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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Life

Failure adequately to vet police officer before issuing him with a firearm he subsequently used in fatal shooting: *violation*

Gorovenky and Bugara v. Ukraine - 36146/05 and 42418/05
Judgment 12.1.2012 [Section V]

Facts – The applicants' relatives were shot and killed when an off-duty police officer became involved in a quarrel and opened fire with his service weapon, which he apparently carried with him at all times. The officer had a history of alcohol abuse, indiscipline and violence.

Law – Article 2: The case was examined under the State's positive obligations to protect life as the police officer was off duty at the time of the shooting and had not been involved in a planned police operation or a spontaneous chase. The national authorities had acknowledged on several occasions that the officer's superiors had failed to appropriately assess his personality and had allowed him to carry a weapon, despite previous troubling incidents. Moreover, the national law expressly forbade issuing guns to police officers who did not have appropriate facilities for safe storage, and no checks had ever been carried out to see where the officer stored his gun at home. It was possible that it was a lack of safe storage that had led to his carrying the gun with him at all times, even when off duty. The Court reiterated that the States were expected to set high professional standards within their law-enforcement systems and ensure that persons serving in those systems met the requisite criteria. In particular, when equipping police forces with firearms, not only had the necessary technical training to be given but the selection of agents allowed to carry firearms had also to be subject to particular scrutiny. There had been a dual failing in the instant case: the officer had been issued with the gun in breach of the domestic regulations (in the absence of a check concerning storage), and his personality had not been correctly assessed in the light of his history of disciplinary offences.

Conclusion: violation (unanimously).

Article 41: EUR 12,000 each to the four surviving applicants in respect of non-pecuniary damage.

Killing by convicted murderer following his release on licence: *no violation*

Choreftakis and Choreftaki v. Greece - 46846/08
Judgment 17.1.2012 [Section I]

Facts – The applicants' son was stabbed to death in the street in May 2008. His assailant, Z.L., who had previously been convicted of several serious offences, for one of which he was sentenced to life imprisonment combined with an accessory penalty of ten years and nine months, had been released on licence. In January 2006 an Assize Court examined Z.L.'s application to have his sentences combined, and fixed the total sentence remaining to be served at about twenty-six years. In August 2007 the prison director submitted an application for Z.L.'s release on licence. The Indictment Division of the Criminal Court rejected the application and Z.L. appealed. In January 2008 the Indictment Division of the Court of Appeal set the earlier decision aside and granted Z.L. early release.

Law – Article 2: The applicants' son had died a tragic death following an unfortunate chain of chance events. Nothing that had occurred prior to the fateful attack could have led the authorities to believe that the victim required special protection or that his life was under any real and immediate threat from the criminal behaviour of others. This case brought to mind the *Mastromatteo* and *Maiorano and Others*[1] cases in so far as it concerned the obligation to protect society in general against the possible threat from people serving or having served prison sentences for serious crimes.

In Greece, to qualify for release on licence a prisoner had to have served a minimum term of imprisonment, and when that condition was satisfied the law provided for "release on licence in all cases, save where it is judged for specific reasons that the prisoner's behaviour in detention makes it strictly necessary for him to remain in prison in order to prevent him from committing other offences". In the instant case the Indictments Chamber of the Court of Appeal had applied the relevant law and verified that the requisite legal conditions had been met. That being so, it was clear that there had been no irregularity in the judicial proceedings that had led to the assailant's release.

It remained to be seen whether the early release system in Greece comprised sufficient measures to

1. *Mastromatteo v. Italy* [GC], no. 37703/97, 24 October 2002, Information Note no. 46; and *Maiorano and Others v. Italy*, no. 28634/06, 15 December 2009, Information Note no. 125.

protect society in general from the possible actions of people serving or having served prison sentences for violent crimes. In view of the wide variety of approaches to conditional release in the member States, a wide margin of appreciation was left to them in this matter. Even more so in cases like the present one, where the Court was required retrospectively to assess the compatibility with Article 2 of a conditional-release system set in place by the respondent State, after a detainee released on licence had committed a serious crime. As there was no direct causal link between the law applied in this case and the murder of the applicants' son, the Court decided to focus its attention on the extent to which the Greek system made it possible in practice for the appropriate court to decide whether to grant early release while fully taking into account the relevant legal provisions. It was pointed out that in order for the State's responsibility to be engaged under the Convention, it had to be established that the death was the result of the failure of the national authorities, including the legislature, to do everything that could reasonably be expected of them to prevent the materialisation of a clear and immediate threat to life of which they were, or should have been, aware.

Greece was one of the few States Parties to the Convention where conditional release was the rule and was granted almost automatically.

The detainee's conduct during his incarceration was the only criterion on which the competent court could base a decision – in exceptional cases – not to grant conditional release. Furthermore, the Prison Code considerably limited the available time-frame for assessing the detainee's "good conduct". In particular, disciplinary sanctions were deleted from the prisoner's record between six months and two years after the event, and were therefore not taken into consideration in the decision on conditional release. In the present case, however, there were other factors that could be taken into account in assessing Z.L.'s conduct, including the report prepared by the prison director, which indicated that his behaviour after 2004 had been "very good", or his behaviour during any prison leave he might have been granted. In this case, therefore, the Greek system could not be considered to have imposed any "automatic" response on the court that had prevented it from assessing Z.L.'s conduct while in prison.

It would have been preferable had the law permitted the Indictments Chamber to take into account the disciplinary sanctions imposed on Z.L. prior to 2004, in so far as some of them concerned serious incidents; this would have given it a fuller picture of his behaviour in prison. However, this strict legislative framework circumscribing the court's appraisal of the detainee's "good conduct" was not necessarily a flaw in the legislation that amounted to a failure on the part of the State to honour its procedural obligations under Article 2. When the Court examined cases like this one, its assessment of the conditional-release system necessarily meant examining the situation at issue after the event. In this case, when examining the compatibility of the conditional-release system in Greece with Article 2, the Court could not ignore the tragic event that followed Z.L.'s early release. However, the fact that there was no direct and solid causal link between the functioning of the Greek justice system and the applicants' son's murder meant that it would have required a clear failure of the law applied in this case to engage the liability of the respondent State under Article 2. There had been no such failure in this case; as mentioned above, the law applied had enabled the judge to take different factors into account when evaluating Z.L.'s behaviour, such as the report dawn up by the prison director.

The conditional-release system in Greece, as applied in the present case, had therefore not upset the fair balance that had to be struck between the aims of social reintegration and preventing recidivism. Rather, it had made sufficient provision for the protection of society from the actions of people convicted of violent criminal offences. Accordingly, Z.L.'s conditional release could not be considered as a failure by the Greek authorities in their duty under Article 2 to protect the life of the applicants' son.

Conclusion: no violation (four votes to three).

ARTICLE 3

Torture

Allegations of rendition to a State not Party to the Convention, followed by torture:
relinquishment in favour of the Grand Chamber

El-Masri v. "the former Yugoslav Republic of Macedonia" - 39630/09
[Section V]

The applicant, who is a German citizen, alleged that he had been subjected to a secret "rendition" operation, namely that he had been arrested, held *incommunicado*, questioned and ill-treated in "the

former Yugoslav Republic of Macedonia" and then handed over to a CIA "rendition" team who had transferred him, on a special CIA-operated flight, to a CIA-run secret detention facility in Afghanistan, where he had been ill-treated for over four months. The alleged ordeal lasted between 31 December 2003 and 29 May 2004, when the applicant returned to Germany. He complained under Articles 3, 5, 8, 10 and 13 of the Convention.

Rape of illegal immigrant by coastguard responsible for supervising him: *violation*

Zontul v. Greece - 12294/07
Judgment 17.1.2012 [Section I]

Facts – The applicant is a Turkish national. In May 2001 he and other migrants boarded a boat in Istanbul bound for Italy. The vessel was intercepted by the Greek coastguard and escorted to a port on the island of Crete. On 5 June 2001 the applicant reported that two coastguard officers had forced him to undress while he was in the bathroom. One of them, D., had allegedly threatened him with a truncheon and then raped him with it. On 6 June 2001 the commanding officer of the coastguard service, who had not been present during the incident, ordered an inquiry after hearing the detainees' account. In February 2004 the applicant left Greece, travelling first to Turkey and then to the United Kingdom. In June 2006 the Naval Appeals Tribunal sentenced D. to a suspended term of six months' imprisonment, which was commuted to a fine.

Law – Article 3: (a) *Substantive aspect* – The rape of a detainee by an official of the State was to be considered as an especially grave and abhorrent form of ill-treatment, given the ease with which the offender could exploit the vulnerability and weakened resistance of his or her victim. Furthermore, rape left deep psychological scars on the victim which did not respond to the passage of time as quickly as other forms of physical and mental violence. In the instant case all the domestic courts examining the case had noted that there had been forced penetration which had caused the applicant acute physical pain. An act of that kind, perpetrated, moreover, against a person in detention, was liable to leave the victim feeling debased and violated both physically and emotionally.

In its judgment in *Aydın v. Turkey*,[1] the Court had found that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she had been subjected amounted to torture in breach of Article 3 of the Convention. Furthermore, a number of international courts had accepted that penetration with an object amounted to an act of torture.

There could be no doubt that, owing to its cruelty and its intentional nature, the treatment to which the applicant had been subjected in the instant case had amounted to an act of torture from the standpoint of the Convention.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – The Court had doubts as to whether a thorough and effective investigation had been carried out in the context of the disciplinary proceedings brought against the coastguard officers. Following the rape, the applicant's request to be examined by the doctor who was on the premises had been refused. Furthermore, the beating inflicted on the applicant, according to D.'s version of the incident, had not been entered in the infirmary's patient records. The conclusion of the report on the inquiry, according to which the coastguard officers' account appeared credible partly because the applicant did not feature in the patient records, was not satisfactory. Furthermore, the applicant's witness evidence in the inquiry had been falsified, as the rape of which he had complained had been recorded as a "slap" and "use of psychological violence". In addition, the events had been summarised inaccurately and the applicant had been reported as saying that he did not wish to see the coastguard officers punished. In that connection the Ombudsman, on 13 March 2007, had requested the Minister of Merchant Shipping to order a fresh disciplinary inquiry, since the first inquiry had not taken into consideration the fact that the applicant had actually been raped by the coastguard officer.

Nevertheless, proceedings had been instituted in the criminal courts. Greece had enacted criminal-law provisions imposing penalties for practices contrary to Article 3, and the coastguard officer D. had been convicted both at first instance and on appeal on the basis of those provisions. Furthermore, the internal administrative inquiry and the criminal proceedings had been sufficiently prompt and diligent to meet the Convention standard.

As to whether the penalty imposed had been adequate and had had a deterrent effect, the court of appeal, acknowledging that there had been

1. *Aydın v. Turkey*, no. 23178/94, 25 September 1997.

extenuating circumstances in D.'s case, had sentenced him to a six-month suspended prison term which it had commuted to a fine of EUR 792. The leniency of the penalty imposed on D. was manifestly disproportionate in view of the seriousness of the treatment inflicted on the applicant. In view of that finding and of the fact that the applicant had been subjected to an act of torture, the Greek criminal-law system, as applied in the present case, had not had the desired deterrent effect such as to prevent the commission of the offence complained of by the applicant, nor had it provided adequate redress for the ill-treatment meted out to him.

With regard to the State's obligation to award compensation to the applicant or, at the very least, afford him the opportunity of seeking and obtaining redress for the harm caused by his ill-treatment, the applicant had applied to be joined as a civil party to the proceedings before the naval tribunals trying the coastguard officers. However, on account of the fact that he had been outside the country and despite his efforts to follow the progress of the proceedings with a view to participating in them, the Greek authorities had failed in their duty to inform him in time, with the result that he had been unable to exercise his rights as a civil party for the purpose of claiming compensation.

