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ARTICLE 2

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Death of new-born baby after being refused admission to public hospitals: *violation*

Asiye Genç v. Turkey - 24109/07
Judgment 27.1.2015 [Section II]

Facts – On 31 March 2005 the applicant gave birth to a premature baby by caesarean section in a public hospital. The baby shortly afterwards developed breathing difficulties. As there was no suitable neonatal unit in that hospital, the doctors decided to transfer the baby to another public hospital 110 km away.

On 1 April 2005 at around 1.15 a.m. that hospital refused to admit the child on the grounds that there was no space in the neonatal intensive care unit. Around 2 a.m. the child was transferred to a medico-surgical and obstetrics centre, where the duty doctor explained that there were no incubators available and suggested that the parents take him back to the public hospital. On their arrival there, the doctors again refused to admit the baby owing to a lack of space in the neonatal unit. The child subsequently died in the ambulance.

On 6 April 2005 the child's parents filed a criminal complaint and two investigations were opened. A criminal investigation against the medical staff was discontinued and an administrative investigation initiated by the Ministry of Health was closed on the grounds that there was no case to answer, as no fault had been committed by the staff.

Law – Article 2: The first public hospital could not have been unaware of the risk for the life of the applicant's new-born baby boy in the event of refusal to admit him to another hospital. Neither the seriousness of his state of health nor the need for urgent medical treatment was in dispute. In spite of that risk, before choosing to transfer him, the staff in question had not taken the necessary measures to ensure that he would definitely be admitted for treatment in the other hospital. That lack of coordination between hospitals was to continue, with different units refusing to admit the baby on grounds of insufficient resources.

The failure to ensure coordination between hospitals and the fact that none of the doctors solicited took charge of the new-born baby could not be justified by a mere lack of space. The quantity and condition of the facilities in the region's hospitals could not be considered satisfactory. This showed that the State had not sufficiently ensured the proper organisation and functioning of the public hospital service, or more generally its health protection system, and the lack of space could not be explained merely by an unforeseeable influx of patients.

As a result of those shortcomings, the premature baby, whose life was in danger, had been pointlessly taken backwards and forwards in an ambulance in the expectation that he would receive some appropriate treatment or be examined. It was in those conditions that he ultimately died in the ambulance.

Accordingly, the applicant's son had to be regarded as the victim of failings in the hospital service, as he had been deprived of access to appropriate emergency treatment. The child had died simply because he was offered no treatment at all. Such a situation constituted a denial of medical care such as to put a person's life in danger.

The fact that there had been no charges or proceedings against the staff who had failed to admit the applicant's son for treatment raised a problem under Article 2 of the Convention. Going beyond that question, it was important to assess the judicial reaction by the respondent State to the allegations about the implementation of its health services.

It was legitimate to expect that the national authorities to which the case had been referred would verify whether and to what extent the failings established in the present case remained compatible with the imperatives of the public health service and the hospital regulations, and that they would if necessary determine liability on that basis. However, there had been no attempt to ascertain how the protocols applicable to the admission of new-born babies to the emergency unit or to coordination between neonatal services had been implemented, or to establish the reasons for the lack of basic facilities in those services, and in particular for the number of incubators that were out of order.

The judicial system's response to the tragedy had thus not been appropriate for the purposes of shedding light on the exact circumstances of the baby's death. In particular, the investigation had not been complete, because none of the above-mentioned crucial factors related to the failings in the management of the health service had been the subject of any investigation.

In conclusion, having regard to the circumstances which had deprived the baby of indispensable

emergency care and to the inadequacy and insufficiency of the internal investigations in that connection, it could be considered that the State had failed in its obligations under Article 2 of the Convention in respect of the applicant's son.

Conclusion: violation (unanimously).

Article 41: EUR 65,000 in respect of non-pecuniary damage.

(See *Mehmet* Şentürk *and Bekir* Şentürk *v. Turkey*, 13423/09, 9 April 2013, Information Note 162)

ARTICLE 3

Degrading treatment

Emotional suffering caused by removal of tissue from the applicant's deceased husband's body without her knowledge or consent: *violation*

Elberte v. Latvia - 61243/08
Judgment 13.1.2015 [Section IV]

Facts – Following the death of the applicant's husband in a car accident, tissue was removed from his body during an autopsy at a forensic centre and sent to a pharmaceutical company in Germany with a view to creating bio-implants, pursuant to a State-approved agreement. When the body was returned to the applicant after the completion of the autopsy its legs were tied together. The applicant only learned of the removal of the tissue two years later, in the course of a criminal investigation into allegations of the wide-scale illegal removal of organs and tissues from cadavers. However, no prosecutions were ever brought as the time-limit had expired.

Law – Article 8: The domestic authorities' failure to secure the legal and practical conditions to enable the applicant to express her wishes concerning the removal of her deceased husband's tissue constituted an interference with her right to respect for private life.

As to the lawfulness of that interference, the question was whether the domestic legislation was formulated with sufficient precision and afforded adequate legal protection against arbitrariness in the absence of relevant administrative regulation.

As to the first aspect, the domestic authorities had disagreed over the scope of the domestic legislation, with the forensic centre and security police considering there existed a system of "presumed consent" while the investigators thought that the Latvian legal system relied on the concept of "informed consent" with removal permissible only with the consent of the donor (during his or her lifetime) or of the relatives. By the time the security police accepted the prosecutors' interpretation and decided that the applicant's consent had been required, they were out of time to bring a criminal prosecution.

This disagreement among the authorities inevitably indicated a lack of sufficient clarity. Indeed, although Latvian law set out the legal framework for consenting to or refusing tissue removal, it did not clearly define the scope of the corresponding obligation or the discretion left to experts or other authorities in this regard. The Court noted that the relevant European and international materials on this subject attached particular importance to establishing the relatives' views through reasonable enquiries. The principle of legality likewise required States to ensure the legal and practical conditions for implementation of their laws. However, the applicant had not been informed how and when her rights as closest relative could be exercised or provided with any explanation.

As to whether the domestic law afforded adequate legal protection against arbitrariness, it had been important, given the large number of people from whom tissue had been removed, for adequate mechanisms to be put in place to balance the relatives' right to express their wishes against the broad discretion conferred on the experts to carry out removals on their own initiative, but this was not done. In the absence of any administrative or legal regulation on the matter, the applicant had been unable to foresee how to exercise her right to express her wishes concerning the removal of her husband's tissue.

Consequently, the interference with her right to respect for her private life was not in accordance with the law within the meaning of Article 8 § 2.

Conclusion: violation (unanimously).

Article 3 (*substantive aspect*): The applicant's suffering had gone beyond that inflicted by grief following the death of a close family member. The applicant had had to face a long period of uncertainty, anguish and distress as to which organs or tissue had been removed, and the manner and purpose of their removal. Following the initiation of the general criminal investigation, the applicant had been left for a considerable period of time to anguish over the reasons why her husband's legs had been tied together when his body was returned to her for burial. Indeed, she had discovered the nature and amount of tissue that had been removed

only during the proceedings before the European Court.

The lack of clarity in the regulatory framework as regards the consent requirement could only have intensified her distress, regard being had to the intrusive nature of the acts carried out on her husband's body and the failure of the authorities themselves during the criminal investigation to agree on whether or not they had acted lawfully when removing tissue and organs from cadavers.

Finally, no prosecution had ever been brought for reasons of prescription and uncertainty over whether the authorities' acts could be considered illegal. The applicant had thus been denied redress for a breach of her personal rights relating to a very sensitive aspect of her private life, namely the right to consent or object to the removal of tissue from her dead husband's body.

In the specialised field of organ and tissue transplantation, it was common ground that the human body had to be treated with respect even after death. Indeed, international treaties including the Convention on Human Rights and Biomedicine and the Additional Protocol had been drafted to safeguard the rights of organ and tissue donors, living or deceased. Moreover, respect for human dignity formed part of the very essence of the European Convention. Consequently, the suffering caused to the applicant had undoubtedly amounted to degrading treatment.

Conclusion: violation (unanimously).

Article 41: EUR 16,000 in respect of non-pecuniary damage.

(See also *Petrova v. Latvia*, 4605/05, 24 June 2014, Information Note 175; *Svinarenko and Slyadnev v. Russia* [GC], 32541/08 and 43441/08, 17 July 2014, Information Note 176; *Salakhov and Islyamova v. Ukraine*, 28005/08, 14 March 2013, Information Note 161; and the Factsheet on Health)

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Limitations on access to domestic courts to review recruitment procedure before European Patent Office when reasonable alternative procedure (arbitration) available: *inadmissible*

Klausecker v. Germany - 415/07
Decision 6.1.2015 [Section V]

Facts – The applicant, who is disabled, applied for a post as a patent examiner at the European Patent Office (EPO) in Munich. Although he passed the professional tests, he was not offered employment as he did not meet the physical requirements for the post. His internal appeal against that decision was declared inadmissible as he was not a staff member. The German Federal Constitutional Court declined to consider his constitutional complaint, *inter alia*, on the ground that the EPO enjoyed immunity from the jurisdiction of the German courts. A further complaint by the applicant to the Administrative Tribunal of the International Labour Organization (ILO) was also dismissed on the grounds that it had no jurisdiction in respect of external candidates for employment and no authority to order the EPO to waive its immunity. The Tribunal noted, however, that its judgment created a legal vacuum and indicated that it was highly desirable that the EPO should seek a solution affording the applicant access to a court, either by waiving its immunity or by submitting the dispute to arbitration. The EPO subsequently informed the applicant that it was willing to go to arbitration, but the applicant ultimately did not take up the offer.

