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

Information Note on the Court's case-law

No. 159 January 2013

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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ISSN 1996-1545

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Mosendz v. Ukraine - 52013/08
Judgment 17.1.2013 [Section V]

Facts – In April 1999 the applicant's son, who was performing mandatory military service at the time, was found dead, with gunshot wounds to his head, about six hundred metres from his post. A criminal investigation which found that the death was a suicide was repeatedly reopened on the grounds that it had not been sufficiently thorough. In 2003 an ex-private explained that on the night of the applicant's son death two sergeants had criticised him and the applicant's son. They had taken them to a separate room where they had forced them to read military statutes and to do push-ups at the same time. At some point the applicant's son had collapsed. One sergeant had ordered him to continue and, when he had failed to do so, the sergeant had kicked him and struck him on the back. The ex-private explained that he had been withholding this information through fear of reprisals. In 2005 one of the two sergeants confessed that he had ill-treated the applicant's son. He was sentenced and stripped of his military rank. Later the other sergeant was relieved from criminal liability as prosecution of the charge had become time-barred. However, the investigator refused to institute criminal proceedings against senior officers in the absence of a *corpus delicti*, as they had not personally bullied the applicant's son and had not instructed anybody to do so. The applicant lodged civil and administrative claims against the Ministry of Interior which are still pending.

Law – Article 2: The authorities had assumed the version of a suicide too readily from the outset and had pursued it throughout the investigation, without seriously considering any alternatives. At the same time, a number of gross discrepancies and omissions in the investigation, and certain inexplicable aspects of the case, had undermined the plausibility of the findings and given grounds for serious misgivings regarding the good faith of the authorities concerned and the genuineness of their efforts to establish the truth. It therefore appeared that all the pertinent facts surrounding the incident which, according to the domestic investigation and judicial authorities, had prompted the suicide of the applicant's son, could not be regarded as having been established with sufficient precision. The domestic authorities, however, had contented themselves with these factual findings. In particular, one of the two sergeants had successfully evaded prosecution until the charges against him had become time-barred. Allowing such a grievous charge to become time-barred was in itself an omission serious enough to raise an issue under Article 2. Moreover, the investigation had stalled and the applicant's claim against the higher military authority remained unadjudicated. Thus, the State authorities could not be regarded as having discharged their obligation to effectively investigate and duly account for the death of the applicant's son, which had occurred while he was under their control. It had been that ill-treatment, and not any frustrating life situation unrelated to the realities of being in the army, that had caused the suicide. The State therefore bore responsibility for the death.

Lastly, having regard to the widespread concern that had been voiced (in particular, in the Ukrainian Ombudsman's report and in some international materials) over the existence of hazing in the Ukrainian army, the Court did not rule out the existence of a broader context of coercive hazing in the military unit where the applicant's son had been serving. That being so, the failure to allocate the responsibility for what had happened there to upper echelons of the hierarchy, rather than limiting it to the wrongdoings of individual officers, was especially worrying. Therefore, there had been a violation of the State's positive obligation to protect the life of the applicant's son while under its control and to adequately account for his death, and of the procedural obligation to conduct an effective investigation into the matter.

Conclusion: violation (unanimously).

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

ARTICLE 3

Torture
Effective investigation

Large-scale violence against prisoners to punish them for peaceful hunger strike and absence of effective investigation: *violations*

Karabet and Others v. Ukraine - 38906/07 and 52025/07
Judgment 17.1.2013 [Section V]

Facts – In January 2007 the applicants, who were all serving prison sentences, took part in a hunger strike with other prisoners to protest about their conditions of detention. A week later the prison authorities conducted a security operation using officers and special forces. Immediately after the search, a group of prisoners whom the authorities considered to be the organisers of the hunger strike, including the applicants, were transferred to other detention facilities (SIZOs). The official report on the operation noted that two of the applicants were subjected to physical measures but all the applicants allege that, during and/or following the operation, they were submitted to ill-treatment. Following the operation, relatives of the applicants complained to various State authorities about the alleged ill-treatment and arbitrary transfer of the prisoners. However, the prosecutor refused to institute criminal proceedings against the prison administration or other authorities involved. The investigation was reopened and subsequently closed on a number of occasions, without any further action being taken.

Law – Article 3 (*procedural aspect*): Having regard to the magnitude of the events complained of and the fact that they unfolded under the control of the authorities and with their full knowledge, the applicants had an arguable claim that they had been ill-treated and that the State officials were under an obligation to carry out an effective investigation into the matter. Whenever a number of detainees were injured as a consequence of a special forces operation in a prison, the State authorities were under a positive obligation under Article 3 to conduct a medical examination of the inmates in a prompt and comprehensive manner.

The status of the prosecutor under domestic law, his proximity to prison officials with whom he supervised the relevant prisons on a daily basis, and his integration into the prison system did not offer adequate safeguards such as to ensure an independent and impartial review of the prisoners' allegations of ill-treatment on the part of prison officials. Furthermore, on many occasions the applicants' complaints were dismissed by Prison Department officials who had been directly involved in the events complained of. In sum, there had been no independent investigation into the applicants' allegations of ill-treatment.

Although medical examinations and the questioning of the supposed victims and the alleged perpetrators had been commenced within a few days, the examinations were incomplete and superficial, the victims had been subjected to intimidation and the alleged perpetrators' denial of any wrongdoing had been taken at face value. Far from constituting a prompt and serious attempt to find out what had happened, the measures taken amounted to a hasty search for any reasons to discontinue the investigation. Further, following several remittals for additional investigations, the authorities had acknowledged almost five years later that the investigation was incomplete. They had thus failed to comply with the requirement of promptness. Nor, in the absence of evidence that the decisions taken in respect of the applicants' allegations had been duly served on them, had their right to participate effectively in the investigation been ensured.

In these circumstances, the investigation into the applicants' allegations of ill-treatment was not thorough or independent, had failed to comply with the requirement of promptness and lacked public scrutiny.

Conclusion: violation (unanimously).

Article 3 (*substantive aspect*): The Court found on the basis of the materials before it that the operation by the security forces had been prompted by the prisoners' mass hunger strike in protest at the conditions of detention and was not a general search or preventive measure. The applicants' submission that the officers concerned were wearing masks was credible in view of the involvement of a special forces unit equipped and trained for antiterrorist operations. While before the impugned operation almost all the prisoners in the jail had united in expressing quite specific complaints against the administration, not a single complaint was recorded after the operation took place. Such a drastic change, in a matter of hours, from explicitly manifested unanimous dissent to complete acceptance could only be explained by indiscriminate brutality towards the prisoners having taken place. Lastly, the applicants had not been given any chance to prepare for their transfers to the SIZOs following the operation: they had not been allowed to collect their personal belongings or even to dress appropriately for the weather conditions. Such a course of events was conceivable against a background of violence and intimidation. In the light of all the foregoing inferences and the Government's silence on the applicants' factual submissions, the Court considered it established to the requisite standard of proof that the applicants had been subjected to the treatment complained of.

It was a commonly accepted fact that the protests by the prisoners had been confined to peaceful refusals to eat prison food, without a single violent incident being reported. They had demonstrated a willingness to cooperate with prison department officials. Moreover, the prison was under a minimum security level because all the inmates were serving a first sentence in respect of minor or medium-severity criminal offences. Nevertheless, the operation had taken place following prior preparations, with the involvement of specially trained personnel. The officers involved outnumbered the prisoners by more than three to one. The prisoners had not received the slightest warning of what was about to happen. As regards the only two instances where the use of force had been acknowledged by the domestic authorities, no attempt had been made by the officials concerned to show that it had been necessary. Instead, all the reports contained identical formalistic wording and referred to unspecified physical resistance by the prisoners to the officers conducting the search. Furthermore, all the prisoners in question had been beaten on the buttocks, an action that appeared to be demeaning and retaliatory, rather than aimed at overcoming physical resistance. While it was impossible for the Court to establish the seriousness of all the bodily injuries and the level of the shock, distress and humiliation suffered by every single applicant, there was no doubt that the authorities' unexpected and brutal action was grossly disproportionate and gratuitous, taken with the aim of crushing the protest movement, punishing the prisoners for their peaceful hunger strike and nipping in the bud any intention of their raising complaints. It must have caused severe pain and suffering and, even though it had not apparently resulted in any long-term damage to their health, could only be described as torture.

Conclusion: violation (unanimously).

The Court also found a violation of Article 1 of Protocol No. 1 on account of a failure by the prison administration to return the applicants' personal belongings.

Article 41: EUR 25,000 each in respect of non-pecuniary damage.

Degrading treatment

Structural problems resulting in prisoner suffering from mental disorders being held for more than fifteen years in prison psychiatric wing with no hope of change or appropriate medical care: *violation*

Claes v. Belgium - 43418/09
Judgment 10.1.2013 [Section V]

Facts – In February 1978 a Criminal Court judgment ruled that the applicant, who had raped his underage sisters, was not criminally responsible for his actions. After committing a series of sexual assaults the applicant, who has an intellectual disability, was held continuously in the psychiatric wing of a prison from 1994 onwards, with the exception of a single period of twenty-two months outside prison following a decision of the Mental Health Board.