Although, in Greek law, the criminal trial could take place without the civil party being present and the criminal courts did not adjourn examination of a case where the civil party was unable to appear, if the civil parties announced their intention to appear they acquired the status of party to the proceedings and enjoyed all the corresponding rights under the Code of Criminal Procedure. The fact that the applicant had been unable to attend the trial was of particular significance in the present case because even at the investigation stage, when he had applied to join the proceedings as a civil party, he had been unable to exercise his rights to the full. Accordingly, he had not been sufficiently involved in the proceedings in his capacity as a civil party.

Consequently, the respondent State had not afforded sufficient redress for the treatment inflicted on the applicant in breach of Article 3. The Court therefore dismissed the Government's objections of failure to exhaust domestic remedies on account of the applicant's supposed waiver of his status as a civil party and lack of victim status.

Conclusion: violation (unanimously).

Article 41: EUR 50,000 in respect of non-pecuniary damage.

Inhuman treatment

Wheelchair-bound prisoner required to go up and down four flights of stairs in order to undergo life-supporting medical treatment: *violation*

Arutyunyan v. Russia - 48977/09
Judgment 10.1.2012 [Section I]

Facts – The applicant was wheelchair-bound and had numerous health problems, including a failing renal transplant, very poor eyesight, diabetes and serious obesity. In April 2009 he was charged with manslaughter and detained in a regular detention facility. His cell was on the fourth floor of a building without an elevator; the medical and administrative units were located on the ground floor. Owing to the absence of an elevator, the applicant was required to walk up and down the stairs on a regular basis to receive haemodialysis and other necessary medical treatment. In May 2010 he was found guilty as charged and sentenced to eleven years' imprisonment. Two months later he was sent to another detention facility to serve his sentence before ultimately being transferred to a regional hospital, where he began receiving the requisite medical assistance.

Law – Article 3: For a period of almost fifteen months the applicant, who was disabled and depended on a wheelchair for mobility, was forced at least four times a week to go up and down four flights of stairs on his way to and from lengthy, complicated and tiring medical procedures that were vital to his health. Indeed, he had had to endure such trips whenever he needed to visit the medical unit, see his lawyer, undergo clinical testing or attend a court hearing. The effort had undoubtedly caused him unnecessary pain and exposed him to an unreasonable risk of serious damage to his health. It was therefore not surprising that he had refused to go down the stairs to exercise in the recreation yard, and had thus remained confined within the walls of the detention facility twenty-four hours a day. In fact, due to his frustration and stress, the applicant had on several occasions even refused to leave his cell to receive life-supporting haemodialysis. Even though there had apparently been no appropriate detention facility to treat the applicant's condition locally, no attempts had been made to find such a place elsewhere in Russia. Moreover, the majority of the medical examinations and procedures the applicant underwent took place in an ordinary room which had been transformed into a special medical unit.

In these circumstances, the Court concluded that the domestic authorities had failed to treat the applicant in a safe and appropriate manner consistent with his disability, and had denied him effective access to the medical facilities, outdoor exercise and fresh air.

Conclusion: violation (unanimously).

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

The Court further found that there had been a violation of Article 5 § 1 (c) of the Convention but no violation of Article 5 § 3.

Inhuman treatment
Degrading treatment

Ill-treatment of conscientious objector, a Jehovah's Witness, in military prison on account of his refusal to serve in the army: *violation*

Feti Demirtaş v. Turkey - 5260/07
Judgment 17.1.2012 [Section II]

Facts – The applicant is a Jehovah's Witness. In 2005 he refused, on the basis of Biblical precepts, to perform his military service and was forcibly conscripted. He joined the regiment but consistently refused to wear a military uniform. As a result, nine sets of criminal proceedings were brought against him before the Air Force Command Tribunal, made up of two military judges and one officer. The tribunal imposed several custodial sentences on the applicant, ranging from one to six months. In connection with those proceedings he was on several occasions taken into custody and placed in pre-trial detention in military prisons where he was ill-treated and threatened by prison officers. He was eventually demobilised and sent home.

Law – Article 3: In September 2008 the military tribunal had found it established that at the material time – between 5 and 12 April 2006 – while the applicant was in prison, he had been forced to undress and to wear military uniform, had been handcuffed to a bed or a chair for several hours and had been threatened and beaten. In the tribunal's view, such acts amounted to ill-treatment within the meaning of the Criminal Code. The Court saw no reason to depart from those findings. The treatment meted out to the applicant during his military service had been such as to cause feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. This was all the more true since the applicant had also been the subject of multiple prosecutions and the cumulative nature of the sentences had had the effect of stifling his intellectual identity. In those circumstances, seen as a whole and given their seriousness, the manner in which the applicant had been treated had caused him severe pain and suffering which went beyond the usual element of humiliation inherent in any criminal conviction or in detention. The treatment to which the applicant had been subjected on account of his refusal to serve in the armed forces had been both inhuman and degrading.

Conclusion: violation (unanimously).

Article 9: The objections of the applicant, a Jehovah's Witness, to serving in the armed forces had been motivated by genuinely held religious beliefs that had been in serious and insurmountable conflict with his obligation to perform military service. There had been interference with the applicant's right to manifest his religion or beliefs, stemming from his multiple criminal convictions and from the failure to propose any form of alternative civilian service. It was apparent that the system of compulsory military service in force in Turkey did not strike a fair balance between the interests of society as a whole and those of conscientious objectors. Accordingly, the penalties imposed on the applicant, in circumstances where no allowances had been made for the exigencies of his conscience and beliefs, could not be considered a measure necessary in a democratic society. Lastly, the fact that the applicant had been demobilised did nothing to alter the findings outlined above. Although he faced no further risk of prosecution (in theory, he could have faced proceedings for the rest of his life), he had been demobilised only because of the onset during his military service of a psychological disorder. This further demonstrated the seriousness of the interference complained of.

Conclusion: violation (unanimously).

Article 6 § 1: In Turkish criminal law, a person was considered as a member of the armed forces from the time he or she joined a regiment. However, the applicant had been forcibly conscripted and had at no point accepted military status during the conscription process. It was understandable that, as a conscientious objector being prosecuted for offences of a purely military nature before a tribunal made up exclusively of military officers, the applicant should have been apprehensive about being tried by judges who were attached to the armed forces, which could be equated to a party to the proceedings. As a result, he could legitimately have

feared that the Air Force Command Tribunal might allow itself to be unduly influenced by one-sided considerations. The applicant's doubts as to the independence and impartiality of the tribunal could therefore be said to have been objectively justified.

Conclusion: violation (unanimously).

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

(See also *Ülke v. Turkey*, no. 39437/98, 24 January 2006; *Erçep v. Turkey*, no. 43965/04, 22 November 2011, Information Note no. 146; and *Bayatyan v. Armenia* [GC], no. 23459/03, 7 July 2011, Information Note no. 143)

Inhuman punishment
Degrading punishment
Extradition

Proposed extradition to United States where applicants faced trial on charges carrying whole life sentences without parole: *extradition would not constitute a violation*

Harkins and Edwards v. the United Kingdom
- 9146/07 and 32650/07
Judgment 17.1.2012 [Section IV]

Facts – Both applicants faced extradition from the United Kingdom to the United States where, they alleged, they risked the death penalty or life imprisonment without parole. The first applicant, Mr Harkins, was accused of killing a man during an attempted armed robbery, while the second applicant, Mr Edwards, was accused of intentionally shooting two people, killing one and injuring the other, after they had allegedly made fun of him. The US authorities provided assurances that the death penalty would not be applied in their cases and that the maximum sentence they risked was life imprisonment.

Law – Article 3

(a) *Death penalty* – The Court reiterated that in extradition matters it was appropriate for a presumption of good faith to be applied to a requesting State which had a long history of respect for democracy, human rights and the rule of law, and which had longstanding extradition arrangements with Contracting States. The Court also attached particular importance to prosecutorial assurances concerning the death penalty. In both applicants' cases, clear and unequivocal assurances had been given by the United States Government and the prosecuting authorities. These were sufficient to remove any risk that either applicant would be sentenced to death if extradited.

Conclusion: inadmissible (manifestly ill-founded).

(b) *Life imprisonment without parole* – The Court began with some general remarks, based on it case-law, concerning the proper approach to Article 3 in extradition cases. It did not accept the three distinctions the majority of the House of Lords had made in the leading domestic case of *Wellington*[1] (the first distinction being between extradition cases and other cases of removal from the territory of a Contracting State; the second between torture and other forms of ill-treatment; and the third between the assessment of the minimum level of severity required in the domestic context and that required in the extra-territorial context). As to the first distinction, the question whether there was a real risk of treatment contrary to Article 3 in another State could not depend on the legal basis for the removal and it would not be appropriate to apply different tests depending on whether the case concerned extradition or another form of removal. As to the second, since a prospective assessment was required in the extra-territorial context, it was not always possible to determine whether potential ill-treatment in a receiving State would be sufficiently severe to qualify as torture and the Court normally refrained from considering that question in cases where it found a real risk of intentionally inflicted ill-treatment in the receiving State. As for the third distinction made by the House of Lords – the assessment of the minimum level of severity required in the domestic context and that required in the extra-territorial context – the Court noted that in the twenty-two years since its *Soering* judgment, in an Article 3 case it had never undertaken an examination of the proportionality of a proposed extradition or other form of removal from a Contracting State and had, to that extent, to be taken to have departed from the balancing approach contemplated by paragraphs 89 and 110 of that judgment.[2] Nevertheless, it was true that the Court was very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3. In particular, save for cases involving the death penalty, it had only very rarely found

1. *R (Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72. In that case, the House of Lords dismissed an appeal in which Mr Wellington had argued that his extradition to the United States on murder charges would expose him to a risk to inhuman and degrading treatment in the form of a sentence of life imprisonment without parole.
2. *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989.

that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect for democracy, human rights and the rule of law.

As regards cases concerning a sentence of life imprisonment without the possibility of parole, the Court noted, as in *Vinter and Others* (see below), that unless the sentence was grossly disproportionate, an Article 3 issue would arise for a sentence (whether mandatory or discretionary) of life imprisonment without the possibility of parole only when it could be shown (i) that the applicant's continued imprisonment could no longer be justified on any legitimate penological grounds and (ii) that the sentence was irreducible *de facto* and *de iure*. The Court noted, however, that while not *per se* incompatible with the Convention, a mandatory sentence of life imprisonment without the possibility of parole was much more likely to be grossly disproportionate than any other type of life sentence, especially if the sentencing court was required to disregard mitigating factors which were generally understood as indicating a significantly lower level of culpability on the part of the defendant, such as youth or severe mental health problems.

The sentences faced by the two applicants were not grossly disproportionate. Although the first applicant's prospective sentence was mandatory and so required greater scrutiny than other forms of life sentence, the Court noted that he was over eighteen at the time of the alleged crime and had not been diagnosed with a psychiatric disorder; moreover, the killing had taken place in the course of an armed robbery, which was a most serious aggravating factor. As to the second applicant, he faced, at most, a discretionary sentence of life imprisonment without parole that would be imposed only after consideration by the trial judge of all relevant aggravating and mitigating factors, and after the applicant's conviction for a premeditated murder in which another man was also shot in the head and injured. Further, since the applicants had not yet been convicted, still less begun serving a sentence, they had not shown that, upon extradition, their incarceration in the United States would not serve any legitimate penological purpose. Only if and when they were in a position to show that their continued detention no longer served such a purpose could an Article 3 issue arise and, even then, it was by no means certain that the United States authorities would refuse to use their powers to commute the sentence and order release on parole.

