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COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law

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Territorial jurisdiction in relation to the alleged killing of Iraqi nationals by members of the British Armed Forces in Iraq

Al-Skeini and Others v. the United Kingdom - 55721/07
Judgment 7.7.2011 [GC]

Facts – On 20 March 2003 armed forces of the United States of America, the United Kingdom and their coalition partners entered Iraq with the aim of displacing the Ba'ath regime then in power. On 1 May 2003 major combat operations were declared to be complete and the United States and the United Kingdom became occupying powers. They created the Coalition Provisional Authority "to exercise powers of government temporarily". These powers included the provision of security in Iraq. The security role assumed by the occupying powers was recognised by the United Nations Security Council in Resolution 1483, adopted on 22 May 2003. The occupation came to an end on 28 June 2004, when full authority for governing Iraq passed to the Interim Iraqi Government and the Coalition Provisional Authority ceased to exist.

During the occupation, the United Kingdom had command of the military division – Multinational Division (South East) – which included the province of Al-Basra. From 1 May 2003 onwards the British forces in Al-Basra province took responsibility for maintaining security and supporting the civil administration. The applicants were close relatives of six Iraqi nationals who were killed in Basra 2003 during this period of occupation.

The first, second and fourth applicants' relatives received fatal gunshot wounds when British soldiers opened fire allegedly believing themselves to be under attack or at immediate risk. The third applicant's wife was killed after allegedly being caught in crossfire during a firefight between a British patrol and unknown gunmen. In each of these four cases, it was decided – in the first three instances by the soldiers' commanding officers and, in the case of the fourth applicant, by the Royal Military Police Special Investigation Branch (SIB) – that the incident fell within the British forces Rules of Engagement[1] and that no further investigation was required.

The fifth applicant's son was beaten by British soldiers who suspected him of looting and was forced into a river, where he drowned. Although the SIB opened an investigation and four soldiers were tried at a court martial for manslaughter, they were acquitted when the key prosecution witness was unable to identify them.

The sixth applicant's son, Baha Mousa, died of asphyxiation at a British military base, with multiple injuries on his body. The SIB was immediately called in to investigate. The sixth applicant brought civil proceedings against the Ministry of Defence, which ended in July 2008 with a formal and public acknowledgement of liability and the payment of GBP 575,000 in compensation. The minister announced that there would be a public inquiry into Baha Mousa's death.

In 2004 the Secretary of State for Defence decided not to conduct independent inquiries into the six deaths, and not to accept liability or pay compensation. The applicants sought judicial review of that decision. The case ultimately came before the House of Lords, which accepted that Baha Mousa's case fell within the UK's jurisdiction as the ill-treatment had occurred within a British military base. That case was therefore remitted to a first-instance court for reconsideration of the question whether there had been an adequate investigation into his death. As regards the other deaths, the House of Lords considered itself bound by the European Court's decision in *Banković and Others v. Belgium and Others* ((dec.) [GC], no. 52207/99, 12 December 2001) to find that the UK did not have jurisdiction.

Law – Article 1 (territorial jurisdiction): A Contracting State's obligation to secure the Convention rights and freedoms was confined to persons within its "jurisdiction", a primarily territorial concept. Acts performed or producing effects outside the State's territory could constitute an

1. The Rules of Engagement stipulated, among other things, that firearms should be used only as a last resort, to protect human life, and that a challenge had to be given before firing unless it would increase the risk of death or injury to those under threat.

exercise of jurisdiction only in exceptional circumstances. The Court's case-law indicated that such circumstances could exist where State agents exercised authority and control over an individual outside the territory. Into this category fell the acts of diplomatic and consular agents, the exercise of extra-territorial public powers with the consent, at the invitation or with the acquiescence of the foreign government concerned or, lastly, the use of force by State agents extra-territorially to bring an individual under their control. Exceptional circumstances could also arise when, as a consequence of lawful or unlawful military action, a Contracting State exercised effective control of an area outside the national territory either directly, through its own armed forces, or through a subordinate local administration.

In the applicants' case, following the removal from power of the Ba'ath regime and until the accession of the Interim Iraqi Government, the United King–dom (together with the United States) had assumed in Iraq the exercise of some of the public powers normally exercised by a sovereign government. In particular, it had assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the United Kingdom had, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations. All the applicants' relatives had died during the relevant period. With the exception of the third applicant's wife, it was not disputed that their deaths were caused by the acts of British soldiers during the course of or contiguous to security operations in Basra City. There was thus a jurisdictional link in their cases. Although it was not known which side had fired the bullet that had resulted in the death of the third applicant's wife, she had died in the course of a United Kingdom security operation when British soldiers carried out a patrol in the vicinity of the third applicant's home and joined in the fatal exchange of fire, so there was a jurisdictional link in her case also.

Conclusion: within the jurisdiction (unanimously).

Article 2 (procedural aspect): The procedural duty under Article 2 had to be applied realistically to take account of the practical problems faced by investigators in a foreign and hostile region in the immediate aftermath of invasion and war. Nonetheless, the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent.

It was clear that the investigations into the shooting of the first, second and third applicants' relatives had failed to meet the requirements of Article 2, since the investigation process had remained entirely within the military chain of command and been limited to taking statements from the soldiers involved. Likewise, although there had been an SIB investigation into the deaths of the fourth applicant's brother and the fifth applicant's son, that was not sufficient to comply with the requirements of Article 2, since the SIB was not, during the relevant period, operationally independent.[1] In addition, there had been a high risk of contaminated and unreliable evidence in the fourth applicant's case owing to lengthy delays in having key witnesses interviewed by a fully independent investigator. Indeed, certain alleged eye witnesses did not appear to have been interviewed by a fully independent investigator at all. The effectiveness of the investigation into the fifth applicant's son's death also appeared to have been seriously undermined by lengthy delays that had resulted in some of the soldiers accused of involvement becoming untraceable. Added to which, the narrow focus of the criminal proceedings had been inadequate: in the particular circumstances of the case, in which there appeared to be at least prima facie evidence that the applicant's minor son had drowned as a result of mistreatment while in the custody of British soldiers assisting the Iraqi police to combat looting, Article 2 required an independent examination, accessible to the victim's family and the public, of the broader issues of State responsibility for the death, including the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion. In contrast, a full, public inquiry was nearing completion into the circumstances of Baha Mousa's death. In the light of that inquiry, the sixth applicant was no longer a victim of any breach of the procedural obligation under Article 2. Accordingly, the respondent State had failed to carry out an effective investigation into the deaths of the relatives of the first five applicants.

Conclusion: violation (unanimously).

1. Any investigation commenced by the SIB on its own initiative could be closed at the request of the military chain of command. On conclusion of the investigation, the SIB's report was sent to the commanding officer, who would then decide whether or not to refer the case to the prosecuting authority.

Article 41: EUR 17,000 each to the first five applicants in respect of non-pecuniary damage.

(See also *Al-Jedda v. the United Kingdom*, Article 5 § 1 below, page 10)

ARTICLE 2

Effective investigation

Failure to hold fully independent and effective investigation into deaths of Iraqi nationals during occupation of southern Iraq by British Armed Forces: *violation*

Al-Skeini and Others v. the United Kingdom - 55721/07
Judgment 7.7.2011 [GC]

(See Article 1 above, page 7)

ARTICLE 3

Inhuman and degrading treatment

Inmate's seven-day placement in security cell without clothing: *violation*

Hellig v. Germany - 20999/05
Judgment 7.7.2011 [Section V]

Facts – The applicant, who was serving a prison sentence, got into a fight with the prison staff. He was then taken to a security cell, where he was strip-searched and apparently left naked. The security cell measured over 8 square metres and was equipped with a mattress and a squat toilet. The applicant remained there for seven days, when he was transferred to the prison hospital. The prison pastor, who visited the applicant in the security cell, observed that he was naked and in a very agitated state of mind. The applicant subsequently requested the competent courts to declare that his detention in the security cell had been unlawful, but his request was dismissed.

