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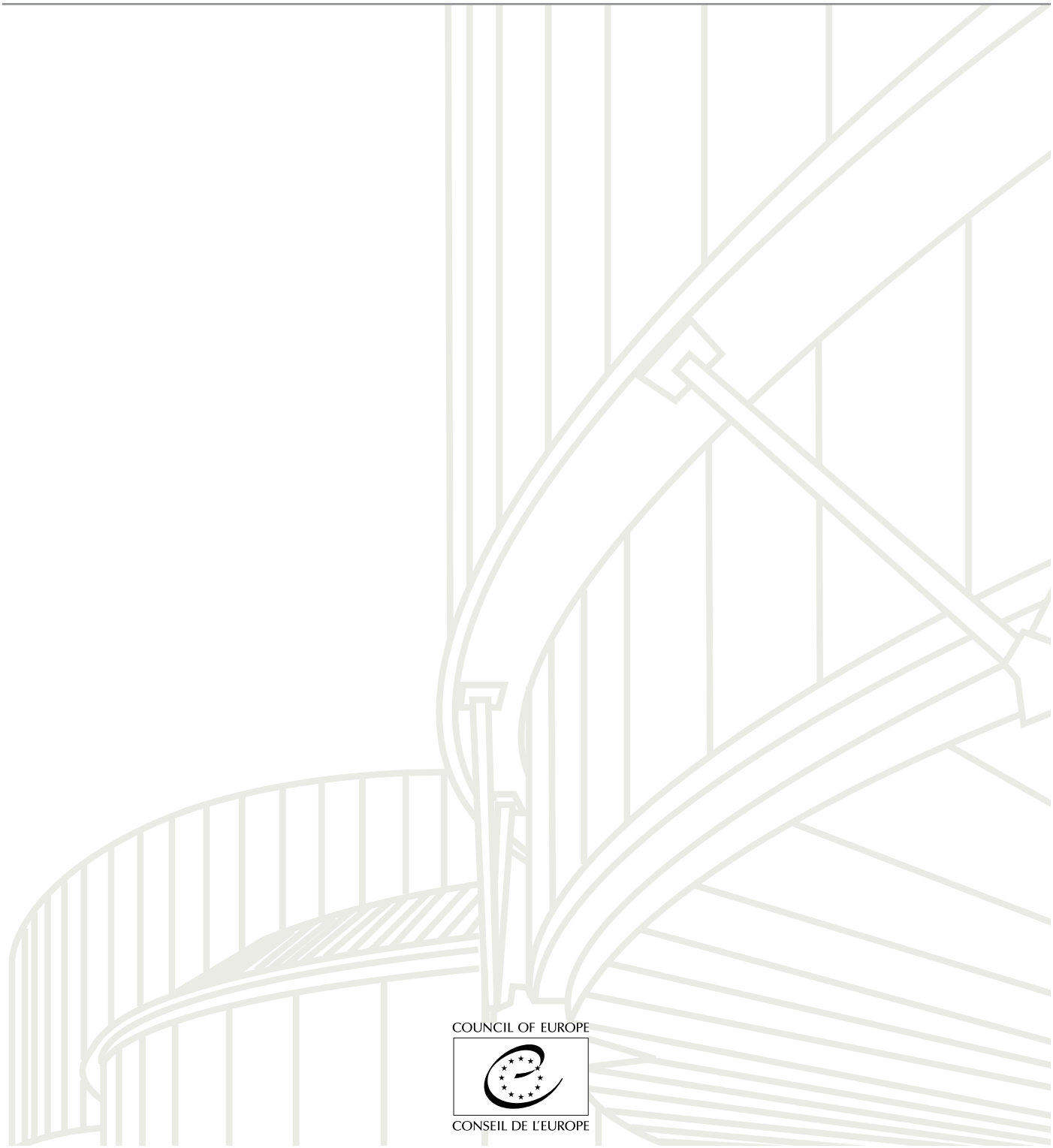

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European Court of Human Rights
(Council of Europe)
67075 Strasbourg Cedex
France
Tel: 00 33 (0)3 88 41 20 18
Fax: 00 33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int

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ARTICLE 2

Positive obligations
Effective investigation

Investigation of shooting of Iraqi civilian by Netherlands serviceman, member of the Stabilisation Force in Iraq: *case relinquished to the Grand Chamber*

Jaloud v. the Netherlands - 47708/08
[Section III]

From July 2003 until March 2005 Netherlands troops participated in the Stabilisation Force in Iraq (SFIR) in battalion strength. They were stationed in south-eastern Iraq as part of Multinational Division South-East (MND-SE), which was under the command of an officer of the armed forces of the United Kingdom. The participation of Netherlands forces in MND-SE was governed by a Memorandum of Understanding between the United Kingdom and the Kingdom of the Netherlands to which Rules of Engagement were appended. Both documents were classified confidential.

The applicant is the father of an Iraqi national who died in April 2004 from bullet wounds received when the car in which he was travelling as a passenger was shot at after passing a vehicle checkpoint at speed. The checkpoint was manned at the time by members of the Iraqi Civil Defence Corps (ICDC), who had been joined by a patrol of Netherlands soldiers who had arrived after the checkpoint had come under fire from another vehicle a few minutes before the incident in which the applicant's son was killed. One of the Netherlands servicemen admitted to having fired several rounds at the car in which the applicant's son was travelling, but claimed to have done so in self-defence, believing himself to have been under fire from the vehicle. Following an investigation by the Royal Military Constabulary (a branch of the Netherlands armed forces), the military public prosecutor concluded that the applicant's son had presumably been hit by an Iraqi bullet and that the Netherlands serviceman had been acting in self-defence. He therefore closed the investigation. That decision was upheld by the military chamber of the court of appeal which found that the serviceman had reacted to friendly fire, mistaking it for fire from inside the car. In the circumstances, he had therefore acted within the confines of his instructions and the decision not to prosecute him could stand.

In his application to the European Court, the applicant complained under Article 2 of the Convention that the investigation was insufficiently independent and insufficiently effective. On 9 July 2013 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber.

Excessive delay in investigation into deaths at the hands of security forces in Northern Ireland: *violation*

McCaughey and Others v. the United Kingdom - 43098/09
Judgment 16.7.2013 [Section IV]

Facts – The applicants were close relatives of two men who were shot dead by security forces in October 1990 in Northern Ireland. The police conducted an investigation and the file was passed to the Director of Public Prosecutions ("DPP"), who in 1993 issued a direction of no prosecution of the soldiers involved in the shooting. Subsequently, the coroner who was to hold an inquest into the deaths received certain papers from the police and the DPP. In 2002 the applicants wrote to the coroner asking when the inquest would be listed and requesting pre-inquest disclosure. They also sought disclosure from the Police Service Northern Ireland (PSNI). In October 2002 the first applicant's husband issued judicial-review proceedings against the Coroner and the PSNI, challenging the latter's retention of relevant documentation. Those proceedings culminated in a judgment of the House of Lords of 28 March 2007 requiring the PSNI to disclose to the Coroner such information about the deaths as the PSNI was then or thereafter able to obtain, subject to any relevant privilege or immunity. In 2009, following the

judgment of the European Court in *Šilih v. Slovenia*[1], the first and third applicants began judicial-review proceedings arguing that the inquest was required to be Article 2 compliant. That submission was upheld by the Supreme Court (formerly the House of Lords) in a judgment of 18 May 2011 in which it held that the Coroner holding the inquest had to comply with the procedural obligations under Article 2. The inquest opened in March 2012 and ended at the beginning of May 2012. The jury considered that the soldiers involved in the operation in October 1990 had shot the deceased in the belief that their position was compromised and their lives were in danger and had thus used reasonable force. In June 2012 the first applicant requested leave to apply for judicial review of the inquest. Those proceedings are still pending.

In their application to the European Court the applicants made a number of complaints under the substantive and procedural aspects of Article 2 about the deaths of their relatives and, under Article 13 of the Convention, about a lack of an effective domestic remedy.

Law – Article 2

(a) *Admissibility* – Save in relation to the complaint about investigative delay, the Court was not in a position to consider the merits of the complaints under the substantive and other procedural aspects of Article 2 because a civil action by the applicants was still pending and because, given the pending judicial-review proceedings, the initiation of further relevant investigative procedures, including of a criminal and/or disciplinary nature, remained possible.

(b) *Merits* – The Court reiterated that Article 2 requires investigations to begin promptly and to proceed with reasonable expedition; this is required quite apart from any question of whether the delay actually impacted on the effectiveness of the investigation. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. It was striking that the inquest hearing proper had not begun until March 2012, more than twenty-one years after the deaths had occurred (although the inquest had proceeded quickly thereafter, ending in May 2012 with a detailed verdict). The overall period could be broadly divided into three phases.

The first, from 1990 to 2002, was marked by inordinately long periods of inactivity during which some (inadequate) disclosure was made by the Royal Ulster Constabulary (RUC) and its successor body the PSNI. The second, from 2002 to March 2012 was characterised by the applicants' and others' legal actions and initiatives which were demonstrably necessary to drive forward their inquests and to ensure the clarification of certain important aspects of coronial law and practice including, notably, those going to the rights of next-of-kin. The fact that it was necessary to postpone the applicants' inquest so frequently and for such long periods pending clarifying judicial-review actions demonstrated that the inquest process itself was not structurally capable at the relevant time of providing the applicants with access to an effective investigation which would commence promptly and be conducted with due expedition. By the time the last and third phase began with the inquest hearing, the delay at that point was such that the High Court considered itself obliged to raise the threshold of leave to apply for judicial review to "exceptional circumstances", which made the clarification of the procedural rights of the applicants exceedingly difficult and therefore rendered rather inescapable another post-inquest judicial-review action. That action was still pending before the High Court.

These delays could not be regarded as compatible with the State's obligation under Article 2 to ensure the effectiveness of investigations into suspicious deaths, in the sense that the investigative process, however organised under national law, must be commenced promptly and carried out with reasonable expedition. To that extent, the finding of excessive investigative delay of itself entailed the conclusion that the investigation was ineffective for the purposes of Article 2. No separate issue arose under Article 13.

Conclusion: violation (unanimously).

Article 46: The carrying out of investigations, including holding inquests, into killings by the security forces in Northern Ireland had been marked by major delays that remained a serious and extensive problem. Indeed, the Council of Europe's Committee of Ministers had expressed concern about investigative delay as regards four other Court judgments (*Hugh Jordan*, *Kelly and Others*, *McKerr* and *Shanaghan*) which reflected a pattern of delay very similar to that in the applicants' case and which it continued to supervise

1. *Šilih v. Slovenia* [GC], 71463/01, 9 April 2009, Information Note 118.

almost twelve years after they were delivered (see Committee of Ministers Resolution CM/ResDH (2009)44).

While it fell to the Committee of Ministers to address the issue of what – in practical terms – may be required of the respondent Government by way of compliance, the Court considered that, whatever the specific modalities chosen, this must involve the State taking, as a matter of some priority, all necessary and appropriate measures to ensure, in the present case and in similar cases concerning killings by the security forces in Northern Ireland where inquests were pending, that the procedural requirements of Article 2 were complied with expeditiously.

Article 41: No claim made in respect of damage.

(See also the Court's judgments of 4 May 2001 against the United Kingdom in the cases of *Hugh Jordan* (24746/94), *McKerr* (28883/95), *Shanaghan* (37715/97) and *Kelly and Others* (30054/96))

ARTICLE 3

Positive obligations
Inhuman treatment
Degrading treatment

Continued detention of paraplegic prisoner: *inadmissible*

Ürfi Çetinkaya v. Turkey - 19866/04
Judgment 23.7.2013 [Section II]

Facts – The applicant suffers from the very severe after-effects of a firearms injury. He is paraplegic and incontinent, with the result that he has to wear a catheter and bag at all times. In November 2003 he was placed in pre-trial detention in connection with an investigation into drug trafficking. In April 2007 he was sentenced to twenty-four years' imprisonment for heroin trafficking as a member of an organised gang. He also faced charges in a separate set of criminal proceedings. The applicant's lawyers submitted applications for their client's release on numerous occasions, arguing that his state of health was incompatible with detention. In 2001, during a previous spell in prison, he had been released on health grounds following a medical report recommending his release for one year.

Law – Article 3: As to whether the applicant was fit to serve his sentence, none of the doctors treating him throughout his detention had considered that he needed to be admitted to hospital or suggested that his state of health was incompatible with detention. Moreover, the applicant had merely asserted that the prison environment was conducive to potentially lethal infections. Furthermore, there was nothing in the applicant's medical file to indicate that his health had deteriorated while he was in detention. Consequently, his situation did not constitute one of the exceptional cases in which a prisoner's state of health was wholly incompatible with his continued detention.

As to the quality of the medical care provided to the applicant, he was receiving treatment under medical supervision, administered by specialised staff. He was examined on a regular basis and was treated either within the prison's medical unit or in the relevant departments of public hospitals. Moreover, he was being treated not just for the problems linked to his disability but also for other health problems. His treatment was dispensed in accordance with medical prescriptions and he was provided with the medical equipment and drugs prescribed for him.

With regard to the suitability of the prison environment in view of the applicant's state of health, the overall conditions of his detention were not open to criticism. Furthermore, he had been issued with special equipment on the basis of his doctors' prescriptions. Parallel metal bars had been installed so that he could do his exercises, and his mattress had been replaced. In addition, work had been carried out in his cell to make his daily life in prison easier. The cell door, the toilet door and the door leading to the exercise yard had all been widened to enable the applicant to get through easily. He was thus able to move around and leave his cell unaided. In addition, Western-style toilets had been installed. Lastly, although the applicant was assisted by fellow inmates in performing everyday tasks, he had never to date complained of a lack of assistance or alleged that the assistance he received was inadequate, nor had he requested permission from the prison authorities to have a carer.

Accordingly, the domestic authorities had fulfilled their obligation to protect the prisoner's physical well-being, in particular by providing him with the appropriate medical care. Furthermore, Turkish law afforded opportunities for the domestic authorities to take action should his condition worsen. In particular, the applicant could apply to be released on health grounds on the basis of sections 16 and 116 of the Law on the enforcement of sentences and preventive measures. In that connection, notwithstanding the wording of section 186 of Regulation no. 2006/10218, the

approach of the Istanbul Assize Court consisted in applying the provisions of the aforementioned Law without taking account of that Regulation, so as to extend to all categories of prisoners the possibility of release on health grounds afforded to prisoners whose conviction had become final after being upheld by the Court of Cassation.

Conclusion: inadmissible (manifestly ill-founded).

The Court also found a violation of Articles 5 § 3 and 6 § 2.

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

Inhuman treatment
Degrading treatment

Imprisonment for life with release possible only in the event of terminal illness or serious incapacitation: *violation*

Vinter and Others v. the United Kingdom - 66069/09, 130/10 and 3896/10
Judgment 9.7.2013 [GC]

Facts – In England and Wales murder carries a mandatory life sentence. Prior to the entry into force of the Criminal Justice Act 2003 the Secretary of State was empowered to set tariff periods for mandatory life-sentence prisoners indicating the minimum term they must serve before they became eligible for early release on licence. Since the entry into force of the Act, that power is now exercised by the trial judge. Prisoners whose tariff was set by the Secretary of State under the previous practice may apply to the High Court for a review.

All three applicants were given "whole life orders" following convictions for murder. Such an order means that their offences are considered so serious that they must remain in prison for life unless the Secretary of State exercises his discretion to order their release on compassionate grounds if satisfied that exceptional circumstances – in practice, terminal illness or serious incapacitation – exist. The whole life order in the case of the first applicant, Mr Vinter, was made by the trial judge under the 2003 Act and upheld by the Court of Appeal on the grounds that Mr Vinter already had a previous conviction for murder. The whole life orders in the cases of the second and third applicants had been made by the Secretary of State under the previous practice, but were confirmed on a review by the High Court under the 2003 Act in decisions that were subsequently upheld on appeal. In the case of the second applicant, Mr Bamber, it was noted that the murders had been premeditated and involved multiple victims; these factors, coupled with sexual gratification, had also been present in the case of the third applicant, Mr Moore.

In their applications to the European Court, the applicants complained that the imposition of whole life orders meant their sentences were, in effect, irreducible, in violation of Article 3 of the Convention.