Law – Article 3: Apart from access to the prison psychiatrist or psychologist, no specific treatment or medical supervision had ever been prescribed for the applicant. Starting in 2002, he had been able to participate in the activities offered by an association and in September 2005 the prison's psychosocial unit, backed up by the Mental Health Board, had observed an improvement in his condition and had raised the possibility of his situation being reviewed. However, he had remained in the psychiatric wing until 2009 since no facility had been found that was prepared to accept him. This long-lasting situation, which had continued since 1994, had clearly had a detrimental effect on the applicant's psychological state. He had suffered distress owing to the lack of any prospect of having his situation reviewed; in addition, he had not come any closer to understanding his problems and required individual and intense supervision.

The Court did not underestimate the efforts made within the prison to improve the support provided to persons in compulsory confinement. Nevertheless, the applicant's allegations were corroborated by unanimous findings at both national and international level with regard to the unsuitability of psychiatric wings for the detention of persons with mental health problems because of widespread staff shortages, the poor standard and lack of continuity of care, the dilapidated state of premises, overcrowding and a structural shortage of places in psychiatric facilities outside prison. Likewise, the Court did not underestimate the steps taken by the authorities on a regular basis from 1998 onwards to find the applicant a place in an external facility geared to dealing with his disorder. However, the applicant's situation stemmed in reality from a structural problem. The support provided to persons detained in prison psychiatric wings was inadequate and placing them in facilities outside prison often proved impossible either because of the shortage of places in psychiatric hospitals or because the relevant legislation did not allow the

mental health authorities to order their placement in external facilities. Accordingly, the national authorities had not provided the appropriate treatment for the applicant's condition in order to prevent a situation contrary to Article 3 from arising in his case. His continued detention in the psychiatric wing without the appropriate medical care and over a significant period of time, without any realistic prospect of change, therefore constituted particularly acute hardship causing distress which went beyond the suffering inevitably associated with detention. Whatever obstacles may have been created by the applicant's own behaviour, they did not dispense the State from its obligations in his regard by virtue of the position of inferiority and powerlessness typical of patients confined in psychiatric hospitals and even more so of those detained in a prison setting. Hence, the applicant had been subjected to degrading treatment on account of his continued detention over a significant period under the conditions referred to above.

Conclusion: violation (unanimously).

The Court further found a violation of Article 5 § 1 (e) since the applicant's confinement in prison in breach of Article 3 had also severed the requisite link between the aim of detention and the conditions in which it was effected. It also found a violation of Article 5 § 4 with regard to the review of lawfulness that could be conducted by the Mental Health Board.

Article 41: EUR 16,000 in respect of non-pecuniary damage. The applicant's transfer to an institution geared to his needs constituted the most appropriate form of redress.

Inhuman punishment
Degrading punishment

Continued enforcement in United Kingdom pursuant to prisoner transfer agreement of lengthy sentence imposed by Thai courts:
inadmissible

Willcox and Hurford v. the United Kingdom
- 43759/10 and 43771/12
Decision 8.1.2013 [Section IV]

Facts – Both applicants were detained in prisons in the United Kingdom serving sentences which had been imposed by courts in Thailand for possession of drugs, after pleading guilty to the charges. They had been transferred to the United Kingdom to serve the remainder of their sentences pursuant to a prisoner transfer agreement which operated between the United Kingdom and Thailand. They had been informed that upon transfer they would not be able to challenge the duration of their sentences.

In their applications to the European Court, the applicants contended that their sentences were grossly disproportionate, being four to five times longer than the sentences they would have been likely to receive had they been convicted of the same offences in the United Kingdom and that their continued enforcement violated their rights under Article 3 of the Convention. They further complained under Article 5 that their continued detention was arbitrary as, owing to the way the prisoner transfer agreement worked, had they in fact pleaded not guilty, they would have ended up serving less time in prison. The first applicant also argued that an "irrebuttable presumption" had been applied in his case which had rendered his trial flagrantly unfair, such that his continued detention in the United Kingdom was arbitrary.

Law – Article 3: While in principle matters of appropriate sentencing largely fell outside the scope of the Convention, the Court accepted that 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 and would only be met in very exceptional circumstances. Further, due regard must be had for the fact that sentencing practices vary greatly between States owing to different domestic conditions and approaches. When considering the degree of humiliation or suffering inherent in the impugned acts, it was necessary to have regard to the degree of humiliation or suffering inherent in the alternative option.

In the present case the sentences had been imposed and, had they not been transferred, the applicants' conditions of continued detention in Thailand may well have been harsh and degrading. It would in the Court's view be paradoxical if the protection afforded by Article 3 operated to prevent prisoners being transferred to serve their sentences in more humane conditions. Therefore the question to be asked was whether any suffering and humiliation involved in the continued enforcement of a sentence would go beyond that connected with the enforcement of the sentence imposed by the foreign court. In assessing that level of suffering, the fact the transfer had occurred within a framework of international cooperation in the administration of justice which was in principle in the interests of the persons concerned, was be taken into account. Prisoner transfer agreements were generally intended

to serve the aims of eliminating the adverse effects of serving a sentence in an environment which was socially, culturally or linguistically unfamiliar and facilitating future reintegration into society.

There was no suggestion in the instant case that the sentences imposed on the applicants were outside the range of sentences generally imposed on others convicted in Thailand of similar offences. They also fell within the permitted maximum applicable to equivalent convictions in England. It was also relevant that Thailand faced a serious drugs problem, and for this reason punished drugs offences severely. Likewise, the impugned sentences were being enforced by the United Kingdom pursuant to requests from the applicants for their transfer, in circumstances where both applicants had been advised of the length of the sentences they would have to serve and their inability to challenge the convictions or sentences imposed. Lastly, had the transfer requests been refused, both applicants would have been eligible for early release only at the two-thirds point of their sentences, instead of at the halfway point applicable to them under English law.

Conclusion: inadmissible (manifestly ill-founded).

Article 5 § 1

(a) *Effect of the guilty pleas* – The applicants argued that their guilty pleas ought to have resulted in a significant reduction of sentence. However, although in Thailand their sentences had been reduced from life imprisonment to determinate sentences, the impact of this reduction had effectively been inversed by their transfer to the United Kingdom. This was because if they had pleaded not guilty and been sentenced in Thailand to life imprisonment, it would have fallen to the English High Court to determine an appropriate minimum term for them to serve before they were considered for release on licence. In carrying out this exercise, the High Court would have had regard to local sentencing guidelines and the tariffs imposed in each of their cases would have been dramatically lower than the determinate sentences imposed by the Thai courts. As such, had they not pleaded guilty, they would now have the prospect of immediate release.

However, the Court observed that in the case of the first applicant, life imprisonment was not the only sentence available to the Thai court had it convicted him after a plea of not guilty. He could have been sentenced to death. In so far as his guilty plea had reduced a death sentence to a determinate sentence of imprisonment, he had reaped a significant benefit from it. Further, royal amnesties were common in Thailand and could operate to reduce a sentence of life imprisonment to a determinate sentence. Both applicants had already benefited from a reduction in sentence as a result of a royal amnesty. It had therefore not been established that had the applicants pleaded not guilty, they would have still been subject to life sentences of imprisonment at their point of transfer, such that the fixing of a minimum term by the High Court would be required. Additionally, in the case of the first applicant, had he been sentenced to life imprisonment he would have been required to serve a minimum term of eight years in Thailand before being eligible for transfer, rather than the four he had actually served. Although no such information had been provided in respect of the second applicant, it was likely that similar limitations would have applied. Moreover, it was not accurate to compare the tariff period under a life sentence with the term of a determinate sentence. In particular, a life sentence entailed obligations and restrictions which extended beyond the mere period spent in detention, both in the form of parole conditions and the risk of being returned to custody in the case of a breach of those conditions. These restrictions made a life sentence a more stringent sentence in principle. Finally, any differences in outcome which had arisen were not due to the arbitrary application of different rules to different prisoners. Clear rules were applied in prisoner transfer cases, and had been applied in the applicants' cases. That different outcomes had occurred was the result of the interaction between the law of the transferring State on sentencing and the practice of the receiving State on transfer.

In these circumstances, the continued detention of the applicants by the United Kingdom could not be said to have been arbitrary within the meaning of Article 5 § 1 (a) as a result of the effect of their guilty pleas.

(b) *The "irrebuttable presumption"* – The first applicant complained that owing to the irrebuttable presumption in Thai law that drugs beyond a certain quantity were for distribution, he had not been able to argue that they were in fact for his personal use. In his submission, therefore, his trial had been flagrantly unfair and his subsequent detention arbitrary.

The Court observed that the test whether there had been a "flagrant denial of justice" was a stringent standard and went beyond mere irregularities to require a destruction of the very essence of the right to a fair trial.

