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COUR EUROPÉENNE DES DROITS DE L'HOMME

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ARTICLE 2

Life

Decision to discontinue nutrition and hydration allowing patient in state of total dependence to be kept alive artificially: *communicated*

Lambert and Others v. France - 46043/14
[Section V]

The applicants are Vincent Lambert's parents, sister and half-brother. Vincent Lambert sustained a head injury in a road-traffic accident in 2008 as a result of which he is tetraplegic and totally dependent. He is being kept alive by artificial nutrition and hydration dispensed through a tube. Following the consultation procedure provided for by the "Leonetti" Act on the rights of patients and the ending of life, the doctor treating Vincent Lambert decided, on 11 January 2014, to discontinue the patient's nutrition and hydration from 13 January. After proceedings in which the implementation of the doctor's decision had been suspended, the *Conseil d'État*, relying on a medical expert's report in particular, declared lawful the decision taken on 11 January 2014 by the doctor treating Vincent Lambert to discontinue his artificial nutrition and hydration.

On receiving a request under Rule 39 of the Rules of Court, the Court ruled that the authorities should stay the execution of the *Conseil d'État*'s decision for the duration of the proceedings before it. The Chamber stipulated that as a result of this interim measure Vincent Lambert should not be moved for the purpose of discontinuing his nutrition or hydration.

The applicants contend, in particular, that the discontinuance of their relative's artificial nutrition and hydration runs counter to the State's obligations under Articles 2 and 3 of the Convention. Relying on Article 2 in its procedural aspect, they complain of a lack of clarity and precision in the legislation and challenge the process which led to the decision of 11 January 2014.

Communicated under Articles 2, 3 and 8 of the Convention.

Death penalty
Extradition

Extraordinary rendition to CIA of suspected terrorist facing capital charges: *violation*

Al Nashiri v. Poland - 28761/11
Judgment 24.7.2014 [Section IV]

(See Article 3 below, page 13)

Use of force

Fatal injuries caused by tear gas canister fired by member of security forces wearing a balaclava: *violation*

Ataykaya v. Turkey - 50275/08
Judgment 22.7.2014 [Section II]

Facts – In March 2006, as he was leaving his place of work, the applicant's son found himself in the middle of a demonstration and was struck in the head by one of several tear-gas canisters fired by the security forces. He died a few minutes later. Administrative and criminal investigations were carried out, but they failed to identify the person who had fired the fatal shot.

Law – Article 2 (*substantive and procedural limbs*): It had been established beyond reasonable doubt that a member of the security forces had fired at the applicant's son using a tear-gas canister launcher, wounding him in the head and causing his death. An investigation had been opened following the complaint lodged by the applicant in March 2006 but was problematic in several respects.

Firstly, the police and administrative investigations had failed to identify – and, consequently, to question – the member of the security forces who had fired the fatal shot, on the ground that his face had been masked by a balaclava. Nor had the investigative authorities been able with any certainty to ascertain how many members of the police force had been authorised to use this type of weapon at the time of the incident. Further, the prosecutor's office had merely questioned a few members of the security forces, and there had been a lack of cooperation on the part of the police authorities with the prosecutor's office responsible for the investigation; this was particularly inexplicable given that the latter's sole aim had been to obtain official information from a State agency.

As a direct result of the decision to wear balaclavas the police officers responsible for the shots had

effectively received immunity from prosecution. On account of the balaclavas, it had been impossible for the eye-witnesses to identify the police officer who had fired at the applicant's son, and impossible to question, as witnesses or suspects, all of the officers who had used canister launchers.

That fact that the eye-witnesses were unable – on account of the balaclava – to identify the officer responsible for the fatal shot was in itself troubling. Where the competent national authorities deployed masked police officers to maintain public order or carry out an arrest, those officers were required to display a distinguishing mark – such as an identification number – which, while preserving their anonymity, would make it possible to identify them for questioning should the conduct of the operation be subsequently challenged.[1]

Thus, the domestic authorities had deliberately created a situation of impunity which had prevented identification of the officers suspected of having fired the tear-gas canisters without due care, establishment of the senior officers' responsibilities and the conduct of an effective investigation. In addition, it was troubling that no information on the incident which had caused the death of the applicant's son had been included in the police records.

There had been virtually no progress in the investigation in the first year after the incident. The prosecutor's attempts to identify the police officers who had fired tear-gas canisters had not been followed up, or had been followed up only partially and with unacceptable delay. Furthermore, the prosecutor's office had delayed in questioning the applicant, the few police officers whose identity had been communicated and the eye-witnesses. In addition, the mere fact that appropriate steps had not been taken to reduce the risk of collusion amounted to a significant shortcoming in the adequacy of the investigation.[2]

Furthermore, despite a request by the applicant, no expert report had been ordered with a view to determining the manner in which the shot had been fired, especially as it appeared that it had been fired directly and in a straight line, rather than at an upward angle, and could not be considered as an appropriate action on the part of the police.[3]

At the relevant time, Turkish law had not contained any specific provisions regulating the use of non-lethal weapons, such as tear-gas canisters, during demonstrations or any guidelines concerning their use.[4] It could be inferred that the police officers had enjoyed a greater autonomy of action and have been left with more opportunities to take ill-considered action than would probably have been the case had they had the benefit of proper training and instructions. Such a situation did not provide the level of protection "by law" of the right to life that was required in modern democratic societies in Europe.

It followed that no meaningful investigation had been conducted at domestic level capable of establishing the circumstances surrounding the death of the applicant's son and that the Government had not satisfactorily shown that the use of lethal force against the applicant's son had been absolutely necessary and proportionate. The same applied to the planning and control phases of the operation; the Government had not produced any evidence to suggest that the police had taken appropriate care to ensure that any risk to life was minimised. Further, with regard to their positive obligation under the first sentence of Article 2 § 1 to put in place an adequate legislative and administrative framework, the Turkish authorities had not done all that could be reasonably expected of them, both to afford citizens, and especially those against whom potentially lethal force was used, the requisite level of safeguards and to avoid the real and immediate risk to life which police operations to suppress violent demonstrations were likely to entail.

Having regard to the foregoing considerations, it had not been established that that the use of force to which the applicant's son had been subjected had not gone beyond what was absolutely necessary. In addition, the investigation had not been effective.

Article 46

(a) *General measures* – With regard to the general measures that the State was to adopt in execution of the present judgment, the violation of the right to life of the applicant's son, as guaranteed by Article 2 of the Convention, had again[5] resulted from a lack of safeguards ensuring the correct use

1. *Hristovi v. Bulgaria*, 42697/05, 11 October 2011, Information Note 145, and Özalp *Ulusoy v. Turkey*, 9049/06, 4 June 2013.
2. *Ramsahai and Others v. the Netherlands* [GC], 52391/99, 15 May 2007, Information Note 97.
3. *Abdullah Yaşa and Others v. Turkey*, 44827/08, 16 July 2013, Information Note 165.
4. See the case of *Abdullah Yaşa and Others*, op. cit., which concerned an injury caused by a tear-gas canister fired during the same events as those which form the subject of the present case.
5. See the cases of *Abdullah Yaşa and Others* (op. cit.) and İzci *v. Turkey* (42606/05, 23 July 2013, Information Note 165).

of tear-gas canisters. In consequence, the Court stressed the need to strengthen these safeguards without further delay, in order to minimise the risks of death and injury associated with the use of tear-gas canisters. In this respect, and so long as the Turkish system did not comply with the requirements of the Convention, the inappropriate use of these potentially deadly weapons during demonstrations was likely to entail similar violations to that found in the present case.

