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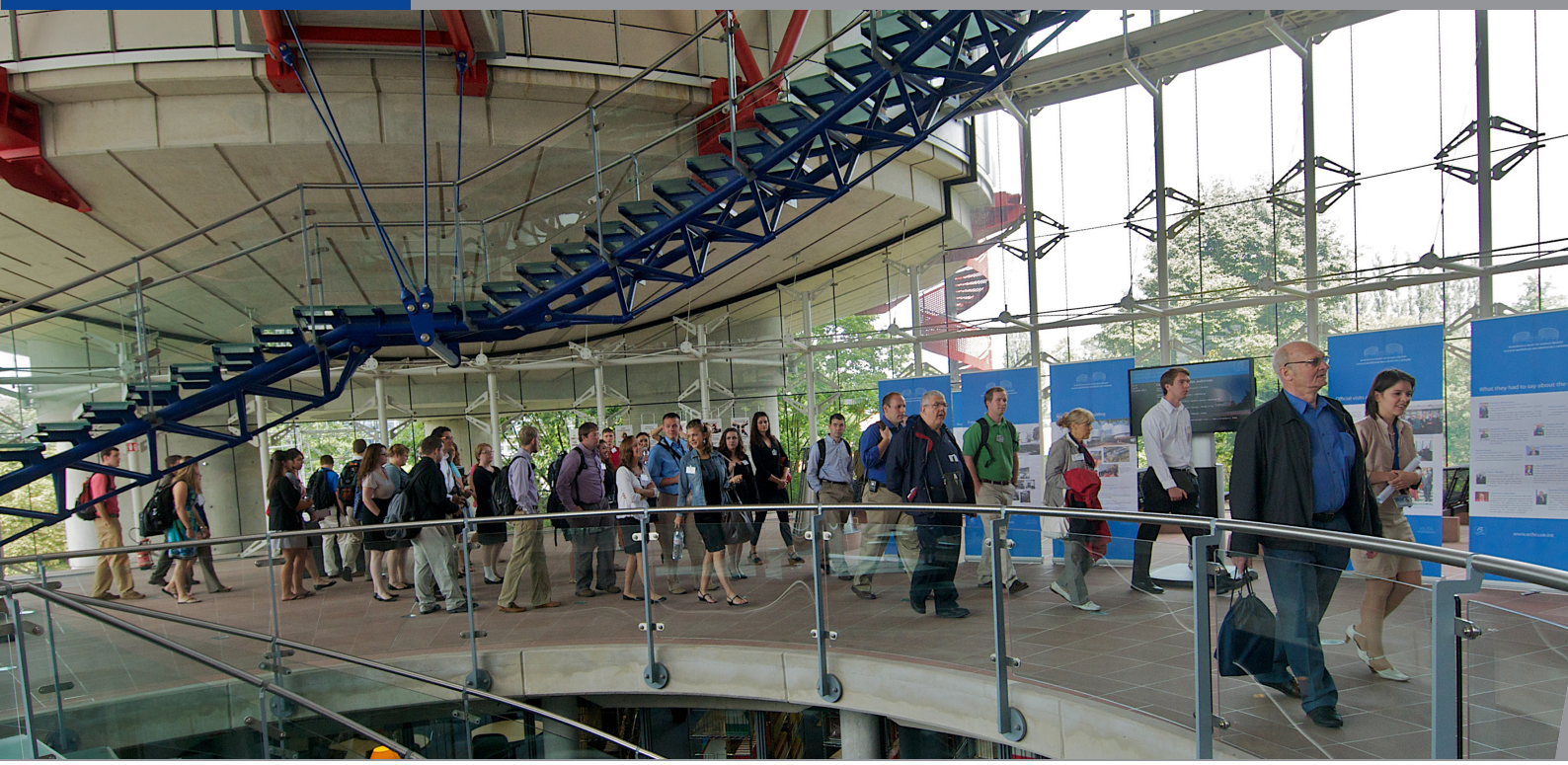

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ARTICLE 3

Inhuman or degrading punishment

Continued detention under whole life order following clarification of Secretary of State's powers to order release: *no violation*

Hutchinson v. the United Kingdom, 57592/08, judgment 17.1.2017 [GC]

Facts – In *Vinter and Others v. the United Kingdom* the European Court found that the law concerning the prospect of release of whole life prisoners in England and Wales was unclear. Although section 30 of the Crime (Sentences) Act 1997 gave the Secretary of State the power to release any prisoner, including one serving a whole life order, chapter 12 of the Indeterminate Sentence Manual ("Lifer Manual")[1] provided that release would only be ordered if a prisoner was terminally ill or physically incapacitated. These were highly restrictive conditions and, in the Court's view, did not afford the "prospect of release" required under the Court's case-law for a life sentence to be regarded as reducible for the purposes of Article 3 of the Convention.

Subsequently, the Court of Appeal of England and Wales considered the position under English law in the light of the *Vinter and Others* judgment. In *McLoughlin*[2] it ruled that the Lifer Manual could not restrict the duty of the Secretary of State to consider all circumstances relevant to release on "compassionate grounds" and that that term, which had to be read in a manner compatible with Article 3, was not restricted to what was set out in the Lifer Manual, but had a wide meaning that could be elucidated on a case by case basis. Further, the Secretary of State's decision had to be reasoned and was subject to judicial review. In the Court of Appeal's view, therefore, the law of England and Wales did afford life prisoners the possibility of release in exceptional circumstances.

The applicant in the present case was convicted in September 1984 of aggravated burglary, rape and three counts of murder and sentenced to life imprisonment with a recommended minimum tariff of 18 years. In December 1994 the Secretary of State informed him that he had decided to impose a whole life term. Following the entry into force of the Criminal Justice Act 2003, the applicant applied for a review of his minimum term of imprisonment. In May 2008 the High Court found that there was no reason to depart from the Secretary of State's decision given the seriousness of the offences. The applicant's appeal was dismissed by the Court of Appeal in October 2008. In his application to the European Court, the applicant alleged that he had no prospects of release from his whole life sentence, in breach of Article 3 of the Convention.

By a judgment of 3 February 2015 (see Information Note 182), a Chamber of the Court concluded by six votes to one that there had been no violation of Article 3. On 1 June 2015 the case was referred to the Grand Chamber at the applicant's request.

Law – Article 3: In the *McLoughlin* decision the Court of Appeal had responded explicitly to the *Vinter* critique. It had affirmed the Secretary of State's statutory duty to exercise the power of release compatibly with Article 3 of the Convention and clarified that the Lifer Manual could not restrict the Secretary of State's duty to consider all circumstances relevant to release or fetter the Secretary of State's discretion by taking account only of the matters stipulated in the Lifer Manual. The Court of Appeal had thus brought clarity as to the content of the relevant domestic law, resolving the discrepancy that had been identified in *Vinter*.

Having established that the lack of clarity in the domestic law identified in *Vinter* had been dispelled, the Grand Chamber went on to consider whether, in the light of the nature of the review and its scope, the conditions and criteria for review and the time-frame, the procedure for review of life sentences in England and Wales met the requirements of Article 3.

(i) *Nature of the review* – The Court saw no reason to depart from its previous case-law that the executive (as opposed to judicial) nature of a review was not in itself contrary to the requirements of Article 3. In this connection, it noted that the Secretary of State was bound to exercise the power of release in a manner compatible with Convention rights, to have regard to the relevant case-law of the Court and to provide reasons for each decision. Furthermore, the Secretary of State's decisions were subject to a review by the domestic courts and the Government had stated that such review would not be confined

1. Issued as Prison Service Order 4700.
2. *R v. Newell; R v McLoughlin* [2014] EWCA Crim 188.

to formal or procedural grounds, but would also involve an examination of the merits.

(ii) *Scope of the review* – The Court of Appeal had crucially specified in *McLoughlin* that the "exceptional circumstances" referred to in section 30 could not legally be limited to end-of-life situations as announced in the Lifer Manual, but had to include all exceptional circumstances relevant to release on compassionate grounds. Although the Court of Appeal had refrained from specifying further the meaning of the words "exceptional circumstances" in this context, or to elaborate criteria, it had recalled earlier domestic case-law to the effect that exceptional progress by the prisoner whilst in prison was to be taken into account. It was thus evident that exceptional progress towards rehabilitation came within the meaning of the statutory language. Likewise, the narrow emphasis put on the term "compassionate grounds" in the Lifer Manual had been corrected by the judgment of the Court of Appeal, which affirmed that it was not limited to humanitarian grounds but had a wide meaning, so as to be compatible with Article 3.

(iii) *Criteria and conditions for review* – The Court reaffirmed that the relevant question was whether those serving life sentences in the domestic system could know what they must do to be considered for release, and under what conditions the review takes place. In that connection, the domestic system could be regarded as possessing a sufficient degree of specificity or precision as, firstly, the exercise of the section 30 power would be guided by all of the relevant case-law of the European Court both present and future and, secondly, the concrete meaning of the terms used in section 30 would continue to be further fleshed out in practice. In this latter context the Secretary of State's duty to give the reasons for each decision, subject to judicial review, acted as a guarantee of the consistent and transparent exercise of the power of release.

(iv) *Time-frame* – The concern that had been expressed in *Vinter* regarding indeterminacy – a prisoner should not be obliged to wait and serve an indeterminate number of years before being permitted to mount an Article 3 challenge – and the repercussions of this for a whole life prisoner could not yet be said to have arisen for the applicant. The process of review under section 30 could be initiated by the prisoner at any time and the applicant had not suggested that he had been prevented or deterred from applying to the Secretary of State at any time to be considered for release.

In conclusion, the *McLoughlin* decision had dispelled the lack of clarity identified in *Vinter* arising out of the discrepancy within the domestic system between the applicable law and the published official policy. In addition, the Court of Appeal had brought clarification as regards the scope and grounds of the review by the Secretary of State, the manner in which it should be conducted, as well as the duty of the Secretary of State to release a whole life prisoner where continued detention could no longer be justified on legitimate penological grounds. Further specification of the circumstances in which a whole life prisoner could seek release, with reference to the legitimate penological grounds for detention, could come through domestic practice. The statutory obligation on the national courts to take into account the Article 3 case-law as it may develop in the future provided an additional important safeguard.

Accordingly, the whole life sentence could now be regarded as reducible, in keeping with Article 3 of the Convention.[3]

Conclusion: no violation (fourteen votes to three).

(See also *Kafkaris v. Cyprus* [GC], 21906/04, 12 February 2008, Information Note 105; *Vinter and Others v. the United Kingdom* [GC], 66069/09 et al., 9 July 2013, Information Note 165; and *Murray v. the Netherlands* [GC], 10511/10, 25 April 2016, Information Note 195; and, more generally, the Factsheet on Life imprisonment)

ARTICLE 4

ARTICLE 4 § 1

Trafficking in human beings, positive obligations

Decision of prosecutor not to pursue investigation into alleged human trafficking offences committed abroad by non-nationals: *no violation*

3. Since the parties' submissions were confined to the issue whether, in light of the *McLoughlin* ruling, the applicant's situation in relation to his whole life sentence was in keeping with the requirements of Article 3 as laid down in *Vinter* the Court did not examine whether there had been a violation of Article 3 in the period of the applicant's imprisonment prior to the *McLoughlin* ruling. It did note, however, that the material circumstances in the two cases were indistinguishable.

J. and Others v. Austria, 58216/12, judgment 17.1.2017 [Section IV]

Facts – The applicants, Filipino nationals recruited from the Philippines, worked as maids and nannies for different families in Dubai. In July 2010 they accompanied their employers to Austria. During their stay there the applicants left the families and reported to the Austrian police alleging that they had been subject to human trafficking and forced labour. The public prosecutor later discontinued investigations on the grounds that the offences had been committed abroad by non-nationals. No offence had been committed in Austria. The prosecutor's decision was upheld by the regional criminal court.

In the Convention proceedings, the applicants complained that the Austrian authorities had failed to comply with their positive obligations to them under the procedural limb of Article 4 as victims of trafficking.

Law – Article 4: The case raised two questions. Firstly, whether the Austrian authorities had complied with their positive obligation to identify and support the applicants as potential victims of human trafficking, and secondly, whether they had fulfilled their positive obligation to investigate the alleged crimes.

(a) *Positive obligation to identify and support the applicants as potential victims of human trafficking* – From the point when the applicants turned to the police, they were immediately treated as potential victims of human trafficking. They were interviewed by specially trained police officers, granted residence and work permits in order to regularise their stay in Austria, and a personal data disclosure ban was imposed on the central register so that their whereabouts were untraceable by the general public. During the domestic proceedings the applicants were supported by an NGO, funded by the Government to provide assistance to victims of human trafficking. The applicants were also given legal representation, procedural guidance and assistance to facilitate their integration in Austria. The legal and administrative framework in place concerning the protection of potential victims of human trafficking in Austria thus appeared to have been sufficient and the authorities had taken all steps which could reasonably have been expected in the given situation.

(b) *Positive obligation to investigate the allegations of human trafficking* – The public prosecutor's office had initiated an investigation after the applicants had given their statements to the police. The investigation was discontinued as the public prosecutor's office was of the opinion that the applicants' employers' alleged conduct on Austrian territory did not fulfil the relevant legal provisions. The office observed that the alleged crime of trafficking in human beings had been committed abroad, the accused were non-nationals, and Austrian interests were not engaged. The decision to discontinue the proceedings was confirmed by the regional criminal court which added that there was no reason to prosecute if, on the basis of the results of the investigation, a conviction was no more likely than an acquittal. It its view, there was also no obligation under international law to pursue the investigation in relation to the events allegedly committed abroad.