Law – Article 3: In order to prevent the applicant from attacking prison staff, the authorities had placed him in a security cell with only very basic facilities that were thus unsuitable for long-term accommodation. Even though it was unclear whether the applicant had been left naked for his entire stay in that cell, there were strong, clear and concordant indications that this had indeed been the case: the pastor who had visited him in the security cell had noted that he was naked and the Government had acknowledged that it was general practice to keep inmates in such cells naked in order to prevent self-injury. The Court noted that depriving an inmate of his clothing might arouse feelings of fear, anguish and inferiority capable of humiliating and debasing him. Moreover, the competent regional court had not been able to establish with certainty whether there was a serious danger of self-injury or suicide at the time of the applicant's placement in the security cell. Further, there was no indication that the prison authorities had considered the use of less intrusive measures, such as providing the applicant with tear-proof clothing, as recommended by the CPT.[1] In sum, the applicant's placement for seven days in the security cell might have been justified, but depriving him of his clothes during his stay there constituted inhuman and degrading treatment.

Conclusion: violation (unanimously).

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

Positive obligations

Violence among pupils in school: *inadmissible*

Đurđević v. Croatia - 52442/09
Judgment 19.7.2011 [Section I]

Facts – In their application to the European Court, the applicants (parents and son) complained that the third applicant, who was of Roma origin, had been subjected to violence by other pupils from the secondary school he attended. Following an incident in October 2008 in which he sustained an injury to his nose he was interviewed by the police, but said that the injury was the result of an accident. Medical reports were drawn up following further incidents in which the third applicant claimed to have been beaten up both in and outside school and in February 2010 he was diagnosed with serious eye impairment as a result of a contusion.

The applicants also complained of a separate incident in June 2009 in which they alleged that both

1. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

the third applicant and his mother (the second applicant) had sustained injuries at the hands of the police. The mother lodged a criminal complaint, but this was rejected by the State Attorney's Office for lack of evidence.

Law – Articles 3 and 8 (alleged violence in school): The States' duty to provide individuals within their jurisdiction, in particular children and other vulnerable persons, effective protection against ill-treatment included an obligation to maintain and apply in practice an adequate legal framework affording protection against acts of violence by others. The third applicant, who was fifteen years old when the events in question took place, clearly fell into the category of "vulnerable individuals" entitled to State protection. In support of his allegations that he had been frequently ill-treated by other pupils at the school he attended, he had submitted a series of medical reports documenting his accounts of beatings, abdominal and back pain, headaches and permanent eye damage. However, both in their submissions to the national authorities and to the Court, the applicants' complaints had been formulated only in vague and general terms, without indicating the exact dates or circumstances. Indeed, the only specific incident they had referred to – which had been examined by the school authorities and noted in one of the medical reports – had turned out to be an accident. The medical reports had either noted no injuries or, in the case of the permanent eye damage, not indicated the cause of the injury or whether it was connected with a specific incident of violence at school. Though aware of the seriousness of the problem of violence in schools, the Court could not see how the applicants' vague and unspecified allegations could have set off the State's positive obligations under Articles 3 or Article 8. For such an obligation to be triggered, allegations of violence had to be specific and more detailed as to the time, place and nature of the acts complained of.

Conclusion: inadmissible (manifestly ill-founded).

As regards the incident in June 2009 the Court found that there had been no violation of the substantive aspect of Article 3 as it had not been established beyond reasonable doubt that the second and third applicants' injuries had been caused by the police. There had, however, been a violation of the procedural aspect of that provision owing to the failure to conduct an effective investigation. The second and third applicants were therefore awarded EUR 6,000, jointly, in respect of non-pecuniary damage.

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Continued preventive detention of Iraqi national by British Armed Forces in Iraq on basis of United Nations Security Council Resolution: *violation*

Al-Jedda v. the United Kingdom - 27021/08
Judgment 7.7.2011 [GC]

Facts – In March 2003 a United States of America-led coalition, including British armed forces, invaded Iraq. Major combat operations in Iraq were declared complete in May 2003. As from that date, the United Kingdom became an occupying power under the relevant provisions of the regulations annexed to the 1907 Hague Convention and the 1949 Fourth Geneva Convention. A United Nations Assistance Mission for Iraq (UNAMI) was established. In its Resolutions 1511 (2003) and 1546 (2004), the United Nations Security Council described the role of UNAMI, reaffirmed its authorisation for the multinational force under unified command and decided "that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq".

The applicant is an Iraqi national. In October 2004 he was arrested on suspicion of involvement in terrorism and subsequently detained for over three years at a detention facility in Basra (Iraq) run by British troops. His internment was deemed necessary for imperative reasons of security in Iraq. The intelligence supporting the allegations was not disclosed to him and no criminal charges were brought against him. His detention was subject to periodic reviews by the commander of the multinational division. In June 2005 he brought judicial-review proceedings in the United Kingdom challenging the lawfulness of his continued detention and the refusal of the Government to return him to the United Kingdom. The case was ultimately decided by the House of Lords on 17 December 2007. Although accepting that the actions of the British troops in Iraq were attributable to the United Kingdom and not the United Nations so that the United Kingdom was responsible for the applicant's internment under international law, the House of Lords went on to find that Resolution 1546 effectively obliged/

authorised British forces within the multinational force to use internment "where necessary for imperative reasons of security in Iraq" and that obligations imposed by Security Council resolutions took primacy over all other international obligations, even those arising under the European Convention.

Law – Article 5 § 1: The Government had contended that the internment was attributable to the United Nations, not to the United Kingdom, and that the applicant was not, therefore, within United Kingdom jurisdiction under Article 1 of the Convention. Alternatively, the internment was carried out pursuant to Resolution 1546, which created an obligation on the United Kingdom to detain the applicant which, pursuant to Article 103 of the United Nations Charter, overrode its Convention obligations.

(a) *Jurisdiction* – Security Council resolutions were to be interpreted in the light not only of the language used but also the context in which they were adopted.[1] At the time of the invasion in March 2003, there was no resolution providing for the allocation of roles in Iraq if the existing regime was displaced. In a letter to the president of the Security Council dated 8 May 2003, the permanent representatives of the United States and the United Kingdom had explained that, after displacing the previous regime, they had created the Coalition Provisional Authority to exercise powers of government, including the provision of security in Iraq, temporarily. They acknowledged that the United Nations had a vital role to play in providing humanitarian relief, supporting the reconstruction of Iraq and helping in the formation of an Iraqi interim government.

The first UNSC resolution after the invasion – Resolution 1483, adopted on 22 May 2003 – did not assign any security role to the United Nations. Although Resolution 1511, adopted on 16 October 2003, authorised "a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq", the Court did not consider that this meant that the acts of soldiers within the Multi-National Force became attributable to the United Nations or ceased to be attributable to the troop-contributing nations. In particular, the United Nations did not assume any degree of control over either the Multi-National Force or any other of the executive functions of the Coalition Provisional Authority. In Resolution 1546, adopted on 8 June 2004, some four months before the applicant was taken into detention, the Security Council had reaffirmed the authorisation for the Multi-National Force, but there was no indication that it had intended to assume any greater degree of control or command over the force than it had exercised previously. Moreover, the fact that the UN Secretary General and UNAMI had repeatedly protested about the extent to which security internment was being used by the Multi-National Force made it difficult to conceive that the applicant's detention was attributable to the United Nations. In sum, the Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force. The applicant's detention was therefore not attributable to the United Nations.

