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COUR EUROPÉENNE DES DROITS DE L'HOMME

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European Court of Human Rights
(Council of Europe)
67075 Strasbourg Cedex
France
Tel: 00 33 (0)3 88 41 20 18
Fax: 00 33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int

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ARTICLE 2

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Kotilainen and Others v. Finland - 62439/12
[Section I]

The applicants are relatives of the victims of a shooting in a school in Kauhajoki in September 2008, in which ten people were killed before the gunman, who held a firearms licence, killed himself. They allege, in particular, that the gunman, who had mental problems, should not have been granted a licence to carry a gun. Following the shooting, the public prosecutor, joined by the applicants, pressed charges against the police officer responsible for granting the firearms licence alleging negligent breach of duty and grossly negligent homicide. The trial court found that the licence had been issued in accordance with the legal requirements and that, although the police officer had become aware, a few days before the shooting, of material the gunman had published on the Internet, he had called him in for questioning the same day and, not finding any clear reason to withdraw the licence, had issued a verbal warning. That decision had been within the officer's margin of appreciation and there was no evidence of any negligence. On appeal, the appeal court found the officer guilty of negligent breach of his official duties as he should have temporarily confiscated the gun, but not guilty of grossly negligent homicide, as he had not had any concrete grounds to suspect that the perpetrator would commit the killings. It further found that no State liability for damage suffered by the applicants could be established on the basis of any acts or omissions of the police officer or of any other civil servants or State organs.

In their application to the European Court, the applicants complained in particular of the failure of the police to take measures to prevent the shooting.

Communicated under Article 2 of the Convention.

ARTICLE 3

Degrading treatment
Positive obligations (substantive aspect)

Unsubstantiated allegations that prisoner had contracted Hepatitis C in prison and not received proper medical care: *no violation*

Cătălin Eugen Micu v. Romania - 55104/13
Judgment 5.1.2016 [Section IV]

Facts – The applicant, who is in prison, alleged, *inter alia*, that he had contracted hepatitis C in prison and had received no adequate medical treatment for that condition.

Law – Article 3 (*substantive head*)

(a) *As regards the alleged contamination with the hepatitis C virus in prison* – The Court held that the propagation of transmissible diseases should be a major public health concern, particularly in prisons. Consequently, it stated that prisoners should have the benefit, with their consent and within a reasonable time after arriving in prison, of free tests for detecting the various types of hepatitis and HIV/AIDS. Had such a facility been available in the present case, it would have made it easier to assess the applicant's allegations in terms of ascertaining whether or not he had contracted the disease in prison. However, since the applicant had not been offered such tests, the Court had to consider the allegations that he had contracted hepatitis C in prison in the light of the evidence submitted by the applicant. The Court took the view that those allegations had not been supported by sufficient evidence. Furthermore, there were no pointers to the time or the manner of the applicant's contamination with hepatitis C. Therefore, even though the disease had been detected while the applicant was under the State's responsibility, the Court could not deduce from that fact that the pathology had been the result of a failure on the part of the State to honour its positive obligations.

(b) *As regards the medical care and treatment provided in prison for hepatitis C* – Having been diagnosed with hepatitis C, the applicant had been treated by a qualified doctor, who had decided, on the basis of four successive medical examinations carried out on the applicant while in hospital, that it was unnecessary to conduct any additional examinations, and had prescribed medical treatment to be administered when needed. However, the applicant had not consistently co-operated with the authorities as regards the administration of the

requisite medical treatment, refusing the medical examinations recommended by the medical staff.

As regards the medical treatment, the applicant was prescribed therapy to be administered "when needed", and he was provided with appropriate medication. Even though the supply of that medication had been somewhat delayed during one of his stays in hospital, the applicant had not been deprived of medicines for any lengthy period, and he did not submit to the Court that his state of health had deteriorated during that period because of the lack of treatment. The authorities had therefore fulfilled their obligation to provide the applicant with medical treatment suited to his condition.

Accordingly, there had been no violation of Article 3 of the Convention *vis-à-vis* the applicant, owing to contamination with hepatitis C or any shortcomings in his medical care in prison.

Conclusion: no violation (unanimously).

The Court also unanimously found a violation of the substantive head of Article 3 owing to the prison overcrowding suffered by the applicant in prison.

Article 41: 4,350 EUR in respect of non-pecuniary damage.

ARTICLE 4

Article 4 § 1

Positive obligations
Trafficking in human beings

Shortcomings in response to criminal complaint of human-trafficking: *violation*

L.E. v. Greece - 71545/12
Judgment 21.1.2016 [Section I]

Facts – The applicant, who is of Nigerian origin, arrived in Greece in 2004 with the help of K.A., in return for a debt pledge of EUR 40,000. Once on Greek territory, K.A. allegedly confiscated her passport and forced her to work as a prostitute. She was arrested on several occasions for prostitution and breach of the legislation on the entry and residence of aliens. In November 2006, while being held in detention pending expulsion, the applicant filed a complaint against K.A. and his spouse D.J. She was assisted in that step by the non-governmental organisation Nea Zoi, which provides practical and psychological support to women who have been forced into prostitution, with which she had been in contact for about two years. The director of Nea Zoi was questioned and corroborated the applicant's claims.

Law – Article 4

(a) *The legislation in force at the material time* – The relevant legislation provided the applicant with practical and effective protection.

(b) *ufficiency of the operational measures taken to protect the applicant* – The key date was that on which the applicant indicated to the police officers that she was a victim of human-trafficking. From that date, the police services had taken immediate action, entrusting the applicant to the specialised anti-trafficking department. In addition, the expulsion proceedings that were pending against her had been discontinued and she was issued with a residence permit allowing her to remain on Greek territory. Lastly, the applicant had been formally classified as a victim of human-trafficking.

However, that status was only granted about nine months after the applicant's complaint, in part because the statement given by the director of Nea Zoi was not included in the case file in good time, as a result of inadvertence on the part of the police authorities. That period could not be described as reasonable, especially as the authorities' omission could have had adverse consequences on the applicant's personal situation, since her release could have been delayed as a result. It followed that this delay in recognising the applicant as a victim of trafficking amounted to a substantial failing in terms of the operational measures that they could have taken to protect her.

(c) *Effectiveness of the police investigation and the judicial proceedings* – With regard to D.J.'s acquittal, in a 42-page judgment and after taking into consideration several witness statements from persons involved in the case, the assize court had concluded that it was not established that the defendant had forced the applicant into prostitution. The assize court could not be accused of issuing an arbitrary or insufficiently reasoned judgment entailing a breach of the procedural obligation under Article 4.

As to the adequacy of the police investigation, the police authorities had reacted promptly to the applicant's complaint and the initial investigation had been completed in due time. However, a number of aspects of the proceedings had been unsatisfactory.

Firstly, the applicant's complaint had initially been rejected by the prosecutor, who did not have available the witness statement by the director of the NGO Nea Zoi. In addition, the relevant judicial authorities had not resumed examination of the applicant's complaint of their own motion following the addition of that statement. It was the applicant who had revived the proceedings. Lastly, it was not until June 2007 that the prosecutor had ordered that criminal proceedings be brought. No explanation had been provided as to this period of inactivity, which had lasted for more than five months. Those acts or omissions had had the effect of prolonging the period between the disclosure of the disputed situation and criminal proceedings being brought against K.A. and D.J. Yet this period had been crucial for ensuring prompt progress in the proceedings. Secondly, a number of shortcomings in the preliminary inquiry and the investigation of the case had compromised their effectiveness. Thus, no measure had been ordered once it was realised that K.A. was not resident at the address under surveillance. Yet stepping up the search for K.A. would appear to have been crucial at that point, given that D.J., his presumed accomplice, had already been summoned for police questioning as part of the preliminary investigation. Thirdly, there had been considerable delays in both the preliminary inquiry and investigation of the case, for which no explanation had been provided.

Lastly, with particular reference to K.A., the main presumed perpetrator of the acts of trafficking against the applicant, the evidence did not indicate that the police had taken further tangible steps to find him and bring him before the courts, other than entering his name in the police criminal research database. Thus, for example, there was nothing in the case file to suggest that the Greek authorities had established contact or instigated cooperation with the Nigerian authorities for the purpose of arresting K.A.

In the light of the foregoing, there had been a lack of promptness in taking operational measures in the applicant's favour and shortcomings with regard to the Greek State's procedural obligations under Article 4 of the Convention.

Conclusion: violation (unanimously).

Article 41: EUR 12,000 in respect of non-pecuniary damage.

(See also the factsheet Slavery, servitude and forced labour)

Article 4 § 2

Forced labour
Compulsory labour

Conditions of employment of personal assistant caring for severely disabled relative: *inadmissible*

Radi and Gherghina v. Romania - 34655/14
Decision 5.1.2016 [Section IV]

Facts – The second applicant had been severely disabled since a road traffic accident in 2001. He was in the care of his aunt (the first applicant), who was a qualified nurse and had a contract of employment with the local authority under which she provided permanent care and assistance for the second applicant in return for a salary equal to the national minimum wage. In 2012 the first applicant filed a complaint against her employer before the County Court alleging in particular that she had not received various benefits to which she was entitled and could not take annual leave as she had to remain continuously at her nephew's disposal. The County Court dismissed her claims, finding that she had received all the benefits to which she was entitled under the legislation governing personal assistants (Law no. 448/2006) and compensation for the loss of her annual leave.

In the Convention proceedings, the first applicant argued that the personal-assistance scheme imposed a disproportionate burden – amounting to forced and compulsory labour in breach of Article 4 of the Convention – on the relatives of persons with disabilities acting as personal assistants.

Law – Article 4 § 2: The first applicant had accepted her work willingly, having voluntarily entered into a bilateral contract with the local authority. There was no indication of any sort of coercion either on the part of her nephew or the authorities. She was remunerated for her work. The fact that she was not satisfied with the salary level did not equate to a lack of remuneration and she had been able to take the matter to the courts. She had been free to denounce the contract at any given moment without any consequences for her. She risked no penalties or loss of rights or privileges. Her studies (she held a law degree) and professional qualifications (twenty-five years' experience as a nurse) opened up a wider range of opportunities for her on the employment market. Neither the uncertainty as to how she would in practice be able to find suitable work nor the manner in which the authorities

might find an alternative solution for her nephew's care altered her freedom to terminate the contract. Accordingly, she had not been required to perform compulsory work.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 5

Article 5 § 1 (e)

Persons of unsound mind

Preventive detention of mental-health patient in purpose-built centre offering appropriate medical care: *no violation*

Bergmann v. Germany - 23279/14
Judgment 7.1.2016 [Section V]

Facts – Following the European Court's judgments in *M. v. Germany* and various follow-up cases, the German Federal Constitutional Court held in a judgment of 4 May 2011 that provisions on the retrospective prolongation of preventive detention beyond the previous maximum ten-year term were incompatible with the German Basic Law. As a result, new legislation was introduced which entered into force on 1 June 2013. Transitional provisions set out in section 316f of the Introductory Act to the Criminal Code restricted the imposition or continuation of retrospective preventive detention to cases where the person concerned was suffering from a mental disorder and was highly likely to commit a serious crime of violence or sexual offence as a result. Article 66c of the Criminal Code changed the manner in which preventive detention was to be implemented, requiring personal treatment plans and suitable accommodation separate from detainees serving terms of imprisonment.

The applicant, who already had a lengthy list of previous convictions, was convicted in 1986 of attempted murder, attempted rape and dangerous assault. Finding on the basis of psychiatric evidence that his criminal responsibility was diminished, the trial court sentenced him to fifteen years' imprisonment and ordered his preventive detention in view of the high risk of his reoffending. The preventive detention began in 2001 in a prison wing and was subsequently renewed at regular intervals. In July 2013 (after the original maximum ten-year period of preventive detention had expired) the court responsible for the execution of sentences ordered its continuation pursuant to section 316f of the Introductory Act after finding, on the basis of fresh psychiatric reports, that the applicant was suffering from a "mental disorder" and that there remained a very high risk that he would commit serious sexually motivated violent offences if released. Since June 2013 the applicant has been detained in a purpose-built centre developed inside a prison in order to comply, in particular, with the newly enacted Article 66c of the Criminal Code.

In the Convention proceedings the applicant complained that the court order extending his preventive detention beyond the maximum period of ten years had breached his right to liberty (Article 5 § 1 of the Convention) and violated the prohibition on retrospective punishment (Article 7 § 1).

Law – Article 5 § 1

(a) *Detention "after conviction"* (Article 5 § 1 (a)) – The applicant's preventive detention beyond the statutory ten-year maximum was no longer detention "after conviction" by a competent court as there was no sufficient causal connection between his conviction in 1986 and his continued deprivation of liberty. It could not, therefore, be justified under sub-paragraph (a) of Article 5 § 1.

(b) *"Persons of unsound mind"* (Article 5 § 1 (e)) – The Court reiterated that an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions (the *Winterwerp* criteria) are satisfied: (i) he must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; (ii) the mental disorder must be of a kind or degree that warrants compulsory confinement; and (iii) the validity of continued confinement depends upon the persistence of such a disorder. In addition, the detention of a person as a mental-health patient will, in principle, only be "lawful" for the purposes of sub-paragraph (e) of Article 5 § 1 if effected in a hospital, clinic or other appropriate institution.