Presumptions of fact or of law operated in every legal system. Such presumptions had to be confined within reasonable limits which took into account the importance of what was at stake and maintained the rights of the defence, so it could not be excluded that there might be circumstances in which a provision of the nature in question in the first applicant's case would give rise to a violation. However the purpose of that provision had been to increase the penalty that could be imposed on those in possession of more than a certain quantity of narcotics, in order to act as a deterrent. The offence had arisen essentially from the possession of the narcotics, and this still had to be proved by the prosecution. The first applicant had had the benefit of a number of procedural guarantees in the Thai proceedings. He had been tried in public before two independent judges; he had been present throughout the proceedings and was legally represented; he had been acquitted of some of the charges in accordance with the presumption of innocence and, despite the fact that possession of heroin and ecstasy was not contested, evidence was led to demonstrate that the drugs were in his possession; and he had been sentenced in accordance with the applicable law and given a significant reduction for his guilty plea. In any event, it was a material factor when assessing the impact of the irrebuttable presumption on the overall fairness of the trial that the first applicant had not alerted the British authorities, either during his trial or when making his request for a transfer, to the alleged flagrant denial of justice in his case.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 5

Article 5 § 1

Deprivation of liberty
After conviction

Continued enforcement in United Kingdom pursuant to prisoner transfer agreement of lengthy sentence imposed by Thai courts: *inadmissible*

Willcox and Hurford v. the United Kingdom - 43759/10 and 43771/12
Decision 8.1.2013 [Section IV]

(See Article 3 above, page 10)

ARTICLE 6

Article 6 § 1 (civil)

Fair hearing

Absence of limitation period for imposing disciplinary penalty on judges and abuse of electronic vote system in Parliament when adopting decision on judge's dismissal: *violations*

Oleksandr Volkov v. Ukraine - 21722/11
Judgment 9.1.2013 [Section V]

(See Article 6 § 1 (civil) below)

Independent tribunal
Impartial tribunal

Structural defects of the system of judicial discipline: *violation*

Oleksandr Volkov v. Ukraine - 21722/11
Judgment 9.1.2013 [Section V]

Facts – From 2003 the applicant was a judge of the Supreme Court of Ukraine and from 2007 President of the Military Chamber of that court. In 2007 he was elected to the post of member of the High Council of Justice ("the HCJ"), but did not assume the office following the refusal of the Chairman of the Parliamentary Committee of the Judiciary ("the Parliamentary Committee") to allow him to take the oath. In 2008 and 2009 two members of the HCJ – one of whom was elected president of the HCJ later – conducted preliminary inquiries into possible misconduct by the applicant. They concluded that he had reviewed decisions delivered by his wife's brother – some of them dating back to 2003 – and that he had been culpable of gross procedural violations, some of his actions dating back to 2006. Following these inquiries, the President of the HCJ submitted two applications to the Parliament for the applicant's dismissal from the post of judge. In 2010 the Parliament, having considered these applications by the HCJ, a recommendation by the Parliamentary Committee, voted for the applicant's dismissal for "breach of oath". According to the applicant, during the electronic vote the majority of the Members of Parliament were absent and those present used voting cards which belonged to their absent colleagues. The applicant challenged his dismissal before the Higher

Administrative Court, which found that the HCJ's application to dismiss him following the inquiry of the president of the HCJ had been lawful and substantiated. The Higher Administrative Court further found that the HCJ's decision based on the results of the other inquiry had been unlawful, because the applicant and his wife's brother had not been considered relatives under the legislation in force at the time. However, it refused to quash the HCJ's acts in that case, noting that under the applicable provisions it had no power to do so. The Higher Administrative Court further noted that there had been no procedural violations either before the parliamentary committee or at the Parliament.

Law – Article 6 § 1

(a) *Applicability* – In determining the applicant's case and taking a binding decision, the HCJ, the parliamentary committee, and the plenary meeting of Parliament had been performing a judicial function in combination. The binding decision on the applicant's dismissal had further been reviewed by the Higher Administrative Court, which was a classic court within the domestic judiciary. It could not therefore be concluded that national law "expressly excluded access to court" for the applicant's claim. Article 6 therefore applied under its civil head.

The sanction imposed on the applicant was a classic disciplinary measure for professional misconduct and, in terms of domestic law, contrasted with criminal-law sanctions for the adoption of a knowingly wrongful decision by a judge. It was also relevant that the applicant's dismissal from the post of judge had not formally prevented him from practising law in another capacity within the legal profession. Article 6 was not, therefore, applicable under its criminal head.

(b) *Independence and impartiality of the bodies determining the applicant's case*

(i) *The HCJ*: With respect to disciplinary proceedings against judges, the necessity of the substantial participation of judges in the relevant disciplinary body had been recognised in the European Charter on the Statute for Judges. However, the HCJ consisted of twenty members who were appointed by different bodies. Three members were directly appointed by the President of Ukraine, three by the Parliament of Ukraine and two by the All-Ukrainian Conference of Prosecutors. The Minister of Justice and the Prosecutor General were *ex officio* members of the HCJ. Non-judicial staff appointed directly by the executive and the legislative authorities comprised the vast majority of the HCJ's members. As a result, the applicant's case had been determined by sixteen members of the HCJ who had attended the hearing, only three of whom were judges. Moreover, only four members of the HCJ worked there on a full-time basis. The other members continued to work and receive a salary outside the HCJ, which inevitably involved their material, hierarchical and administrative dependence on their primary employers and endangered both their independence and impartiality. The Court referred also to the opinion of the Venice Commission that the presence of the Prosecutor General on a body concerned with the appointment, disciplining and removal of judges created a risk that judges would not act impartially in such cases or that the Prosecutor General would not act impartially towards judges of whose decisions he disapproved. Furthermore, the members of the HCJ who had carried out the preliminary enquiries in the applicant's case and submitted requests for his dismissal had subsequently taken part in the decisions to remove the applicant from office. One of those members had been appointed President of the HCJ and had presided over the hearing of the applicant's case. The role of those members in bringing disciplinary charges against the applicant, based on the results of their own preliminary enquiries, threw objective doubt on their impartiality when deciding on the merits of the applicant's case. Accordingly, the facts of the present application disclosed a number of serious issues pointing both to structural deficiencies in the proceedings before the HCJ and to the appearance of personal bias on the part of certain members of the HCJ determining the applicant's case. The proceedings before the HCJ had thus not been compatible with the principles of independence and impartiality required by Article 6 § 1.

(ii) *The Parliamentary Committee*: The chairman of the committee and one of its members were also members of the HCJ and had taken part in deciding the applicant's case at both levels. Accordingly, they may not have acted impartially when examining the submissions by the HCJ. In addition, the Court's considerations concerning the lack of personal impartiality were equally pertinent to this stage of the procedure. Moreover, proper account should be taken of the fact that the chairman, together with two members of the Parliamentary Committee, had applied to the HCJ seeking the initiation of preliminary enquiries into possible misconduct by the applicant. At the same time, the HCJ's members had not been able to withdraw as no withdrawal procedure was envisaged

by the relevant legislation. This pointed to the lack of appropriate guarantees for the proceedings' compliance with the test of objective impartiality.

(iii) *The plenary meeting of Parliament*:– At that stage, the determination of the case had been limited to the adoption of a binding decision based on the findings previously reached by the HCJ and the Parliamentary Committee. On the whole, the procedure at the plenary meeting was not an appropriate forum for examining issues of fact and law, assessing evidence and making a legal qualification of facts. The role of the politicians sitting in Parliament, who were not required to have any legal and judicial experience, had not been sufficiently clarified by the Government and had not been justified as being compatible with the requirements of independence and impartiality of a tribunal.

(iv) *The Higher Administrative Court*: The Higher Administrative Court had been vested with powers to declare the decisions of the HCJ and the Parliament unlawful without being able to quash them and take any further steps. There was no automatic reinstatement in the post of judge exclusively on the basis of the Higher Administrative Court's declaratory decision. Moreover, important arguments advanced by the applicant had not been properly addressed by the Higher Administrative Court. The judicial review of the applicant's case had thus not been sufficient. Furthermore, the judges of the Higher Administrative Court were also under the disciplinary jurisdiction of the HCJ and could also be subjected to disciplinary proceedings before the HCJ. They were therefore unable to demonstrate "the independence and impartiality" required by Article 6.

The domestic authorities had thus failed to ensure independent and impartial determination of the applicant's case and the subsequent judicial review had not remedied those defects.

Conclusion: violation (unanimously).

(c) *Absence of a limitation period for imposing a disciplinary penalty* – The applicant had been placed in a difficult position, as he had had to mount his defence before the HCJ in 2010 with respect to events some of which had occurred in the distant past (in 2003 and 2006). Domestic law did not provide any time bars on proceedings for dismissal of a judge for "breach of oath". While the Court did not find it appropriate to indicate how long the limitation period should be, such an open-ended approach to disciplinary cases involving the judiciary posed a serious threat to the principle of legal certainty.

Conclusion: violation (unanimously).