The internment had taken place within a detention facility controlled exclusively by British forces, and the applicant had thus been within the authority and control of the United Kingdom throughout. The decision to hold him in internment had been taken by the British officer in command of the detention facility. The fact that his detention was subject to reviews by committees including Iraqi officials and non-United Kingdom representatives from the Multi-National Force did not prevent it from being attributable to the United Kingdom. The applicant thus fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention.

Conclusion: within the jurisdiction (unanimously).

(b) *Substantive aspect* – The Government did not contend that the detention was justified under any of the exceptions set out in subparagraphs (a) to (f) of Article 5 § 1, or purport to derogate under Article 15. Instead, they argued that, by virtue of Article 103[2] of the United Nations Charter, the obligations created by Security Council Resolution 1546 prevailed over the United Kingdom's Convention duties.

The Court noted, however, that the United Nations was created, not just to maintain international peace and security, but also to "achieve international cooperation in … promoting and encouraging respect for human rights and fundamental freedoms". Article 24(2) of the Charter required

1. International Court of Justice advisory opinion: "Legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)".

2. Article 103 provides that UN Member States' obligations under the Charter shall prevail in the event of a conflict with obligations under any other international agreement.

the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". Against that background, there had to be a presumption when interpreting Security Council resolutions that the Security Council did not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of such a resolution, the Court therefore had to choose the interpretation which was most in harmony with the requirements of the Convention and which avoided any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it was to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human-rights law.

Internment was not explicitly referred to in Resolution 1546, which authorised the Multi-National Force "to take all necessary measures to contribute to the maintenance of security and stability in Iraq". Internment was, however, listed in a letter from the US Secretary of State annexed to the Resolution, as an example of the "broad range of tasks" which the Multi-National Force was ready to undertake. In the Court's view, the terminology of the Resolution left open to the Member States within the Multi-National Force the choice of the means to be used to contribute to the maintenance of security and stability in Iraq. Moreover, in the Preamble to the Resolution, the commitment of all forces to act in accordance with international law was noted, and the Convention was part of international law. In the absence of clear provision to the contrary, the presumption had to be that the Security Council intended States within the Multi-National Force to contribute to the maintenance of security in Iraq while complying with their obligations under international human-rights law.

Furthermore, it was difficult to reconcile the argument that Resolution 1546 placed an obligation on Member States to use internment with the objections repeatedly made by the UN Secretary General and UNAMI to the use of internment by the Multi-National Force. Under Resolution 1546 the Security Council mandated both the Secretary General, through his Special Representative, and UNAMI to "promote the protection of human rights … in Iraq". In his quarterly reports throughout the relevant period, the UN Secretary General had repeatedly described the extent to which security internment was being used by the Multi-National Force as "a pressing human rights concern". UNAMI had reported on the human-rights situation every few months during the same period and repeatedly expressed concern at the large number of people being held in indefinite internment without judicial oversight.

In conclusion, the Court considered that Resolution 1546 had authorised the United Kingdom to take measures to contribute to the maintenance of security and stability in Iraq. However, neither that nor any other resolution explicitly or implicitly required the United Kingdom to place individuals considered a security risk into indefinite detention without charge. In those circumstances, in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the UN Charter and its obligations under Article 5 § 1 of the Convention. The provisions of Article 5 § 1 were accordingly not displaced.

Conclusion: violation (sixteen votes to one).

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

(See also *Al-Skeini and Others v. the United Kingdom*, Article 1 above, page 7)

ARTICLE 8

Private life

Non-fatal attack on elderly woman by stray dogs in city where problem was rife: *violation*

Georgel and Georgeta Stoicescu v. Romania - 9718/03
Judgment 26.7.2011 [Section III]

Facts – In 2000 the second applicant, an elderly woman, was attacked, bitten and knocked to the ground by a pack of stray dogs in a residential area of Bucharest. Following the incident, she started to suffer from amnesia and from shoulder and thigh pains and had difficulty walking. She lived in a constant state of anxiety and never left the house for fear of another attack. By 2003 she had become totally immobile.

She brought an action in damages against the local mayor's office. Although a district court found in her favour on the merits her action was dismissed on appeal on the technical ground that the mayor's

office was not the proper defendant as it was the municipal council which exercised authority over the animal control agency. A subsequent action against the municipal council failed on the grounds that the animal control agency was by then defunct and responsibility for stray dogs had reverted to the mayor's office.

Since the mid-1990s the national and international media have regularly reported on the large number of stray dogs in Romania and attacks resulting in serious injuries or even death to passers-by. By 2000 the population of stray dogs in the city of Bucharest alone numbered some 200,000. In March 2001 the mayor of Bucharest decided to have recourse to euthanasia in the light of statistics indicating that the population of stray dogs in the city had doubled between 1996 and 2001 and that in 2000 some 22,000 persons had required medical care following attacks.

Law – Article 8: The Court had to determine whether the State authorities had failed to comply with their positive obligation to protect the second applicant's physical and psychological integrity. It was common ground that the authorities had broad and detailed information on the problem of the large number of stray dogs in the city of Bucharest and the danger they represented. Even before the attack on the second applicant in 2000 regulations had been in force providing for the creation of specific structures to control the population of strays. These regulations were modified several times after the attack. In 2001 the authorities acknowledged the special situation and introduced legislation providing for stray dogs to be captured and either neutered or euthanised. However, the situation remained critical, with several thousand people being injured in the city of Bucharest alone. In its judgment of 19 June 2001 the county court found that the animal control agency, a public body, had not taken all necessary measures to avoid endangering the lives of the population and to preserve their health and physical integrity. That judgment was, however, quashed for procedural reasons and the second applicant's subsequent attempts to secure appropriate redress had also failed.

Apart from arguing that society in general should bear responsibility for the situation of stray dogs in Romania, the Government had not provided any indication as to the concrete measures taken by the authorities at the time to properly implement the existing legislative framework with a view to addressing the serious problem of public health and threat to the physical integrity of the population represented by a large number of stray dogs. Nor had they indicated whether the applicable regulations and practices were capable of providing appropriate redress for victims. That situation seemed to be continuing. In the particular circumstances of the case, by failing to take sufficient measures to address the issue of stray dogs and to provide appropriate redress to the second applicant for her injuries, the authorities had failed to discharge their positive obligation to secure respect for the applicant's private life.

Conclusion: violation (six votes to one).

Article 6 § 1: The dismissal of a court action as a result of the interpretation of the legal capacity of a defendant authority, compared with that of one of its departments or executive bodies, could raise an issue under Article 6 § 1. Under the relevant legislation, the mayor's offices were the executive bodies of the municipal councils, the latter being responsible for setting up services for stray dogs and the former for implementing specific policy. Since in the instant case the animal control agency's stamp had borne the name of the mayor's office, it had been reasonable for the second applicant to believe that the mayor's office had legal standing in the matter. In the context of local organisational changes in the field of animal control, shifting onto the second applicant the duty of identifying the authority against which she should bring her claim was disproportionate and failed to strike a fair balance between the public interest and her rights. She had thus been denied a clear, practical opportunity of claiming compensation.

Conclusion: violation (unanimously).

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

(Compare *Berü v. Turkey*, no. 47304/07, 11 January 2011, Information Note no. 137)

Family life

Order for return of minor child, who had been living with mother in Latvia, to father in Italy without due consideration of child's best interests: *violation*

Šneersone and Kampanella v. Italy - 14737/09
Judgment 12.7.2011 [Section II]

Facts – The second applicant, whose mother (the first applicant) is Latvian and father Italian, was born in Italy in 2002. A year later his parents separated and he has lived with his mother ever

since. The mother was granted custody by an Italian court in September 2004. She left Italy for Latvia in April 2006 taking the second applicant with her. Subsequently, the Italian courts granted the father sole custody. In 2007 the Latvian courts decided on the basis of a psychologist's report that the boy's return to Italy would not be in his best interests and might even provoke neurotic problems and illnesses. The Italian courts subsequently ordered the child's return to Italy on the basis of European Council Regulation No. 2201/2003 concerning jurisdiction in matters of parental responsibility ("the Regulation"). Latvia brought an action against Italy before the European Commission in connection with the return proceedings but, in a reasoned opinion, the Commission found that Italy had not violated either the Regulation or the general principles of Community law.