In his application to the European Court, the applicant complained that Germany had failed to ensure that he had access to a tribunal in order to protect his right not to be discriminated against on grounds of disability and that Germany was also to be held responsible for the allegedly deficient appeal procedures before the EPO.

Law – Article 6

(a) *Procedure before the German courts* – In so far as the applicant complained of a lack of access to the German Federal Constitutional Court to have his complaint about the EPO's decision not to offer him employment examined on the merits, he fell within the "jurisdiction" of the German State for the purposes of Article 1. The Court considered it unnecessary to determine whether Article 6 § 1 was applicable in the applicant's case as the complaint was in any event manifestly ill-founded.

The applicant's access to the German courts was limited to access to the Federal Constitutional Court to argue the preliminary issue of the extent of the EPO's immunity. The immunity had a legitimate objective, namely guaranteeing the proper functioning of that international organisation free from unilateral interference by individual governments.

As regards proportionality, the applicant was not only refused an examination of the merits of his complaint by the Federal Constitutional Court: as a candidate for a post rather than a staff member he was also found not to have standing to lodge an internal appeal within the EPO. Accordingly, his complaint about the EPO's decision was not reviewed on the merits by any tribunal or other body. However, in response to the ILO Administrative Tribunal's finding that it was highly desirable that the applicant should have access to a court, the EPO had made concrete proposals for private arbitration under the rules which would have been applicable had the applicant become a staff member. Noting (a) that the proportionality test could not be applied in such a way as to compel an international organisation to submit to national litigation in relation to employment conditions prescribed under national labour law and (b) that the absence of an oral hearing in public did not of itself make the arbitration procedure unreasonable, the Court considered that the arbitral procedure that had been offered constituted a reasonable alternative means to protect the applicant's Convention rights effectively. The limitations on his access to the German courts had thus been proportionate.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Waite and Kennedy v. Germany* [GC], 26083/94, and *Beer and Regan v. Germany* [GC], 28934/95, both 18 February 1999, summarised in Information Note 3)

(b) *Procedure before EPO and the Administrative Tribunal of the ILO* – Applying its earlier case-law, the Court found that the mere fact that the EPO's decision was taken at its seat on German territory did not bring the act within Germany's jurisdiction for the purposes of Article 1 of the Convention.

As to whether any other grounds for Germany assuming "jurisdiction" existed, the Court noted that the German authorities had not directly or indirectly intervened in the proceedings before either the EPO or the ILO Administrative Tribunal, so jurisdiction could not arise on that account. There was no reason to consider that the EPO, to which Germany had transferred part of its sovereign powers, did not afford "equivalent protection" to that secured by the Convention system. In particular, the Convention did not require in all circumstances full access to a tribunal in respect of complaints concerning the refusal of a person's recruitment to civil service and the ILO Administrative Tribunal had referred to the need to protect fundamental rights – which entailed a right not to be discriminated on grounds of disability – in its case-law.

Nor could the protection of fundamental rights offered by the EPO in the present case be said to have been "manifestly deficient". The Convention itself permitted restrictions on access to a tribunal in relation to measures concerning an applicant's recruitment to civil service and indeed an issue as regards the applicability of Article 6 had arisen in the applicant's case (see (a) above). Further, the Court had already found that the EPO's offer of arbitration constituted a reasonable alternative means to have his complaint about the EPO's decision examined on the merits. Accordingly, the fact that the applicant was denied access to the review procedures set up by the EPO in relation to the decision not to recruit him but was offered an arbitration procedure instead did not disclose a manifestly deficient protection of fundamental rights within the EPO.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Bosphorus Hava Yolları Turizm ve Ticaret Anonim* Şirketi *v. Ireland* [GC], 45036/98, 30 June 2005, Information Note 76; and *Gasparini v. Italy and Belgium* (dec.), 10750/03, 12 May 2009, Information Note 119)

Article 6 § 1 (constitutional)

Access to court

Inadmissibility of *amparo* appeal on grounds that it had not been shown to be of special constitutional importance: *no violation*

Arribas Antón v. Spain - 16563/11
Judgment 20.1.2015 [Section III]

Facts – In July 2002 the applicant, who worked in a psychiatric hospital as a nursing assistant, was disciplined for very serious misconduct, and was debarred from working in psychiatric hospitals for one year. He appealed against the decision to a higher administrative authority, but was unsuccessful. He then took his case to the Administrative Court, which set aside the sanction imposed on him. The health service appealed. The High Court of Justice ordered that the same sanction be imposed on the applicant. His appeals against it were all dismissed.

In July 2010 the applicant lodged an *amparo* appeal with the Constitutional Court, but it was declared inadmissible on the grounds that he had not

complied with the obligation to prove that his appeal was one of "special constitutional importance".

Law – Article 6 § 1: The applicant had complained that he had been denied access to the Constitutional Court when his *amparo* appeal was declared inadmissible, submitting that the ground of inadmissibility, introduced by Institutional Law no. 6/2007 of 24 May 2007, which required the appellant to show that the appeal was one of "special constitutional importance", was excessively formal.

The aim pursued by the legislative amendment of 2007 was legitimate, as it sought to improve the functioning of the Constitutional Court and to strengthen the protection of fundamental rights, by ensuring that cases of lesser importance did not create a backlog.

In view of the specific nature of the Constitutional Court's role as court of last resort for the protection of fundamental rights, it could be accepted that the procedure before it should be marked by a greater degree of formalism. Moreover, the fact of subjecting the admissibility of an *amparo* appeal to the existence of objective criteria and to a requirement of justification by the appellant, as provided for by law and interpreted by constitutional jurisprudence, was neither disproportionate nor in breach of the right of access to the Constitutional Court.

The Constitutional Court had applied the criteria in question, taking into account the date on which the *amparo* appeal had been lodged, 9 July 2010, in the light of its judgment no. 155/2009 of 25 June 2009, which enumerated non-exhaustively the situations that might be considered as taking on special constitutional importance. The objective criteria, which the Constitutional Court had to address and apply in its case-law, were nevertheless already mentioned in the explanatory memorandum accompanying Institutional Law no. 6/2007, which had entered into force on 25 May 2007. Moreover, the proceedings in the present case before the Constitutional Court had followed an examination of the applicant's case by two courts before which he had been able to defend himself and which had given reasoned and non-arbitrary decisions at first instance and on appeal.

Lastly, even if the Constitutional Court declared an *amparo* appeal inadmissible on the grounds that it did not take on the requisite special constitutional importance or that the appellant had not demonstrated the existence of such importance, that would not prevent the Court from ruling on the admissibility and merits of an application before it on that subject.

In the light of the foregoing, the applicant had not been deprived of the essence of his right of access to a court. In addition, the limitations applied pursued a legitimate aim. In applying those limitations, the authorities had ensured that a reasonable relationship was maintained between the means used and the aim pursued. For those reasons the applicant had not sustained any disproportionate hindrance to his right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

Conclusion: no violation (unanimously).

ARTICLE 7

Article 7 § 1

Nullum crimen sine lege
Heavier penalty

Conviction for "continuing" offence comprising acts committed before it was introduced in the Criminal Code: *no violation*

Rohlena v. the Czech Republic - 59552/08
Judgment 27.1.2015 [GC]

Facts – The applicant was charged with repeatedly physically and mentally abusing his wife between 2000 and 8 February 2006. In 2007 the trial court found him guilty of the continuing offence of abusing a person living under the same roof as defined in Article 215a of the Criminal Code as worded since 1 June 2004. It considered that that definition extended to acts perpetrated prior to that date to the extent that at the time they had, as in the applicant's case, amounted to another offence. The conviction was upheld by the appeal court and the Supreme Court.

Referring to its case-law, the Supreme Court observed that where the offence was a continuing one that was regarded as a single act, the criminal nature of that act had to be assessed under the law in force at the time of the last act constituting the offence. That law also applied to the preceding acts on condition that these would have been criminal acts under the preceding law. In the present case the applicant's acts prior to the amendment of the Criminal Code of 1 June 2004 had amounted to violence against an individual or group of individuals within the meaning of Article 197a of the

Criminal Code and assault within the meaning of Article 221 of that Code.