(b) *Individual measures* – With regard to individual measures, given that the investigation file was still open at domestic level and in the light of the documents in its possession, the Court considered that new investigative measures ought to be taken under the supervision of the Committee of Ministers. In particular, the measures required from the domestic authorities in order to combat impunity had to include an effective criminal investigation aimed at the identification and, if appropriate, the punishment of those responsible for the death of the applicant's son.

Article 41: EUR 65,000 in respect of non-pecuniary damage; claim for pecuniary damage rejected.

Positive obligations (substantive aspect)

Failure to provide adequate care for HIV positive mental patient: *violation*

Centre of Legal Resources v. Romania - 47848/08
Judgment 17.7.2014 [GC]

(See Article 34 below, page 34)

Positive obligations (substantive aspect)

Death as a result of prolonged exposure to asbestos in Government run ship yard: *violation*

Brincat and Others v. Malta - 60908/11 et al.
Judgment 24.7.2014 [Section V]

Facts – The applicants were employees (or their relatives) of a Government-run ship repair yard from 1968 to 2003. They allege that they (or their relatives) were constantly and intensively exposed to asbestos particles during their employment repairing ship machinery insulated with asbestos. This resulted in damage to their health and in one case the death of one of the workers (Mr Attard) from asbestos related cancer.

In May 2009 the applicants brought constitutional redress proceedings, in which they sought compensation alleging that the State had failed to protect them (or their relatives) from unnecessary risks to their health. Their applications were ultimately dismissed in April 2011 for non-exhaustion of domestic remedies, the Constitutional Court considering that constitutional redress proceedings could only be brought after the applicants had brought civil proceedings for damages arising out of tort or contractual liability.

Law

(a) *Admissibility* – Article 35 § 1 (*exhaustion of domestic remedies*): The Government had submitted that the applicants had not exhausted domestic remedies as they had failed to institute an ordinary civil action in tort, opting instead to attempt constitutional redress proceedings. Rejecting that submission, the Court re-affirmed that in the event of a breach of Articles 2 and 3 of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies. The same had to be true of the applicants' complaint under Article 8 which in this specific case was closely connected to those provisions. The Court accordingly rejected the Government's argument that there was no general or absolute obligation on States to pay compensation for non-pecuniary damage in such cases. It considered that the domestic courts' and Government's reliance on the Court's judgment in *Zavoloka v. Latvia*[1] was based on a very broad reading of that case. In *Zavoloka* the Court held solely that there was no right to non-pecuniary damage in the specific circumstances of that case, where the applicant's daughter had died as a result of a traffic accident due to the negligence of a third party and where no responsibility, direct or indirect, could be attributed to the authorities. It therefore had to be distinguished from the applicants' case.

Noting that under Maltese law the constitutional remedy, unlike a civil action in tort, was capable, in theory at least, of affording appropriate compensatory redress in respect of both pecuniary and non-pecuniary damage, and that there was no pre-existing mandatory legal requirement to bring an action in tort before using the constitutional remedy, the Court considered that the applicants

1. *Zavoloka v. Latvia*, 58447/00, 7 July 2009, Information Note 121.

could not be blamed for having pursued one remedy instead of two.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – Articles 2 and 8: The Court reiterated that the State had a positive duty to take reasonable and appropriate measures to secure applicants' rights under Articles 2 and 8 of the Convention. In the context of dangerous activities, the scope of the positive obligations under Articles 2 and 8 of the Convention largely overlapped. Indeed, the positive obligation under Article 8 required the national authorities to take the same practical measures as those expected of them in the context of their positive obligation under Article 2.

The Court found that the Maltese Government had known or ought to have known of the dangers arising from exposure to asbestos at least from the early 1970s, given the domestic context as well as scientific and medical opinion accessible to the Government at the time. The applicants had been left without any adequate safeguards against the dangers of asbestos, either in the form of protection or information about risks, until the early 2000s by which time they had left employment at the ship repair yard. Legislation which had been passed in 1987 had not adequately regulated asbestos related activity or provide any practical measures to protect employees whose lives may have been endangered. Lastly, no adequate information was in fact provided or made accessible to the applicants during the relevant period of their careers at the shipyard.

The Court concluded that, in view of the seriousness of the threat posed by asbestos, and despite the State's margin of appreciation as to the choice of means, the Government had failed to satisfy their positive obligations, to legislate or take other practical measures under Articles 2 and 8.

Conclusions: violation of Article 2 (substantive aspect) in respect of Mr Attard (unanimously); violation of Article 8 in respect of the other applicants (unanimously).

Article 41: EUR 30,000 in respect of the claim for non-pecuniary damage under Article 2; awards ranging from EUR 1,000 to EUR 12,000 in respect of the claims for non-pecuniary damage under Article 8; claims in respect of pecuniary damage dismissed.

(See also *Öneryıldız v. Turkey* [GC], 48939/99, 30 November 2004, Information Note 69; *Roche v. the United Kingdom* [GC], 32555/96, 19 October 2005, Information Note 79; *Budayeva and Others v. Russia*, 15339/02, 20 March 2008, Information Note 106; *Kolyadenko and Others v. Russia*, 17423/05 et al., 28 February 2012; *Vilnes and Others v. Norway*, 52806/09 and 22703/10, 5 December 2013, Information Note 169; and *O'Keeffe v. Ireland* [GC], 35810/09, 28 January 2014, Information Note 170)

Positive obligations (substantive aspect)
Effective investigation

Alleged failure to carry out demining operations or to effective investigate death following explosion of antipersonnel device: *inadmissible*

Dönmez and Others v. Turkey - 20349/08
Decision 17.6.2014 [Section II]

Facts – The applicants' relative died in 2006 after treading on an anti-personnel mine while on a walk. The gendarmes drew up a report, produced a sketch map of the scene and took photographs. Autopsy and ballistics reports were issued and evidence was taken from witnesses. On completion of the preliminary investigation, the public prosecutor's office indicated members of a terrorist organisation as the suspects and forwarded the file to the prosecutor's office at the appropriate court with a view to opening a criminal investigation. The criminal proceedings are still pending before the court in question.

Law – Article 2

(a) *Substantive aspect* – The anti-personnel mine had been on a passageway used both by villagers and by soldiers going to their barracks. It had not been in a military zone or an area where mines had been laid by the authorities. It would not be reasonable to expect the national authorities to inform villagers of the risk that explosives of unknown origin might be present on this public land.