In the context of its positive obligations, the questions arose as to whether Austria was under a duty to investigate the crimes allegedly committed abroad and whether the investigation into the events in Austria was sufficient. Under its procedural limb, Article 4 did not require States to provide for universal jurisdiction over trafficking offences committed abroad. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children was silent on the matter of jurisdiction, and the Council of Europe Anti-Trafficking Convention only required State parties to provide for jurisdiction over any trafficking offence committed on their own territory, or by or against one of their nationals. In the present case, there was no obligation incumbent on Austria to investigate the applicants' recruitment in the Philippines or their alleged exploitation in the United Arab Emirates.

The applicants had been given the opportunity to provide a detailed account of the events to specially trained police officers and over thirty pages of statements had been drawn up. Based on the descriptions given, the authorities had concluded that the events – as reported by the applicants – did not amount to a criminal action. In the light of the facts of the case and the evidence that the authorities had at their disposal, the assessment that the elements of the relevant offence had not been fulfilled did not appear unreasonable. The authorities had only been alerted approximately a year after the events in Austria, when the applicants' employers had long since left Austria and presumably returned to Dubai. The only further

steps the authorities could possibly have taken would have been to request legal assistance from the United Arab Emirates, attempting to question the applicants' employers by means of letters of request and issuing an order to determine their whereabouts. However, the authorities could not have had any reasonable expectation of even being able to confront the applicants' employers with the allegations made against them, as no mutual legal assistance agreements existed between Austria and the United Arab Emirates. It did not appear that these steps, albeit possible in theory, would have had any reasonable prospects of success and would therefore have been required. As such, the investigation conducted by the Austrian authorities in the applicants' case was sufficient for the purposes of Article 4 of the Convention.

Conclusion: no violation (unanimously).

The Court also concluded (unanimously) that there had been no violation of Article 3 of the Convention, as the test of the State's positive obligations under the procedural limb of Article 3 of the Convention was very similar to that under Article 4 which had been comprehensively examined and no violation found.

(See *Rantsev v. Cyprus and Russia*, 25965/04, 7 January 2010, Information Note 126; *Siliadin v. France*, 73316/01, 26 July 2005, Information Note 77)

ARTICLE 5

ARTICLE 5 § 4

Review of lawfulness of detention

Lack of remedy to determine whether sentence for criminal offence imposed some twenty years earlier was time-barred: *violation*

Ivan Todorov v. Bulgaria, 71545/11, judgment 19.1.2017 [Section V]

Facts – In April 1987 the applicant was found guilty of aiding and abetting the misuse of public property and was sentenced, among other penalties, to twenty years' imprisonment. In June 1987 the Supreme Court upheld the judgment and the sentences imposed. The Supreme Court judgment was final and enforceable under domestic law. The applicant had been placed in pre-trial detention in June 1986 and began serving his sentence in June 1987.

In January 1991 the applicant lodged an application for review with the Supreme Court. On the same date the President of the Supreme Court ordered a stay of execution of his sentence on account of his state of health, and he was released. In December 1992 the Supreme Court dismissed the application for review and upheld the applicant's conviction. The authorities were unable to locate the applicant.

In 2005 the applicant requested a pardon from the President of the Republic of Bulgaria. In November 2007 the pardons commission informed him that it was unnecessary to examine his request as the limitation period for execution of his sentence had expired.

The applicant decided to return to Bulgaria. In January 2008 he was arrested by the police on arrival at the airport under the terms of an arrest warrant. He was subsequently sent to prison to serve the twenty-year sentence handed down in 1987.

The applicant appealed to the public prosecutor's office, arguing that execution of the prison sentence was time-barred and applying to be released. In February 2008 the military prosecutor ruled that the applicant had to serve the remainder of his sentence and that the limitation period had not expired. The applicant's appeals against that order were all dismissed.

The applicant was released in May 2014.

Law – Article 5 § 4: From the time of his imprisonment in January 2008 the applicant had maintained that the limitation period for execution of his sentence had expired and that there was no legal basis for his detention. The pardons commission attached to the President's Office had expressed the same view in response to the applicant's request for a pardon in 2007. However, the prosecuting authorities, who were responsible for deciding whether or not the sentence should be served, had taken the opposite view. The question whether execution of the applicant's sentence was time-barred, which was decisive for the lawfulness of his detention, had not been examined at the time of the trial judgment in 1987 or when the applicant's application for review was being considered in 1992. Accordingly, the domestic legal order should have afforded the applicant access to a legal remedy satisfying the requirements of Article 5 § 4 of the Convention, in order to have this issue determined.

Bulgarian law did not provide for a specific judicial remedy by which to contest the lawfulness of detention following a criminal conviction. The prosecuting authorities alone were empowered to determine issues relating to the execution of sentences. The orders made were subject only to supervision by a higher-ranking prosecutor and not to judicial review. However, a public prosecutor could not be regarded as a tribunal satisfying the requirements of Article 5 § 4. Likewise, there was no general *habeas corpus*-type procedure in domestic law providing for a review of the lawfulness of detention and for the release of the person concerned if the detention was found to be unlawful.

With regard to the action for compensation provided for by section 2(1) of the State and Municipalities Responsibility for Damage Act, which had been amended to include a right to compensation in respect of any violation of Article 5 §§ 1 to 4 of the Convention and which entered into force on 15 December 2012, the procedure in question, although it could potentially lead to a finding that a person's detention had been unlawful, did not provide for his or her release in the event of such a finding.

In view of the foregoing the applicant had not had access, at any point during his detention from January 2008 to May 2014, to a judicial remedy by which to obtain a review of the lawfulness of his detention and to secure his release in the event of a finding of unlawfulness.

Conclusion: violation (unanimously).

The Court also held unanimously that there had been a violation of Article 5 § 5, given that the action for compensation provided for under the State Responsibility Act had not been apt to secure the applicant's right to redress and that no other remedy existed in domestic law capable of providing him with compensation for the damage sustained on account of the violation of Article 5 § 4, either before or after adoption of the present judgment.

Article 41: EUR 6,000 in respect of non-pecuniary damage; claim for pecuniary damage dismissed.

In the case of *I.P. v. Bulgaria* (72936/14, 19 January 2017) the Court also held unanimously that there had been a violation of Article 5 § 4 on the ground that the applicant had not had the benefit of a judicial review of the lawfulness of his detention. The violation had not stemmed from the actions or omissions of one of the authorities referred to in section 2 of the State Responsibility Act, but rather from the absence in domestic law of a procedure for judicial review of the applicant's detention in a short-stay institution for young people. Hence, the action for compensation under that Act was not an accessible and effective remedy capable of affording redress to the applicant in respect of his complaint.

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Access to court

Dismissal of appeal as being out of time despite late receipt of impugned decision by appellant: *violation*

Ivanova and Ivashova v. Russia, 797/14 and 67755/14, judgment 26.1.2017 [Section III]

Facts – The second applicant, Ms Ivashova (hereafter, "the applicant") wished to lodge an appeal against a judgment delivered by a district court. The deadline laid down by domestic law was one month from the date on which the full text of the decision was published. During the hearing at which the first-instance decision was delivered, only the operative provisions were read out. The applicant went to the court registry on numerous occasions to inquire about the availability of the full text, and also submitted written requests. On her first visits, the text had not yet been added to the case file. According to her submissions, the registry then refused to provide her with a full copy of the decision, on the ground that it had already been sent by post; however, the postal delivery arrived too late for her to be able to submit a reasoned appeal. Nonetheless, the applicant made a point of filing a summary statement of appeal within the relevant deadline, explaining that she had not yet been informed of the reasons for the decision. Once in possession of a full copy of the decision, she supplemented her appeal pleadings, but without success.

Arguing that the ground for refusing her appeal, namely that it had been lodged out of time, was erroneous, the applicant alleged that there had been a breach of her right of access to a court.

Law – Article 6 § 1: The exercise of the right of appeal was only genuinely possible from the point at which the individual concerned could effectively appraise himself or herself of the full version of the decision in question.

With regard to the transmission of a full copy of the relevant decision by post, the methods used by the domestic courts when sending out decisions did not enable the Court to verify the date of receipt. However, the applicant had submitted a document corroborating its late receipt. The relevant date of receipt had also been confirmed by the appeal court.

In the absence of any system for notifying the parties and informing them that the finalised text was available at the registry, the Court considered that the applicant had taken all reasonable steps to obtain the full text of the decision and to lodge an appeal within the statutory time-limits.

Calculating the deadline for lodging an appeal from the date on which the full text of a court's decision was drawn up by the court's registry amounted to making expiry of this deadline dependent on a factor that was totally outside the appellant's control.

In other words, dismissing the applicant's appeal as being out of time resulted from an inflexible interpretation of the domestic legislation, placing an obligation on the applicant with which she had been unable to comply, even by showing special diligence.

In view of the seriousness of the consequences for the applicant of failure to comply with the deadline thus calculated, the contested measure had therefore not been proportionate to the aim of guaranteeing legal certainty and the proper administration of justice.

Conclusion: violation (unanimously).

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

In a similar case concerning the first applicant, Ms Ivanova, the Court concluded unanimously that there had been no violation of Article 6 § 1, as there was nothing in the file enabling it to depart from the appeal court's conclusion in this specific case that the first applicant had necessarily been made aware of the relevant decision in good time.

ARTICLE 6 § 1 (CRIMINAL)

Fair hearing, adversarial trial, equality of arms

Defence denied access to documents concerning arrangements under which former criminals had agreed to give evidence for the prosecution: *no violation*

Habran and Dalem v. Belgium, 43000/11 and 49380/11, judgment 17.1.2017 [Section II]

Facts – The applicants were tried in the Assize Court for an armed raid on an armoured van which resulted in fatalities. As the indictment contained references to certain "witness statements" made by "criminals turned witnesses" (*repentis*), the applicants questioned the probative value of those statements, arguing that the persons concerned had cooperated with the judicial authorities in return for concessions. They complained in that connection of the failure to disclose the prior exchanges between these witnesses and the prosecuting and investigating authorities, which they claimed had hampered their defence. The Assize Court replied in detail to their arguments in an interlocutory judgment. On conclusion of the trial the applicants were found guilty and sentenced to fifteen and twenty-five years' imprisonment respectively.

Law – Article 6 (*fairness of the proceedings*): Although no such status existed under Belgian law, there was no reason not to consider the witnesses in question in the present case as "criminals turned witnesses", as they had criminal backgrounds and had secured financial concessions. The timing of the events also suggested that one of them had been granted certain sentencing concessions in return for his statements.

As to the fact that one of the witnesses had been an informer, the Convention did not preclude reliance, at the preliminary investigation stage and where the nature of the offence might warrant it, on sources such as anonymous informers. However, the subsequent use of such sources by the trial court to found a conviction was a different matter and was acceptable only if adequate and sufficient safeguards against abuse were in place. The use of statements of doubtful origin did not rule out the possibility of a fair trial.

In view of the timing of the events, the combined status of informer and witness and the backgrounds of the two witnesses in question, who had links to organised crime, the applicants had been entitled to raise the question whether they had been accused and convicted on the basis of allegations that had not been fully verified, made by individuals who were not necessarily disinterested.

As to whether the statements of those witnesses had formed the decisive basis for the applicants' conviction, other factors had been taken into consideration, such as the ballistic evidence and

other witness statements which there had been no reason to doubt and which concurred with those of the witnesses concerned, although the strength of this evidence taken in isolation was open to question. In any event, the fact remained that the testimony in question carried a certain weight. The Court therefore had to examine whether the applicants' defence had been adversely affected as a result or whether account had been taken of the difficulties that might be caused by the circumstances in which the evidence had been obtained.

In the course of the oral proceedings concerning the applicants' guilt, one of the witnesses in question had appeared before the Assize Court and had been cross-examined by the defence. However, the other witness had died before the trial began, although his statements had been read out to the jury by the presiding judge.

Nevertheless, as the fairness of the trial had to be assessed as a whole, the Court took note of other factors that had been apt to compensate for the difficulties that could arise for the applicants' defence:

– although the witnesses in question had been subject to certain protective measures, they had not been granted anonymity and their identity had been known to the applicants;

– the initial information provided by the witnesses in question had not differed in substance (as stated by the police officers concerned under oath) from their subsequent official statements contained in the criminal file, which had been accessible to the defence;

– the two witnesses in question had hardly known each other;

– the statements of the two witnesses had concurred despite coming from different sources. These concurring statements, coming from different sources and given at different times, had formed a "whole" capable of convincing the jury beyond any reasonable doubt. The fact that they had been made by persons with a criminal background who could have been indirectly involved in the acts of which the applicants were convicted did not alter that finding;

– although they had not had access to the confidential "informer" file or the files of the witness protection commission, the applicants had been able to consult the entire criminal case file. Furthermore, in general terms, they did not claim to have been hindered in the preparation of their defence before the Assize Court;

– the applicants had not been prevented at any point in the proceedings from challenging the reliability of the witnesses or the content and credibility of their statements. Following the witness confrontation during the investigation stage, adversarial proceedings had taken place at a public hearing before the Assize Court, during which the witness who was still alive had appeared with his face uncovered and could be questioned by the applicants. The applicants' arguments had all been carefully examined by the Assize Court and subsequently by the Court of Cassation;

– the prosecution had not made use of the undisclosed evidence, which had not been brought to the attention of the jury;

– the Assize Court had been aware of the fact that the testimony came from persons with a criminal background who could have been indirectly involved in the acts of which the applicants were convicted, and the jurors had thus been in a position to assess the risk that this testimony might pose to the fairness of the trial.

Accordingly, the limits placed on the disclosure of certain items in the case file had been sufficiently counterbalanced in the present case by the oral adversarial proceedings before the trial court. Hence, the proceedings as a whole had been attended by sufficiently strong safeguards and had not been unfair.

Conclusion: no violation (unanimously).