In 2008 the Constitutional Court dismissed as manifestly ill-founded a constitutional appeal lodged by the applicant, considering that the courts' decisions in his case had not been of a retrospective effect prohibited by the Constitution.

In a judgment of 18 April 2013 (see Information Note 162), a Chamber of the European Court held unanimously that the domestic courts' decision had not violated Article 7 of the Convention.

Law – Article 7: The applicant had been convicted of a criminal offence under Article 215a of the Criminal Code which had been introduced by virtue of 2004 amendments to that Code also in respect of acts committed before that date. The domestic courts found that a continuous criminal offence was to be considered a single act whose legal classification had to be assessed under the law in force at the time of the completion of the last occurrence of the offence, provided that the acts committed under any previous law would also have been punishable under that law. Thus, Article 215a also applied to the assaults committed by the applicant before 2004 as they had amounted to criminal conduct under the previous law. In interpreting the domestic law, the domestic courts had referred to the concept of a continuing criminal offence, which consisted of individual acts driven by the same purpose, constituting the same offence and linked by virtue of being carried out in an identical or similar manner, which occurred close together in time and pursued the same object. The applicant's conduct before 1 June 2004 had amounted to punishable criminal offences under domestic law in force at that time and had thus comprised the constituent elements of the Article 215a offence. Thus, holding the applicant liable under that provision also in respect of acts committed before that date had not constituted retroactive application of more detrimental criminal law as prohibited by the Convention.

In these circumstances, and considering also the clarity with which the relevant domestic provisions were formulated and interpreted by the national courts, the applicant had been in a position to foresee that he could be held criminally liable for a continuous offence also as regards the period before 2004, and to regulate his conduct accordingly. Therefore, the offence of which the applicant had been convicted had a basis in the relevant "national ... law at the time when it was committed", which in turn had defined the offence sufficiently clearly to meet the quality requirement of foreseeability under Article 7 of the Convention.

Finally, the Court rejected the applicant's argument that the imposition of a penalty under the 2004 provision had resulted in a more severe penalty than would have otherwise been imposed. Nothing indicated that the domestic courts' approach had had the adverse effect of increasing the severity of the applicant's punishment. On the contrary, had the acts perpetrated by him prior to 1 June 2004 been assessed separately from those he committed afterwards, the applicant could have received at least the same sentence as the one actually imposed, or even a harsher one.

Conclusion: no violation (unanimously).

(See also *Del Río Prada v. Spain* [GC], 42750/09, 21 October 2013, Information Note 167; and *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], 2312/08 and 34179/08, 18 July 2013, Information Note 165)

ARTICLE 8

Respect for private and family life
Positive obligations

Inability under Turkish law for adoptive mother to have her forename recorded on child's identity papers in place of the biological mother's forename: *violation*

Gözüm v. Turkey - 4789/10
Judgment 20.1.2015 [Section II]

Facts – In May 2007 the applicant, an adoptive single mother, was unable to have her own forename registered in place of the biological mother's name on her child's administrative documents.

In November 2007 the district court dismissed her application on the ground, *inter alia*, that her request lacked any legal basis. She appealed. In March 2009, while her appeal was pending, a legislative reform was introduced allowing adoptive single mothers to have their forename registered in place of that of the biological mother. In November 2009 the Court of Cassation nonetheless dismissed the appeal, in a judgment which remained silent as to the legislative reform.

In November 2010 the applicant succeeded in having her forename officially registered as that of the child's mother.

Law – Article 8: The present case concerned one aspect of the problems that could be encountered by persons wishing to adopt as a single parent and, in view of the judicial reaction to the problem, the Court considered it appropriate to analyse the case as one concerning the State's positive obligations to guarantee effective respect for private and family life through its legislative, executive and judicial authorities.

At the material time Turkish civil law recognised the right of persons wishing to adopt as a single parent to give their surname to their adopted child, but did not provide for a regulatory framework for recognition of the adoptive parent's forename as that of the natural parent.

In striking a balance between the competing interests of the biological mother, the child and the adoptive family and the general interest, the State enjoyed a certain margin of appreciation, but the child's best interests had to be paramount in all cases. The margin of appreciation coincided with the discretionary power allegedly conferred on the civil courts in reconciling the various personal interests underlying single-parent adoptions. However, neither the first-instance courts nor the appeal court had even taken note of the ground of appeal submitted by the applicant on the basis of the rules of interpretation flowing from Article 1 of the Civil Code, which required them to fill the legal vacuum observed in the law in such a way as to protect the competing interests related to adoption of the child. Furthermore, there was nothing in the decisions to suggest that the courts had endeavoured to carry out an assessment based on the particular circumstances of the present case, still less to protect the best interests of the child in question.

The balance that the Turkish legislature had sought to strike required that particular importance be given to the positive obligations under Article 8 of the Convention. To that end, in order to be effective, there would have to have been an established framework for the intended protection in the domestic legal system that enabled the proportionality of the restrictions imposed on the fundamental or "intimate" rights of the applicant recognised under Article 8 to be assessed. An incomplete and unreasoned assessment by the domestic courts regarding the exercise of those rights – as in the present case – was not consonant with an acceptable margin of appreciation.

Accordingly, in relation to single-parent adoptions Turkish civil law contained a legal vacuum which affected persons who found themselves in the situation of the applicant, whose request fell within a legal sphere which the Turkish legislature had clearly failed to envisage and regulate in such a way as to strike a fair balance between the general interest and the competing interests of the individuals involved.

Accordingly, civil-law protection, as envisaged at the relevant time, had been inadequate in respect of the positive obligations incumbent on the respondent State under Article 8 of the Convention.

Conclusion: violation (unanimously).

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

Respect for private and family life

Removal of a child born abroad as a result of a surrogacy arrangement entered into by a couple later found to have no biological link with the child: *violation*

Paradiso and Campanelli v. Italy - 25358/12
Judgment 27.1.2015 [Section II]

Facts – The applicants are a married couple. In 2006 they had obtained authorisation to adopt a child. After unsuccessfully attempting to have a child through *in vitro* fertilisation they opted for a gestational surrogacy arrangement in order to become parents. For that purpose they contacted a Moscow-based clinic which specialised in assisted-reproduction techniques and entered into an agreement with a Russian company. After successful *in vitro* fertilisation in May 2010 – supposedly carried out using the second applicant's sperm – two embryos "belonging to them" were implanted in the womb of a surrogate mother. A baby was born in February 2011. The surrogate mother gave her written consent to the child being registered as the applicants' son. In accordance with Russian law, the applicants were registered as the baby's parents. In line with the provisions of the Hague Convention Abolishing the Requirement for Legalisation for Foreign Public Documents of 5 October 1961 ("the Hague Convention"), an apostille was placed on the Russian birth certificate, which did not refer to the surrogacy arrangement.

In May 2011, having requested that the Italian authorities register the birth certificate, the applicants were placed under investigation for "misrepresentation of civil status" and violation of the adoption legislation, in that they had brought the child into the country in breach of the law and of the authorisation to adopt, which had ruled out

the adoption of such a young child. On the same date the public prosecutor requested the opening of proceedings to release the child for adoption, since he was to be considered as having been abandoned. In August 2011 a DNA test was carried out at the court's request. It showed that, contrary to what the applicants had submitted, there was no genetic link between the second applicant and the child. In October 2011 the minors court decided to remove the child from the applicants. Contact was forbidden between the applicants and the child. In April 2013 the court held that it was legitimate to refuse to register the Russian birth certificate and ordered that a new birth certificate be issued, indicating that the child had been born to unknown parents and giving him a new name. The proceedings for the child's adoption were currently pending. The domestic court considered that the applicants did not have status to act in those proceedings.

Law – Article 8: Although the right to have a foreign birth certificate registered was not as such one of the rights guaranteed by the Convention, the Court examined the application under the Convention in the context of the other relevant international treaties.

The refusal to recognise the legal parent-child relationship established abroad, the removal of the child and his placement in care had amounted to interference in the applicants' right to respect for their private and family life. This interference – based, *inter alia*, on the relevant articles of the legislation on international private law and on international adoption – had been in accordance with the law. Moreover, the measures taken with regard to the child pursued the "prevention of disorder", in so far as the applicants' conduct had been contrary to the law governing international adoption, given that recourse to artificial procreation with donated ova or sperm was, at the relevant time, prohibited. In addition, the contested measures were intended to protect the child's rights and freedoms.