As regards the absence of demining operations, Turkey was a signatory to the Ottawa Treaty. Among the obligations it had assumed on that account was an undertaking to demine all areas where mines were known or suspected to have been laid. Turkey had until 1 March 2014 to comply with the requirements of the Treaty. The site of the explosion was not a military zone where mines had been laid by the authorities. Nor was it an area where the presence of mines might have been suspected, since it was a public pathway; an excessive burden would be placed on the authorities if they

had to inspect all roads and/or paths used by soldiers in the region. Accordingly, while the incident in question had been regrettable, it did not engage the State's responsibility.

(b) *Procedural aspect* – The authorities – the gendarmes and subsequently the public prosecutor – had acted promptly on the very day of the incident. A sketch map of the scene had been produced and a report had been issued to determine the factual circumstances surrounding the incident, bomb fragments had been collected, evidence had been taken from witnesses, an autopsy had been carried out to establish the precise cause of death and ballistics analyses had been performed on the explosive with a view to determining its origin. The authorities had therefore taken all the necessary measures to shed light on the case.

Although the investigation had not been pursued beyond the preliminary stage, the authorities had attributed the act to a terrorist organisation, and the public prosecutor's office had asked for a criminal investigation to be opened in respect of members of the organisation concerned; the proceedings were still pending before the domestic courts. Thus, although the investigation had not resulted in the identification of the killer or killers, it had not been ineffective and the relevant authorities had not failed to take action to establish the circumstances in which the applicants' relative had been killed.

Conclusion: inadmissible (manifestly ill-founded).

Effective investigation

Use of balaclava preventing identification of member of security forces responsible for fatal injuries: *violation*

Ataykaya v. Turkey - 50275/08
Judgment 22.7.2014 [Section II]

(See above, page 9)

ARTICLE 3

Torture
Effective investigation
Extradition

Torture and inhuman and degrading treatment during and following applicants' extraordinary rendition to CIA: *violations*

Al Nashiri v. Poland - 28761/11
Husayn (Abu Zubaydah) v. Poland - 7511/13
Judgments 24.7.2014 [Section IV]

Facts – Both applicants alleged that they were victims of an "extraordinary rendition" by the United States Central Intelligence Agency (CIA), that is, of apprehension and extrajudicial transfer to a secret detention site in Poland with the knowledge of the Polish authorities for the purpose of interrogation. They arrived in Poland on board the same "rendition plane" in December 2002 and were detained in a CIA operated detention facility, where they were subjected to so-called "enhanced interrogation techniques" and to "unauthorised" interrogation methods, including in Mr Al Nashiri's case: mock executions, prolonged stress positions and threats to detain and abuse members of his family. They were subsequently secretly removed from Poland (Mr Al Nashiri in June 2003 and Mr Husayn in September 2003) on rendition flights before ultimately arriving at the US Naval Base in Guantanamo Bay.

In 2011 Mr Al Nashiri was indicted to stand trial before a US military commission on capital charges. The military commissions were set up in March 2002 specifically to try "certain non-citizens in the war against terrorism", outside the US federal judicial system. The trial and review panels were composed exclusively of commissioned officers of the US armed forces. The commission rules did not exclude any evidence, including evidence obtained under torture, if it "would have probative value to a reasonable person". On 29 June 2006 the US Supreme Court ruled that the military commission "lacked power to proceed" and that the scheme had violated the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions.[1]

The circumstances surrounding the applicants' extraordinary rendition have been the subject of various reports and investigations, including reports prepared by Dick Marty, as rapporteur for the investigation conducted by the Parliamentary Assembly of the Council of Europe (PACE) into allegations of secret detention facilities being run by the CIA in several Council of Europe member States (the "Marty Reports"). The applicants also relied on a report by the CIA Inspector General[2] in 2004 that was released in heavily redacted form by the US authorities in August 2009. It shows

1. *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006).
2. "Special Review Counterterrorism Detention and Interrogation Activities September 2001-October 2003".

that they fell into the category of "High-Value Detainees" – terrorist suspects likely to be able to provide information about current terrorist threats against the United States – against whom the "enhanced interrogation techniques" were being used, which included the "waterboard technique", confinement in a box, wall-standing and other stress positions. They also referred to a 2007 report by the International Committee for the Red Cross on the treatment of "High-Value Detainees" in CIA custody, based on interviews with 14 such detainees, including Mr Al Nashiri and Mr Husayn, which describes the treatment to which they were subjected.

A criminal investigation in Poland concerning secret CIA prisons on Polish territory was opened against persons unknown in March 2008. It was extended a number of times and was still pending at the date of the Court's judgment.

Law – Article 38: The Government had refused on grounds of confidentiality and the pending criminal investigation to comply with the Court's repeated requests to produce documentary evidence.

The Court was mindful that the evidence requested was liable to be of a sensitive nature or might give rise to national-security concerns and for that reason had from the start given the Government an explicit guarantee as to the confidentiality of any sensitive materials produced. It had imposed confidentiality on the parties' written submissions and had held a separate hearing *in camera*, devoted exclusively to matters of evidence.

The Court did not accept the Government's view that the Court's rules of procedure did not offer sufficient safeguards of confidentiality. The obligations the Contracting States took upon themselves under the Convention read as a whole included their undertaking to comply with the procedure as set by the Court under the Convention and the Rules of Court. The Rules of Court were not, as the Government had maintained, a mere "act of an internal nature" but emanated from the Court's treaty-given power set forth in Article 25 (d) of the Convention to adopt its own rules regarding the conduct of the judicial proceedings before it. The absence of specific, detailed provisions for processing confidential, secret or otherwise sensitive information in the Rules did not mean that the Court operated in a vacuum. On the contrary, over many years the Convention institutions had established sound practice in handling cases involving highly sensitive matters, including national-security related issues. The Court was sufficiently well equipped to address adequately any concerns involved in processing confidential evidence by adopting a wide range of practical arrangements adjusted to the particular circumstances of a given case.

Nor could the Court accept the Government's plea that the domestic regulations on the secrecy of investigations constituted a legal barrier to the discharge of their obligation to furnish evidence. A Government could not rely on national laws or domestic legal impediments to justify a refusal to comply with evidential requests by the Court. In particular, the Court could not be required to obtain permission from the investigating prosecutor to consult the case file. In sum, it was the Government's responsibility to ensure that the documents requested were prepared by the prosecution authority and submitted either in their entirety or, as directed, at least in a redacted form, within the prescribed time-limit and in the manner indicated by the Court. The failure to submit this information had to be seen as hindering the Court's tasks under Article 38.

Conclusion: failure to comply with Article 38 (unanimously).

Establishment of the facts

Having regard to the materials before it, including the expert and witness evidence and the international inquiries and reports, the Court found it established beyond reasonable doubt that the applicants had arrived in Poland on board a CIA rendition aircraft on 5 December 2002, had been detained in a CIA detention facility where they were subjected to unauthorised interrogation techniques and had subsequently been transferred from Poland on a CIA rendition aircraft in June and September 2003 respectively.