(d) *Voting procedure at the plenary meeting of Parliament* – The decision on the applicant's dismissal had been voted on in the absence of the majority of the Members of Parliament. The MPs present had deliberately and unlawfully cast multiple votes belonging to their absent peers. The decision had therefore been taken in breach of the Constitution, the Status of Members of Parliament Act and the Rules of Parliament. The vote had therefore undermined the principle of legal certainty. The Higher Administrative Court had failed to address that issue properly.

Conclusion: violation (unanimously).

(e) *Composition of the chamber of the Higher Administrative Court* – Under domestic law, the personal composition of the special chamber that was to examine the applicant's case was to be defined by the President of the Higher Administrative Court, but his five-year term as President had already expired when this was done. The relevant provisions of national law regulating the procedure for appointing presidents of the courts had been declared unconstitutional and new provisions had not yet been introduced. In the meantime, the appointment of presidents of the courts had been a matter of serious controversy among the Ukrainian authorities. The Court could not find that the chamber deciding the case had been composed in a manner satisfying the requirement of a "tribunal established by law".

Conclusion: violation (unanimously).

Article 8: The applicant's dismissal had constituted interference with his right to respect for private and family life. The Court's finding that the parliamentary vote on the decision to remove him from office had not been lawful under national law was sufficient to find that the interference in question had not been justified and was therefore in breach of Article 8. At the time the applicant's case had been decided there were no guidelines or practice establishing a consistent interpretation of the notion of "breach of oath" and no adequate procedural safeguards had been put in place to prevent arbitrary application of the relevant provisions. In particular, national law had not set any time-limits for proceedings against a judge for "breach of oath", which had made the discretion of the disciplinary authorities open-ended and had undermined the principle of legal certainty. Moreover, national law had not set out an appropriate

scale of sanctions for disciplinary offences and had not developed rules ensuring their application in accordance with the principle of proportionality. Finally, there had been no appropriate framework for independent and impartial review of a dismissal for "breach of oath".

Conclusion: violation (unanimously).

Article 41: EUR 20,000 in respect of non-pecuniary damage. Question of just satisfaction in respect of pecuniary damage reserved.

Article 46

(a) *General measures* – The case disclosed serious systemic problems as regards the functioning of the Ukrainian judiciary. In particular, the system of judicial discipline did not ensure the sufficient separation of the judiciary from the other branches of State power. Moreover, it did not provide appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence. The respondent State would therefore be required to take a number of general measures aimed at reforming the system of judicial discipline. Those measures should include legislative reform involving the restructuring of the institutional basis of the system. The measures should also entail the development of appropriate forms and principles of coherent application of domestic law in that field.

(b) *Individual measures* – Having regard to the necessity of reforming the system of judicial discipline, reopening the domestic proceedings would not constitute an appropriate form of redress for the violations found. There were no grounds to assume that the applicant's case would be retried in accordance with the principles of the Convention in the near future. The Court saw no point in indicating such a measure. Having regard to the very exceptional circumstances of the case and the urgent need to put an end to the violations of Articles 6 and 8, the Court held that the respondent State must secure the applicant's reinstatement in the post of judge of the Supreme Court at the earliest possible date.

Tribunal established by law

Composition of chamber examining applicant's case defined by a judge whose term of office as court's president had expired: *violation*

Oleksandr Volkov v. Ukraine - 21722/11
Judgment 9.1.2013 [Section V]

(See Article 6 § 1 (civil) above, page 12)

Article 6 § 1 (criminal)

Fair hearing

Assize court judgment containing statement of reasons for jury's guilty verdict: *violation; no violation*

Agnelet v. France - 61198/08
Legillon v. France - 53406/10
Judgments 10.1.2013 [Section V]

Facts – In *Agnelet*, the applicant was sentenced in 2007 by the Assize Court to twenty years' imprisonment for murder. He was the lover and lawyer of the murdered woman. Earlier proceedings against him had been discontinued or had led to an acquittal.

The applicant in *Legillon* was sentenced by the Assize Court of Appeal to fifteen years' imprisonment for rape and sexual assault of minors under the age of fifteen within his immediate family.

The applicants complained of the lack of reasons given in the assize court judgments. They lodged appeals with the Court of Cassation, which were dismissed on the grounds that the requirements of Article 6 of the European Convention had been satisfied.

Law – Article 6 § 1: The absence of reasons in a judgment, owing to the fact that the applicant's guilt was determined by a lay jury, was not in itself contrary to the Convention. The specific features of the procedure before the assize courts with the participation of a lay jury had to be taken into account. It emerged from the Grand Chamber judgment in *Taxquet v. Belgium* that it should be clear from the indictment, together with the questions put to the jury, which pieces of evidence and factual circumstances among all those examined in the course of the trial the jurors had ultimately based their answers to the questions on, and that the questions themselves had to be precise and geared to the individual concerned.

In *Agnelet*, the applicant had been the only defendant and the case had been very complex. The indictment decision had been limited in scope because it had preceded the debates, which formed the crux of the proceedings. As to the factual information included in the indictment and its usefulness in understanding the guilty verdict against the applicant, it had of necessity left a number of areas of uncertainty: as the murder had not been positively established, the explanation for the victim's disappearance had inevitably been

based on hypothesis. As to the questions, they had been all the more important since, when deliberating, the judges and jury had not had access to the case file and had based their decision solely on the elements examined during the adversarial proceedings, albeit with the addition, in this case, of the decision indicting the accused. Furthermore, there had been a great deal at stake as the applicant had been sentenced to twenty years' imprisonment after earlier proceedings had been discontinued or had led to his acquittal. The subsidiary questions had been found to be devoid of purpose, so that only two questions had been put to the jury: the first was whether the applicant had intentionally murdered the victim and the second, if so, whether the murder had been premeditated. Considering the considerable complexity of the case, those questions had been succinctly worded and made no allusion to the specific circumstances. They had not referred to "any precise and specific circumstances that could have enabled the applicant to understand why he [had been] found guilty". It was true that the public prosecutor had appealed, thus enabling the first-instance judgment to be reviewed. However, besides the fact that this judgment had not been accompanied by reasons either, the appeal had resulted in the formation of a new assize-court bench, made up of different judges, whose task was to re-examine the case file and reassess the factual and legal issues in the course of fresh hearings. It followed that the applicant had been unable to retrieve any pertinent information from the first-instance proceedings as to why he had been convicted on appeal by a different jury and different judges, especially since he had initially been acquitted. Thus, the applicant had not had sufficient guarantees to enable him to understand why he had been found guilty.

Conclusion: violation (unanimously).

Article 41: no claim made in respect of damage.

In *Legillon*, the applicant had been the sole defendant and the offences of which he was accused, despite their seriousness, had not been complex. The indictment decision that had preceded the hearings had been particularly detailed and the charges had then been debated for three days. The reclassification of the offences after the order committing the applicant for trial and before the questions to the jury emphasised that the latter's decision was not to be confused with the indictment decision. This development, arising out of the debate, had necessarily allowed the accused to understand part of the jury's reasoning. Twelve questions had been asked, forming a clear whole which left no ambiguity as to the charges against the applicant. Furthermore, specific questions concerning the aggravating circumstances of the father-daughter relationship and the age of the victims had enabled the jury to weigh precisely the applicant's individual criminal responsibility. In sum, the applicant had been given sufficient guarantees to enable him to understand the guilty verdict against him.

Lastly, a reform had been put in place since the time of the events, following the enactment of legislation in August 2011 introducing a new provision (Article 365-1) into the Code of Criminal Procedure. This provided for the reasons for the assize court judgment to be set out in a "statement of reasons form" appended to the list of questions. In the event of a conviction, the reasons had to be based on those facts examined in the course of the deliberations which had convinced the assize court in respect of each of the charges brought against the accused. This reform thus appeared, on the face of it, to significantly strengthen the guarantees against arbitrariness and to help the accused understand the court's decision, as required by Article 6 § 1 of the Convention.

Conclusion: no violation (unanimously).

(See *Taxquet v. Belgium* [GC], no. 926/05, 16 November 2010, Information Note no. 135)

ARTICLE 7

Article 7 § 1

Nulla poena sine lege

Power of public prosecutor to decide in which court to try a person accused of drug-trafficking, and therefore the range of sentence: *violation*

Camilleri v. Malta - 42931/10
Judgment 22.1.2013 [Section IV]

Facts – In 2003 the applicant was charged with possession of illegal drugs not intended for his exclusive use. The relevant domestic law provided two different ranges of sentence for that offence, namely four years to life imprisonment on conviction by the Criminal Court, or six months to ten years on conviction by the Court of Magistrates. Under domestic law, it was the public prosecutor who decided in which court the accused would be

tried. The applicant was tried in the Criminal Court and sentenced to fifteen years' imprisonment and a EUR 35,000 fine. The judgment was upheld on appeal. In 2009 the applicant sought constitutional redress on the grounds that the public prosecutor's power to decide the trial court violated the impartiality requirement. In dismissing that complaint, the Constitutional Court held that that power could not be equated with the powers of a judge, as the public prosecutor had no control over the finding of guilt. Nevertheless it considered that it would be desirable, for the sake of fairness and transparency, to establish criteria to assist public prosecutors in the choice of appropriate forum.