The Court was satisfied that the domestic courts were competent authorities and had established, on the basis of a recent objective psychiatric report, that the applicant had a mental disorder as defined by the applicable domestic law. His condition necessitated both treatment with medication under medical supervision and therapy and the trial court had considered it sufficiently serious (when combined with the consumption of alcohol) to diminish the applicant's criminal responsibility. The

Court therefore considered that the applicant was suffering from a "true mental disorder" for the purposes of Article 5 § 1 (e). The Court was further satisfied that the disorder was of a kind or degree that warranted compulsory confinement in view of the very high risk that he would commit serious sexually motivated violent offences if released. As to the persistence of the mental disorder, the Court noted that under the relevant legislation the applicant's continued preventive detention could be ordered only if, and for so long as, there was a high risk that, if released, he would reoffend as a result of that disorder. The applicant was thus a person "of unsound mind" for the purposes of Article 5 § 1 (e). The question whether he also fell within the category of "alcoholics" for the purposes of that provision was left open.

The Court was also satisfied that the applicant was detained in an institution suitable for mental-health patients. He was held in a newly constructed preventive-detention centre that had been built pursuant to the new federal rules requiring preventive detention to be executed in institutions that offered detainees individual and intensive care. The staff included a psychiatrist, psychologists and social workers. The applicant had received regular and repeated offers of appropriate treatment and had access to activities such as group therapy and motivation meetings. Overall, there had been a substantial change in the medical and therapeutic care offered to him following his transfer to the preventive-detention centre. His position thus differed to that of the applicants in cases such as *Glien v. Germany* who were detained in separate prison wings without suitable facilities for mental-health patients.

Lastly, the Court was satisfied that the detention was in compliance with the substantive and procedural rules of domestic law and was not arbitrary.

Conclusion: no violation (unanimously).

Article 7: The Court accepted that the applicant's preventive detention had been extended with retrospective effect under a law enacted after the applicant had committed his offences. It went on to consider whether the preventive detention constituted a penalty for the purposes of that provision.

In that connection it reiterated that the concept of "penalty" in Article 7 was autonomous in scope, that the starting-point – and thus a very weighty factor – in any assessment of the existence of a penalty was whether the measure in question was imposed following conviction for a criminal offence and that other relevant factors were the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity.

The Court found that the more preventive nature and purpose of the revised form of preventive detention did not suffice to eclipse the fact that the measure, which entailed a deprivation of liberty without a maximum duration, had been imposed following conviction for a criminal offence and was still determined by courts belonging to the criminal justice system. However, in cases such as the applicant's, where preventive detention was extended because of and with a view to the need to treat his mental disorder, both the nature and the purpose of the preventive detention substantially changed and the punitive element and its connection with the criminal conviction were eclipsed to such an extent that the measure should no longer be classified as a penalty within the meaning of Article 7 § 1. There had been a substantial change in the nature of the applicant's preventive detention after his transfer to the centre with the focus now being on the applicant's medical and therapeutic treatment, while the preventive purpose pursued by the amended preventive detention legislation – which now required evidence of a mental disorder before preventive detention could be prolonged – attained decisive weight.

Conclusion: no violation (unanimously).

(See, in particular, *Winterwerp v. the Netherlands*, 6301/73, 24 October 1979; *M. v. Germany*, 19359/04, 17 December 2009, Information Note 125. and *Glien v. Germany*, 7345/12, 28 November 2013, Information Note 168)

ARTICLE 6

Article 6 § 1 (civil)

Civil rights and obligations
Fair hearing

Unfairness of lustration proceedings against Constitutional Court president owing to remarks made by Prime Minister while proceedings were pending: *violation*

Ivanovski v. the former Yugoslav Republic of Macedonia - 29908/11
Judgment 21.1.2016 [Section I]

(See Article 8 below, page 19

Independent and impartial tribunal

Impartiality and independence of members of State Judicial Council in professional misconduct proceedings against a judge: *violation*

Gerovska Popčevska v. the former Yugoslav Republic of Macedonia - 48783/07
Judgment 7.1.2016 [Section I]

Facts – In 2007 the applicant was removed from office as a judge for professional misconduct. The State Judicial Council ("the SJC"), whose intervention had been prompted by a request of the State Anti-Corruption Commission, found that she had wrongly applied the law in a case which she had decided without following the established order of priority. In her application to the European Court she complained that the SJC had not been "an independent and impartial" tribunal in line with Article 6 § 1 of the Convention because two of its members, Judge D.I. and the then Minister of Justice, had participated in the preliminary stages of the proceedings against her and had therefore had a preconceived idea about her dismissal. Moreover, the Minister's participation in the SJC's decision constituted interference by the executive in judicial affairs.

Law – Article 6 § 1: In its decision to remove the applicant from office, the SJC relied on two opinions of the Supreme Court finding that there were grounds for establishing professional misconduct. It was not contested that Judge D.I., a member of the plenary of the SJC that decided the applicant's case, had also been a member of the division and plenary of the Supreme Court that had adopted the two opinions. It further appeared that Judge D.I. had voted in favour of the plenary's opinion although he must have been aware that it would be used in the pending SJC proceedings against the applicant. In such circumstances, the applicant had legitimate grounds for fearing that Judge D.I. was already personally convinced that she should be dismissed for professional misconduct before that issue came before the SJC. His participation in the professional misconduct proceedings before the SJC was thus incompatible with the requirement of impartiality under Article 6 § 1 of the Convention.

The same applied to the participation of the then Minister of Justice in the SJC's decision to remove the applicant from office, since he had previously requested, in his former capacity as President of the State Anti-Corruption Commission, that the SJC review the case adjudicated by her. Moreover, his presence on that body as a member of the executive had impaired its independence in this particular case.

Accordingly, the applicant's case had not been decided by "an independent and impartial" tribunal as required by Article 6 § 1 of the Convention.

Conclusion: violation (unanimously).

Article 41: EUR 4,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed. The most appropriate form of redress would be the reopening of the proceedings, if requested.

(See also *Mitrinovski v. the former Yugoslav Republic of Macedonia*, 6899/12, 30 April 2015, Information Note 184; and *Jakšovski and Trifunovski v. the former Yugoslav Republic of Macedonia*, 56381/09 and 58738/09, 7 January 2016, Information Note 192)

Impartial tribunal

Impartiality of State Judicial Council in professional misconduct proceedings against judges: *violation*

Jakšovski and Trifunovski v. the former Yugoslav Republic of Macedonia - 56381/09 and 58738/09
Judgment 7.1.2016 [Section I]

Facts – In 2008 and 2009 respectively the applicants were removed from office as judges for professional misconduct. In their application to the European Court they complained that, in violation of Article 6 of the Convention, their cases had not been considered by an "independent and impartial tribunal" as two members of the State Judicial Council ("the SJC") who decided on their dismissal had previously carried out the preliminary inquiries and initiated the impugned proceedings.

Law – Article 6 § 1: Pursuant to the relevant domestic law, two members of the SJC (V.V. in the first applicant's case and R.P. in the second applicant's) had requested the SJC to establish whether there had been professional misconduct on the part of the applicants. In the first applicant's case, V.V. had also conducted a preliminary inquiry to gather relevant information and evidence and had filed his request despite the fact that the lawyer who had prompted the initial intervention had subsequently withdrawn his allegation.

The next stage in the proceedings was then conducted by an internal body of the SJC, which had considered relevant evidence and heard arguments by the applicants and V.V. and R.P. respectively. Having regard to the relevant domestic law, the Court could not but conclude that V.V. and R.P. had acted as "prosecutors" in respect of the applicants in this preliminary phase.

Despite their role in the first stage of the proceedings, V.V. and R.P. had then taken part in the SJC's decisions to remove the applicants from office. In the Court's view, this cast objective doubt on their impartiality when deciding the merits of the applicants' cases, which in turn prompted objectively justified doubts as to the impartiality of the SJC as a whole.

Conclusion: violation (unanimously).

Article 41: EUR 4,000 each in respect of non-pecuniary damage; claims in respect of pecuniary damage dismissed. The most appropriate form of redress would be the reopening of the proceedings, if requested.

(See also *Mitrinovski v. the former Yugoslav Republic of Macedonia*, 6899/12, 30 April 2015, Information Note 184; and *Gerovska Popčevska v. the former Yugoslav Republic of Macedonia*, 48783/07, 7 January 2016, Information Note 192)

Article 6 § 1 (criminal)

Access to court

Rejection by Supreme Court of request for revision of criminal judgment following judgment of European Court finding violation of Article 6 of the Convention: *relinquishment in favour of the Grand Chamber*

Moreira Ferreira v. Portugal (no. 2) - 19867/12
[Section I]

The case concerns a Portuguese Supreme Court judgment in March 2012 rejecting a request by the applicant for the reopening of criminal proceedings following the European Court's finding of a violation of Article 6 of the Convention in *Moreira Ferreira v. Portugal* (19808/08, 5 July 2011).

The Supreme Court found that the European Court's judgment was not irreconcilable with the judgment convicting the applicant and did not raise serious doubts as to the merits of the conviction, as required by Article 449 § 1 (g) of the Portuguese Code of Criminal Procedure for a reopening of proceedings.

The applicant argues that the Supreme Court wrongly interpreted the European Court's judgment, in breach of Articles 6 § 1 and 46 § 1 of the Convention.

This case was communicated to the Government under Article 6 § 1 and Article 46 § 1 of the Convention. On 12 January 2016 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber.

Article 6 § 1 (constitutional)

Fair hearing

Conflicting Constitutional judgments concerning the Court's *Salduz* case-law: *no violation*

Borg v. Malta - 37537/13
Judgment 12.1.2016 [Section IV]

(See Article 6 § 3 (c) below)

Article 6 § 3 (c)

Defence through legal assistance

Domestic law not providing for legal assistance during pre-trial investigations: *violation*

Borg v. Malta - 37537/13
Judgment 12.1.2016 [Section IV]

Facts – Before 2010 Maltese law did not provide for legal assistance during pre-trial investigations and questioning. However, before being questioned suspects had to be informed of their right to remain silent and that anything they said could be used in evidence against them. No inferences could be drawn by the trial courts from the silence of the accused at that stage.

In 2003 the applicant was arrested on suspicion of importing and trafficking drugs. During questioning in the absence of a lawyer and after being cautioned about his right to remain silent, he gave a statement to the police, which he refused to sign. In the subsequent criminal proceedings the statement was used in evidence against him. In 2008 he was found guilty as charged and sentenced to

twenty-one years' imprisonment. In 2013 the Constitutional Court dismissed the applicant's appeal. In the meantime, the applicant also filed a constitutional redress complaint claiming that, in violation of Article 6 § 3 read in conjunction with Article 6 § 1 of the Convention, his fair-trial rights had been violated as he had not had legal assistance during the pre-trial investigation, contrary to the Grand Chamber's findings in *Salduz v. Turkey* (36391/02, 27 November 2008, Information Note 113), and that he had suffered a violation of Article 6 § 1 as a result of conflicting constitutional judgments concerning the application of the *Salduz* case-law. This claim was also rejected.

Law – Article 6 § 3 (c) in conjunction with Article 6 § 1: The Court had already found a number of violations of the provisions at issue in different jurisdictions arising from the fact that domestic law did not provide for legal assistance while in police custody. In the present case, no reliance could be placed on the assertion that the applicant had been reminded of his right to remain silent; indeed, it was not disputed that he had not waived the right to be assisted by a lawyer at that stage of the proceedings, a right which was not available in the domestic law. It followed that the applicant had been denied the right to legal assistance at the pre-trial stage as a result of a systemic restriction applicable to all accused persons. This state of affairs fell short of the requirements of Article 6, in particular that the right to the assistance of a lawyer at the initial stages of police interrogation should only be subject to restrictions if there were compelling reasons.

Conclusion: violation (unanimously).

Article 6 § 1: The difference among the domestic constitutional judgments concerning the *Salduz* case-law resided not in the factual situations examined by the domestic courts but in the application of the law based on the case-law of the Court. In this connection, the Court noted that, while the Maltese Constitutional Court had originally followed the *Salduz* judgment strictly, from 2012 onwards it had "restricted" its interpretation of that judgment, with the consequence that a number of persons who were subject to the systemic ban in Malta, and who therefore were not assisted by a lawyer when they made their statements, did not have the benefit of favourable judgments remedying their situation. This interpretation appeared to have remained the practice thereafter.

The applicant's case did not therefore concern divergent approaches by the Constitutional Court which could create jurisprudential uncertainty, depriving him of the benefits arising from the law. On the contrary, it constituted a reversal of case-law which, in the absence of arbitrariness, fell within the discretionary powers of the domestic courts, notably in countries which had a system of written law and which were not bound by precedent. Therefore, no issue arose in respect of Article 6 § 1 as regards the notion of legal certainty.

Conclusion: no violation (six votes to one).

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

(See also the Factsheet on Police arrest and assistance of a lawyer)

ARTICLE 7

Article 7 § 1

Heavier penalty

Retrospective extension of preventive detention intended to secure medical and therapeutic treatment: *no violation*

Bergmann v. Germany - 23279/14
Judgment 7.1.2016 [Section V]

(See Article 5 § 1 (e) above, page 12)

Retroactivity

Failure to apply new reduced penalty retrospectively: *violation*

Gouarré Patte v. Andorra - 33427/10
Judgment 12.1.2016 [Section III]

Facts – In 1999 the applicant was sentenced to a prison term for sexual offences committed while carrying out his duties as a doctor. An ancillary penalty, namely a lifetime ban on practicing medicine, was also imposed. As a result of the combination of a pardon and other forms of remission, the applicant did not serve the prison sentence. However, the ban on exercising his profession was not affected by the pardon. Subsequently, the new Criminal Code, adopted in 2005, specified that the duration of ancillary penalties could not exceed that of the main sentence. A transitional provision of this new Criminal Code gave persons who had been sentenced in a final judgment to a prison or custodial sentence the possibility of lodging an

application for revision, if their sentence was being served at the time of the entry into force of the new Criminal Code. An application by the applicant for revision of his sentence, and his subsequent appeals, were dismissed on the ground that he did not satisfy the conditions laid down by the transitional provision.