It was not necessary to compare the legislation of member States with a view to ascertaining whether, in the area of surrogacy, there was broad harmonisation in Europe. In the present case, a Russian company – which employed the lawyer representing the applicants before the Strasbourg Court – had received a sum of money from the applicants, purchased the gametes from unknown donors, found a surrogate mother and transferred the embryos to her, handed over the child to the applicants and assisted them in obtaining the birth certificate. To explain this process more clearly, the lawyer in question had explained that it was entirely possible to circumvent the requirement to have a genetic link with one of the future parents by purchasing the embryos, which thus became "one's" embryos. Irrespective of any ethical considerations with regard to the actions of the company in question, those actions had had very severe consequences for the applicants, especially if it was accepted that the second applicant had been certain that he was the child's biological father and that it had not so far been established that he had not been acting in good faith. The domestic courts had not acted unreasonably in applying strictly the national law on establishing legal parent-child relationships and by ignoring the legal status established abroad. Nonetheless, it had to be ascertained whether the measures adopted in respect of the child – particularly his removal and placement under guardianship – could be considered proportionate, and specifically whether the child's interests had been sufficiently taken into account.

The approach adopted by the domestic courts clearly corresponded to the need to put an end to this illegal situation. However, the conditions which would have justified the use of the disputed measures had not been met, for the following reasons. Firstly, the mere fact that the child would have developed stronger emotional ties with his intended parents had he remained with them for longer did not suffice to justify his removal. Further, the courts had considered that it was unnecessary to await the outcome of the criminal proceedings brought against the applicants, since the issue of the applicants' criminal responsibility was irrelevant. Yet the suspicions against the applicants were also insufficient to justify the disputed measures. In any event, it was impossible to speculate as to the outcome of the criminal proceedings. Further, the applicants would have become legally incapable of adopting or fostering the child only in the event of conviction for a breach of the adoption law. In this connection, the applicants, who had been assessed as fit to adopt in 2006, were held to be incapable of bringing up and loving the child on the sole ground that they had circumvented the adoption legislation, without any expert report being ordered by the courts. Lastly, the child had received a new identity only in April 2013, which meant that he had had no official existence for more than two years. It was necessary to ensure that a child was not disadvantaged on account of the fact that he or she was born to a surrogate mother, first and foremost with regard to citizenship

or identity, which were matters of crucial importance. In consequence, the Court was not convinced of the adequacy of the grounds on which the authorities had relied when concluding that the child ought to be taken into the care of the social services. It followed that the Italian authorities had failed to strike a fair balance between the interests at stake.

However, given that the child had undoubtedly developed emotional ties with the foster family with whom he had been placed at the beginning of 2013, the finding of a violation in the applicants' case was not to be understood as obliging the Italian State to return the child to them.

Conclusion: violation (five votes to two).

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

(See also *Pontes v. Portugal*, 19554/09, 10 April 2012, and *Zhou v. Italy*, 33773/11, 21 January 2014, Information Note 170; see, on surrogacy arrangements, *Mennesson and Others v. France*, 65192/11, 26 June 2014, Information Note 175, and *D. and Others v. Belgium* (dec.), 29176/13, 8 July 2014, Information Note 177; lastly, more generally, see the factsheet on Reproductive rights)

Respect for private life

Lack of clarity in domestic law on consent of close relatives to tissue removal from dead body: *violation*

Elberte v. Latvia - 61243/08
Judgment 13.1.2015 [Section IV]

(See Article 3 above, page 8)

Dismissal of claim for defamation of applicant's grandfather, the former Soviet leader Joseph Stalin: *inadmissible*

Dzhugashvili v. Russia - 41123/10
Decision 9.12.2014 [Section I]

Facts – The applicant is the grandson of the former Soviet leader, Joseph Stalin. In 2009 he sued the *Novaya Gazeta* newspaper for defamation after it published an article accusing leaders of the Soviet Politburo, including Stalin, of being "bound by much blood" in the order to execute Polish prisoners of war at Katyń in 1940. The article described Stalin as a "bloodthirsty cannibal" and also alleged that the Soviet leaders had "evaded moral responsibility for the extremely serious crime". The District Court dismissed the claim after finding that the article contributed to a factual debate on a question of profound historical discussion and that Stalin's role as a world-famous figure called for a higher degree of tolerance to public scrutiny and criticism.

The newspaper subsequently published a further article giving the background to the defamation proceedings. The applicant again sued, but his claim was dismissed on the grounds that the article constituted an expression of the author's view of the initial defamation proceedings.

Law – Article 8: The Court reaffirmed the principle that publications concerning the reputation of a deceased member of a person's family might, in certain circumstances, affect that person's private life and identity and thus come within the scope of Article 8 (see *Putistin v. Ukraine*, 16882/03, 21 November 2013, Information Note 168). However, it distinguished between defamation of a private individual (as in *Putistin*), whose reputation as part and parcel of their families' reputation remains within the scope of Article 8, and legitimate criticism of public figures who, by taking up leadership roles, expose themselves to outside scrutiny.

In the applicant's case, the newspaper's publication of the first article had contributed to a historical debate of public importance, concerning Joseph Stalin and his alleged role in the Katyń shootings. The second article concerned the author's interpretation of the domestic court's findings and could therefore be seen as a continuation of the same discussion. Furthermore, the Katyń tragedy and the related historical figures' alleged roles and responsibilities inevitably remained open to public scrutiny and criticism, as they presented a matter of general interest for society. Given that cases such as the present one required the right to respect for private life to be balanced against the right to freedom of expression, the Court reiterated that it was an integral part of freedom of expression, guaranteed under Article 10 of the Convention, to seek historical truth.

In conformity with the principles laid down in the Court's case-law, the national courts had considered that the articles contributed to a factual debate on events of exceptional public interest and importance, had found that Stalin's historic role called for a high degree of tolerance to public scrutiny

and criticism of his personality and actions, and had taken the highly emotional presentation of the opinions outlined within the articles into consideration, finding that they fell within the limits of acceptable criticism.

The national courts had thus struck a fair balance between the applicant's privacy rights and journalistic freedom of expression.

Conclusion: inadmissible (manifestly ill-founded).

Respect for private life
Respect for correspondence

Insufficient guarantees against arbitrariness of domestic secret surveillance provisions: *violation*

Dragojević v. Croatia - 68955/11
Judgment 15.1.2015 [Section I]

Facts – In 2007 the applicant was suspected of involvement in drug-trafficking. At the request of the prosecuting authorities, the investigating judge authorised the use of secret surveillance measures to covertly monitor the applicant's telephone. In 2009 the applicant was found guilty of drug-trafficking and money laundering and sentenced to nine years' imprisonment. His conviction was upheld by the Supreme Court in 2010 and his constitutional complaint was dismissed in 2011.

Law – Article 8: Tapping the applicant's telephone constituted an interference with his rights to respect for his "private life" and "correspondence".

Under domestic law, the use of secret surveillance was subject to prior authorisation. However, in the applicant's case the orders issued by the investigating judge were based only on a statement referring to the prosecuting authorities' request and the assertion that "the investigation could not be conducted by other means", without any information as to whether less intrusive means were available. That approach was endorsed by the Supreme Court and the Constitutional Court. In an area as sensitive as the use of secret surveillance the Court had difficulties accepting such interpretation of the domestic law, which envisaged prior detailed judicial scrutiny of the proportionality of the use of secret surveillance measures. The domestic courts' circumvention of this requirement by retrospective justification opened the door to arbitrariness and could not provide adequate and sufficient safeguards against potential abuse.

In the applicant's case, the criminal courts had limited their assessment of the use of secret surveillance to the extent relevant to the admissibility of the evidence thus obtained, without going into the substance of the Convention requirements concerning the allegations of arbitrary interference with the applicant's Article 8 rights. The Government had not provided any information on remedies which could be available to a person in the applicant's situation. Therefore, the relevant domestic law, as interpreted and applied by the domestic courts, was not sufficiently clear as to the scope and manner of exercise of the discretion conferred on the public authorities, and did not secure adequate safeguards against possible abuse. Accordingly, the procedure for ordering and supervising the implementation of the interception of the applicant's telephone had not complied with the requirements of lawfulness, nor was it adequate to keep the interference with the applicant's right to respect for his private life and correspondence to what was "necessary in a democratic society".

Conclusion: violation (unanimously).

The Court found no violation of Article 6 § 1 in respect of the alleged lack of impartiality of the trial bench and the use of evidence obtained by secret surveillance.

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

(See also *Kopp v. Switzerland*, 23224/94, 25 March 1998; *Khan v. the United Kingdom*, 35394/97, 12 May 2000; *P.G. and J.H. v. the United Kingdom*, 44787/98, 25 September 2001, Information Note 34; *Kvasnica v. Slovakia*, 72094/01, 9 June 2009; and *Goranova-Karaeneva v. Bulgaria*, 12739/05, 8 March 2011)

Respect for family life
Positive obligations

Failure to conduct return proceedings under Brussels IIa regulation expeditiously and efficiently: *violation*

M.A. v. Austria - 4097/13
Judgment 15.1.2015 [Section I]

Facts – The applicant is an Italian national whose partner (the first applicant in the case of *Povse*

v. Austria)[1] removed their daughter from Italy, where the family lived, to Austria in February 2008. In July 2009, following an application by the applicant under the Brussels IIa Regulation,[2] an Italian court ordered the child's return to Italy and issued a certificate of enforceability. The Austrian district court which was asked to enforce that order refused on the grounds that a return without the mother would entail a grave risk of harm for the child. The matter ultimately came before the Austrian Supreme Court, which after obtaining a preliminary ruling from the Court of Justice of the European Union directed the district court to enforce the return order on receipt of evidence that suitable accommodation would be available for the mother and child in Italy. The district court wrote to the applicant requesting such evidence in February 2011.