Law – Article 7: While it was clear that the sentence imposed on the applicant had been established by law and had not exceeded the statutory limits, the law did not make it possible for him to know, before the decision of the public prosecutor determining the court where he was to be tried, which of the two ranges of sentence would apply to him. The domestic case-law seemed to indicate that such decisions were at times unpredictable. The applicant would not have been able to know the punishment applicable to him even if he had obtained legal advice on the matter, as the decision was solely dependent on the prosecutor's discretion to determine the trial court. The criteria to be applied by the prosecutor when taking his decision were not specified in any legislative text and had not been clarified by the courts. The law did not provide any guidance on what would amount to a more serious offence or a less serious one. The lack of such guidelines had also been noted by the Constitutional Court. Thus, the law did not determine with any degree of precision the circumstances in which a particular range of sentence applied. The prosecutor had in effect an unfettered discretion to decide which minimum penalty would be applicable with respect to the same offence. His decision was inevitably subjective and left room for arbitrariness, particularly given the lack of procedural safeguards. The domestic courts were bound by that decision and could not impose a sentence below the minimum established by law despite any concerns they might have as to the use of the prosecutor's discretion. The relevant legal provision had therefore failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment.

Conclusion: violation (by six votes to one).

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

ARTICLE 8

Respect for private life

Dismissal of a judge for "breach of oath" in absence of consistent interpretation of that offence and of requisite procedural safeguards: *violation*

Oleksandr Volkov v. Ukraine - 21722/11
Judgment 9.1.2013 [Section V]

(See Article 6 § 1 (civil) above, page 12)

Respect for family life

Authorities' failure to ensure legal representation of mentally disabled applicant in proceedings divesting her of parental rights and to inform her of adoption proceedings in respect of her son: *violation*

A.K. and L. v. Croatia - 37956/11
Judgment 8.1.2013 [Section I]

Facts – The first applicant is the mother of the second applicant L., who was born in 2008. Soon after his birth, L. was placed, with his mother's consent, in a foster family in another town, on the grounds that his mother had no income and lived in a dilapidated property without heating. In May 2010 the first applicant was divested of her parental rights in respect of L., on the grounds that she had a mild mental disability and was not able to provide proper care to him. She applied for legal aid to lodge an appeal, but was only assigned a lawyer after the time-limit for appealing had expired. In October 2010 her lawyer applied to a municipal court for an order restoring the first applicant's parental rights, but the application was dismissed because in the meantime L. had been adopted by third parties. The first applicant was not a party to the adoption proceedings and was not informed of them, as her consent was not needed because she had been divested of her parental rights.

Law – Article 8

(a) *Standing of the first applicant to act on behalf of L.* – In respect of any issues concerning the facts after the adoption became final, L.'s only representatives under national law were his adoptive parents. However, all issues concerning the severing of his ties with his biological mother before his adoption should be examined by the Court. It was in principle in a child's interest to preserve its ties with its

biological parents, save where weighty reasons existed to justify severing them. In the present proceedings, owing to his tender age, L. was not in a position to represent his interests. The first applicant was the only person able to argue on his behalf that severing the ties between them had also affected L.'s right to respect for his family life. The Government's objection as regards the *locus standi* of the first applicant to represent L. in the proceedings before the Court had to be dismissed.

(b) *Applicability* – Although the child had been placed in a foster family soon after birth, the first applicant had continued to visit him. In the Court's view there existed a bond between the first applicant and her son that amounted to "family life". Article 8 was therefore applicable.

(c) *Merits* – The measures taken by the State amounted to interference with the applicants' right to respect for their family life. The interference had a basis in domestic law and had been aimed at protecting the best interests of the child. The Court was not called upon to determine whether the adoption of the first applicant's child was justified as such. Nor did it have to rule on the compliance with Article 8 of legislation which did not allow a parent divested of parental rights to participate in the adoption proceedings. Instead, the Court examined whether sufficient safeguards for the protection of the applicants' private and family life had been provided at every stage of the process. The domestic legislation provided adequate safeguards as regards the interests of parents and their children in proceedings. However, despite the legal requirement and the authorities' findings that the first applicant suffered from a mild mental disability, she had not been represented by a lawyer in the proceedings divesting her of parental rights. Given that she could not properly understand the full legal effect of such proceedings and adequately argue her case and given the importance of such proceedings for her right to respect for her family life, the national authorities should have ensured that the interests of both the first applicant and L. were adequately protected, in particular from the standpoint of preserving ties between them. While the Court could accept that the consent of the first applicant, who had been divested of her parental rights, was not necessary in the adoption proceedings, it nevertheless considered that where, as in Croatia, a national system allowed for parental rights to be restored, it was indispensable that a parent be given an opportunity to exercise that right before the child was put up for adoption. However, by not informing the first applicant about the adoption proceedings the national authorities had deprived her of the opportunity to seek restoration of her parental rights before the ties between her and her son had been finally severed by his adoption. She had thus been prevented from enjoying her right guaranteed by domestic law and had not been sufficiently involved in the decision-making process.

Conclusion: violation (unanimously).

Article 41: EUR 12,500 to the first applicant in respect of non-pecuniary damage

ARTICLE 9

Manifest religion or belief

Disciplinary measures against employees for wearing religious symbols (cross) at work or refusing to perform duties they considered incompatible with their religious beliefs:
violation; no violations

Eweida and Others v. the United Kingdom
- 48420/10 et al.
Judgment 15.1.2013 [Section IV]

Facts – All four applicants were practising Christians who complained that domestic law had failed adequately to protect their right to manifest their religious beliefs. The first applicant, Ms Eweida, a British Airways employee, and the second applicant, Ms Chaplin, a geriatrics nurse, complained that their employers had placed restrictions on their visibly wearing Christian crosses around their necks while at work. The third applicant, Ms Ladele, a Registrar of Births, Deaths and Marriages; and the fourth applicant, Mr McFarlane, a counsellor with a confidential sex therapy and relationship counselling service, complained that they had been dismissed for refusing to carry out certain of their duties which they considered would condone homosexuality, a practice they felt was incompatible with their religious beliefs.

Law – Article 9 alone and/or in conjunction with Article 14: There is case-law of the Court and Commission which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under Article 9 § 1 and the limitation does not therefore require to be justified under Article 9 § 2. However, given the importance in a democratic society of freedom of religion, the Court considered that where an individual complains of a restriction on freedom

of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.

Where, as in the case of the first and fourth applicants, the acts complained of were carried out by private companies and were not therefore directly attributable to the respondent State, the Court must consider the issues in terms of the positive obligation on the State authorities to secure the rights under Article 9 to those within their jurisdiction.

As regards the applicable principles under Article 14 of the Convention, while generally for an issue to arise there must be a difference in the treatment of persons in analogous, or relevantly similar, situations, the right not to be discriminated against is also violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different. Such actions are discriminatory if they have no objective and reasonable justification; in other words, if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(a) *The first applicant* – The Court was satisfied that the first applicant's insistence on wearing a cross visible at work was a manifestation of her religious belief, and that the refusal by British Airways between September 2006 and February 2007 to allow her to remain in her post while visibly wearing a cross amounted to interference with her right to manifest her religion. Since the interference was not directly attributable to the State, the Court examined whether the State had complied with the positive obligation under Article 9.

The Court did not consider that the lack of explicit protection in UK law to regulate the wearing of religious clothing and symbols in the workplace in itself meant that the right to manifest religion was breached, since the issues could be and were considered by the domestic courts in the context of discrimination claims brought by the applicants.

The aim of the British Airways uniform code, namely to communicate a certain image of the company and to promote recognition of its brand and staff, was legitimate. However, the domestic courts had accorded this aim too much weight. The first applicant's cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other previously authorised items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image.

Moreover, the fact that the company was later able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrated that the earlier prohibition had not been of crucial importance.

Therefore, as there was no evidence of any real encroachment on the interests of others, the domestic authorities had failed sufficiently to protect the first applicant's right to manifest her religion, in breach of the positive obligation under Article 9. No separate examination of her complaint under Article 14 in conjunction with Article 9 was necessary.

Conclusion: violation in respect of the first applicant (five votes to two).

(b) *The second applicant* – The Court was satisfied that the second applicant's determination to wear a cross at work was a manifestation of her religious belief and that the refusal by the health authority to allow her to remain in the nursing post while wearing the cross was an interference with her freedom to manifest her religion.

The restriction in question had a legitimate aim, which was to protect the health and safety of nurses and patients. The evidence was that the second applicant's managers considered there was a risk that a disturbed patient might seize and pull the chain with the risk of injury, or that the cross might swing forward, and could, for example, come into contact with an open wound. The reason for the restriction in this situation was therefore inherently of greater magnitude than in the case of the first applicant. There was also evidence that another Christian nurse had been requested to remove a cross and chain; two Sikh nurses had been told they could not wear a bangle or kirpan; and that flowing hijabs were prohibited. The second applicant had been offered the possibility of wearing a cross in the form of a brooch attached to her uniform, or tucked under a high-necked top worn under her tunic, but she had not considered this would be sufficient to comply with her religious convictions.