Accordingly, neither applicant had demonstrated that there would be a real risk of treatment reaching the Article 3 threshold as a result of his sentence if he was extradited to the United States.

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

The Court also dismissed the second applicant's complaint of a violation of Article 5 § 4 of the Convention for the reasons stated in *Vinter and Others* (see below).

(See also *Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008, Information Note no. 105; *Iorgov v. Bulgaria (no. 2)*, no. 36295/02, 2 September 2010, Information Note no. 133; and *Schuchter v. Italy* (dec.), no. 68476/10, 11 October 2011, Information Note no. 145)

Inhuman punishment
Degrading punishment

Imprisonment for life with release possible only in the event of terminal illness or serious incapacitation: *no violation*

Vinter and Others v. the United Kingdom - 66069/09, 130/10 and 3896/10
Judgment 17.1.2012 [Section IV]

Facts – In England and Wales murder carries a mandatory life sentence. Prior to the entry into force of the Criminal Justice Act 2003 the Secretary of State was empowered to set tariff periods for mandatory life sentence prisoners indicating the minimum term they must serve before they became eligible for early release on licence. Since the entry into force of the Act, that power is now exercised by the trial judge. Prisoners whose tariff was set by the Secretary of State under the previous practice may apply to the High Court for a review.

All three applicants were given "whole life orders" following convictions for murder. Such an order means that their offences are considered so serious that they must remain in prison for life unless the Secretary of State exercises his discretion to order their release on compassionate grounds if satisfied that exceptional circumstances – in practice, terminal illness or serious incapacitation – exist. The whole life order in the case of the first applicant, Mr Vinter, was made by the trial judge under the 2003 Act and upheld by the Court of Appeal on the grounds that Mr Vinter already had a previous conviction for murder. The whole life order in the cases of the second and third applicants had been made by the Secretary of State under the

previous practice, but were confirmed on a review by the High Court under the 2003 Act in decisions that were subsequently upheld on appeal. In the case of the second applicant, Mr Bamber, it was noted that the murders had been premeditated and involved multiple victims; these factors, coupled with sexual gratification, had also been present in the case of the third applicant, Mr Moore.

In their applications to the European Court, the applicants complained that the imposition of whole life orders meant their sentences were, in effect, irreducible, in violation of Article 3 of the Convention, and that the imposition of whole life orders without the possibility of regular review by the domestic courts violated Article 5 § 4. The second and third applicants also alleged a violation of Article 7 in that the whole life orders in their cases had been made not by the trial judge, but subsequently by the High Court, according to principles which they maintained reflected a harsher sentencing regime than had been in place when their offences were committed.

Law – Article 3: While, in principle, matters of appropriate sentencing largely fell outside the scope of the Convention, a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3 at the moment of its imposition. However, "gross disproportionality" was a strict test that would be met only on "rare and unique occasions". Given the gravity of the murders of which the applicants had been convicted, the whole life orders imposed on them were not grossly disproportionate.

The next point to examine was at what point in the course of a life or other very long sentence an Article 3 issue might arise. For life sentences it was necessary to distinguish between three types of sentence: (i) a life sentence with eligibility for release after a minimum period has been served; (ii) a discretionary sentence of life imprisonment without the possibility of parole; and (iii) a mandatory sentence of life imprisonment without the possibility of parole. The first type of sentence was clearly reducible and no issue could therefore arise under Article 3. As for the second and third types (discretionary and mandatory sentences of life imprisonment without the possibility of parole) in the absence of gross disproportionality, an Article 3 issue could not arise when the sentence was imposed, but only at such time as it could be shown (i) that the applicant's continued imprisonment could no longer be justified on any legitimate penological grounds; and (ii) that the sentence was irreducible *de facto* and *de iure*.

The whole life orders imposed in the applicants' cases were, in effect, of the second category: discretionary sentences of life imprisonment without parole. As regards the first limb of the above tests, the Court found that none of the applicants had demonstrated that their continued incarceration could no longer be justified on any legitimate penological grounds. The first applicant, Mr Vinter, had been convicted of a particularly brutal and callous murder while on parole following a previous murder and had only been serving his sentence for three years. His continued incarceration served the legitimate penological purposes of punishment and deterrence. While the second and third applicants, Mr Bamber and Mr Moore, had served respectively twenty-six and sixteen years in prison, they had effectively been re-sentenced in 2009 following their application to the High Court for review of their whole life tariffs. In the light of the relevant, sufficient and convincing reasons given in the High Court's decisions, the Court was satisfied that their continued incarceration also served the legitimate penological purposes of punishment and deterrence.

Since the applicants had failed to show that their continued incarceration could no longer be justified on any legitimate penological grounds, the Court did not need to go on to examine the second limb of the test, namely whether the whole life orders imposed on them were irreducible *de facto* and *de iure*.[1]

Conclusion: no violation in respect of all three applicants (four votes to three).

Article 5 § 4: The applicants' complaints were indistinguishable from the complaint that was declared inadmissible in the *Kafkaris* decision.[2] While continued detention could violate Article 3 if it was no longer justified on legitimate penological grounds and the sentence was irreducible, that did not mean that the detention had to be reviewed regularly in order for it to comply with Article 5. It was clear from the domestic courts' remarks that whole life orders were imposed to meet the requirements of punishment and deterrence. The applicants' sentences were therefore different from

1. The Court did, however, express certain reservations about the Secretary of State's policy on compassionate release: (i) as drafted, it could conceivably mean that a prisoner would remain in prison even if his continued imprisonment could not be justified on any legitimate penological grounds; (ii) it no longer followed the former practice of holding a twenty-five year review of the need for continued imprisonment; and (iii) could compassionate release for the terminally ill or physically incapacitated really be considered release at all, if all it meant was that a prisoner died at home or in a hospice rather than behind prison walls.

2. *Kafkaris v. Cyprus* (dec.), no. 9644/09, 21 June 2011.

the life sentence considered in *Stafford*,[1] which the Court found was divided into a tariff period (imposed for the purposes of punishment) and the remainder of the sentence, when continued detention was determined by considerations of risk and dangerousness. Consequently, as in *Kafkaris*, the Court was satisfied that the lawfulness of the applicants' detention required under Article 5 § 4 was incorporated in the whole life orders and no further review was required.

Conclusion: inadmissible (manifestly ill-founded).

Article 7: The second and third applicants had complained that in its review of the Secretary of State's decisions the High Court had imposed whole life orders on the basis of a harsher sentencing regime than had been in force when they were convicted. The Court rejected that argument. While it accepted that the setting of a minimum term in the context of a sentence of life imprisonment attracted the protection of Article 7, it noted, firstly, that the legislation under which the High Court had reached its decisions expressly protected against the imposition of a longer minimum term thanwas initially imposed and, secondly, that in conducting its review the High Court was required to have regard to both the new sentencing regime, which provided a comprehensive and carefully constructed framework for determining the minimum term justified for the purposes of punishment and deterrence, and the recommendations made by the trial judge and the Lord Chief Justice.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008, Information Note no. 105; *Iorgov v. Bulgaria (no. 2)*, no. 36295/02, 2 September 2010, Information Note no. 133; and *Schuchter v. Italy* (dec.), no. 68476/10, 11 October 2011, Information Note no. 145; and *Harkins and Edwards v. the United Kingdom*, above, page 14)

Degrading treatment

Living conditions in a social care home for persons with mental disorders: *violation*

Stanev v. Bulgaria - 36760/06
Judgment 17.1.2012 [GC]

(See Article 6 § 1 below, page 19)

1. *Stafford v. the United Kingdom* [GC], no. 46295/99, 28 May 2002, Information Note no. 42.

Failure to provide prisoner with adequate orthopaedic footwear: *violation*

Vladimir Vasilyev v. Russia - 28370/05
Judgment 10.1.2012 [Section I]

Facts – While serving a life sentence, the applicant had a toe of his right foot and the distal part of his left foot amputated due to frostbite, but was unable to obtain appropriate orthopaedic footwear. A medical facility in which he had been detained in 1996 confirmed the need for such footwear, but stated that the relevant regulations on supplies to convicted detainees did not require that it be provided by the State. Another detention facility, where the applicant was held in 2001, said that it could not provide orthopaedic footwear because it could only be produced in another town and there was a long waiting list. The facilities where the applicant was held thereafter seemed to suggest that, in the absence of any disability status, the applicant did not need orthopaedic footwear. The applicant maintained that the lack of such footwear caused him pain and difficulties keeping his balance during long routine line-ups or while cleaning his cell. On account of this and various other medical conditions (including diabetes) he suffered from, he lodged a civil claim but was never transferred to the court in time for the hearings in his case, which was ultimately dismissed.

Law – Article 3: While the Court dismissed as unsubstantiated the applicant's allegations as to insufficient medical assistance in respect of his other health conditions, his complaint concerning orthopaedic footwear raised serious concerns. At least one medical facility where the applicant had been detained in 1996 confirmed that he had been in need of such footwear, whereas another facility where he had stayed in 2001 gave a completely different justification for failing to provide him with it. However, in the absence of any indication that the applicant's condition had improved after 2001, or that it had been properly reassessed, it was incumbent on the national authorities to react to the applicant's situation of which they had been well aware. The lack of any appropriate solution to the applicant's problem between 2005 and 2011 had caused him distress and hardship amounting to degrading treatment.

Conclusion: violation (unanimously).

Article 6 § 1: In essence the applicant complained about his inability to be present at the court hearings in his civil case. Even though Russian law provided for a party's right to an oral hearing, it did not make any explicit provisions for detainees to be brought

to the courthouse in civil proceedings. Article 6 did not guarantee the right to be heard in person in civil proceedings, but a more general right to an adversarial trial and to equality of arms, leaving to the State a free choice of the means to be used in guaranteeing these rights. Given the risk of practical difficulties in ensuring the applicant's presence at the hearing, the national authorities could have held a session using a video link or in the detention facility, but neither of these options was considered. The applicant had also been unable to obtain legal aid for his civil case and the only possibility open to him had been to appoint a relative, friend or acquaintance to represent him in the proceedings. However, having refused the applicant's request to appear in person, the domestic courts had not considered how to secure his effective participation in the proceedings by inquiring whether he had had a friend or a relative willing to represent him or the possibility of contacting such a person and giving him or her authority to act on his behalf. Considering that the applicant's testimony would have constituted an indispensable part of the presentation of his case, the Court concluded that the domestic proceedings had not satisfied the requirements of Article 6 of the Convention.

Conclusion: violation (unanimously).