It also found that Poland had known of the nature and purposes of the CIA's activities on its territory at the material time. Poland had cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory by enabling the CIA to use its airspace and the airport, by its complicity in disguising the movements of rendition aircraft and by providing logistics and services, including special security arrangements, a special procedure for landings, the transportation of CIA teams with detainees on land, and the securing of the base for the secret detention. Having regard to the widespread public information about ill-treatment and abuse of detained terrorist suspects in the custody of the US authorities, Poland ought to have known that, by

enabling the CIA to detain such persons on its territory, it was exposing them to a serious risk of treatment contrary to the Convention.

Article 3

(a) *Procedural aspect* – The investigation into the allegations concerning the existence of a CIA secret detention facility in Poland was only opened in March 2008 some six years after the applicants' detention and ill-treatment, despite the Polish authorities' knowledge of the nature and purposes of the CIA's activities on their territory between December 2002 and September 2003. However, at that time they had done nothing to prevent such activities, let alone inquire into whether they were compatible with the national law and Poland's international obligations. More than six years later the investigation – against persons unknown – was still pending and there had been no official confirmation that criminal charges had been brought. This failure to inquire on the part of the Polish authorities could be explained only by the fact that the activities were to remain a secret shared exclusively by the US and Polish intelligence services.

These were cases in which the importance and the gravity of the issues involved – allegations of serious human-rights violations, questions of the legality and the legitimacy of the activities – had required particularly intense public scrutiny of the investigation. Securing proper accountability of those responsible for the alleged, unlawful action was instrumental in maintaining confidence in the Polish State institutions' adherence to the rule of law and the Polish public had a legitimate interest in being informed of the investigation and its results. The case also raised a more general problem of democratic oversight of intelligence services and the need for appropriate safeguards – both in law and in practice – against violations of Convention rights by intelligence services, notably in the pursuit of their covert operations. The circumstances of the instant case could raise concerns as to whether the Polish legal order fulfilled that requirement.

In the light of all these considerations, the Court held that the proceedings had failed to meet the requirements of a "prompt", "thorough" and "effective" investigation for the purposes of Article 3 of the Convention.

Conclusion: violations (unanimously).

(b) *Substantive aspect* – The treatment to which the applicants had been subjected by the CIA during their detention in Poland had amounted to torture. It was true that the interrogations and, therefore, the ill-treatment of the applicants at the detention facility had been the exclusive responsibility of the CIA and it was unlikely that the Polish officials had witnessed or known exactly what had happened inside it. However, under Article 1 of the Convention, taken together with Article 3, Poland had been required to take measures to ensure that individuals within its jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment. For all practical purposes, Poland had facilitated the whole process, had created the conditions for it to happen and had made no attempt to prevent it from occurring. Accordingly, the Polish State, on account of its acquiescence and connivance in the CIA rendition programme had to be regarded as responsible for the violation of the applicants' rights committed on its territory.

Furthermore, Poland had been aware that the transfer of the applicants to and from its territory was effected by means of "extraordinary rendition". Consequently, by enabling the CIA to transfer the applicants to other secret detention facilities, the Polish authorities had exposed them to a foreseeable serious risk of further ill-treatment and conditions of detention in breach of Article 3.

Conclusion: violations (unanimously).

Article 5: The secret detention of terrorist suspects was a fundamental feature of the CIA rendition programme. The rendition operations largely depended on the cooperation, assistance and active involvement of the countries which put at the US's disposal their airspace, airports for the landing of aircraft transporting CIA prisoners and, premises on which the prisoners could be securely detained and interrogated. Such cooperation and assistance in the form of customising premises for the CIA's needs, ensuring security and providing logistics were the necessary condition for the effective operation of the CIA secret detention facilities.

In addition, the Court's finding under Article 3 that by enabling the CIA to transfer the applicants to its secret detention facilities overseas Poland had exposed them to a foreseeable serious risk of non-Convention compliant conditions of detention also applied to the complaint under Article 5.

Poland's responsibility was thus engaged in respect of both the applicant's detention on its territory and his transfer from Poland.

Conclusion: violations (unanimously).

Article 6 § 1: At the time of the applicants' transfer from Poland there was a real risk that their trial before the US military commission would amount to a flagrant denial of justice for three reasons. First,

the commission did not offer guarantees of impartiality or independence as required of a "tribunal" under the Court's case-law; second, it did not have legitimacy under US and international law (the US Supreme Court had ruled that it lacked the "power to proceed") and so for the purposes of Article 6 § 1 was not "established by law"; third, there was a sufficiently high probability of evidence obtained under torture being admitted in trials against terrorist suspects.

The Polish authorities must have been aware at the time that any terrorist suspect would be tried by the military commission and of the circumstances that had given rise to the grave concerns expressed worldwide about that institution, notably in a PACE Resolution of 26 June 2003.[3]

Consequently, Poland's cooperation and assistance in the applicants' transfer from its territory, despite a real and foreseeable risk that they could face a flagrant denial of justice, had engaged its responsibility under Article 6 § 1.

Conclusion: violations (unanimously).

Articles 2 and 3 of the Convention in conjunction with Article 1 of Protocol No. 6 (*Al Nashiri* only): At the time of Mr Al Nashiri's transfer from Poland there was a substantial and foreseeable risk that he would be subjected to the death penalty following his trial before the military commission. Given that he was indicted on capital charges on 20 April 2011, that risk had not diminished.

Conclusion: violation (unanimously).

The Court also found, unanimously, violations of Article 8 of the Convention in that the interference with the applicants' right to respect for their private and family life had not been in accordance with the law and lacked any justification, and of Article 13 in conjunction with Article 3 in that the criminal investigation had fallen short of the standards of an effective investigation and had thus denied the applicants an "effective remedy".

Article 46 (*Al Nashiri* case): In order to comply with its obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 6 to the Convention, Poland was required to seek to remove, as soon as possible, the risk that Mr Al Nashiri would be subjected to the death penalty by seeking assurances from the US authorities that it would not be imposed.

Article 41: EUR 100,000 each in respect of non-pecuniary damage.

(For more information on secret detention sites and on death penalty abolition, see the Court's factsheets at <www.echr.coe.int> – Press)

Degrading treatment

Use of metal cage to hold defendants during criminal trial: *violation*

Svinarenko and Slyadnev v. Russia - 32541/08 and 43441/08
Judgment 17.7.2014 [GC]

Facts – Both applicants were charged with criminal offences including robbery. In a series of court appearances during the trial proceedings, they were confined in a caged enclosure measuring about 1.5 by 2.5 metres and formed by metal rods on four sides and a wire ceiling.

In a judgment of 11 December 2012, a Chamber of the Court held unanimously that their confinement to the cage had constituted degrading treatment in breach of Article 3 of the Convention.

Law – Article 3: The Government submitted that recourse to a cage had been justified to ensure proper conditions for holding the trial, having regard to the violent nature of the offences charged, the applicants' criminal records and the victims' and witnesses' fears of the applicants.

The Court observed that while order and security in the courtroom were indispensable for the proper administration of justice, the means used to achieve that end must not involve measures of restraint of such severity as to bring them within the scope of Article 3, which prohibited torture and inhuman or degrading treatment or punishment in absolute terms.

