences charged had been committed in several countries, including France and Algeria), and was made the subject of a permanent exclusion order from French territory. In 2010 he was placed under house arrest pending the enforcement of the latter additional penalty, which he unsuccessfully applied to have lifted. In 2014 he lodged an asylum application, which was rejected by the French Office for the Protection of Refugees and Stateless Persons (OFPRA) on 17 February 2015. The applicant was not informed of the rejection of his application until 9.20 a.m. on 20 February 2015 and was returned to Algeria on a flight departing at 4.00 p.m. Shortly beforehand his lawyer obtained an interim measure from the European Court indicating that the French authorities should suspend the expulsion, but the information arrived at the airport too late. The applicant was arrested on his arrival in Algeria and then placed in detention pending the commencement of criminal proceedings.

Law

Article 3: As regards the situation in Algeria, there was no new evidence to cast doubt on the conclusions reached by the Court in *Daoudi v. France* (19576/08, 3 December 2009, Information Note 125) in the light of the concurring reports of the United Nations Committee Against Torture and several non-governmental organisations, particularly in connection with persons suspected of involvement in international terrorism.

Furthermore, the applicant was not merely "suspected" of having links with terrorism but had actually been convicted in France of serious offences of which the Algerian authorities had been apprised. Consequently, at the time of the applicant's expulsion to Algeria there had been a genuine and serious risk that he would be exposed to treatment contrary to Article 3 of the Convention.

Clearly, it was astonishing that the applicant had waited almost fourteen years before applying for refugee status; however, that waiting period was not included among the facts on which OFPRA,

which was better placed to assess the applicant's conduct, had based its decision.

Nor did the Court accept the Government's plea, in the absence of all the detailed information required to evaluate its importance, that other persons convicted of terrorist offences had been expelled to Algeria without any allegations of a risk under Article 3.

Conclusion: violation (six votes to one).

Article 34: Although it might be necessary for the competent authorities to implement an expulsion order expeditiously and efficiently, the conditions for such enforcement should not be geared to depriving the expellee of the right to request the indication of an interim measure from the Court.

In the present case the French authorities had created conditions making it very difficult for the applicant to submit such a request in time: he had not been notified of the 17 February 2015 decision rejecting his asylum application until 20 February, the day of his expulsion; his transport had already been organised on 18 February; and a laissez-passer had been obtained from the Algerian authorities on 19 February. Those preparations had enabled the applicant to be expelled to Algeria barely seven hours after the notification of the decision establishing the country of destination.

In so doing the authorities had deliberately and irreversibly reduced the level of protection of the Convention rights, compliance with which the applicant had been seeking to ensure by applying to the Court. The authorities' action had rendered nugatory any finding of a possible breach of the Convention, since the applicant was now in a country which was not a party to that instrument.

Conclusion: failure to comply with Article 34 (six votes to one).

Article 46: Having regard to the fact that the applicant was now under the jurisdiction of a State which was not a party to the Convention, it was incumbent on the French Government to make all possible representations in order obtain from the Algerian authorities a practical and specific assurance that the applicant had not been and would not be subjected to treatment contrary to Article 3 of the Convention.

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

ARTICLE 35

ARTICLE 35 § 1

Exhaustion of domestic remedies, effective domestic remedy – Russia

Complaints relating to enforcement of judgments following introduction of new domestic remedies in response to *Gerasimov and Others* pilot judgment: *inadmissible*

Shtolts and Others v. Russia, 77056/14 et al., decision 30.1.2018 [Section III]

Facts – In its pilot judgment in *Gerasimov and Others v. Russia*, the Court required Russia to provide effective domestic remedies in cases of non-enforcement or delayed enforcement of domestic court orders requiring the State authorities to provide the applicants with housing or comply with other obligations in kind.

In December 2016 new legislation (Federal Law no. 450-FZ of 1 January 2017 amending Federal Law no. 68-FZ "the Compensation Act") was introduced in response to the pilot judgment. The new legislation introduced provisions extending the scope of the Compensation Act to cases concerning the non-enforcement of domestic judgments imposing obligations of a pecuniary or non-pecuniary nature on various domestic authorities.

In the instant case, the three applicants complained under Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 about the non-enforcement of domestic judgments in their favour and the lack of an effective domestic remedy in that regard.