In their application to the European Court, the applicants complained that the Italian courts' decisions ordering the second applicant's return to Italy were contrary to his best interests and to international and Latvian law. They further complained that the Italian courts had heard the case in the first applicant's absence.

Law – Article 8

(a) *The return order* – The Italian court's order for the child's return to Italy constituted an interference with the applicants' right to respect for their family life. The interference was in accordance with the law (Article 11 of the Regulation in combination with Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction) and pursued the legitimate aim of protecting the rights and freedoms of the child and his father.

As to whether the interference had been necessary in a democratic society, the reasoning in the Italian courts' decisions was rather scant. Even assuming that the Italian courts' role was limited by Article 11(4) of the Regulation to assessing whether adequate arrangements had been made to secure the child's protection after his return to Italy from any identified risks within the meaning of Article 13(b) of the Hague Convention, the fact remained that none of the risks identified by the Latvian authorities were addressed by the Italian courts. The Italian courts did not refer to the two psychologists' reports that had been drawn up in Latvia or to the potential dangers to the boy's psychological health the reports identified. No effort was made by the Italian authorities to inspect the accommodation proposed by the father to establish its suitability as a home for a young child. The Court was thus unpersuaded that the Italian courts had sufficiently appreciated the seriousness of the difficulties the child was likely to encounter in Italy. Nor could the "safeguards" of the child's well-being accepted by the Italian courts be regarded as adequate: allowing the first applicant to stay with the child for fifteen to thirty days during the first year and then for one summer month every other year was a manifestly inappropriate response to the psychological trauma that would inevitably follow a sudden and irreversible severance of the close ties between mother and child; the provision of facilities such as a kindergarten, swimming pool and Russian-language classes could in no way compensate for the child's drastic immersion in a linguistically and culturally foreign environment; and external psychological support could not be considered equivalent to the support intrinsic to strong, stable and undisturbed ties between a child and its mother. Nor had the Italian courts considered any alternative solutions for ensuring contact between the boy and his father. The interference had thus not been necessary in a democratic society.

Conclusion: violation (six votes to one).

(b) *Procedural fairness* – Taking into account that both the father and the first applicant had submitted, with the aid of counsel, detailed written statements to two levels of Italian jurisdiction, the Court, like the European Commission, was satisfied that the procedural fairness requirement of Article 8 had been observed.[1]

Conclusion: no violation (unanimously).

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

Positive obligations

Violence among pupils in school: *inadmissible*

Đurđević v. Croatia - 52442/09
Judgment 19.7.2011 [Section I]

(See Article 3 above, page 9)

1. Whilst it contains no explicit procedural requirements, Article 8 requires that the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by that Article.

EU Regulation on the enforcement of judgments and illegal removal of a child: *violation*

Shaw v. Hungary - 6457/09
Judgment 26.7.2011 [Section II]

Facts – After the applicant, an Irish national living in Paris, and his Hungarian wife divorced in 2005, they were granted joint custody of their then five-year-old daughter. In December 2007 the mother took the child to Hungary for the holidays and enrolled her in a school there without the applicant's consent. Relying on Council Regulation (EC) no. 2201 of 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility ("the EC Regulation") and the Hague Convention on the Civil Aspects of International Child Abduction, in March 2008 the applicant brought an action against the mother in a Hungarian court for the return of the child. The court established that the habitual residence of the child was in France and that, given their joint custody, neither parent could change that residence without the approval of the other. On 30 May 2008 the court established that the child had been abducted and ordered the mother to take her back to France by 6 June or hand her over to the Hungarian police by 10 June. On appeal, on 2 September 2008 the second-instance court upheld that decision but granted the mother an extension of time. However, when the mother did not comply, on 15 October 2008 the first-instance court ordered enforcement of the judgment. A court bailiff then unsuccessfully asked the mother to comply voluntarily with the order. On 18 November 2008 the Supreme Court upheld the lower courts' decisions. The mother then requested a stay of execution, but her request was rejected and she was ordered to pay a fine of about EUR 180. In April 2009 the court ordered the enforcement of the child's return with police assistance and scheduled an on-site intervention for 29 July 2009. Meanwhile, a French court had issued a European arrest warrant against the mother, on the basis of which she was arrested on 27 July 2009, but released a day later since no criminal proceedings were pending against her in Hungary. The enforcement attempt of 29 July was unsuccessful since the mother and daughter had absconded. In October 2009 the bailiff tried to find the child in school, but established that she had not attended classes during the school year. Despite numerous measures – such as monitoring the telecommunication providers, the school and the database of the national-health insurance fund – the authorities have been unable to locate the mother or the child.

Meanwhile, in April 2008, on the basis of Article 41(2) of the EC Regulation, a French court issued a certificate concerning the applicant's access rights established after the divorce. However, when the applicant requested enforcement of those rights before the Hungarian authorities, his request was dismissed with the explanation that they lacked jurisdiction.

Law – Article 8: The Court was called upon to examine whether, seen in the light of their international obligations arising in particular under the EC Regulation and the Hague Convention, the Hungarian authorities had made adequate and effective efforts to secure compliance with the applicant's right to the return of his child and the child's right to be reunited with her father. Even though Article 11(3) of the EC Regulation set out a clear obligation on the domestic courts to issue a judgment within six weeks after the lodging of the application, in the applicant's case the first-instance judgment was delivered only after seven weeks, the second-instance judgment after another thirteen weeks and the Supreme Court's judgment eleven weeks later. These delays may have been partially due to the five-week court holiday period, but cases of this sort should be classified as urgent and be dealt with even during court holidays. The delays in the procedure alone enabled the Court to conclude that the authorities had not complied with the positive obligations under the European Convention. Moreover, the authorities had failed to take adequate steps for the enforcement of the return order prior to 29 July 2009. Almost eleven months had elapsed between the delivery of the enforcement order and the mother's disappearance with the daughter. During that time, the only enforcement measures taken were an unsuccessful request for the voluntary return of the child and the imposition of a relatively modest fine. Finally, the situation had been aggravated by the fact that more than three and a half years had passed without the father being able to exercise his access rights. This was essentially due to the fact that the Hungarian authorities had declined jurisdiction in the matter despite the existence of a final court decision that had been certified in accordance with Article 41 of the EC Regulation.

Conclusion: violation (unanimously).

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

ARTICLE 9

Applicability
Manifest religion or belief

Conviction of conscientious objector for refusing to perform military service: *violation*

Bayatyan v. Armenia - 23459/03
Judgment 7.7.2011 [GC]

Facts – The applicant, a Jehovah's Witness who had been declared fit for military service, informed the authorities that he refused to serve in the military on conscientious grounds but was ready to carry out alternative civil service. When summoned to commence his military service in May 2001 he failed to report for duty and temporarily left his home for fear of being forcibly taken to the military. He was charged with draft evasion and in 2002 was sentenced to two and a half years' imprisonment. He was released on parole after serving about ten and a half months of his sentence. At the material time in Armenia there was no law offering alternative civil service for conscientious objectors.