In a judgment of 17 January 2012 (see Information Note 148), a Chamber of the Court held, by four votes to three, that there had been no violation of Article 3 of the Convention as the applicants' sentences did not amount to inhuman or degrading treatment. In particular, the applicants had failed to demonstrate that their continued detention served no legitimate penological purpose. The Chamber also laid emphasis on the fact that the applicants' whole life orders had either been recently imposed by a trial judge (in the case of Mr Vinter) or recently reviewed by the High Court (in the cases of Mr Bamber and Mr Moore).

Law – Article 3: The Grand Chamber agreed with and endorsed the Chamber's finding that a grossly disproportionate sentence would violate Article 3 of the Convention, although that test would be met only on rare and unique occasions. In the instant case, the applicants had not sought to argue that their whole life orders were grossly disproportionate; instead, they submitted that the absence of an in-built procedural requirement for a review constituted ill-treatment, not only, as the Chamber had found, when there ceased to be legitimate penological grounds to justify continued detention, but from the moment the order was made.

The Court reiterated that Contracting States must be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes and must remain free to impose life sentences on adult offenders for especially serious crimes. However, the imposition of an irreducible life sentence on an adult could raise an issue under Article 3. In determining whether a life sentence in a given case could be regarded as irreducible, the Court would seek to ascertain whether the prisoner could be said to have any prospect of release. Where national law afforded the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, that would be sufficient to satisfy Article 3.

There were a number of reasons why, for a life sentence to remain compatible with Article 3, there had to be both a prospect of release and a possibility of review. Firstly, it was axiomatic that a prisoner could not be detained unless there were legitimate penological grounds for that detention. The balance between the justifications for detention was not necessarily static and could shift in the course of the sentence. It was only by carrying out a review at an appropriate point in the sentence that these factors or shifts could be properly evaluated. Secondly, incarceration without any prospect of release or review carried the risk that the prisoner would never be able to atone for his offence, whatever he did in prison and however exceptional his progress towards rehabilitation. Thirdly, it would be incompatible with human dignity for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom. Moreover, there was now clear support in European and international law for the principle that all prisoners, including those serving life sentences, should be offered the possibility of rehabilitation and the prospect of release if rehabilitation was achieved.

Accordingly, Article 3 had to be interpreted as requiring reducibility of life sentences, in the sense of a review allowing the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. While it was not the Court's task to prescribe the form (executive or judicial) which that review should take or to determine when it should take place, the comparative and international law materials before it showed clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter. A whole life sentence would not measure up to the standards of Article 3 where the domestic law did not provide for the possibility of such a review. Lastly, although the requisite review was a prospective event necessarily subsequent to the passing of the sentence, a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he could raise the complaint that the legal conditions attaching to his sentence failed to comply with the requirements of Article 3. Whole life prisoners were entitled to know, at the outset of their sentence, what they must do to be considered for release and under what conditions, including when a review of their sentence will take place or may be sought. Consequently, where domestic law did not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arose when the whole life sentence was imposed and not at a later stage of incarceration.

The Government had argued before the Court that the aim of the 2003 Act was to remove the executive from the decision-making process concerning life sentences, and this was the reason for abolishing the 25-year review by the Home Secretary which had existed beforehand. However, the Court considered that it would have been more consistent with the legislative aim to provide that the 25-year review would be conducted within a judicial framework, rather than completely eliminated.

The Court also found that the current law concerning the prospect of release of life prisoners in England and Wales was unclear. Although section 30 of the 1997 Act gave the Justice Secretary the power to release any prisoner, including one serving a whole life order, the relevant Prison Service Order 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, compassionate release of this kind would not be what was meant by a "prospect of release" in *Kafkaris*.

In light, therefore, of this contrast between the broad wording of section 30 and the exhaustive conditions announced in the Prison Service Order, as well as the absence of any dedicated review mechanism for whole life orders, the Court was not persuaded that, at the present time, the applicants' life sentences could be regarded as reducible for the purposes of Article 3. The requirements of that provision had not, therefore, been met in relation to any of the three applicants.

The Court emphasised, however, that the finding of a violation in the applicants' cases should not be understood as giving them any prospect of imminent release. Whether or not they should be released would depend, for example, on whether there were still legitimate penological grounds for their continued detention and whether they should continue to be detained on grounds of dangerousness. These questions were not in issue in this case and were not the subject of argument before the Court.

Conclusion: violation (sixteen votes to one).

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

damage sustained by the first applicant. No claim made by the other applicants.

(See also *Kafkaris v. Cyprus* [GC], 21906/04, 12 February 2008, Information Note 105; *Iorgov v. Bulgaria (no. 2)*, 36295/02, 2 September 2010, Information Note 133; *Schuchter v. Italy* (dec.), 68476/10, 11 October 2011, Information Note 145; and *Harkins and Edwards v. the United Kingdom*, 9146/07 and 32650/07, 17 January 2012, Information Note 148)

Serious injury to nose caused by tear gas canister fired by police officer: *violation*

Abdullah Yaşa and Others v. Turkey - 44827/08
Judgment 16.7.2013 [Section II]

Facts – The first applicant, who was thirteen at the material time, was struck in the face by a tear gas canister which he claimed had been fired directly into the crowd by a law-enforcement officer during a demonstration. The public prosecutor decided to take no further action, without examining whether the force used had been proportionate, on the grounds that the law-enforcement agencies had acted in the interests of maintaining public order and to defend themselves against a hostile crowd.

Law – Article 3 (*substantive aspect*): The applicant had been injured in the nose by a tear gas canister fired by a police officer and his injuries had unquestionably been serious. The treatment to which the applicant had been subjected had attained the threshold of severity required by Article 3.

It was clear from the video footage and all the evidence in the file that the demonstration had not been peaceful. Accordingly, no particular issue arose under Article 3 on account of the use of tear gas as such to disperse the gathering. However, what was in issue in the present case was not simply the fact that tear gas had been used but the fact that a tear gas canister had been fired directly at the demonstrators. The firing of tear gas canisters using a launcher entailed a risk of causing serious injury, as in the present case, or even of killing someone if the launcher was used improperly. Consequently, given the dangerous nature of the equipment used, the Court considered that its case-law on the use of potentially lethal force should apply *mutatis mutandis* in the present case. As well as being authorised under national law, policing operations – including the firing of tear gas canisters – had to be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness, abuse of force and avoidable accidents.

In his decision to take no further action, the public prosecutor had merely observed that the applicant had been injured during a demonstration in which he had been actively involved. He noted that the police officers had fired tear gas canisters in order to disperse the demonstrators, but did not take the trouble to examine the manner in which the tear gas had been fired. Such an approach appeared clearly inadequate in the light of the applicant's allegation that he had been struck directly in the nose by a canister, especially since the demonstration had been taking place on a boulevard with numerous passers-by who could potentially have been hit. In that connection the video footage appeared to show that, as the applicant claimed, the canister had been fired directly and in a straight line rather than at an upward angle. Since the Government had not produced any evidence capable of disproving the applicant's allegations, the Court accepted that the canister had been fired directly and in a straight line. That could not be considered an appropriate action on the part of the police given that firing tear gas in that way could cause serious or even fatal injury; firing tear gas at an upward angle was generally considered the proper method, in so far as it avoided causing injury or death if someone was hit. Furthermore, at the time of the events, Turkish law had not contained any specific provisions regulating the use of tear gas canisters during demonstrations or any guidelines concerning their use. In view of the fact that two people had been killed by tear gas canisters during the events in question and that the applicant had been injured on that occasion, it could be inferred that the police officers had enjoyed a greater autonomy of action and been left with more opportunities to take unconsidered initiatives than would probably have been the case had they had the benefit of proper training and instructions. Such a situation did not afford the level of protection of individuals' physical safety that was required in contemporary democratic societies in Europe.

Accordingly, it was not established that the use of force to which the applicant had been subjected had been an appropriate response to the situation from the standpoint of the requirements of Article 3 of the Convention or that it had been proportionate to the aim sought to be achieved, namely the dispersal of a non-peaceful gathering. The seriousness of the applicant's head injuries was not consistent with the use by the police of a degree of force made strictly necessary by his conduct.

Conclusion: violation (unanimously).

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

Article 46: There had been a violation of Article 3 of the Convention because it had not been established that the use of force to which the applicant had been subjected had been an appropriate response to the situation. Furthermore, at the material time, Turkish law had not contained any specific provisions regulating the use of tear gas canisters during demonstrations, nor had any guidelines on their use been issued to the law-enforcement agencies. The Court noted that on 15 February 2008 a circular laying down the conditions governing the use of tear gas had been sent to all the security forces. Nevertheless, the safeguards surrounding the proper use of tear gas canisters needed to be strengthened by means of more detailed legislation and/or regulations, in order to minimise the risk of death or injury resulting from their use.

ARTICLE 5

Article 5 § 1

Deprivation of liberty

Transfer and stay at police headquarters of a group of immigrants with a view to identifying and deporting unlawful residents: *violation*

M.A. v. Cyprus - 41872/10
Judgment 23.7.2013 [Section IV]

Facts – The applicant, a Syrian national of Kurdish origin, fled Syria in 2005 and made an unsuccessful claim for asylum in Cyprus. His file was reopened by the asylum service in 2008 because new information had been received. In 2010, while the reopened asylum proceedings were still pending, the applicant joined a round-the-clock protest that was being staged against the Government's asylum policy. The authorities decided to remove the protestors, citing unsanitary conditions, the illegal use of electricity and complaints from members of the public. Early one morning in June 2010 250 police officers descended on the encampment, escorted the protesters to waiting buses and took them to police headquarters with a view to determining their immigration status. Those who were found to be refugees or *bona fide* asylum-seekers were allowed to leave. Those whose presence in the country was found to be unlawful were detained with a view to deportation. 22 protestors were deported on the same day and 44 others, including the applicant, were charged with unlawful stay and transferred to detention centres in Cyprus. The applicant was considered by the authorities to be unlawfully staying in the Republic and deportation and detention orders were issued against him despite the pending asylum proceedings. The next day, the applicant and 43 other people of Kurdish origin submitted a request to the European Court for interim measures under Rule 39. The Court indicated to the Cypriot Government that they should not be deported until the Court had had the opportunity to receive and examine all documents pertaining to their claims. In August 2010 the Minister of the Interior declared the applicant an irregular immigrant on public order grounds, relying on allegations that he had received money from prospective Kurdish immigrants in exchange for residence and work permits in Cyprus. New deportation and detention orders were issued on that basis and the previous ones cancelled. The Rule 39 interim measure in respect of the applicant was reviewed by the European Court in September 2010 and maintained. The applicant brought habeas corpus proceedings before the domestic courts to complain of his detention. Ultimately, in 2012, his appeal to the Supreme Court was dismissed as, in the meantime, in May 2011, he had been released after being granted refugee status.

Law – Articles 2 and 3: The applicant had been granted refugee status and was no longer at risk of deportation to Syria and could therefore not claim to be a victim of violations of his rights under those Articles.

Conclusion: inadmissible (incompatible *ratione personae*).

Article 13 in conjunction with Articles 2 and 3: The applicant's complaints under Articles 2 and 3 had been arguable, so he could rely on Article 13. Although the decision to grant him refugee status had removed the risk that he would be deported, it had not acknowledged and afforded redress for his claim that the judicial-review proceedings were ineffective. He could therefore still claim to be a "victim" in respect of that complaint.

Where a complaint suggested that an applicant's expulsion might expose him or her to a real risk of treatment contrary to Articles 2 or 3, an effective remedy had to be such as to prevent the execution of measures that were contrary to the Convention and whose effects were potentially irreversible; this

required close scrutiny by a national authority, a particularly prompt response and automatic suspensive effect. At the time the deportation and detention orders were issued, the applicant's file was under consideration by the asylum service and such proceedings were, under the domestic law, suspensive in nature. The applicant had thus been lawfully in Cyprus and should not have been subject to deportation. Nonetheless the deportation order had remained in place for several months while the asylum proceedings were still pending, and the only reason he had not been deported to Syria was because Rule 39 had been applied. As admitted by the Government, that situation had arisen as a result of an error by the authorities. No effective domestic judicial remedy had been available to counter that error. Moreover, there had been a lack of effective safeguards to protect the applicant from wrongful deportation. In particular, recourse to the Supreme Court for annulment of a deportation order and an application for a provisional order to suspend deportation did not have automatic suspensive effect. In so far as the Government had argued that the latter remedy was suspensive "in practice", the requirements of Article 13 and other provisions of the Convention took the form of guarantees and not mere statements of intent or practical arrangements. In sum, the applicant had not had an effective remedy in relation to his complaint under Articles 2 and 3.

Conclusion: violation (unanimously).

(See in this connection *Gebremedhin [Gaberamadhien] v. France*, 25389/05, 26 April 2007, Information Note 96; and *De Souza Ribeiro v. France* [GC], 22689/07, 13 December 2012, Information Note 158)

Article 5 § 1: In order to evaluate the lawfulness of the applicant's detention, the Court identified three distinct stages.

First, regarding his transfer to the police headquarters, the protesters had been left with little choice but to board the buses and remain at the headquarters. Given the coercive nature, scale and aim of the police operation, including the fact that it had been carried out so early in the morning, there had been a *de facto* deprivation of liberty. As to the legal basis for that deprivation of liberty, the Government had relied on the police's statutory powers and duties of arrest and to preserve order on the public highway and regulate movement. However, they had not claimed that any of those powers had actually been used to effect the applicant's arrest. It was clear that the aim of the operation had also been to identify those protesters who were unlawfully on the territory with a view to deporting them. The authorities had considered that it would have been impossible to carry out an effective on-the-spot inquiry without provoking a violent reaction and so had taken the protesters to police headquarters. While the Court was conscious of the difficult situation in which the Cypriot authorities had found themselves, that could not justify measures giving rise to a deprivation of liberty without any clear legal basis. The applicant's deprivation of liberty during that period had, therefore, been contrary to Article 5 § 1.

Second, the applicant's detention on the basis of the deportation and detention orders issued in June 2010 had been unlawful, as the orders were issued by mistake at a time when he had lawful resident status because the re-examination of his asylum application was still pending.

Finally, the procedure prescribed by law had not been followed in respect of the applicant's detention from August 2010 until his release in May 2011, as he had not been given notice of the new deportation and detention orders in accordance with the domestic law.

Overall, the applicant's entire period of detention namely, from June 2010 until May 2011, had been in breach of Article 5 § 1.

Conclusion: violation (unanimously).

(See *Austin and Others v. the United Kingdom* [GC], 39692/09, 40713/09 and 41008/09, 15 March 2012, Information Note 150; and *Medvedyev and Others v. France* [GC], 3394/03, 29 March 2010, Information Note 128).

Article 4 of Protocol No. 4: All the persons concerned had had an individual examination of their personal circumstances. In particular, their asylum applications had been dealt with on an individual basis over a period of more than five years. Those who had appealed had had their appeals individually examined and dismissed. Separate letters had been sent by the asylum authorities to the persons concerned informing them of the relevant decisions. The authorities had carried out a background check with regard to each person before issuing the orders and separate deportation and detention orders had been issued in respect of each person. Individual letters had also been prepared informing the persons detained of the authorities' decision to detain and deport them. The fact that the protesters, including the applicant, had been taken together to the police headquarters, that some had been deported in groups, or that deportation orders and letters had been phrased in similar terms and

therefore had not specifically referred to the asylum decisions, was not itself indicative of a collective measure within the meaning attributed to that term by the Court's case-law. Although a mistake had been made in relation to the status of some of the persons concerned, including the applicant, that fact, while unfortunate, could not be taken as showing that there had been a collective expulsion.

Conclusion: no violation (unanimously).

(See also *Čonka v. Belgium*, 51564/99, 5 February 2002, Information Note 39)

The Court also found no violation of Article 5 § 2 and a violation of Article 5 § 4 (speediness of review).