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

Effective investigation

Inadequacy of redress afforded by State to detainee victim of torture: *violation*

Zontul v. Greece - 12294/07
Judgment 17.1.2012 [Section I]

(See Article 3 above, page 11)

Expulsion

Detailed assurances from receiving State that high-profile Islamist would not be ill-treated if returned to Jordan: *deportation would not constitute a violation*

Othman (Abu Qatada) v. the United Kingdom - 8139/09
Judgment 17.1.2012 [Section IV]

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

ARTICLE 5

Article 5 § 1

Liberty of person

Allegations of rendition to a State not Party to the Convention, followed by torture: *relinquishment in favour of the Grand Chamber*

El-Masri v. "the former Yugoslav Republic of Macedonia" - 39630/09
[Section V]

(See Article 3 above, page 10)

Deprivation of liberty
Procedure prescribed by law

Lawfulness of placement in a social care home for persons with mental disorders: *violation*

Stanev v. Bulgaria - 36760/06
Judgment 17.1.2012 [GC]

(See Article 6 § 1 below, page 19)

Article 5 § 4

Take proceedings

Lack of remedies to challenge lawfulness of placement in a social care home for persons with mental disorders: *violation*

Stanev v. Bulgaria - 36760/06
Judgment 17.1.2012 [GC]

(See Article 6 § 1 below, page 19)

Inability of minor children, placed in administrative detention with their parents pending expulsion, to challenge lawfulness of this measure: *violation*

Popov v. France - 39472/07 and 39474/07
Judgment 19.1.2012 [Section V]

(See Article 8 below, page 26)

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Lack of direct access to court for person seeking restoration of his legal capacity: *violation*

Stanev v. Bulgaria - 36760/06
Judgment 17.1.2012 [GC]

Facts – In 2000, at the request of two of the applicant's relatives, a court declared him to be partially lacking legal capacity on the ground that he was suffering from schizophrenia. In 2002 the applicant was placed under partial guardianship against his will and admitted to a social care home for people with mental disorders, near a village in a remote mountain location. Following its official visits in 2003 and 2004, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) concluded that the conditions at the home could be said to amount to inhuman and degrading treatment. In 2004 and 2005 the applicant, through his lawyer, asked the public prosecutor and the mayor to institute proceedings for his release from partial guardianship, but his requests were refused. His guardian likewise refused to take such action, finding that the social care home was the most suitable place for him to live since he did not have the means to lead an independent life. In 2006, on his lawyer's initiative, the applicant was examined by an independent psychiatrist, who concluded that the diagnosis of schizophrenia was inaccurate but that the applicant had a tendency towards alcohol abuse and the symptoms of the two conditions could be confused, that he was capable of reintegrating into society, and that his stay in the social care home was very damaging to his health.

Law – Article 5 § 1

(a) *Applicability* – The applicant's placement in the social care home was attributable to the national authorities, since it was the result of various steps taken by public authorities and institutions through their officials from the initial request for his placement in an institution and throughout the implementation of the relevant measure. The applicant had been housed in a block which he was able to leave, but the time he spent away from the home and the places where he could go had always been subject to controls and restrictions. This system of leave of absence and the fact that the management kept the applicant's identity papers had placed significant restrictions on his personal liberty. Although the applicant had been able to undertake certain journeys, he had been under constant supervision and had not been free to leave the home without permission whenever he wished. The Government had not shown that the applicant's state of health was such as to put him at immediate risk, or to require the imposition of any special restrictions to protect him. The duration of the applicant's placement in the home had not been specified and was thus indefinite since he was listed in the municipal registers as having his permanent address at the home, where he still remained, having lived there for more than eight years. He must therefore have felt the full adverse effects of the restrictions imposed on him. He had not been asked to give his opinion on his placement in the home and had never explicitly consented to it. Domestic law attached a certain weight to the applicant's wishes and he appeared to have been well aware of his situation. At least from 2004, the applicant had explicitly expressed his desire to leave the social care home, both to psychiatrists and through his applications to the authorities to have his legal capacity restored. The Court was not convinced that the applicant had consented to the placement or had accepted it tacitly. Regard being had to the Bulgarian authorities' involvement in the decision to place the applicant in the home, the rules on leave of absence from the home, the duration of the placement and the applicant's lack of consent, the situation under examination amounted to a deprivation of liberty and Article 5 § 1 was applicable.

(b) *Merits* – The decision to place the applicant in a social care home for people with mental disorders without having obtained his prior consent had been invalid under Bulgarian law. That conclusion was in itself sufficient for the Court to establish that the applicant's deprivation of liberty was contrary to Article 5. In any event, that measure had not been lawful within the meaning of Article 5 § 1 of the Convention since none of the exceptions provided for in that Article were applicable, including Article 5 § 1 (e) – deprivation of liberty of a "person of unsound mind". In the present case it was true that the expert medical report produced in the course of the proceedings for the applicant's legal incapacitation had referred to the disorders from which he was suffering. However, more than two years had elapsed between the expert psychiatric assessment relied on by the authorities and the

applicant's placement in the home, during which time his guardian had not checked whether there had been any change in his condition and had not met or consulted him. That period was excessive and a medical opinion issued in 2000 could not be regarded as a reliable reflection of the state of the applicant's mental health at the time of his placement in the home (in 2002). It should be noted that the national authorities had not been under any legal obligation to order a psychiatric report at the time of the placement. The lack of a recent medical assessment would be sufficient in itself to conclude that the applicant's placement in the home had not been lawful. In addition, it had not been established that the applicant posed a danger to himself or to others. The Court also noted deficiencies in the assessment of whether the disorders warranting the applicant's placement in the home still persisted. Although he had been under the supervision of a psychiatrist, the aim of such supervision had not been to provide an assessment at regular intervals of whether he still needed to be kept in the social care home for the purposes of Article 5 § 1 (e). Indeed, no provision was made for such an assessment under the relevant legislation. The applicant's placement in the home had not been ordered "in accordance with a procedure prescribed by law" and had not been justified by sub-paragraph (e), or any of sub-paragraphs (a) to (f), of Article 5 § 1.

Conclusion: violation (unanimously).

Article 5 § 4: The Government had not indicated any domestic remedy capable of affording the applicant the direct opportunity to challenge the lawfulness of his placement in the social care home and the continued implementation of that measure. The Bulgarian courts had not been involved at any time or in any way in the placement and the domestic legislation did not provide for automatic periodic judicial review of placement in a home for people with mental disorders. Furthermore, since the applicant's placement in the home was not recognised as a deprivation of liberty in Bulgarian law, there was no provision for any domestic legal remedies by which to challenge its lawfulness in terms of a deprivation of liberty. The validity of the placement agreement could have been challenged on the ground of lack of consent only on the guardian's initiative.

Conclusion: violation (unanimously).

Article 5 § 5: It had not been shown the applicant could have availed himself prior to the Court's judgment in the present case, or would be able to do so after its delivery, of a right to compensation for his unlawful deprivation of liberty.

Conclusion: violation (unanimously).

Article 3: Article 3 prohibited the inhuman and degrading treatment of anyone in the care of the authorities, whether this entailed detention in the context of criminal proceedings or admission to an institution with the aim of protecting the life or health of the person concerned. The food in the social care home had been insufficient and of poor quality. The building had been inadequately heated and in winter the applicant had had to sleep in his coat. He had been able to have a shower once a week in an unhygienic and dilapidated bathroom. The toilets were in an execrable state and access to them was dangerous, according to the findings by the CPT. Lastly, the home did not return clothes to the same people after they were washed, which was likely to arouse a feeling of inferiority in the residents. The applicant had been exposed to all the above-mentioned conditions for a considerable period of approximately seven years (between 2002 and 2009, when the building where he lived had been renovated). The CPT had concluded, after visiting the home, that the living conditions there at the relevant time could be said to amount to inhuman and degrading treatment. Despite having been aware of those findings, during the period from 2002 to 2009 the Bulgarian Government had not acted on their undertaking to close down the institution. The lack of financial resources cited by the Government was not a relevant argument to justify keeping the applicant in the living conditions described.

Conclusion: violation (unanimously).

Article 13 in conjunction with Article 3: The applicant's placement in the social care home was not regarded as detention under domestic law. Therefore, he would not have been entitled to compensation under the State Responsibility for Damage Act 1988 for the poor living conditions there. Moreover, there were no judicial precedents in which that Act had been found to apply to allegations of poor conditions in social care homes. Even assuming that the applicant had been able to have his legal capacity restored and to leave the home, he would not have been awarded any compensation for having been kept there in degrading conditions.

Conclusion: violation (unanimously).

Article 6 § 1: The applicant had been unable to apply for restoration of his legal capacity other than through his guardian or one of the persons listed

in Article 277 of the Code of Civil Procedure. Domestic law made no distinction between those who were entirely deprived of legal capacity and those who were only partially incapacitated, and did not provide for any possibility of automatic periodic review of whether the grounds for placing a person under guardianship remained valid. Moreover, in the applicant's case the measure in question had not been limited in time. While the right of access to the courts was not absolute and restrictions on a person's procedural rights could be justified, even where the person had been only partially deprived of legal capacity, the right to ask a court to review a declaration of incapacity was one of the most important rights for the person concerned. It followed that such persons should in principle enjoy direct access to the courts in this sphere. However, the State remained free to determine the procedure by which such direct access was to be realised. At the same time, it would not be incompatible with Article 6 for national legislation to provide for certain restrictions on access to court in this sphere, with the sole aim of ensuring that the courts were not overburdened with excessive and manifestly ill-founded applications. Nevertheless, it seemed clear that this problem could be solved by other, less restrictive means than automatic denial of direct access, for example by limiting the frequency with which applications could be made or introducing a system for prior examination of their admissibility on the basis of the file. In addition, there was now a trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity. International instruments for the protection of people with mental disorders were likewise attaching growing importance to granting them as much legal autonomy as possible. Article 6 § 1 should be interpreted as guaranteeing in principle that anyone who had been declared partially incapable, as was the applicant's case, had direct access to a court to seek restoration of his or her legal capacity. Direct access of that kind was not guaranteed with a sufficient degree of certainty by the relevant Bulgarian legislation.

Conclusion: violation (unanimously).

Article 46: To redress the effects of the breach of the applicant's rights, the authorities should ascertain whether he wished to remain in the social care home. Nothing in this judgment should be seen as an obstacle to his continued placement in the home in question or any other home for people with mental disorders if it was established that he consented to the placement. However, should the applicant object to such placement, the authorities should re-examine his situation without delay in the light of the findings of this judgment. In view of its finding of a violation of Article 6 § 1 on account of the lack of direct access to a court for a person who had been partially deprived of legal capacity and wished to seek its restoration, the Court recommended that the respondent State envisage the necessary general measures to ensure the effective possibility of such access.

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

Failure to duly inform applicant, who was neither present nor represented at hearing, of procedure for challenging a court order withdrawing his parental authority: *violation*

Assunção Chaves v. Portugal - 61226/08
Judgment 31.1.2012 [Section II]

Facts – The applicant is a Brazilian national who lives in Portugal. He and a Portuguese national had a daughter who was born in hospital in 2006. Concerned for the safety of the child, the hospital staff informed the public prosecutor that the mother was suffering from drug addiction, learning difficulties and epilepsy and that she was refusing to take care of herself. They also noted the precarious financial situation of the child's parents and the fact that there was conflict with the mother's family. The Commission for the Protection of Children and Young People at Risk ordered that the child should remain in the hospital and then be placed in residential care. On 2 April 2009 the Family Court withdrew the couple's parental responsibility and their contact rights. In September 2009 the judge appointed a temporary guardian and started adoption proceedings.

Law – Article 6 § 1: The applicant had been absent when the Family Court had given judgment. However, the decision had been served on him in person when he went to the court registry on 7 April 2009. That was the starting-date for the ten-day period allowed for lodging an appeal with the Court of Appeal. While it was true that the applicant had not lodged such an appeal, he had expressed his opposition to the judgment by means of two applications sent via email, the first to the Attorney General on 9 April 2009 and the second to the Supreme Court on 10 April 2009. The applicant had evidently not complied with the formal procedure or made use of the remedies provided for in order to challenge the Family Court's judgment,

opting instead to lodge objections to the judgment with two authorities which did not have the power to afford redress for the alleged violations. Furthermore, the applicant should have been represented by a lawyer at the appeal stage. An application for legal aid could have stopped time running for the purposes of lodging an appeal. However, the applicant had not requested legal aid until August 2009, by which time the judgment had already become final.