Law – Article 9

(a) *Applicability* – This was the first case in which the Court had examined the issue of the applicability of Article 9 to conscientious objectors. Previously, the European Commission of Human Rights had in a series of decisions refused to apply that provision to such persons, on the grounds that, since Article 4 § 3 (b) of the Convention excluded from the notion of forced labour "any service of a military character or, in cases of conscientious objectors, in countries where they are recognised, service exacted instead of compulsory military service", the choice whether or not to recognise conscientious objectors had been left to the Contracting Parties. The question was therefore excluded from the scope of Article 9, which could not be read as guaranteeing freedom from prosecution for refusing to serve in the army. However, that interpretation of Article 9 was a reflection of ideas that prevailed at that time. Since then, important developments had taken place both on the international level and in the domestic legal systems of Council of Europe member States. By the time of the alleged interference with the applicant's Article 9 rights in 2002-03, there was virtually a consensus among the member States, the overwhelming majority of which had already recognised the right to conscientious objection. After the applicant's release from prison, Armenia had recognised that right also. The United Nations Human Rights Committee considered that the right to conscientious objection could be derived from Article 18 of the International Covenant on Civil and Political Rights and Article 9 of the Charter of Fundamental Rights of the European Union explicitly stated that the right to conscientious objection was recognised in accordance with the national law governing its exercise. Moreover, the Parliamentary Assembly of the Council of Europe and the Committee of Ministers had on several occasions called on the member States which had not yet done so to recognise the right to conscientious objection and this had eventually become a pre-condition for admission of new member States into the Organisation. In the light of the foregoing and of its "living instrument" doctrine, the Court concluded that a shift in the interpretation of Article 9 was necessary and foreseeable and that that provision could no longer be interpreted in conjunction with Article 4 § 3 (b). In any event, it transpired from the *travaux préparatoires* on Article 4 that the sole purpose of subparagraph 3 (b) was to provide further elucidation of the notion "forced or compulsory labour", which neither recognised nor excluded a right to conscientious objection. It should therefore not have a delimiting effect on the rights guaranteed by Article 9.

Accordingly, although Article 9 did not explicitly refer to a right to conscientious objection, the Court considered that opposition to military service motivated by a serious and insurmountable conflict between the obligation to serve in the army and an individual's conscience or deeply and genuinely held religious or other beliefs constituted a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9. This being the situation of the applicant, Article 9 was applicable to his case.

(b) *Compliance* – The applicant's failure to report for military service had been a manifestation of his religious beliefs and his conviction therefore amounted to an interference with his freedom to manifest his religion. Leaving open the questions whether the interference had been prescribed by law or whether it pursued a legitimate aim, the Court went on to examine the margin of appreciation afforded to the respondent State in the applicant's case. Given that almost all Council of Europe member States had introduced alternatives to military service, any State which had not done so enjoyed only a limited margin of appreciation and had to demonstrate that any interference corresponded to a "pressing social need". At the

material time, however, the existing system in Armenia imposed on citizens an obligation which had potentially serious implications for conscientious objectors while failing to allow any conscience-based exceptions and penalising those who, like the applicant, refused to perform military service. Such a system therefore failed to strike a fair balance between the interests of society as a whole and those of the individual. In the Court's view, the imposition of a criminal sanction on the applicant, where no allowances were made for the exigencies of his religious beliefs, could not be considered a measure necessary in a democratic society. The Court further observed that the applicant's prosecution and conviction had occurred after the Armenian authorities had officially pledged, upon acceding to the Council of Europe, to introduce alternative service within a specific period and they had done so less than a year after the applicant's conviction. In these circumstances, the applicant's conviction, which had been in direct conflict with the official policy of reform and legislative changes in pursuance of Armenia's international commitment, could not be said to have been prompted by a pressing social need.

Conclusion: violation (sixteen votes to one).

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

ARTICLE 10

Freedom of expression

Conviction of newspaper editor for publishing verbatim interview without prior authorisation by interviewee: *violation*

Wizerkaniuk v. Poland - 18990/05
Judgment 5.7.2011 [Section IV]

Facts – The applicant was the editor-in-chief and co-owner of a newspaper. In February 2003 two journalists working for that newspaper interviewed a Member of Parliament who, on seeing the text, refused to authorise its publication. Notwithstanding that refusal, the newspaper published parts of the interview verbatim but stated that the MP had refused to authorise publication. Following a complaint by the MP the applicant was prosecuted under the Press Act 1984 on charges of publishing an interview without the interviewee's consent. He was sentenced to a fine. He then sought, unsuccessfully, to challenge the constitutionality of the Press Act. Despite the Prosecutor General, the Speaker of the Parliament and the Ombudsman all opining that the law was incompatible with the Constitution, the Constitutional Court found that civil-law remedies did not provide effective redress for infringements of personal rights, that journalists had the option of summarising interviews without seeking authorisation and that the legal requirement for authorisation before publication was a guarantee for readers that statements purportedly made during interviews were authentic.

Law — Article 10: While the Court had difficulty accepting that the aim of the interference at issue could have been the protection of the MP's reputation, since the conviction was not based on the substance or content of the impugned article but on the lack of consent to its publication, it was nevertheless prepared to assume that the interference served a legitimate aim. In previous cases the Court had been called upon to examine whether interference with freedom of expression was "necessary in a democratic society" by reference to the substance and content of statements of fact or value judgments for which the applicants had ultimately been penalised under the civil or criminal law. The essential difference in the applicant's case was that the domestic courts had imposed a criminal sanction on grounds which were completely unrelated to the substance of the impugned article. The Court noted, firstly, that even though domestic law provided for the possibility of a private prosecution in cases concerning less serious offences, the criminal proceedings against the applicant were brought by the public prosecutor. Further, at no stage of the proceedings was it shown that either the content or the form of the MP's remarks had been distorted in any way. Despite this, the mere fact of publication without the authorisation required by section 14 of the Press Act had automatically entailed the imposition of a criminal sanction. Accordingly, when examining the case against the applicant, the domestic courts had not been required to give any thought to the relevance of the fact that the person interviewed was an MP with political responsibilities towards his constituents. Indeed, they did not have any regard to the substance of the published statements or to whether they corresponded to what had been said during the interview. The provisions applied in the applicant's case effectively gave interviewees carte blanche to prevent a journalist from publishing any interview they regarded embarrassing or unflattering, regardless of how truthful or accurate it was. These provisions were also liable to produce other negative consequences,

in that they were capable of making journalists avoid putting probing questions for fear that publication of the entire interview would be blocked by a refusal of authorisation. These provisions were thus capable of having a chilling effect on journalism by going to the heart of decisions on the substance of press interviews. Moreover, they dated back to a period before the collapse of the communist system in Poland when all media were subjected to preventive censorship and consequently, as applied in the applicant's case, they could not be said to be compatible with the tenets of a democratic society.

Lastly, it appeared paradoxical that the more faithfully journalists reported interviews, the more they were exposed to the risk of criminal proceedings for failure to seek authorisation. In any event, the mere fact that the applicant was free to paraphrase words used by the interviewee – but chose to publish his statements verbatim and was penalised for it – did not make the penalty imposed on him proportionate. The applicant's conviction and sentence to a fine, without any regard being had to the accuracy and subject-matter of the published text and notwithstanding his unquestioned diligence in ensuring its accuracy, was therefore disproportionate.

Conclusion: violation (unanimously).

Article 41: EUR 256 in respect of pecuniary damage and EUR 4,000 in respect of non-pecuniary damage.

Conviction for defamation in respect of newspaper article criticising wine produced by State-owned company: *violation*

Uj v. Hungary - 23954/10
Judgment 19.7.2011 [Section II]

Facts – The applicant, a journalist, was convicted of defamation and sentenced to a reprimand in respect of a newspaper article in which he had criticised the quality of a well-known variety of Hungarian wine produced by a State-owned company. The domestic courts found that although the applicant was entitled to express his opinion about the wine, characterising it as "shit" was unduly insulting and infringed the wine producer's right to a good reputation.