Before the European Court, the applicant complained that the more lenient criminal law had not been applied retrospectively. He considered that the length of the ban on exercising his profession ought to have been reduced.

Law – Article 7: In line with the two Criminal Codes concerned and the assessment of the domestic courts, it was appropriate to classify the prohibition on practicing as a doctor as a punishment within the meaning of Article 7, moreover an ancillary one. In addition, although the 1990 Criminal Code applied in the applicant's case imposed a lifetime ban on practising his profession, the 2005 reform established that the duration of ancillary penalties could not exceed that of the most severe main penalty. This sufficed to show that the amendment to the Criminal Code was the most favourable criminal law for the applicant.

However, the applicant's conviction had become final prior to the entry into force of the new Criminal Code and the new text expressly recognised the principle of the retrospective application of the more favourable criminal law. The new Criminal Code specifically imposed an obligation on courts which had delivered verdicts convicting and sentencing defendants to revise them of their own motion where a subsequent law reduced the penalty or security measure laid down for an offence, even in the event of a final judgment. No valid reason could be discerned for excluding the applicant from the benefit of the provision. This specific feature of the Andorran domestic law gave the present case a particular character. Where a State expressly provided in its legislation for the principle of the retrospective application of the more favourable criminal law, it had to enable the persons appearing before its courts to exercise this right in accordance with the Convention's safeguards. In the present case, the Andorran courts had continued to apply the more severe penalty, imposed previously, although the legislature had not only laid down a more lenient penalty but had also specifically provided for its retrospective application. Thus, by maintaining the application of a penalty which went beyond the provisions of the criminal legislation in force, the Andorran courts, in violation of the principle of the rule of law, had breached the applicant's right to the penalty provided by law.

Conclusion: violation (five votes to two).

The Court also held, by five votes to two, that there had been a violation of Article 13 taken together with Article 7 of the Convention, on account of the absence of an effective remedy.

Article 41: EUR 12,000 in respect of non-pecuniary damage; no award in respect of pecuniary damage.

(See also *Scoppola v. Italy (no. 2)* [GC], 10249/03, 17 September 2009, Information Note 122)

ARTICLE 8

Respect for private and family life

Change of recognised paternity at request and in favour of biological father without child's consent: *no violation*

Mandet v. France - 30955/12
Judgment 14.1.2016 [Section V]

Facts – The first two applicants married for the first time in 1986. Three children were born to them. In 1995 they filed jointly for divorce. The divorce was granted on 17 June 1996. The first applicant gave birth to a fourth child (the third applicant) in August 1996. The child was registered under his mother's name. In September 1997 the second applicant recognised the third applicant. The first two applicants married each other again in October 2003 thereby legitimising the third applicant.

In February 2005 Mr G. applied to a court, challenging the recognition of paternity in respect of the third applicant, who was then aged eight, and seeking to have his own paternity outside marriage recognised. By a judgment of 10 February 2006, the court held that as the third applicant was born more than 300 days after the decision authorising the first two applicants to live separately, the legal presumption that the second applicant was the father ought to be dismissed. It further noted that it was not contested that, at the time of the child's conception, Mr G. had been in a sexual relationship with the first applicant and that numerous witness statements, supported by a social services report, confirmed that they had lived together as a couple, and that the third applicant had been considered their common child. The court concluded that the child had not had continuous status as the first two applicants' legitimate

child, and that his paramount interest lay in knowing the truth about his origins. In consequence, the court declared Mr G.'s action admissible and ordered genetic testing. An *ad hoc* guardian was appointed to represent the third applicant's interests. The latter, who was in Dubai, never met her, and it proved impossible to carry out the genetic tests on him. The court set aside the recognition of paternity and subsequent legitimation of the third applicant, held that he was to resume use of his mother's surname and that Mr G. was his father; it also ordered that this was to be entered on the birth certificate and that parental authority was to be exercised by the mother alone, and organised contact and residence rights for Mr G. The third applicant was aged about fifteen at the close of the proceedings.

Law – Article 8: By setting aside the legal parent-child relationship between the third and second applicants, the domestic courts had, from a legal viewpoint, changed an important element of the family structure within which the former had developed for several years, replacing it with another legal father-child relationship. Consequently, Article 8 was applicable and the impugned measure amounted to an interference with the third applicant's right to family life, and also to respect for his private life. That interference had been in accordance with the law and had the aim of protecting the rights of Mr G., who, as the claimant before the domestic courts, wished to be recognised as the third applicant's father. Approached from this standpoint, the impugned interference had been aimed at protecting "the rights and freedoms of others", the "other" being Mr G.

As to the domestic courts' findings with regard to the parent-child relationship between the third applicant and Mr G., this was not based on the first applicants' opposition to genetic tests, but on the establishment of the legal period of conception and an assessment of the elements submitted by the parties in adversarial proceedings. In addition, the court had appointed an *ad hoc* guardian to represent the third applicant's interests. Moreover, the Court of Cassation had examined the question of the child's right to be heard in the proceedings and had held that this right had been respected. It had noted in this regard that the third applicant had been informed of the proceedings and knew that his paternity was being challenged, and that he had sent letters from Dubai to the courts examining the case, in which he expressed his wish not to change his surname and to retain his legal parent-child relationship with the second applicant, without however directly asking to be heard. It followed that the domestic courts could not be considered to have failed to do what could be expected of them in order to involve the third applicant in the decision-making process.

In addition, the reasoning in the domestic courts' decisions showed that the child's best interests had been duly placed at the heart of their considerations. Without criticising the first two applicants' wish to preserve the family as it was constituted after their remarriage, they had held that although the third applicant considered the second applicant to be his father and had forged a very strong emotional bond with him, his interests lay primarily in knowing the truth about his origins. Thus, the courts had not failed to attach decisive importance to the child's best interests, but had held, in substance, that those interests did not lie where he perceived them – in maintaining the established parent-child relationship and preserving emotional stability – but rather in ascertaining his real paternity. In other words, their decision did not amount to unduly favouring Mr G.'s interests over those of the third applicant, but in holding that the two sets of interests partly overlapped.

Admittedly, the domestic proceedings and the decisions concerning the third applicant's legal parent-child relationship and surname, and the contact and residence rights granted to Mr G., were such as to cause confusion in the third applicant's private and family life, especially as they occurred during his childhood and adolescence. However, the domestic courts had entrusted the exercise of parental responsibility to the first applicant, and their decisions did not prevent the third applicant from continuing to live on a daily basis within the family unit centred around the first two applicants, in line with his wishes. In effect, he had continued living within that family until he reached adulthood.

The Court fully appreciated the impact of the impugned interference on the third applicant's private and family life. However, in holding that the child's best interests lay less in preserving the parent-child relationship created by the second applicant's recognition of paternity than in establishing his real parental filiation – in which his interests partly overlapped with those of Mr G. –, the domestic courts had not exceeded the margin of appreciation afforded to them.

Conclusion: no violation (six votes to one).

(See also the Factsheets Parental rights and Children's rights)

Respect for private life

Constitutional Court president's removal from public office as a result of lustration proceedings: *violation*

Ivanovski v. the former Yugoslav Republic of Macedonia - 29908/11
Judgment 21.1.2016 [Section I]

Facts – In 2009 the applicant – who was then the President of the Constitutional Court – submitted a declaration of non-collaboration with the security services to the Lustration Commission, pursuant to the Lustration Act 2008, which made collaboration with the State security services between 1944 and 2008 an impediment to holding public office. On 29 September 2010 the Lustration Commission found on the basis of materials obtained from the State Archives that the applicant did not fulfil the requirement for holding public office under the Lustration Act as there was evidence that he had collaborated after being interrogated by the secret police in 1964 in connection with his involvement in a high-school nationalist group. He had been deregistered in 1983.

Both before and during the lustration proceedings against the applicant there was a fierce public debate between Government politicians and the Constitutional Court, in which the politicians severely criticised the Constitutional Court's decisions to review, suspend and then invalidate certain provisions of the Lustration Act. In particular, on 24 September 2010, while the lustration proceedings were still pending, the Prime Minister published an open letter in which he stated that the Lustration Commission had revealed that a member of the Constitutional Court had collaborated with the security services and been behind that court's decisions to invalidate a number of the Government's legislative reforms.

The applicant sought judicial review of the Lustration Commission's decision of 29 September 2010, but his application was dismissed by the Administrative Court and his appeal to the Supreme Court was rejected. He was removed from office in April 2011 and disqualified from holding public office for a period of five years.

In the Convention proceedings, the applicant complained under Article 6 § 1 of the Convention that he had been denied access to court and that the lustration proceedings had been unfair, and under Article 8 of a violation of his right to respect for his private life.

Law – Article 6 § 1

(a) *Access to court* – In reviewing the decision of the Lustration Commission the Administrative Court and the Supreme Court had exercised full jurisdiction over the facts and law in addressing the substance of the applicant's case. A hearing had been held before the Administrative Court to which an expert assistant had been invited at the applicant's suggestion. The applicant had accordingly had had access to court.

Conclusion: no violation (unanimously).

(b) *Fairness of the proceedings* – As regards the alleged overall unfairness of the proceedings, the Court attached particular importance to the open letter, published while the lustration proceedings were pending, in which the Prime Minister had used the initial findings of the Lustration Commission to denounce the applicant as a collaborator of the secret police of the former regime. The Court saw no reason to speculate on what effect the Prime Minister's statement might have had on the course of the proceedings. It was sufficient to note that they had ended in the applicant's disfavour and that, in view of its content and the manner in which it was made, the statement was *ipso facto* incompatible with the notion of an "independent and impartial tribunal", it being understood that what was at stake was not actual proof of influence or pressure on judges but the importance of the appearance of impartiality.

The Court's finding was further reinforced by the opinion expressed in the European Commission's Progress Report on "the former Yugoslav Republic of Macedonia" of 9 November 2010 that the lustration proceedings in the applicant's case "raised concerns about pressure on the independence of the judiciary".

Those considerations were sufficient to conclude that the proceedings, taken as a whole, had not satisfied the requirements of a fair hearing.

Conclusion: violation (unanimously).

Article 8: The decision of the Lustration Commission had constituted interference with the applicant's right to respect for his private life. It was based on the relevant provisions of the Lustration Act and was thus "in accordance with the law" and the Court was ready to accept that it pursued the legitimate aim of protecting national security.

As to whether the interference was justified, the Court noted that, having regard to the relevant European standards,[1] it should in some manner be a qualifying condition for the imposition of a lustration measure that the person being lustrated was not acting under compulsion when he/she collaborated with the secret police. That was an essential factor in the exercise of balancing the interests of national security against the protection of the affected individual's rights. However, under the applicable domestic law, the authorities, including the courts, had not been called on to address that issue. As a result, the applicant's arguments that he had not consented to the collaboration had been dismissed as irrelevant. It followed that the domestic authorities' analysis in the applicant's case was not, and could not be, sufficiently thorough to satisfy the test of "necessity in a democratic society".

In any event, the interference with the applicant's rights under Article 8 had been disproportionate. He had not only been removed from office, he had also been banned from taking any employment in the public service or academia for a period of five years, while the opportunities for him finding a job as a private-sector lawyer that would correspond to his professional qualifications and experience had been reduced to an extent which made practising his profession nigh impossible. Furthermore, the Lustration Act was enacted some sixteen years after the respondent State adopted its democratic Constitution and any threat which persons being lustrated could initially have posed to the newly created democracy must have considerably decreased with the passage of time.

For the same reason, the Court could not overlook the fact that the applicant's recruitment process with the former secret police had commenced while he was still a minor. While it was true that the findings of the domestic authorities suggested that he had continued to collaborate as an adult, his contact with the secret police had ceased at the latest in 1983, some twenty-seven years before the lustration proceedings were instituted. The Court was not convinced that after such a lapse of time he posed such a threat, if any, to a democratic society as to justify wide-ranging restrictions on his professional activities for a period of five years and the related stigma of a collaborator which he would continue to carry even longer.

Conclusion: violation (unanimously).

Article 41: EUR 4,500 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Sidabras and Džiautas v. Lithuania*, 55480/00 and 59330/00, 27 July 2004, Information Note 67; *Matyjek v. Poland*, 38184/03, 24 April 2007, Information Note 96; *Žičkus v. Lithuania*, 26652/02, 7 April 2009; and *Sõro v. Estonia*, 22588/08, 3 September 2015, Information Note 188)

Respect for private life
Respect for home
Respect for correspondence

Absence of sufficient guarantees against abuse in legislation on secret surveillance: *violation*

Szabó and Vissy v. Hungary - 37138/14
Judgment 12.1.2016 [Section IV]

Facts – In 2011 an Anti-Terrorism Task Force ("the TEK") was established as a branch of the Hungarian police. Its competence was defined in section 7/E of the Police Act, as amended in 2011, and the National Security Act. In their application to the European Court, the applicants complained that the legislation, and in particular "section 7/E (3) surveillance" of the Police Act, violated Article 8 of the Convention because it was not sufficiently detailed and precise and did not provide sufficient guarantees against abuse and arbitrariness.