Nevertheless, it was legitimate to ask whether the applicant had been duly informed of the procedures to be followed in order to appeal against the judgment of the Family Court, in so far as he had not been present when the judgment was delivered, had not been represented by counsel during the proceedings and had had only ten days in which to lodge an appeal. Proceedings concerning the protection of a child at risk were complex, not only because of the issues to be addressed but also because of the extremely serious and sensitive nature of what was at stake both for the child and for the parents. The Family Court had taken all the steps that could be expected of it to enable the applicant and his partner to participate effectively in the proceedings. Nevertheless, additional precautions and measures should have been taken once the court had noted that the applicant had not been informed of the date on which the judgment was due to be delivered, especially since he had not been represented by a lawyer. The judgment in question had not indicated what follow-up measures were to be taken or the date on which it would become final, as Portuguese law did not require that information to be included in the context of such proceedings. The applicant could therefore not be criticised, in the particular circumstances of the case, for not appealing against the judgment using the procedure and the avenues of appeal provided for by the law. Consequently, in the instant case, the lack of clear and reliable official information concerning the avenues of appeal and the formal requirements and time-limits for lodging an appeal had infringed the applicant's right of access to a court under Article 6 § 1 of the Convention.

Conclusion: violation (four votes to three).

Article 8: While the decision to take the child into care and keep her initially in an institution had been taken on medical grounds, the judgment of 2 April 2009 had taken particular account of the fact that all contact between the child and her parents had been broken off, since 7 November 2007 in the mother's case and since 5 December 2007 in the applicant's case. As the couple had had contact rights in respect of their daughter, they had been wholly responsible for the breaking of the family tie, having chosen to take up residence in Spain. The applicant had not advanced any valid and compelling reason to justify moving away from his daughter, who had been made the subject of a protective measure with particularly serious repercussions. Accordingly, the Family Court's decision had been based on relevant and sufficient reasons and had been justified in the child's best interests.

Conclusion: no violation (four votes to three).

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

Article 6 § 1 (criminal)

Fair hearing
Expulsion

Real risk of evidence obtained by torture of third parties being admitted at the applicant's retrial: *deportation would constitute a violation*

Othman (Abu Qatada) v. the United Kingdom - 8139/09
Judgment 17.1.2012 [Section IV]

Facts – The applicant, a Jordanian national, arrived in the United Kingdom in 1993 and was granted asylum. He was detained from 2002 until 2005 under the Anti-terrorism, Crime and Security Act 2001. Following his release, the Secretary of State served the applicant with a notice of intention to deport. Meanwhile, in 1999 and 2000 the applicant was convicted *in absentia* in Jordan of offences of conspiracy to carry out bombings and explosions. The crucial evidence against the applicant in each of the trials that led to those convictions were the incriminating statements of two co-defendants, who had subsequently complained of torture. In 2005 the United Kingdom and Jordanian Governments signed a Memorandum of Understanding (MOU) which set out a series of assurances of compliance with international human-rights standards to be adhered to when an individual was returned to one State from the other. It also provided for any person returned to have prompt and regular visits from a representative of an independent body nominated jointly by the two Governments. The Adaleh Centre for Human Rights Studies later signed a monitoring agreement with the UK Government to that effect. In the applicant's case

additional questions as to any possible retrial were put to, and answered by, the Jordanian Government. The applicant appealed against the decision to deport him but his claims, after careful examination by the domestic courts, were ultimately dismissed.

Law – Article 3: Reports by the United Nations and various NGOs indicated that torture in Jordan remained "widespread and routine" and the parties accepted that without assurances of the Jordanian Government there would have been a real risk of ill-treatment of the applicant, a high profile Islamist. In that connection, the Court observed that only in rare cases would the general situation in a country mean that no weight at all could be given to assurances it gave. More usually, the Court would assess, firstly, the quality of the assurances given (whether they had been disclosed to the Court, whether they were specific, whether they were binding on the receiving State at both central and local levels and whether their reliability had been examined by the domestic courts of the sending/Contracting State) and, secondly, whether in the light of the receiving State's practices they could be relied upon (whether the receiving State was a Contracting State, whether it afforded effective protection against torture and outlawed the conduct to which the assurances related, whether it had strong bilateral relations with the sending State and had abided by similar assurances in the past, whether the applicant had previously been ill-treated there and whether adequate arrangements were in place in the receiving State to allow effective monitoring and unfettered access for the applicant to his or her lawyers).

In the applicant's case, the UK and Jordanian Governments had made genuine efforts to obtain and provide transparent and detailed assurances to ensure that he would not be ill-treated upon his return to Jordan. The MOU reached as a result of those efforts was superior in both its detail and formality to any assurances previously examined by the Court. Furthermore, the assurances had been given in good faith and approved by the highest levels of Jordanian Government, whose bilateral relations with the UK had historically been very strong. The MOU clearly contemplated that the applicant would be deported to Jordan, where he would be detained and retried for the offences for which he had been convicted *in absentia*. The applicant's high profile would likely make the Jordanian authorities careful to ensure his proper treatment, since any ill-treatment would not only have serious consequences on that country's bilateral relationship with the UK, but would also cause international outrage. Finally, in accordance with the MOU, the applicant would be regularly visited by the Adaleh Centre, which would be capable of verifying that the assurances were respected. Consequently, the applicant's return to Jordan would not expose him to a real risk of ill-treatment.

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

Article 5: The Court confirmed that Article 5 applied in expulsion cases and that a Contracting State would be in a violation of that provision if it removed an applicant to a State where he or she would be at a real risk of a flagrant breach of rights protected under that Article. However, a very high threshold applied in such cases. Under Jordanian law, the applicant would have to be brought to trial within fifty days from his being detained, which in the Court's view fell far short of the length of detention required for a flagrant breach of Article 5.

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

Article 6: The applicant complained that, if returned to Jordan, his retrial would amount to a flagrant denial of justice because, *inter alia*, of the admission of evidence obtained by torture. The Court observed that a flagrant denial of justice went beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What was required was a breach of the principles of fair trial which was so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article. In that connection, it noted that admission of torture evidence would be manifestly contrary not only to Article 6 of the Convention, but also to the basic international-law standards of fair trial. It would render a trial immoral, illegal and entirely unreliable in its outcome. The admission of torture evidence in a criminal trial would therefore amount to a flagrant denial of justice. The incriminating statements in the applicant's case had been made by two different witnesses, both of whom had been exposed to beating of the soles of their feet commonly known as *falaka*, the purpose of which could have only been to obtain information. The Court had previously examined this form of ill-treatment and had no hesitation in characterising it as torture. Furthermore, the use of torture evidence in Jordan was widespread and the legal guarantees contained under Jordanian law seemed to have little practical value. While it would be open for the applicant to challenge the admissibility of the statements against him that had been obtained through torture, he would encounter sub-

stantial difficulties in trying to do that many years after the events and before the same court which routinely rejected such claims. Having provided concrete and compelling evidence that his co-defendants had been tortured into providing the case against him, and that such evidence would most likely be used in his retrial, the applicant had met the high burden of proof required to demonstrate a real risk of a flagrant denial of justice if he were deported to Jordan.

Conclusion: deportation would constitue a violation (unanimously).

Article 41: No claim made in respect of damage.

Article 6 § 2

Presumption of innocence

Judicial findings concerning criminal liability of a deceased suspect: *violation*

Vulakh and Others v. Russia - 33468/03
Judgment 10.1.2012 [Section I]

Facts – The four applicants were the heirs of V.V., who was suspected by the authorities of leading a crime syndicate that was under investigation for a series of violent offences. Following V.V.'s suicide after learning of the arrest of three fellow members of the alleged syndicate the criminal proceedings that had been brought against him were discontinued. The other three alleged members of the syndicate were subsequently convicted of a series of offences and the trial court expressly stated in its judgment that V.V. had been the leader. In subsequent civil proceedings, the civil courts ordered part of V.V.'s shares in a dairy factory to be transferred to the victims of the offences. In reaching that decision, and notwithstanding the fact that the criminal proceedings against V.V. had been discontinued, they relied on the findings of the criminal court concerning his alleged role in the gang. In their complaint to the European Court, the applicants complained of a breach of the presumption of innocence in V.V.'s case (Article 6 § 2 of the Convention) and of a violation of their right to respect for their possessions (Article 1 of Protocol No. 1).

Law – Article 6 § 2: The scope of Article 6 § 2 was not limited to pending criminal proceedings but extended to judicial decisions taken after a prosecution was discontinued. Further, it was a fundamental rule of criminal law that criminal liability did not survive the person who committed the criminal act. However, in the criminal proceedings against the co-defendants, the criminal court had stated as an established fact, without any qualification or reservation, that V.V. had been the leader of a criminal syndicate and had coordinated and funded its criminal activities. The wording used in the subsequent civil proceedings was even more explicit going so far as to say that the gang had committed, under V.V.'s leadership, serious crimes, including murder and attempted murder. There was a fundamental distinction to be made between a statement that someone is merely suspected of having committed a crime and a clear judicial declaration, in the absence of a final conviction, that the individual has committed the crime in question. The explicit and unqualified character of the statements contained in the domestic courts' judgments amounted to a pronouncement on V.V.'s guilt before he had been proved guilty, in breach of his right to be presumed innocent.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1: Under Article 1064 of the Russian Civil Code, a person inflicting damage on another could only be relieved from civil liability if he or she was able to demonstrate the absence of fault. In adjudicating the compensation claim, the civil courts did not make any independent findings as to any fault on the part of V.V. or the applicants, but merely referred to the criminal courts' judgments in the proceedings against V.V.'s co-defendants. Since neither the applicants nor V.V. had been a party to those proceedings and since the Court had already found that the declaration of V.V.'s guilt in the criminal judgments amounted – in the absence of a conviction – to a breach of his presumption of innocence the domestic proceedings had not afforded the applicants the necessary procedural guarantees for a vindication of their property rights.

Conclusion: violation (unanimously).

Article 41: EUR 4,000 each in respect of non-pecuniary damage. The Court further considered that a re-opening of the civil proceedings and review of the matter in the light of the principles identified in its judgment would be the most appropriate means of affording reparation in respect of pecuniary damage.

ARTICLE 8

Positive obligations

Local population informed by authorities of potential risks of living in region contaminated with uncollected waste:
no violation

Di Sarno and Others v. Italy - 30765/08
Judgment 10.1.2012 [Section II]

(See below)

Respect for private life
Respect for home

Prolonged failure by authorities to ensure collection, treatment and disposal of rubbish:
violation

Di Sarno and Others v. Italy - 30765/08
Judgment 10.1.2012 [Section II]

Facts – The municipality in the province of Naples, Italy, where the applicants lived and worked was affected by the "waste crisis". A state of emergency was in place in the region from 11 February 1994 to 31 December 2009 and the applicants were forced to live in an environment polluted by the piling-up of rubbish in the streets, at least from the end of 2007 until May 2008.

Law – Article 8: This provision was applicable, since the applicants' situation in the municipality had been liable to have a negative impact on their quality of life and, in particular, to adversely affect their right to respect for their private lives and their homes. The Court was unable to find that the applicants' health and lives had been endangered, in view of the fact that they had not claimed to have suffered any disorders linked to their exposure to the waste, although the Court of Justice of the European Union had held that a significant accumulation of waste on public roads or in temporary storage sites was liable to expose the population to a health risk.

The present case concerned the alleged failure of the public authorities to take appropriate measures to ensure the proper functioning of the waste collection, treatment and disposal service in the municipality. The Court therefore considered it appropriate to examine the case in the light of the positive obligations flowing from Article 8.

Between 2000 and 2008 the waste disposal and treatment services had been entrusted to private companies, while the municipal waste collection service had been provided by several publicly owned companies. The fact that the Italian authorities had outsourced the running of a public service did not, however, dispense them from their duty of care under Article 8. Furthermore, the circumstances relied on by the Italian State could not be attributed to *force majeure*, which was defined in international law as "an irresistible force or ... an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform [an international] obligation".