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

Procedure prescribed by law
Lawful arrest or detention

Lack of clarity in the law resulting in refusal to deduct period spent under house arrest overseas from length of prison sentence: *violation*

Ciobanu v. Romania and Italy - 4509/08
Judgment 9.7.2013 [Section III]

Facts – In a final judgment delivered in January 2005, a court of appeal in Romania sentenced the applicant, in his absence, to two years' imprisonment for fraud and forging private documents. In order to enforce the sentence, the Romanian authorities asked Italy – where the applicant was living – to extradite him. In May 2006 the applicant was apprehended and remanded in custody for a fortnight, pending extradition. His detention was replaced by house arrest, with authorisation to go out to work, until his eventual extradition to Romania in December 2007, one year and six months later. The applicant brought proceedings before the Romanian courts challenging the execution of his sentence. He argued that considering the time he had spent under house arrest in Italy pending his extradition, he had already served enough of the sentence to entitle him to release on licence under the Romanian Criminal Code. The court of first instance found in his favour. The prosecution appealed and the county court found that house arrest was not a custodial measure, whereas the Romanian Criminal Code provided only for the deduction of time actually spent in detention under the custodial measures provided for in Romanian law, that is to say in remand or in pre-trial detention. The applicant was not released on licence until December 2008.

Law – Article 5 § 1: The applicant complained about the Romanian authorities' refusal to deduct the time he had spent under house arrest in Italy from the prison sentence he served in Romania. Romanian law (Section 18 of Law no. 302/2004) provided for time spent in "detention" abroad pending the outcome of an extradition request from the Romanian authorities to be deducted from the prison sentence pronounced by the Romanian courts. However, the county court refused to apply the provision concerned, considering that the applicant's house arrest in Italy had been a provisional measure not provided for in Romanian law and that it had not deprived the applicant of his liberty. Under Italian law, however, a person placed under house arrest was considered to be in detention pending trial, even if he was allowed to go to work. Indeed, in its amply reasoned judgment the first-instance court had found that the applicant had been deprived of his liberty while under house arrest. On appeal, however, the county court had set aside that judgment. It should therefore have given good reasons for overruling the first-instance judgment. The reasons it gave were insufficient, however. That being so, the applicant could arguably claim that he had spent time in detention in Italy that should have been deducted from the sentence he served in Romania.

Furthermore, section 18 of Law no. 302/2004 was not sufficiently clear for the category of measures it covered to be foreseeable. This lack of clarity of the law had not been offset by any settled case-law of the Romanian courts as to its interpretation. On the contrary, not until an appeal made for the purpose of clarifying the law did the High Court of Cassation and Justice – in a judgment of 2009, that is, after the applicant had been released – rule on the interpretation of that particular law, thereby putting an end to the conflicting case-law of the Romanian courts as regards the deduction of house arrest abroad from a prison sentence served in Romania. Clearly such divergence in the case-law was not likely to allow a person to foresee, to a degree that was reasonable in the circumstances, the consequences which a given action might entail. That being so, the relevant Romanian legislation did not satisfy the test of "foreseeability" of a "law" for the purposes of Article 5 § 1 of the Convention. The applicant had therefore served a longer sentence than necessary under Romanian law considering the time that should have been deducted. The additional time he had spent in prison could not be considered as lawful detention

within the meaning of Article 5 § 1 of the Convention, for want of a basis in law of the requisite quality to satisfy the general principle of legal certainty.

Conclusion: violation by Romania (unanimously).

The Court also found a violation of Article 3 because of the conditions of the applicant's detention in Romania.

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

Lawful arrest or detention

Unlawful questioning of minor while in police custody did not constitute serious and manifest irregularity in decision to order pre-trial detention: *inadmissible*

Dinç and Çakır v. Turkey - 66066/09
Judgment 9.7.2013 [Section II]

Facts – In 2009 the police received an anonymous phone call informing them that five individuals – including the applicants, who were minors at the time – were making Molotov cocktails. That same day Molotov cocktails were thrown at a shop and a car. Four people – including the applicants – were arrested and taken into custody. According to the record of the questioning by the police to establish the suspects' identities, the police were unable to take statements from the applicants as they were minors. However, statements were taken from one of the applicants and from another suspect, F.G., in the course of "interviews". F.G. identified one of the applicants in surveillance camera footage and made statements to the public prosecutor accusing the applicants, who were placed in detention pending trial. In April 2010 they were found guilty of the charges against them and sentenced to seven years, four months and twenty days' imprisonment each. In view of the time they had already spent in pre-trial detention, they were released. Throughout the time they spent in pre-trial detention – about one year and two months – their detention was automatically reviewed at regular intervals.

Law – Article 5 § 1: The applicants had been arrested on suspicion of throwing Molotov cocktails. The investigating authorities had had material evidence of their guilt. After being taken into police custody, the applicants had been placed in detention pending trial, then prosecuted and found guilty of the charges against them. The applicants could therefore be considered to have been arrested and placed in detention based on reasonable suspicion that they had committed a criminal offence, within the meaning of Article 5 § 1 of the Convention.

Although the first applicant had been questioned while in police custody, which strictly speaking he should not have been under Turkish law, there was no evidence that the police had acted under orders from the public prosecutor. But the police had committed a procedural irregularity. As this had occurred subsequent to the first applicant's arrest this irregularity had not cast any doubt on the existence of the plausible reasons that had led to the applicant's arrest and remand in custody. It remained to be seen whether it had marred the lawfulness of the order to place the applicants in pre-trial detention several hours after their arrest. In order to determine whether the detention order was flawed by a "serious and manifest irregularity" that would invalidate it *ex facie*, thereby making the resulting detention unlawful, all the circumstances of the case had to be taken into account. First, it was to be noted that this case differed from those concerning irregularities directly affecting a decision to place someone in pre-trial detention. In the present case the judge who had ordered the applicants' detention had had the power to do so. Furthermore, after having heard the applicants, who had been assisted by a lawyer, the judge had decided to place them in detention pending trial in accordance with the Code of Criminal Procedure, and had given reasons for that decision. Based on the facts at his disposal, he had considered that the basic condition pre-trial detention should fulfil – namely, the existence of plausible reasons to suspect that the applicants had thrown the Molotov cocktails concerned – had been met. As to the evidence on the strength of which the judge had ordered the pre-trial detention, the record of the first applicant's interview had been included in the investigation file. When questioning him, the judge had asked him about the contents of that record. The judge could therefore be considered to have based his decision to order the applicants' pre-trial detention in part on the interview conducted when they had been in police custody.

The judge also had other evidence, however, which gave him good reason to believe that the applicants had committed the offence with which they were charged. Furthermore, they had not argued that the record of the interview had been decisive in the adoption of the decision to place them in pre-trial detention. Accordingly, the order to have them placed in detention had not been seriously and

manifestly flawed and therefore null and void. Lastly, the, applicants' detention had not been arbitrary. With the exception of the police interview, all the procedural rules relating to their arrest and remand in custody had been respected. The police had been acting on orders from the public prosecutor when they had carried out the searches at the suspects' homes and arrested them and remanded them in custody. Official records had been made of their arrest and placement in custody, they had been informed of the charges against them and of their rights as suspects, and they had been given a medical check-up. When their police custody had ended – after only a few hours – the applicants had been taken to the prosecutor's office, then presented before a judge, who had decided to have them placed in pre-trial detention. It followed that this part of the application was manifestly ill-founded.

Conclusion: inadmissible (manifestly ill-founded).

The Court found a violation of Article 5 § 3.

Article 41: EUR 1,200 to each applicant in respect of non-pecuniary damage; claim in respect of pecuniary damage rejected.

Article 5 § 1 (f)

Prevent unauthorised entry into country

Detention of asylum-seeker for period which, particularly in view of his conditions of detention, was unreasonable: *violation*

Suso Musa v. Malta - 42337/12
Judgment 23.7.2013 [Section IV]

Facts – The applicant entered Malta in an irregular manner by boat in April 2011, was arrested by the police and placed in detention. He submitted an application for asylum and challenged his detention. In July 2012 the Immigration Appeals Board held that in the applicant's case, had the asylum request still been pending, he could not have been kept in detention unless return proceedings were under way or he presented a risk of absconding. However, the situation had changed, given that on 2 April 2012 the applicant's asylum request had been rejected by a final decision.

Before the European Court the applicant complained that his detention did not fall within any of the situations provided for by Article 5 and, more particularly, that its purpose had not been to prevent his unauthorised entry into Malta, given that he had been awaiting a decision on his asylum application and the consequent authorisation to enter or remain in Malta.

Law – Article 5 § 1 (f): In *Saadi v. the United Kingdom*[1] the Grand Chamber had interpreted for the first time the meaning of the first limb of Article 5 § 1 (f), namely, "to prevent his effecting an unauthorised entry into the country". It had considered that until a State had "authorised" entry to the country concerned, any entry was "unauthorised" and the detention of a person who wished to effect entry and who needed but did not yet have authorisation to do so, could be, without any distortion of language, to "prevent his effecting an unauthorised entry". It had not accepted that, as soon as an asylum-seeker had surrendered himself to the immigration authorities, he was seeking to effect an "authorised" entry, with the result that detention could not be justified under the first limb of Article 5 § 1 (f). It had considered that to interpret the first limb of Article 5 § 1 (f) as permitting detention only of a person who had been shown to be trying to evade entry restrictions would have been to place too narrow a construction on the terms of the provision and on the power of the State to exercise its undeniable right of control. However, the Court's case-law did not appear to offer specific guidelines as to when detention in an immigration context ceased to be covered by the first limb of Article 5 § 1 and fell under its second limb. The applicant's argument to the effect that *Saadi* should not be interpreted as meaning that all member States may lawfully detain immigrants pending their asylum application, irrespective of national law, was not devoid of merit. Indeed, where a State which had gone beyond its obligations in creating further rights or a more favourable position enacted legislation explicitly authorising the entry or stay of immigrants pending an asylum application, any ensuing detention for the purpose of preventing an unauthorised entry might raise an issue as to the lawfulness of detention under Article 5 § 1 (f). Indeed, in such circumstances it would be hard to consider the measure as being closely connected to the purpose of the detention and to regard the situation as being in accordance with domestic law. In fact, it would be arbitrary and thus run counter to the purpose of Article 5 § 1 (f) to interpret clear and precise domestic-law provisions in a manner contrary to their meaning. In *Saadi* the national law (albeit allowing temporary admission) had not provided for the applicant to

1. *Saadi v. the United Kingdom* [GC], 13229/03, 29 January 2008, Information Note 104.

be granted formal authorisation to stay or to enter the territory, and therefore no such issue had arisen. Therefore the question as to when the first limb of Article 5 ceased to apply, because the individual had been granted formal authorisation to enter or stay, was largely dependent on national law.

As to the facts of the present case, the Court observed that it was faced with conflicting interpretations of Legal Notice 243 of 2008, and particularly of Regulation 12(1) thereof, which provided that an applicant should be "allowed to enter or remain in Malta pending a final decision of his application". The Government had submitted that this provision did not oblige them to provide the applicant with any authorisation to stay. However, in the determination of the applicant's case, the Immigration Appeals Board had upheld the argument that the provision authorised entry and that therefore in principle the circumstances of the applicant's case had been such that he could not have been detained. It was not for the Court to interpret the intention of the legislature one way or another. However, it might well be that what had been intended was for the provision to reflect international standards to the effect that an asylum-seeker might not be expelled pending an asylum application, without necessarily requiring that an individual be granted formal authorisation to stay or to enter the territory. The fact that the provision, while establishing the conditions to be met by the asylum-seeker, did not provide for any formal authorisation procedure or for the issuance of any relevant documentation lent support to this interpretation. In this situation the Court considered that the first issue that arose concerned the quality of the domestic law. While it was clear that Article 5 in conjunction with Article 14 of the Immigration Act had authorised the detention of prohibited immigrants, it was undeniable that Legal Notice 243, which "applied notwithstanding the provisions of any other law to the contrary", had created some confusion as to the extent of the legal basis, in particular, whether detention under the Immigration Act was lawful (in terms of the domestic law) only up to the moment an individual applied for asylum or continued to be lawful pending the determination of the asylum claim. However, while considering that clarification of the legal framework was called for in the domestic system, the Court was ready to accept that the detention had had a sufficiently clear legal basis, namely Article 5 in conjunction with Article 14 of the Act, and that, given that it had not been established that the applicant had actually been granted formal authorisation to stay – the Court in fact noted that the applicant had not been issued with the relevant written documentation –, his detention had fallen under the first limb of Article 5 § 1 (f).

As whether the applicant's detention had been arbitrary, the Court noted a series of odd practices on the part of the domestic authorities, such as the by-passing of the voluntary departure procedure and the across-the-board decisions to detain, which the Government considered did not require individual assessment. In the light of these practices the Court had reservations as to the Government's good faith in applying an across-the-board detention policy with a maximum duration of eighteen months. Furthermore, the appropriateness of the place and the conditions of the detention raised concerns. Periods of three months' detention pending a determination of an asylum application had already been considered to be unreasonably lengthy, when coupled with inappropriate conditions. Hence, the Court could not consider a period of six months to be reasonable, particularly in the light of the conditions of detention described by various independent entities. It followed that the applicant's detention up to the date of determination of his asylum application had not been compatible with Article 5 § 1 (f) of the Convention, which had therefore been violated.

Conclusion: violation (unanimously).

The Court also found a violation of 5 § 1 (f) in respect of the applicant's detention following the determination of his asylum claim and of Article 5 § 4 on account of the lack of effective and speedy remedy under domestic law by which to challenge the lawfulness of detention.

Article 41: EUR 24,000 in respect of non-pecuniary damage.

(See also *Aden Ahmed v. Malta*, 55352/12, 23 July 2013)

ARTICLE 6

Article 6 § 1 (criminal)

Impartial tribunal

Alleged lack of impartiality of trial judge who had already taken procedural decisions adverse to defence and had sat in trial of co-accused: *no violation*

Khodorkovskiy and Lebedev v. Russia - 11082/06 and 13772/05
Judgment 25.7.2013 [Section I]

(See Article 7 below, page 23)

Article 6 § 2

Presumption of innocence

Refusal of compensation following reversal of applicant's conviction of criminal offence: *no violation*

Allen v. the United Kingdom - 25424/09
Judgment 12.7.2013 [GC]

Facts – In September 2000 the applicant was convicted of the manslaughter of her baby son on the basis of medical evidence that the boy's injuries were consistent with "shaken baby syndrome" (also known as "non-accidental head injury" – "NAHI"). On appeal she claimed that new medical evidence suggested that the injuries could be attributed to a cause other than NAHI. In July 2005 the Court of Appeal (Criminal Division) ("CACD") quashed her conviction on the grounds that it was unsafe after finding that the new evidence might have affected the jury's decision to convict. The prosecution did not apply for a re-trial given that the applicant had already served her sentence and a considerable amount of time had passed.

The applicant lodged a claim with the Secretary of State under section 133 of the Criminal Justice Act 1988 ("the 1988 Act"), which provides that compensation shall be paid to someone who was convicted of a criminal offence but has subsequently had that conviction reversed on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice. Her claim was refused. An application for judicial review of that decision was dismissed by the High Court, which concluded that the CACD had only decided that the new evidence, when taken with the evidence given at trial, "created the possibility" that a jury "might properly acquit" the applicant. The Court of Appeal subsequently dismissed an appeal by the applicant after noting that the acquittal decision did "not begin to carry the implication" that there was no case for her to answer, so that the test for a "miscarriage of justice" had not been made out.

In her application to the European Court, the applicant alleged that the reasons given in the decision not to award her compensation had violated her right to be presumed innocent.

Law – Article 6 § 2

(a) *Scope of the case* – The question before the Court was not whether the refusal of compensation *per se* violated the applicant's right to be presumed innocent (Article 6 § 2 did not guarantee a person acquitted of a criminal offence a right to compensation for a miscarriage of justice), but whether the individual decision refusing compensation in the applicant's case, including the reasoning and the language used, was compatible with the presumption of innocence.

(b) *Applicability* – There were two aspects to Article 6 § 2. The first imposed certain procedural requirements in the context of the criminal trial itself (for example relating to the burden of proof, presumptions of fact and law and the privilege against self-incrimination). The second, which was the one relevant in the applicant's case, was aimed at protecting individuals who had been acquitted of a criminal charge, or in respect of whom criminal proceedings had been discontinued, from being treated by public officials and authorities as though they were in fact guilty. Where criminal proceedings had concluded, an applicant seeking to rely on Article 6 § 2 in subsequent proceedings would have to show that there was a link between the two sets of proceedings. Such a link was likely to be present, for example, where the subsequent proceedings required examination of the outcome of the prior criminal proceedings and, in particular, where they obliged the court to analyse the criminal judgment, to engage in a review or evaluation of the evidence in the criminal file, to assess the applicant's participation in some or all of the events leading to the criminal charge, or to comment on the subsisting indications of the applicant's possible guilt. The necessary link was present in the instant case because the right to commence compensation proceedings was triggered by the acquittal in the criminal proceedings, and because the Secretary of State and the courts had had to have regard to the judgment in the criminal proceedings when making and reviewing the decision on compensation. Article 6 § 2 was therefore applicable.