Law – Article 8: Under the legislation, two situations could entail secret surveillance by the TEK: the prevention, tracking and repelling of terrorist acts in Hungary and the gathering of intelligence necessary for rescuing Hungarian citizens in distress abroad. The TEK was entitled to search and keep under surveillance homes secretly, to check post and parcels, to monitor electronic communications and computer data transmissions and to make recordings of any data acquired through these methods. The Court found that these measures constituted interference by a public authority with the exercise of the applicants' right to respect for their private life, home and correspondence.

In the context of secret surveillance measures, the foreseeability requirement did not compel States to list in detail all situations that could prompt a

1. See point l. of the Council of Europe 'Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law' referred to in the Parliamentary Assembly of the Council of Europe adopted Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems.

decision to launch secret surveillance operations. However, in matters affecting fundamental rights legislation granting discretion to the executive in the sphere of national security had to indicate the scope of such discretion and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference. Under the Hungarian legislation authorisation for interception could be given in respect not only of named persons, but also of a "range of persons", a notion that was overly broad and could pave the way for the unlimited surveillance of a large number of citizens. The legislation did not clarify how that notion was to be applied in practice and the authorities were not required to demonstrate the actual or presumed relation between the persons or range of persons concerned and the prevention of any terrorist threat. In the Court's view, it would defy the purpose of government efforts to keep terrorism at bay, and thus restore citizens' trust in their abilities to maintain public security, if the terrorist threat were paradoxically replaced by a perceived threat of unfettered executive power intruding into citizens' private spheres by virtue of uncontrolled yet far-reaching surveillance techniques. In the present case, it could not be ruled out that the domestic provisions could be interpreted to enable strategic, large-scale interception. That was a matter of serious concern.

In the context of secret surveillance, the need for the interference to be "necessary in a democratic society" had to be interpreted as requiring that any measures taken should be strictly necessary both, as a general consideration, to safeguard democratic institutions and, as a particular consideration, to obtain essential intelligence in an individual operation. Any measure of secret surveillance which did not fulfil the strict necessity criterion would be prone to abuse by the authorities. In this connection, the Court noted the absence from the legislation of safeguards such as a requirement for prior judicial authorisation of interceptions or of clear provisions governing the frequency of renewals of surveillance warrants. Although surveillance measures were subject to prior authorisation by the Minister of Justice, such supervision was eminently political and inherently incapable of ensuring the requisite assessment of strict necessity. For the Court, supervision by a politically responsible member of the executive did not provide the necessary guarantees.

The Court accepted that situations of extreme urgency could arise in which a requirement for prior judicial control would run the risk of losing precious time. It emphasised, however, that in such cases any surveillance measures authorised *ex ante* by a non-judicial authority had to be subject to a *post factum* judicial review. The Court noted that under the Hungarian system the executive was required to give account in general terms of such operations to a parliamentary committee. However, it was not persuaded that this reporting procedure, which did not appear to be public, was able to provide redress in respect of any individual grievances caused by secret surveillance or to control effectively the daily functioning of the surveillance organs. Moreover, the domestic law did not provide a judicial-control mechanism that could be triggered by those subject to secret surveillance, as the complaint procedure did not foresee any kind of subsequent notification of the surveillance measures to the citizens subjected to them. Furthermore, complaints were to be investigated by the Minister of Home Affairs, who did not appear to be sufficiently independent.

It followed from the above considerations that the legislation did not provide sufficiently precise, effective and comprehensive safeguards on the ordering, execution and potential redressing of surveillance measures.

Conclusion: violation (unanimously).

The Court found no violation of Article 13 of the Convention taken together with Article 8 since Article 13 was not to be interpreted as requiring a remedy against the state of domestic law.

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

(See also the Factsheets on Personal data protection and New technologies)

Respect for private life
Respect for correspondence
Positive obligations

Monitoring of an employee's use of the Internet at his place of work and use of data collected to justify his dismissal: *no violation*

Bărbulescu v. Romania - 61496/08
Judgment 12.1.2016 [Section IV]

Facts – The applicant was dismissed by his employer, a private company, for using the company's Internet during working hours in breach of internal regulations prohibiting the use of company computers for personal purposes. The employer had, over a period of time, monitored the applicant's com-

munications on a Yahoo Messenger account the applicant had been requested to open for the purpose of responding to clients' enquiries. The records produced during the domestic proceedings showed that he had exchanged messages of a purely private nature with third parties.

In the Convention proceedings, as before the domestic courts, the applicant complained that the termination of his contract had resulted from a breach of his right to respect for his private life and correspondence and that the domestic courts had failed to protect that right.

Law – Article 8: Given, in particular, that the content of the applicant's communications on Yahoo Messenger had been accessed and the transcript of the communications had been used in the proceedings before the labour courts, the Court was satisfied that the applicant's "private life" and "correspondence" within the meaning of Article 8 § 1 were concerned by the measures. Article 8 § 1 was therefore applicable.

The applicant's complaint had to be examined from the standpoint of the State's positive obligations since he was employed by a private company, which could not by its actions engage State responsibility under the Convention. The Court had to examine whether the State, in the context of its positive obligations, had struck a fair balance between the applicant's right to respect for his private life and correspondence and his employer's interests.

The Court noted that the applicant had been able to raise his arguments before the domestic courts, which had duly examined them and found the disciplinary breach established as the applicant had used Yahoo Messenger on the company's computer during working hours in breach of company rules. The domestic courts had attached particular importance to the fact that the employer had accessed the applicant's Yahoo Messenger account in the belief that it contained professional messages. They had not attached particular weight to the actual content of the applicant's communications, but had relied on the transcript only to the extent that it proved the applicant had used the company's computer for personal purposes during working hours. There was no mention in their decisions of particular circumstances the applicant had communicated or the identity of the parties with whom he had communicated. The content of the communications was thus not a decisive element in the domestic courts' findings.

The Court further observed that although it had not been claimed that the applicant had caused actual damage to his employer, it was not unreasonable for an employer to want to verify that employees were completing their professional tasks during working hours. The employer's monitoring had been limited in scope and proportionate as, apart from the communications on the Yahoo Messenger account, no data and documents stored on the applicant's computer were examined. Lastly, the applicant had not convincingly explained why he had used the account for personal purposes.

In sum, there was nothing to indicate that the domestic authorities had failed to strike a fair balance, within their margin of appreciation, between the applicant's right to respect for his private life under Article 8 and his employer's interests.

Conclusion: no violation (six votes to one).

(See also *Halford v. the United Kingdom* [GC], 20605/92, 25 June 1997; and *Copland v. the United Kingdom*, 62617/00, 3 April 2007, Information Note 96)

ARTICLE 9

Manifest religion or belief

Refusal to grant applicant leave from house arrest to attend Mass: *no violation*

Süveges v. Hungary - 50255/12
Judgment 5.1.2016 [Section IV]

Facts – The applicant, who had previously been in custody awaiting trial, was placed under house arrest. In the proceedings before the Court, he alleged, among other things, that the restrictions accompanying his house arrest prevented him from attending Sunday Mass and thus infringed his right under Article 9 of the Convention to manifest his religion.

Law – Article 9: By denying the applicant leave from house arrest to attend Mass, the authorities had interfered with his rights under Article 9. The measure was prescribed by law and aimed to ensure his presence throughout the criminal proceedings. It thus pursued a legitimate aim, namely, the protection of public order. A restriction on attending religious ceremonies, including Mass, was a direct consequence of the fact that a less coercive form of deprivation of liberty had been imposed

on the applicant. Had he remained in pre-trial detention, rather than being placed under house arrest, he would in all likelihood have been able to take advantage of religious services at his place of detention.

The applicant's request for leave from house arrest was formulated in general terms concerning lengthy periods every Sunday and did not specify the place or the church he intended to attend. That consideration appeared to have been decisive in leading the domestic courts to conclude that the applicant's request was contrary to the aims of the house arrest. The Court was satisfied that the interference with the applicant's confessional rights had not been such as to impair the very essence of his rights under Article 9. Having regard to the margin of appreciation afforded to the respondent State in that field, the restriction on the applicant's religious conduct had been proportionate to the legitimate aim pursued by his house arrest.

Conclusion: no violation (six votes to one).

The Court also found unanimously a violation of Article 5 § 3 on account of the length of the applicant's pre-trial detention and a violation of Article 6 § 1 on account of the excessive length of the criminal proceedings. It found unanimously no violation of Article 5 § 4 in respect of the alleged breach of the applicant's procedural rights and, by six votes to one, no violation of Article 8 on account of the restrictions on the number of the applicant's visits to his family members.

Article 41: EUR 2,000 in respect of non-pecuniary damage.

ARTICLE 10

Freedom of expression

Search and seizure operation conducted to identify journalistic source: *violation*

Görmüş and Others v. Turkey - 49085/07
Judgment 19.1.2016 [Section II]

Facts – In April 2007 the weekly magazine for which the six applicants worked published an article based on documents classified as "confidential" by the general staff of the armed forces, which revealed, *inter alia*, a system for assessing press editors and journalists introduced by the general staff with a view to excluding journalists assumed to be "hostile" to the armed forces from certain invitations and activities. Following a request for an investigation by the Chief of Staff, the military court ordered a search of the magazine's premises in order to seize the documents that had allegedly been transmitted to the editor in chief, with a view to identifying the whistle-blowing State employee. The electronic files stored on 46 computers located on the magazine's premises were copied onto external disks that were retained by the prosecutor's office.

Law – Article 10: The search carried out in the applicants' workplace and the seizure of their data amounted to an interference in the exercise of their right to freedom of expression. This interference was prescribed by law and pursued the legitimate aim of preventing the disclosure of confidential information.

The Court had therefore to determine whether the impugned measure had struck a fair balance between, on the one hand, freedom of expression and the freedom of the press – which included the protection of journalists' sources and protection of whistle-blowers employed by the State – and, on the other, the protection of confidential data belonging to State bodies.

(a) *The public interest in having information disclosed and having the sources of that information protected* – The fact of holding files in which journalists were classed according to their political leanings, with a view to excluding certain of their number from the dissemination of information of public concern pertained to the public's right to receive information, which was one of the main rights provided for by Article 10 of the Convention. It was therefore beyond doubt that the points of view expressed and the content of the documents disclosed in the contested article were likely to contribute to the public debate on the armed forces' relationship with general policy.

The fact that the authorities had transferred the data stored on the journalists' work computers to external disks could deter any potential sources from assisting the press in informing the public about questions concerning the armed forces, even where these related to matters of public interest.

The investigation was aimed at identifying those responsible for the leak and bringing about their arrest. In protecting their sources of information, the applicants were thus protecting the State employees who had acted as whistle-blowers.

Although the content of the documents disclosed by the presumed whistle-blowers was such as to contribute to public discussion, Turkish legislation

contained no provisions concerning disclosures by members of the armed forces with regard to potentially unlawful acts committed in their workplace. It followed that the applicants could not be accused of having published the information received by them without waiting until their sources and/or the whistle-blowers had raised their concerns through the internal chain of command.

(b) *The national authorities' protected interests* – The case file did not reveal why the documents referred to in the article had been classified as "confidential". Thus, it was not alleged that the style of the contested article or the date of its publication could have created difficulties such as to cause "considerable damage" to the State's interests.

The public interest in the disclosure of information describing questionable practices on the part of the armed forces in the area of freedom to receive information was so important in a democratic society that it outweighed the interest in maintaining public confidence in that institution.

(c) *Review by the national courts* – Given that the military courts had not verified if the "confidential" classification of the documents in question was justified, and had not balanced the various competing interests in the case, the formal application of the concept of confidentiality to the documents from military sources had prevented the domestic courts from reviewing whether the interference had been compatible with Article 10 of the Convention.

(d) *Conduct of the applicants* – There were no problems with the form of publication. In addition, the applicants, in their manner of presenting the subject, had respected its importance and seriousness, without using stylistic effects that were likely to divert the reader from an objective provision of information. They had had no intention other than to inform the public on a topic of general interest.

(e) *Proportionality of the interference* – The search of the magazine's premises and the transfer to external discs of the entire content of the computers and their storage by the prosecutor's office had undermined the protection of sources to a greater extent than an order requiring them to reveal the identity of the informers. The indiscriminate retrieval of all the data in the software packages had enabled the authorities to gather information that was unconnected to the acts in issue.

This intervention was likely not only to have very negative repercussions on the applicants' relationships with all of their sources, but could also have a serious chilling effect in respect of other journalists or other whistle-blowers employed by the State, and could discourage them from reporting any misconduct or controversial acts by public authorities.

It followed that the intervention had been disproportionate to the aim pursued.

Having regard to the foregoing, and especially to the importance of freedom of expression with regard to matters of public interest and the need to protect journalistic sources in this area, including where these sources were State employees who had observed and reported potentially questionable conduct or practices in their workplaces, the Court, having weighed up the various interests at stake and in particular the confidentiality of military affairs, held that the interference with the applicants' right to freedom of expression, especially their right to impart information, did not meet a pressing social need, had not been proportionate to the legitimate aim sought and, in consequence, had not been "necessary in a democratic society".

Conclusion: violation (unanimously).

Article 41: sums ranging between EUR 850 and EUR 2,750 in respect of non-pecuniary damage.