The Court likewise found no violation of Article 6 with regard to the length of the proceedings.

Impartial tribunal

Alleged lack of impartiality of juror owing to comments she made in newspaper interview after sentencing: *inadmissible*

Bodet v. Belgium, 78480/13, decision 5.1.2017 [Section II]

Facts – In 2012, by two judgments of the same date, an assize court convicted the applicant of the premediated murder of his partner's daughter, and sentenced him to life imprisonment. Two days later, a regional daily newspaper published an interview with a member of the court's lay jury, whose identity was not given. The interviewee allegedly stated

that (i) she could not but put herself in the place of the victim's mother; (ii) she wished to pay tribute to the work of the investigators, who, by drawing up a precise timeline, had removed the doubts of the majority of jurors and refuted the defence arguments; and (iii) she had wanted to "thump [the applicant]" when he spoke.

Law – Article 6 § 1: Statements made about a case or the parties involved by a member of the entity judging the case, whether these were made before, during or after the trial, were capable of indicating the existence of bias on its part. The question of whether or not these statements constituted sufficient evidence of a lack of subjective or objective impartiality depended on the context and the content of the comments in issue. In the present case, the following elements led to the conclusion that the applicant's fears were not objectively justified.

(a) *Subjective impartiality* – The impugned comments had been made subsequent to the verdict, that is, at a point when the juror concerned no longer had a jurisdictional role. The legal provisions in place to ensure the jury's impartiality no longer applied as such, but had been replaced by those banning any violation of the secrecy of the deliberations. The applicant did not allege that the juror in question had externalised any opinion or emotion during the trial. Nor had he requested that any juror be discharged during the trial.

Although the impugned comments did indeed reflect a negative perception of the defendant's case, it could not be deduced from the interview as a whole that the juror in question had begun the trial with a preconceived idea about the applicant's guilt, but rather that this conviction had developed over the course of the trial. Furthermore, the article contained elements which could indicate the opposite conclusion (the juror had indicated that the investigators' work and the precise timeline drawn up by them had been of great assistance to the jury, and then referred to the deliberations).

(b) *Objective impartiality* – As to the composition of the assize court, Belgian law provided that a lay jury was made up of twelve members. It deliberated alone on the question of the defendant's guilt. Three professional judges joined the jury to formulate the reasons for the decision and to discuss together the sentence to be imposed.

The applicant had not advanced any concrete argument capable of casting doubt on the capacity of the assize court, a collegial judicial bench, to form an opinion with complete impartiality, this element. That opinion had been formed at the close of the deliberations and had then taken tangible shape in the form of two reasoned decisions which did not appear arbitrary.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 7

Nulla poena sine lege, heavier penalty

Fixing of a combined sentence in respect of multiple offences: *violation*

Koprivnikar v. Slovenia, 67503/13, judgment 24.1.2017 [Section IV]

Facts – The applicant was convicted in separate judgments of three separate offences for which he was sentenced to prison terms of five months, four years and thirty years respectively. Subsequently, the applicant applied to the District Court under Article 53 § 2 (2) of the 2008 Criminal Code to have the three prison terms joined in an overall sentence. That provision laid down that the overall sentence had to exceed each individual sentence but was not to exceed the total of all the offences or twenty years' imprisonment. Taking the view that the legislature had not intended to enact legislation enabling offenders who had been sentenced to thirty years' imprisonment for an individual offence to benefit from an overall sentence that would have been ten years lower when the offences were joined, the District Court imposed a combined sentence of thirty years' imprisonment on the applicant in respect of all three offences. In the Convention proceedings, the applicant complained that the overall sentence imposed on him had breached Article 7 of the Convention.

Law – Article 7: The relevant legal provision relied on by the domestic courts provided a deficient legal basis for the determination of the sentence. In particular, the application of the wording of the 2008 Criminal Code to the applicant's situation led to contradictory results. While, according to the terms of that provision, the applicant should not have had an overall sentence of more than twenty years imposed on him, the overall sentence should have exceeded each individual sentence, which in the applicant's case included a term of imprisonment of thirty years. The only way for the domestic courts to have ensured the observance of the principle that only

the law can define a crime and prescribe a penalty, and to mitigate the effects of the law's unpre*dicta*bility in the present case would have been to interpret the deficient provision restrictively, that is to say to the advantage of the applicant.

The relevant provision could have been applied to the applicant by either disregarding the lower limit, which required the overall sentence to exceed each individual sentence, or by disregarding the upper limit, which laid down that the overall prison sentence should not exceed the maximum ceiling of twenty years. The first option was more favourable to the applicant and would have complied with the maximum limit on the overall sentence explicitly provided for in the legislation. The domestic courts had interpreted the deficient provision by resorting to different canons of interpretation and concluded that it should be understood as imposing a sentence of thirty years, despite the fact that such a penalty was heavier than the maximum explicitly provided for and that, having regard to the actual wording of that provision, it was clearly to the detriment of the applicant.

Accordingly and having regard to the above considerations, the domestic courts had failed to ensure observance of the principle of legality enshrined in Article 7 of the Convention. The overall penalty imposed on the applicant was in violation of both the principle that only the law can prescribe a penalty and the principle of retrospectiveness of the more lenient criminal law.

Conclusion: violation (six votes to one).

Article 41: Finding of a violation constituted in itself sufficient just satisfaction.

ARTICLE 8

Respect for private and family life, positive obligations

Dismissal of divorce petition of spouse who wished to marry new partner: *no violation*

Babiarz v. Poland, 1955/10, judgment 10.1.2017 [Section IV]

(See Article 12 below, page 22)

Respect for private life

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

Paradiso and Campanelli v. Italy, 25358/12, judgment 24.1.2017 [GC]

Facts – The applicants were a married couple. In 2006 they obtained official authorisation to adopt a child. After having attempting unsuccessfully to have a child through *in vitro* fertilisation, they decided to resort to surrogacy in order to become parents. To that end, they contacted a Moscow-based clinic which specialised in assisted reproduction technology and entered into a gestational surrogacy agreement with a Russian company. After a successful *in vitro* fertilisation in May 2010 – purportedly carried out using the second applicant's sperm – two embryos "belonging to them" were implanted in the womb of a surrogate mother. A child was born in February 2011. The surrogate mother gave her written consent to the child being registered as the applicants' son. In accordance with Russian law, the applicants were registered as the baby's parents. The Russian birth certificate, which contained no reference to the gestational surrogacy, was certified in accordance with the provisions of the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

In May 2011, after they had requested that the Italian authorities register the birth certificate, the applicants were placed under investigation for "misrepresentation of civil status" and violation of the adoption legislation, in that they had brought the child into the country in breach of the law and of the authorisation to adopt, which had ruled out the adoption of such a young child. On the same date the public prosecutor requested the opening of proceedings to release the child for adoption, since he was to be considered as being in a "state of abandonment". In August 2011 a DNA test was carried out at the court's request. It showed that, contrary to what the applicants had stated, there was no genetic link between the second applicant and the child. In October 2011 the minors court decided to remove the child from the applicants. Contact was forbidden between the applicants and the child. In April 2013 the court held that it was legitimate to refuse to register the Russian birth certificate and ordered that a new birth certificate be issued, indicating that the child had been born to unknown parents and giving him a new name. The child had since been adopted by another

family. The domestic court considered that the applicants did not have status to act in those adoption proceedings.

By a judgment of 27 January 2015 (see Information Note 181), a Chamber of the Court found, by five votes to two, that the child's removal had amounted to a violation of Article 8 of the Convention on account, in particular, of the hasty conclusion that the intended parents were not fit to look after the child and the fact that the interests of the child, who had been without a legal identity for more than two years, had not been taken properly into account.

On 1 June 2015 the case was referred to the Grand Chamber at the Government's request.

Law – Article 8: The case concerned applicants who, acting outside any standard adoption procedure, had brought to Italy from abroad a child who had no biological tie with either parent, and who had been conceived – according to the domestic courts – through assisted reproduction techniques that were unlawful under Italian law.

(a) *Applicability*

(i) *Family life* – The termination of the applicants' relationship with the child was the consequence of the legal uncertainty that they themselves had created in respect of the ties in question, by engaging in conduct that was contrary to Italian law and by coming to settle in Italy with the child. The Italian authorities had reacted rapidly to this situation by requesting the suspension of parental authority and opening proceedings to make the child available for adoption.

Having regard to the absence of any biological tie between the child and the intended parents, the short duration of the relationship with the child (about eight months) and the uncertainty of the ties from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional bonds, the Court considered that the conditions enabling it to conclude that there had existed a *de facto* family life had not been met.

In these circumstances, the Court concluded that no family life had existed in the present case.

(ii) *Private life* – Bearing in mind that the applicants had had a genuine intention to become parents and had explored the various options available in order to love and bring up a child, what was at issue was the right to respect for the applicants' decision to become parents, and the applicants' personal development through the role of parents that they wished to assume *vis-à-vis* the child. Lastly, given that the proceedings before the minors court had concerned the issue of biological ties between the child and the second applicant, those proceedings and the establishment of the genetic facts had had an impact on the second applicant's identity and the relationship between the two applicants.

It followed that the facts of the case fell within the scope of the applicants' private life.

(b) *Merits* – The measures taken in respect of the child had amounted to an interference with the applicants' private life. This interference had been in accordance with the law and pursued the aims of prevention of disorder and the protection of the rights and freedoms of others.

The national courts had based their decisions on the absence of any genetic ties between the applicants and the child and on the breach of domestic legislation concerning international adoption and on medically assisted reproduction. The measures taken by the authorities had been intended to ensure the immediate and permanent rupture of any contact between the applicants and the child, and the latter's placement in a home and under guardianship.

The facts of the case touched on ethically sensitive issues – adoption, the taking of a child into care, medically assisted reproduction and surrogate motherhood – in which member States enjoyed a wide margin of appreciation.

The domestic authorities had relied in particular on two strands of argument: the illegality of the applicants' conduct and the urgency of taking measures in respect of the child, whom they considered to be "in a state of abandonment" within the meaning of section 8 of the Adoption Act.

The reasons advanced by the domestic courts were directly linked to the legitimate aim of preventing disorder, and also that of protecting children – in the present case but also more generally – having regard to the State's prerogative to establish descent through adoption and through the prohibition of certain techniques of medically assisted reproduction.

As the case was to be examined from the angle of the applicants' right to respect for their private life, bearing in mind that what was at stake was their right to personal development through their

relationship with the child, the reasons given by the domestic courts, which had concentrated on the situation of the child and the illegality of the applicants' conduct, had been sufficient.

The domestic courts had attached considerable weight to the applicants' failure to comply with the Adoption Act and to the fact that they had recourse abroad to methods of medically assisted reproduction that were prohibited in Italy. In the domestic proceedings, the courts, focused as they were on the imperative need to take urgent measures, had not expanded on the public interests involved; nor had they explicitly addressed the sensitive ethical issues underlying the legal provisions breached by the applicants.

For the domestic courts the primary concern had been to put an end to an illegal situation. The laws which had been contravened by the applicants and the measures which were taken in response to their conduct served to protect very weighty public interests.

In respect of the child's interests, the minors court had had regard to the fact that there was no biological link between the applicants and the child and had held that a suitable couple should be identified as soon as possible to take care of him. Given the child's young age and the short period spent with the applicants, the court had not agreed with the psychologist's report submitted by the applicants, suggesting that the separation would have devastating consequences for the child. It had concluded that the trauma caused by the separation would not be irreparable.

As to the applicants' interest in continuing their relationship with the child, the minors court had noted that there was no evidence in the file to support their claim that they had provided the Russian clinic with the second applicant's genetic material. Having obtained approval for inter-country adoption, they had circumvented the Adoption Act by bringing the child to Italy without the approval of the Commission for Inter-Country Adoption. Having regard to that conduct, the minors court had expressed concern that the child might be an instrument to fulfil a narcissistic desire of the applicants or to exorcise an individual or joint problem. Furthermore, the applicants' conduct had thrown a "consistent shadow on their possession of genuine affective and educational abilities and of the instinct of human solidarity which must be present in any person wishing to bring the children of others into their lives as their own children".

The child was not an applicant in the present case. In addition, he was not a member of the applicants' family within the meaning of Article 8 of the Convention. This did not mean however, that the child's best interests and the way in which these had been addressed by the domestic courts were of no relevance.

The domestic courts had not been obliged to give priority to the preservation of the relationship between the applicants and the child. Rather, they had had to make a difficult choice between allowing the applicants to continue their relationship with the child, thereby legalising the unlawful situation created by them as a *fait accompli*, or taking measures with a view to providing the child with a family in accordance with the legislation on adoption.

The Italian courts had attached little weight to the applicants' interest in continuing to develop their relationship with a child whose parents they wished to be. They had not explicitly addressed the impact which the immediate and irreversible separation from the child would have on their private life. However, this had to be seen against the background of the illegality of the applicants' conduct and the fact that their relationship with the child had been precarious from the very moment that they had decided to take up residence with him in Italy. The relationship had become even more tenuous once it had turned out, as a result of the DNA test, that there was no biological link between the second applicant and the child.

The proceedings had been of an urgent nature. Any measure prolonging the child's stay with the applicants, such as placing him in their temporary care, would have carried the risk that the mere passage of time would have determined the outcome of the case.

The Court did not underestimate the impact which the immediate and irreversible separation from the child must have had on the applicants' private life. While the Convention did not recognise a right to become a parent, the Court could not ignore the emotional hardship suffered by those whose desire to become parents had not been or could not be fulfilled. However, the public interests at stake weighed heavily in the balance, while comparatively less weight was to be attached to the applicants' interest in their personal development by continuing their relationship with the child. Agreeing to let the child stay with the applicants,

possibly with a view to their becoming his adoptive parents, would have been tantamount to legalising the situation created by them in breach of important rules of Italian law. The Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, had struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them in the present case.