In November 2011 the Italian court awarded the applicant sole custody and ordered the child's return to Italy to reside with the applicant after noting that the child had been unlawfully removed to Austria, that the applicant had been deprived of contact without good reason and that the child's return would not entail any grave risk of psychological or physical harm. The Austrian district court again refused to enforce the return order pending receipt of evidence of suitable accommodation for the mother and child. That decision was overturned on appeal and the Austrian Supreme Court dismissed the mother's appeal on points of law. The case was then referred to a different district court in Austria which initially sought to instigate a negotiated solution between the parents before going on to order the child's return. Following an unsuccessful attempt at enforcement in July 2013, the proceedings before the Austrian courts were stayed pending the outcome of an application by the mother to the Italian courts for a stay of execution. Those proceedings were still pending at the date of the European Court's judgment. The applicant had no contact with his daughter between mid-2009 and February 2014.

Law – Article 8

(a) *Admissibility* – The Government contended that the applicant had failed to exhaust remedies in Austria as he could have made an application under section 91 of the Courts Act, a provision the Court had accepted afforded an effective remedy in respect of length-of-proceedings complaints under Article 6 § 1 of the Convention.

The Court reiterated, however, that given the difference in the nature of the interests protected by Articles 6 § 1 and 8 and the wider purpose pursued by Article 8 of ensuring proper respect for family life, the finding that a remedy is effective for a length-of-proceedings complaint under Article 6 § 1 was not decisive in respect of a complaint under Article 8. In the present case, the applicant had made use of the appropriate mechanism under the Brussels IIa Regulation to bring about the speedy return of his wrongfully removed daughter and had, at least in substance, claimed his right to respect for his family life before the Austrian courts. The Austrian Government had not submitted any particular example showing the application of section 91 of the Courts Act in the specific context of proceedings concerning the enforcement of a return order.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – In the specific context of return proceedings, it was for each Contracting State to equip itself with adequate and effective means to ensure compliance with its positive obligations under Article 8 of the Convention. As in proceedings relating to the Hague Convention on the Civil Aspects of International Child Abduction, the Court would examine whether the procedural framework provided by the State was adequate to give effect to the object and purpose of a return under the Brussels IIa Regulation.

Specific streamlined proceedings could be required for the enforcement of return orders – be it under the Hague Convention or under the Brussels IIa Regulation – for a number of reasons. While it was true that enforcement proceedings have to protect the rights of all involved and that the interests of the child were of paramount importance, it was in the nature of such proceedings that the passage of time risked compromising the position of the non-resident parent irretrievably. Moreover, as long as the return decision remained in force the presumption stood that return was also in the interests of

1. *Povse v. Austria* (dec.), 3890/11, 18 June 2013, Information Note 164.

2. Under the Brussels IIa Regulation (Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility), which applies to EU member States, the State to which a child is wrongfully removed can oppose return in justified cases. However, the State in which the child had its habitual residence prior to the wrongful removal can override a decision refusing return pursuant to Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction. If such a decision is accompanied by a certificate of enforceability pursuant to Article 42 of the Regulation, the requested State has to enforce it.

the child. The proceedings available to the applicant in the instant case had followed the normal pattern of enforcement proceedings. They did not contain any specific rules or mechanisms to ensure particular speediness. Nor did it appear that the authorities had had appropriate means at their disposal to ensure that contact between the applicant and his daughter, which had broken off in mid-2009, was re-established and maintained while the proceedings were pending.

The Austrian authorities had failed to act swiftly, in particular in the first set of proceedings, and the procedural framework had not facilitated the expeditious and efficient conduct of the return proceedings. In sum, the applicant had not received effective protection of his right to respect for his family life.

Conclusion: violation (unanimously).

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

Positive obligations

Failure to take sufficient measures to enforce father's contact rights: *violation*

Kuppinger v. Germany - 62198/11
Judgment 15.1.2015 [Section V]

(See Article 13 below, page 20)

ARTICLE 10

Freedom to receive information

Ban on Kurdish language newspaper in Turkish prisons: *violation*

Mesut Yurtsever and Others v. Turkey - 14946/08 et al.
Judgment 20.1.2015 [Section II]

Facts – By decisions of the education committee, the applicants, who were detained in prison, did not receive editions of a daily newspaper in Kurdish. The committee had argued that it was not in a position to verify whether the content of the publications was obscene or likely to endanger security in the prison. None of the appeals by the applicants against those decisions was successful.

Law – Article 10: The refusal by the prison administrative authorities to provide the applicants with certain editions of a daily newspaper in Kurdish amounted to an interference with the applicants' right to receive information and ideas.

Domestic law recognised the right of convicted prisoners to receive publications where these were not banned, that is, did not contain information, articles, photographs or commentaries that were obscene or likely to endanger security in the establishment.

The national authorities had referred to the relevant legal provision in justifying their decisions but had refused to provide the applicants with certain editions of a daily newspaper not because the content was allegedly obscene or likely to endanger security but because the authorities were unable to assess the content of the publications in question. Accordingly, as they could not understand the language in which the daily in question had been published, the national authorities stated that they were unable to assess whether the content was in conformity with the relevant statutory provision. In the absence of such an assessment, which was moreover a statutory pre-condition, a question arose as to the legal basis for the interference.

In that connection no statutory provision mentioned any possibility at all of restricting or banning a prisoner's access to publications on account of the language in which these appeared. Furthermore, the monitoring power conferred on the prison authorities under domestic law regarding prisoners' access to publications concerned only their content. In the present case the authorities had made their decision without carrying out a prior assessment of the content of the publications in question, thus depriving prisoners at their discretion of access to a category of publications from which they could seek to benefit. The decisions of the prison authorities not to provide the applicants with certain editions of the daily newspaper had not been based on any grounds provided for by law. Accordingly, the interference complained of had not been "prescribed by law".

Conclusion: violation (unanimously).

Article 41: EUR 300 each in respect of non-pecuniary damage.

(See also, for a similar approach regarding the monitoring of prisoners' written correspondence in a language other than Turkish, *Mehmet Nuri* Özen *and Others v. Turkey*, 15672/08 et al., 11 January 2011, Information Note 137)

Freedom of expression

Refusal to grant citizenship to leader of protest movement against Government's language policy: *Article 10 not applicable*

Petropavlovskis v. Latvia - 44230/06
Judgment 13.1.2015 [Section IV]

Facts – The applicant was a "permanently resident non-citizen" of the Republic of Latvia, a legal status granted to citizens of the former Soviet Union who had lost their Soviet citizenship following the dissolution of the USSR but, while being so entitled, had not subsequently obtained any other nationality. The applicant was one of the leaders of a movement which protested against an education reform in Latvia in 2003 and 2004. In that capacity he made public statements advocating the Russian-speaking community's rights to education in Russian and the preservation of State-financed schools with Russian as the sole language of instruction. In 2004 his application for Latvian citizenship was refused by the Cabinet of Ministers and his subsequent appeals were unsuccessful. In his application to the European Court he complained that this refusal was a punitive measure imposed because he had criticised the Government.

Law – Articles 10 and 11: The Court could not see how the refusal to grant Latvian citizenship to the applicant could have prevented him from expressing his disagreement with government policies or from participating in meetings or movements. The decision concerning his naturalisation could not be considered punishment for his opinions and it had not weakened his resolve to speak out and participate in debates on matters of public interest. On the contrary, his views on the education reform had been widely reported in the media and he had remained politically active even after his application for naturalisation was refused. He had never been criminally sanctioned for expressing his opinion or participating in a demonstration.

Furthermore, in accordance with international law, decisions on naturalisation were matters primarily falling within the domestic jurisdiction and were usually based on criteria aimed at establishing a link between the State and the person requesting naturalisation. Neither the European Convention nor international law in general provided a right to acquire a specific nationality. There was nothing in domestic law to indicate that the applicant had an unconditional right to Latvian citizenship or that the authorities' decision could be seen as arbitrary.

In exercising his freedom of expression and assembly, the applicant was free to disagree with government policies for as long as that critique took place in accordance with the law. The limits of such criticism were wider with regard to a Government than to a private citizen or even a politician. However, this was an entirely different matter from the issue of the criteria and procedure for naturalisation, both of which were determined by domestic law. In many jurisdictions, acquisition of citizenship was accompanied by an oath of allegiance whereby the individual pledged loyalty to the State and its Constitution, as in the present case. Such a requirement – which had to be distinguished from a criterion requiring a pledge of loyalty to a particular Government – could not be considered a punitive measure capable of interfering with freedom of expression and of assembly. Rather, it was a criterion which had to be fulfilled by any person seeking to obtain Latvian citizenship through naturalisation.