Conviction of journalist for taking weapon on board aircraft with a view to exposing security flaws: *inadmissible*

Erdtmann v. Germany - 56328/10
Decision 5.1.2016 [Section V]

Facts – After the terrorist attacks of 11 September 2001 in New York, the applicant, a television reporter, researched the effectiveness of security checks at four German airports and made a television documentary about his investigation and findings. Carrying a hidden butterfly knife in his hand luggage, he entered the airports, passed through the security checkpoints and boarded four aeroplanes, flying from one city to the next. Footage from a hidden camera, showing his security checks, was included in the television documentary. In 2002 the report was aired by a private television channel and it subsequently served as a training video for security personnel. In 2003 the applicant was convicted of carrying a weapon on board an aircraft.

Law – Article 10: The applicant's conviction had not prevented him or the television channel from creating or showing the documentary, and did non concern the broadcasting of the programme as such. However, since the conviction was a conse-

quence of the applicant's conduct as a journalist, it could be regarded as an interference with his freedom of expression. In this connection the Court recalled that, in line with the principles of responsible journalism, a journalist cannot claim exclusive immunity from criminal liability for the sole reason that the offence in question is committed during the performance of his or her journalistic functions.

When assessing the necessity of the interference, the Court observed that the applicant's conviction did not relate to broadcasting the report or filming the security checks with a hidden camera or, therefore, to his journalistic activity as such. It was not based on restrictions specific to the press and the applicant was not fined for overstepping his journalistic duties and responsibilities.

Instead he was convicted of carrying a weapon on board an aircraft, pursuant to a general prohibition forming part of the ordinary criminal law which did not require proof of an intention to use the weapon or that the weapon led to a concrete threat. Moreover, the domestic courts had considered the applicant's role as a journalist, his journalistic freedom and his protection under the right to freedom of expression but found that those elements could not justify or excuse his conduct. In their view, the applicant could have revealed the security flaws at the airport without committing a criminal offence, for example by disposing of the knife after leaving the security checkpoints. Moreover, due notably to his prior research into airport security checks, he should have known that his actions infringed the criminal law. As to the nature and the severity of the penalty, the domestic courts took into account the fact that the applicant's report had increased airport security, that he was a journalist reporting on an issue of general public interest, and that the knife had been securely stowed away and did not lead to any concrete threat for other passengers. As a result, the applicant was sentenced to a fine of 15 daily rates converted into a warning with a deferred fine, which was the most lenient sentence possible in domestic law. That penalty could not therefore discourage the press from investigating or expressing an opinion on topics of public debate.

It followed that the applicant's conviction did not appear to have been disproportionate and hence an unjustified restriction of his right to freedom of expression. There was accordingly no appearance of a violation of Article 10 of the Convention.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Pentikäinen v. Finland* [GC], 11882/10, 20 October 2015, Information Note 189; *Axel Springer AG v. Germany* [GC], 39954/08, 7 February 2012, Information Note 149; and *Stoll v. Switzerland* [GC], 69698/01, 10 December 2007, Information Note 103)

Freedom to impart information

Conviction of television company for defamation for broadcasting report implicating Saudi Prince in attacks of 11 September 2001: *violation*

De Carolis and France Télévisions v. France
- 29313/10
Judgment 21.1.2016 [Section V]

Facts – The first applicant was chairman of the national television channel France 3, now succeeded in its rights by the corporation France Télévisions, the second applicant. In September 2006 France 3 broadcast a documentary which investigated why there had still been no trial five years after the attacks of 11 September 2001. It focused on the complaint lodged by families of the victims and the proceedings against over one hundred individuals and entities suspected of having assisted and funded al-Qaeda. As the victims' lawyers were seeking the prosecution of those who had helped to finance the attacks, the journalist looked at the background of Osama bin Laden and Al-Qaeda. Prince Turki Al Faisal was among the individuals interviewed, being named in the complaint by the victims' relatives, who accused him of having assisted and financed the Taliban when he had been head of the intelligence service in Saudi Arabia. In December 2006 the Prince brought defamation proceedings in the Criminal Court against the first applicant, as director of the television channel France 3, as well as the journalist who had produced the documentary, and against the company France 3 in so far as it was civilly liable.

In November 2007 the Criminal Court found the first applicant and the journalist guilty of public defamation of an individual, namely Prince Turki Al Faisal, who had joined the proceedings as a civil party. It sentenced each of them to a fine of EUR 1,000 and ordered them jointly to pay a token euro in damages to the Prince. By way of additional reparation it ordered the broadcasting of a legal news item on France 3, within fifteen days from the date on which the judgment became final. It

also held France 3 civilly liable. The judgment was upheld by the higher courts.

Law– Article 10: The judgment against the applicants had constituted an interference with the exercise of their right to freedom of expression. The interference had been prescribed by law and pursued the legitimate aim of the protection of the rights of others. The impugned documentary certainly concerned a subject of general interest and Prince Turki Al Faisal held an eminent position in the Kingdom of Saudi Arabia. With those circumstances in mind, the State's margin of appreciation was particularly reduced. Moreover, even though the documentary had mentioned certain precise facts, the impugned statements had amounted more to value judgments than to mere statements of fact. The factual basis of those value judgments was sufficient. In addition, the journalist had distanced herself from the various testimony and had consulted many of the protagonists, including Prince Turki Al Faisal himself. His statements had not been distorted or quoted inaccurately. Consequently, the manner in which the subject had been dealt with did not contravene the standards of responsible journalism. Lastly, the relatively moderate amount of the fines did not suffice to justify the interference with the first applicant's right to freedom of expression or to negate the potential deterrent effect of the sanction.

Conclusion: violation (unanimously).

Article 41: Finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage; EUR 10,500 jointly, plus EUR 1,000 to the first applicant, in respect of pecuniary damage.

Freedom to receive information

Restrictions placed on prisoner's access to Internet sites containing legal information: *violation*

Kalda v. Estonia - 17429/10
Judgment 19.1.2016 [Section II]

Facts – The applicant, a prisoner, complained that he was prevented from carrying out legal research as a result of being refused access to certain Internet sites. These included the website of the local Council of Europe Information Office and certain, but not all, State-run databases containing legislation and judicial decisions. In the appeal proceedings brought by the applicant, the Supreme Court concluded that granting access to Internet sites beyond those authorised by the prison authorities could increase the risk of prisoners engaging in prohibited communication, thus giving rise to a need for heightened levels of monitoring of their use of computers.

Law – Article 10: The question at issue was not the authorities' refusal to release the requested information. Rather, the applicant's complaint concerned a particular means of accessing – specifically, via the Internet – information published on certain websites that was freely available in the public domain.

Imprisonment inevitably involved a number of restrictions on prisoners' communications with the outside world, including on their ability to receive information. Article 10 could not be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites, for prisoners. However, in the circumstances of the case, given that under the domestic law prisoners were granted limited access to the Internet – including access to the official databases of legislation and judicial decisions – the restriction of access to other sites that also contained legal information had constituted interference with the applicant's right to receive information. The interference was prescribed by law and pursued the legitimate aims of protecting the rights of others and preventing disorder and crime.

The websites to which the applicant had requested access predominantly contained legal information and information related to fundamental rights, including the rights of prisoners. The accessibility of such information promoted public awareness and respect for human rights. The national courts used such information and the applicant therefore also needed access to it for the protection of his rights in the court proceedings. When the applicant lodged his complaint with the domestic courts, Estonian language translations of the European Court's judgments against the respondent State were only available on the website of the local Council of Europe Office to which he had been denied access.

In a number of Council of Europe and other international instruments Internet access had increasingly been understood as a right, and calls had been made to develop effective policies to attain universal access to the Internet and to overcome the "digital divide". Moreover, an increasing amount of services and information was only available on the Internet.

Lastly, under the domestic law prisoners had been granted limited access to the Internet via computers specially adapted for that purpose and under the supervision of the prison authorities. The arrangements necessary for the use of the Internet by prisoners had thus already been made and the related costs had already been borne by the authorities. The domestic courts had not given due consideration to any possible security risks attendant on the applicant's use of the websites in question, bearing in mind that they were run by the Council of Europe and by the State itself. Nor had it been demonstrated that giving the applicant access to three additional websites would have caused any noteworthy additional costs. In sum, while the security and economic considerations referred to by the domestic authorities might be considered relevant, they had not been sufficient to justify the interference with the applicant's right to receive information.

Conclusion: violation (six votes to one).

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

(See *Ahmet Yıldırım v. Turkey*, 3111/10, 18 December 2012, Information Note 158)

ARTICLE 11

Freedom of peaceful assembly

Authorities' failure to communicate with the leaders of a protest demonstration in order to ensure its peaceful conduct: *violation*

Frumkin v. Russia - 74568/12
Judgment 5.1.2016 [Section III]

Facts – On 6 May 2012 the applicant participated in an authorised political rally at Bolotnaya Square in Moscow whose aim was to protest against alleged "abuses and falsifications" in the 2011 elections to the State Duma and the presidential elections held earlier in 2012. After a peaceful march, the demonstrators reached the square but found that, contrary to expectations, the park was excluded from the meeting venue and access to it was barred by a cordon of riot police. The venue was instead limited to Bolotnaya embankment, where the organisers had set up a stage. After unsuccessfully trying to negotiate with the police, the leaders of the march announced a "sit-down strike" and sat on the ground; between 20 and 50 people followed their call and joined them. About an hour later congestion occurred at the site of the "sit-down strike" and the pressure of the crowd caused the cordon to break for the first time, before it was quickly restored without the use of force. Protestors from among the crowd began tossing various objects at the police cordon, including a Molotov cocktail. At the same time, upon police instructions, an announcement was made from the stage that the meeting was over. However, most of the demonstrators and media reporters did not hear the message. Subsequently riot police began to disperse the demonstration and arrested some of the activists, including several of the march leaders.

The applicant was arrested during the dispersal of the demonstration. He was detained for a period of 36 hours and eventually sentenced to 15 days' administrative detention for obstructing traffic and disobeying police orders. He alleged that the authorities had intended from the outset to suppress the rally in order to discourage street protest and political dissent and had implemented the crowd-control measures in order to provoke a confrontation that would serve as a pretext for the early dispersal of the meeting. He also argued that his own arrest, pre-trial detention and ensuing conviction for an administrative offence had been arbitrary and unnecessary.

Law

Article 11: While the applicant's complaint partly concerned general events, it was clear that these had directly affected him individually and his rights guaranteed by Article 11: he had been unable to take part in the meeting because it had been disrupted and then cancelled. That complaint was distinct from the grievances about the applicant's own subsequent arrest and detention. The Court examined the two issues separately.

(a) *Obligation to ensure the peaceful conduct of the assembly* – An elaborate security operation had been prepared throughout the city on the day of the assembly in view of the anticipated unauthorised street protests. The authorities had suspected the opposition activists of plotting a popular uprising with campsites, similar to the "Occupy" movement and the "Maidan" protest in Ukraine. It was for this reason that the police had decided to restrict the venue to the embankment where tents could not easily be set up. Although Article 11 of the Convention did not guarantee a right to set up a campsite at a location of one's choice, such temporary installations might in certain circumstances constitute a form of political expression and any restrictions had to comply with the requirements

of the Convention. The Court took that into account when assessing the proportionality of the measures taken.

On the face of it, the decision to close the park to the rally did not appear in itself hostile or underhand, given that the embankment had sufficient capacity to accommodate the assembly. However, the organisers had objected not only to the lack of access, but above all to a last-minute alteration to the venue layout. Given the high priority attributed to policing the event and the thoroughness with which the security forces had followed every piece of information concerning the protest activity, it was unlikely that the original map published by the police, which had included the park, had inadvertently slipped their attention. There had thus been at least a tacit, if not an express, agreement that the park would form part of the venue.

As regards the "sit-down strike", even though it had aggravated the congestion, it had remained localised, left sufficient space for those wishing to pass and was strictly peaceful. However, it had required the authorities' intervention. While it was not for the Court to indicate what was the most appropriate manoeuvre for the police cordon in the circumstances and while the police's refusal to allow access to the park may have been justified, the authorities should have communicated their chosen course of action openly, clearly and promptly.

In the Court's view, had the competent officials been prepared to come forward in order to communicate with the assembly organisers, they could have alleviated the tensions caused by the unexpected change of venue. However, the police authorities had not provided a reliable channel of communication with the organisers. No officer had been assigned to liaise with the assembly organisers (although officers had been designated for liaising with civil society organisations and the press). That omission was striking, given the general thoroughness of the security preparations. Furthermore, the authorities had failed to respond to the real-time developments in a constructive manner. The standoff near the cordon had lasted for about 50 minutes, a considerable period of time. The senior police officers had had ample opportunity to contact the organisers by telephone and to personally approach them. However, no official had taken any interest in talking to the leaders of the march. Eventually, when the "sit-down strike" began, they sent the Ombudsman with a message to the leaders to stand up and move on, but this provided no answer to the protestors' concerns. The authorities' failure to take simple and obvious steps at the first signs of the conflict had allowed it to escalate, leading to the disruption of the previously peaceful assembly. The authorities had, therefore, not complied with even the minimum requirements in their duty to communicate with the assembly leaders, which was an essential part of their positive obligation to ensure the peaceful conduct of the assembly, to prevent disorder and to secure the safety of all the citizens involved.

Conclusion: violation (unanimously).

(b) *Termination of the assembly and the applicant's arrest, detention and charges* – The tensions had been localised at the place of the "sit-down strike" while the rest of the venue had remained calm. The authorities had not shown that prior to announcing the whole meeting closed they had attempted to separate the turbulent sector and target the problems there, so as to enable the meeting to continue in the sector of the stage where the situation had remained peaceful. The Court was therefore not convinced that the termination of the meeting had been inevitable. However, even assuming that the decision to close the meeting was taken because of a real and imminent risk that violence would spread and intensify and that the authorities were acting within their margin of appreciation, it could have been implemented in different ways and using various methods.