This was an area where the domestic authorities had to be allowed a wide margin of appreciation. The hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which had heard no

direct evidence. It followed that the Court was unable to conclude that the measures in question were disproportionate, and that the interference with the second applicant's freedom to manifest her religion had been necessary in a democratic society. There had therefore been no violation of Article 9 alone or in conjunction with Article 14.

Conclusion: no violation in respect of the second applicant (unanimously).

(c) *The third applicant* – It was clear that the third applicant's objection to participating in the creation of same-sex civil partnerships was directly motivated by her religious beliefs. The events in question therefore fell within the ambit of Article 9 and Article 14 was applicable. The relevant comparator in this case was a registrar with no religious objection to same-sex unions. The Court accepted that the local authority's requirement that all registrars of births, marriages and deaths be designated also as civil-partnership registrars had had a particularly detrimental impact on her because of her religious beliefs. The requirement pursued the legitimate aim of protecting equal opportunities for those of different sexual orientation. In considering the proportionality of the measures, it was notable that the consequences for the third applicant were serious: she considered that she had no choice but to face disciplinary action rather than be designated a civil-partnership registrar and, ultimately, she lost her job. Furthermore, it could not be said that when she entered into her contract of employment she had specifically waived her right to manifest her religious belief by objecting to participating in the creation of civil partnerships, since this requirement had been introduced by her employer at a later date.

On the other hand, however, the local authority's policy aimed to secure the rights of others which were also protected under the Convention and the Court generally allowed the national authorities a wide margin of appreciation when it came to striking a balance between competing Convention rights. In all the circumstances, the Court did not consider that either the local-authority employer which had brought the disciplinary proceedings or the domestic courts which had rejected the third applicant's discrimination claim, had exceeded the margin of appreciation available to them. There had therefore been no violation of Article 14 in conjunction with Article 9.

Conclusion: no violation in respect of the third applicant (five votes to two).

(d) *The fourth applicant* – While employed by a private company with a policy of requiring employees to provide services equally to heterosexual and homosexual couples, the fourth applicant had refused to commit himself to providing psycho-sexual counselling to same-sex couples. As a result, disciplinary proceedings had been brought against him.

The Court accepted that the fourth applicant's objection was directly motivated by his orthodox Christian beliefs about marriage and sexual relationships, and held that his refusal to undertake to counsel homosexual couples constituted a manifestation of his religion and belief. The State therefore had a positive obligation under Article 9 to secure his rights.

In deciding whether the positive obligation was met by achieving an appropriate balance between the competing interests, the Court took into account that the loss of his job was a severe sanction with grave consequences for the fourth applicant. On the other hand, he had voluntarily enrolled on his employer's post-graduate training programme in psycho-sexual counselling, knowing that his employer operated an equal opportunities policy and that filtering of clients on the ground of sexual orientation would not be possible.

While an individual's decision to enter into a contract of employment and to undertake responsibilities which he knew would have an impact on his freedom to manifest his religious belief was not determinative of the question whether or not there has been an interference with Article 9 rights, this was a matter to be weighed in the balance when assessing whether a fair balance was struck.

However, the most important factor to be taken into account was that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination. The State authorities had therefore benefited from a wide margin of appreciation in deciding where to strike the balance between the fourth applicant's right to manifest his religious belief and the employer's interest in securing the rights of others. In all the circumstances, the Court did not consider that that margin had been exceeded. There had therefore been no violation of Article 9 alone or in conjunction with Article 14.

Conclusion: no violation in respect of the fourth applicant (unanimously).

Article 41: EUR 2,000 to the first applicant in respect of non-pecuniary damage.

ARTICLE 10

Freedom of expression

Conviction of photographers for copyright infringement through publication on the Internet of photographs of fashion show: *no violation*

Ashby Donald and Others v. France - 36769/08
Judgment 10.1.2013 [Section V]

Facts – The applicants are fashion photographers. Accredited by the French designers' federation *Fédération française de la couture* for different fashion publications, they were invited by various fashion houses to the women's winter 2003/2004 collection fashion shows in March 2003. They had not signed any exclusive agreements. Photographs they took at the fashion shows were sent to a company that published them on line, a few hours after the shows, on a specialised Web site offering photos and videos of fashion shows on a free or pay-to-view basis and for sale. The designers' federation and several fashion houses lodged a complaint with the Central Industrial and Artistic Copyright Infringement Brigade. The applicants were questioned in 2003. They were acquitted by the criminal court in June 2005. The complainants and the public prosecutor appealed. In a judgment of January 2007 the court of appeal set aside the first-instance judgment and found the applicants guilty of copyright infringement. The Court of Cassation rejected their subsequent appeal in February 2008.

Law – Article 10: There had been interference with the applicants' legally protected right to freedom of expression as they had been convicted of copyright infringement for disseminating or representing intellectual works in breach of the authors' rights under the Intellectual Property Code as interpreted by the domestic courts. The interference pursued the legitimate aim of protecting the rights of others, namely the authors' rights of the fashion houses whose creations were featured in the disputed photographs. The photos had been published on the Web site of a company run by the first two applicants, with the aim of selling them or charging a fee to view them. The applicants' approach had essentially been a commercial one. Although there was no denying the public appeal of fashion in general and designer fashion in particular, it could not be said that the applicants had taken part in a debate on a topic of general interest by simply publishing photographs of fashion shows. The domestic authorities had a particularly wide margin of appreciation in this case considering the aim of the interference and the fact that, as Article 1 of Protocol No. 1 applied to intellectual property, the interference was also aimed at protecting rights safeguarded by the Convention or its Protocols.

The applicants considered that their conviction for copyright infringement was not "necessary" in so far as they had been invited to the fashion shows in question, in their capacity as photographers, to take photographs of the fashions presented with a view to their publication, and the publication of the photographs outside the framework of their accreditation had given rise to no additional risk of copyright infringement because the same pictures had been published at the same time by accredited magazines, and the "press commitment" practice whereby photographers were required to sign exclusive agreements with the magazines that accredited them was no longer really followed. The court of appeal had nevertheless found that the applicants had knowingly disseminated the photographs in issue without the authorisation of the rights holders, that the argument that "press commitment" agreements were unsuitable or no longer standard practice did not absolve them of their liability and that they were accordingly guilty of copyright infringement. The domestic court had therefore not overstepped its margin of appreciation in privileging respect for the fashion designers' property over the applicants' right to freedom of expression.

The applicants also contended that the sentences served on them had been disproportionately harsh. They had been sentenced not only to large criminal fines but also to pay substantial damages. They adduced no evidence, however, as to the consequences of these penalties on their financial situation. In any event, the domestic court had fixed these sums following adversarial proceedings the fairness of which was not in dispute, and had given adequate reasons for its decision, explaining the circumstances which it considered warranted such penalties.

In these circumstances and regard being had to the particularly wide margin of appreciation open to the domestic authorities, the nature and gravity of the penalties imposed on the applicants were not such that the Court could find that the interference in issue was disproportionate to the aim pursued.

Conclusion: no violation (unanimously).

Conviction for having spoken non-official language during election campaigns: *violation*

Şükran Aydın and Others v. Turkey - 49197/06 et al.
Judgment 22.1.2013 [Section II]

Facts – The applicants, candidates in parliamentary and municipal elections, were convicted and sentenced to prison terms and fines for having spoken Kurdish during rallies, in breach of the statutory ban on using non-official languages in election campaigning. The courts finally decided to defer delivery of the judgments or to grant stays of execution, having regard to the applicants' character and the circumstances of the cases.

Law – Article 10: The ban on using non-official languages in election campaigning had directly affected the applicants and had thus amounted to an interference with their freedom of expression. The case did not concern the use of an non-official language in the context of communications with public authorities or before official institutions, but a linguistic restriction imposed in their relations with other private individuals. Article 10 encompassed the freedom to receive and impart information and ideas in any language that allowed people to participate in the public exchange of all varieties of cultural, political and social information and ideas and in such contexts language as a medium of expression undoubtedly deserved protection under that provision. The relevant law at the time had contained a blanket prohibition on the use of any language other than the official language, Turkish, in election campaigning. Breaches of that provision had entailed criminal sanctions ranging from six months to one year and the payment of a fine. Moreover, the absolute nature of the ban had deprived the domestic courts of their power to exercise proper judicial scrutiny: they had not gone, in the applicants' cases, beyond checking records and recordings of the election rallies. While States had discretion to determine their linguistic policies and were entitled to regulate the use of languages during election campaigns, a blanket ban on the use of unofficial languages coupled with criminal sanctions was not compatible with freedom of expression. Furthermore, Kurdish was the applicants' mother tongue as well as the mother tongue of the population they had addressed. Some of the applicants had stressed that many people in the crowd, notably the elderly and women, did not understand Turkish. Free elections were inconceivable without the free circulation of political opinions and information. The right to impart one's political views and ideas and the right of others to receive them would be meaningless if the possibility of using the language which could properly convey these views and ideas was diminished owing to the threat of criminal sanctions. Turkey was alone among the twenty-two Council of Europe States in respect of whom materials had been before the Court to make the use of minority languages by candidates speaking at election meetings subject to criminal penalties. The Court welcomed the fact that the impugned legislation had been subsequently amended. In those circumstances and notwithstanding the national authorities' margin of appreciation, the ban in question had not met a pressing social need and could not be regarded as "necessary in a democratic society".