Law – Article 35 § 1: The Court examined whether the new remedies created as a result of the amendment were effective, complied with the precepts set out in *Gerasimov and Others*, and whether the applicants were required to have recourse to them in order to comply with Article 35 § 1 of the Convention. Since the remedy had been put in place in response to a pilot judgment, it could be taken into account even though it was not in force when the applications were lodged. There was nothing to suggest that the new compensatory remedy was not available to the applicants.

Considering the effectiveness of the new remedy, firstly, the Court's findings in *Nagovitsyn and Nalgiyev v. Russia* (dec.) concerning the initial Com-

pensation Act were applicable to the amended legislation and the new criteria for the examination of the applications appeared analogous to those laid down in the Court's case-law.

Secondly, delays in issuing a writ of execution and transferring it to a competent authority were taken into account by the domestic courts in their assessment of the authorities' conduct in compensation proceedings, consonant with the Court's own position.

Thirdly, the procedure for the examination of claims for compensation conformed to the principle of fairness guaranteed by Article 6 of the Convention with the domestic court fee not constituting an excessive burden for applicants.

Finally, the Court accepted that the domestic courts had not yet been able to establish any stable practice under the amended Compensation Act but that there was no reason to assume the courts would be unable to deal with compensation claims within a reasonable time, or that awards would not be paid promptly. Any doubts about the prospects of a remedy, which appears to offer a reasonable possibility of redress, were not a sufficient reason to eschew it.

In sum, the Compensation Act as amended met in principle the criteria set out in the *Gerasimov and Others* pilot judgment. Accordingly, the applicants and all others in their position were required to use the remedies introduced by the Act.

However, the Court was prepared to change its approach as to the potential effectiveness of the remedy, should the practice of the domestic courts show, in the long run, that applications for compensation were being refused on formalistic grounds, that compensation proceedings were excessively long, that compensation awards were insufficient or were not paid promptly, or that domestic case-law was not in compliance with the requirements of the Convention. The Court would not lose sight of the more general context and, notably, of the respondent State's compliance with its legal obligation under Article 46 to solve underlying structural problems.

Conclusion: inadmissible (failure to exhaust domestic remedies).

(See *Gerasimov and Others v. Russia*, 29920/05 et al., 1 July 2014, Information Note 176; and *Nagovitsyn and Nalgiyev v. Russia* (dec.), 27451/09 and 60650/09, 23 September 2010, Information Note 133)

ARTICLE 1 OF PROTOCOL No. 1

Control of the use of property

Taxation on expropriation compensation interfering with property rights: *inadmissible*

Cacciato v. Italy, 60633/16, decision 16.1.2018 [Section I]

Facts – Both applicants owned land that was subject to an expropriation order issued by the local authority. The applicants brought a court action and were awarded expropriation compensation corresponding to the market value of the land. In accordance with Law no. 413/1991 the local authority deducted taxation on the compensation at a flat rate of 20%, although the applicants also had the option of having the capital gain arising from the compensation taxed under the ordinary taxation rules when filing their annual tax return.

In the Convention proceedings, the applicants complained that the 20% reduction in the expropriation compensation represented a disproportionate interference with their property rights under Article 1 of Protocol No. 1.

Law – Article 1 of Protocol No. 1: The award of compensation by the domestic court amounted to a "possession" attracting the guarantees of Article 1 of Protocol No. 1. The applicants' complaint was examined from the standpoint of control of the use of property "to secure the payment of taxes", under the second paragraph of that provision.

In assessing whether a fair balance had been struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights, the Court considered that it was well within the area of discretionary judgment for the Italian legislature to develop substantive tax rules providing for taxation of expropriation compensation, and determining the type and amount of taxation and the concrete means of enforcement (deduction at source in the instant case).

The fiscal measures applied in the applicants' case had not impaired the very substance of their property rights: the 20% tax rate could not be considered quantitatively prohibitive and the deduction of the amount had not had the effect of nullifying or essentially frustrating the award to the extent of causing the applicants' tax burden to acquire a "confiscatory" nature.

There was no evidence that the levying of the tax had fundamentally undermined the applicants' financial situation and the applicants could have opted for taxation under the ordinary income tax regime had they so wished.