Law – Article 10: The sole issue before the Court was whether the interference with the applicant's right to freedom of expression had been necessary in a democratic society. The Court accepted that the wine company had without question the right to defend itself against defamatory allegations and that there was a general interest in protecting the commercial success and viability of companies, not only for the benefit of shareholders and employees, but also for the wider economic good. However, there was a difference between damaging an individual's reputation concerning his or her social status, with the repercussions that that could have on his or her dignity, and a company's commercial reputation, which had no moral dimension. While the term used by the applicant was offensive, the article had expressed a value judgment or opinion whose primary aim was to raise awareness about the disadvantages of State ownership rather than to denigrate the quality of the company's products. Raising as it did the question of government policies on the protection of national values and the role of private enterprise and foreign investment, it concerned a matter of public interest in respect of which the press had a duty to impart information and ideas, even if exaggerated or provocative. Since the domestic courts had failed to have regard to these considerations, the respondent State could not establish that the restriction had been proportionate.

Conclusion: violation (unanimously).

Article 41: No claim made in respect of damage.

Freedom of expression
Freedom to impart information

Dismissal of nurse for lodging a criminal complaint alleging shortcomings in care provided by private employer: *violation*

Heinisch v. Germany - 28274/08
Judgment 21.7.2011 [Section V]

Facts – The applicant was employed as a geriatric nurse in a nursing home for a company which was majority-owned by the Berlin *Land*. Between January 2003 and October 2004 she and colleagues regularly indicated to the management that they were overburdened owing to a shortage of staff and that services were not being properly documented. Following an inspection, the medical review board of the health insurance fund noted serious shortcomings in the care provided, including an insufficient staff and unsatisfactory care and documentation of care. In November 2004 the applicant's legal counsel wrote to the company pointing out the staffing problems and enquiring how the company intended to avoid incurring criminal

liability. When the company rejected the accusations, he lodged a criminal complaint alleging aggravated fraud in that the company had knowingly failed to provide the high quality care announced in its advertisements, had systematically tried to cover up the problems and had urged staff to falsify service reports. In January 2005 the public prosecutor's office discontinued the preliminary investigations it had opened. In the same month the applicant was dismissed with effect from 31 March on account of repeated absences through illness. A trade union and friends of the applicant subsequently circulated a leaflet denouncing her dismissal as a "political disciplinary measure taken in order to gag those employed" and mentioning the criminal complaint. The company, which had not previously been aware of the criminal complaint, then dismissed the applicant without notice, suspecting that she had initiated the production and dissemination of the leaflet. The domestic courts rejected the applicant's claims in respect of her dismissal after finding that her criminal complaint had provided a "compelling reason" for the termination of her employment relationship without notice.

Law – Article 10: It was common ground that the criminal complaint lodged by the applicant had to be regarded as whistle-blowing, within the ambit of Article 10, and that her resulting dismissal and the related decisions of the domestic courts had interfered with her right to freedom of expression. That interference was prescribed by law and pursued the legitimate aim of protecting the reputation and rights of others, namely the business reputation and interests of the applicant's employer.

As to the proportionality of the interference, the Court considered that the principles and criteria established in *Guja v. Moldova*,[1] a case concerning a public-sector employee, also applied to private-law employment relationships and should be used to weigh the employee's right to signal illegal conduct or wrongdoing on the part of his or her employer against the employer's right to protection of its reputation and commercial interests.

Given the particular vulnerability of elderly patients and the need to prevent abuse, the in–formation disclosed was undeniably of public interest and so satisfied the first of the *Guja* criteria. As regards the second criterion, whether alternative channels could have been used to make the disclosure, by the time the applicant lodged the criminal complaint she had already informed her superiors numerous times that she was overburdened and had warned them that a criminal complaint was possible. It was true that the legal qualification of the employer's conduct as aggravated fraud was mentioned for the first time in the criminal complaint, but the applicant had already disclosed to her employer the factual circumstances on which that complaint was based and there was not sufficient evidence to counter her contention that further internal complaints would have been ineffective. As to the next criterion, whether the information disclosed was authentic, the applicant's allegations were not devoid of factual background (the medical review board had also criticised the same deficiencies) and there was nothing to establish that she had knowingly or frivolously reported incorrect information. The fact that the preliminary investigations were discontinued did not necessarily mean that the allegations underlying the criminal complaint were without factual basis or frivolous from the start. There was no reason to doubt that the applicant also satisfied the fourth criterion: acting in good faith. Even though there was a degree of exaggeration and generalisation in the formulation of her criminal complaint, her allegations were not entirely devoid of factual grounds and did not amount to a gra–tuitous personal attack on her employer. Further, having concluded that external reporting was ne–cessary, she had not immediately gone to the media or disseminated flyers, but had instead sought the assistance and advice of a lawyer, with a view to lodging a criminal complaint. As regards the fifth criterion, the detriment caused to her employer, while the applicant's allegations had certainly been prejudicial to the company, the public interest in being informed about shortcomings in the pro–vision of institutional care for the elderly by a State-owned company was so important that it outweighed the interest in protecting a company's business reputation and interests. Finally, as regards the severity of the sanction, the applicant had been given the heaviest penalty possible under labour law. Not only had this had negative repercussions on her career, it was also liable to have a serious chilling effect both on other company employees and on nursing-service employees generally, so discouraging reporting in a sphere in which patients were frequently not capable of defending their own rights and where members of the nursing staff would be the first to become aware of shortcomings in the provision of care.

The applicant's dismissal without notice had there–fore been disproportionate and the domestic courts had failed to strike a fair balance between the need

1. *Guja v. Moldova* [GC], no. 14277/04, 12 February 2008, Information Note no. 105.

to protect the employer's reputation and the need to protect the applicant's right to freedom of expression.

Conclusion: violation (unanimously).

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

ARTICLE 14

Discrimination (Article 1 of Protocol No. 1)

Refusal to take work performed in prison into account in calculation of pension rights: *no violation*

Stummer v. Austria - 37452/02
Judgment 7.7.2011 [GC]

Facts – The applicant spent some twenty-eight years of his life in prison. During his prison terms he worked for lengthy periods but was not affiliated to the old-age pension system under the General Social Security Act. However, from 1 January 1994 he was affiliated to the unemployment-insurance scheme in respect of periods worked in prison. His application for an early retirement pension was dismissed by the Workers' Pension Insurance Office in March 1999 on the grounds that he had failed to accumulate the minimum of 240 insurance months required for pension eligibility. He subsequently brought an action against that Office arguing that the months he had spent working in prison should be counted as insurance months. In April 2001, a labour and social court dismissed his claim. A court of appeal dismissed his appeal after finding that the fact that prisoners were affiliated to the unemployment-insurance scheme since an amendment to the Execution of Sentences Act in 1993 was not conclusive as regards the question of their affiliation to the old-age pension system. In February 2002 the Supreme Court dismissed the applicant's appeal. After his release from prison in January 2004, the applicant received unemployment benefit for a few months and since then has received emergency relief payments under the Unemployment Insurance Act.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: The Court observed that prison work differed from work performed by ordinary employees in many aspects and that it served the primary aim of rehabilitation and resocialisation. Even though prison work was obligatory under Austrian law the Court did not find that factor decisive. What was at issue was the need to provide for old age, in which respect the applicant was in a relevantly similar situation to ordinary employees. In respect of affiliation to the health and accident insurance scheme under the General Social Security Act, however, the applicant's situation as a working prisoner was different from ordinary employees since prisoners' health and accident care was provided by the State under the Execution of Sentences Act.

The Government had argued that working prisoners often did not have the means to pay social-security contributions and that it would have thus undermined the economic efficiency of the old-age pension system if periods for which no meaningful contributions had been made were counted as insurance periods giving rise to pension entitlements. The overall consistency of the old-age pension system had to be preserved and periods of work in prison could therefore not be counted as qualifying or substitute periods compensating for times during which no contributions had been made. Austrian social-security law provided for that possibility only in a limited number of socially accepted situations, such as child-raising, unemployment or military service. The Court considered the above aims legitimate.