Conclusion: preliminary objection dismissed (unanimously).

(c) *Merits* – There was no single approach to ascertaining the circumstances in which Article 6 § 2 would be violated in the context of proceedings which followed the conclusion of criminal proceedings. Much depended on the nature and context of the proceedings in which the impugned decision was adopted. However, in all cases and no matter what the approach applied, the language used by the decision-maker was of critical importance in assessing the compatibility of the decision and its reasoning with Article 6 § 2.

Turning to examine the nature and context of the proceedings in the applicant's case, the Court noted that the applicant's acquittal was not an acquittal "on the merits" in a true sense. Although formally an acquittal, the termination of the criminal proceedings in her case shared more of the features present in a case in which criminal proceedings had been discontinued.

It further noted that specific criteria had to be met under section 133 of the 1988 Act for the right to compensation to arise, namely: the claimant had to have been convicted, she had to have suffered punishment as a result, an appeal had to have been allowed out of time, and the ground for allowing the appeal had to have been that a new fact showed beyond reasonable doubt that there had been a miscarriage of justice. Those criteria reflected, with only minor linguistic changes, the provisions of Article 3 of Protocol No. 7, which had to be capable of being read in a manner compatible with Article 6 § 2 of the Convention. Nothing in those criteria called into question the innocence of an acquitted person and the legislation itself did not require criminal guilt to be assessed.

As to the language used by the domestic courts, the Court did not consider that, when viewed in the context of the exercise which they had been required to undertake under section 133 of the 1988 Act, it had undermined the applicant's acquittal or treated her in a manner inconsistent with her innocence. In assessing whether a "miscarriage of justice" had arisen, the domestic courts had not commented on whether, on the basis of the evidence as it stood at the appeal, the applicant should be, or would likely be, acquitted or convicted. Equally, they had not commented on whether the evidence was indicative of her guilt or innocence. Indeed, they had consistently repeated that it would have been for a jury to assess the new evidence, had a retrial been ordered.

Moreover, under the law of criminal procedure in England it was for a jury in a criminal trial on indictment to assess the prosecution evidence and to determine the guilt of the accused. The CACD's role in the applicant's case was to decide whether the conviction had been "unsafe", not to substitute itself for the jury in deciding whether, on the basis of the evidence now available, her guilt had been established beyond reasonable doubt. The decision not to order a retrial had spared the applicant the stress and anxiety of undergoing another criminal trial and she had not argued that there ought to have been a re-trial. Both the High Court and the Court of Appeal had referred extensively to the judgment of the CACD to determine whether a miscarriage of justice had arisen and did not seek to reach any autonomous conclusions on the outcome of the case. They had not questioned the CACD's conclusion that the conviction was unsafe and had not suggested that the CACD had erred in its assessment of the evidence before it. They had accepted at face value the findings of the CACD and drawn on them, without any modification or re-evaluation, in order to decide whether the section 133 criteria had been satisfied.

Conclusion: no violation (unanimously).

Article 6 § 3 (b)

Adequate time and facilities

Need for applicants to study large volume of evidence in difficult prison conditions, but supported by highly qualified legal team: *no violation*

Khodorkovskiy and Lebedev v. Russia - 11082/06 and 13772/05
Judgment 25.7.2013 [Section I]

(See Article 7 below, page 23)

Article 6 § 3 (c)

Defence through legal assistance

Systematic perusal by prison authorities and trial judge of communications between accused and their lawyers: *violation*

Khodorkovskiy and Lebedev v. Russia - 11082/06 and 13772/05
Judgment 25.7.2013 [Section I]

(See Article 7 below, page 23)

Article 6 § 3 (d)

Examination of witnesses

Absence of reasons for authorities' refusal to secure attendance of witness whose testimony had been used for applicant's conviction: *violation*

Rudnichenko v. Ukraine - 2775/07
Judgment 11.7.2013 [Section V]

Facts – The applicant was found guilty of robbery in conspiracy with B. and sentenced to seven years' imprisonment. B. had already been found guilty at a separate trial and sentenced to imprisonment. The trial court relied on statements B. had made at his own trial which were read out at the applicant's trial and rejected an application for B. to be cross examined. The trial judge sought permission to stand down on the ground that she had sat in B.'s case, but her request was rejected. Before the European Court, the applicant complained *inter alia*, that he had been found guilty on facts established at B.'s trial, and that he had been unable to cross examine B., one of the key witnesses in his case.

Law – Article 6 § 1 and Article 6 § 3 (d): The requirement that there be a good reason for admitting the evidence of an absent witness was a preliminary question which had to be examined before any consideration was given as to whether that evidence was sole or decisive. Even where the evidence of an absent witness had not been sole or decisive, the Court had still found a violation of Article 6 §§ 1 and 3 (d) when no good reason had been shown for the failure to have the witness examined. This was because, as a general rule, witnesses should give evidence at the trial and all reasonable efforts should be made to secure their attendance. Thus, when witnesses did not attend to give live evidence, there was a duty to enquire whether that absence was justified.

In the instant case, B. had not attended the applicant's trial simply because the trial judge had not summoned him. Indeed, there was nothing in the case file to suggest that any efforts had been made whatsoever to ensure B.'s attendance in the proceedings against the applicant, at least at the pre-trial investigation stage if not at a court hearing. Given that B. was serving a prison sentence, the authorities would have had no difficulty locating him and ensuring his attendance had they wished. Furthermore, there was no evidence to suggest that B. had been asked, but had refused, to make depositions in connection with the applicant's trial.

The Court noted the Government's submission that the applicant had sought B.'s attendance at an inappropriate stage of the proceedings, and had not sufficiently persisted with that request. It did not consider, however, that the applicant's behaviour indicated consent to B.'s statements being read out at the trial and it was certainly not sufficient for the Court to conclude that he had waived his right to examine that witness. Indeed, the applicant had complained before both the appellate court and the cassation court of his inability to examine B.

The foregoing considerations were sufficient to enable the Court to conclude that there had been no reason, let alone good reason, for the restriction of the applicant's right to obtain the examination of the witness whose testimony had been used for his conviction. In those circumstances, the Court did not consider it necessary to proceed with the second part of the test as to whether the applicant's conviction had been based solely or to a decisive degree on B.'s depositions.

Conclusion: violation (unanimously).

The Court also found violations of Article 5 §§ 1 and 3, as well as Article 6 § 1 (the "impartial tribunal" requirement).

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

(See also *Al-Khawaja and Tahery v. the United Kingdom* [GC], 26766/05 and 22228/06, 15 December 2011, Information Note 147)

Refusal to allow defence to cross-examine expert witnesses called by the prosecution or to call their own expert evidence: *violation*

Khodorkovskiy and Lebedev v. Russia - 11082/06 and 13772/05
Judgment 25.7.2013 [Section I]

(See Article 7 below)

ARTICLE 7

Article 7 § 1

Nullum crimen sine lege

Interpretation of offence of tax evasion derived by reference to other areas of law: *no violation*

Khodorkovskiy and Lebedev v. Russia - 11082/06 and 13772/05
Judgment 25.7.2013 [Section I]

Facts – Before their arrest the applicants were senior managers and major shareholders of a large industrial group which included the Yukos oil company. They were among the richest men in Russia.

Mr Khodorkovskiy, the first applicant, was also politically active: he allocated significant funds to support opposition parties and funded several development programmes and NGOs. In addition, Yukos pursued large business projects which went against the official petroleum policy.

In 2003 the applicants were arrested and detained on suspicion of the allegedly fraudulent privatisation of one of the companies in the group. Subsequently tax and enforcement proceedings were brought against Yukos oil company, which was put into liquidation. New charges were brought against the applicants relating to alleged tax evasion through the registration of trading companies, which in fact had no business activities, in a low-tax zone, and through allegedly false income tax returns. In 2005 the applicants were found guilty of most of the charges. They were sentenced to nine years' imprisonment and ordered to pay the State the equivalent of over EUR 500,000,000 in respect of unpaid company taxes. Their prison sentences were reduced to eight years on appeal. Both applicants were sent to serve their sentences in remote colonies, thousands of kilometres from their Moscow homes.

In their applications to the European Court, the applicants complained of various breaches of the Convention, in particular of their right to a fair trial (Article 6 § 1) and of their right not to be tried of an offence that was not an offence when it was committed (Article 7).

Law

Article 6 § 1: Both applicants complained of several distinct breaches of this provision. The first group of their arguments concerned alleged bias on the part of the presiding judge. The second group to procedural unfairness, in particular: a lack of time and facilities to prepare the defence, an inability to enjoy effective legal assistance, and an inability to examine prosecution evidence or adduce evidence for the defence.

(a) *Impartiality* – The applicants claimed that procedural decisions taken by the judge during their trial were indicative of bias, that the judge had herself been under investigation during their trial and that she was biased because of her previous findings in the case of another top Yukos manager.

As to the first point, the Court had to have stronger evidence of personal bias than a series of procedural decisions unfavourable to the defence. There was nothing in the trial judge's decisions to reveal any particular predisposition against the applicants. As to the second point, the allegation that the trial judge was herself under investigation was based on rumour, and could not found a claim of impartiality. As to the final point – the fact that the judge had already sat in a case concerning another senior Yukos manager – the Court had previously clarified that the mere fact that a judge had already tried a co-accused was not, in itself, sufficient to cast doubt on the judge's impartiality. Criminal adjudication frequently involved judges presiding over various trials in which a number of co-accused stood charged and the work of criminal courts would be rendered impossible if, by that fact alone, a judge's impartiality could be called into question. An examination was, however, needed to determine whether the earlier judgments contained findings that actually prejudged the question of the applicant's guilt. The judge in the applicants' case was a professional judge, *a priori* prepared to disengage herself from her previous experience in the other manager's trial. The judgment in the manager's case did not contain findings that prejudged the question of the applicants' guilt in the subsequent proceedings and the judge was not bound by her previous findings, for example as regards the admissibility of evidence, either legally or otherwise.

Conclusion: no violation (unanimously).

(b) *Fairness of the proceedings*

(i) Article 6 § 1 in conjunction with Article 6 § 3 (b): *Time and facilities for the preparation of the defence* – The second applicant had had eight months and twenty days to study over 41,000 pages of his case-file, and the first applicant five months and eighteen days to study over 55,000 pages. The Court noted the complexity of the documents, the need to make notes, compare documents, and discuss the case-file with lawyers. It also took account of the breaks in the schedule of working with the case-file, and of the uncomfortable conditions in which the applicants had had to work (for example, they had been unable to make photocopies in prison or to keep copies of documents in their cells and there had been restrictions on their receiving copies of documents from their lawyers). However, the issue of the adequacy of time and facilities afforded to an accused had to be assessed in the light of the circumstances of each particular case. The applicants were not ordinary defendants: they had been assisted by a team of highly professional lawyers of great renown, all privately retained. Even if they were unable to study each and every document in the case file personally, that task could have been entrusted to their lawyers. Importantly, the applicants were not limited in the number and duration

of their meetings with their lawyers. The lawyers were able to make photocopies; the applicants were allowed to take notes from the case-file and keep their notebooks with them. Indeed, the applicants, who both had university degrees, were senior executives of one of the largest oil companies in Russia and knew the business processes at the heart of the case arguably better than anybody else. Thus, although the defence had had to work in difficult conditions at the pre-trial stage, the time allocated to the defence for studying the case file was not such as to affect the essence of the right guaranteed by Article 6 §§ 1 and 3 (b).

The Court further examined the conditions in which the defence had had to work at the trial and during the appeal proceedings. In particular, at some point the judge had decided to intensify the course of the trial and hold hearings every day. However, it had not been impossible for the applicants to follow the proceedings and the defence had been able to ask for adjournments when necessary.

At the appeal stage the defence had had over three months to draft written pleadings and to prepare for oral argument. Although the defence had had to start preparing their appeal without having the entirety of the trial materials before them and although there had been doubts as to the accuracy of the trial record, the Court was not persuaded that any such inaccuracies had made the conviction unsafe. Furthermore, the defence was aware of the procedural decisions that had been taken during the trial and what materials had been added. They had audio recordings of the trial proceedings and could have relied on them in the preparation of their points of appeal. The difficulties experienced by the defence during the appeal proceedings had thus not affected the overall fairness of the trial.

Conclusion: no violation (unanimously).

(ii) Article 6 § 1 in conjunction with Article 6 § 3 (c): *Lawyer-client confidentiality* – The applicants had claimed that that their confidential contacts with their lawyers had been seriously hindered. The Court reiterated that any interference with privileged material and, *a fortiori*, the use of such material against the accused in the proceedings should be exceptional and justified by a pressing need and would always be subjected to the strictest scrutiny.

As to the applicants' complaint that one of their lawyers had received summonses from the prosecution, the Court noted that the lawyer concerned had refused to testify and that his refusal had not led to any sanctions against him. Accordingly, in the particular circumstances of the present case, lawyer-client confidentiality had not been breached on account of that episode.

In contrast, by carrying out a search of that lawyer's office and seizing his working files, the authorities had deliberately interfered with the secrecy of lawyer-client contacts. The Court saw no compelling reasons for that interference. The Government had not explained what sort of information the lawyer might have had, how important it was for the investigation, or whether it could have been obtained by other means. At the relevant time the lawyer was not under suspicion of any kind. Most significantly, the search of his office had not been accompanied by appropriate procedural safeguards, such as authorisation by a separate court warrant, as required by the law. The search and seizure were thus arbitrary.

Another point of concern was the prison administration's practice of perusing all written documents exchanged between the applicants and their lawyers during the meetings in the remand prison. Such perusal had no firm basis in the domestic law, which did not specifically regulate such situations. Furthermore, notes, drafts, outlines, action plans and other like documents prepared by the lawyer for or during a meeting with his detained client were to all intents and purposes privileged material. Any exception from the general principle of confidentiality was only permissible if the authorities had reasonable cause to believe that professional privilege was being abused in that the contents of the document concerned might endanger prison security or the safety of others or was otherwise of a criminal nature. In the present case, however, the authorities had taken as their starting point the opposite presumption, namely that all written communications between a prisoner and his lawyer were suspect. Despite there being no ascertainable facts to show that either the applicants or their lawyers might abuse professional privilege, the measures complained of had lasted for over two years. In the circumstances the rule whereby defence working documents were subject to perusal and could be confiscated if not checked by the prison authorities beforehand was unjustified, as were the searches of the applicants' lawyers.

Finally, as regards the conditions in which the applicants had been able to communicate with their lawyers in the courtroom the trial judge had requested the defence lawyers to show her all written documents they wished to exchange with the applicants in accordance with the prison authorities'

security arrangements. While checking drafts and notes prepared by the defence lawyers or the applicants the judge might have come across information or arguments which the defence would not wish to reveal and which could have affected her opinion about the factual and legal issues in the case. In the Court's opinion, it would be contrary to the principle of adversarial proceedings if the judge's decision was influenced by arguments and information which the parties did not present and did not discuss at an open trial. Furthermore, the oral consultations between the applicants and their lawyers could have been overheard by the prison escort officers. During the adjournments the lawyers had had to discuss the case with their clients in close vicinity of the prison guards. In sum, the secrecy of the applicants' exchanges, both oral and written, with their lawyers had been seriously impaired during the hearings.

Conclusion: violation (unanimously).

(iii) Article 6 § 1 in conjunction with Article 6 § 3 (d): *Taking and examination of evidence* – As regards the applicants' complaints that evidence from two experts consulted by the prosecution had been admitted without the applicants being able to challenge it, the Court noted, firstly, that the fact that the prosecution had obtained an expert report without any involvement of the defence did not of itself raise any issue under the Convention, provided that the defence subsequently had an opportunity to examine and challenge both the report and the credibility of those who prepared it, through direct questioning before the trial court.