The applicants had been tried in open court by a jury. The hearings had been attended by some 70 witnesses. In these circumstances, their exposure to the public eye in a cage must have undermined their image and aroused in them feelings of humiliation, helplessness, fear, anguish and inferiority. They had been subjected to this treatment throughout the trial, which had lasted for over a year, with several hearings almost every month. They must also have had objectively justified fears that their exposure in a cage would undermine the presumption of innocence by conveying to the judges the impression that they were dangerous. The Court found no convincing arguments to show

3. Parliamentary Assembly of the Council of Europe Resolution no. 1340 (2003) on rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay, 26 June 2003.

that holding a defendant in a cage during a trial was a necessary means of physically restraining him, preventing his escape, dealing with disorderly or aggressive behaviour, or protecting him against aggression from the outside. Its continued practice could therefore only be understood as a means of degrading and humiliating the caged person. Accordingly, the applicants had been subjected to distress of an intensity exceeding the unavoidable level of suffering inherent in their detention during a court appearance, and their confinement in a cage had attained the "minimum level of severity" to bring it within the scope of Article 3.

A series of Chamber judgments had in recent years found a violation of Article 3 in cases where the use of a cage was not justified by security considerations. However, the Grand Chamber did not consider that the use of cages in this context could ever be justified under Article 3. In any event, even assuming it could be, the Government's allegation that the applicants represented a threat to security had not been substantiated.

The Court reiterated that the very essence of the Convention was respect for human dignity and that the object and purpose of the Convention as an instrument for the protection of individual human beings required that its provisions were interpreted and applied so as to make its safeguards practical and effective. In view of its objectively degrading nature, holding a person in a metal cage during trial in itself constituted an affront to human dignity. The applicants' confinement in a metal cage in the courtroom had thus amounted to degrading treatment in breach of Article 3.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 6 § 1 on account of the length of the criminal proceedings.

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

Inhuman or degrading punishment

Whole-life prison regime offering inadequate opportunities of rehabilitation to obtain reduction in sentence: *violation*

Harakchiev and Tolumov v. Bulgaria - 15018/11 and 61199/12
Judgment 8.7.2014 [Section IV]

Facts – The two applicants were serving sentences of life imprisonment, the first applicant without commutation, the second with commutation. Both applicants were held under the strict detention regime applicable to life prisoners, which entailed confinement to permanently locked cells for the greater part of the day and isolation from other prisoners. In their applications to the European Court, they complained of their conditions of detention (Article 3 of the Convention) and of the lack of an effective domestic remedy (Article 13).

In addition, the first applicant complained that his life sentence without commutation and no prospects of rehabilitation amounted to inhuman and degrading punishment in breach of Article 3. The sentence of life imprisonment without commutation was introduced in Bulgaria in December 1998 following the abolition of the death penalty. It exists alongside the penalty of "simple" life imprisonment, which is commutable. With effect from 13 October 2006 the Bulgarian President's discretionary power of clemency has included the power to commute all life sentences, including those imposed without commutation. In 2012 the Bulgarian Constitutional Court[1] ruled that the power of clemency had to be exercised in a non-arbitrary way, subject to the duty to give effect to the constitutional values and principles and to take into account equity, humanity, compassion, mercy, the health and family situation of the convict and any positive changes in the convict's personality. A Clemency Commission was set up in 2012 to advise on the exercise of the power of clemency, and laid down rules of procedure governing its work.

Law – Article 3

(a) *Conditions of detention (both applicants)* – The applicants had remained in permanently locked cells and isolated from the rest of the prison population throughout the entire period of their incarceration. They were confined to their cells for 21 to 22 hours a day, unable to interact with other inmates, even those housed in the same units. The automatic segregation of life prisoners from the rest of the prison population and from each other, in particular where no comprehensive out-of-cell activities or in-cell stimulus are available, could in itself raise an issue under Article 3 of the Convention. There was no evidence that either applicant could be regarded as dangerous to the point of requiring such stringent measures. Indeed, the applicants' isolation appeared to a great extent to be the result of the automatic application of the domestic legal provisions regulating the prison

1. Decision no. 6 of 11 April 2012.

regime rather than any security concerns as to their behaviour. In addition the applicants had limited access to outdoor exercise and reasonable activities, and since they were only allowed out of their cells to use the toilet three times a day they had to resort to the use of buckets.

The distress and hardship endured by the applicants as a result of the cumulative effect of their conditions of detention and the period of detention (respectively 12 and 14 years) had thus exceeded the unavoidable level of suffering inherent in detention and went beyond the minimum threshold of severity required for a breach of Article 3. It constituted inhuman and degrading treatment.

Conclusion: violation (unanimously).

(b) *Life imprisonment without commutation (first applicant)* – The Court reiterated that the imposition of an irreducible life sentence could raise an issue under Article 3. However, a life sentence did not become "irreducible" by the mere fact that in practice it could be served in full: it was enough for the purposes of Article 3 that such a sentence be *de jure* and *de facto* reducible.[2] In order to remain compatible with Article 3 a life sentence had to offer both a prospect of release and a possibility of review because a prisoner could not be detained unless there were legitimate penological grounds, which included rehabilitation, for his incarceration. A whole life prisoner was entitled to know at the outset of his sentence what he or she would have to do to be considered for release and under what conditions, including when a review of his sentence would take place or may be sought.[3]

While it was clear that the first applicant's sentence had been *de jure* reducible since the amendment to the law in 2006, the position before that date was less clear. But irrespective of the question of *de jure* reducibility, the Court was not persuaded that throughout the relevant period the sentence was *de facto* reducible or that the first applicant could have known that a mechanism existed to permit him to be considered for release or commutation.

From the time the first applicant's sentence became final in November 2004 until the beginning of 2012, the way the presidential power of clemency was exercised was opaque with no policy statements made publicly available and no reasons provided for individual clemency decisions. The process lacked any formal or even informal safeguards and there were there no concrete examples of a person serving a sentence of life imprisonment without commutation having been able to obtain an adjustment of sentence during that time.

Since the reforms introduced in 2012 as a result of the decisions of the new President, the practice of the Clemency Commission and the Constitutional Court's decision of 11 April 2012, there was considerable clarity about the manner of exercise of the presidential power of clemency, such that the first applicant could now be regarded as knowing that a mechanism existed to enable him to be considered for release or commutation.

However, the Court also had to consider whether the first applicant had been given a genuine opportunity to reform. While the Convention did not guarantee, as such, a right to rehabilitation, and while Article 3 did not impose on the authorities an absolute duty to provide prisoners with rehabilitation or reintegration programmes and activities, it did require the authorities to give life prisoners a chance, however remote, to someday regain their freedom. For that chance to be genuine and tangible, the authorities also had to give life prisoners a proper opportunity to rehabilitate themselves. Although the States enjoyed a wide margin of appreciation in this sphere, the regime and conditions of a life prisoner's incarceration could not be considered a matter of indifference. The first applicant had been subjected to a particularly stringent prison regime, with almost complete isolation and very limited possibilities for social contact. The deleterious effects of that impoverished regime, coupled with the unsatisfactory material conditions in which he was held, must have seriously weakened the possibility of his reforming and thus entertaining a real hope that he might one day achieve and demonstrate his progress and obtain a reduction of sentence. To that should be added the lack of consistent periodical assessment of his progress towards rehabilitation. Accordingly, his life sentence could not be regarded as *de facto* reducible in the period following the 2012 reforms.