Lastly, the Court clarified that, unlike the position in *Scordino (no. 1)* and *Gigli Costruzioni*, in which awards of expropriation compensation had been drastically reduced by retrospective legislation, the compensation award in the present case had not been subjected to any reduction with respect to the market value. Moreover, *Scordino (no. 1)* could not be understood as implying that the application of the 20% tax on expropriation compensation, *per se*, ran contrary to Article 1 of Protocol No. 1.

In sum, taking into account the wide margin of appreciation which the States have in taxation matters, the levying of the tax on the expropriation compensation did not upset the balance which must be struck between the protection of the applicants' rights and the public interest in securing the payment of taxes.

Conclusion: inadmissible (manifestly ill-founded).

(See *Scordino v. Italy (no. 1)* [GC], 36813/97, 29 March 2006, Information Note 85; and *Gigli Costruzioni S.r.l. v. Italy*, 10557/03, 1 April 2008)

OTHER JURISDICTIONS

European Union – Court of Justice (CJEU) and General Court

Temporary lowering of judges' salaries, within the framework of austerity measures, no impact on their independence

Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, C-64/16, judgment 27.2.2018 (CJEU, Grand Chamber)

In this case the Portuguese Supreme Administrative Court requested a preliminary ruling from the CJEU as to whether the second sub-paragraph of Article 19(1) of the Treaty on European Union (TEU) should be interpreted to mean that the principle of judicial independence precluded general salary-reduction measures, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of a Member State's judiciary.

Facts – The Portuguese legislature temporarily reduced the remuneration of some public-sector officials, including those of the judges of the Court of Auditors (*Tribunal de Contas*). The Portuguese Judges' Professional Association ("the AJSP"), acting on behalf of members of the Court of Auditors, brought an action in the Supreme Administrative Court seeking, among other things, the annulment of these budgetary measures. The AJSP submitted that the salary-reduction measures infringed "the principle of judicial independence" in that they were based on mandatory requirements for reducing the Portuguese State's excessive budget deficit, imposed on the Portuguese Government by EU decisions granting, in particular, financial assistance to that Member State.

Law – It was for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in the fields covered by EU law.

The principle of the effective judicial protection of rights, referred to in the second sub-paragraph of Article 19(1) TEU, was a general principle of EU law stemming from the constitutional traditions common to the Member States and which was now reaffirmed by Article 47 of the Charter of Fundamental Rights. That principle was inherent in the rule of law.

It followed that every Member State had to ensure that the bodies which, as "courts or tribunals" within the meaning of EU law, came within its judicial system in the fields covered by that law, met the requirements of effective judicial protection.

The factors to be taken into account in assessing whether a body was a "court or tribunal" included whether the body was established by law, whether it was permanent, whether its jurisdiction was compulsory, whether its procedure was *inter partes*, whether it applied rules of law and whether it was independent.

To the extent that the Court of Auditors could rule, as a "court or tribunal'", on questions concerning the application or interpretation of EU law – which it was for the Supreme Administrative Court to verify – Portugal had to ensure that that court met the requirements essential to effective judicial protection.

In order for that protection to be ensured, maintaining the independence of such a court was essential, was inherent in the task of adjudication, and was

required at EU level and also at the level of the Member States with regard to the national courts. Independence was essential to the proper working of the judicial cooperation system between the national courts and the CJEU.

Against this background, the CJEU specified that the concept of "independence" presupposed, in particular, that the court concerned exercised its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it was thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The receipt by those members of a level of remuneration commensurate with the importance of the functions they carried out constituted a guarantee essential to judicial independence.

The CJEU observed that the salary-reduction measures at issue:

– had been adopted because of mandatory requirements linked to eliminating the Portuguese State's excessive budget deficit and in the context of an EU programme of financial assistance to Portugal;

– provided for a limited reduction of the amount of remuneration;

– had not been specifically adopted in respect of the members of the Court of Auditors, but were in the nature of general measures seeking a contribution from all members of the national public administration to the austerity effort *dicta*ted by the mandatory requirements for reducing the Portuguese State's excessive budget deficit;

– had been temporary in nature, having been in force from 1 October 2014 to 1 October 2016.

In those circumstances, the salary-reduction measures at issue could not be considered to impair the independence of the members of the Court of Auditors.

Conclusion – The second sub-paragraph of Article 19(1) TEU was to be interpreted as meaning that the principle of judicial independence did not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Court of Auditors.