In response to the Government's submission that the defence had not shown why it had been necessary to question the expert witnesses, the Court stated that, contrary to the situation with defence witnesses, an accused was not required to demonstrate the importance of a prosecution witness. If the prosecution decided to rely on a particular person's testimony as being a relevant source of information and if the testimony was used by the trial court to support a guilty verdict, the presumption arose that the personal appearance and questioning of the person concerned were necessary, unless the testimony was manifestly irrelevant or redundant. The two experts had clearly been key witnesses since their conclusions went to the heart of some of the charges against the applicants. The defence had taken no part in the preparation of the experts' report and had not been able to put questions to them at an earlier stage. In addition, the defence had explained to the district court why they needed to question the experts and there were no good reasons for preventing them from coming to the court. Even if there were no major inconsistencies in the report, questioning experts could reveal possible conflicts of interest, insufficiency of the materials at their disposal or flaws in the methods of examination.

The applicants had also complained of the trial court's refusal to admit expert evidence (both written and oral) proposed by the defence for examination at the trial. The Court noted that the trial court had refused to admit certain expert evidence which it deemed irrelevant or useless. In that connection, the Court reiterated that the requirement of a fair trial did not impose an obligation on trial courts to order an expert opinion or any other investigative measure merely because a party had sought it and, having examined the nature of the reports in question, the Court was prepared to accept that the primary reason for not admitting certain of them was their lack of relevance or usefulness which matters were within the trial court's discretion to decide. However, two audit reports (by Ernst and Young and Price Waterhouse Coopers) were in fact rejected for reasons related not to their content but to their form and origins. Unlike the other expert evidence the defence had sought to adduce, these reports were non-legal and concerned essentially the same matters as the reports produced by the prosecution and so were relevant to the accusations against the applicants. By excluding that evidence, the trial court had put the defence in a disadvantageous position as the prosecution had been entitled to select experts, formulate questions and produce expert reports, while the defence had had no such right. Furthermore, in order effectively to challenge a report by an expert the defence had to have the same opportunity to introduce their own expert evidence. The mere right of the defence to ask the court to commission another expert examination did not suffice. In practice, however, the only option that had been available to the applicants under Russian law had been to obtain oral questioning of "specialists" at the trial, but "specialists" had a different procedural status to "experts", as they had no access to primary materials in the case and the trial court refused to consider their written opinions. In the circumstances, the decision to exclude the two audit reports had created an imbalance between the defence and the prosecution in the area of collecting and adducing "expert evidence", thus breaching the equality of arms between the parties.

Conclusion: violation (unanimously).

Article 7

(a) *Alleged procedural obstacles to prosecution* – The applicants had claimed that by virtue of a Constitutional Court ruling of 27 May 2003 they could not be held criminally liable for tax evasion before their tax liability had been established in separate proceedings. The Court was not persuaded that the applicants' understanding of that ruling was correct. In any event, the alleged "procedural obstacles" did not mean that the acts imputed to the applicants were not defined as "criminal offences" when they were committed. There had therefore been no violation of Article 7 on that account.

(b) *Novel interpretation of the concept of "tax evasion"* – The applicants had argued that they had suffered from a completely novel and unpredictable interpretation of the provisions (Articles 198 and 199 of the Criminal Code) under which they were convicted. The Court observed that while those provisions defined tax evasion in very general terms, by itself such a broad definition did not raise any issue under Article 7. Forms of economic activity were in constant development, and so were methods of tax evasion. In order to define whether particular behaviour amounted to tax evasion in the criminal-law sense the domestic courts could invoke legal concepts from other areas of law. The law in this area could be sufficiently flexible to adapt to new situations, provided it did not become unpredictable. Thus, although in the criminal-law sphere there was no case-law directly applicable to the transfer-pricing arrangements and allegedly sham transactions at the heart of the applicants' case, the concept of sham transaction was known to Russian law and the courts had the power to apply the "substance-over-form" rule and invalidate a transaction as sham under the Civil and Tax Codes. The Court reiterated that in this area it was not called upon to reassess the domestic courts' findings, provided they were based on a reasonable assessment of the evidence. In the present case, despite certain flaws, the domestic proceedings could not be characterised as a flagrant denial of justice.

The Court next turned to the question whether the substantive findings of the domestic courts were arbitrary or manifestly unreasonable.

(i) *Charges under Article 199 of the Criminal Code (trading companies' operation in the low-tax zone and the technique of "transfer pricing")* – While acknowledging that legitimate methods of tax minimisation could exist, the Court noted that the scheme deployed by Yukos was not fully transparent and that some elements of the scheme that might have been crucial for determining the companies' eligibility for tax cuts had been concealed from the authorities. For instance, the applicants had never informed the tax authorities of their true relation to the trading companies. The benefits of the trading companies had been returned to Yukos indirectly. All business activities which had generated profit were in fact carried out in Moscow, not in a low-tax zone. The trading companies, which existed only on paper, had no real assets or personnel. Tax minimisation was the sole reason for the creation of the trading companies in the low-tax zone. Such behaviour could not be compared to that of a *bona fide* taxpayer making a genuine mistake. Finally, it was difficult for the Court to imagine that the applicants, as senior executives and co-owners of Yukos, had not been aware of the scheme or that the trading companies' fiscal reports did not reflect the true nature of their operations. Thus, the applicants' acts could reasonably be interpreted as submitting false information to the tax authorities, thus constituting the *actus reus* of the offence of tax evasion.

(ii) *Charges under Article 198 of the Criminal Code (personal income-tax evasion)* – In so far as the personal income tax evasion was concerned, the applicants had argued that they had given consulting services to foreign firms and that the tax cuts they had received as "individual entrepreneurs" were legitimate. However, the domestic courts had concluded that such service agreements were in fact *de facto* payments for the applicants' work in Yukos and its affiliated structures that would normally have been taxable under the general taxation regime and that the applicants had knowingly misinformed the tax authorities about the true nature of their activities. Those conclusions were not unreasonable or arbitrary.

(c) *Application of allegedly dormant criminal law* – Lastly, the Court did not accept the applicants' argument that the authorities' failure to prosecute and/or convict other businessmen who had been using similar tax-minimisation techniques had made such techniques legitimate and excluded criminal liability. While in certain circumstances a long-lasting tolerance of certain conduct, otherwise punishable under the criminal law, could grow into *de facto* decriminalisation of such conduct, this was not the case here, primarily because the reasons for such tolerance were unclear. It was possible that the authorities had simply not had sufficient information or resources to prosecute the applicants and/or other businessmen for using such schemes. It required a massive criminal investigation

to prove that documents submitted to the tax authorities did not reflect the true nature of business operations. Finally, there was no evidence that tax minimisation schemes used by other businessmen had been organised in exactly the same way as that employed by the applicants. The authorities' attitude could not therefore be said to have amounted to a conscious tolerance of such practices.

In sum, Article 7 of the Convention was not incompatible with judicial law-making and did not outlaw the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development was consistent with the essence of the offence and could reasonably be foreseen. While the applicants may have fallen victim to a novel interpretation of the concept of tax evasion, it was based on a reasonable interpretation of the domestic law and consistent with the essence of the offence.

Conclusion: no violation (unanimously).

Article 8: The applicants had complained that their transfer to penal colonies situated thousands of kilometres from their homes had made it impossible for them to see their families. The Court accepted that the situation complained of constituted interference with the applicants' private and family lives and was prepared to accept that the interference was lawful and pursued the legitimate aims of preventing disorder and crime and of securing the rights and freedoms of others.

As to whether it was necessary in a democratic society, the Curt noted, firstly, that it was very likely that the rule set out in the Russian Code of Execution of Sentences, which provides for convicts in areas where prisons were overpopulated to be sent to the next closest region (but not several thousand kilometres away), had not been followed in the applicants' case. It was hardly conceivable that there were no free places for the applicants in any of the many colonies situated closer to Moscow. The Court stressed that the distribution of the prison population must not remain entirely at the discretion of the administrative bodies and that the interests of convicts in maintaining at least some family and social ties had to somehow be taken into account. In the absence of a clear and foreseeable method of distribution of convicts amongst penal colonies, the system had failed to provide a measure of legal protection against arbitrary interference by public authorities and had led to results that were incompatible with respect for the applicants' private and family lives.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1: The first applicant had complained that, after convicting him of corporate-tax evasion, the trial court had made an award of damages which overlapped with the claims for back payment of taxes that had been brought against Yukos. The Court found, firstly, that the first applicant's obligation to pay certain outstanding taxes could be considered an interference with his possessions falling within the scope of Article 1 of Protocol No. 1.

However, it was unnecessary for the Court to examine separately the first applicant's claim that the State had been awarded the same amount of outstanding corporate taxes twice, as in any event, the interference did not have a lawful basis. The Court accepted that where a limited-liability company was used merely as a façade for fraudulent actions by its owners or managers, piercing the corporate veil may be an appropriate solution for defending the rights of its creditors, including the State. However, there had to be clear rules allowing the State to do this if the interference was not to be arbitrary. Neither the Russian Tax Code at the material time nor the Civil Code permitted the recovery of a company's tax debts from its managers. Furthermore, the domestic courts had repeatedly interpreted the law as not allowing liability for unpaid company taxes to be shifted to company executives. Finally, the trial court's findings regarding the civil claim were extremely short and contained no reference to applicable provisions of the domestic law or any comprehensible calculation of damages, as if it was an insignificant matter. In sum, neither the primary legislation then in force nor the case-law allowed for the imposition of civil liability for unpaid company taxes on the company's executives. The award of damages in favour of the State had thus been arbitrary.

Conclusion: violation (unanimously).

Article 18 (*alleged political motivation for prosecution*): The Court reiterated that the whole structure of the Convention rested on the general assumption that public authorities in the member States acted in good faith. Though rebuttable in theory, that assumption was difficult to overcome in practice: an applicant alleging that his rights and freedoms were limited for an improper reason had to show convincingly that the real aim of the authorities was not the same as that proclaimed. Thus, the Court had to apply a very exacting standard of proof to such allegations.

That standard had not been met in the applicants' case. While the circumstances surrounding it could be interpreted as supporting the applicants' claim

of improper motives, there was no direct proof of such motives. The Court was prepared to admit that some political groups or government officials had had their own reasons for pushing for the applicants' prosecution. However, that was insufficient to conclude that the applicants would not have been convicted otherwise. In the final reckoning, none of the accusations against them even remotely concerned their political activities. Elements of "improper motivation" which may have existed in the instant case did not make the applicants' prosecution illegitimate from beginning to end: the fact remained that the accusations against the applicants of common criminal offences, such as tax evasion and fraud, were serious, that the case against them had a "healthy core", and that even if there was a mixed intent behind their prosecution, this did not grant them immunity from answering the accusations.

Conclusion: no violation (unanimously).

Article 34: The first applicant had further complained that, in order to prevent him from complaining to the European Court, the authorities had harassed his lawyers.

In the Court's opinion, there was a significant difference between the first applicant's allegations under Article 18 and those under Article 34. In so far as his prosecution and trial were concerned, the aims of the authorities for bringing the first applicant to trial and convicting him were evident and did not require further explanation. By contrast, the aim of the disciplinary and other measures directed against his lawyers was far from evident. The Court had specifically invited the Government to explain the reasons for the disbarment proceedings, extraordinary tax audit and denial of visas to the first applicant's foreign lawyers, but the Government had remained silent on those points. In such circumstances it was natural to assume that the measures directed against the first applicant's lawyers were linked to his case before the Court. In sum, the measures complained of had been directed primarily, even if not exclusively, at intimidating the lawyers working on the first applicant's case before the Court. Although it was difficult to measure the effect of those measures on his ability to prepare and argue his case, it was not negligible.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 3 of the Convention on account of the fact that the second applicant appeared at his trial in a metal cage and no violation of that provision in respect of the conditions of his detention in the remand prison; a violation of Article 5 § 3 of the Convention in respect of the length of the second applicant's pre-trial detention and a violation of Article 5 § 4 on account of delays in the review of his detention.

Article 41: EUR 10,000 to the first applicant in respect of non-pecuniary damage; the second applicant's pecuniary claims were rejected in full.

(See also *Khodorkovskiy v. Russia*, 5829/04, 31 May 2011, Information Note 141; and *OAO Neftyanaya Kompaniya Yukos v. Russia*, 14902/04, 20 September 2011, Information Note 144)

Heavier penalty

Retrospective application of criminal law laying down heavier sentences for war crimes than the law in force when the offences were committed: *violation*

Maktouf and Damjanović v. Bosnia and Herzegovina - 2312/08 and 34179/08
Judgment 18.7.2013 [GC]

Facts – Both applicants were convicted by the Court of Bosnia and Herzegovina ("the State Court") of war crimes committed against civilians during the 1992-1995 war. War crimes chambers were set up within the State Court in early 2005 as part of the International Criminal Tribunal for the former Yugoslavia's completion strategy. The State Court, which consists of international and national judges, can decide to take over war crime cases because of their sensitivity or complexity, and can transfer less sensitive and complex cases to the competent courts of the two entities of Bosnia and Herzegovina (the Entity courts").

The first applicant (Mr Maktouf) was convicted by the State Court in July 2005 of aiding and abetting the taking of two civilian hostages as a war crime and sentenced to five years' imprisonment under the 2003 Criminal Code of Bosnia and Herzegovina. In April 2006, an appeals chamber of the court confirmed his conviction and the sentence after a fresh hearing with the participation of two international judges. The second applicant (Mr Damjanović), who had taken a prominent part in the beating of captured Bosniacs in Sarajevo in 1992, was convicted in June 2007 of torture as a war crime and sentenced to eleven years' imprisonment under the 2003 Criminal Code.

In their applications to the European Court, both men complained, *inter alia*, that the State Court had retroactively applied to them a more stringent

criminal law, the 2003 Criminal Code, than that applicable when the offences were committed, namely the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia and that they had received heavier sentences as a result.

Law – Article 7: The Court reiterated that it was not its task to review *in abstracto* whether the retroactive application of the 2003 Criminal Code in war crimes cases was, *per se*, incompatible with Article 7. That matter had to be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts had applied the law whose provisions were most favourable to the defendant concerned.

The definition of war crimes was the same in both the 1976 and the 2003 Criminal Codes and the applicants did not dispute that their acts had constituted criminal offences defined with sufficient accessibility and foreseeability at the time they were committed. What was at issue was therefore not the lawfulness of their convictions but the different sentencing frameworks applicable to war crimes under the two Codes.

The State Court had sentenced the first applicant to five years' imprisonment; the lowest possible sentence for aiding and abetting war crimes under the 2003 Code, whereas under the 1976 Code his sentence could have been reduced to one year. Likewise, the second applicant had been sentenced to eleven years' imprisonment, slightly above the ten-year minimum applicable in his case under the 2003 Code. However, under the 1976 Code, it would have been possible to impose a sentence of only five years.

As the applicants had received sentences at the lower end of the sentencing range, it was of particular relevance that the 1976 Code was more lenient in respect of the minimum sentence. In this context, the fact that the 2003 Code may have been more lenient as regards the maximum sentence was immaterial as the crimes of which the applicants had been convicted clearly did not belong to the category to which the maximum sentence was applicable. Further, while the Court accepted that the applicants' sentences were within the latitude of both the 1976 Criminal Code and the 2003 Criminal Code, so that it could not be said with any certainty that either applicant would have received lower sentences had the 1976 Code been applied, the crucial point was that the applicants could have received lower sentences if it had been. Accordingly, since there was a real possibility that the retroactive application of the 2003 Code had operated to the applicants' disadvantage as regards sentencing, it could not be said that they had been afforded effective safeguards against the imposition of a heavier penalty.

Nor was the Court able to agree with the Government's argument that if an act was criminal under "the general principles of law recognised by civilised nations" (Article 7 § 2 of the Convention) at the time it was committed then the rule of non-retroactivity of crimes and punishments did not apply. That argument was inconsistent with the intention of the drafters of the Convention that Article 7 § 1 contained the general rule of non-retroactivity and that Article 7 § 2 was only a contextual clarification, included to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of crimes committed during that war. It was thus clear that the drafters of the Convention had not intended to allow for any general exception to the rule of non-retroactivity.

With regard to the Government's argument that a duty under international humanitarian law to punish war crimes adequately required that the rule of non-retroactivity be set aside in the applicants' case, the Court noted that that rule also appeared in the Geneva Conventions and their Additional Protocols. Moreover, as the applicants' sentences were within the compass of both the 1976 and 2003 Criminal Codes, the Government's argument that the applicants could not have been adequately punished under the former Code was clearly unfounded.