Conclusion: violation (unanimously).

The Court also found (unanimously) a breach of Article 13 on account of the lack of an effective remedy under Bulgarian law for the applicants to complain of their conditions of detention.

Article 46: In order to properly implement the judgment Bulgaria should reform, preferably by means of legislation, the legal framework governing the prison regime applicable to persons sentenced

2. *Kafkaris v. Cyprus* [GC], 21906/04, 12 February 2008, Information Note 105.
3. *Vinter and Others v. the United Kingdom* [GC], 66069/09, 130/10 and 3896/10, 9 July 2013, Information Note 165.

to life imprisonment with or without parole addressing, in particular, the automatic imposition of a highly restrictive prison regime and isolation on all life prisoners.

Article 41: EUR 4,000 to the first applicant and EUR 3,000 to the second applicant in respect of the non-pecuniary damage flowing from their conditions of detention; finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage the first applicant had suffered as a result of being unable to obtain a reduction of his sentence of life imprisonment without commutation.

Effective investigation

Repeated failure by investigative committee to open criminal case into credible allegations of police ill-treatment: *violation*

Lyapin v. Russia - 46956/09
Judgment 24.7.2014 [Section I]

Facts – In April 2008 the applicant was arrested in connection with an investigation into a series of thefts. He alleges that while in police custody he was gagged, tied up with a rope, punched, kicked and subjected to electric shocks for almost 12 hours. Although an investigative committee carried out a pre-investigation inquiry into his injuries it repeatedly refused to open a criminal case, which would have allowed the investigators to use the full range of investigative measures available. The applicant's appeal against the committee's tenth refusal in December 2009 was dismissed by the domestic courts, which considered that the pre-investigation inquiry had been thorough and the decision lawful and reasoned.

Law – Article 3

(a) *Substantive aspect* – The applicant had suffered various acts of physical violence that had caused him intense physical and mental suffering. Subjecting him to electric shocks and tying him up in a painful position would have had required a certain preparation and knowledge on the part of the police officers, who had intentionally meted out such treatment to extract a confession. Such treatment amounted to torture.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – The pre-investigation inquiry served as the initial stage in dealing with a criminal complaint under the Russian law of criminal procedure. The inquiry had to be carried out expediently and, if it disclosed elements of a criminal offence, was followed by the opening of a criminal case and a criminal investigation.

In the applicant's case, however, owing to its repeated refusal over a 20-month period to open a criminal case, despite credible medical evidence in support of the applicant's allegations of ill-treatment, the investigative committee had never conducted a "preliminary investigation" into the applicant's complaint, that is, a fully-fledged criminal investigation in which the whole range of investigative measures were carried out. As a result, police officers who could have shed light on the events had never been questioned as witnesses subject to criminal liability for perjury or for refusing to testify, and it had not been possible to hold a confrontation or an identity parade.

The "pre-investigation inquiry" alone was not capable of establishing the facts and leading to the punishment of those responsible since the opening of a criminal case and a criminal investigation were prerequisites for bringing charges which could then be examined by a court. Confronted with numerous cases of this kind against Russia, the Court was bound to draw stronger inferences from the mere fact of the investigative authority's refusal to open a criminal investigation into credible allegations of serious ill treatment in police custody.

The investigative committee's failure to discharge its duty to carry out an effective investigation had not been remedied by the domestic courts which had reviewed its decisions. In the first set of proceedings they had declined to carry out a judicial review on the grounds that criminal proceedings were pending against the applicant. In another set of proceedings their decision had not been executed by the investigative committee, which had meant that the defect identified by the courts had continued to reappear in the committee's seven subsequent decisions throughout the following year. Lastly, the domestic court had, without exercising any independent scrutiny, upheld the investigative committee's decision not to open a criminal case.

There had thus been a violation of Article 3 under its procedural aspect.

Conclusion: violation (unanimously).

Article 41: EUR 45,000 in respect of non-pecuniary damage.

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Detention during and following operation involving extraordinary rendition to CIA: *violations*

Al Nashiri v. Poland - 28761/11
Husayn (Abu Zubaydah) v. Poland - 7511/13
Judgments 24.7.2014 [Section IV]

(See Article 3 above, page 13)

Continued imprisonment without review under "wholly punitive" life sentence: *inadmissible*

Lynch and Whelan v. Ireland -
70495/10 and 74565/10
Decision 8.7.2014 [Section V]

Facts – The applicants were serving life sentences for murder. Mr Lynch was convicted of murder in 1997 and given the sentence of life imprisonment that is mandatory in Irish law. His detention was reviewed on a number of occasions by the Parole Board and in September 2012 it recommended his placement on a temporary release programme, which has since commenced. Mr Whelan was convicted of murder and attempted murder in 2002 and given consecutive 15year and life sentences.

In their applications to the European Court both applicants complained that their continuing imprisonment violated Article 5 § 1 of the Convention as no there was no form of review available to them to test whether it was still justified by their original convictions. They further argued under Article 6 § 1 of the Convention that the power of the Minister to grant temporary release meant that the executive was effectively determining the duration of their sentence, contrary to their right to be tried by an independent and impartial tribunal.

Mr Whelan's application was declared inadmissible as being out of time.

Law

Article 5 § 1: The Court noted that Mr Lynch's trial and detention had been in full conformity with Irish law.

The Court next considered his argument that his sentence was not wholly punitive as in most cases such prisoners were in practice granted temporary release. In its view, this did not belie what the Supreme Court also termed the "exclusively punitive" nature of the applicant's sentence. In Ireland a mandatory life sentence for the crime of murder had as its sole purpose the punishment of the offender. There was no 'tariff period' which a prisoner must serve. Temporary release did not as a matter of domestic law terminate the sentence imposed upon the prisoner following conviction.

Mr Lynch's situation was clearly distinguishable from that in *Stafford v. the United Kingdom* in which a life prisoner who had been released on licence complained to the Court that 30 years after his conviction, and because of more recent, lesser offences, he had been recalled and remained in prison by decision of the executive to maintain the revocation of his licence. In Mr Lynch's case, there had been no interruption in incarceration that could be viewed as rupturing the link between the original conviction and present detention and his detention was not based on any administrative withdrawal of the privilege of temporary release.

The discretionary power of the executive to grant temporary release to a life prisoner was not inconsistent with the solely punitive character of a mandatory life sentence, as expounded by the Irish courts. Nor could it be said to give rise to any uncertainty as regards Mr Lynch's legal status such as would raise an issue of quality of law or respect for the rule of law.

Accordingly, the causal connection between Mr Lynch's conviction of murder in 1997 and his imprisonment from that point on was both clear and sufficient. His detention remained in conformity with the original life sentence imposed on him. Finding no sign of any arbitrariness, the Court was satisfied that the applicant's detention was justified under Article 5 § 1.