Conclusion: violation (unanimously).

Article 41: EUR 10,000 to each applicant in respect of non-pecuniary damage; claims in respect of pecuniary damage dismissed.

Freedom to impart information

Criminal conviction for making public irregular telephone tapping procedures: *violation*

Bucur and Toma v. Romania - 40238/02
Judgment 8.1.2013 [Section III]

Facts – The first applicant worked in the telephone communications surveillance and recording department of a military unit of the Romanian Intelligence Service (RIS). In the course of his work he came across a number of irregularities. In addition, the telephones of a large number of journalists, politicians and businessmen were tapped, especially after some high-profile news stories received wide media coverage. The applicant affirmed that he reported the irregularities to his colleagues and the head of department, who allegedly reprimanded him. When the people he spoke to showed no further interest in the matter, the applicant contacted an MP who was a member of the RIS parliamentary supervisory commission. The MP told him that the best way to let people know about the irregularities he had discovered was to hold a press conference. In his opinion telling the parliamentary commission about the irregularities would serve no purpose in view of the ties between the chairman of the commission and the director of the RIS. On 13 May 1996 the applicant held a press conference which made headline news nationally and internationally. He

justified his conduct by the desire to see the laws of his country – and in particular the Constitution – respected. In July 1996 criminal proceedings were brought against him. Amongst other things, he was accused of gathering and imparting secret information in the course of his duty. In 1998 he was given a two-year suspended prison sentence.

One of the tapes the applicant had made public contained a recording of a telephone conversation between the third applicant, the minor daughter of the second applicant, and her mother on the telephone at the home of the second and third applicants.

Law – Article 10: The applicant's criminal conviction had interfered with his right to freedom of expression, with the legitimate aim of preventing and punishing offences that threatened national security. Concerns about the foreseeability of the legal basis for the conviction did not need to be examined in so far as the measure was, in any event, not necessary in a democratic society.

(a) *Whether or not the applicant had other means of imparting the information* – No official procedure existed. All the applicant could do was inform his superiors of his concerns. But the irregularities he had discovered concerned them directly. It was therefore unlikely that any internal complaints the applicant made would have led to an investigation and put a stop to the unlawful practices concerned. As regards a complaint to the parliamentary commission responsible for supervising the RIS, the applicant had contacted an MP who was a member of the commission, who had advised him that such a complaint would serve no useful purpose. The Court was not convinced, therefore, that a formal complaint to this commission would have been an effective means of tackling the irregularities. It was worth noting that Romania had passed special laws to protect whistleblowers in the public service. However, these new laws, which were all the more praiseworthy as very few other States had introduced them, had been passed well after the activities denounced by the applicant, and therefore did not apply to him. Consequently, divulging the information directly to the public had been justifiable.

(b) *The public interest value of the information divulged* – The interception of telephone communications took on a particular importance in a society which had been accustomed under the communist regime to a policy of close surveillance by the secret services. Furthermore, civil society was directly affected by the information concerned, as anyone's telephone calls might be intercepted. The information the applicant had disclosed related to abuses committed by high-ranking officials and affected the democratic foundations of the State. It concerned very important issues for the political debate in a democratic society, in which public opinion had a legitimate interest. The domestic courts did not take this argument of the applicant into account, however.

(c) *The accuracy of the information made public* – The applicant had spotted a number of irregularities. All the evidence seemed to support his conviction that there were no signs of any threat to national security that could justify the interception of the telephone calls, and indeed that no authorisation for the phone tapping had been given by the public prosecutor. In addition, the courts had refused to examine the merits of the authorisations produced by the RIS for the interception of the phone calls. The domestic courts had thus not attempted to examine every aspect of the case, but had simply acknowledged the existence of the requisite authorisations. Yet the applicant's defence comprised two arguments: firstly that the requisite authorisations had not been obtained, and secondly that there was no evidence of any threat to national security that could possibly have justified the alleged interception of the telephone conversations of numerous politicians, journalists and members of the public. What is more, the Government had failed to explain why the information divulged by the applicant was classified "top secret"; instead, they had refused to produce the full criminal case file, which included the requests from the RIS and the authorisations of the public prosecutor. In such conditions the Court could only trust the copies of these documents submitted by the applicants concerning the interception of the telephone conversations of the second applicant, Mr Toma. However, these documents showed that the RIS had given no reasons for requesting the authorisation and the public prosecutor had given no reasons for granting it. The first applicant had accordingly had reasonable grounds to believe that the information he divulged was true.

(d) *The damage done to the RIS* – The general interest in the disclosure of information revealing illegal activities within the RIS was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution.

(e) *The good faith of the first applicant* – There was no reason to believe that the applicant was driven by any motive other than the desire to make a public institution abide by the laws of Romania and in particular the Constitution. This was sup-

ported by the fact that he had not chosen to go to the press directly, in order to reach the broadest possible audience, but had first turned to a member of the parliamentary commission responsible for supervising the RIS.

Consequently, the interference with the first applicant's freedom of expression, and in particular with his right to impart information, had not been necessary in a democratic society.

Conclusion: violation in respect of the first applicant (unanimously).

The Court also found a violation of Article 6 in respect of the first applicant and a violation of Article 8 and of Article 13 combined with Article 8 in respect of the second and third applicants.

Article 41: The applicants were each awarded a sum ranging from EUR 7,800 to EUR 20,000 in respect of non-pecuniary damage; the first applicant's claim in respect of pecuniary damage was rejected.

(See also *Guja v. Moldova* [GC], no. 14277/04, 12 February 2008, Information Note no. 105)

ARTICLE 14

Discrimination (Article 9)

Disciplinary measures against employees for wearing religious symbols (cross) at work or refusing to perform duties they considered incompatible with their religious beliefs: *violation; no violations*

Eweida and Others v. the United Kingdom - 48420/10 et al.
Judgment 15.1.2013 [Section IV]

(See Article 9 above, page 18)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies
Effective domestic remedy – Serbia

In cases concerning non-enforcement of judgments against socially-owned companies, Constitutional Court appeal may under certain conditions be effective domestic remedy requiring exhaustion

Marinković v. Serbia - 5353/11
Decision 29.1.2013 [Section II]

Facts – The applicant complains under Article 6 § 1 of the European Convention of a failure by the respondent State to enforce final judgments against a predominantly socially-owned company that had become insolvent and under Article 13 of the lack of an effective remedy. The Government raised a preliminary objection arguing that the applicant had failed to exhaust domestic remedies as he had not lodged an appeal with the Constitutional Court, which had recently harmonised its case-law with that of the European Court.

Law – Article 35 § 1: The recent case-law of the Serbian Constitutional Court indicated that, in matters concerning the non-enforcement of judgments against socially-owned companies *undergoing insolvency proceedings* and/or that *had ceased to exist*, it was prepared to find a violation of the relevant constitutional rights, and to order the State to pay compensation in respect of both non-pecuniary damage and pecuniary damage. Accordingly, a constitutional appeal was, in principle, to be considered an effective domestic remedy requiring exhaustion in respect of all applications lodged from 22 June 2012 onwards (the date of publication in the Official Gazette of the relevant Constitutional Court decision).

Conversely, in cases where the debtor company was *still undergoing a process of restructuring*, the Constitutional Court was only willing to award compensation against the State in respect of non-pecuniary damage, but not in respect of pecuniary damage. Consequently, a constitutional appeal still could not be considered effective in cases involving the respondent State's liability for the non-enforcement of judgments against socially-owned companies undergoing restructuring, although the European Court might reconsider that position in the future if there was clear evidence that the Constitutional Court had fully harmonised its approach with the Court's case-law.

In the present case, as the applicant had lodged his application well before 22 June, he had been under no obligation to lodge a constitutional appeal before turning to the Court. The Government's preliminary objection was therefore dismissed.

Conclusion: admissible (unanimously).

ARTICLE 41

Just satisfaction

Award in respect of non-pecuniary damage to be paid to legal guardian for use in best interests of legally incapacitated mental patient

Lashin v. Russia - 33117/02
Judgment 22.1.2013 [Section I]

Facts – In 2000 a district court declared the applicant, who was suffering from schizophrenia, legally incapacitated. His father was subsequently appointed as his legal guardian. Two applications were lodged seeking to restore the applicant's legal capacity. In 2002 the applicant was placed in a psychiatric hospital following a medical hospitalisation order. In 2003 his daughter was appointed as his legal guardian and he was discharged from hospital.

Law – The Court found violations of Articles 8, 5 § 1 and 5 § 4 of the Convention.