Accordingly, there had been a violation of Article 7 in the particular circumstances of the applicants' cases. However, the Court emphasised that that conclusion did not indicate that lower sentences ought to have been imposed, but simply that the sentencing provisions of the 1976 Code should have been applied.

Conclusion: violation (unanimously).

Article 6 § 1: The first applicant had also complained that the State Court was not independent for the purposes of Article 6 § 1, notably because two of its members had been appointed by the Office of the High Representative in Bosnia and Herzegovina for a renewable period of two years. The European Court found no reasons to doubt that the international judges of the State Court were independent of the political organs of Bosnia and Herzegovina, of the parties to the case and of the institution of the High Representative. Their appointment had been motivated precisely by a

desire to reinforce the independence of the State Court's war crimes chambers and to restore public confidence in the judicial system. The fact that the judges in question had been seconded from amongst professional judges in their respective countries represented an additional guarantee against outside pressure. Although their term of office was relatively short, this was understandable given the provisional nature of the international presence at the State Court and the mechanics of international secondments.

Conclusion: inadmissible (manifestly ill-founded)

Article 14 and/or Article 1 of Protocol No. 12: As regards the applicants' complaint that their trial by the State Court rather than the Entity courts was discriminatory, the Court noted that given the large number of war-crimes cases in post-war Bosnia and Herzegovina, it was inevitable that the burden had to be shared between the State Court and the Entity courts if the respondent State was to be able to honour its Convention obligation to bring to justice those responsible for serious violations of international humanitarian law in a timely manner. Although the Court was aware that the Entity courts imposed in general lighter sentences than the State Court at the time, that difference in treatment was not to be explained in terms of personal characteristics and therefore did not amount to discriminatory treatment. Whether a case was to be heard by the State Court or an Entity court was a matter decided on a case-by-case basis by the State Court itself with reference to objective and reasonable criteria.

Conclusion: inadmissible (manifestly ill-founded).

Article 41: finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage sustained by the applicants; claim made by the first applicant in respect of pecuniary damage dismissed.

ARTICLE 8

Respect for private life

Newspaper editorial criticising applicant without insulting her or calling for the use of violence: *no violation*

Mater v. Turkey - 54997/08
Judgment 16.7.2013 [Section II]

Facts – The applicant wrote a book containing the testimonies of former soldiers who had fought against the PKK (Workers' Party of Kurdistan). She was prosecuted in connection with its publication on a charge of insulting the armed forces of the State, before being acquitted in September 2000. In August 2001 a newspaper printed a series of editorial articles which contained virulent criticism of the applicant. In October 2001 she applied to the courts seeking compensation for the non-pecuniary damage she had allegedly sustained as a result of the publication of the articles. Following lengthy proceedings her claims were eventually dismissed by the domestic courts.

Law – Article 8: The applicant, a public figure, had attracted more attention following the publication of her book and the considerable publicity surrounding the criminal proceedings against her that resulted from it. The articles in question had concerned topical subjects of general interest. Owing to the style used, the impugned pieces of journalism had directly engaged the reader on the subject of the facts set out in them. The tone of the articles had been incisive and ironic, they had included numerous negative comments and the journalist had expressed clear scepticism as to the authenticity of the interviews in the applicant's book. The articles had also challenged the applicant directly. They claimed that she had received funding for the writing of the book from an American foundation with supposed links to the CIA, and cast doubt on her ideological and financial motives for writing the book.

The language used could be considered provocative. However, while any individual who took part in a public debate of general concern must not overstep certain limits, particularly with regard to respect for the reputation and the rights of others, a degree of exaggeration, or even provocation, was permitted. Moreover, the allegations made by the journalist in question had not been without some factual basis, especially regarding the funding received by the applicant for the writing of the book. The various ways in which the journalist had speculated about and interpreted the applicant's motives for writing the book had been recognisable as personal comments and expressions of opinion and easily identifiable as such by the reader. Explanations had been printed in the form of a summary of statements including those of the applicant and of the chairman of the foundation in question, accompanied by comments from the journalist.

It was true that the applicant had been the subject, over a period of around ten days, of articles amounting to virulent criticism against her. However, the articles in question had been editorials which, although very forthright in tone, had not contained

personal insults against the applicant or calls for the use of violence against her. In that sense their content was not sufficient to establish that they would in themselves have been capable of endangering the applicant's physical safety or that of her family and friends.

Lastly, the domestic courts had stressed both the importance of press freedom and its limits with regard to the personality rights of others. The case had been examined three times by the Court of Cassation and the latter, sitting as a full civil court, had eventually concluded, after weighing up the different interests at stake, that the articles in question had remained within the bounds of permissible criticism.

Conclusion: no violation (unanimously).

Courts' refusal to order newspaper to remove article damaging applicant's reputation from its Internet archive: *no violation*

Węgrzynowski and Smolczewski v. Poland - 33846/07
Judgment 16.7.2013 [Section IV]

Facts – The applicants are lawyers who won a libel case against two journalists working for the daily newspaper *Rzeczpospolita* following the publication of an article alleging that they had made a fortune by assisting politicians in shady business deals. Holding in particular that the journalists' allegations were largely based on gossip and hearsay and that they had failed to take the minimum steps necessary to verify the information, the domestic courts ordered them and their editor-in-chief to pay a fine to a charity and to publish an apology. These obligations were complied with.

Subsequently, after discovering that the article remained accessible on the newspaper's website, the applicants brought fresh proceedings for an order for its removal from the site. Their claim was dismissed on the grounds that ordering removal of the article would amount to censorship and the rewriting of history. The court indicated, however, that it would have given serious consideration to a request for a footnote or link informing readers of the judgments in the original libel proceedings to be added to the website article. That judgment was upheld on appeal.

Law – Article 8: The Court declared the first applicant's application inadmissible, as being out of time. As regards the second applicant, it noted that during the first set of civil proceedings he had failed to make claims regarding the publication of the impugned article on the Internet. The domestic courts had therefore not been able to decide that matter. Their judgment, finding that the article was in breach of the applicants' rights, had not created a legitimate expectation that the article would be removed from the newspaper's website. The second applicant had not advanced any arguments to justify his failure to address the issue of the article's presence online during the first set of proceedings, especially in view of the fact that the Internet archive of *Rzeczpospolita* was a widely known and frequently used resource both for Polish lawyers and the general public.

As to the second set of proceedings, the second applicant had been given the opportunity to have his claims examined by a court and had enjoyed full procedural guarantees. The Court accepted that it was not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which had in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations. Furthermore, the legitimate interest of the public in access to public Internet archives of the press was protected under Article 10 of the Convention. It was significant that the domestic courts had pointed out that it would be desirable to add a comment to the article on the newspaper's website informing the public of the outcome of the first set of proceedings. This demonstrated their awareness of how important publications on the Internet could be for the effective protection of individual rights and of the importance of making full information about judicial decisions concerning a contested article available on the newspaper's website. The second applicant had not, however, requested the addition of a reference to the judgments in his favour.

Taking into account all those circumstances, the respondent State had complied with its obligation to strike a balance between the rights guaranteed under Article 10 and under Article 8.

Conclusion: no violation (unanimously).

(See also *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, 3002/03 and 23676/03, Information Note 117)

Respect for private life
Respect for family life

Imprisonment in penal colonies thousands of kilometres from prisoners' homes: *violation*

Khodorkovskiy and Lebedev v. Russia - 11082/06 and 13772/05
Judgment 25.7.2013 [Section I]

(See Article 7 above, page 23)

ARTICLE 10

Freedom of expression

Refusal of newspaper to publish paid advertisement: *no violation*

Remuszko v. Poland - 1562/10
Judgment 16.7.2013 [Section IV]

Facts – The applicant, a journalist, published a book relating, in an unfavourable light, the origins of *Gazeta Wyborcza*, one of the best known Polish daily newspapers, its journalists and the financial dealings of its publisher. He subsequently asked seven daily and weekly newspapers to publish paid advertisements for the book. All refused. The applicant brought proceedings against the newspapers. Eventually, two newspapers were ordered to publish the advertisement concerned. Before the European Court the applicant complained that the domestic courts had endorsed *Rzeczpospolita's* (one of the newspapers) refusal to publish paid advertisements for his book, after finding the advertisement was incompatible with the newspaper's editorial profile and its publication might give rise to suspicion that the editors of *Rzeczpospolita* were trying to denigrate a competitor, *Gazeta Wyborcza*, in the eyes of the public.

Law – Article 10: The right invoked by the applicant had to be interpreted and applied with due consideration for the rights of the press. Privately owned newspapers had to be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals or even by their own staff reporters and journalists. The State's obligation to ensure freedom of expression did not give private citizens or organisations an unfettered right of access to the media in order to put forward opinions. Those principles applied also to the publication of advertisements. An effective exercise of freedom of the press presupposed the right of newspapers to establish and apply their own policies in respect of the content of advertisements.

In the instant case it had not been argued, let alone shown, that the applicant had had any difficulties in publishing his book or that the authorities had tried in any way to prevent or dissuade him from publishing it or, more generally, that the media market in Poland was not pluralistic. While the issues examined in that book might contribute to a debate about the mission of the press in the Polish society, the paid advertisements proposed by the applicant had been essentially aimed at promoting the distribution and his sales and thus had been primarily designed to further the applicant's commercial interests. At no point had the applicant been prevented from disseminating information about the book by any means he wished. Indeed, he had created his own Internet website, through which he had informed the general public about the book, its content and its potential significance for the public debate. The domestic law provided an effective procedural framework within which the applicant could seek to have the substantive issues involved in his case determined by judicial authorities. The courts had carefully weighed the applicant's interests against the legitimate rights of the publishers, such as their own freedom of expression and economic freedom. Their conclusion that, in a pluralistic media market press, publishers should not be obliged to carry advertisements proposed by private parties was compatible with the freedom of expression standards under the Convention. The State had therefore not failed to comply with its obligation to secure the applicant's freedom of expression.

Conclusion: no violation (unanimously).

(See also *Appleby and Others v. the United Kingdom*, 44306/98, 6 May 2003, Information Note 53)

Freedom to receive information
Freedom to impart information

Urgent search at journalist's home involving the seizure of data storage devices containing her sources of information: *violation*

Nagla v. Latvia - 73469/10
Judgment 16.7.2013 [Section IV]

Facts – The applicant worked for the national television broadcaster where she produced and hosted a weekly investigative news programme *De Facto*. In February 2010 she was contacted by an anonymous source who revealed that there were serious security flaws in a database maintained by the State Revenue Service (VID). She informed the VID of a possible security breach and then publicly announced the data leak during a broadcast of *De Facto*. A week later her source, identifying

himself as "Neo", began to use Twitter to publish information concerning the salaries of state officials in various public institutions, and continued to do so until mid-April 2010. The VID initiated criminal proceedings and in February 2010 the investigating police interviewed the applicant as a witness. She declined to disclose the identity of her source. In May 2010 the investigating authorities established that one I.P. had been connected to the database and had made several calls to the applicant's phone number. I.P. was arrested in connection with the criminal proceedings. The same day the applicant's home was searched, and a laptop, an external hard drive, a memory card, and four flash drives were seized after a search warrant was drawn up by the investigator and authorised by a public prosecutor.

Law – Article 10: The seized data storage devices contained not only information capable of identifying the journalist's source of information but also information capable of identifying her other sources of information. Accordingly, the search at the applicant's home and the information capable of being discovered therefrom came within the sphere of protection under Article 10. There had been interference with the applicant's freedom to receive and impart information which interference was prescribed by law and pursued the aims of preventing disorder or crime and of protecting the rights of others.

The search warrant was drafted in such vague terms as to allow the seizure of "any information" pertaining to the offence allegedly committed by the journalist's source and was issued under the urgent procedure by an investigator faced with the task of classifying the crime allegedly committed by I.P. and establishing the applicant's role. These reasons were not, however, "relevant" and "sufficient" and did not correspond to a "pressing social need".

The subject-matter on which the applicant reported and in connection with which her home was searched made a twofold contribution to a public debate: keeping the public informed about the salaries paid in the public sector at a time of economic crisis and about the database of the VID which had been discovered by her source. Although it was true that the actions of her source were subject to a pending criminal investigation, the right of journalists not to disclose their sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information, to be treated with the utmost caution.

When, three months after the broadcast, the investigating authorities decided that a search of the applicant's home was necessary, they proceeded under the urgent procedure without any judicial authority having properly examined the proportionality between the public interest in the investigation and the protection of the journalist's freedom of expression. According to the national law, such a search could be envisaged only if delay might allow relevant documents or objects to be destroyed, hidden or damaged or the suspect to abscond. The ground given for an urgent search in the warrant was "to prevent the destruction, concealment or damaging of evidence" without further explanation. Information was acquired linking the applicant to I.P. in her capacity as a journalist. The applicant's last communication with I.P. was on the day of the broadcast. In these circumstances, only weighty reasons could have justified the urgency of the search. However, the assessment was carried out by the investigating judge on the day following the search and the judges who subsequently examined the applicant's complaint against the investigating judge's decision confined themselves to finding that the search did not relate to the journalist's sources at all without weighing up the conflicting interests.

Although the investigating judge's involvement in an immediate *post factum* review was provided for in the law, he failed to establish that the interests of the investigation in securing evidence were sufficient to override the public interest in the protection of the journalist's freedom of expression, including source protection and protection against the handover of the research material. The court's reasoning concerning the perishable nature of evidence linked to cybercrimes in general could not be considered sufficient, given the investigating authorities' delay in carrying out the search and the lack of any indication of the impending destruction of evidence. Nor was there any suggestion that the applicant was responsible for disseminating personal data or implicated in the events other than in her capacity as a journalist; she remained "a witness" for the purposes of these criminal proceedings. In sum, he domestic authorities had failed to give "relevant and sufficient" reasons for the interference complained of.

Conclusion: violation (unanimously).

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

ARTICLE 11

Freedom of association

Refusal to register a trade union for priests on account of the autonomy of religious communities: *no violation*

Sindicatul "Păstorul cel Bun" v. Romania - 2330/09
Judgment 9.7.2013 [GC]

Facts – In April 2008 thirty-five clergy members and lay employees of the Romanian Orthodox Church decided to form a trade union. The elected president applied to the court of first instance for the union to be granted legal personality and entered in the register of trade unions. However, the representative of the archdiocese lodged an objection. The union's representative maintained the application, which was supported by the public prosecutor's office. In May 2008 the court allowed the union's application and ordered its entry in the register, thereby granting it legal personality. The archdiocese appealed against that judgment. In a final judgment of July 2008 the county court allowed the appeal, quashed the first-instance judgment and, on the merits, refused the application for the union to be granted legal personality and entered in the register of trade unions.

In a judgment of 31 January 2012 (see Information Note 148) a Chamber of the Court held by five votes to two that there had been a violation of Article 11, finding that in the absence of a "pressing social need" and of sufficient reasons, a measure as drastic as the refusal to register the applicant union had been disproportionate to the aim pursued and therefore unnecessary in a democratic society.

Law – Article 11

(a) *Applicability* – The duties performed by the members of the trade union and the manner of their remuneration entailed many of the typical features of an employment relationship. However, the work of members of the clergy had certain special characteristics, such as its spiritual purpose, the fact that it was carried out within a church enjoying a certain degree of autonomy, and the heightened duty of loyalty towards the Church. It could therefore be a delicate task to make a precise distinction between strictly religious activities and activities of a more financial nature. However, notwithstanding their special circumstances, members of the clergy fulfilled their mission in the context of an employment relationship falling within the scope of Article 11, which was therefore applicable to the facts of the case.

(b) *Merits* – The refusal to register the applicant union amounted to interference, which had been based on the provisions of the Statute of the Romanian Orthodox Church. The domestic courts had inferred from the Statute that the establishment of Church associations and foundations was the prerogative of the Holy Synod and the archbishop's permission was required for members of the clergy to take part in any form of association whatsoever. The interference had pursued the legitimate aim of protecting the rights of others, and specifically those of the Romanian Orthodox Church.