The Court abstained from analysing the manner in which the police had dispersed the protestors at the site of the "sit-down strike", as it fell outside the scope of the applicant's case. Instead, it examined the actions taken against the applicant personally, while taking into account the general situation in his immediate vicinity, that is, the area in front of the stage inside the designated meeting area on the embankment.

The applicant had stayed within the perimeter of the cordoned meeting venue and his behaviour had remained, by all accounts, strictly peaceful. Accordingly, even after the assembly was officially terminated, the guarantees of Article 11 continued to apply in respect of the applicant, notwithstanding the clashes at the site of the "sit-down strike".

The Court was mindful of the authorities' admission that the entirety of the security measures, in particular the crackdown on those charged with offences committed during the rally, had been motivated by the "fear of Maidan". At the same time, the applicant had been arrested, detained and sentenced to fifteen days' imprisonment for obstructing traffic and disobeying lawful police orders

to stop, not for breaching the rules on public assembly. In that context, the severity of the measures taken against the applicant was entirely devoid of justification. He had not been accused of violent acts, or even of "passive resistance" in protest against the closure of the meeting. His motives for walking on the road and obstructing the traffic were left unexplained by the domestic judgments; the applicant's explanation that there had been no traffic and that he was simply not quick enough to leave the venue in the general confusion had not been contested or ruled out. Therefore, even assuming that the applicant's arrest, pre-trial detention and administrative sentence had complied with domestic law and pursued one of the legitimate aims enumerated in Article 11 § 2 – presumably, public safety – the measures taken against him had been grossly disproportionate to the aim pursued. There had been no "pressing social need" to arrest the applicant, to escort him to the police station or, in particular, to sentence him to a prison term, albeit a short one.

The applicant's arrest, detention and ensuing administrative conviction could not but have discouraged him and others from participating in protest rallies or engaging actively in opposition politics. Undoubtedly, those measures had had a serious potential also to deter other opposition supporters and the public at large from attending demonstrations and, more generally, participating in open political debate. The chilling effect of those sanctions had been amplified further by the large number of arrests effected on that day, which had attracted broad media coverage.

Conclusion: violation (unanimously).

Article 5 § 1: From the time of his arrest, at the latest at 8.30 p.m. on 6 May 2012, to his transfer to court at 8 a.m. on 8 May 2012 the applicant had been deprived of his liberty within the meaning of Article 5 § 1. The duration of administrative detention should not as a general rule exceed three hours, which was an indication of the period of time the law regarded as reasonable and sufficient for drawing up an administrative offence report. Once the administrative offence report had been drawn up at 9.30 p.m., the objective of escorting the applicant to the police station was met and he could have been discharged. However, he was formally remanded in custody to secure his attendance at the hearing before the justice of the peace. In the absence of any explicit reason given by the authorities for not releasing the applicant, his 36-hour detention pending trial was unjustified and arbitrary.

Conclusion: violation (unanimously).

Article 6 § 1 in conjunction with Article 6 § 3 (d): The domestic courts had based their judgment exclusively on standardised documents submitted by the police and had refused to accept additional evidence or to call the police officers who had arrested the applicant. The only evidence against him had thus not been tested in the judicial proceedings. Moreover, the courts had limited the scope of the administrative case to the applicant's alleged disobedience, having omitted to consider the "lawfulness" of the police order. They had thus punished the applicant for actions protected by the Convention without requiring the police to justify the interference with the applicant's right to freedom of assembly, which included affording him a reasonable opportunity to disperse when such an order was given. The failure to give him that opportunity had run counter to the fundamental principles of criminal law, namely, *in dubio pro reo*. The administrative proceedings against the applicant, which fell under the criminal limb of Article 6, taken as a whole, had been conducted in violation of his right to a fair hearing.

Conclusion: violation (unanimously).

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

(See also *Kasparov and Others v. Russia*, 21613/07, 3 October 2013, Information Note 167; *Navalnyy and Yashin v. Russia*, 76204/11, 4 December 2014, Information Note 180; *Nemtsov v. Russia*, 1774/11, 31 July 2014)

Imposition of lengthy prison sentence on a minor for taking part in and throwing stones at a demonstration: *violation*

Gülcü v. Turkey - 17526/10
Judgment 19.1.2016 [Section II]

Facts – In 2008 the applicant, who was then fifteen years old, was convicted by an assize court of membership of an illegal armed organisation (the PKK), of disseminating terrorist propaganda on account of his participation in a demonstration and for throwing stones at police officers during the demonstration. He was detained pending trial for almost four months, at the end of which he was convicted of the offences charged and sentenced to a total of seven years and six months' imprisonment. He served part of his prison sentence before he was released and his case was re-assessed

in 2012 by a juvenile court as a result of legislative amendments made in favour of minors committing offences during demonstrations.

Law – Article 11: In a number of cases where demonstrators had engaged in acts of violence, the Court had held that the protests in question fell within the scope of Article 11 of the Convention but that the interference with the right guaranteed by that Article had been justified in order to prevent disorder or crime or to protect the rights and freedoms of others. In the present case, however, nothing in the case file suggested that the demonstration attended by the applicant was not intended to be peaceful or that the organisers or the applicant himself had violent intentions. In addition, the charges against the applicant did not concern the infliction of any bodily harm.

As to the applicant's "victim status", the Court noted that the juvenile court's judgment was more favourable to the applicant than the assize court's judgment. However, the applicant had been deprived of his liberty for more than two years, while the juvenile court had not conducted a new examination of the facts, provided reasoning for the applicant's re-conviction or acknowledged or afforded redress for the alleged breach of his freedom of assembly caused by his original convictions. The fact that the applicant's convictions and sentences had been reassessed did not, therefore, deprive him of victim status.

The judgments of the assize court and the juvenile court and the applicant's detention constituted interference with his right to freedom of assembly.

As to whether the interference was necessary in a democratic society, the Court first noted that the assize court's judgment convicting the applicant of membership of the PKK and of disseminating propaganda in support of a terrorist organisation did not contain relevant and sufficient reasons. Even assuming that the applicant had taken part in the demonstration in response to the PKK's call, the Court agreed with the Council of Europe's Commissioner for Human Rights that the conviction of a person for membership of an illegal organisation or an act or statement which may be deemed to coincide with the aims or instructions of an illegal organisation was a matter of concern. There was nothing in the case file to substantiate the domestic courts' finding that the applicant had in fact made propaganda in support of an illegal organisation. The failure of the domestic courts to provide "relevant" and "sufficient" reasons had thus deprived the applicant of the procedural protection to which he was entitled under Article 11.

As to proportionality, the applicant was a minor at the relevant time. In this context, Article 37 of the United Nations Convention on the Rights of the Child and General Comment No. 10 (2007) of the UN Committee on the Rights of the Child stated that the arrest, detention or imprisonment of a child could be used only as a measure of last resort and for the shortest period of time. The Committee of Ministers and the Parliamentary Assembly of the Council of Europe also shared that view. Despite this, nothing in the applicant's case file showed that the national courts had sufficiently taken his age into consideration. The Court noted the extreme severity of the penalties imposed and the fact that the applicant was detained pending trial for almost four months. No alternative measures had been considered, nor had the applicant's detention been used only as a measure of last resort.

As to the applicant's conviction for throwing stones at police officers, the Court observed that, while the State authorities enjoyed a wider margin of appreciation when examining the need for interference with freedom of assembly in cases involving acts of violence, it could not overlook the harshness of the sentence (two years and nine months' imprisonment) imposed on a minor or the lengthy period of pre-trial detention. The punishment had thus been disproportionate.

In the light of the foregoing, the applicant's criminal convictions for membership of the PKK, dissemination of propaganda in support of the PKK and resistance to the police, and the imposition upon him of prison sentences and his detention between 2008 and 2010, had not been "necessary in a democratic society".

Conclusion: violation (unanimously).

(See also *Osmani and Others v. the former Yugoslav Republic of Macedonia* (dec.), 50841/99, 11 October 2001, Information Note 35; *Taranenko v. Russia*, 19554/05, 15 May 2014, Information Note 174; and the Factsheet on Children's rights)

Freedom of association

Dissolution on grounds that it supported terrorism of a political party advocating a peaceful solution to the Kurdish problem: *violation*

Party for a Democratic Society (DTP) and Others v. Turkey - 3840/10 et al.
Judgment 12.1.2016 [Section II]

Facts – The applicants were the Party for a Democratic Society ("the DTP"), the party's co-presidents and individuals exercising various functions in the party.

Founded in 2005, the DTP belonged to the movement of Turkish left-wing pro-Kurdish political parties.

In December 2009 it was dissolved by a unanimous decision of the Constitutional Court, which entailed liquidation of the party and the transfer of its assets to the Treasury. In addition, the parliamentary mandates of the party's two co-presidents were terminated, on the ground that they had brought about the dissolution through their statements and activities. Lastly, 37 members of the DTP were banned from becoming founding members, ordinary members, leaders or treasurers of any other political party for five years.

The Constitutional Court considered that the DTP had the same political goals as a terrorist organisation, the PKK (Kurdish Workers' Party). Based essentially on speeches by the DTP's leaders and the activities of the party and its members, it concluded that the DTP had become an instrument of the PKK's terrorist strategy, and that it was linked to and in sympathy with that organisation. It also held that the fact that the DTP had not openly distanced itself from the PKK's activities could be considered as evidence of its support for terrorism.

Law

Article 11: The DTP's dissolution and the ancillary measures amounted to an interference in the applicants' exercise of their right to freedom of association. The interference had been prescribed by law and the impugned measures pursued, in particular, the legitimate aim of preventing disorder and protecting the rights and freedoms of others.

In deciding to order the dissolution, the Constitutional Court had first noted that the DTP had the same political aims as the PKK terrorist organisation, that it distinguished between the Kurdish people and the Turkish people, and that it took the view that the Republic of Turkey oppressed the Kurdish people.

(a) *Compatibility of the ideas put forward by the DTP with the principles of democracy* – Prior to its dissolution, the DTP was the main legally created political organisation in Turkey which advocated a peaceful solution to the Kurdish problem. The political organisations which preceded it had been dissolved by the Constitutional Court on account of activities contrary to the Constitution. In so far as they had been examined by the European Court, those dissolutions had resulted in findings of a violation of Article 11 of the Convention.

Neither in its constitution nor in its programme had the DTP proposed altering Turkey's constitutional settlement in a way that would be contrary to the fundamental principles of democracy. Its programme condemned violence and put forward political solutions that were democratic and compatible with the rule of law and respect for human rights. The fact that the political programme defended by the DTP was considered incompatible with the current principles and structures of the Turkish State did not make it incompatible with the rules of democracy. It was of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that called into question the way a State was currently organised, provided that they did not harm democracy itself. It followed that the principles set out by the DTP's bodies, such as a peaceful solution to the Kurdish problem and recognition of Kurdish identity, were not, in themselves, contrary to the fundamental principles of democracy.

Furthermore, if a parallel were to be established between the principles defended by the DTP and those of the PKK, this would not suffice to conclude that the party approved of the use of force in order to implement its policy. If it were to be considered that merely by advocating those principles a legally established political group were held to be supporting acts of terrorism, that would reduce the possibility of dealing with related issues in the context of a democratic debate and would allow armed movements to monopolise support for the principles in question.

Thus, the Court did not detect any political project that was incompatible with the concept of a democratic society within the meaning of the Convention.

(b) *Examination of the DTP's activities*

(i) *Speeches by the DTP's co-presidents* – In the Court's opinion, there was no link to violence in the speeches, and a peaceful and democratic solution was foreseen for important problems facing Turkey. The speeches drew the public's attention to certain subjects, without indicating any support for the PKK's actions or any approval of them.

As parliamentarians, the two co-presidents of the DTP represented their electorate. Their statements, which qualified as political speech, had not encouraged the use of violence, armed resistance or insurrection. In consequence, they had pursued

the aim of discharging their duty to draw attention to their electors' concerns.

(ii) *The DTP's other stances* – With regard to the actions to protest against Abdullah Öcalan's conditions of detention or to draw domestic and international public attention to his state of health, these pertained to the protection afforded to the right to freedom of expression and to peaceful demonstration.

As to the slogans in support of Abdullah Öcalan and the PKK flags, placards and emblems displayed at meetings at which the co-presidents had spoken, it was not alleged or established that the leaders had been responsible for them, or had encouraged the crowd to behave in this way. Moreover the Court reiterated that it had already ruled on similar slogans and had considered that they had no impact on national security or public order.

Furthermore, given that the statements made by the DTP's two co-presidents had been examined, it was not necessary to analyse all of the speeches or activities for which the DTP members or local leaders were criticised.

The Court was aware of the authorities' concern about words or deeds which had the potential to exacerbate the security situation in south-east Turkey, where since approximately 1985 serious disturbances had raged between the security forces and the members of the PKK, involving very heavy loss of life.

Taking measures against the DTP on the ground that the party had not openly distanced itself from actions or speeches by its members or local leaders that were likely to be interpreted as tacit support for terrorism could reasonably be regarded as corresponding to a "pressing social need". It was therefore appropriate to examine whether there was a reasonable relationship of proportionality between the dissolution of the DTP and the legitimate aims pursued.