(As regards the ECHR case-law, see *Zubko and Others v. Ukraine*, 3955/04, 26 April 2006, Information Note 86; F*ábián v. Hungary* [GC], 78117/13, 5 September 2017, Information Note 210; and the Factsheet on Austerity measures)

Inter-American Court of Human Rights (IACtHR)

State obligations with respect to change of name and gender identity

Advisory Opinion OC-24/17, Series A No. 24, opinion (first part) 24.11.2017

[This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. It relates only to the first part of the Opinion, specifically concerning State obligations with respect to the change of name and gender identity. A more detailed, official abstract (in Spanish only) is available on that Court's website: www.corteidh.or.cr.]

The request – The Republic of Costa Rica presented a request for an advisory opinion from the Inter-American Court to rule on the protection afforded by Articles 11(2), 18 and 24 in relation to Article 1 of the American Convention on Human Rights (ACHR) concerning the recognition of a change of name in accordance with the gender identity of the person concerned. Costa Rica submitted the following specific questions for the Court´s interpretation:

(1) Taking into account that gender identity is a category protected by Articles 1 and 24 of the ACHR, and also the provisions of Articles 11(2) and 18 thereof: Does that protection mean that the State must recognise and facilitate an individual´s change of name in accordance with his or her gender identity?

(2) If the answer to the preceding question is affirmative, could it be considered contrary to the ACHR that those interested in changing their given name may only do so by resorting to judicial proceedings, in the absence of a pertinent administrative procedure?

Law

Concerning the right to identity, and in particular gender and sexual identity, the Court interpreted that: (i) the right to identity emanates from the recognition of the free development of the personality and the right to respect for private life, which covers a series of factors related to the dignity of the person,

including, for example, the ability to develop their own personality, aspirations, determine their identity and define their personal relationships; (ii) such right has been recognised by the Court as protected by the ACHR; (iii) it can be conceptualised as the collection of attributes and characteristics that allow for the individualisation of the person in a society, and it comprises other rights, according to the persons and circumstances involved in each case, though it is closely related to human dignity, the right to life, and the principle of personal autonomy; (iv) recognition of the affirmation of sexual and gender identity as a manifestation of personal autonomy is a constitutive component of the identity of the individual which is protected by the ACHR under Articles 7 and 11(2); (v) gender and sexual identity are linked to the concept of liberty, the right to respect for private life, and the possibility for all human beings to self-determine and freely choose the options and circumstances that give meaning to their existence, according to their own beliefs; (vi) gender identity was defined as the internal and individual experience of gender just as each person perceives it, whether or not it corresponds to the sex assigned at birth; (vii) sex, gender, as well as the socially constructed identities, attributes and roles that are ascribed to the biological differences determining the sex assigned at birth, are not to be regarded as objective and unchangeable elements that characterise an individual. Rather, they are traits that depend on the subjective appreciation of the person concerned and are based on a construction of the self-perceived gender identity related to the free development of the personality, sexual self-determination, and the right to respect for private life; (viii) the right to identity also holds an instrumental value for the exercise of certain rights; (ix) State recognition of gender identity is critical to ensure that transgender persons can fully enjoy all human rights, including protection from violence, torture, ill-treatment, as well as the rights to health, education, employment, housing, access to social security, and freedom of expression and association; and (x) States must respect and ensure the coexistence of individuals with distinct identities, gender expressions and sexual orientations, so that they are able to live and develop with the same dignity and respect to which everyone is entitled.

The Court stated that individuals in their diversity of sexual orientations, identities and gender expressions should be able to enjoy their legal capacity in all aspects of life. In accordance, the Court established that the right of individuals to autonomously define their sexual and gender identity becomes effective by ensuring that such definitions are consistent with, or correspond to the identification data recorded in different registries as well as identity documents. Hence, the Court determined that the ACHR protects name change, the amendment of photographs, and the rectification of the sex or gender reference in public records and identity documents, so that they correspond to the self-perceived gender identity, through the provisions that guarantee the free development of personality (Articles 7 and 11(2)), the right to respect for private life (Article 11(2)), the right to recognition of juridical personality (Article 3), and the right to name (Article 18). Consequently, pursuant to the obligation to respect and ensure rights without any discrimination (Articles 1(1) and 24), and the obligation to adopt domestic legal provisions (Article 2), the Court concluded that States are obliged to recognise, regulate and establish appropriate procedures to this end.