Bearing in mind the arguments put forward by the archdiocese before the domestic courts in support of its objection to recognising the trade union, it had been reasonable for the county court to take the view that a decision to allow the union's registration would create a real risk to the autonomy of the religious community in question. In Romania, all religious denominations were entitled to adopt their own internal regulations and were thus free to make their own decisions concerning their operations, recruitment of staff and relations with their clergy. The principle of the autonomy of religious communities was the cornerstone of relations between the Romanian State and the religious communities recognised within its territory. The Romanian Orthodox Church had chosen not to incorporate into its Statute the labour law provisions which were relevant in this regard, a choice that had been approved by a Government ordinance in accordance with the principle of the autonomy of religious communities. Having regard to the aims set forth by the applicant union in its constitution – in particular those of promoting initiative, competition and freedom of expression among its members, ensuring that one of its members took part in the Holy Synod, requesting an annual financial report from the archbishop and using strikes as a means of defending its members' interests – the judicial decision refusing to register the union with a view to respecting the autonomy of religious denominations did not appear unreasonable, particularly given the State's role in preserving such autonomy. In refusing to register the applicant union, the State had simply declined to become involved in the organisation and operation of the Romanian Orthodox Church, thereby observing its duty of neutrality under Article 9 of the Convention.

The county court had refused to register the applicant union after noting that its application did not satisfy the requirements of the Church's

Statute because its members had not complied with the special procedure in place for setting up an association. The court had thus simply applied the principle of the autonomy of religious communities. It had concluded, endorsing the reasons put forward by the archdiocese, that if it were to authorise the establishment of the trade union, the consultative and deliberative bodies provided for by the Church's Statute would be replaced by or obliged to work together with a new body – the trade union – not bound by the traditions of the Church and the rules of canon law governing consultation and decision-making. The review undertaken by the court had thus confirmed that the risk alleged by the Church authorities was plausible and substantial, that the reasons they had put forward did not serve any other purpose unrelated to the exercise of the autonomy of the religious community in question, and that the refusal to register the applicant union did not go beyond what was necessary to eliminate that risk.

More generally, the Statute of the Romanian Orthodox Church did not provide for an absolute ban on members of its clergy forming trade unions to protect their legitimate rights and interests. Accordingly, there was nothing to stop the applicant union's members from availing themselves of their right under Article 11 of the Convention by forming such an association that pursued aims compatible with the Church's Statute and did not call into question the Church's traditional hierarchical structure and decision-making procedures. Moreover, the applicant union's members were free to join any of the associations currently existing within the Romanian Orthodox Church which had been authorised by the national courts and operated in accordance with the requirements of the Church's Statute.

Lastly, there was a wide variety of constitutional models governing relations between States and religious denominations in Europe. In view of the lack of a European consensus on this matter, the State enjoyed a wider margin of appreciation in this sphere, encompassing the right to decide whether or not to recognise trade unions that operated within religious communities and pursued aims that might hinder the exercise of such communities' autonomy. In conclusion, the county court's refusal to register the applicant union had not overstepped the margin of appreciation afforded to the national authorities in this sphere, and accordingly was not disproportionate.

Conclusion: no violation (eleven votes to six).

Dissolution of association involved in anti-Roma rallies and paramilitary parading:
no violation

Vona v. Hungary - 35943/10
Judgment 9.7.2013 [Section II]

Facts – The applicant was the chair of the Hungarian Guard Association ("the Association"), which was founded in May 2007 by ten members of a political party called Movement for a Better Hungary with the stated aim of preserving Hungarian traditions and culture. In July 2007 the Association founded the Hungarian Guard Movement ("the Movement"), whose objective was defined as "defending Hungary, defenceless physically, spiritually and intellectually".

Shortly after its foundation, the Movement started to carry out activities which were not in accordance with its charter, including organising the swearing-in of 56 guardsmen in Buda Castle in August 2007. The authorities requested the Association to put an end to its unlawful activities. In November 2007 the applicant notified the authorities that the unlawful activities had ceased and that the Association's charter would be modified accordingly. However, members of the Movement dressed in uniforms subsequently held rallies and demonstrations throughout Hungary, including in villages with large Roma populations, calling for the defence of ethnic Hungarians against so-called "Gipsy criminality". Following an incident in December 2007 when the police refused to allow a march to pass through a street inhabited by Roma families, the authorities sought a court order for the dissolution of the Association. This was granted in December 2008, and in July 2009 following two further demonstrations organised by the Movement, the scope of that order was extended to the latter in a judgment that was upheld by the Supreme Court.

Law

(a) *Admissibility* – Article 17: The Government had argued that the application should be declared inadmissible as being incompatible *ratione materiae* with the Convention in the light of Article 17, because the Association provided an institutional framework for expressing racial hatred against Jewish and Roma citizens. The Court noted, however, that the applicant's complaint concerned the dissolution of an association essentially on account of a demonstration which had not been declared unlawful at the domestic level and had not led to any act of violence. Those activities did not prima facie reveal any act aimed at the destruction of any of the rights and freedoms set forth in

the Convention or any intention on the part of the applicant to provide an apology or propaganda for totalitarian views. Accordingly, the application did not constitute an abuse of the right of petition for the purposes of Article 17.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – Article 11: The dissolution of the association chaired by the applicant and subsequently of the movement, constituted an interference with the applicant's right to freedom of association. The interference was prescribed by law and pursued the aims of ensuring public safety, preventing disorder and protecting the rights of others.

Although the case concerned the dissolution of an association and a movement, rather than the dissolution of a political party, the Court acknowledged that social organisations such as the applicant's could play an important role in the shaping of politics and policies. It reiterated that a State did not have to wait until a political movement had recourse to violence before intervening. Even if the political movement had not made an attempt to seize power and the danger of its policy was not sufficiently imminent, a State was entitled to take preventive measures to protect democracy as long as it was established that such a movement had started to take concrete steps in public life to implement a policy incompatible with the standards of the Convention.

Although no violence had actually occurred during the rallies, the activists had marched in villages wearing military-style uniforms in a military-like formation giving salutes and commands. Such rallies were capable of conveying the message that its organisers were willing and able to have recourse to a paramilitary organisation in order to achieve their aims. In addition, the paramilitary formation was reminiscent of the Hungarian Nazi movement (Arrow Cross), the backbone of the regime responsible for the mass extermination of Roma in Hungary. In view of historical experience – such as that of Hungary in the wake of Arrow Cross power – the reliance of an association on paramilitary demonstrations expressing racial division and implicitly calling for race-based action had to have had an intimidating effect on members of a racial minority, therefore exceeding the scope of protection under the Convention for freedom of expression or of assemblies. Indeed, such a paramilitary march had gone beyond the mere expression of a disturbing or offensive idea, given the physical presence of a threatening group of organised activists.

As regards the dissolution of the Association, it was irrelevant that the demonstrations, in isolation, had not been illegal since it was only in the light of the actual conduct of such demonstrations that the real nature and goals of the association became apparent. Indeed, a series of rallies organised to allegedly keep so-called "Gipsy criminality" at bay by paramilitary parading could have led to a policy of racial segregation being implemented. While the advocacy of anti-democratic ideas was not enough in itself for banning a political party, still less an association, the entirety of the circumstances – in particular the Movement's coordinated and planned actions – constituted sufficient and relevant reasons for such a measure. Therefore, the arguments of the Hungarian authorities had been relevant and sufficient to demonstrate that the dissolution had corresponded to a pressing social need.

The threat posed by the Movement could only be effectively eliminated by removing the organisational backup of the Movement provided by the Association. The general public could even have perceived the State as legitimising such a menace, had the authorities continued to acquiesce in the activities of the Movement and the Association by upholding their legal existence. This would have meant that the Association, benefiting from the prerogatives of a legally registered entity, could have continued to support the Movement, and that the State would have indirectly facilitated the orchestration of its campaign of rallies. Finally, since no additional sanction had been imposed on the Association or the Movement or their members, who had not been prevented from continuing political activities in other forms, the Court concluded that the dissolution had not been disproportionate.

Conclusion: no violation (unanimously).

ARTICLE 13

Effective remedy

Lack of remedy with automatic suspensive effect against a deportation order: *violation*

M.A. v. Cyprus - 41872/10
Judgment 23.7.2013 [Section IV]

(See Article 5 § 1 above, page 15)

ARTICLE 14

Discrimination (Article 8)

Unjustified difference in treatment of remand prisoners compared to convicted prisoners as regards conjugal visits: *violation*

Varnas v. Lithuania - 42615/06
Judgment 9.7.2013 [Section II]

Facts – In his application to the European Court, the applicant, who was held more than three years in pre-trial detention, complained that he had been denied conjugal visits from his wife, despite repeated requests, while convicted prisoners were allowed such visits.

Law – Article 14 in conjunction with Article 8: At the relevant time, the duration of visits for remand prisoners, such as the applicant, was shorter (two hours) than that which the law allowed in respect of a convicted person (four hours). Above all, remand prisoners had no right to conjugal visits at all, while convicted prisoners could receive long-term visits, including conjugal visits, lasting up to forty-eight hours once every three months, on special separate premises without surveillance. Moreover, the frequency of visits and the type of contact (short-term or conjugal) to which convicted prisoners were entitled differed according to the security level both of the prisoner and of the facility in which he was being held. In contrast, the restrictions on the visiting rights of remand prisoners were applicable generally, regardless of the reasons for their detention and the related security considerations. However, International instruments such as the International Covenant on Civil and Political Rights and the European Prison Rules of 1987[1] stressed the need to respect the remand prisoner's status as a person who was to be presumed innocent, while the European Prison Rules 2006 provided that unless there was a specific reason to the contrary untried prisoners should receive visits and be allowed to communicate with family and other persons in the same way as convicted prisoners. That approach was supported by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its report on its visit to Lithuania, which considered that any restriction on a remand prisoner's right to receive visits should be based on the requirements of the investigation or security considerations, applied for a limited period and be the least severe possible. In that regard the Court had already had occasion to hold that, inasmuch as it concerned restrictions on visiting rights, the aim of protecting the legitimate interests of an investigation could also be attained by other means, such as the setting up of different categories of detention, or restrictions adapted to the individual case.

As to the reasonableness of the justification for the difference in treatment between remand prisoners and convicted prisoners, security considerations relating to any criminal family links were absent in the instant case. The applicant's wife was neither a witness nor a co-accused and there was no indication that she had been involved in criminal activities. Accordingly, the Court was not persuaded that there was any particular reason to prevent conjugal visits. The Government, like the Lithuanian administrative courts, had in essence relied on the relevant statutory provisions, without any reference as to why the restrictions had been necessary and justified in the applicant's specific situation. Lastly, although the applicant had received short-term visits and so had not lost all contact with his wife, the physical contact available during those visits appeared to have been especially limited, as the couple had been separated by wire netting, except for a 20 centimetre gap used for passing food. Such limited physical interaction had further been compounded by the fact that they had been under the constant observation of a guard. The particularly long period of the applicant's pre-trial detention (two years) had reduced his family life to a degree that could not be justified by the inherent limitations involved in detention. The remand prison authorities' refusal to grant the applicant a conjugal visit had also been based on a lack of appropriate facilities. However, that reason could not withstand the Court's scrutiny. The authorities had therefore failed to provide reasonable and objective justification for the difference in treatment of remand prisoners compared to convicted prisoners and had thus acted in a discriminatory manner.

Conclusion: violation (unanimously).

Article 41: EUR 6,000 in respect of non-pecuniary damage.

(See also *Laduna v. Slovakia*, 31827/02, 13 December 2011, Information Note 147)

1. Recommendation No. R (87) 3 of the Committee of Ministers of the Council of Europe on the European Prison Rules adopted on 12 February 1987, replaced with Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe on the European Prison Rules adopted on 11 January 2006.

Discrimination (Article 2 of Protocol No. 1)

Unexpected change, without corrective transitional provisions, in rules governing access to university: *violation*

Altınay v. Turkey - 37222/04
Judgment 9.7.2013 [Section II]

Facts – In 1995 the applicant enrolled in a vocational high school specialised in communication science. Graduates from vocational training schools were able, on an equal footing with graduates from ordinary upper secondary schools, to apply to universities specialising in communication studies, which opened the door to high-level posts in the media. In July 1998 the Higher Education Council issued a circular introducing new rules on admission to university, applying a coefficient of 0.5 to the average marks scored by pupils at ordinary upper secondary schools and a coefficient of 0.2 to the marks of pupils at specialised communication schools. The applicant applied to leave the specialised school where he was studying and move to a school with a general curriculum. His application was refused. He failed the faculty of communication studies entrance examination, but calculated that without the coefficient his marks would have been good enough to pass. He appealed to the Supreme Administrative Court, which rejected his appeal. The following year it became possible for pupils from vocational training schools to switch to a school with a general curriculum, entitling them to the higher coefficient.

Law – Article 14 in conjunction with Article 2 of Protocol No. 1

(a) *Differential treatment in access to university because of the application of different coefficients to the marks of graduates from vocational training schools and graduates from ordinary high schools* – The applicant had suffered a difference of treatment in the exercise of his right of access to higher education under Article 2 of Protocol No. 1 because of the weighting system applied to the marks obtained by candidates in different types of upper secondary school.

The new selection system answered the need to guarantee a higher standard in higher education. However, in European countries the trend was to broaden access to university by extending the admission criteria beyond the usual upper secondary school diplomas to include vocational training school diplomas, for example. In vocational training schools specialising in communication science, the teaching of basic subjects like mathematics, science or the social sciences had gradually diminished to the point of disappearing altogether from the curriculum. It could be difficult for upper secondary education truncated in this way to achieve the goal of high-level vocational training. The Court thus accepted that while waiting for vocational training to attain the level required for higher education, which necessitated investment by the State in pre-university vocational training, the State could take the type of upper secondary establishment into account for the purposes of access to university. So a selection system that privileged pupils from ordinary upper secondary schools pursued the legitimate aim of improving the level of university studies.

The weighting coefficient introduced into the university admission process was applied to candidates depending on the type of upper secondary school they opted for. Pupils from vocational training schools took the national university entrance examinations on an equal footing with pupils from ordinary upper secondary schools and their exams were marked in the same way. A coefficient was then applied to their average score, the coefficient applied to pupils from vocational schools being lower than that applied to pupils from ordinary schools. Pupils entering upper secondary education could choose between a school with a general curriculum and a vocational training school where the curriculum was limited to a specific field of study. So the difference of treatment in issue, in so far as it concerned the distinction between non-specialised schools and vocational training schools was reasonably proportionate to the legitimate aim pursued, which was to improve standards in higher education.

Conclusion: no violation (five votes to two).

(b) *Differential treatment of the applicant compared with pupils who graduated from upper secondary school in the years before him, or in subsequent years, because of the introduction, several years after he had chosen to attend a vocational training school, of new conditions of access to university, with no transitional measures* – Changes had been made to the conditions of access to university without any provision for transitional measures, so the applicant had been treated differently from pupils who had graduated from upper secondary school in the years before and after him. The purpose of the immediate application of the new conditions was to rapidly improve the quality of higher education.

Regard being had to the teaching dispensed and the 0.5 coefficient generally applied until the

applicant had entered his final year of upper secondary education, the applicant had argued in good faith that he had opted to attend a school specialising in communication science in preparation for university studies in the same field and a subsequent career in journalism. The change in the conditions of access to university, placing pupils at specialised communication schools at a disadvantage when it came to going on to university to study journalism, had effectively deprived him of the possibility of entering a faculty of communication sciences. In spite of the suddenness of the change of conditions, no corrective measures had been applied to the applicant. First of all his request to move to a school with a general curriculum had been refused outright, whereas the legislation actually provided for such a possibility, but had not been applied in practice until the school year following the introduction of the new rules. Furthermore, the syllabus taught in the final year of the specialised upper secondary school the applicant had attended had not been adjusted to the new standards required for admission to a faculty of communication science. Considering the lack of foreseeability for the applicant of the change in the conditions of access to higher education, and the absence of any corrective measure applicable to his case, the difference of treatment complained of had limited the applicant's right of access to higher education, depriving it of its effect, and had therefore not been reasonably proportional to the aim pursued.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage rejected.