Article 41: Taking into account the cumulative effect of the violations of the applicant's rights, their duration, and the fact that the applicant had been in a particularly vulnerable situation, the Court awarded him EUR 25,000 in respect of non-pecuniary damage.

It further ruled that if the applicant was still legally incapacitated when the award was paid, the Government should ensure that it was transferred to the guardian on the applicant's behalf and in his best interest.

ARTICLE 46

Pilot judgment – General measures

Respondent State required to provide effective remedies in respect of prison overcrowding

Torreggiani and Others v. Italy - 43517/09 et al.
Judgment 8.1.2013 [Section II]

Facts – The seven applicants were detained in Busto Arsizio and Piacenza prisons. Over periods ranging from fourteen to fifty-four months, they had 3 sq. m of personal space each in prison.

Law – Article 3: The severe shortage of space to which the seven applicants had been subjected for periods ranging from fourteen to fifty-four months, which in itself constituted treatment contrary to the Convention, appeared to have been exacerbated by other conditions. The lack of hot water in both establishments over lengthy periods and the inadequate lighting and ventilation in the Piacenza prison cells, while not in themselves amounting to inhuman and degrading treatment, had nevertheless caused the applicants additional suffering. Taking into account also the duration of the applicants' imprisonment, their conditions of detention had subjected them to hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

Conclusion: violation (unanimously).

Article 46: The violation of the applicants' right to adequate conditions of detention did not stem from isolated incidents but from a systemic problem arising out of a chronic dysfunction of the Italian prison system which had affected and remained liable to affect a large number of persons. The situation complained of therefore amounted to a practice incompatible with the Convention. Furthermore, several hundred applications against Italy were currently pending before the Court raising the same issue of overcrowding in various Italian prisons, and the numbers continued to rise. In addition, approximately 40% of the persons held in Italian prisons were remand prisoners awaiting trial. The Court pointed in that context to the Recommendations of the Committee of Ministers of the Council of Europe inviting States to encourage prosecutors and judges to make use of alternative measures to detention wherever possible, and to devise their penal policies with a view to reducing recourse to imprisonment, in order, among other objectives, to tackle the problem of the growth in the prison population. Lastly, the only remedy indicated by the respondent Government in the present cases which was capable of improving the conditions of detention complained of, namely an application to the judge responsible for the execution of sentences, was one which, although accessible, was not effective in practice in so far as it did not afford the possibility of putting a rapid end to an individual's detention in breach of Article 3. Moreover, recent court rulings giving the judge responsible for the execution of sentences the power to order the administrative authorities to pay financial compensation by no means amounted to settled and consistent practice on the part of the national authorities. Consequently, the national authorities had to put in place, within one year, a remedy or combination of remedies with preventive and compensatory

effect affording real and effective redress in respect of Convention violations stemming from overcrowding in Italian prisons.

Article 41: sums ranging between EUR 10,600 and EUR 23,500 to each applicant in respect of non-pecuniary damage.

Execution of judgment – General measures

Respondent State required to reform the system of judicial discipline

Oleksandr Volkov v. Ukraine - 21722/11
Judgment 9.1.2013 [Section V]

(See Article 6 § 1 (civil) above, page 12)

Execution of judgment – Individual measures

Respondent State required to secure applicant's reinstatement in the post of judge of the Supreme Court at the earliest possible date

Oleksandr Volkov v. Ukraine - 21722/11
Judgment 9.1.2013 [Section V]

(See Article 6 § 1 (civil) above, page 12)

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Accrual to State of monies on bank accounts that had become irrecoverable owing to operation of statutory limitation period: *violation*

Zolotas v. Greece (no.2) - 66610/09
Judgment 29.1.2013 [Section I]

Facts – Having opened a bank account in Greece, the applicant was obliged to leave the country for several years. On his return, his bank refused to pay back to him the balance in his account on the ground that it had remained dormant for over twenty years. In 2003 the applicant filed a claim with the civil courts in order to recover the sum in question (EUR 30,550). The courts took the view that his claims against the bank were barred by the limitation period stipulated in the Civil Code and that the sum in question belonged to the State, as beneficiary of dormant bank accounts. In January 2009 the Court of Cassation dismissed an appeal by the applicant on points of law.

Law – Article 1 of Protocol No. 1: When the applicant had visited his bank in February 2003 to enquire about his account, he had learnt that as no transactions had been registered on it since the second half of 1981 all his claims had become time-barred. It could be seen from the domestic courts' decisions that on opening his account he had signed an agreement with the bank to open a deposit account. The applicant's claims under that agreement were subject to the twenty-year limitation period provided for by the Civil Code. The domestic courts to which the applicant had taken his case had applied the law, under which cash deposits and interest accruing thereon in banks would be transferred irreversibly to the State where, for a period of twenty years, they had not been claimed by the account holder or there had been no transactions registered on the account. The court of appeal had further found that the limitation period had not been interrupted, as the registration in the bank's records of interest that had accrued on the applicant's account did not stop the period running, nor had it been suspended by force majeure, as the applicant had alleged.

The application of a limitation period to the applicant's claims in respect of his own bank account had constituted an interference with his right to the peaceful enjoyment of his possessions. The time-bar had pursued a legitimate aim in the general interest: namely that of terminating, for reasons of economic efficiency, legal relationships that had been created so long before that their existence had become uncertain. That time bar was reasonable, as the period was a long one and it was not difficult or impossible for account holders to stop it running. However, the application of such a radical measure as the time-barring of claims to a bank account, on the ground that no transactions had been registered for a certain time, together with case-law to the effect that the crediting of interest by a bank was not regarded as an account transaction interrupting the limitation period, had the result of placing account holders, especially when they were ordinary citizens unversed in civil or banking law, in an unfavourable situation in relation to the bank, or even to the State. Under the Civil Code, while a person who deposited a sum of money in a bank transferred to it the right to use that sum, the bank was required to keep it, and if it used the sum to make profit for itself it had to return an equivalent sum to the depositor on the termination of the agreement. The account holder was therefore entitled to believe, in good faith, that his deposit with the bank was safe, especially when he had been receiving interest. It

was legitimate for the account holder to expect that a situation threatening the substance of his agreement with the bank and his financial interests would be notified to him so that he could make provisions beforehand to act in accordance with the law and preserve his right to the protection of his property. Such a relationship of trust was inherent in banking and banking law. The State had a positive obligation to protect the citizen and to require that banks, in view of the unfortunate consequences of such a limitation period, should inform the holder of a dormant account of the pending expiry of the limitation period, thus enabling him to stop the period running, for example by carrying out a transaction on the account. The failure to require such information risked upsetting the fair balance between the requirements of the general interest of the community and the imperatives of securing fundamental rights to the individual. The absence of that information had placed an excessive and disproportionate burden on the applicant that could not be justified by the need to terminate legal relationships whose existence had become uncertain or to ensure the proper functioning of the banking system.

Conclusion: violation (unanimously).

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

COURT NEWS

Press conference

The Court held its annual press conference on 24 January 2013. On this occasion, Dean Spielmann, the President of the Court, reviewed the Court's activities in 2012, which he described as an exceptional year for the Court, and presented its annual statistics.

At the beginning of 2012 more than 150,000 applications had been pending before the Court. By the end of the year, for the first time since the single full-time Court came into operation in 1998, the stock of pending cases had been reduced, by some 16%. It now stood at 128,000. This was a remarkable achievement, largely due to the adoption of new working methods accompanying the optimum exploitation of the Single Judge procedure introduced by Protocol No. 14. The overall number of applications disposed of increased by 68%. This opened up the perspective of bringing the inflow and backlog of inadmissible cases under control within two to three years.

Webcast

Opening of the judicial year

The Court's judicial year was formally opened on 25 January 2013. One hundred and fifty eminent figures from the European judicial scene attended a seminar on the theme "Implementing the European Convention on Human Rights in times of economic crisis". At the solemn hearing which followed the seminar, President Dean Spielmann and Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, addressed an audience of about 300, including many representatives of judicial institutions and national and local authorities.

More information

RECENT COURT PUBLICATIONS

Annual Report 2012 of the European Court of Human Rights

On 24 January 2013 the Court issued its Annual Report for 2012 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 2012 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 – Annual Reports).

Statistics for 2012

The Court's statistics for 2012 are now available. All information related to statistics for 2012 can be found on the Court's Internet site (<www.echr.coe.int> – Reports – Statistics), including the Analysis of statistics 2012.

Human rights factsheets by country

The country profiles, which provide wide-ranging information on human-rights issues in each respondent State, have been updated to include developments in the second half of 2012. They can be downloaded from the Court's Internet site (<www.echr.coe.int> – Press – Information sheets – Country profiles).

Videos about the Court

The Court is publishing 15 new language versions of its videos. The video entitled "The Convention belongs to you", presenting the main rights protected by the Convention, now exists in 38 languages. The video on admissibility criteria, designed to remind would-be applicants that certain conditions must be met before they lodge an application, exists in 21 languages.

Videos