Concerning the procedure for requesting amendment of identity data, the Court recognised that States may determine and establish, in accordance with the characteristics of each context and their domestic law, the most appropriate procedure for a name change, amendment of photographs and rectification of the reference to sex or gender in records and on identity documents so that they conform with the self-perceived gender identity. The procedures may be administrative or judicial in nature, however, according to the Court, they should preferably be administrative or notarial and comply with the following minimum requirements: (i) focused on a comprehensive adjustment of all identity components to the self-perceived gender identity; (ii) based solely on the free and informed consent of the applicant and not require medical and/or psychological certifications or other requirements that could be unreasonable or pathologising; (iii) confidential. The changes, corrections or amendments should not be reflected in the registries or the identity documents; (iv) prompt and, insofar as possible, free of charge, and (v) should not require evidence of surgery and/or hormonal therapy.

The Court underlined that the foregoing considerations concerning the right to gender identity are also applicable to children who wish to apply for recognition of their self-perceived gender identity in their records and on their documents. Thus, any restriction imposed on the full exercise of that right

by provisions aimed at the protection of the child can only be justified based on the principles of the child's best interests, progressive autonomy and the right to be heard. The child's views should be taken into account in any procedure that concerns them, respect the right to life, survival and development, and should not be discriminatory or disproportionate.

COURT NEWS

Information for applicants

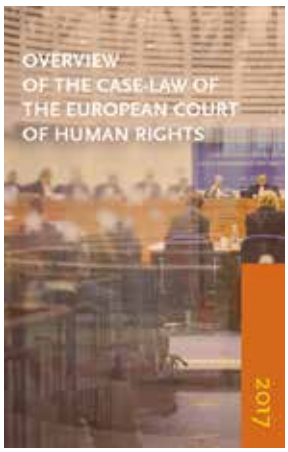
The "Applicants" pages, which are there to guide and assist persons wishing to lodge an application with the Court, are available in 36 official languages of the member States of the Council of Europe. They can be viewed from the Court's Internet site (www.echr.coe.int – Applicants).

They contain basic texts and documents, and also information on the formal requirements and admissibility conditions. They are also a means of accessing all translations of the case-law and information material (documents and videos) on the Court and how it functions.

RECENT PUBLICATIONS

Overview of the Court's case-law

The Court has recently published an Overview of its case-law for 2017. This annual *Overview* series, available in English and French, focuses on the most important cases the Court deals with each year and highlights judgments and decisions which raise either new issues or important matters of general interest.



The Overviews can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law). Moreover, a print edition of the 2017 Overview is also available from Wolf Legal Publishers (the Netherlands) at sales@wolfpublishers.nl.

Case-Law Guides: translations into Ukrainian

Translations into Ukrainian of some of the Case-Law Guides have recently been published on the Court's Internet site (www.echr.coe.int – Case-law).

Довідник із застосування статті 4 Конвенції – Заборона рабства і примусової праці

Довідник із застосування статті 5 Конвенції – Право на свободу та особисту недоторканність

Довідник із застосування статті 6 Конвенції – Право на справедливий суд (кримінально-процесуальний аспект)

Довідник із застосування статті 7 Конвенції – Ніякого покарання без закону

Посібник зі статті 3 Протоколу № 1– право на вільні вибори

Посібник зі статті 4 Протоколу № 4 – Заборона колективного вислання іноземців

Посібник зі статті 4 Протоколу № 7 – Право не бути притягненим до суду або покараним двічі

Admissibility Guide: translation into Azerbaijani

A translation into Azerbaijani of the third edition of the Practical Guide on Admissibility Criteria is now available on the Court's Internet site (www.echr.coe.int – Case-Law).

Qəbuledilənlik meyarlari üzrə praktik bələdçi

Factsheets: translations into Romanian

Several Factsheets on the Court's case-law have been translated into Romanian. They are available for downloading from the Court's Internet site (www.echr.coe.int – Press).

Dreptul de vot al deținuților

Libertatea de religie

Persoanele cu dizabilități și Convenția Europeană a Drepturilor Omului

Protecția datelor personale

Protecţia minorilor

Refuz de hrană în detenție

Simboluri și ținute religioase

Supraveghere la locul de muncă

Violenta impotriva femeilor

Commissioner for Human Rights

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