Conclusion: inadmissible (manifestly ill-founded).

Article 5 § 4: Preventative considerations were not part of Irish criminal law generally, *a fortiori* when it came to the imposition of a mandatory life sentence. The existence of an executive power of

temporary release, which took account of factors of security and risk and which was routinely exercised, did not entitle Mr Lynch to a judicial procedure to test the ongoing legality of his current imprisonment. In any event, the power of the Minister was subject to legal safeguards. The Convention did not require any further review of the lawfulness of the detention.

Conclusion: inadmissible (manifestly ill-founded).

Article 6 § 1: Mr Lynch also complained that, in view of the executive power of temporary release, the criminal proceedings against him had not been conducted in accordance with his right to be tried by an independent and impartial tribunal. The Court rejected Mr Lynch's argument that it was the Minister who determined the duration of his imprisonment. It found that the criminal charges against him were determined on the day his appeal against conviction was dismissed in 1998. The involvement of the Minister did not come until many years after the trial and it was artificial to suggest that the mandatory life sentence given to the first applicant for the crime of murder remained "unfixed" until he was eventually released by ministerial decision.

Conclusion: inadmissible (manifestly ill-founded).

(See *Stafford v. the United Kingdom* [GC], 46295/99, 28 May 2002)

Article 5 § 1 (f)

Expulsion

Detention pending removal despite lack of realistic prospect of expulsion and lack of diligence by authorities in conduct of the proceedings: *violation*

Kim v. Russia - 44260/13
Judgment 17.7.2014 [Section I]

(See Article 46 below, page 42)

Article 5 § 3

Length of pre-trial detention
Reasonableness of pre-trial detention

Pre-trial detention for over a year of investigative journalists accused of aiding and abetting a criminal organisation: *violation*

Nedim Şener v. Turkey - 38270/11
Şık v. Turkey - 53413/11
Judgments 8.7.2014 [Section II]

Facts – The applicants are two investigative journalists who have won numerous awards for their work. In March 2011 the police searched the applicants' homes and took them both into police custody. They were accused, in particular, of having been involved in the production of publications criticising the government and/or serving as propaganda for the criminal organisation Ergenekon, whose members were convicted in 2013 of fomenting a *coup d'*état. The applicants were not released until March 2012.

Law – Article 5 § 3: The period of detention to be taken into consideration had lasted for one year and one week. When they were arrested the applicants had been informed that they had allegedly contributed, at the request of the suspected members of a criminal organisation, to the production of books criticising the actions of the government and the judicial authorities. That accusation, provided for by Article 100 § 3 of the Code of Criminal Procedure, entailed a presumption in favour of keeping the persons concerned in pre-trial detention. However, the offence of bringing pressure to bear on the judicial authorities in charge of a criminal investigation, at the request of a criminal organisation, had been at the core of the charges brought against the applicants and it was on that basis that they had been held in pre-trial detention for over a year. That offence, however, was not among those referred to in Article 100 § 3 of the Code of Criminal Procedure. Furthermore, no reasons had been given for the decisions ordering the applicants' continued detention. While the lack of detailed reasons might be explained by the fact that the main charge entailed a legal presumption, it meant, in the context of the review required by Article 5 § 3 of the Convention, that no specific evidence had been provided demonstrating the need to keep the applicants in pre-trial detention. Lastly, the applicants had also been accused of using "black propaganda" methods, although that offence as such was not punishable under the Criminal Code. Moreover, the books in question were on sale to the public and it had not been shown that they contained, beyond value judgments formulated in an abrupt or provocative manner, statements made by the author in bad faith and based on untrue facts, which were not normally protected by freedom of expression. In any event, even if the books had contained such passages, the offences of def-

amation or bringing pressure to bear on the judiciary were less serious in nature than the crimes of belonging to or aiding and abetting a terrorist organisation, and did not warrant such a lengthy period of pre-trial detention. Furthermore, the continued pre-trial detention of one of the applicants had been requested and ordered by the very judicial bodies whose conduct was criticised in the book in question. That measure, which was contrary to the general legal principle according to which no man should be the judge of his own cause, appeared to have been motivated more by a desire to punish those who had criticised the Ergenekon trial than by the aim of bringing the suspected perpetrators of terrorist acts to justice.

Accordingly, in classifying the offences of which the applicants were accused as serious terrorist offences from the outset of the investigation and therefore applying the legal presumption in favour of keeping them in pre-trial detention, the authorities had not provided "relevant and sufficient" reasons to justify detaining the applicants for the period in question.

Conclusion: violation (unanimously).

Article 10: The applicants' pre-trial detention in the context of criminal proceedings for offences which carried a heavy sentence did not constitute a purely hypothetical risk but was a real and effective constraint and thus amounted to "interference" with the exercise of their right to freedom of expression. The Government argued that the interference in question had been aimed at preventing crime and safeguarding the authority, independence and impartiality of the judiciary. The Court wondered whether the aim had not been rather to stifle any criticism of, or commentary on, the conduct of a trial that had already been the subject of widespread public debate. However, in the light of its finding as to the necessity of the interference, it considered that this question could be left open. In view of their nature and severity, the measures taken against the applicants constituted interference that was disproportionate to the legitimate aims pursued by Article 10 of the Convention. In detaining the applicants for such a lengthy period without relevant or sufficient reasons, the judicial authorities had had a chilling effect on the applicants' willingness to express their views on matters of public interest. Applying such a measure was liable to create a climate of self-censorship for the applicants and for any investigative journalist planning to carry out research and comment on the conduct and actions of State bodies.

Conclusion: violation (unanimously).

The Court also held unanimously that there had been a violation of Article 5 § 4 on account of the applicants' inability to consult the files.

Article 41: EUR 20,000 to Mr. Şener and EUR 10,000 to Mr Şık in respect of non-pecuniary damage.

ARTICLE 6

Article 6 § 1 (criminal)

Fair hearing

Extraordinary rendition to CIA despite real risk of flagrantly unfair trial before US military commission: *violations*

Al Nashiri v. Poland - 28761/11
Husayn (Abu Zubaydah) v. Poland - 7511/13
Judgments 24.7.2014 [Section IV]

(See Article 3 above, page 13)

ARTICLE 7

Article 7 § 1

Nullum crimen sine lege

Use of undefined colloquial expression in definition of criminal offence: *no violation*

Ashlarba v. Georgia - 45554/08
Judgment 15.7.2014 [Section IV]

Facts – In 2005 the Georgian legislature created a series of new offences designed to assist in the fight against organised crime. As part of a wider legislative package Article 223(1) of the Criminal Code was amended to make it an offence to be a member of the "thieves' underworld" or a "thief in law". Although neither expression was defined in the Code, they were explained in other legislation that was introduced the same day (Law on Organised Crime and Racketeering). The expressions were also known within Georgian society as referring to the professional criminal underworld and 'Godfather' type figures among the criminal elite.

In 2007 the applicant was convicted of being a member of the "thieves' underworld" under Article 223(1) of the Criminal Code and sentenced to seven years' imprisonment. In his application to the European Court, he complained under Article 7 of the Convention that that provision was not sufficiently precise or foreseeable to enable him to determine what conduct constituted an offence.