(a) *Substantive aspect* – Even if one accepted the Government's assertion that the acute phase of the crisis had lasted only five months, from late 2007 until May 2008, and notwithstanding the margin of appreciation left to the respondent State, the Court could not but find that the prolonged inability of the Italian authorities to ensure the proper functioning of the waste collection, treatment and disposal service had infringed the applicants' right to respect for their private lives and their homes.

Conclusion: violation (six votes to one).

(b) *Procedural aspect* – The applicants alleged a lack of information enabling them to assess the risk to which they had been exposed. However, the studies commissioned by the civil emergency planning department had been made public in 2005 and 2008. Accordingly, the Italian authorities had fulfilled their obligation to inform the persons concerned, including the applicants, of the potential risks they faced by continuing to live in the region.

Conclusion: no violation (unanimously).

The Court further held, by six votes to one, that there had been a violation of Article 13 in respect of the applicants' complaint concerning the absence in the Italian legal system of effective remedies enabling them to secure compensation for the damage they had sustained.

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

Respect for family life
Expulsion

Administrative detention of foreign parents and their infant children for fifteen days, pending expulsion: *violation*

Popov v. France - 39472/07 and 39474/07
Judgment 19.1.2012 [Section V]

Facts – The applicants are a married couple from Kazakhstan who arrived in France in 2002 and their two young children who were born in France. The parents allege that they were the victims of recurrent persecution in Kazakhstan because of their Russian origin and Orthodox faith. They applied for asylum, but their application was rejected, as were their applications for residence permits. On 27 August 2007 the parents and their children, then aged five months and three years, were arrested at their home and taken into police custody. Their administrative detention in a hotel was ordered the same day. The following day they were transferred to an airport to be flown back to Kazakhstan. The flight was cancelled, however, and they never boarded the plane. The applicants were then taken to the Rouen-Oissel administrative-detention centre, which was authorised to accommodate families. On 29 August 2007 the liberties and detention judge ordered a two-week extension of their detention. The applicants were taken back to the airport on 11 September 2007, but this second attempt to deport them also failed. Noting that the applicants were not to blame for that failure, the judge ordered their release. In 2009 the refugee status the applicants had applied for prior to their arrest was granted, on the grounds that the enquiries the Prefecture had made to the authorities in Kazakhstan, disregarding the confidentiality of asylum applications, had made it dangerous for them to return there.

Law – Article 3

(a) *As regards the children* – By virtue of a Decree of 2005 the Rouen-Oissel administrative-detention centre was authorised to accommodate families. However, the Decree merely mentioned the need to provide "specially equipped rooms, and in particular amenities suitable for small children", without actually explaining exactly what those amenities were. Arrangements at the different centres were left to the discretion of the head of the establishment and varied considerably from one centre to another, and there were often no staff specially trained in child welfare. While families were separated from other detainees at the Rouen-Oissel centre, the only beds available were iron-frame beds for adults, which were dangerous for children. Nor were there any play areas or activities for children, and the automatic doors to the rooms were dangerous for them. The Council of Europe's Commissioner for Human Rights and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) also pointed out that the promiscuity, stress, insecurity and hostile atmosphere in these centres were bad for young children, in contradiction with international child protection principles according to which the authorities must do everything in their power to avoid detaining children for lengthy periods. Two weeks' detention, while not in itself excessive, could seem like a very long time to children living in an environment ill-suited to their age. The conditions in which the applicants' children were detained for two weeks, in an adult environment with a strong police presence, with no activities to keep them occupied, combined with their parents' distress, were clearly ill-suited to their age. The two children found themselves in a situation of vulnerability heightened by their detention, which was bound to cause them stress and distress and have serious psychological repercussions. In view of the children's young age, and the duration and conditions of their detention, the authorities had not measured the inevitably harmful effects on the children. The way in which they had treated the children was incompatible with the provisions of the Convention and exceeded the minimum level of severity required to fall within the scope of Article 3.

Conclusion: violation (unanimously).

(b) *As regards the parents* – While the parents' administrative detention with their children in a holding centre must have caused them feelings of helplessness, distress and frustration, the fact that they had not been separated from their children must have somewhat alleviated those feelings, so the minimum level of severity for a violation of Article 3 was not attained.

Conclusion: no violation (six votes to one).

Article 5 § 1 (f): Although the children had been placed with their parents in a wing reserved for families, their particular situation had not been taken into account and the authorities had not sought to establish whether any alternative solution, other than administrative detention, could have been envisaged. The French system had therefore not properly protected the children's right to liberty.

Conclusion: violation (unanimously).

Article 5 § 4: The parents had had the possibility to have the lawfulness of their detention examined by the courts. There had therefore been no violation of Article 5 § 4 in respect of the parents. The law made no provision, however, for children to be placed in administrative detention, so children "accompanying" their parents found themselves in a legal void, unable to avail themselves of such a xremedy. In the present case no removal order had been issued against the children that they might have challenged in court. Nor had their administrative detention been ordered, so the courts had not been able to examine the lawfulness of their presence in the administrative-detention centre. That being so, they had not enjoyed the protection required by the Convention.

Conclusion: violation (unanimously).

Article 8: The applicants' detention in a holding centre for two weeks, in the prison-like conditions inherent in that type of establishment, amounted to an interference with their right to respect for their family life. The measure pursued the legitimate aim of combating illegal immigration and controlling the entry and residence of foreigners in France. It served, *inter alia*, to protect national security, law and order and the country's economy and to prevent crime. Detention measures, however, had to be proportionate to the aim pursued by the authorities, which in this case was the applicants' removal. In dealing with families, it was the authorities' duty, when considering the proportionality of the measure, to take the children's best interests into account. There was a broad consensus – including in international law – that all decisions concerning children should protect their best interests. In this case there had been no particular risk of the applicants absconding that might have justified their detention. Thus their detention did not appear to have been justified by any pressing social need, especially considering that their placement in a hotel during their initial administrative detention did not seem to have caused any problems. The information communicated by the Government did not indicate that any alternative to detention had been considered, such as house arrest or placement in a hotel. Lastly, the facts of the case did not show that the authorities had done everything in their power to enforce the expulsion measure promptly and thus limit the duration of the family's detention. Instead the applicants were held for two weeks without any flight being organised. The Court was aware that a similar complaint concerning the detention of four children with their mother for a month had been declared inadmissible, even though no alternative to detention had been envisaged.[1] However, in the light of the above facts and of recent developments in the case-law concerning "the child's best interests" in the context of the detention of migrant children, the Court considered that the child's best interests called not only for families to be kept together but also for the authorities to do everything in their power to limit the detention of families with young children and effectively protect their right to respect for their family life. As there had been no grounds to believe that the family would abscond, two weeks' detention in a closed facility was disproportionate to the aim pursued.

Conclusion: violation (unanimously).

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

ARTICLE 10

Freedom of expression

Obligation to pay compensation to child victim of sexual abuse for revealing her identity in a newspaper article: *no violation*

Kurier Zeitungsverlag und Druckerei GmbH v. Austria - 3401/07
Judgment 17.1.2012 [Section I]

Facts – The applicant newspaper published two articles concerning the case of C, a child who had been ill-treated and sexually abused by her father and stepmother. The articles were published during the latter's criminal trial and gave a detailed description of the circumstances of the case, revealing C's identity, her father's and stepmother's full names and their photographs. Given the significant media attention in her case, C had to be re-admitted to hospital for psychological problems. She subsequently filed a claim for compensation against the applicant company for publication of her name and the particulars of her case. Her claim was upheld on appeal and the applicant company was ordered to pay compensation in the amount of EUR 10,000 on the grounds that revealing C's identity in a matter concerning exclusively her private life had been unnecessary and in breach of domestic law.

Law – Article 10: The case concerned a balancing of the applicant newspaper's right to freedom of expression against C's right to protection of her

1. See *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07, 19 January 2010, Information Note no. 126.

identity. C was not a public figure and could not be considered to have entered the public scene by becoming a victim of a criminal offence which attracted considerable media attention. Further, even though the impugned articles dealt with a matter of public concern, the fact that neither the offenders nor the victim were public figures meant that knowledge of their identity had not been material for undestanding the particulars of the case. The applicant newspaper had not been prevented from reporting all the details of the case, only from revealing C's identity. The identity of victims of crime deserved special protection due to their vulnerable position. That obligation had been all the more important in C's case as she was a child at the time of the abuse. Both the Council of Europe's Convention on the Protection of Children against Sexual Exploitation and various recommendations adopted by its Committee of Ministers urged the States to take measures to protect the identity of victims of crime. Lastly, the sanction imposed on the applicant newspaper had not been disproportionate: the amount of compensation awarded appeared reasonable in the circumstances, in particular given the impact the articles must have had on C, who had experienced severe psychological problems and had had to be re-admitted to hospital.

Conclusion: no violation (unanimously).

Newspaper and former jury member found guilty of contempt of court and fined for breach of secrecy of jury deliberations:
inadmissible

Seckerson and Times Newspapers Limited v. the United Kingdom - 32844/10 and 33510/10
Decision 24.1.2012 [Section IV]

Facts – The first applicant was the foreman of the jury at the trial of a childminder found guilty of having shaken a baby in her care so violently that the infant died two days later. In late 2007, following the conviction of the childminder, he contacted *The Times* newspaper (the second applicant) and expressed his grave concerns about the trial and the conviction. *The Times* published two articles based on his comments. In particular, the articles contained the following two quotes: "...the consensus was taken three minutes after the foreman was voted in. It was 10-2 against, all based on the evidence. After that, there was no going back." and "Ultimately the case was decided by laymen and laywomen using that despicable enemy of correct and logical thinking, that wonderfully persuasive device, common sense." The two applicants were found guilty of contempt of court under section 8 of the 1981 Contempt of Court Act, which prohibited the disclosure of information regarding the deliberations of a jury. The first applicant was fined 500 pounds sterling (GBP). The second applicant was fined GBP 15,000 and ordered to pay costs of over 27,000 GBP.

Law – Article 10: Rules imposing requirements of confidentiality of judicial deliberations played an important role in maintaining the authority and impartiality of the judiciary, by promoting free and frank discussion by those who were required to decide the issues which arose. It was therefore essential that jurors be free to air their views and opinions on all aspects of the case and the evidence before them, without censoring themselves for fear of their general views or specific comments being disclosed to, and criticised in, the press. Even an absolute secrecy of jury deliberations could not be viewed as unreasonable, given that any qualification would necessarily lead to an element of doubt which could undermine the very objective which the rule sought to secure. In the instant case, the published comments had revealed the opinions expressed by ten members of the jury at an early stage of a long deliberation, and the reference to "no going back" had indicated their firm intention not to change their minds. The reference to "despicable enemy of correct and logical thinking" had revealed the first applicant's assessment of the opinions of and statements expressed by the majority members, and had constituted an accusation of incorrect and illogical thinking against them. The phrase "wonderfully persuasive device, common sense" had disclosed their approach to the evidence, and in particular that they had relied on common sense and not correct and logical thinking. The Court was accordingly satisfied that all of these disclosures had offended against the secrecy of the deliberations of the jury. Given that most of the content of the articles was not challenged, the Court was satisfied that the applicants had not been precluded from contributing to the debate on the use of expert medical evidence in trials at the relevant time. The fines imposed and the costs awarded as regards the second applicant were not insignificant. However, the Court did not consider them to be disproportionate in all the circumstances of the case, having regard to the revenues of the second applicant and the need to ensure that the sanctions imposed had a deterrent effect.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 11

Freedom of peaceful assembly

Retroactive removal of legal basis of a ban on demonstration: *violation*

Patyi v. Hungary - 35127/08
Judgment 17.1.2012 [Section II]

Facts – In February 2007 the applicant applied to a Budapest police department for authorisation to organise a demonstration in a square in front of the Parliament building. The police refused to deal with his application as the area in question had been declared a "security operational zone" ever since events in September 2006. The decision to declare the area a security zone was successfully challenged by another person, K., who after four years' litigation obtained a court ruling in November 2010 that continuation of the measure was unnecessary and disproportionate.