Conclusion: Articles 10 and 11 not applicable (unanimously).

(See also *Slivenko v. Latvia* [GC], 48321/99, 9 October 2003, Information Note 57; *Kolosovskiy v. Latvia* (dec.), 50183/99, 29 January 2004, Information Note 60; *Sisojeva and Others v. Latvia* striking out [GC], 60654/00, 15 January 2007, Information Note 93; and *Fehér and Dolník v. Slovakia* (dec.), 14927/12 and 30415/12, 21 May 2013)

ARTICLE 11

Freedom of peaceful assembly

Refusal to grant citizenship to leader of protest movement against Government's language policy: *Article 11 not applicable*

Petropavlovskis v. Latvia - 44230/06
Judgment 13.1.2015 [Section IV]

(See Article 10 above)

ARTICLE 13

Effective remedy

Lack of domestic remedy to expedite parental contact proceedings: *violation*

Kuppinger v. Germany - 62198/11
Judgment 15.1.2015 [Section V]

Facts – In his application to the European Court, the applicant complained, among other things, of the length of domestic proceedings he had taken to enforce a court decision awarding him contact rights to his child and of the lack of an effective remedy to expedite the implementation of that decision (Article 13 of the Convention in conjunction with Article 8). He also complained under Article 8 that a EUR 300 fine imposed by the domestic courts on the child's mother following her repeated refusal to comply with the decision granting him contact had been too low to have any coercive effect.

Law – Article 8: The domestic courts had imposed an administrative fine on the mother, as none of the six contact visits that had been arranged pursuant to the interim decision had taken place as scheduled. Although the Court had no information about the mother's financial situation, it could not but observe that the overall fine of EUR 300 appeared rather low, given that the applicable law allowed the imposition of a fine of up to EUR 25,000 for each case of non-compliance. It was thus doubtful if the sanction could have reasonably been expected to have a coercive effect on the mother, who had persistently prevented contact between the applicant and the child. In addition, the enforcement proceedings had lasted more than ten months between the date the applicant had first requested the imposition of a fine until the fine was paid. A number of the delays were attributable to the domestic courts. The authorities had thus failed to take effective steps to execute the interim contact decision of May 2010.

Conclusion: violation (unanimously).

The Court unanimously found no violation of Article 8 regarding the length of further proceedings concerning contact custodianship or the review of the contact regulations.

Article 13 in conjunction with Article 8: The Government had contended that the applicant could have sued for compensation for the alleged unreasonable length of the proceedings under the Protracted Court Proceedings and Criminal Investigations Act 2011 ("Remedy Act").

The Court reiterated that a remedy will normally be "effective" within the meaning of Article 13 in length-of-proceedings cases if it can be used either to expedite a decision by the courts dealing with the case or to provide the litigant with adequate redress for delays that have already occurred. However, in proceedings in which the length of the proceedings has a clear impact on the applicant's family life a more rigid approach is called for which obliges the States to put into place a remedy which is at the same time preventive and compensatory. The State's positive obligation to take appropriate measures to ensure respect for family life would risk becoming illusory if all that was available was a remedy leading only to an *a posteriori* award for monetary compensation.

The proceedings in the applicant's case concerned the applicant's right to contact with his young child and thus fell within the category of cases which risked being predetermined by their length. It thus had to be determined whether German law provided a remedy which not only offered monetary redress, but was also effective to expedite the proceedings before the family courts.

The Remedy Act had only entered into force a year and a half after the contact proceedings had started. In addition, the Court was not convinced that the potential compensatory remedy it provided could be regarded as having a sufficient expediting effect on pending proceedings in cases concerning a parent's contact rights with young children. The Act thus did not meet the specific requirements for a legal remedy designed to meet the State's obligations under Article 8 in such proceedings. Neither of the two other remedies that had been suggested by the Government could be regarded as effective either.

Conclusion: violation (unanimously).

The applicant's length-of-proceedings complaint under Article 6 § 1 of the Convention was declared inadmissible for failure to exhaust domestic remedies as the applicant could have claimed just satisfaction under the Remedy Act after its entry into force. The Court had previously found that the Act was in principle capable of providing appropriate redress for the violation of the right to a trial within a reasonable time.

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

(See also *Macready v. the Czech Republic*, 4824/06 and 15512/08, 22 April 2010, Information Note 129;

and *Bergmann v. the Czech Republic*, 8857/08, 27 October 2011; see, more generally, the Factsheet on Parental Rights)

Lack of effective remedy in respect of conditions of detention: *violation*

Neshkov and Others v. Bulgaria - 36925/10 et al. Judgment 27.1.2015 [Section IV]

(See Article 46 below)

ARTICLE 46

Pilot judgment – General measures

Respondent State required to take general measures in respect of conditions of detention and the lack of effective domestic remedies

Neshkov and Others v. Bulgaria - 36925/10 et al. Judgment 27.1.2015 [Section IV]

Facts – The case concerned conditions of detention in various corrective facilities in Bulgaria. The applicants alleged a violation of Article 3 of the Convention and the first applicant (Mr Neshkov) also alleged a violation of Article 13 on account of the lack of an effective domestic remedy.

The Court had previously examined conditions of detention in Bulgaria under Article 3 in more than 20 other cases. For its part, the Committee of Ministers of the Council of Europe had repeatedly emphasised the need for additional measures to bring conditions of detention in Bulgarian correctional facilities in line with Convention standards. In 2008, having been satisfied by information submitted by the Government that in 2003 the Bulgarian courts had started to award compensation to persons kept in poor conditions of detention under a general statutory rule governing the liability of the authorities for unlawful acts or omissions, the Court started declaring inadmissible such complaints brought by persons who no longer remained in such conditions in cases where the remedy had not been exhausted. However, it did not do so in respect of persons who continued to be held in inadequate conditions, on the basis that in such circumstances an award of compensation is insufficient.

Law – Article 13

(a) *Compensatory remedy* – The Court had previously accepted that proceedings for compensation under section 1 of the State and Municipalities Liability for Damage Act 1988 could be regarded as an effective domestic remedy in respect of complaints under Article 3 of the Convention relating to conditions of detention in cases where the alleged breach had come to an end. However, in view of the manner in which the Bulgarian courts' case-law had evolved the Court no longer considered the remedy effective. The two domestic cases brought by the first applicant highlighted a series of problems: a failure to make clear the specific acts or omissions the prisoner was required to establish, an overly strict burden of proof, a tendency to assess individual aspects of the conditions of detention rather than their cumulative impact, a failure to recognise that even briefly non-compliant conditions must be presumed to cause non-pecuniary damage and the application of domestic time-limits without taking into account the continuous nature of the overall situation. The two claims for damages the first applicant had brought under section 1 of the 1988 Act could not therefore be regarded as an effective remedy.

The issues faced by the first applicant appeared representative of those met by a number of persons who had sought damages under the 1988 Act in respect of the conditions of their detention. Indeed, only about 30% of such cases had resulted in an award. The Court noted in particular that, when examining claims of this type, the domestic courts very often did not take into account the general rule proscribing inhuman and degrading treatment, but only the concrete statutory or regulatory provisions governing conditions of detention. In addition, more often than not they also failed to recognise that poor conditions of detention must be presumed to cause non-pecuniary damage to the person concerned. There was also uncertainty about the proper defendants to such claims. The remedy under section 1 of the 1988 Act was thus not sufficiently certain and effective.

(b) *Preventive remedy* – Prisoners who continued to be held in non-compliant conditions required a preventive remedy capable of rapidly bringing the ongoing violation to an end. However no such remedy existed under Bulgarian law. In particular, although in theory Articles 250 § 1, 256 and 257 of the Code of Administrative Procedure 2006 could offer injunctive relief, they did not appear to have been interpreted by the administrative courts in a way that enabled prisoners to obtain a general improvement in their conditions of confinement. In any event, injunctions were of little practical use where overcrowding was systemic and required substantive reform. Other forms of relief,

such as a complaint to the prosecutor responsible for overseeing the facility or a complaint to the Ombudsman were not considered effective either.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 3 of the Convention in respect of the conditions of detention endured by four of the applicants.

Article 46

(a) *Conditions of detention* – Since its first judgment concerning inhuman and degrading conditions in Bulgarian detention facilities (*Iorgov v. Bulgaria*, 40653/98, 11 March 2004, Information Note 62), the Court had found a breach of Article 3 of the Convention on account of poor conditions of detention in such facilities in 25 cases. While the breaches related to various facilities, the underlying facts in each case were very similar, the most recurring issues being a lack of sufficient living space, unjustified restrictions on access to natural light and air, poor hygiene, and a lack of privacy and personal dignity when using sanitary facilities. The breaches were therefore not prompted by isolated incidents but originated in a widespread problem resulting from a malfunctioning of the Bulgarian penitentiary system. The Court decided to apply the pilot-judgment procedure.