ARTICLE 18

Restrictions for unauthorised purposes

Allegedly politically motivated criminal proceedings against applicants: *no violation*

Khodorkovskiy and Lebedev v. Russia - 11082/06 and 13772/05
Judgment 25.7.2013 [Section I]

(See Article 7 above, page 23)

ARTICLE 34

Hinder the exercise of the right of petition

Disciplinary and other measures against the lawyers acting for applicants in case pending before European Court: *failure to comply with Article 34*

Khodorkovskiy and Lebedev v. Russia - 11082/06 and 13772/05
Judgment 25.7.2013 [Section I]

(See Article 7 above, page 23)

ARTICLE 35

Article 35 § 3

Competence *ratione materiae*

Derogation from statutory restriction, in cases pending before Committee of Ministers, on reopening of criminal trial following a finding of a violation by the Court: *inadmissible*

Hulki Güneş v. Turkey - 17210/09
Decision 2.7.2013 [Section II]

Facts – In March 1994 the State Security Court sentenced the applicant to death, which was commuted to life imprisonment. In May 1995 he applied to the European Commission of Human Rights. The application was transmitted to the European Court, which declared it admissible in October 2001. In June 2003 the Court found that there had been a violation of Articles 3 and 6 §§ 1 and 3 (d) of the Convention.[1]

In the meantime, a law enacted in January 2003 provided for the reopening of criminal proceedings following a judgment by the Court finding a violation in only two circumstances: where the Court had delivered a final judgment prior to the entry into force of the law, or where it had delivered a final judgment in respect of an application lodged after the law had entered into force. In October 2003, on the basis of the Court's judgment, and relying on the Turkish Constitution, the applicant applied to the State Security Court to have his trial reopened. It dismissed his request, holding that the

1. See the judgment *Hulki Güneş v. Turkey*, 28490/95, 19 June 2003, Information Note 54.

applicant's case was not covered by the aforementioned law, since he had lodged his application before the Strasbourg institutions in May 1995 and the Court had issued its judgment after the law's entry into force. The various appeals lodged by the applicant to have his trial reopened were unsuccessful.

Law – Article 35 § 3: With regard to the execution of the judgment and the measures which might have been taken to afford *restitutio in integrum*, the Committee of Ministers, in its Resolution CM/ResDH(2007)150, considered, in particular, that "the Court's judgment required the adoption of individual measures in view of the extent of the violations of the right to a fair trial casting serious doubts on the safety of the applicant's conviction". It had accordingly urged the Government "to remove promptly the legal lacuna preventing the reopening of domestic proceedings in the applicant's case". In that respect, subject to monitoring by the Committee of Ministers, the respondent State remained free to choose the means by which it would discharge its legal obligation under Article 46 of the Convention, provided that such means were compatible with the conclusions set out in the Court's judgment. The Court could not assume any role in this dialogue or in respect of the execution of its judgment. The Convention did not give it jurisdiction to direct a State to open a new trial or to quash a conviction. It followed that it could not find a State to be in breach of the Convention on account of its failure to take either of these courses of action when executing one of its judgments.

The Court's case-law provided examples of supervision of execution in the context of examining the merits of cases. In particular, through the concept of "a new issue", the Court could hold that it had jurisdiction to examine a case which concerned, in part, the execution of its earlier judgment. However, that consideration did not apply in this case.

The Court stressed the importance of ensuring that procedures at national level were in place which allowed a case to be revisited in the light of a finding by it that Article 6 of the Convention had been violated. Such procedures could be regarded as an important aspect of the execution of its judgments and demonstrated a State's commitment to the Convention and the Court's case-law. In that connection, the Court attached considerable weight to the fact that the law enacted on 11 April 2013 provided for a derogation from the one-year restriction imposed by the Code of Criminal Procedure on the reopening of criminal trials, in respect of those cases pending before the Committee of Ministers of the Council of Europe on 15 June 2012 with regard to monitoring of their execution. The individuals affected by that derogation, including the applicant, could request the reopening of their trials within three months of the law's entry into force on 30 April 2013.

Conclusion: inadmissible (unanimously).

ARTICLE 46

Execution of a judgment – General measures

Respondent State required to take measures to minimise risk of injury or death caused by tear gas canisters

Abdullah Yaşa and Others v. Turkey - 44827/08
Judgment 16.7.2013 [Section II]

(See Article 3 above, page 14)

Respondent State required to take all necessary and appropriate measures to ensure expeditious compliance with procedural requirements of Article 2 in cases concerning killings by the security forces in Northern Ireland

McCaughey and Others v. the United Kingdom - 43098/09
Judgment 16.7.2013 [Section IV]

(See Article 2 above, page 9)

Respondent State required to take measures to ensure respect by law-enforcement officials of right to peaceful assembly

İzci v. Turkey - 42606/05
Judgment 23.7.2013 [Section II]

Facts – On 6 March 2006 the applicant took part in a demonstration in Istanbul to celebrate Women's Day which ended in clashes between police and protesters. Video footage of the events showed police officers hitting a large number of demonstrators with truncheons and spraying them with tear gas. Women who had taken refuge in shops were dragged out by the police and beaten up. According to the report of an expert appointed by the Turkish authorities to examine the video footage, police officers had not issued any warnings to disperse demonstrators before attacking them. The demonstrators, for their part, had not tried to

respond to the attack but had only tried to flee. The applicant sustained bruising all over her body and lodged an official complaint against the police officers she considered responsible for her ill-treatment. Of a total of 54 police officers accused of causing injuries by the use of excessive force at the demonstration, 48 were acquitted for lack of evidence. The six remaining officers were sentenced to terms of imprisonment ranging from five to twenty-one months, but the proceedings against them were discontinued under the statute of limitations.

Law – The Court unanimously found violations of the substantive and procedural aspects of Article 3 of the Convention through the use of disproportionate force and lack of an effective investigation, and a violation of Article 11 on account of the failure to respect her right to freedom of assembly.

Article 46 – The Court had already found in over 40 judgments against Turkey that the heavy-handed intervention of law-enforcement officials in demonstrations had amounted to a violation of Article 3 and/or Article 11 of the Convention. The common feature of those cases was the failure of the police forces to show a certain degree of tolerance towards peaceful gatherings and, in some instances, the precipitate use of force, including tear gas, by the police. In over 20 of the judgments, the Court had already observed the failure of the Turkish investigating authorities to carry out effective investigations into allegations of ill-treatment by law-enforcement personnel during demonstrations. It further stressed that 130 applications against Turkey concerning the right to freedom of assembly and/or use of force by law-enforcement officials during demonstrations were currently pending.

Having classified these problems as "systemic", the Court requested the Turkish authorities to adopt general measures in order to prevent further similar violations in the future. In particular, it asked the Turkish authorities to take steps to ensure that the police act in accordance with Articles 3 and 11 of the Convention, that the judicial authorities conduct effective investigations into allegations of ill-treatment in conformity with the obligation under Article 3 and in such a way as to ensure the accountability of senior police officers also. Finally, the Court highlighted the need for a clearer set of rules to be adopted as regards the use of violence and weapons such as tear gas during demonstrations[1], especially against demonstrators who do not put up violent resistance.

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

ARTICLE 3 OF PROTOCOL No. 1

Vote

Automatic and indiscriminate ban on convicted prisoners' voting rights: *violation*

Anchugov and Gladkov v. Russia - 11157/04 and 15162/05
Judgment 4.7.2013 [Section I]

Facts – Both applicants were convicted of murder and other criminal offences and sentenced to death, later commuted to fifteen years' imprisonment. They were also debarred from voting, in particular, in elections to the State Duma and in presidential elections, pursuant to Article 32 § 3 of the Russian Constitution. Both applicants challenged that provision before the Russian Constitutional Court, which, however, declined to accept the complaint for examination on the grounds that it had no jurisdiction to check whether certain constitutional provisions were compatible with others.

Law – Article 3 of Protocol No. 1

(a) *Election of the Russian President* – The obligations imposed on the Contracting States by Article 3 of Protocol No. 1 did not apply to the election of a Head of State.

Conclusion: inadmissible (incompatible *ratione materiae*).

(b) *Parliamentary elections* – Article 32 § 3 of the Constitution applied automatically and indiscriminately to all convicted prisoners, regardless of the length of their sentence and irrespective of the nature or gravity of their offence or of their individual circumstances. While the Court was prepared to accept that the applicants' disenfranchisement had pursued the aims of enhancing civic responsibility and respect for the rule of law and of ensuring the proper functioning of civil society and the democratic regime, it could not accept the Government's argument regarding the

1. See in this respect the judgment in the case of *Abdullah Yaşa and Others v. Turkey*, 44827/08, 16 July 2013, summarised at page 14 of the current Information Note.

proportionality of the restrictions. Indeed, while a large category of prisoners, namely those in detention during judicial proceedings, retained their right to vote, disenfranchisement nonetheless concerned a wide range of offenders and sentences from two months – the minimum period of imprisonment following conviction in Russia – to life and from relatively minor offences to the most serious ones. Nor was there evidence that, when deciding whether or not an immediate custodial sentence should be imposed, the Russian courts took into account the fact that such a sentence would involve disenfranchisement, or that they could make a realistic assessment of the proportionality of disenfranchisement in the light of the circumstances of each case. The Court reiterated in that connection that removal of the right to vote without any ad hoc judicial decision did not, in itself, give rise to a violation of Article 3 of Protocol No. 1. The fact that the ban on prisoners' voting rights in Russia was laid down in the Constitution – the basic law of Russia adopted following a nationwide vote – rather than in an act of parliament, was irrelevant as all acts of a member State were subject to scrutiny under the Convention, regardless of the type of measure concerned. Besides, no relevant materials had been provided to the Court showing that an attempt had been made to weigh the competing interests or to assess the proportionality of a blanket ban on convicted prisoners' voting rights.

In such circumstances, the respondent Government had overstepped the margin of appreciation afforded to them in that field and failed to secure the applicants' right to vote. As regards the implementation of the judgment, the Court noted the Government's argument that the ban was imposed by a provision of the Russian Constitution which could not be amended by the Parliament and could only be revised by adopting a new Constitution, which would involve a particularly complex procedure. However, it was primarily for the Russian authorities to choose, subject to the supervision of the Committee of Ministers, the means to be used in order to bring its legislation into line with the Convention once the judgment in the instant case became final. Indeed, it was open to the Government to explore all possible ways to ensure compliance with Article 3 of Protocol No. 1, including through some form of political process or by interpreting the Russian Constitution in harmony with the Convention.

Conclusion: violation (unanimously).

Article 41: finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants.

(See also *Hirst v. the United Kingdom (no. 2)* [GC], 74025/01, 6 October 2005, Information Note 79; and *Scoppola v. Italy (no. 3)* [GC], 126/05, 22 May 2012, Information Note 152)

ARTICLE 2 OF PROTOCOL No. 4

Article 2 § 2

Freedom to leave a country

Travel restrictions on judgment debtor: *violation*

Khlyustov v. Russia - 28975/05
Judgment 11.7.2013 [Section I]

Facts – Between November 2003 and December 2005 the applicant was subject to a series of six-monthly bans on leaving the Russian Federation. The bans were imposed by decisions of the bailiffs' service on the grounds that the applicant had failed to pay a judgment debt to a third party voluntarily. The applicant had requested time to pay, in view of his financial circumstances and the fact that he had two dependent children and a sick mother.

Law – Article 2 of Protocol No. 4: The interference with the applicant's right to leave the country had been in "accordance with law" for the purpose of Article 2 of Protocol No. 4. It had had a basis in the domestic law (the 1997 Federal Act on Enforcement Proceedings and the 1996 Federal Act on Leaving and Entering the Russian Federation), which permitted temporary restrictions on the right to leave Russia of citizens who had evaded obligations imposed on them by a court. The legislation was accessible and, although it conferred a wide discretion on the bailiffs' service, sufficiently foreseeable. In any event, safeguards against arbitrary interference were provided by the fact that the bailiffs' decisions were subject to judicial review. The interference had also pursued a legitimate aim, namely the protection of the rights of others.

As regards the question of whether the interference had been "necessary in a democratic society", the Court reiterated that restrictions on movement imposed on account of unpaid debts were justified only so long as they furthered the aim of guaranteeing recovery of the debts in question. In parti-

cular, the domestic authorities had to ensure that the restrictions were, from the outset and throughout their duration, justified and proportionate and did not extend for long periods without regular re-examination of their justification.

Under the domestic legislation as interpreted by the Constitutional Court, travel restrictions could not be imposed automatically for failure to pay the judgment debt, but only once it had been established that their imposition was necessary in cases where the debtor had evaded the obligations imposed on him or her by a court. The bailiffs were obliged to issue a ruling indicating the grounds for their decision. However, in the applicant's case, the bailiffs' decision had been based solely on the ground that the applicant had not paid the judgment debt voluntarily. They had not cited any other reason and, in particular, had not stated that he had evaded payment or explained how the travel ban might serve to collect the debt. Nor had they examined the applicant's individual situation and other relevant circumstances of the case. The wording of the bailiffs' successive decisions had not evolved with the passage of time. In sum, from the outset and throughout its duration, the restriction on the applicant's freedom to leave the country had been based solely on the ground that he had not paid the judgment debt voluntarily and was extended automatically by the bailiffs' service without any reassessment of its justification. The situation had not been rectified by the domestic courts, which when reviewing the decisions of the bailiffs' service had not assessed the justification or proportionality of the travel restrictions.

In conclusion, the domestic authorities had not complied with their obligation to ensure that the interference with the applicant's right to leave his country was justified and proportionate throughout its duration.

Conclusion: violation (unanimously).

Article 41: EUR 2,000 in respect of non-pecuniary damage; claim for pecuniary damage dismissed.

(See also *Ignatov v. Bulgaria*, 50/02, 2 July 2009; and *Gochev v. Bulgaria*, 34383/03, 26 November 2009, Information Note 124)

ARTICLE 4 OF PROTOCOL No. 4

Prohibition of collective expulsion of aliens

Individual deportation orders phrased in similar terms and issued in respect of a group of immigrants after completion of asylum proceedings in respect of each of them:
no violation

M.A. v. Cyprus - 41872/10
Judgment 23.7.2013 [Section IV]

(See Article 5 § 1 above, page 15)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Jaloud v. the Netherlands - 47708/08
[Section III]

(See Article 2 above, page 9)

RULES OF COURT

On 6 May 2013 the Plenary Court adopted amendments to the following provisions of the Rules of Court:

Rule 24 – Composition of the Grand Chamber

Rule 26 – Constitution of Chambers

Rule 28 – Inability to sit, withdrawal or exemption

Rule 29 – *Ad hoc* judges

Rule 47 – Contents of an individual application

Amended Rules 24, 26, 28 and 29 entered into force on 1 July 2013. Amended Rule 47 will enter into force on 1 January 2014.

The Rules of Court can be downloaded from the Court's Internet site (www.echr.coe.int – Official texts).

COURT NEWS

Protocol No. 16

On 10 July 2013, the Committee of Ministers of the Council of Europe adopted Protocol No. 16 to the Convention. The Protocol will be opened for signature on 2 October 2013.

Protocol No. 16 allows the highest courts and tribunals of a High Contracting Party, as specified by the latter, to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

For additional information on Protocols Nos. 15 and 16, please consult the Court's Internet site (www.echr.coe.int – Official texts)

RECENT PUBLICATIONS

1. The Court in facts and figures 2012

This document contains statistics on cases dealt with by the Court in 2012, particularly judgments delivered, the subject-matter of the violations found and violations by Article and by State. It can be downloaded from the Court's Internet site (www.echr.coe.int – Information).

The ECHR in facts and figures 2012 (eng)

La CEDH en faits et chiffres 2012 (fra)

2. Publications in non-official languages

• *Translations of the Convention*

The text of the European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, is now available in Georgian, Lithuanian, Norwegian and Polish. These translations can be downloaded from the Court's Internet site (www.echr.coe.int – Official texts).

• *Thematic factsheets on the Court's case-law*

Thanks to the translations made available by the Ministry of Foreign Affairs of Romania – the Government Agent, the Court is now able to provide some of the Court's Factsheets in Romanian. Further translations of the Factsheets into Romanian will be made available on the Court's Internet site in the future (www.echr.coe.int – Press), in addition to English, French, German, Russian, Italian, Polish and Turkish.

• *Information in Japanese*[1]

Japanese translations of some information documents are now available on the Court's Internet site (www.echr.coe.int). This means that the Court's basic information documents are now available in forty-one languages, bringing information about the Convention system to an ever wider audience.

The Court in brief (jpn)

The ECHR in 50 questions (jpn)

Questions and answers (jpn)

1. Japan has had observer status with the Council of Europe since 1996.