The question whether the difference in treatment of working prisoners was proportionate to the legitimate aims pursued was closely linked to the State's general choice of economic and social policy. In this area the States enjoyed a wide margin of appreciation so the Court would intervene only when the policy choice was without reasonable foundation. Moreover, the question had to be seen as one feature in the overall system of prison work and prisoners' social cover. There was, however, no European consensus on social security for prisoners. While an absolute majority of Council of Europe member States provided prisoners with some kind of social security, only a small majority affiliated them to their old-age pension system and some of them, like Austria, did so only by giving them the possibility of making voluntary contributions.

The applicant worked for lengthy periods in prison. The domestic authorities' decisions indicated that his periods without insurance cover occurred between the 1960s and the 1990s. At the material time there was no common ground regarding the affiliation of working prisoners to domestic social-security systems. This lack of common ground was reflected in the 1987 European Prison Rules, which did not contain any provision in this regard. Subsequently, the 2006 European Prison Rules

recommended including, as far as possible, prisoners who worked in national social-security systems, without referring specifically to old-age pension systems. Austrian law reflected that trend in that all prisoners were to be provided with health and accident care and in that since January 1994 working prisoners were affiliated to the unemploy–ment-insurance scheme. It was significant that the applicant, although not entitled to an old-age pension, was not left without social cover. Following his release from prison he had received unemployment benefit and subsequently emergency relief payments to which he was entitled on account of having been covered by the Unemployment Insurance Act as a working prisoner. When the Court delivered its judgment in his case, the applicant was still receiving emergency-relief payments supplemented by a housing allowance amounting to a total of approximately EUR 720, almost the minimum pension level (approximately EUR 780).

In sum, in a context of changing standards, a Contracting State could not be reproached for giving priority to the insurance scheme it considered most relevant for the reintegration of prisoners upon their release. While Austria was required to keep the issue raised by the case under review, the Court found that by not having affiliated working prisoners to the old-age pension system it had not exceeded the wide margin of appreciation afforded to it in that matter.

Conclusion: no violation (ten votes to seven).

Article 4: The applicant argued that European standards had changed to such an extent that prison work without affiliation to the old-age pension system could no longer be regarded as work required to be done in the ordinary course of detention. Austrian law reflected the development of European law in that all prisoners were provided with health and accident care and working prisoners were affiliated to the unemployment-insurance scheme but not to the old-age pension system. It appeared, however, that there was no sufficient consensus on the issue of the affiliation of working prisoners to the old-age pension system. While the 2006 European Prison Rules reflected an evolving trend, this could not be translated into an obligation under the Convention. The Court did not find a basis for the interpretation of Article 4 advocated by the applicant and concluded that the obligatory work he had performed as a prisoner without being affiliated to the old-age pension system had to be regarded as "work required to be done in the ordinary course of detention" within the meaning of Article 4 § 3 (a) of the Convention and did not therefore constitute "forced or compulsory labour".

Conclusion: no violation (sixteen votes to one).

ARTICLE 34

Hinder the exercise of the right of petition

Loss by prison authorities of irreplaceable papers relating to prisoner's application to European Court: *failure to comply with Article 34*

Buldakov v. Russia - 23294/05
Judgment 19.7.2011 [Section I]

Facts – The applicant, a convicted prisoner, de–posited a parcel containing his application to the European Court and over 900 pages of enclosures with the prison authorities, who registered its receipt. However, the parcel was never dispatched and inquiries made by the prosecutor's office established that it had been lost. The authorities subsequently indicated that the official responsible had been disciplined and provided the applicant with two new application forms. The domestic courts dismissed a claim by the applicant for compensation on the grounds that he had not been irreversibly deprived of the opportunity to lodge a complaint with the European Court.

Law – Article 34: It was difficult to accept the Government's assertion that the heavy mailing had been inadvertently misplaced and lost shortly after being submitted to the prison authorities, who had special responsibility to ensure the strict control and supervision of detainees' correspondence. However, even assuming its loss through negligence, that did not in itself relieve the authorities of their responsibility under the Convention, especially as the applicant had no other means of corresponding with the Court. The Government's assertion that disciplinary action had been taken against the prison official responsible were vague and unsupported by evidence. It was also relevant that all or most of the documents included in the mailing could not be restored. In these circum–stances, the prison administration's failure to send the first application form with its voluminous attachments was serious enough to interfere with the proceedings before the Court and could even be perceived as discouraging the effective exercise of the applicant's right of individual petition.

Conclusion: failure to comply (unanimously).

With respect to the applicant's substantive complaint concerning the length of the criminal proceedings, the Court found that there had been no violation of Article 6 § 1 of the Convention.

Article 41: EUR 3,000 in respect of non-pecuniary damage.

ARTICLE 37

Article 37 § 1

Continued examination not justified

Follow-up applications not requiring assessment of appropriate redress or payment of financial compensation: *struck out*

Pantusheva and Others v. Bulgaria - 40047/04 et al.
Decision 5.7.2011 [Section IV]

Facts – The instant case concerned the same events that led to the European Court's finding of a violation of Article 9 of the Convention in *Holy Synod and Others*.[1] All the applicants were supporters of the "alternative leadership" of the Bulgarian Orthodox Church ("the Church") presided over by Metropolitan Inokentiy. Following the adop–tion of the Religious Denominations Act 2002 the activities of the alternative leadership were suppressed and the Church was forcibly united under the control of Patriarch Maxim. In a mas–sive police operation in 2004, supporters of the alternative leadership were evicted from all churches, monasteries and administrative premises that they ontrolled allowing clergy and staff loyal to Patriarch Maxim to take possession. Some of the applicants were present and were physically evicted. In their applications to the European Court the applicants complained, *inter alia*, that they had been the victims of an unlawful and arbitrary State interference in the internal affairs of the Church.

Law – Article 9: The complaints in the instant case were identical to those that had led to a finding of a violation of Article 9 in *Holy Synod and Others*. When dealing with groups of follow-up applications involving an already identified violation of the Convention, the Court had different options: it could decide to adjourn all or part of the applications pending the introduction of an effective domestic remedy, continue their examination in order to secure timely relief or, if the conditions were present, strike them out of the list of cases in accordance with Article 37 § 1 of the Convention. It was this latter option which the Court considered most appropriate in the instant case. In *Greens and M.T. v. the United Kingdom*[2] the Court had indicated that in considering whether to strike out follow-up applications it would have regard, in particular, to the nature of the violation, the fact that no individual examination was required in order to assess appropriate redress and the fact that no financial compensation was payable.

In *Holy Synod and Others* the Court had clearly established that the impugned events had given rise to a violation of Article 9 in respect of every active member of the affected religious community and had declined to award damages to individual applicants or to order individual measures. Acc–ordingly, nothing was to be gained and justice would not be best served by the repetition of those findings in a lengthy series of identical cases and such an exercise would not contribute usefully or in any meaningful way to the strengthening of human-rights protection under the Convention.

Nor, in the applicants' case, was it necessary to defer striking out the applications until the Government had made the legislative amendment to the Religious Denominations Act 2002 the Court had indicated as a general measure in *Holy Synod and Others*. Unlike the position in *Greens and M.T.*, the violation found in *Holy Synod and Others* did not concern a permanent statutory ban on exercising a Convention-protected right but particular events which had happened in 2003-04 and did not give rise to a continuing situation. The general measure indicated in *Holy Synod and Others* was necessary to prevent possible future violations of the Con–vention in the event of religious leadership disputes, should they occur, not to put an end to an existing situation violating the applicants' rights. Fur–thermore, the applicants in the present case were affected by the Convention violation not because of their legal status (unlike the serving prisoners concerned in *Greens and M.T.*) but simply because they happened to be active members of a religious community at a time when the State interfered with its organisation. In those circumstances, the progress in the Bulgarian authorities' compliance with the Court's judgments in *Holy Synod and Others* could not be seen as directly decisive for

1. *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, nos. 412/03 and 35677/04, 22 January 2009, Information Note no. 115.