The systemic problem regarding the conditions of detention was of considerable magnitude and complexity and stemmed from a plethora of factors. There were two issues Bulgaria needed to tackle. The first concerned overcrowding for which there were a number of potential solutions including the construction of new facilities, better allocation of prisoners in existing facilities, a reduction in the number of persons serving custodial sentences, reduced recourse to imprisonment, shorter custodial sentences and alternatives to custody. The second concerned the material conditions of detention and hygiene. Despite being aware of the problem for years the authorities but had not done enough to tackle it. At this stage, the only solution was major renovation works or the replacement of existing buildings with new ones. This needed to be done without any delay.

(b) *Domestic remedies* – By contrast to the position regarding the conditions of detention, the systemic problem underlying the breach of Article 13 appeared to be due chiefly to the legislation and its interpretation by the courts. Specific changes in the Bulgarian legal system were thus required in the form of (i) a preventive remedy capable of providing swift redress to prisoners held in non-compliant conditions and (ii) a compensatory remedy.

(i) *Preventive remedy* – The best way of putting a preventive remedy into place would be to set up a special authority to supervise correctional facilities. A special authority normally produces speedier results than would be the case with ordinary judicial proceedings. To be considered an effective remedy, the authority should have the power to monitor breaches of prisoners' rights, be independent from the authorities in charge of the penitentiary system, have the power and duty to investigate complaints with the participation of the complainant, and be capable of rendering binding and enforceable decisions. Other options would be to set up a procedure before existing authorities such as public prosecutors (provided appropriate safeguards were in place such as the right for the prisoner to make submissions and a duty on the prosecutor to deliver a binding and enforceable decision without delay) or to mould existing forms of injunctive relief to accommodate grievances relating to conditions of detention.

(ii) *Compensatory remedy* – Even though the Convention was in principle regarded as directly applicable in Bulgaria and part of domestic law, there was no general remedy allowing protection at domestic level of the rights and freedoms enshrined in domestic law. One solution would be a general remedy allowing those complaining of Convention breaches to seek the vindication of their rights in a procedure specially designed for that purpose. Another option would be to put in place special rules laying down in detail the manner in which claims concerning conditions of detention are examined and determined. Redress could take the form of monetary compensation or, for those still in custody, a proportionate reduction in sentence. Any remedy would have to operate retrospectively.

The required preventive and compensatory remedies should be made available within eighteen months after the Court's judgment became final. Other similar pending applications would not be adjourned in the meantime.

(c) Individual measures – The fourth applicant (Mr Zlatev), who appeared to be particularly vulnerable and was still held in particularly harsh conditions, should be transferred to another correctional facility urgently if he so wished.

Article 41: Awards ranging from EUR 6,750 to EUR 11,625 in respect of non-pecuniary damage

(certain claims were reduced or dismissed for failure to comply with the applicable time-limit).

(See also *Ananyev and Others v. Russia*, 42525/07, 10 January 2012, Information Note 148; and see generally, Factsheets on Detention conditions and treatment of prisoners and on Pilot judgments)

Execution of judgment – General measures

Respondent State required to amend settlement plan for the enforcement of final domestic judgments

Đurić and Others v. Bosnia and Herzegovina - 79867/12 et al.
Judgment 20.1.2015 [Section IV]

Facts – Between 1999 and 2008, Republika Srpska (an Entity of Bosnia and Herzegovina) was ordered to pay war damages to the applicants by a first-instance court. The payments were not made. In 2009, in the case of Čolić *and Others v. Bosnia and Herzegovina*, the European Court held that the failure to comply with final domestic judgments awarding war damages had breached Article 6 of the Convention and Article 1 of Protocol No. 1 and, in view of the large number of other similar cases, invited the respondent State to take general measures to solve the problem. As a result, in 2012 Republika Srpska introduced a settlement plan which envisaged the enforcement of final judgments ordering payment of war damages in cash within 13 years starting from 2013 and the payment of EUR 50 in respect of non-pecuniary damage. The enforcement time-frame was extended to 20 years in 2013.

Law – Article 6 of the Convention and Article 1 of Protocol No. 1: The Court examined the adequacy of the settlement plan. It considered the proposed time-frame of 20 years too long in the light of the lengthy delays which had already occurred. Although the Court was aware of the State's significant public debt and the number of non-enforced judgments and cases pending before the domestic courts, it reiterated that it was not open to a State authority to cite a lack of funds as an excuse for not honouring a judgment debt. Moreover, it was the State's legal system that had allowed for the creation of such a high number of judgments awarding war damages. While a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights was inherent in the entire Convention, the consequence of delaying for another 20 years the enforcement of these judgments was to impose an individual and excessive burden on the creditors concerned. The settlement plan, as extended in 2013, was thus not in accordance with Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention.

Conclusion: violation (unanimously).

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

Article 46: In view of the nature of the violation, which affected many people, the respondent State should amend the settlement plan, preferably within a year after the present judgment became final. Moreover, in view of the lengthy delay which had already occurred, a more appropriate enforcement interval should be introduced, such as that initially adopted in 2012. In any event, in cases in which there had already been a delay of more than ten years, the judgments needed to be enforced without further delay. The respondent State should also undertake to pay default interest at the statutory rate in the event of a delay in the enforcement of judgments in accordance with the settlement plan as amended following this judgment.

(See also Čolić *and Others v. Bosnia and Herzegovina*, 1218/07 et al., 10 November 2009)

ARTICLE 1 OF PROTOCOL No. 1

Possessions
Deprivation of property

Unlawful forced relocation of applicant and demolition of his house: *violation*

Akhverdiyev v. Azerbaijan - 76254/11
Judgment 29.1.2015 [Section I]

Facts – In 2004 the neighbourhood where the applicant lived became part of a municipal development project. In 2009 the authorities requested the applicant to vacate his house, which he had acquired from his parents in 2005, and accept an occupancy voucher for a new flat under construction as compensation. The applicant initially refused but was later obliged to vacate the property,

which was eventually demolished in 2009. He was unsuccessful in an action in the civil courts.

Law – Article 1 of Protocol No. 1: Even though the applicant had acquired ownership only in 2005, the property had been in his unchallenged possession before that date. He thus had a sufficient proprietary interest from the outset for the property to qualify as his "possessions".

As to the lawfulness of the measures taken by the authorities, the Court could not accept that the house had been lawfully expropriated. The expropriation order had been issued more than a year before the applicant became the actual owner of the house, so it could not be described as an "expropriation" act. According to the text of the order, it merely served as a basis for the preparation of the design and as a means for the project developer to obtain the relevant documentation. It could thus not be considered as a lawful basis for interfering with the applicant's property. Moreover, the "expropriation" procedure had been carried out unlawfully, as the statutory provisions relied on were either irrelevant or inapplicable. The domestic courts had refrained from examining the applicability of the relevant provisions or the issue of lawfulness, despite the applicant's repeated requests for them to do so. Lastly, the offer of compensation was not lawful as it was based on provisions that were inapplicable in the context of the present case. It followed that the interference with the applicant's property rights had not been carried out in compliance with the "conditions provided for by law".

Conclusion: violation (unanimously).

Article 41: reserved.

Peaceful enjoyment of possessions

Retroactive liability of French nationals residing in Monaco to wealth tax: *no violation*

Arnaud and Others v. France - 36918/11 et al.
Judgment 15.1.2015 [Section V]

Facts – The applicants are eight French nationals who live in Monaco. In 2001 France and Monaco negotiated a change to the Franco-Monegasque Tax Convention to the effect that those French nationals who had changed their residence to Monaco since 1 January 1989 would be liable to pay the wealth tax (ISF) from 1 January 2002, on the same basis as French taxpayers who were domiciled in France for tax purposes. This measure was announced publicly in October 2001, with an indication that it would take effect from 1 January 2002. The taxpayers concerned were informed, in particular by a ministerial letter notifying them of the forthcoming enactment of the law and its envisaged retrospective effect. In addition, they were advised that it would be preferable to anticipate the entry into force of this law by submitting tax returns and paying tax from 2002, although there was no legal obligation to do so. In March 2005 a law validating France's approval of the Protocol to the Tax Convention was enacted and a decree promulgating it was published in the Official Gazette.

Before the Court, the applicants alleged that the fact of being required to pay wealth tax with retrospective effect, from 2005 for two of them and from 2002 for the four others, had infringed their right to the peaceful enjoyment of their possessions.