Conclusion: no violation (eleven votes to six).

(See also *Giusto, Bornacin and V. v. Italy* (dec.), 38972/06, 15 May 2007, Information Note 97; *Wagner and J.M.W.L. v. Luxembourg*, 76240/01, 28 June 2007, Information Note 98; *Moretti and Benedetti v. Italy*, 16318/07, 27 April 2010, Information Note 129; *Kopf and Liberda v. Austria*, 1598/06, 17 January 2012; *Labassee v. France*, 65941/11, 26 June 2014, Information Note 175; and *Mennesson v. France*, 65192/11, 26 June 2014, Information Note 175)

Respect for family life, positive obligations

Failure to take appropriate steps to facilitate contact of deaf and mute father with his son: *violation*

Kacper Nowakowski v. Poland, 32407/13, judgment 10.1.2017 [Section IV]

Facts – The applicant, who was deaf and mute, married a woman who also had a hearing impairment. The couple had a son in 2006. They divorced in 2007 and the domestic courts ruled that the boy was to reside with his mother and that the applicant would be allowed to see him two hours a week.

However, in 2011, when his son was almost five, the applicant applied to the courts for an extension of his contact rights in order to strengthen their ties. His request was refused on the grounds that it would not be in his son's best interests owing to the child's own disability and heavy dependence on his mother, and the need to involve the mother in contact visits, as she was able to use sign language and communicate orally, whereas the father mostly used sign language and the son only communicated orally.

In the Convention proceedings the applicant complained *inter alia* under Article 8 that the dismissal of his application for an extension of contact with his son had infringed his right to respect for his family life.

Law – Article 8: The decisive question was whether the national authorities had taken all appropriate steps that could reasonably have been demanded to facilitate contact between the applicant and his son.

In its assessment of the reasons advanced by the domestic courts for refusing to extend contact the Court had to pay due regard to two specific features of the present case, namely (i) the serious conflict between the parents, and (ii) the respective disabilities of the applicant and his son.

As to the conflict between the parents, the Court accepted that the task of the domestic courts had been rendered difficult by the strained relationship between the applicant and the child's mother. However, a lack of cooperation between separated parents was not a circumstance which could, in and of itself, exempt the authorities from their positive obligations under Article 8. Rather, it imposed on the authorities an obligation to take measures to reconcile the conflicting interests of the parties, keeping in mind the paramount interests. In this context the Court noted that (i) the domestic courts had decided not to impose an obligation on the parents to undergo family therapy despite the recommendations made by the experts for specialist counselling, (ii) the domestic legislation contained no provision for mediation in family-law cases, and (iii) the domestic courts had not properly examined the possibility of resorting to the range of existing legal instruments which could have facilitated the broadening of contact.

As regards the disabilities of father and son, the applicant had an incontestable right to contact with his son and the communication issue should have been taken into account. The domestic courts' solution had been to involve the child's mother in the contact arrangements (since she was able to communicate both orally and in sign language) but that ignored the existing animosity between the parents and the frequent complaints by the applicant that the mother had attempted to obstruct contact and to marginalise his role. It was clear that the maintenance of the same restricted contact arrangements was likely to entail, with the passage of time, a risk of severance of the applicant's relationship with his son. The domestic courts should therefore have envisaged additional measures, more adapted to the specific circumstances of the case, but they had failed to obtain expert evidence from specialists familiar with the problems faced by persons suffering from a hearing impairment.

The domestic courts' duty, in cases like the present one, was to address the issue of what steps could be taken to remove existing barriers and to facilitate contact between the child and the non-custodial parent. However, the national courts had failed to consider any means that would have assisted the applicant in overcoming the barriers arising from his disability and had thus not taken all appropriate steps that could reasonably be demanded with a view to facilitating contact.

Conclusion: violation (unanimously).

Article 41: EUR 16,250 in respect of non-pecuniary damage.

Positive obligations

Lack of comprehensive law-enforcement approach to anti-Roma demonstration: *violation*

Király and Dömötör v. Hungary, 10851/13, judgment 17.1.2017 [Section IV]

Facts – The applicants were Hungarian nationals of Roma origin. In August 2012 an anti-Roma demonstration was held. Speeches were made following which demonstrators marched between houses inhabited by the Roma, threatening the inhabitants and engaging in acts of violence. The applicants complained that the authorities had failed in their obligations to protect them from racist threats during the demonstration and to conduct an effective investigation into the incident in breach of Article 8.

Law – Article 8

(a) *Applicability* – Article 8 embraced multiple aspects of a person's physical and social identity and an individual's ethnic identity had to be regarded as another such element. The threats uttered against the Roma during the course of the demonstration did not actually materialise into concrete acts of physical violence against the applicants themselves. Nonetheless, the Court considered that the fact that certain acts of violence had been carried out by at least some of the demonstrators and that following the speeches the demonstrators had marched in the Roma neighbourhood shouting threats would have aroused in the applicants a well-founded fear of violence and humiliation. Further, the threats had been directed against the inhabitants on account of their belonging to an ethnic minority, and had thus necessarily affected the feelings of self-worth and self-confidence of its members, including the applicants.

(b) *Merits* – The domestic courts had concluded that there had been no legal basis to disperse the demonstration, since it had maintained its generally peaceful nature, despite some unruly incidents. The Court was satisfied that there was no appearance of arbitrariness or a manifest lack of judgment on the part of the authorities as regards the decision of the police not to disperse the demonstration. In particular, the national courts had engaged in an assessment of whether the action taken by the police had been professionally justified and whether it had been sufficient to protect the applicants and the Roma community in general, emphasising that the police had taken a number of preparative steps and, during the demonstration, had placed themselves between the protesters and the local residents. Consequently, it was not appropriate to call into question the findings of the domestic courts concerning the adequacy of the police reaction to the demonstration.

However, the fact remained that the applicants were unable to avoid a demonstration advocating racially motivated policies and intimidating them on account of their belonging to an ethnic group. The criminal investigation into the crime of incitement against a group was discontinued because the domestic authorities found that the speakers' statements during the march were not covered by the relevant offence. An investigation was opened into the criminal offence of violence and the ensuing proceedings led to the conviction of one of the demonstrators.

The manner in which the criminal-law mechanisms had been implemented was a relevant factor for the assessment of whether the protection of the applicant's rights had been defective to the point of constituting a violation of the respondent State's positive obligations under Article 8. The domestic authorities should have paid particular attention to the specific context in which the impugned statements were uttered. The event had been organised in a period when marches involving large groups and targeting the Roma had taken place on a scale that could qualify as large scale, coordinated intimidation. Racist statements taken together with the context in which they were expressed could constitute a clear and imminent risk of violence and violation of the rights of others.

The proceedings had lasted almost three years and their scope was statutorily bound to be limited to the actual acts of violence. Although the police

had had sufficient time to prepare themselves for the event and should have been able to interrogate numerous persons after the incident, only five demonstrators were questioned. That course of action had not been capable of leading to the establishment of the facts of the case and did not constitute a sufficient response to the true and complex nature of the situation complained of.

The cumulative effect of the shortcomings in the investigations, especially the lack of a comprehensive law-enforcement approach into the events, was that an openly racist demonstration with sporadic acts of violence had remained virtually without legal consequences and the applicants had not been provided with the required protection of their right to psychological integrity.

Conclusion: violation (five votes to two).

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

(See *P.F and E.F. v. the United Kingdom* (dec.), 28326/09, 23 November 2010, Information Note 135; *Perinçek v. Switzerland* [GC], 27510/08, 15 October 2015, Information Note 189)

ARTICLE 9

Manifest religion or belief

Imposition of fine on parents for refusing, on religious grounds, to allow their daughters to attend compulsory mixed swimming lessons at their primary school: *no violation*

Osmanoğlu and Kocabaş v. Switzerland, 29086/12, judgment 10.1.2017 [Section III]

Facts – On religious grounds, the applicants sought to have their daughters exempted from compulsory mixed swimming lessons at their primary school. Their request for an exemption was refused. Under the applicable Cantonal law, pupils could not be exempted until they reached puberty. The applicants continued to refuse to send their daughters to swimming lessons. The authorities accordingly imposed minor-offence fines on them in a total sum of 1,400 Swiss francs (CHF – approximately EUR 1,300).

The applicants, who were Muslims, complained of an infringement of their freedom of religion: in their view, even though the Koran did not instruct women to cover their bodies until they reached puberty, they were bound by their faith to prepare their daughters for precepts that would subsequently be applied to them.

Law – Article 9: The parental right to respect for their right "to ensure … education and teaching in conformity with their religious and philosophical convictions" was specifically guaranteed by the second sentence of Article 2 of Protocol No. 1 to the Convention, which was in principle a *lex specialis* in relation to Article 9 of the Convention. That Protocol had not been ratified by Switzerland. However, the Government had not disputed the applicability of Article 9 of the Convention, relied on by the applicants.

(a) The Court accepted that there had been interference in the exercise by the applicants of their right to manifest their religion, which was one of the aspects of the freedom protected by Article 9: as they had parental responsibility for their children, the latter's religious education was their right by law.

(b) The disputed measure had been prescribed by law and had pursued legitimate aims: integration of children from different cultures and religions, teaching as per the curriculum, respect for compulsory education and sex equality. It had sought in particular to protect foreign pupils from any form of social exclusion. Those factors fell within the protection of the rights and freedoms of others or the protection of public order, set forth in the second paragraph of Article 9.

(c) It remained to be determined whether the measure had been proportionate. With regard to the relationship between the State and religions and the significance to be given to religion in society, the States enjoyed a considerable margin of appreciation, in particular where such questions arose in the sphere of State education.

Whilst the States had a duty to convey information and knowledge in school curricula in an objective, critical and pluralistic manner and to refrain from pursuing any aim of indoctrination, they were nonetheless free to devise their school curricula according to their needs and traditions. Admittedly, priority was given to parents in ensuring their children's education. However, they could not rely on the Convention for the purpose of requiring the State to propose particular classes or to organise lessons in a particular way. Those principles applied all the more to the present application in that it had been brought against Switzerland, which had not ratified Protocol No. 1 to the Convention and was

accordingly not bound by Article 2 of that Protocol, and whose federal organisation gave the cantons and municipal authorities wide powers in terms of organising and devising school curricula.

School played a special role in the process of social integration, particularly where children of foreign origin were concerned. Given the importance of compulsory education for children's development, an exemption from certain lessons was justified only in very exceptional circumstances, in well-defined conditions and having regard to equality of treatment of all religious groups. The fact that the relevant authorities did allow exemptions from swimming lessons on medical grounds showed, moreover, that their approach was not an excessively rigid one.

Accordingly, the children's interest in a full education, thus facilitating their successful social integration according to local customs and mores, prevailed over the parents' wish to have their daughters exempted from mixed swimming lessons. That was so even though requests of this type emanated in practice, as pointed out by the applicants, only from a small number of parents on grounds of their Muslim faith. With regard to the applicants' allegation that exemptions were granted to children of fundamentalist Christians or orthodox Jews, the Court found it unsubstantiated.

Firstly, the Court did not uphold the submission that swimming lessons were not in the curriculum of all Swiss schools, or even in the canton where the applicants lived.

The Court had always respected the particular features of the federal system, in so far as these were compatible with the Convention. School curricula fell within the powers of the cantons and the municipal authorities.

A child's interest in attending swimming lessons was not just to take physical exercise or learn to swim – which were in themselves legitimate objectives – but more importantly to take part in that activity and learn alongside the other pupils, with no exception on the basis of the child's origin or the parents' religious or philosophical convictions.

Secondly, that interest in taking part in a collective activity accordingly justified dismissing the applicants' argument that their daughters attended private swimming classes. Moreover, exempting children whose parents had sufficient financial resources to pay for private lessons would create inequality with regard to children whose parents did not have those means, which was unacceptable in compulsory education.

Thirdly, the authorities had offered the applicants very flexible arrangements so as to reduce the impact of their daughters' attendance at mixed swimming classes on the parents' religious convictions. Among other things, their daughters had been allowed to wear a burkini during the swimming lessons. The applicants had not submitted any evidence in support of their assertion that wearing a burkini had a stigmatising effect. In addition, their daughters had been able to undress and shower with no boys present.

Lastly, apart from the fact that the swimming lessons were mixed, no other infringement of the applicants' beliefs was alleged.

With regard to the severity of the punishment, the minor-offences fines imposed had totalled CHF 350 (approximately EUR 325) per applicant and per child, that is, CHF 1,400 in total (approximately EUR 1,300). Having regard to the aim pursued, namely, to ensure in the children's own interests – their successful socialisation and integration – that the parents duly sent them to the compulsory lessons, the amount of the fines, which had moreover been preceded by warnings, did not appear disproportionate.

With regard to the decision-making process in the present case, in addition to publication of a guideline on dealing with religious matters in schools, in which the applicants were able to find the relevant information, the relevant authority had personally warned them of the fine they would incur, and the school authorities had had a meeting with the applicants and had sent them two letters before imposing the fine.

The domestic courts had duly weighed up the competing interests at stake and had given properly reasoned decisions at the end of fair and adversarial proceedings.

In giving precedence to the children's obligation to follow the full school curriculum and to their successful integration over the applicants' private interest in obtaining an exemption from mixed swimming lessons for their daughters on religious grounds, the domestic authorities had not exceeded their margin of appreciation.

Conclusion: no violation (unanimously).