2. *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, 23 November 2010, Information Note no. 135.

the approach to be taken to the examination of the Article 9 complaints in the present case. No particular reason relating to respect for human rights as defined in the Convention and its Protocols required the Court to continue its examination of the application under Article 37 § 1 *in fine*.

Conclusion: struck out (unanimously).

ARTICLE 46

Measures of a general character

Respondent State required to amend legislation in order to provide additional safeguards in deportation cases

M. and Others v. Bulgaria - 41416/08
Judgment 26.7.2011 [Section IV]

Facts – In 1998 the first applicant, an Afghan national, arrived in Bulgaria where he converted to Christianity. He married the second applicant and had two children with her (the third and fourth applicants). In March 2004 he was granted refugee status due to his religious conversion. In December 2005 the National Security Service issued orders for the withdrawal of his residence permit, for his expulsion and for his detention pending expulsion. It also banned him from re-entering the country for ten years on alleged national-security grounds contained in an internal document that stated, *inter alia*, that he had been involved in the trafficking of migrants. The expulsion order did not specify the country to which the first applicant was to be deported. The first applicant challenged the expulsion and detention orders, but the competent court did not question the conclusions in the internal document that he posed a threat to national security and rejected his complaint about possible ill-treatment in Afghanistan on the grounds that he had failed to prove that the authorities would be unable to guarantee his safety. It also ruled that the detention order was not amenable to judicial review since it related to the execution of an expulsion order.

In October 2006 another agency, the Migration Directorate of the National Police, also issued an order for the first applicant's detention pending expulsion. Both that order and the orders of December 2005 were immediately enforceable. The first applicant was then arrested and detained, but was not deported as the Afghan Embassy refused to issue a travel document in the absence of a request by him. On appeal, the second detention order was ultimately declared null and void by a city court because it had been signed by an unauthorised official. However, the city court did not find itself competent to order the first applicant's release. He was finally released in July 2009.

Law – Article 5 § 1: The Court reiterated that deprivation of liberty could only be justified under the Convention for as long as deportation or extradition proceedings were in progress. If such proceedings were not conducted with due diligence, the detention would cease to be permissible. The first applicant had been detained for two years and eight and a half months. Although his deportation was ordered in December 2005, the authorities did not attempt to secure a travel document for his deportation until February 2007, when a letter was sent to the Afghan Embassy. Having received no reply, they renewed their request in September 2008, a year and seven months later. In addition, the Government had not provided evidence of any effort having been made to secure the first applicant's admission to a third country. Accordingly, the grounds for the first applicant's detention with a view to deportation had not remained valid for the entire period he was detained, as the authorities had failed to act with due diligence. Furthermore, although the first applicant's deprivation of liberty was based on a valid legal act, the existence of two separate orders for his detention issued by two different authorities appeared to have been a source of uncertainty and the legal significance of the existence of two orders was unclear. Moreover, even after June 2009, when the judgment annulling one of the two orders entered into force, the police had continued referring to it as if it were valid, in disregard of the domestic court's final ruling.

Conclusion: violation (unanimously).

Article 5 § 4: Since two different authorities had issued orders for his detention, the first applicant had brought two separate sets of proceedings challenging them. In the first, the Supreme Administrative Court had refused to examine his appeal, while in the second it took almost two and a half years for him to obtain a judicial decision establishing that the order concerned was invalid. That situation disclosed a serious failing to secure the first applicant's right to speedily challenge in court the lawfulness of his detention.

Conclusion: violation (unanimously).

Article 8: The applicants had established a genuine family life in Bulgaria. The initial deportation order

against the first applicant was based on a declaratory statement in an internal document of the National Security Service which apparently did not mention the factual grounds or the evidence on which it was based. The Supreme Administrative Court had considered itself bound by the declaratory statement and so had dismissed the appeal against the deportation order. However, such a formalistic approach meant that a governmental agency had been left full and uncontrolled discretion to "certify" blankly, with reference to little more than its own general statements, that an alien was a threat to national security and had to be deported. As such "certifications" were based on undisclosed internal information and were held to be beyond any meaningful judicial scrutiny, the applicants had not enjoyed the minimum degree of protection against arbitrariness required for the interference to be "in accordance with the law", as required by Article 8 § 2 of the Convention.

Conclusion: deportation would constitute violation (unanimously).

Article 13: The Supreme Administrative Court had not carried out a proper examination of the executive's assertion that the first applicant presented a national-security risk. The judicial-review proceedings had not, therefore, secured him an effective domestic remedy for his Article 8 complaint. Indeed, the Supreme Administrative Court's approach was disturbing: while apparently acknowledging that the first applicant risked ill-treatment and death if deported to Afghanistan, it had placed on him the burden of proving that the risk stemmed from the Afghan authorities and that they would not guarantee his safety. That approach seemed to place excessive reliance on the question whether the ill-treatment risked in the receiving State would emanate from State or non-State sources, and by dealing with such a serious issue summarily and requiring the first applicant to prove a negative had practically deprived him of a meaningful examination of his claim under Article 3. Further, under Bulgarian law, appeals against a deportation order had no suspensive effect if the executive chose to rely on national-security grounds, even in cases of irreversible risk of death or ill-treatment in the receiving State and the first applicant's request for a stay of deportation pending the judicial-review proceedings appeared to have been left unexamined. This ran counter to the notion of an effective remedy under Article 13 which required that the remedy be capable of preventing the execution of measures with potentially irreversible effects.

Conclusion: violation (unanimously).

Article 46: Given that the Court had already delivered similar judgements against Bulgaria and that other like cases were pending before it, it found it necessary to assist the Government in the execution of their duty to enforce the Court's judgment. In particular, the Court expressed the view that the general measures in execution of this judgment should include amendments to the Aliens Act or other Bulgarian legislation to ensure that: (i) even where national security is invoked as a ground for deportation, the factual basis and reasons for the decision should be subject to thorough judicial scrutiny, if need be with appropriate procedural adjustments related to the use of classified information; (ii) courts examining appeals against deportation should balance the aim pursued by the deportation order against the fundamental human rights of the affected individuals, including the right to respect for their family life; (iii) the destination country should always be indicated in a legally binding act and a change of destination should be amenable to appeal; (iv) claims alleging a risk of death or ill-treatment in the destination country should be austerely examined by courts; and (v) such claims, made in deportation appeals, should have an automatic suspensive effect pending their examination.

Article 41: EUR 12,000 to the first applicant in respect of non-pecuniary damage.

RULE 39 OF THE RULES OF COURT

Interim measures

New instructions on requests to suspend expulsion of applicants

New instructions covering requests to suspend the extradition or expulsion of applicants before the European Court – and any other requests to apply interim measures under Rule 39 of the Rules of Court – have recently been published. The Court has also published, for the first time, statistics on the use of interim measures.

The amended practice direction underlines the need for applicants and their lawyers to help the Court by explaining clearly and fully the reasons for their request. It specifies that such requests will only be granted in exceptional circumstances,where

the applicant concerned would otherwise risk "serious, irreversible harm". The application of Rule 39 is binding on the State concerned.

Link to the full text of Press Release no. 128 (2011)

Link to the practice direction on requests for interim measures

COURT NEWS

Election of the President of the Court

On 4 July 2011 the Plenary Court elected Sir Nicolas Bratza, judge in respect of the United Kingdom, as its new President. He will take office on 4 November 2011, thus succeeding Jean-Paul Costa, whose mandate will come to an end on 3 November, because he has reached the age limit fixed by the European Convention on Human Rights.

Link to Press Release no. 83 (2011)

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