(c) *Proportionality of the impugned measure* – The Constitutional Court had imposed the most severe of the measures laid down by the Constitution, by ordering the party's dissolution, its liquidation and the transfer of its assets to the Treasury, rather than a less drastic measure depriving it partially or entirely of financial assistance from the State. Equally, the DTP's co-presidents had been removed from their parliamentary seats, and 37 members of the party, including the applicants, had been banned from becoming founding members, ordinary members, leaders or treasurers of another political party for five years.

The Constitutional Court had essentially based its dissolution of the party on certain stances taken by the DTP's leaders, but without placing them in their historical and political context, and without attaching any importance to the party's wish to play a mediatory role in the process aimed at ending the violence in Turkey.

Thus, the Constitutional Court had held, on the basis of actions or activities by the DTP's leaders, that this party shared the ideology and the aims of an armed organisation. Yet the Court could not discern any political project that was incompatible with the concept of democratic society within the meaning of the Convention. Equally, the two co-presidents had essentially recommended "democratic" and "peaceful" solutions to the Kurdish problem in their speeches.

In addition, the party's two co-presidents had openly excluded any recourse to violence to achieve their objectives. Furthermore, although the party had not openly distanced itself from actions or speeches by its members or local leaders that were likely to be interpreted as tacit support for terrorism, it had not been alleged that the party's central leaders had refrained from condemning a specify act of violence carried out by the PKK at a given moment. Nor was it alleged that the DTP's positions were likely to give rise to social conflict between its supporters and the other political formations.

Although the two co-presidents had refused to describe the PKK as a terrorist organisation, this did not, when placed in context, necessarily indicate support for violence. They had emphasised the mediatory role that their party wished to play in securing a peaceful solution to the Kurdish problem.

In those circumstances, in so far as the contested measure was based on the DTP's political line, the reasons put forward by the Constitutional Court to order the dissolution of the party (one of the main political protagonists to have argued in favour of a peaceful solution to the Kurdish problem) could not be considered sufficient to justify the interference. In addition, the mere fact that this party had not openly distanced itself from acts or speeches by its members or its local leaders that were likely to be interpreted as tacit support for terrorism had had a relatively limited potential impact on "public order" or the "protection of the rights of others". In the circumstances, this failing could not in itself constitute a reason justifying such a severe penalty as the dissolution of an entire party. The dissolution of the DTP could thus not

be considered proportionate to the legitimate aims pursued.

It followed that the reasons put forward by the respondent State, while relevant, could not be considered sufficient to justify the interference in question. In spite of the margin of appreciation enjoyed by the Contracting States in this area, there was no reasonable relationship of proportionality between the DTP's dissolution and the legitimate aims pursued.

Conclusion: violation (unanimously).

Article 3 of Protocol No. 1: Even supposing that the measure in question pursued one or more legitimate aims, namely the protection of public order and the rights and freedoms of others, the Court considered that it had not been proportionate. Under Article 84 § 5 of the Constitution, only the seat of a member of parliament whose words and deeds had led to the dissolution of his or her party was to be forfeited. Yet the forfeiture of the applicants' parliamentary seats had been the consequence of the dissolution of the political party of which they were members and occurred regardless of their personal political activities.

The applicants' speeches had not been such as to justify the dissolution measure. Their right to freedom of expression was protected in so far as their statements could not be interpreted as expressing any form of direct or indirect support for the acts committed by Abdullah Öcalan or by the PKK, or any form of approval for them. In their capacity as elected representatives of the people, the two applicants represented their electorates, drew attention to the latter's preoccupations and defended their interests.

The Court was struck by the extreme harshness of the measure in question: the DTP had been immediately and permanently dissolved, and the applicants, who were members of parliament, had been prohibited from engaging in their political activities and the functions related to their mandates.

In view of all the above considerations, the penalty imposed on the applicants by the Constitutional Court could not be regarded as proportionate to any legitimate aim. It followed that the measure in question was incompatible with the very substance of the applicants' right under Article 3 of Protocol No. 1 to be elected and to sit in parliament, and infringed the sovereign power of the electorate who had elected them as members of parliament.

Conclusion: violation (unanimously).

Article 41: EUR 30,000 to each of the party's co-presidents in respect of pecuniary and non-pecuniary damage; EUR 7,500 to one of the other applicants in respect of non-pecuniary damage and claim in respect of pecuniary damage dismissed.

(See also: *The Christian Democratic People's Party v. Moldova*, 28793/02, 14 February 2006, Information Note 83; *Republican Party of Russia v. Russia,* 12976/07, 12 April 2011, Information Note 140; *Refah Partisi (the Welfare Party) and Others v. Turkey*, 41340/98 et al., 13 February 2003, Information Note 50)

ARTICLE 14

Discrimination (Article 3 of Protocol No. 1)

Application of 5% threshold in parliamentary elections in Lower Saxony: *no violation*

Partei Die Friesen v. Germany - 65480/10
Judgment 28.1.2016 [Section V]

Facts – The applicant was a political party representing the interests of the Frisian national minority. The party's activities were confined to the *Land* of Lower Saxony (*Niedersachsen*). Under the Electoral Law of Lower Saxony, parliamentary seats were attributed only to parties which obtained a minimum of 5% of the total votes validly cast. The applicant party asked the Prime Minister and President of Lower Saxony for exemption from this requirement in the 2008 elections, but its request was refused. In those elections it attained approximately 0.3% of all votes validly cast and so did not obtain a parliamentary mandate.

In its application to the European Court, the applicant party complained that the 5% threshold violated its right to participate in elections without being discriminated against, in breach of Article 14 of the Convention read in conjunction with Article 3 of Protocol No. 1.

Law – Article 14 in conjunction with Article 3 of Protocol No. 1: In the 2008 parliamentary elections the applicant party did not receive sufficient votes to obtain a parliamentary mandate irrespective of the 5% threshold. However, the threshold could nonetheless have had a chilling effect on potential voters not wishing to "waste" their votes on a political party that was unable to achieve that score. The application of the 5% threshold had thus interfered with the applicant party's right to stand for election and the case fell within the scope of

Article 3 of Protocol No. 1. Article 14 was therefore applicable.

Although the threshold as such did not raise an issue under Article 14 read in conjunction with Article 3 of Protocol No. 1, the Court had to assess whether its application to the applicant party had violated those provisions. In this regard, it was undisputed that the applicant party had not been treated differently to any other small political parties standing for election in Lower Saxony.

As to whether the applicant party's situation was, as it alleged, analogous to that of the parties of the Danes and the Sorbs who were standing for election in two other *Länder*, both of which privileged minority parties, the Court observed that under federal election law all national minority parties enjoyed the same privileges in federal elections. However, as regards participation in elections of the *Länder*, the Lower Saxony Constitutional Court found that there was no obligation under constitutional law applicable in Lower Saxony to exempt parties of national minorities from electoral thresholds regarding elections in the *Land*. In the light of the sovereignty accorded to *Länder* in the German legal system, the decision of *Länder* legislatures to include exemptions for national minority parties in their electoral law therefore did not have any implications for national minority parties outside their jurisdiction. It followed that the applicant party's situation was not analogous to that of the parties of the Danes and the Sorbs because they were not standing for election in Lower Saxony.

As to whether the situation of the applicant party was significantly different from that of other political parties in Lower Saxony, the Court accepted that the number of Frisians in that *Land* was not high enough to reach the electoral threshold even if all Frisian voters were to cast their vote for the applicant party. However, the situation of the applicant party in this respect was similar to the situation of those parties which concentrated on the representation of numerical small interest groups defined by criteria such as age, religious belief and profession. The disadvantages in the electoral process were therefore based on the chosen concept of only representing the interests of a small part of the population, for which a Contracting State could not be held responsible.

The Court lastly examined whether the applicant party had been discriminated against in its capacity as a party representing a national minority. Since forming an association to express and promote its identity could be instrumental in helping a minority preserve and uphold its rights, this issue was linked to the question whether, under the Convention, national minority parties should be treated differently to other special interest parties. In its decision in *Magnago and Südtiroler Volkspartei v. Italy* (25035/94, 15 April 1996) the European Commission of Human Rights had found that the Convention did "not compel the Contracting Parties to provide for positive discrimination in favour of minorities". The subsequent 1998 Framework Convention for the Protection of National Minorities put an emphasis on the participation of national minorities in public affairs. Although the possibility of exemption from the minimum threshold was merely presented as one of many options, the interpretation provided by the Advisory Committee on the Framework Convention and the Venice Commission was that the electoral thresholds requirements should be designed so as not to affect national minorities. However, no clear and binding obligation derived from the Framework Convention to exempt national minority parties from electoral thresholds. Consequently, even interpreted in the light of the Framework Convention, the Convention did not call for different treatment in favour of minority parties.

Conclusion: no violation (unanimously).

(See also the Factsheet on the Right to free elections)

ARTICLE 34

Victim

***Locus standi* of heirs to make Article 3 complaint on behalf of man who died before application to the Court was lodged:** *victim status upheld*

Boacă and Others v. Romania - 40355/11
Judgment 12.1.2016 [Section IV]

Facts – The first six applicants were the heirs of I.B., a Romanian national of Roma origin, who was allegedly subjected to a beating by the police in March 2006. In June 2006 I.B. and the first three applicants, who also alleged ill-treatment, lodged a criminal complaint against the officers responsible. In April 2010 I.B. died of causes unrelated to the incident at the police station. The first six applicants continued the domestic proceedings, which were ultimately dismissed. In the Convention proceedings, they were joined by the

seventh applicant, who was not an heir, but who had been married to I.B., and had spent most of her life and raised their six children with him. The applicants complained in their own name and on behalf of I.B., *inter alia*, that I.B. and the first three applicants had been subjected to ill-treatment by the police and of the lack of an effective investigation.

Law – Article 34 (*victim status*): The Court observed that I.B., the direct victim of the alleged violations of the Convention, had died before the application was lodged. It therefore examined the standing of all the applicants to bring the complaints before the Court on his behalf. Without losing sight of the strictly personal nature of the Article 3 right, the Court had not in previous cases excluded recognising standing in the context of complaints under Article 3 to applicants who complain about treatment exclusively concerning a deceased relative. Such applicants had to show either a strong moral interest, besides the mere pecuniary interest in the outcome of the domestic proceedings, or other compelling reasons, such as an important general interest which required their case to be examined.

In finding that the first six applicants could be considered indirect victims, the Court noted that all bar the seventh applicant had accompanied I.B. immediately after the attack, were part of the domestic proceedings, and had eventually continued the domestic proceedings on his behalf after his death. The application, which concerned police brutality and discrimination on ethnic grounds, raised serious issues under the Convention. The first six applicants had a strong moral interest in the case. Indeed, they also alleged that they had been victims of police brutality and discrimination, and the first three had lodged their own complaints along with I.B.'s before the domestic authorities. They could thus claim to have been closely concerned with the events giving rise to the instant application and consequently to have more than a mere pecuniary interest in the case. The first six applicants thus had a legitimate interest in bringing before the Court the current application, which concerned issues of general interest pertaining to respect of human rights. However, the seventh applicant could not be considered an indirect victim.

Conclusion: admissible in respect of the first six applicants (unanimously).

On the merits, the Court found, unanimously, a substantive violation of Article 3 on account of I.B.'s ill-treatment, a procedural violation of Article 3 in the absence of an effective investigation, a violation of Article 14 read in conjunction with the procedural limb of Article 3 and no violation of Article 14 read in conjunction with the substantive limb of Article 3. It awarded the first six applicants EUR 11,700 jointly as non-pecuniary damage in respect of the abuse suffered by I.B.

(Compare *Kaburov v. Bulgaria* (dec.), 9035/06, 19 June 2012, Information Note 153)

ARTICLE 46

Execution of judgment

Rejection by Supreme Court of request for revision of criminal judgment following judgment of European Court finding violation of Article 6 of the Convention: *relinquishment in favour of the Grand Chamber*

Moreira Ferreira v. Portugal (no. 2) - 19867/12
[Section I]

(See Article 6 § 1 (criminal) above, page 15)

ARTICLE 3 OF PROTOCOL No. 1

Stand for election

Removal of members of parliament from office on account of words or deeds that led to dissolution of their political party: *violation*

Party for a Democratic Society (DTP) and Others v. Turkey - 3840/10 et al.
Judgment 12.1.2016 [Section II]

(See Article 11 above, page 30)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Moreira Ferreira v. Portugal (no. 2) - 19867/12
[Section I]

(See Article 6 § 1 (criminal) above, page 15)

DECISIONS OF OTHER INTERNATIONAL JURISDICTIONS

Inter-American Court of Human Rights

Rights to life, personal integrity, education and non-discrimination of a child living with HIV

Case of Gonzales Lluy et al v. Ecuador - Series C No. 298
Judgment 1.9.2015[1]

Facts – The applicants were Talía Gabriela Gonzales Lluy, her mother and her brother, all Ecuadorian nationals. In 1998, when Talía was three years old, she was infected with the HIV virus while receiving a blood transfusion on which the respective serological tests were not done. The blood was obtained from a blood bank of the Red Cross of the province of Azuay and the transfusion was done in a private clinic in Ecuador. At the time of the events, the Ecuadorian Red Cross had exclusive authority to manage blood banks. After Talía was infected, her mother filed several criminal and civil actions seeking that those responsible for her infection were punished, as well as payment of damages. However, the criminal proceedings ended with the tolling of the statute of limitations of the action, given that the defendant did not appear in the proceedings and was not captured. Likewise, the civil proceedings did not progress because, according to the First Chamber of the Superior Court of Justice of Cuenca, civil compensation arising from a criminal offence could not be claimed while there was no enforceable criminal conviction.