(See also, regarding the right to manifest one's religion: *Eweida and Others v. the United Kingdom*, 48420/10 et al., 15 January 2003, Information Note 159; school curricula: *Folgerø and Others v. Norway* [GC], 15472/02, 29 June 2007, Information Note 98; display of crucifix in classroom: *Lautsi and Others v. Italy* [GC], 30814/06, 18 March 2011, Information Note 139)

ARTICLE 10

Freedom of expression

Civil liability for newspaper article describing holder of public office as a "total unknown": *violation*

Kapsis and Danikas v. Greece, 52137/12, judgment 19.1.2017 [Section I]

Facts – The first applicant was a journalist and former proprietor of a daily newspaper; the second was also a journalist and worked for the same newspaper.

In December 2004 the second applicant published an article in that newspaper. In a column on political life behind the scenes, the article related to the appointment of the actress P.M. to the subsidies advisory board of the Ministry of Culture's Theatre Department.

In April 2005 P.M. brought an action for damages in the Athens Court of First Instance against the two applicants and the newspaper's editor, claiming to have been the victim of insults and of a violation of her personality rights.

In June 2006 the three defendants were ordered jointly to pay the sum of EUR 30,000 to P.M. The court noted that the use of the words "completely unknown" had overstepped the limits of legitimate criticism and had not been objectively necessary in order for the journalist to express his views on the appointment. It also noted that the claimant's contribution to theatrical arts and to the country's representation abroad in cultural matters was considerable.

The appeals against that decision were unsuccessful.

Law – Article 10: The award of damages against the applicants had constituted interference with their right to freedom of expression. That interference was in accordance with the law and pursued a legitimate aim: the protection of the reputation or rights of others.

The expression "completely unknown", read in context, was a value judgment not requiring proof. That expression was not devoid of any factual basis, since P.M., who was an actress, had not occupied any public position in the past, and the article had not sought to convey information in the strict sense of the word but was part of a column which looked behind the scenes in politics and which was thus known for the sarcastic tone in which it portrayed certain politicians and political developments.

The domestic courts had not considered the offending comments in the general context of the case in order to assess the applicants' intention. The expression "completely unknown" had actually been followed by quite favourable comments on the appointment of P.M. The domestic courts had taken the expression out of context and had concluded that the words "she was not known to a wide circle" would have sufficed for the second applicant to express his views. However, the role of the domestic courts in such proceedings did not consist in telling an author what style to use when exercising his right to criticise, however harsh the criticism might be. Rather they had to examine whether the context of the case, the public interest and the author's intention justified the possible use of a degree of provocation or exaggeration.

P.M. had been appointed as a member of the advisory board on government subsidies to theatres; she thus had an essentially political role, with public duties, and could not therefore be regarded as a "mere private individual". Those involved in the case had therefore been acting in a public context and the article in question contributed to a debate in the general interest. It had been directed at P.M. only in her capacity as a member of the advisory board. Accordingly, in that capacity she should have expected her appointment to be subjected to close scrutiny by the press, and even to harsh criticism. The expressions used by the second applicant had not therefore been gratuitously offensive.

Lastly, the defendants, including the two applicants, had been ordered jointly to pay EUR 30,000 in damages to P.M. The domestic courts had taken into consideration the nature and gravity of the harm caused to the claimant, her status, the defendants' financial situation and the constitutional principle of proportionality in general terms, but they

had not, for example, carried out any analysis of the applicants' financial situation.

Having regard to the foregoing, the national authorities had not provided any relevant and sufficient reasons to justify the award of damages to P.M., this sanction not being proportionate to the legitimate aim pursued. This civil judgment against the applicants did not meet a "pressing social need" and was thus not necessary in a democratic society.

Conclusion: violation (unanimously).

Article 41: EUR 2,000 each in respect of non-pecuniary damage; finding of a violation sufficient for pecuniary damage.

Freedom to receive information

Restriction placed on prisoner's access to an Internet site providing educational information: *violation*

Jankovskis v. Lithuania, 21575/08, judgment 17.1.2017 [Section IV]

Facts – The applicant, a prisoner, complained that he had been refused access to a website run by the Ministry of Education and Science, thus preventing him from receiving education-related information in breach of Article 10 of the Convention.

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 a website that was freely available in the public domain.

Imprisonment inevitably entailed 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, since access to information relating to education was granted under Lithuanian law, the restriction of access to the Internet site in question constituted an interference with the applicant's right to receive information. That interference was prescribed by law and pursued the legitimate aim of protecting the rights of others and preventing disorder and crime.

The website to which the applicant wished to have access contained information about learning and study programmes in Lithuania. The information on that site was regularly updated to reflect, for example, admission requirements for the current academic year. It was not unreasonable to hold that such information was directly relevant to the applicant's interest in obtaining education, which was in turn relevant for his rehabilitation and subsequent reintegration into society.

The domestic decisions had focused on the legal ban on prisoners having Internet access instead of examining the applicants' argument that access to a particular website was necessary for his education. The Internet played an important role in people's everyday lives, in particular since certain information was exclusively available on the Internet. The Lithuanian authorities had not considered the possibility of granting the applicant limited or controlled Internet access to that particular website administered by a State institution, which could hardly have posed a security risk.

The Court was not persuaded that sufficient reasons had been put forward to justify the interference with the applicant's right to receive information which, in the specific circumstances of the case, could not be regarded as having been necessary in a democratic society.

Conclusion: violation (unanimously).

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

(See *Kalda v. Estonia*, 17429/10, 19 January 2016, Information Note 192)

ARTICLE 12

Right to marry

Dismissal of divorce petition of spouse who wished to marry new partner: *no violation*

Babiarz v. Poland, 1955/10, judgment 10.1.2017 [Section IV]

Facts – In 2005 the applicant left his wife of seven years to move in with another woman with whom he later had a child. He subsequently sought a divorce but his wife refused and his petition was dismissed on the grounds that, although the marriage had irretrievably broken down, domestic law did not permit a divorce to be granted to the party at fault in the absence of consent (provided it was

not unreasonably withheld)[4] from the innocent party.

In the Convention proceedings the applicant complained under Articles 8 and 12 of the Convention that by refusing to grant him a divorce the authorities had prevented him from marrying the woman with whom he was now living.

Law – Articles 8 and 12: The Court reiterated that neither Article 12 nor Article 8 of the Convention could be interpreted as conferring on individuals a right to divorce. However, if national legislation allowed divorce, Article 12 secured for divorced persons the right to remarry.

The Court had not ruled out that an issue could arise under Article 12 where judicial divorce proceedings were unreasonably lengthy (see *Aresti Charalambous v. Cyprus*, 43151/04, 19 July 2007) or where, despite an irretrievable breakdown of marital life, domestic law regarded the lack of consent of an innocent party as an insurmountable obstacle to granting a divorce to a guilty party (see *Ivanov and Petrova v. Bulgaria*, 15001/04, 14 June 2011). However, neither of those situations obtained in the applicant's case. The circumstances of his case also differed from those in *Johnston and Others v. Ireland* (9697/82, 18 December 1986), as it did not concern a blanket restriction or blanket prohibition imposed by the domestic law, but the dismissal of his divorce action by the domestic courts.

Polish divorce law provided detailed substantive and procedural rules which could lead to a divorce being granted. The domestic courts had examined the facts of the applicant's case in detail and in the proper context of domestic law: comprehensive evidence had been gathered, the applicant had had an opportunity to present his position to the court and question witnesses, and the first-instance judgment had been subject to a review by the appellate court and had contained detailed reasoning.

The Court was well aware that the applicant had a daughter with his new partner, that he was apparently in a stable relationship and that the domestic courts had acknowledged a complete and irretrievable breakdown of his marriage. However, this did not mean that a request for a divorce had to be allowed regardless of the procedural and substantive rules of domestic divorce law by a person simply deciding to leave his or her spouse and have a child with a new partner. While under Article 8, *de facto* families and relationships were protected, such protection did not mean that they had to be accorded particular legal recognition. Nor had it been argued or shown that failure to obtain a divorce and the legal fiction of his continuing marriage had prevented the applicant from recognising his paternity in respect of the child he had with his new partner. Lastly, it had not been argued that under Polish law a refusal to divorce created *res iudicata* preventing the applicant from submitting a fresh petition for divorce to the courts at a later stage.

In the Court's view, if the provisions of the Convention could not be interpreted as guaranteeing a possibility, under domestic law, of obtaining divorce, they could not, *a fortiori*, be interpreted as guaranteeing a favourable outcome in divorce proceedings instituted under domestic law.

In sum, there had been no violation of the applicant's right to marry and, in the circumstances of the case, the positive obligations arising under Article 8 had not imposed on the Polish authorities a duty to accept the applicant's petition for divorce. There had thus been no violation of either Article 8 or 12, assuming the latter provision to have been applicable.

Conclusions: no violation of Article 8 (five votes to two); no violation of Article 12 (five votes to two).

ARTICLE 13

Effective remedy

Uncertainty surrounding regularisation of immigration status: *no violation*

Abuhmaid v. Ukraine, 31183/13, judgment 12.1.2017 [Section V]

Facts – The applicant, a holder of a passport issued by the Palestinian Authority, arrived in Ukraine in 1993. In March 2010 he applied for an extension of his residence permit. The authorities noted that his permit had expired in November 2009 and that the applicant was in breach of migration regulations. On 17 March 2010 the police issued a decision stating that the applicant should be removed from Ukraine. The domestic courts granted the authorities' application but on 29 October 2014 held that

4. Article 5 of the Polish Civil Code refers to the refusal of the innocent party not being "contrary to the reasonable principles of social coexistence" (*zasady współżycia społecznego*).

the applicant's forcible removal from Ukraine would be in violation of his right to respect of family life. The applicant complained under Articles 8 and 13 of the Convention about the uncertainty of his further stay and status in Ukraine. In particular, he argued that the expulsion decision of 17 March 2010 remained valid and that he could not legalise his residence in Ukraine.

Law – Article 13 read in conjunction with Article 8: The domestic courts' initial decisions granting the authorities' request for the applicant's forcible removal from Ukraine had been overturned and the applicant had been given the opportunity to submit an asylum application, providing him with a lawful ground to stay in Ukraine for the duration of the examination of that application. As such, he did not face any real and imminent risk of expulsion from Ukraine. However, his prospects of further stay remained uncertain and he had not, to that point, been able to regularise his status.

Respect for the applicant's private life in combination with the requirement of effective domestic remedies entailed a positive obligation on the respondent State to provide an effective and accessible procedure or combination of procedures enabling him to have the issues of his further stay and status in Ukraine determined with due regard to his private-life interests. In that connection the Court observed that in 2001 Ukraine had enacted the Immigration Act setting out the conditions and procedures for foreigners and stateless persons seeking leave to permanently reside in that country. Although the applicant had been unsuccessful in trying to regularise his stay and status in Ukraine in accordance with that Act, there was nothing to suggest that that could be attributed to a deficiency in the relevant regulations or that he was no longer able to have access to those procedures.

The issues of uncertainty of the applicant's stay in Ukraine and his inability to regularise his status in that country had not been resolved by the refusal of his forcible expulsion and it was not clear whether they could have been effectively resolved with the help of the procedures under the Immigration Act. However, having regard to the fact that the applicant still had access to different domestic procedures which might result in the regularisation of his stay and status in Ukraine, it could not be said that the respondent State had disregarded its positive obligation to provide an effective and accessible procedure or a combination of procedures enabling him to have the issue of his further stay and status in Ukraine determined.

Conclusion: no violation (unanimously).

Action for damages for complaints about the length of pending criminal proceedings: *no violation*

Hiernaux v. Belgium, 28022/15, judgment 24.1.2017 [Section II]

Facts – The applicant complained unsuccessfully about a breach of the reasonable-time requirement in proceedings before the judicial investigating bodies to which she had been a party and which had lasted about 17 years, asking the domestic court to find the entire prosecution inadmissible. Before the European Court, she alleged that she had not had an effective remedy in order to raise her complaint about the excessive length of the criminal proceedings.

Law – Article 13 taken together with Article 6 § 1: Several types of remedy provided an opportunity to prevent or remedy the excessive length of criminal proceedings.

(a) *Preventive remedies provided for by the Code of Criminal Procedure (CCP)* – The judicial investigating bodies had noted, at the stage of closing the proceedings, that the ongoing proceedings had been excessively long. However, they held that it was inappropriate to penalise the excessive length at that stage by discontinuing the proceedings, declaring the prosecution inadmissible or by another method. The passage of time had not in fact resulted in the loss or deterioration of evidence and had not prevented the applicant from exercising her defence rights. According to the Court of Cassation's case-law, in those circumstances it was for the trial court to assess the impact of the failure to comply with the reasonable-time requirement. The first-instance court declared the prosecution inadmissible for infringement of the right to a fair trial on a different ground to that of the right to be judged within a reasonable time.

That approach was not contrary to the Convention. It did not in fact follow from Articles 6 and 13 of the Convention that a failure to hear a case within a reasonable time, established in the context of closing the proceedings, where that failure had not given rise to an irretrievable prejudice to the accused's defence rights or to the loss of evidence, had to be

penalised by extinction of the public prosecution or by discontinuance.

However, the judicial investigating bodies had not themselves penalised the failure to comply with the reasonable-time requirement, in the light of their finding that there had been no irretrievable prejudice to a fair trial; in addition, the outcome of the proceedings had, in the present case, prevented the application of Article 21*ter* of the Preliminary Title of the CCP, which provided for the option of a deferred penalty by the trial court.

It followed that the applicant had been unable to obtain any tangible redress to remedy the delays complained of by her. Thus, the remedies provided for in the CCP had not proved effective in the present case.

(b) *Compensatory remedy* – In the case of *Panju v. Belgium* (18393/09, 28 October 2014, Information Note 178) concerning the excessive length of judicial proceedings, the compensatory remedy had not been regarded as an effective remedy within the meaning of Article 13, since it had not been shown that it had been granted in practice by the courts in the context of criminal proceedings, nor therefore that this remedy could lead to results that satisfied the requirements of effectiveness enshrined in Article 13 of the Convention.