Law – Article 11

(a) *Admissibility (exhaustion of domestic remedies)* – The Government claimed that the applicant had failed to exhaust domestic remedies as he had not challenged the original decision to declare the area in question a security zone. However, the Court was not convinced that the proceedings that had been pursued by K. could be considered an effective remedy requiring exhaustion. Given the instantaneous nature of a political demonstration – the impact of which might rapidly diminish with time – a judicial procedure which produced a favourable decision after more than four years could hardly be regarded as effective or adequate.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – The Court noted that the police had declared the square a security operational area in 2006 and it had remained so ever since. However, in 2010 the domestic courts had criticised the authorities for failing to assess the necessity and proportionality of that measure after November 2006 and the police had later found that the proportionality of the measure had indeed not been proven. These rulings had thus retroactively removed the legal basis for the impugned measure, irrespective of the fact that they were reached in proceedings initiated by a person other than the applicant.

Conclusion: violation (unanimously).

Article 41: EUR 2,400 in respect of non-pecuniary damage.

(See also *Szerdahelyi v. Hungary*, no. 30385/07, 17 January 2012)

Freedom of association

Refusal to register a trade union of church employees: *violation*

Sindicatul "Păstorul cel Bun" v. Romania - 2330/09
Judgment 31.1.2012 [Section III]

Facts – In April 2008 thirty-five clerics and lay members of the Romanian Orthodox Church decided to establish a trade union. The elected president requested the Court of First Instance to grant the union legal personality and enter it in the trade-unions register. The representative of the Archdiocese lodged an objection. The union's representative reiterated the request, which was supported by the public prosecutor's office. In May 2008 the court granted the union's request and ordered its entry in the trade-unions register, thereby granting it legal personality. The Archdiocese appealed against that judgment. In a final judgment of July 2008 the county court allowed the appeal, set aside the first-instance judgment and, on the merits, dismissed the request for the union to be granted legal personality and entered in the trade-unions register.

Law – Article 11: The members of the clergy and lay personnel carried out their duties within the Romanian Orthodox Church on the basis of individual employment contracts. Their salaries were paid largely from the State budget and they were covered by the general social-insurance scheme. A relationship based on an employment contract could not be "clericalised" to the point of being exempted from all rules of civil law. Hence, members of the clergy, and to an even greater extent lay employees of the Church, could not be excluded from the scope of protection of Article 11.

The refusal to register the applicant union had been based on domestic law. In so far as the refusal had sought to prevent a disparity between the law and practice concerning the establishment of trade unions for Church employees, it had been aimed at protecting public order, which encompassed the freedom and autonomy of religious communities.

The civil courts had had jurisdiction to rule on the validity of the request for the trade union to be granted legal personality. The county court had

based its refusal on the need to protect Christian Orthodox tradition, its founding dogmas and the rules of canon law governing decision-making, and on the finding that it was not legally possible for members of the clergy to join a trade union since they occupied positions of leadership in their parishes. However, the Court observed that the trade union's statutes specified that it intended to fully comply with and apply the provisions of the civil legislation and the ecclesiastical rules, including the Statute and canons of the Church. The union's demands had related exclusively to defending the economic, social and cultural rights and interests of salaried employees of the Church. Hence, recognition of the union would not have undermined the legitimacy of religious beliefs or the means used to express such beliefs. The criteria defining a "pressing social need" were therefore not met in the instant case. The court had not established that the trade union's programme as set out in its statutes, or the positions adopted by its members, were incompatible with a "democratic society", still less that they represented a threat to democracy.

The reasons given by the County Court to justify the interference had been of a purely religious nature. The court had not examined the repercussions of the employment contract on the employer-employee relationship, the distinction between members of the clergy and lay employees of the Church or the issue whether the ecclesiastical rules prohibiting union membership were compatible with the domestic and international regulations enshrining the right of employees to belong to a trade union. However, these issues had been of particular importance in the present case. As such, they had called for an explicit response and should have been taken into consideration in balancing the interests at stake. The county court had also based its refusal to register the trade union on the provisions of the Orthodox Church's Statute, which had entered into force in 2008, that is, after the members of the union had taken up their duties within the Church. Although the background to the present case was unusual, particularly on account of the position occupied by the Orthodox faith in the history and tradition of the respondent State, this could not by itself justify the interference, especially since the applicant trade union had in no way sought to challenge that position, and the right of employees of the Orthodox Church to join a trade union had already been recognised on at least two occasions by the domestic courts. While, admittedly, that recognition had pre-dated the entry into force of the Statute of the Orthodox Church, the fact remained that two unions had been set up within the Orthodox clergy without this having been found to be unlawful or incompatible with democracy. In view of those circumstances, the grounds relied on by the county court appeared insufficient to justify the refusal of the applicant trade union's request for registration.

Accordingly, in the absence of a "pressing social need" or of sufficient reasons, a measure as drastic as the refusal to register the applicant union had been disproportionate to the aim pursued and therefore not necessary in a democratic society.

Conclusion: violation (five votes to two).

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

ARTICLE 13

Effective remedy

Lack of remedies to obtain compensation for poor living conditions in a social care home for persons with mental disorders: *violation*

Stanev v. Bulgaria - 36760/06
Judgment 17.1.2012 [GC]

(See Article 6 § 1 above, page 19)

Allegations of rendition to a State not Party to the Convention, followed by torture: *relinquishment in favour of the Grand Chamber*

El-Masri v. "the former Yugoslav Republic of Macedonia" - 39630/09
[Section V]

(See Article 3 above, page 10)

ARTICLE 35

Article 35 § 1

Effective domestic remedy – Republic of Moldova

Claim for compensation under Law no. 87 in length of proceedings and non-enforcement cases: *effective remedy*

Balan v. the Republic of Moldova - 44746/08
Decision 24.1.2012 [Section III]

Facts – In 2004 the applicant was awarded damages by a court against a third party in respect of injuries he had sustained in an accident. In an application lodged with the European Court in 2008, the applicant complained that the authorities had failed to enforce the award. In September 2011 the Court was informed by the respondent Government that a new statutory remedy for the problems of non-enforcement of final domestic judgments and length of proceedings had been introduced by Law no. 87 in response to the Court's direction in the pilot judgment of *Olaru and Others v. Moldova* (nos. 476/07 et al., 28 July 2009, Information Note no. 121). The Court therefore examined whether the applicant, who had not used this new remedy, had complied with the obligation to exhaust domestic remedies.

Law – Article 35 § 1: The Court accepted that Law no. 87 was designed, in principle, to address the issue of delayed enforcement of judgments in an effective and meaningful manner, taking account of the Convention requirements. While the domestic courts had not been able yet to establish any stable practice under the Law, the Court did not at this stage see any reason to believe that the new remedy could not afford the applicant adequate and sufficient redress or offer reasonable prospects of success.

Even though the new remedy had only become available after the introduction of the application, this was a case where it was appropriate and justified to require the applicant to use it since, firstly, the remedy had been introduced in response to a pilot judgment and it would be in line with the spirit and logic of that judgment for applicants complaining about non-enforcement of final judgments and length of proceedings to use the new remedy;[1] and, secondly, the transitional provision of Law no. 87 reflected the Moldovan authorities' intention to grant domestic redress to people who had already applied to the Court before the entry into force of the Law and was thus in accord with the paramount principle of subsidiarity.

Save in exceptional circumstances where necessary for the sake of fairness and effectiveness, the Court would require, as a matter of principle, that all new cases introduced after the pilot judgment and falling under Law no. 87 be submitted in the first place to the national courts. That position might, however, be subject to review in the future depending, in particular, on the domestic courts' capacity to establish consistent case-law under Law no. 87 in line with the Convention requirements.

Conclusion: inadmissible (failure to exhaust domestic remedies).

1. See also *Fakhretdinov and Others v. Russia* (dec.), nos. 26716/09, 67576/09 and 7698/10, and *Nagovitsyn and Nalgiyev v. Russia* (dec.), nos. 27451/09 and 60650/09, both 23 September 2010, Information Note no. 133.

Article 35 § 3 (a)

Abuse of the right of petition

Failure to respect duty of confidentiality in friendly-settlement negotiations: *inadmissible*

Mandil v. France - 67037/09
Decision 13.12.2011 [Section V]

Facts – In 2006 the applicant was sentenced to two months' imprisonment, suspended, and a fine of EUR 1,000 for deliberately damaging or destroying plots of genetically modified maize. In 2008 the criminal court found him guilty of refusing to undergo biological testing for the purposes of identifying his DNA, and ordered him to pay a fine of EUR 7 per day for sixty days. The applicant lodged a complaint with the European Court, alleging that his conviction for that offence was in violation of his right to respect for his private life. In 2011 his application was communicated to the French Government. On 14 October 2011 the regional daily newspaper *L'Est Républicain* published an article on its website entitled "Negotiation – €1,500 offered to a Pontarlier municipal councillor to withdraw his complaint against the French government – A cut for the GM reaper". The article was accompanied by a photograph of the applicant displaying a letter from his lawyer, with the caption "A Pontarlier municipal councillor has been offered payment to drop proceedings". A press agency journalist subsequently contacted the European Court to ask whether a friendly settlement of that kind was in keeping with the spirit of the Convention.

Law – Article 35 § 3 (a): The information on procedure sent to the applicant following the communication of his complaint had specified that in accordance with Rule 62 § 2 of the Rules of Court negotiations conducted with a view to reaching a friendly settlement were strictly confidential. In this case, the information available to the Court had made it possible to establish that the applicants and their lawyers had knowingly disclosed to the

press details of negotiations on a potential friendly settlement of the case. Such conduct had demonstrated malicious intent and at the very least unfair exploitation because that information had been accompanied by comments capable of discrediting the Government's actions, which had been taken in accordance with the rules governing proceedings before the Court. As a result, the applicant had violated the principle of confidentiality enshrined in Article 39 § 2 of the Convention and Rule 62 of the Rules of Court and, in the circumstances, his conduct had constituted abuse of the right of individual petition for the purposes of Article 35 § 3 (a) of the Convention.

Conclusion: inadmissible (abuse of the right of petition).

(See also the *Barreau and Others v. France* (no. 24697/09) and *Deceuninck v. France* (no. 47447/08) decisions of 13 December 2011)

ARTICLE 46

Pilot judgment – General measures

Respondent State required to take general measures to alleviate conditions of detention in remand prisons

Ananyev and Others v. Russia - 42525/07 and 60800/08
Judgment 10.1.2012 [Section I]

Facts – The case concerned the conditions of the applicants' detention, at different periods between 2005 and 2008, in various remand prisons pending trial. Having found violations of Articles 3 and 13 of the Convention, the European Court went on to consider the case under Article 46 of the Convention.