When Talía was five years old, she was enrolled in a public primary school which she attended for two months until the principal informed her mother that Talía would not be accepted any longer. This decision was taken after a teacher told him that Talía was a person living with HIV. On 8 February 2000 Talía's mother filed a writ of *amparo* against the Ministry of Education and Culture, the school principal and the teacher, alleging a deprivation of Talía's right to education, and requested her reintegration into school, as well as the payment of damages. However, the domestic court determined that "there was a conflict of interest between Talía's individual rights and the interests of a student conglomerate, and this collision caused social or collective rights to prevail, as it is the right to life *vis*-à-*vis* the right to education". Moreover, the domestic court maintained that Talía could exercise her right to education through special education and distance learning.

According to the statements by Talía and her family, they were forced to move multiple times due to the exclusion and rejection they were subjected to because of Talía's condition.

Law

(a) *Preliminary objection* – The State raised two preliminary objections: (i) partial lack of jurisdiction of the Inter-American Court to decide on facts not part of the factual framework of the case and on alleged violations of rights that were not established by the Inter-American Commission on Human Rights in its merits report, and (ii) non-exhaustion of domestic remedies.

The first point was deemed not to be a preliminary objection. The Inter-American Court further found that the facts presented by the representatives were contained in the factual framework of the case, so that they could argue points of law based on those facts.

The Court rejected the second preliminary objection on two grounds. Firstly, it deemed some of the arguments to be time-barred. Secondly, it found that the remedies invoked by the State were not adequate or effective in light of the facts of the case.

(b) *Article 4(1) (right to life) and 5 (right to personal integrity) in relation to Article 1(1) (obligation to respect and ensure rights) of the American Convention on Human Rights (ACHR)* – The Inter-American Court recalled that the State bears a duty of supervision and control of health services, even if offered by a private entity. It found that the blood bank that provided the blood that was transfused to Talía was insufficiently monitored and inspected by the State. This had allowed the blood bank to continue providing services under irregular conditions. This serious omission by the State had allowed blood which had not been subjected to the most basic security tests, such as HIV tests, to be delivered to Talía's family for transfusion, resulting in her infection and consequent permanent damage to her health (citing the ECHR judgment in *Oyal v. Turkey*, 4864/05, 23 March 2010, Information Note 128).

The Court came to the conclusion that, because of the severity of the disease and the risk involved at

1. This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. A more detailed, official abstract (in Spanish only) is available on that Court's Internet site (<www.corteidh.or.cr>).

various times to the applicant´s life, the damage to Talía's health constituted a violation of the right to life, given the danger of death she had faced at various times and could face in the future because of her illness. Ecuador had violated the negative obligation not to affect the life of Talía Gonzales Lluy by means of blood contamination, which had occurred while she was in the care of a private entity. This had caused, in moments of deterioration of her defences associated with a lack of access to antiretroviral drugs, threats to her life and a possible risk of death that could re-emerge in the future. The Court therefore found that, as the negligence that had led Talía to contract HIV was attributable to the State, Ecuador was responsible for the violation of the duty to inspect and supervise the provision of health services arising from the right to personal integrity and the obligation not to expose life to risk enshrined in Articles 5 and 4 of the ACHR.

It also determined that the Lluy family had suffered stigmatisation as a result of Talia's condition as a person living with HIV. It noted the constant situation of vulnerability in which the applicant´s mother and brother found themselves because they were subjected to discrimination, ostracised from society and living in precarious economic conditions; in addition they had to devote great physical, material and financial efforts to ensure Talia's survival and a dignified life for her. The Court established that there were many differences in the treatment of Talía and her family in respect of housing, work and education as a result of her status as a person living with HIV. The State had not taken the necessary measures to ensure Talía and her family access to their rights without discrimination, so that the State's acts and omissions constituted discriminatory treatment against them. Consequently, the Court concluded that the State was responsible for the violation of the right to personal integrity of Talía´s mother and brother, protected under Article 5(1) of the ACHR.

Conclusion: violation of Articles 4 and 5, in relation to Article 1(1) of the ACHR, and violation of Article 5(1), in relation to Article 1(1) of the ACHR (unanimously).

(c) *Article 13 of the Protocol of San Salvador (right to education) in relation to Article 1(1) and Article 19 (rights of the child) of the ACHR* – The Inter-American Court recalled that the right to education was contained in Article 13 of the Protocol of San Salvador. The Inter-American Court has jurisdiction to decide on this right in contentious cases under Article 19(6) of the Protocol of San Salvador. The Inter-American Court stressed that the right to education epitomises the indivisibility and interdependence of all human rights. On the basis of standards set forth by the UN Committee on Economic, Social and Cultural Rights, the Court held that in order to ensure the right to education, four essential and interrelated characteristics should be fulfilled in all educational levels: (i) availability, (ii) accessibility, (iii) acceptability and (iv) adaptability. In this regard, it concluded that there are three obligations inherent in the right to education of people living with HIV/AIDS: (i) the right to receive timely and unprejudiced information on HIV/AIDS; (ii) a prohibition on banning access to educational centres to people with HIV/AIDS, and (iii) the right that the education promote their inclusion and non-discrimination within the social environment. The Court cited the ECHtR judgment in *Kiyutin v. Russia*, 2700/10, 10 March 2011, Information Note 139).

Regarding Talía's expulsion from school when she was five years old, the Court concluded that the real and significant risk of contagion that would put the health of Talía's classmates at risk was extremely low. It highlighted that under a test reviewing the necessity and strict proportionality of the measure, the means chosen by the domestic authorities constituted the most damaging and disproportionate alternative available in order to protect the integrity of other pupils. Such treatment also evidenced that there was no adaptability of the educational environment to Talía's situation through biosecurity or other similar measures that must exist in any educational establishment for the general prevention of disease transmission.

In Talía's case, multiple vulnerabilities and the risk of discrimination had converged intersectionally. The discrimination that Talía suffered was not only caused by multiple factors, but had led to a specific form of discrimination that resulted from the intersection of these factors. In that regard, the Court concluded that Talía had suffered discrimination resulting from her status as a female child living in poverty and with HIV.

Conclusion: violation of Article 13 of the Protocol of San Salvador, in relation to Articles 1(1) and 19 of the ACHR (unanimously).

(d) *Articles 8(1) (right to a fair trial) and 25(1) (right to judicial protection) in relation to Articles 1(1) and 19 of the ACHR* – Having regard to the ECHR´s case-law (among others, *X. v. France*, 18020/91, 31 March 1992, and *F.E. v. France*, 38212/97, 30 October 1998), the Inter-American Court found that there was a special obligation to act with

due diligence under the particular circumstances of the instant case and Talía's situation in view of (i) the fact that Talía's integrity was at stake; (ii) the consequent urgency due to her status as a child with HIV, and (iii) the crucial importance of concluding the proceedings so that Talía and her family could gain access to compensation for damages. The Court concluded that this obligation had not been fulfilled by the State.

After analysing the four elements to determine the reasonableness of the length of criminal proceedings, and considering that there was a duty to act with exceptional due diligence, the Court concluded that Ecuador had violated the judicial guarantee of a determination of responsibilities within a reasonable time.

Regarding the civil proceedings, it held that the evidence before it was insufficient to conclude that their duration had violated the guarantees of due diligence and a determination of rights within a reasonable time. It also deemed that there was insufficient evidence to conclude that the existence of incidental proceedings (*prejudicialidad*) in Ecuadorian legislation constituted, in itself, a violation of judicial guarantees. Lastly, the Court concluded that the State had not infringed the right to judicial protection in relation to the *amparo* proceedings, or the criminal and civil proceedings.

Conclusion: violation of the guarantee of a reasonable time, established in Article 8(1) in relation to Articles 1(1) and 19 of the ACHR, with respect to the criminal proceedings and no violation in relation to the civil proceedings; no violation of the right to judicial protection recognised in Article 25(1) in relation to Article 1(1) of the ACHR (unanimously).

(e) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered that the State: (i) provide, in a timely manner, free medical and psychological or psychiatric treatment to Talía Gabriela Gonzales Lluy, as well as any medicines she required; (ii) publish the judgment and its official summary; (iii) carry out a public act of recognition of international responsibility; (iv) grant a scholarship to Talía that was not subject to obtaining qualifications that make her deserving of a scholarship of excellence, so that she may continue her university studies; (v) grant a scholarship to Talía so that she may pursue postgraduate studies, that was not conditional on her academic performance while studying; (vi) provide Talía with decent housing; (vii) conduct a programme to train health staff on best practices and the rights of HIV patients; and (viii) pay the amount stipulated in the judgment as compensation for pecuniary and non-pecuniary damage and the reimbursement of costs and expenses.

COURT NEWS

Elections

During its winter session held from 25 to 29 January 2016, the Parliamentary Assembly of the Council of Europe elected Georgios A. Serghides judge of the Court in respect of Cyprus. His nine-year term in office will commence no later than three months after his election.

Press conference

The Court held its annual press conference on 28 January 2016. The President of the Court, Guido Raimondi (see photos), took stock of the year 2015 and pointed out that much work remained to be done and that very close cooperation with the member States was called for, in the spirit of "shared responsibility". He 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 available on the Court's Internet site (<www.echr.coe.int> – Press).

Opening of the judicial year 2016

The Court's judicial year was formally opened on 29 January 2016. Around 290 eminent figures from the European judicial scene attended a seminar on the theme "International and national courts confronting large-scale violations of human rights".

The seminar was followed by the official opening ceremony, in the course of which President Raimondi (see photos) and Andrzej Rzepliński, President of the Constitutional Tribunal of Poland, addressed a 350-strong audience representing the judicial world and local and national authorities.

Videos of the seminar and of the ceremony and more information on the Court's Internet site (<www.echr.coe.int> – The Court – Events).

2016 Václav Havel Human Rights Prize

The Parliamentary Assembly of the Council of Europe (PACE), in partnership with the Vaclav Havel Library and the Charta 77 Foundation, has just issued a call for nominations for the 2016 Václav Havel Human Rights Prize, which will be awarded for the fourth consecutive year on 10 October next in Strasbourg. Individuals or non-governmental institutions active in the defence of human rights can be nominated for the Prize. The deadline for submitting nominations is 30 April 2016.

More information on the Council of Europe's Internet site (<www.assembly.coe.int> – PACE)

RECENT PUBLICATIONS

Annual Report 2015 of the Court

On 28 January 2016 the Court issued its Annual Report for 2015 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 2015. It is available free on the Court's Internet site (<www.echr.coe.int> – The Court).

Statistics for 2015

The Court's statistics for 2015 are now available. All information related to statistics for 2015 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 2015, which provides an overview of developments in the Court's caseload in 2015, such as pending applications and different aspects of case processing, and also country-specific information.

Admissibility Guide: translation into Armenian

With the help of the Council of Europe's Directorate General Human Rights and Rule of Law, a translation into Armenian of the third edition of the Practical Guide on Admissibility Criteria has now been published on the Court's Internet site (<www.echr.coe.int> – Case-Law).

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Case-law research reports

A new edition, updated to 30 June 2015, of the research report on Internet and the Court's case-law has just been published on the Court's Internet site (<www.echr.coe.int> – Case-Law).

Internet: case-law of the European Court of Human Rights (eng)

Internet : la jurisprudence de la Cour européenne des droits de l'homme (fre)

Human rights factsheets by country

The statistics in the country profiles, which provide wide-ranging information on human-rights issues in each respondent State, have been updated up to 31 December 2015. Some of the profiles are also available in the official language of the countries concerned: Deutschland, Ελλάδα, España, Österreich and Россия.

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

Handbook on European law relating to asylum, borders and immigration: new translations

Translations into Danish, Dutch, Finnish and Turkish of the Handbook – which was published jointly by the Court and the European Union Agency for Fundamental Rights (FRA) in 2014 – are now available. Thanks to the International Organization for Migration (lOM) – Mission in Azerbaijan a translation into Azerbaijani of this Handbook has also just been published.

The 25 linguistic versions of the Handbook on European law relating to asylum, borders and immigration can be downloaded from the Court's Internet site (<www.echr.coe.int> – Case-Law).

Sığınacaq, sərhəd və immiqrasiya məsələlərinə dair Avropa qanunvericiliyi üzrə vəsait (aze)

Håndbog om europæisk lovgivning vedrørende asyl, grænser og indvandring (dan)

Turvapaikkaa, rajoja ja maahanmuuttoa koskevan eurooppaoikeuden käsikirja (fin)

Handboek Europees recht op het gebied van asiel, grenzen en immigratie (dut)

Sığınma, sınırlar ve göç ile ilgili Avrupa hukuku el kitabı (tur)

Network neutrality guidelines to protect freedom of expression and privacy

The Council of Europe called on European states to safeguard the principle of network neutrality in the development of national legal frameworks in order to ensure the protection of the right to freedom of expression, including the right to receive and impart information or ideas, and the right to privacy in full compliance with Articles 10 and 8 of the Convention.

Hence, in a Recommendation[1] of 13 January 2016, the Committee of Ministers issued a set of network neutrality guidelines pointing out that Internet traffic should be treated equally, without discrimination, restriction or interference irrespective of the sender, receiver, content, application, service or device.

This recommendation is available on the Council of Europe's Internet site (<www.coe.int/cm> – Committee of Ministers).

1. Recommendation CM/Rec(2016)1 of the Committee of Ministers to member States on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality, adopted on 13 January 2016.