In the context of the present case, several examples had been submitted of decisions taken by the civil courts, in order to demonstrate that the compensatory remedy could be used successfully to obtain adequate redress for excessive length of criminal proceedings where this occurred at the investigation stage or when closing proceedings.

In addition, the Court of Cassation had recently delivered judgments in which it expressly acknowledged that the compensation to which the defendant could make claim in the event of excessive length of the proceedings, occurring at either the investigation stage or when closing the proceedings, could consist in damages, to be claimed before the civil courts.

In the light of this new information and those developments, the compensatory remedy could in principle be considered an effective remedy for redressing a violation based on the excessive length of criminal proceedings, including when it was found at the investigation stage or when closing proceedings.

In those circumstances, the applicant could not allege that she had been deprived of any effective remedy.

Conclusion: no violation (unanimously).

(See also *J.R. v. Belgium*, 56367/09, 24 January 2017)

ARTICLE 14

Discrimination (Article 5)

Alleged discrimination in provisions governing liability to life imprisonment: *no violations*

Khamtokhu and Aksenchik v. Russia, 60367/08 and 961/11, judgment 27.1.2017 [GC]

Facts – Article 57 of the Russian Criminal Code provides that a sentence of life imprisonment may be imposed for certain particularly serious offences. However, such a sentence cannot be imposed on women, or on persons under 18 when the offence was committed or over 65 at the date of conviction. The Russian Constitutional Court has repeatedly declared inadmissible complaints of alleged incompatibility of that provision with the constitutional protection against discrimination, *inter alia*, on the grounds that any difference in treatment is based on principles of justice and humanitarian considerations and allows age, social and physiological characteristics to be taken into account when sentencing.

In their applications to the European Court, the applicants, who were both adult males serving life sentences for criminal offences, complained under Article 14 of the Convention read in conjunction with Article 5 of discriminatory treatment *vis-à-vis* other categories of convicts who were exempt from life imprisonment as a matter of law.

On 1 December 2015 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber.

Law – Article 14 in conjunction with Article 5

(a) *Applicability* – Although Article 5 of the Convention does not preclude the imposition of life imprisonment where such punishment is prescribed by national law, the prohibition of discrimination enshrined in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee and applies also to those additional rights, falling within the general scope of any Convention Article,

for which the State has voluntarily decided to provide. It followed that where national legislation exempted certain categories of convicted prisoners from life imprisonment, this fell within the ambit of Article 5 § 1 for the purposes of the applicability of Article 14 taken in conjunction with that provision.

Article 57 of the Russian Criminal Code established a sentencing policy which differentiated on the basis of sex and age with regard to life imprisonment, both of which were prohibited grounds of discrimination for the purposes of Article 14 of the Convention.

Article 14 taken in conjunction with Article 5 was therefore applicable.

(b) *Compliance* – The sentencing policy which exempted female offenders, juvenile offenders and offenders aged 65 or over from life imprisonment amounted to a difference in treatment on grounds of sex and age. The Government's stated aim of promoting the principles of justice and humanity through taking into account the age and "physiological characteristics" of various categories of offenders could be regarded as legitimate in the context of sentencing policy and for the purposes of applying Article 14 in conjunction with Article 5 § 1.

As regards proportionality, life imprisonment was reserved in the Russian Criminal Code for the few particularly serious offences in respect of which, after taking into account all the aggravating and mitigating circumstances, the trial court was satisfied that a life sentence was the only punishment that would befit the crime. It was not a mandatory or automatic sentence for any offence, no matter how serious. The outcome of the applicants' trials was decided on the specific facts of their cases and their sentences were the product of individualised application of the criminal law by the trial court whose discretion in the choice of appropriate sentence was not curtailed. In these circumstances, in view of the penological objectives of the protection of society and general and individual deterrence, the life sentences imposed on the applicants did not appear arbitrary or unreasonable. Moreover, provided they abided by the prison regulations, the applicants would be eligible for early release after the first twenty-five years so that no issues comparable to those in *Vinter and Others v. the United Kingdom* ([GC], 66069/09 et al., 9 July 2013, Information Note 165; and *Murray v. the Netherlands* ([GC], 10511/10, 26 April 2016, Information Note 195) arose in their case.

(i) *Difference in treatment on grounds of age* – There was no reason to question the difference in treatment between the applicants and juvenile offenders. The exemption of juvenile offenders from life imprisonment was consonant with the approach common to the legal systems of all the Contracting States. It was also consistent with international standards[5] and its purpose was evidently to facilitate the rehabilitation of juvenile delinquents. The Court considered that when young offenders were held accountable for their deeds, however serious, this had to be done with due regard for their presumed immaturity, both mental and emotional, as well as the greater malleability of their personality and their capacity for rehabilitation and reformation.

As to the difference in treatment with offenders aged 65 or over, the Court saw no grounds for considering that the relevant domestic provision excluding offenders aged 65 or over from life imprisonment had no objective and reasonable justification. The purpose of that provision in principle coincided with the interests underlying the eligibility for early release after the first twenty-five years for adult male offenders aged under 65, such as the applicants, noted in *Vinter* as being a common approach in national jurisdictions where life imprisonment can be imposed. Reducibility of a life sentence carried even greater weight for elderly offenders in order not to become a mere illusory possibility.

(ii) *Difference in treatment on grounds of sex* – The Court took note of various European and international instruments addressing the needs of women for protection against gender-based violence, abuse and sexual harassment in the prison environment, as well as the needs for protection of pregnancy and motherhood. The Government had provided statistical data showing a considerable difference between the total number of male and female prison inmates and had also pointed to the relatively small number of persons sentenced to life

5. The recommendation of the Committee on the Rights of the Child (General comment No. 10 (2007)) to abolish all forms of life imprisonment for offences committed by persons below the age of 18 and with the UN General Assembly's Resolution A/RES/67/166 of 20 December 2012 on Human Rights in the Administration of Justice inviting the States to consider repealing all forms of life imprisonment for such persons.

imprisonment. It was not for the Court to reassess the evaluation made by the domestic authorities of the data in their possession or of the penological rationale which such data purported to demonstrate. In the particular circumstances of the case, there was a sufficient basis for the Court to conclude that there existed a public interest underlying the exemption of female offenders from life imprisonment by way of a general rule.

It was quite natural that the national authorities, whose duty it was also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy broad discretion when asked to make rulings on sensitive matters such as penal policy. Since the delicate issues raised in the present case touched on areas where there was little common ground (apart from the exemption of juvenile offenders from life imprisonment) amongst the member States and, generally speaking, the law appeared to be in a transitional stage, a wide margin of appreciation had to be left to the authorities of each State.

It therefore appeared difficult to criticise the Russian legislature for having established, in a way which reflected the evolution of society in that sphere, the exemption of certain groups of offenders from life imprisonment. Such an exemption represented, all things considered, social progress in penological matters. In the absence of common ground regarding the imposition of life imprisonment, the Russian authorities had not overstepped their margin of appreciation.

In sum, while it would clearly be possible for the respondent State, in pursuit of its aim of promoting the principles of justice and humanity, to extend the exemption from life imprisonment to all categories of offenders, it was not required to do so under the Convention as currently interpreted by the Court. Moreover, in view of the practical operation of life imprisonment in the Russian Federation, both as to the manner of its imposition and to a possibility of subsequent review, the interests of the society as a whole as far as they were compatible with the Convention and having regard to the wide margin of appreciation enjoyed by the respondent Government, the Court was satisfied that there was a reasonable relationship of proportionality between the means employed and the legitimate aim pursued. The impugned exemptions did not constitute a prohibited difference in treatment. In reaching that conclusion, the Court took full account of the need to interpret the Convention in a harmonious manner and in conformity with its general spirit.

Conclusions: no violation on grounds of age (sixteen votes to one); no violation on grounds of sex (ten votes to seven).

Discrimination (Article 8)

Ban on adoption of Russian children by US nationals: *violation*

A.H. and Others v. Russia, 6033/13 et al., judgment 17.1.2017 [Section III]

Facts – In December 2012, amidst political tensions between Russia and the United States, the Russian State Duma adopted a law banning the adoption of Russian children by US nationals. The law entered into force on 1 January 2013. In the Convention proceedings, the applicants, US nationals at various stages of the adoption process, complained about this ban.

Law – Article 14 in conjunction with Article 8

(a) *Applicability* – The right to adopt was not guaranteed by the Convention. However, where a State had gone beyond its obligations under Article 8 and created such a right in its domestic law, it could not, in applying that right, take discriminatory measures within the meaning of Article 14. The applicants' right to apply for adoption, and to have their applications considered fairly, fell within the general scope of private life under Article 8.

(b) *Merits* – There was a difference in treatment between US applicants and that of other foreign nationals on the grounds of nationality. As to whether the difference in treatment had an objective and reasonable justification, the Court accepted that, in principle, the aims stated by the Government of protecting children's interests and encouraging adoption at national level could constitute legitimate aims.

Intercountry adoption was a relatively long and complicated procedure, requiring significant time and effort on the part of the adoptive parents. In cases where the procedure was initially aimed at the adoption of a particular child, or after the adoptive parents had met the child at a later stage, it also involved considerable emotional resources as an attachment began to form between the adults and the child. By the date of the introduction of the adoption ban on 1 January 2013 most of the appli-

cants had met the child they were seeking to adopt, had spent a certain amount of time with them, and had either submitted the adoption application to a Russian court or had completed all the prior stages of the procedure and had their file ready for submission to a court.

Adoption proceedings do not necessarily guarantee a favourable outcome as the final decision always rests with the domestic courts of the State of the child's origin. However, in the cases at hand the US applicants had not received a negative decision based on the assessment of their individual circumstances by a competent court. Instead, the adoption proceedings had been brought abruptly to an end on account of the automatic ineligibility that unexpectedly came into effect over the course of ten days. No consideration was given to the interests of the children concerned.

The Government had failed to show that there were compelling or very weighty reasons to justify the blanket ban being applied retroactively and indiscriminately to all prospective adoptive parents from the US, irrespective of the stage of the adoption proceedings and their individual circumstances. It thus constituted a disproportionate measure in relation to the aims stated by the Government.

Conclusion: violation (unanimously).

Art 41: EUR 3,000 each in respect of non-pecuniary damage; claims in respect of pecuniary damage dismissed.

(See *E.B. v. France*, 43546/02, 22 January 2008, Information Note 104)

Discrimination (Article 1 of Protocol No. 1)

Difference in amount of damages recoverable depending on whether injury or illness is caused by negligence of an employer or of a third-party: *no violation*

Saumier v. France, 74734/14, judgment 12.1.2017 [Section V]

Facts – The applicant contracted an occupational illness which left her severely disabled and, among other things, requiring permanent assistance. The courts found that there had been inexcusable negligence by her employer. However, the statutory ceiling on compensation for certain heads of damage, as applied by the Court of Appeal, considerably reduced the total amount of damages awarded (the cost of permanent assistance by a third person, for example, was not dealt with separately). The court of first instance, which had identified further autonomous heads of damage not covered by that limit, had awarded a level of damages eight times higher.

Under French law, liability for work-related accidents or occupational disease is governed by a special set of rules, which, irrespective of any liability on the part of the employer, are based on automatic cover by the health insurance fund (cover for that risk being funded by specific contributions from the employer). The heads of damage covered by those rules are exhaustively listed and the *quantum* of damages (in the form of annuity or capital) is a lump-sum amount. In the event of inexcusable negligence by the employer, the victim can claim a limited increase in the sums awarded (for which the fund can then claim reimbursement by the employer). Full redress can only be obtained from the employer for the heads of damage which the courts find not to be covered by those rules.

Law – Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1: The existence of inexcusable negligence by the employer having been made out, the applicant considered that her inability to obtain full compensation for the damage, as an exception to the ordinary rules of civil liability, was unjustified. The Court held that there had been no discrimination, however, on the following grounds.

Employees who had suffered an accident at work or contracted an occupational disease as a result of negligence by their employer were not in an analogous or comparable situation to that of individuals who had sustained physical injury or damage to health as a result of negligence by a third party.

Admittedly, the two situations were similar in some respects. In both cases the persons concerned had suffered physical injury or damage to health as a result of another's negligence and sought to obtain compensation. However, the situation of employees was a special one in several respects.

Generally, the employer-employee relationship was a contractual one in which the employee was legally subordinate to the employer and which involved particular rights and obligations for both parties, which clearly distinguished it from the general rules governing relations between individuals.

The special rules of civil liability applicable in this area reflected that special relationship. They were

distinguishable from the rules of ordinary law in that, to a large extent, they were not based on proof of negligence, a causal link between that negligence and the damage, and a judge's decision, but on solidarity and automaticity. They were also distinguishable in that they applied in three phases: first, automatic cover for temporary total unfitness for work; second, automatic compensation for permanent unfitness for work; and, third, the possibility of obtaining additional compensation in the event of inexcusable negligence on the part of the employer.

As had been observed by the Constitutional Council (decision no. 2010-8 QPC (preliminary question of constitutionality)), employees who had been injured in a work-related accident or had contracted an occupational disease were entitled to compensation where the accident had occurred as a result of or during their employment, during the journey to or from their workplace or, in the event of occupational disease – even where they had themselves committed an act of inexcusable negligence. Moreover, irrespective of the employer's situation, compensation was paid by the health insurance fund, which meant that employees did not have to sue their employer and prove negligence on the latter's part. Those special rules ensured that compensation was automatic, speedy and secure.