Law – Article 46: Inadequate conditions of detention were a recurrent structural problem in Russia, as a result of which the Court had found violations of Articles 3 and/or 13 in more than 80 judgments since *Kalashnikov*.[1] A further 250 similar cases were pending. The origins of the violations that had been found in these cases were substantially similar: an acute lack of personal space, a shortage of sleeping room, limited access to light and fresh air and non-existent privacy when using sanitary facilities. The problem was thus widespread and the result of a malfunctioning of the Russian penitentiary system and of insufficient legal and administrative safeguards. Taking into account the recurrent and persistent nature of the problem, the large number of people affected, and the urgent need to grant them speedy and appropriate redress at the domestic level, it was appropriate to apply the pilot-judgment procedure.

The recurrent violations of Article 3 resulting from inadequate conditions of detention in some Russian remand centres was an issue of considerable magnitude and complexity that stemmed from a large number of negative factors, both legal and logistical. The situation in Russian remand centres indisputably still required comprehensive general measures at the national level, despite the efforts that had been made to renovate and build remand facilities and to provide inmates with 4 sq.m of space by 2016. Furthermore, other short-term measures that could have been implemented at little extra cost – such as shielding cell toilets, removing netting from cell windows and increasing the frequency of showers – had not been introduced.

While supporting the Russian authorities' view that there should be an integrated approach to finding solutions to the problem of overcrowding in remand prisons, with changes to the legal framework, practices and attitudes, the Court considered that it was not its task to advise the Government on such a complex reform process, still less to recommend a particular way of organising its penal and penitentiary system. It nevertheless deemed it important to highlight two issues the Russian authorities needed to address: firstly, the close affinity between overcrowding and the equally recurring Russian problem of excessive length of pre-trial detention and, secondly, the need for provisional arrangements and safeguards to prevent remand prisons being filled beyond capacity.

As to the first point, all Council of Europe bodies had consistently indicated that a reduction in the number of remand prisoners would be the most appropriate solution to the problem of overcrowding. The Court had also stated in many of its judgments that remands in custody must be the exception rather than the norm and a measure of last resort. The Court had already identified a malfunctioning of the Russian judicial system on account of excessively lengthy detention on remand without proper justification (the percentage of applications for detention orders granted was inordinately high: 90% for initial applications, 98% for renewals). The Court also considered that

1. *Kalashnikov v. Russia*, no. 47095/99, 15 July 2002, Information Note no. 44.

Russian prosecutors should be formally encouraged to continue to reduce the number of applications they made for detention orders, except in the most serious cases involving violent offences. Ultimately, however, the successful prevention of overcrowding in remand centres was contingent on further consistent and long-term measures to achieve full compliance with the requirements of Article 5 § 3 of the Convention, notably through amendments to the Code of Criminal Procedure. Any such amendments would also have to be accompanied by effective measures to implement the changes in judicial practice.

As to the second issue – provisional arrangements to prevent and alleviate overcrowding – the Court noted that, notwithstanding a marked improvement in material conditions, substandard conditions were likely to persist for several more years. This called for the prompt introduction of additional legal safeguards to prevent or at least alleviate overcrowding in those prisons where it remained and to ensure effective respect for the rights of individuals detained there. Appropriate measures would include establishing both maximum and operational capacities for each remand prison, giving remand-centre governors power to refuse additional detainees where capacity would be exceeded and special transitional arrangements along the lines of those that had been introduced in Poland (see the Court's decisions in *Łatak v. Poland* and *Łomiński v. Poland*)[1]. The crucial features of such arrangements would be that any detention in substandard conditions should be of short and defined duration, under judicial supervision and give rise to a claim for compensation. Consideration should also be given to releasing detainees whose authorised period of detention was about to expire or was no longer needed.

As regards the Article 13 issue, the respondent State was required to set up effective preventive and compensatory domestic remedies without further delay. Preventive remedies had to make it possible for detainees to obtain prompt and effective examination of their complaints by an independent authority or court empowered to order remedial action. Compensatory remedies should provide redress, including a reduction of sentence or monetary compensation in an amount comparable to the Court's awards in similar cases, to detainees held in inhuman or degrading conditions pending trial. A binding time-frame within which preventive and compensatory remedies would be made available had to be produced, in co-operation with the Committee of Ministers, within six months from the date on which the Court's judgment became final.

Lastly, in view of the fundamental nature of the right not to be subjected to inhuman or degrading treatment, the examination of similar pending applications would not be adjourned. Their continued processing would serve as a regular reminder to the Government of their Convention obligations. The Government were required to ensure the accelerated settlement of individual cases currently pending before the Court within 12 months from the date on which the Court's judgment became final or when such applications were brought to the Government's attention.

1. *Łatak v. Poland* (dec.), no. 52070/08, and *Łomiński v. Poland* (dec.), no. 33502/09, both 12 October 2010, Information Note no. 134.

General measures

Respondent State required to take general measures to ensure effective access to court for persons seeking restoration of their legal capacity

Stanev v. Bulgaria - 36760/06
Judgment 17.1.2012 [GC]

(See Article 6 § 1 above, page 19)

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Reduction of applicants' pensions due to changes in their pension scheme: *inadmissible*

Torri and Others v. Italy -
11838/07 and 12302/07
Decision 24.1.2012 [Section II]

Facts – The applicants were civil servants employed by a public entity and paying old-age pension contributions into the primary Italian pension fund. In December 1992 the entity they had been working for was dissolved by statute and they acquired a right to "end-of-service" payments or the possibility of new employment with another civil service at a reduced salary. As regards their pension contributions, the applicants had several options, including combining the payments they

had previously paid with their contributions to their new employment pension fund. They chose this course in the belief that, in line with the case-law as it then stood, they would be repaid any payment in excess which did not go towards the calculation of their pensions. However, that practice eventually changed and such repayments were limited only to persons who had left the civil service before a certain date for which the applicants did not qualify owing to their new employment. The applicants then sued for the excess but their claims failed when the Supreme Administrative Court (*Consiglio di Stato*) changed its previous case-law.

Law – Article 1 of Protocol No. 1: In so far as the applicants complained about the national courts' interpretation of the domestic law, the Court noted that it had not been arbitrary and recalled that a reversal of jurisprudence fell within the discretionary powers of the domestic courts. The law at issue clearly stated that the refund of contributions applied only to a certain category of persons, which did not include the applicants. Furthermore, in so far as the applicants complained about a disproportionate interference with their possessions, the Court observed that their right to derive benefits from the social-insurance scheme had not been infringed to the extent that the essence of their pension right was impaired. The applicants had not suffered a total deprivation of their pension entitlements and indeed had failed to submit appropriate numerical details showing the extent to which their pensions would be reduced. Given the State's wide margin of appreciation in regulating the pension system and the legitimate aim pursued – namely, the principle of solidarity – the applicants had not been made to bear an excessive individual burden.

Conclusion: inadmissible (manifestly ill-founded).

Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: The applicants were treated differently to those who had received back their contributions prior to the change in the domestic courts' case-law. However, given that such a change was legitimate, its effects and the apparent difference in treatment fell within the State's wide margin of appreciation and could therefore be considered objectively justified. In any event, the applicants could not claim to be in an analogous situation to their former colleagues who had chosen not to take up the new employment but to retire instead.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 2 OF PROTOCOL No. 4

Article 2 § 1

Freedom of movement

Order prohibiting French national leaving Poland during criminal proceedings lasting for over five years: *violation*

Miażdżyk v. Poland - 23592/07
Judgment 24.1.2012 [Section IV]

Facts – In November 2004 the applicant was detained in Poland on charges of running an organised criminal group and numerous counts of fraud, theft and handling of stolen goods. A year later he was released on bail and ordered not to leave the country for an indefinite period. His passport was confiscated by the authorities. His lawyer made nine requests for the measure to be lifted, on account of the applicant's poor health and lack of contact with his family, who lived in France. Those requests were dismissed on the grounds that allowing the applicant to leave the country might impair the proper conduct of the criminal proceedings. Finally, in January 2011 the preventive measure was lifted and the applicant left for France. He appeared at subsequent court hearings in Poland and ultimately obtained the court's agreement for the proceedings to continue in his absence. At the date of the European Court's judgment, the proceedings were still pending at first instance.

Law – Article 2 of Protocol No. 4: The Court had previously decided a number of cases against Italy concerning prohibitions on leaving one's place of residence. In one of those cases, *Luordo*, the Court found such a preventive measure disproportionate because the bankruptcy proceedings had lasted over fourteen years. In the applicant's case, the preventive measure was applied for a period of five years and two months. However, the duration of the restriction could not be taken as the sole basis for determining whether a fair balance had been struck between the general interest in the proper conduct of the criminal proceedings and the applicant's right to freedom of movement. It was to be noted that for the entire duration of the preventive measure no first-instance judgment had been given in the applicant's case and that the factual and organisational complexity of the case could not justify the application of the measure throughout the whole proceedings. Moreover, the applicant was a French national and his family and business had been based in France. His situation

could therefore not be compared to a restriction of an individual's freedom of movement within his or her own country. Lastly, once the preventive measure was finally lifted, the Polish courts agreed to continue the proceedings in the applicant's absence. In such circumstances, the restriction on his freedom of movement for a considerable amount of time had been disproportionate.

Conclusion: violation (unanimously).

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

(See also *Luordo v. Italy*, no. 32190/96, 17 July 2003; *Prescher v. Bulgaria*, no. 6767/04, 7 June 2011; and *Riener v. Bulgaria*, no. 46343/99, 23 May 2006)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

El-Masri v. "the former Yugoslav Republic of Macedonia" - 39630/09
[Section V]

(See Article 3 above, page 10)

COURT NEWS

The Court held its annual press conference on Thursday 26 January 2012. On this occasion, Sir Nicolas Bratza, the President of the Court, presented a summary of the Court's activities and its statistics for 2011. He said that the European governments must assume their part of the shared responsibility for the protection of human rights across the continent.

The Court's judicial year was formally opened on Friday 27 January 2012. Some 200 leading judicial figures from across Europe were invited to participate in a seminar on the topic "How to ensure greater involvement of national courts in the Convention system?". At the solemn hearing which followed the seminar, President Sir Nicolas Bratza and Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights, addressed an audience of about 300, including many representatives of judicial institutions and national and local authorities.

During the opening of its judicial year, the Court launched a short video in English and French on the criteria for admissibility, produced with the support of the Principality of Monaco. The video, which is approximately three minutes long, is aimed at the general public and sets out the main conditions required in order to apply to the Court; failure to satisfy these conditions is the reason why the vast majority of applications are rejected.

See the video on the criteria for admissibility

RECENT COURT PUBLICATIONS

1. Annual Report 2011 of the European Court of Human Rights

On 26 January 2012 the Court issued its Annual Report for 2011 at the press conference preceding the opening of its judicial year. This report contains a wealth of statistical and substantive information such as the Jurisconsult's short survey of the main judgments and decisions delivered by the Court in 2011 as well as a selection in list form of the most significant judgments, decisions and communicated cases. It is available free on the Court's Internet site (<www.echr.coe.int> – Reports).

2. Statistics for 2011

The Court's statistics for 2011 are now available. All information related to statistics for 2011 can be found on the Court's Internet site (<www.echr.coe.int> – Reports – Statistics), including the 2011 table of violations by Article and by respondent State and an updated version of the Court's Facts and Figures leaflet.

3. Human rights factsheets by country

The "country profiles", which are produced by the Court's Press Unit and provide wide-ranging information on human-rights issues in each respondent State, have been updated to include developments in the second half of 2011. They can be downloaded from the Court's Internet site (<www.echr.coe.int> – Press).

4. Research reports

Three new reports on the case-law of the Court, prepared by the Research Division of the Registry on its own authority, have now been added to this collection and are available on the Court's Internet site (<www.echr.coe.int> – Case-Law):

- Internet and the Court's case-law
- Positive obligations under Article 10 to protect journalists and prevent impunity
- Child sexual abuse and child pornography