Law – Article 1 of Protocol No. 1: The interference to which the disputed tax liability amounted had been expressly provided for by law: approval of the Protocol to the Tax Convention had been validated by the legislature and its text had been published by decree. Moreover, this interference had been intended to combat tax evasion, namely the settling of French nationals in Monaco with the sole aim of avoiding wealth-tax liability in respect of their assets located outside France. The disputed tax liability fell within the broad margin of appreciation enjoyed by the State in tax matters, and could not therefore be considered arbitrary as such. The retrospective application of this law did not in itself constitute a violation of Article 1 of Protocol No. 1, given that the retrospective application of a tax law was not as such prohibited by that provision.

As to whether this retrospective application had imposed an excessive burden on the applicants, it was to be noted that the contested Protocol had been enacted in the context of a longstanding and close relationship between France and Monaco in tax matters, particularly in respect of the French nationals who had settled in the Principality, for reasons related to that State's specific geographical and fiscal features. In addition, the retrospective nature of the disputed measure, in so far as it applied to the year 2005 for two of the applicants, was not at all exceptional from the perspective of fiscal legislation, as legislative authorisation for approval of the Protocol to the Tax Convention had been enacted in the course of the same tax year.

With regard to the amounts paid by the other applicants for the years 2002 to 2004, the applicants complained about the amount of tax to which the French nationals living abroad had been subjected in 2005, as it had corresponded to four years of liability. Yet the taxpayers had been informed of the forthcoming enactment of the measure and its envisaged retrospective effect as early as October 2001, through a public announcement, and again in May 2002 through a letter from the Minister. That letter invited them to anticipate the text's entry into force by submitting tax declarations and paying their tax from 2002, although there had been no legal obligation to do so at that stage. Certain taxpayers had opted to follow that advice and had thus not been subjected in 2005 to a tax bill that was higher than the sum corresponding to the relevant tax year. Others, in contrast, had preferred to await the measure's entry into force in 2005 before submitting the declarations and the corresponding voluntary payments. In respect of those persons, the tax authorities had announced that arrangements for payment would be introduced and that no sanctions would be imposed for the period preceding ratification of the Protocol. In addition, the applicants had not been deprived of their right to challenge, before the relevant courts, the lawfulness of the liabilities in respect of which they had made voluntary payments.

Thus, in spite of the retrospective nature of the contested measure, the authorities had provided the taxpayers with prior information enabling them to anticipate its effects. Equally, appropriate measures had been taken to minimise the amount of tax payable from 2005 onwards by those who had awaited the law's entry into force before complying with it. In consequence, no excessive burden had been imposed on the applicants as a result of the contested measure and it had not fundamentally interfered with their financial position. In view of those factors, the liability provided for in the Protocol to the Tax Convention had not upset the "fair balance" which had to be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

Conclusion: no violation (unanimously).

The Court also concluded that there had been no violation of Article 14 taken together with Article 1 of Protocol No. 1, finding that the French nationals resident in Monaco were not in an identical situation to those of other French nationals living abroad. It held that, in the area of international bilateral tax conventions, the rules defined by the States were the result of negotiations which depended both on the diplomatic relations existing between them and on their respective national taxation systems, and that, in consequence, French nationals living abroad could not be regarded as forming a single category whose members were in an identical situation.

Control of the use of property

Statutory removal and non-renewal of tobacco licence without compensation: *violation*

Vékony v. Hungary - 65681/13
Judgment 13.1.2015 [Section II]

Facts – Since 1994 the applicant's family had operated a grocery store where they sold tobacco products subject to excise tax. Following a legislative change in 2012, tobacco retail became a State monopoly and tobacco retailers had to be licensed through a concession tender. As a consequence the applicant lost his tobacco retail licence. He was unable to obtain a new licence under the new rules.

Law – Article 1 of Protocol No. 1: The statutory cancellation and non-renewal of the applicant's licence to sell tobacco constituted a measure of control of the use of property amounting to an interference with his rights under Article 1 of Protocol No. 1.

The loss of the licence had drastic effects on the applicant's business as it reduced turnover by a third and the business eventually had to be wound up. The transitional periods between the enactment of the impugned law and the deadline for terminating the tobacco retail were insufficient. Furthermore, it was implicit in Article 1 of Protocol No. 1 that any interference with the peaceful enjoyment of possessions had to be accompanied by procedural guarantees affording those concerned a reasonable opportunity to present their case to the authorities and to effectively challenge the measures. A disproportionate and arbitrary control measure could not satisfy the requirements of protection of possessions under Article 1 of Protocol No. 1.

The Court found that an excessive individual burden had been imposed on the applicant. In reaching that conclusion it noted that the applicant's licence had been extinguished without compensation, the measure had been introduced through constant changes to the law and with remarkable hastiness, the loss of the old licence had

been automatic, there had been no public scrutiny of the refusal to grant a new licence and no legal remedy available, and the applicant had had no realistic prospect of remaining in possession because the process of granting of new concessions was arbitrary and gave no precedence to previous licence-holders. Finally, it had not been suggested that the applicant had been in breach of the law.

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 29 January 2015. The President of the Court, Dean Spielmann (see photos), took stock of the year 2014 and said that the Court had continued to build on the progress made in 2013. He also stressed the need for each member State to ensure that endemic problems were resolved at domestic level rather than being brought before the Court.

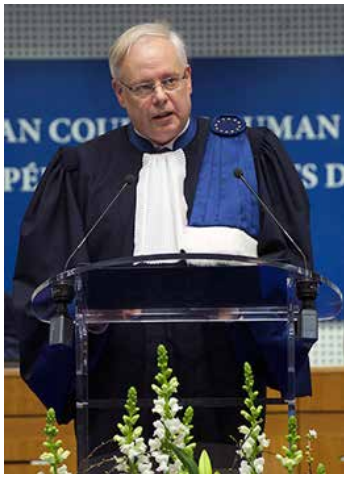
Webcast (English and original versions available on the Court's Internet site: <www.echr.coe.int> – Press)

Opening of the judicial year 2015

The Court's judicial year was formally opened on 30 January 2015. Around 260 eminent figures from the European judicial scene attended a seminar on the theme ""Subsidiarity: a two-sided coin?".

At the solemn hearing which followed the seminar, President Dean Spielmann and Francisco Pérez de los Cobos, President of the Constitutional Tribunal of Spain, addressed a 330-strong audience representing the judicial world and local and national authorities.

More information on the Court's Internet site (<www.echr.coe.int> – The Court – Events)



Elections

During its winter session held from 26 to 30 January 2014, the Parliamentary Assembly of the Council of Europe elected two new judges to the Court: Yonko Grozev in respect of Bulgaria and Branko Lubarda in respect of Serbia. Judges Grozev and Lubarda will begin their nine-year terms in office no later than three months after their election.

Rule 47 video clip

Rule 47 of the Rules of Court, which introduces stricter conditions for applying to the Court, came into force one year ago, on 1 January 2014 (see Information Note 169).

Six new language versions of the tutorial explaining to applicants how to fill in the application form correctly have been uploaded to the Court's YouTube account (Armenian, Czech, Estonian, Georgian, Montenegrin, Portuguese). The Rule 47 video is now available in 22 official languages of the Council of Europe member States on the Court's YouTube account (<https://www.youtube.com/user/EuropeanCourt>).

RECENT PUBLICATIONS

Annual Report 2014 of the Court

On 29 January 2015 the Court issued its Annual Report for 2014 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 overview of the main judgments and decisions delivered by the Court in 2014. It is available free on the Court's Internet site (<www.echr.coe.int> – Publications – Reports).

Statistics for 2014

The Court's statistics for 2014 are now available. All information related to statistics for 2014 can be found on the Court's Internet site (<www.echr.coe.int> –Statistics), including the annual table of violations for each country and the Analysis of Statistics 2014, which provides an overview of developments in the Court's caseload in 2014, such as pending applications and different aspects of case processing, and also country-specific information.

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 2014. They can be downloaded from the Court's Internet site (<www.echr.coe.int> – Press).

Case-Law Guides: new translations

A translation into Russian of the updated version (2014) of the Guide on Article 5 (Right to liberty and security) as well as a translation into Ukrainian of the Guide on the civil limb of Article 6 (Right to a fair trial) are now available on the Court's Internet site (<www.echr.coe.int> – Case-Law).

Руководство по применению статьи 5 – Право на свободу и личную неприкосновенность (rus)

Практичний посібник зі статті 6 – Цивільна частина (ukr)

Handbook on European non-discrimination law: Serbian translation

A translation into Serbian of the Handbook – which was published jointly by the Court and the European Union Agency for Fundamental Rights (FRA) in 2011 – is now available. This translation was produced by the IRZ (Deutsche Stiftung fur internationale rechtliche Zusammenarbeit e.V.) and funded by the German Foreign Ministry from the German contribution to the Stability Pact for South-East Europe.

The 32 linguistic versions of the Handbook can be downloaded from the Court's Internet site (<www.echr.coe.int>– Publications).

Priručnik o Evropskom Antidiskriminacionom Pravu (srp)