Furthermore, with regard specifically to injury incurred by the employee as a result of inexcusable negligence by the employer, it was noteworthy that this supplemented the damages automatically received by the former, which also distinguished his or her situation from the position under the ordinary law.

Accordingly, the situation of an employee who had suffered an accident at work or contracted an occupational disease was not the same as that of an individual who had suffered damage occurring in a different context.

Another difference concerned the person liable for the damage. Liability for damages for a work-related accident or occupational disease was in the first place incurred not by the employer but by the collective body of employers (the "work-related accidents and occupational disease" section of the health insurance fund being funded by contributions from the employers).

In sum, different sets of legal rules applied to persons in different situations.

Conclusion: no violation (unanimously).

ARTICLE 35

ARTICLE 35 § 1

Exhaustion of domestic remedies, effective domestic remedy – Russia

Failure to use new cassation appeal procedure introduced by Code of Administrative Procedure: *inadmissible*

Chigirinova v. Russia, 28448/16, decision 13.12.2016 [Section III]

Facts – The Code of Administrative Procedure, which entered into force on 15 September 2015, enables cassation and supervisory-review appeals to be brought before the Supreme Court of Russia against the final decisions of the administrative courts.

Before the European Court the applicant complained under Article 1 of Protocol No. 1 about a local authority's refusal to sell her a plot of land. She did not lodge an application for cassation review with the Supreme Court in the domestic proceedings and the question therefore arose as to whether she had exhausted domestic remedies.

Law – Article 35 § 1: The cassation and supervisory-review proceedings under the Code of Administrative Procedure concerning disputes involving public authorities were very similar to the cassation and supervisory-review proceedings in place under the Code of Civil Procedure. In particular, the second cassation appeal before the Supreme Court allowed potential applicants to submit their grievances to the highest judicial body of the Russian Federation, which would have an adequate opportunity to consider and remedy any alleged violation of the Convention at the domestic level prior to examination of the case by the Court.

The Court therefore considered it appropriate to apply its conclusions in *Abramyan and Yakubovskiye* ((dec.), 38951/13 and 59611/13, 12 May 2015, Information Note 186), which concerned the effectiveness of cassation appeals and supervisory-review in civil proceedings before the Supreme Court, to the present case. Accordingly, an application for cassation review before the Supreme Court constituted an effective remedy capable of also providing redress and requiring exhaustion under the Code of

Administrative Procedure.[6] Since the applicant had not lodged an application for cassation review with the Supreme Court she had not exhausted domestic remedies.

Conclusion: inadmissible (failure to exhaust domestic remedies).

(See also *Sakhanov v. Russia* (dec.), 16559/16, 18 October 2016, Information Note 201)

OTHER JURISDICTIONS

Court of Justice of the European Union (CJEU)

Conditions and scope of EU's liability in respect of infringement of individual right to hearing of cases within reasonable time

Gascogne Sack Deutschland GmbH and Gascogne v. European Union, T-577/14, judgment (General Court) 10.1.2017

An action for damages was brought before the General Court against the European Union on account of the excessive length of proceedings in the case referred to below. The EU as respondent was represented by the Court of Justice of the European Union (CJEU).

Facts – In November 2005 the two applicant companies were affected by a decision of the European Commission in a case concerning a cartel in which fifteen companies were involved. They each brought an action before the General Court in February 2006, seeking the annulment of the decision or, in the alternative, the reduction of the fine imposed on them. In two judgments of 16 November 2011, the General Court dismissed their actions. Their appeals to the Court of Justice were dismissed in November 2013.

Law – The EU could incur non-contractual liability, entailing a right to compensation, when three cumulative conditions (not having to be examined in any given order) were fulfilled, namely (1) the institutions' conduct must have been unlawful, (2) actual damage must have been suffered, and (3) there must have been a causal link between the conduct and the damage pleaded.

1. *Length of proceedings in relevant cases* – The proceedings in question had concerned a breach of the competition rules (Article 101 of the Treaty on the Functioning of the European Union). The implications were considerable for the applicants, and also for third parties, having regard to the fundamental requirement of legal certainty for economic operators.

The length of proceedings complained of (about 5 years and 9 months) could not have been justified by any of the circumstances of the cases in question.

The General Court specifically examined the period of 46 months (3 years and 10 months) between the end of the written part of the procedure (filing of last observations) and the opening of the oral part. Having assessed what the appropriate duration would be (see below), the General Court found that there had been 20 months of unjustified inactivity in that phase.

(a) *Complexity of case*

(i) *Complexity of subject matter* – In view of the length of decisions such as that in the present case, the volume of material and the need to make a detailed assessment of numerous and complex facts, often spread out in time and space, a period of fifteen months between the end of the written part of the procedure and the opening of the oral part would generally constitute an appropriate period.

(ii) *Number of parallel cases* – In such matters, the actions brought by various parties against the same decision required the parallel treatment of related cases, even when they were not joined, as a result of the similarity between the cases and the need for coherent examination and resolution. This might justify an increase in the length of the proceedings by a period of one month per additional related case. Thus, in the present case, the relevant phase could appropriately have been extended to 26 months.

(iii) *Specific complexity of the case* – No factual or legal element, nor any particular measure of procedural organisation, could have justified a longer period in the present case.

(b) *Conduct of parties, interlocutory applications* – The General Court did not note any significant effect of such circumstances on the length of the relevant phase.

6. The Court noted, however, that supervisory review under the Code of Administrative Procedure could not be seen as an effective remedy within the meaning of Article 35 of the Convention.

As there had been no other unjustified period of inactivity in the rest of the procedure, it followed that the procedure as a whole showed an unjustified period of inactivity of 20 months in each of the two cases. The EU had thus breached a rule conferring rights on private persons, namely Article 47 of the Charter of Fundamental Rights (right to adjudication within a reasonable period), in a sufficiently characterised manner.

2. *As to the damage suffered and the causal link with the excessive length of proceedings* – The limitation period applicable to a particular type of damage could run only from a sufficiently objective and certain date. In the present case, the General Court took into account the date of the two judgments at the end of the first-instance proceedings, even though the period of abnormal length had been earlier.

(a) *Material harm*

(i) *Loss of opportunity "to find an investor earlier"* – The existence of a serious and real opportunity that was allegedly lost had not been demonstrated. In particular, the applicant companies would have had to show that they had been able and willing to meet all the other conditions stipulated by the relevant investors.

(ii) *Bank guarantee costs and late payment interest* – The appeals did not have suspensory effect and the fine was immediately payable. In accordance with the possibility offered to them by the Commission, the applicant companies had nevertheless decided not to pay it at once but to set up a bank guarantee, with interest accruing on the fine at a lower rate.

– *Payment of interest on the fine*: Using their right to defer payment, the applicant companies had retained possession of the amount corresponding to the fine. They had not shown that the amount of the late payment interest accruing in the relevant period (of excessive length) had been greater than the benefit they had gained from that retention. The alleged harm was thus not real or certain.

– *Payment of bank guarantee costs*: Two reasons rendered the causal link sufficiently direct here: (i) the breach of the right to adjudication within a reasonable period had been unforeseeable at the time when the bank guarantee had been constituted (the companies at that point could have legitimately expected the cases to be processed within a reasonable time); (ii) the initial choice of setting up a bank guarantee had predated the exceeding of the reasonable time (that choice could not therefore preclude the causal link).

That direct link had lasted only until the judgments of the General Court (16 November 2011). The subsequent examination of the applicant companies' appeals to the Court of Justice was unrelated to the breach of the reasonable-time requirement.

In other words, the bank guarantee costs incurred after the General Court judgments, putting an end to the breach of the right to adjudication within a reasonable period, stemmed from the personal and independent choice of the applicant companies, subsequent to that breach, not to pay the fine, not to seek a stay of execution of the Commission's decision, and to appeal against the judgments in question.

(iii) *Assessment of material harm* – The General Court, having regard to the relevant circumstances, assessed the compensation for the material harm, consisting in the payment of additional bank guarantee costs, at about EUR 47,000.

(b) *Non-material harm* – It was normally for the applicant party to adduce evidence to show the existence and determine the extent of any material or non-material harm. Failing that, it was required, at the very least, to establish that the impugned conduct was, by its seriousness, capable of causing it such harm.

(i) *Nature*

– *Harm to reputation*: This harm had not been demonstrated. Having regard to the subject matter and gravity of the breach that had been found above, such finding would in any event constitute sufficient compensation.

– *Prolonged uncertainty*: The failure to adjudicate within a reasonable period had placed the two companies in a situation of uncertainty which went beyond the degree of uncertainty usually caused by litigation. That state of prolonged uncertainty had necessarily had an influence on the planning of decisions to be taken and on the management of those companies and therefore constituted non-material harm. In the circumstances of the case, that harm had not been fully compensated for by the finding of a breach.

(ii) *Quantum*: In view of the need to ensure compliance with the competition rules, the failure to adjudicate within a reasonable period could not allow the applicant company to call into question the

merits or quantum of a fine when all the grounds of appeal relating thereto had been dismissed.

That would indeed have been the actual result of allowing the applicants' claim in the present case (EUR 500,000), even though they had not established that the breach of the reasonable-time requirement had had an influence on the amount of the fine.

The General Court decided, ex aequo et bono, that it was appropriate to award each of the two companies damages of EUR 5,000 as compensation for the non-material harm (uncertainty), having regard to all the relevant conditions (including the extent of the breach of the reasonable-time requirement, the conduct of the applicant companies, the need to ensure compliance with EU competition rules, and the effectiveness of the present remedy).

Refusal to grant refugee status on ground of applicant's participation in terrorist group's activities

Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani, C-573/14, judgment (CJEU Grand Chamber) 31.1.2017

In the context of main proceedings between the Belgian Commissioner-General for Refugees and Stateless Persons and a Moroccan national, concerning the latter's exclusion from refugee status on account of "acts contrary to the purposes and principles of the United Nations", the Belgian *Conseil d'État* referred several questions to the CJEU for a preliminary ruling, namely:

(1) whether, for refugee status to be refused, it was necessary for the person concerned to have been convicted of a "terrorist offence";

(2) whether participation in the "activities of a terrorist group" was sufficient to justify the refusal of refugee status, even though the person concerned had not committed, attempted to commit or threatened to commit a "terrorist act".

This entailed interpreting Article 12 of Council Directive 2004/83/EC on minimum standards for the granting of refugee status[7] ("the Directive"), read in conjunction with Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.

Facts

Mr Lounani, a Moroccan national, was unlawfully resident in Belgium. In 2006 he was convicted by the Criminal Court of participation in the activities of a terrorist group, as a member of its leadership. The facts taken into consideration in classifying the offence included providing logistical support to a terrorist group by the provision of material resources or information, in particular by means of the forgery and fraudulent transfer of passports and by means of active participation in the organisation of a network for sending volunteers to Iraq. In 2010 Mr Lounani applied for asylum, stating that he feared being persecuted by the Moroccan authorities as a radical Islamist and jihadist on account of his conviction. The competent administrative authority rejected his application. However, the Aliens Appeals Board ruled that he should be granted refugee status on the ground that his criminal conviction had not been based on direct participation in a "terrorist act". The referring court was called upon to examine an appeal on points of law against that judgment.

Law

(1) *Whether a conviction for a "terrorist offence" was a prerequisite* – For the purposes of the concept of acts "contrary to the purposes and principles stated in the Charter of the United Nations", the recitals of the Directive referred to the United Nations resolutions on terrorism, from which it was apparent that this concept encompassed not only "acts of international terrorism" but also "the financing, planning and preparation" of such acts, as well as "any other form of support" in that regard. The resolutions called on States to deny asylum to any person who "support[ed], facilitate[d], participate[d] or attempt[ed] to participate in the financing, planning, preparation or commission of terrorist acts, or provide[d] safe haven".

Hence, the concept in question could not be interpreted as being confined to the commission of "terrorist acts" as specified in the Security Council resolutions or, *a fortiori*, to the "terrorist offences" specified in Framework Decision 2002/475. Accordingly, the existence of a criminal conviction imposing punishment for such offences could not be required in order to justify exclusion from refugee status.

7. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Framework Decision 2002/475 listed various forms of conduct which could fall within the scope of the general concept of terrorism and classified them within four categories of offences: (i) "terrorist offences"; (ii) "offences relating to a terrorist group"; (iii) "offences linked to terrorist activities"; and (iv) inciting, aiding or abetting, or attempting to commit some of those offences.

If the EU legislature had intended to confine the concept of "acts contrary to the purposes and principles of the United Nations" solely to the "terrorist offences" defined by Framework Decision 2002/475, it could easily have done so, by expressly stipulating those offences or referring to that framework decision.

The relevant provision of the Directive made no reference, however, either to Framework Decision 2002/475, although that framework decision had been in existence when the provision in question was drafted, or to any other European Union instrument adopted in the context of the fight against terrorism.

In sum, in order for the exclusion of refugee status to be justified by reference to the above-mentioned concept, it was not necessary for the applicant for international protection to have been convicted of one of the terrorist offences referred to by Framework Decision 2002/475.

(2) *Whether personal involvement in a "terrorist act" was a prerequisite or whether participation in the "activities of a terrorist group" was sufficient* – It was true that Mr Lounani had not been found personally to have committed terrorist acts, to have instigated such acts, or to have participated in their commission.

Nevertheless, it was clear from the relevant Security Council resolutions that the concept of "acts contrary to the purposes and principles of the United Nations" was not confined to terrorist acts.

The Security Council resolutions identified, among the activities to be combated by States as part of the fight against international terrorism, those consisting in wilfully organising the travel of individuals travelling to a State other than their States of residence or nationality for the purpose of the perpetration, planning or preparation of terrorist acts.

It followed that application of the above-mentioned ground for exclusion from refugee status could not be confined to the actual perpetrators of terrorist acts, but could also extend to those who engaged in these logistical activities behind the scenes.

Moreover, it was apparent from Article 12(2) and Article 12(3) of the Directive, read together, that exclusion from refugee status was also applicable to persons in respect of whom there were serious reasons for considering that they had "instigated" acts contrary to the purposes and principles of the United Nations or had otherwise "participated" in such acts. It was not a prerequisite for the offences to relate to a terrorist act.

Participation in the activities of a terrorist group could cover a wide range of conduct of varying degrees of seriousness.

Accordingly, the competent authority in the Member State concerned was required, in each individual case, to undertake an assessment of the specific facts brought to its attention with a view to determining whether there were serious reasons for considering that the acts committed fell within the scope of the exclusion in question.

With regard to Mr Lounani, the final assessment of his application for international protection fell to the competent national authorities, subject to review by the national courts. The factors to be taken into consideration included (1) the fact that Mr Lounani had been a member of the leadership of a terrorist group that operated internationally and had been registered since 2002 on the United Nations list identifying certain individuals and entities subject to sanctions; and (2) the fact that his logistical support for the activities of that group had an international dimension in so far as he had been involved in the forgery of passports and had assisted volunteers who wanted to travel to Iraq. Such conduct could justify exclusion from refugee status.

Ultimately, it was immaterial that:

– the group of which Mr Lounani had been one of the leaders may not have perpetrated any terrorist acts or that the volunteers who wanted to travel to Iraq and had been helped by that group may not ultimately have committed such acts;

– it had not been established that Mr Lounani had committed, attempted to commit, or threatened to commit terrorist offences, or that he had instigated or otherwise participated in a "terrorist offence".

Furthermore, the fact that Mr Lounani had been convicted by a final judgment was of particular

importance in the context of the individual assessment that had to be undertaken by the competent authority, as was the finding that he had been a member of the leadership of the group in question.

In conclusion, the CJEU replied to the questions as follows:

(1) In order for the ground for exclusion from refugee status to be found established, it was not a prerequisite that an applicant for international protection should have been convicted of one of the "terrorist offences" referred to in Framework Decision 2002/475.

(2) Acts constituting participation in the activities of a terrorist group could in themselves justify exclusion from refugee status, even though it was not established that the person concerned had been personally involved in a "terrorist act". For the purposes of the individual assessment of the facts to be carried out by the competent authority, the fact that the person in question had been convicted by the courts of a Member State on a charge of participation in the activities of a terrorist group was of particular importance, as was a finding that he or she had been a member of the group's leadership.

Inter-American Court of Human Rights (IACtHR)

Contemporary forms of slavery and human trafficking

Case of "Fazenda Brasil Verde" Workers v. Brazil, Series C No. 318, judgment 20.10.2016

[This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. It relates only to the merits and reparations aspects of the judgment. A more detailed, official abstract (in Spanish only) is available on that Court's website: www.corteidh.or.cr.]

Facts – The facts of the case are related to the *Fazenda Brasil Verde* (Brazil Verde Farm), located in the state of Pará, Brazil. As from 1988 a series of complaints were filed before the Federal Police and the Council for the Defence of Human Rights alleging the practice of slave labour therein.

In March 2000 two young men managed to escape from the *Fazenda*. After they reported the situation, the Ministry of Labour organised an inspection during which the workers expressed their wish to leave. The audit report noted that the workers had been subjected to slavery. The inspectors obliged the manager to return their work permits to the workers and pay them the amounts necessary to terminate the labour contracts.

The workers had been enticed to the *Fazenda* by a recruiter who had offered a good salary and even payment in advance in the state of Piauí, one of the poorest in the country. They had travelled several days by bus, train and on the back of a truck. On arrival at the *Fazenda*, their work permits were retained and they were obliged to sign blank documents. The regime consisted of 12 working hours or more, with a break of half an hour for lunch and only one day off per week. Dozens of workers slept in hammocks in ranches without electricity, beds or sanitary facilities. The food was insufficient, of poor quality and deducted from their wages. They got sick regularly and were not given medical attention. The work was carried out under orders, threats and armed surveillance. In addition, in order to receive the salary they had to meet a production goal, which was difficult to achieve, so some were not paid for their services. These conditions generated a desire to flee. However, the vigilance, the lack of salary, the isolated location of the *Fazenda* and its surroundings with the presence of wild animals, had prevented them from doing so.

Law

(a) *Articles 6(1) (freedom from slavery) in relation to Articles 1(1) (obligation to respect and ensure rights without discrimination), 3 (right to juridical personality), 5 (right to personal integrity), 7 (right to personal liberty), 11 (right to privacy) and 22 (freedom of movement and residence) of the American Convention on Human Rights (ACHR)* – The Inter-American Court expanded on the content and scope of the concepts of slavery, servitude, slave trade and traffic in women, as well as forced labour, which were all prohibited by the ACHR. After an overview of relevant provisions of binding international instruments and decisions of international tribunals on the international crime of slavery (or enslavement), the Court reiterated its absolute and universal prohibition in international law, and held that its legal definition had not varied substantially since the 1926 Slavery Convention.

However, the concept of slavery and its analogous forms had evolved and was not limited to ownership of the person, but also encompassed the loss of the person's own will or a considerable reduction of personal autonomy. That manifestation of the exercise of the attributes of property, in modern times, should be understood as control that significantly

restricted or denied individual liberty with an intent to exploit by using, managing, taking advantage of, transferring or disposing of the person concerned, usually through the use of violence, force, deception and/or coercion.

The Court recalled that the ACHR used the expression "slave trade and traffic in women". However, considering the evolution of international law, the most favourable interpretation and the *pro persona* principle, that expression was to be understood as "trafficking in persons", which would also bring its current definition in line with the Palermo Protocol.

In the instant case, Brazil had not demonstrated that it had adopted specific measures or acted with due diligence to prevent the contemporary form of slavery to which the victims were subjected or to put an end to the situation. This breach of the duty to guarantee was particularly serious in view of (a) the State´s knowledge of the context and (b) the particular situation of vulnerability and risk to the workers concerned. The State was thus responsible for the violation of the prohibition of slavery and servitude. Additionally, considering the context of recruitment from the poorest regions of the country of workers through fraud, deception and false promises, the workers rescued in March 2000 had also been victims of trafficking in persons. Lastly, the Court also acknowledged that the events in question had occurred in a context of historical structural discrimination based on the economic status of the 85 workers identified and rescued by the Ministry of Labour in March 2000.

Conclusion: violation (unanimously); in relation to the structural discrimination violation (five votes to one).

(b) *Articles 8(1) (right to a fair trial) and 25(1) (right to judicial protection) of the ACHR in conjunction with Articles 1(1) (obligation to respect and ensure rights) and 2 (domestic legal effects) thereof* – None of the domestic legal procedures had determined any criminal responsibility, sought redress for the victims or studied the issue in depth. The statute of limitations had been applied despite the non-applicability of statutory limitations under international law for the crime of slavery. For the Court, the lack of action and sanction of these facts was the result of a process of normalisation of the conditions to which people with certain characteristics were continually subjected in the poorer states of Brazil. The Court therefore found that the State had violated the right of access to justice for the 85 victims, as well as for the 43 other workers who had been rescued in 1997 and who had not received adequate judicial protection.

Conclusion: violation of Article 8(1) (unanimously) and violation of Article 25 (five votes to one).

(c) *Reparations*: The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered the State to: (i) publish the judgment and its official summary; (ii) restart, with due diligence, investigations and/or criminal proceedings with regard to the facts, within a reasonable time, to identify, prosecute and, if applicable, punish those responsible; (iii) adopt the necessary measures to ensure that statutory limitations do not apply to the international law crime of slavery and its analogous forms; and (iv) pay compensation in respect of non-pecuniary damage, as well as costs and expenses.

(See also, for an overview of the ECHR's case-law on slavery and human-trafficking, the Factsheet on Slavery, servitude and forced labour and the Case-law guide on Article 4 of the European Convention on Human Rights)

COURT NEWS

Launch of a new HUDOC database

Launched on 26 January 2017 the HUDOC-EXEC search engine provides access to information in all cases pending before the Committee of Ministers, as well as in cases closed by a final resolution. Searches can be made using search criteria such as State, date, status of execution, violation, theme. HUDOC-EXEC has been developed in co-operation with the ECHR. The HUDOC platform also includes HUDOC-ECHR, HUDOC-CPT, HUDOC-ESC and HUDOC-ECRI.

The new database can be found at the following Internet address (for the English interface): http://hudoc.exec.coe.int/eng.

Press conference

The Court held its annual press conference on 26 January 2017. The President of the Court, Guido Raimondi (see photos), took stock of the year 2016 and reported that the volume of incoming cases, after falling over the previous two years, had considerably increased. This had largely been the result

of the situation in three countries: Hungary and Romania, for complaints about detention conditions, and Turkey, especially since the attempted *coup d'état* in July 2016. By the end of 2016 the number of pending cases was up 23% compared to the end of 2015.

Webcast (original version) available on the Court's Internet site (www.echr.coe.int – Press).

Opening of the Judicial Year 2017

The official opening of the Court's Judicial Year took place on 27 January 2017. Some 300 senior judicial figures from European States took part in a seminar on the theme "*Non-refoulement* as a principle of international law and the role of the judiciary in its implementation". Following the seminar, President Guido Raimondi and Silvia Alejandra Fernández de Gurmendi, President of the International Criminal Court, addressed an audience of about 350 at the solemn hearing.

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

2017 Václav Havel Human Rights Prize

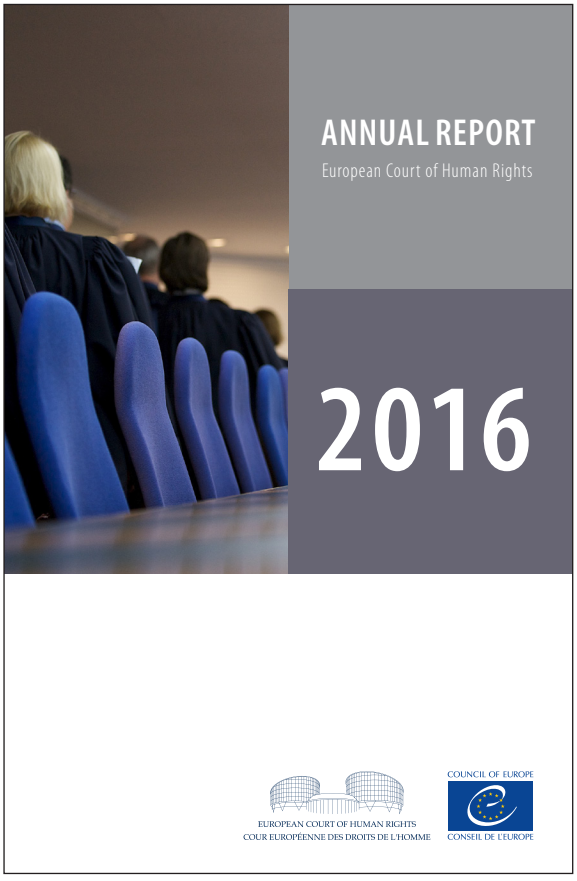
The Parliamentary Assembly of the Council of Europe (PACE), in partnership with the Vaclav Havel Library and the Charta 77 Foundation, has just issued a call for nominations for the 2017 Václav Havel Human Rights Prize, which will be awarded on 9 October next in Strasbourg. Individuals or non-governmental institutions active in the defence of human rights can be nominated for the Prize. The deadline for submitting nominations is 30 April 2017.

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

RECENT PUBLICATIONS

Annual Report 2016 of the Court

On 26 January 2017 the Court issued its Annual Report for 2016 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 2016. It is available on the Court's Internet site (www.echr.coe.int – The Court).



Statistics for 2016

The Court's statistics for 2016 are now available. All related information 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 2016, which provides an overview of developments in the Court's caseload in 2016, such as pending applications and different aspects of case processing, and also country-specific information.

Factsheets

The Court has launched three new factsheets: the first on Austerity measures, the second on Mass surveillance, and the third on Gestational surrogacy. The factsheet on Domestic violence has been translated into Spanish.

All the Court's factsheets, in English, French and some non-official languages, are available for downloading from the Court's Internet site (www.echr.coe.int – Press).

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 1 January 2017. All country profiles can be downloaded from the Court's Internet site (www.echr.coe.int – Press).

Admissibility Guide: new translations

Thanks to the Polish Ministry of Justice, a translation into Polish of the third edition of the Practical Guide on Admissibility Criteria is now available. A translation into Hungarian of the Admissibility Guide is also available on the Court's Internet site (www.echr.coe.int – Case-Law).

Gyakorlati útmutató az elfogadhatósági féltételekről (hun)

Praktyczny Przewodnik w Sprawie Kryteriów Dopuszczalności (pol)

The Information Note, compiled by the Court's Case-Law Information and Publications Division, contains summaries of cases examined during the month in question which the Registry considers as being of particular interest. The summaries are not binding on the Court.

In the provisional version the summaries are normally drafted in the language of the case concerned, whereas the final single-language version appears in English and French respectively. The Information Note may be downloaded at www.echr.coe.int/NoteInformation/en. For publication updates please follow the Court's Twitter account at twitter.com/echrpublication.

The HUDOC database is available free-of-charge through the Court's Internet site (http://hudoc.echr.coe.int/sites/eng). It provides access to the case-law of the European Court of Human Rights (Grand Chamber, Chamber and Committee judgments, decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions).

ENG

www.echr.coe.int

The European Court of Human Rights is an international court set up in 1959 by the member States of the Council of Europe. It rules on individual or State applications alleging violations of the rights set out in the European Convention on Human Rights of 1950.

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

COUNCIL OF EUROPE
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