Law – Article 7: The Court reiterated that Article 7 § 1 requires that an offence, and its penalties, must be clearly defined by law. Individuals must be able to know from the wording of the relevant provision what acts and omissions will make them criminally liable.

The applicant had been convicted under Article 223(1) of the Criminal Code of being a member of the "thieves' underworld", a term not defined in the Criminal Code itself. The Court noted, however, that the influence exerted in Georgian society by the "thieves' underworld" was not only confined to the prison sector, but extended to the public at large and in particular vulnerable members of society such as young people. The rationale behind the decision to create specific laws concerning the milieu in question was to allow the State to more effectively combat these dangerous criminal syndicates which not only affected the criminal underworld, but also contaminated many aspects of ordinary public life. Indeed, studies and submissions supplied by the Government on the impact of the "thieves' underworld" showed that this criminal phenomenon was deeply rooted in society, and that concepts such as "thieves' underworld" and "thief-in-law" were common knowledge, and widely understood by the public.

Consequently, the offences introduced by Article 223(1) had merely criminalised concepts whose meaning was already well known to the general public. In the Court's view, the Georgian legislature had opted to use colloquial terms in the legal definitions because it wished to ensure that the essence of the offences would be grasped more easily by the public at large. The Court did not accept that these concepts were entirely foreign to the applicant, especially as he had expressly suggested the contrary in his depositions during the domestic investigations.

Most importantly, Article 223(1) of the Criminal Code was part of a wider legislative package enacted on the same day which included the Law on Organised Crime and Racketeering. Section 3 of that Law comprehensively explained the definitions of terms such as "thieves' underworld" and "thief-in-law". When read in conjunction with that Law, Article 223(1) of the Criminal Code conveyed to the ordinary reader all the necessary constituent elements of the two criminal offences relating to the functioning of the "thieves' underworld". Accordingly, if not through common knowledge, then by reference to section 3 of the Law on Organised Crime and Racketeering and, if need be, with the assistance of appropriate legal advice, the applicant could easily have foreseen which of his actions would have attracted criminal responsibility under Article 223(1) of the Criminal Code.

Conclusion: no violation (unanimously).

ARTICLE 8

Respect for private and family life
Positive obligations

Refusal to give applicant female identity number following sex change unless marriage was transformed into a civil partnership:
no violation

Hämäläinen v. Finland - 37359/09
Judgment 16.7.2014 [GC]

Facts – Under Finnish law marriage is only permitted between persons of opposite sex. However, while same-sex couples are not permitted to marry, they can contract a civil partnership. The applicant was born a male and married a woman in 1996. The couple had a child in 2002. In 2009 the applicant underwent gender re-assignment surgery. However, although she changed her first names she could not have her identity number changed to a female one unless her wife consented to the transformation of their marriage into a civil partnership or the couple divorced. Both the applicant and her spouse wished to remain married as a divorce would be against their religious convictions and they considered that a civil partnership did not provide the same security as marriage for them and their child.

In her application to the European Court the applicant complained, *inter alia*, under Article 8 of the Convention that her right to private and family life had been violated when the full recognition of her new gender was made conditional on the transformation of her marriage into a civil partnership. In a judgment of 13 November 2012 a Chamber of the Court held unanimously that there had been no violation of Article 8 of the

Convention and no violation of Article 14 in conjunction with Article 8 (see Information Note 162).

Law – Article 8: The question to be determined by the Court was whether respect for the applicant's private and family life entailed a positive obligation on the State to provide an effective and accessible procedure allowing the applicant to have her new gender legally recognised while remaining married.

The Court reiterated that the Convention did not impose an obligation on the Contracting States to allow same-sex marriage. The regulation of the effects of a change of gender in the context of marriage fell to a large extent, though not entirely, within the margin of appreciation of the Contracting States. Furthermore, the Convention did not require that any further special arrangements be put in place for situations such as the applicant's. The Grand Chamber also noted that there was still no European consensus on allowing same-sex marriages and no consensus in those States which did not allow same-sex marriages as to how to deal with gender recognition in the case of a pre-existing marriage (the situation in the applicant's case). Indeed, the majority of the States did not have any kind of legislation on gender recognition in place. In the absence of a consensus, and given the sensitive moral and ethical issues at stake, Finland had to be afforded a wide margin of appreciation, both as to its decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative transsexuals and, having intervened, to the rules laid down in order to achieve a balance between the competing public and private interests.

Finnish law provided the applicant with three options. Leaving aside the options of maintaining the status quo or divorcing, the applicant's complaint was primarily directed at the possibility of converting the marriage into a civil partnership, with the consent of her wife. According to the Government, the aim of the relevant legislation was to unify the varying practices applied in different parts of the country and to establish coherent requirements for legal gender recognition. If the spouse's consent was received, it provided both for legal recognition of the new gender and legal protection of the relationship. The Court found that since the conversion of the marriage into a civil partnership was automatic under the Finnish system the spouse's consent to registration of the change of gender was an elementary requirement designed to protect each spouse from the effect of unilateral decisions taken by the other.

Moreover, the applicant and her wife would not lose any other rights if their marriage were converted into a registered partnership. Thus, for example, for the purposes of assessing pension rights, the length of the relationship would be calculated from the date of the marriage, not from the date of its conversion into a civil partnership.

Turning to the family-life aspects of the case, the Court observed that the civil partnership would not affect the paternity of the applicant's daughter as it had already been validly established during the marriage. Nor did the gender reassignment have any legal effects on the responsibility for the care, custody, or maintenance of the child, as responsibility in Finland was based on parenthood, irrespective of sex or form of partnership. Consequently, the change to a civil partnership would have no implications for the applicant's family life.

While it was regrettable that she was inconvenienced on a daily basis by her incorrect identity number, the applicant had a genuine possibility of changing that state of affairs via the conversion, at any time, of her marriage into a registered partnership with the consent of her spouse. In the Court's view, it was not disproportionate to require such a conversion, as a precondition to legal recognition of an acquired gender, as that was a genuine option which provided legal protection for same-sex couples that was almost identical to that of marriage. The minor differences between these two legal concepts were not capable of rendering the Finnish system deficient from the point of view of the State's positive obligation. The system as a whole was not disproportionate in its effects on the applicant and a fair balance had been struck between the competing interests in the case.

Conclusion: no violation (fourteen votes to three).

The Grand Chamber also found, by fourteen votes to three, that there had been no violation of Article 14 take in conjunction with Article 8 and, unanimously, that it was unnecessary to examine the applicant's complaint under Article 12 as it had already been examined under Article 8.

(For more information on gender identity, see the Court's factsheet at <www.echr.coe.int> – Press)

Respect for private life

Ban on wearing religious face covering in public: *no violation*

S.A.S. v. France - 43835/11
Judgment 1.7.2014 [GC]

Facts – The applicant is a practising Muslim and said that she wore the burqa and niqab, which covered her whole body except for her eyes, to live in accordance with her religious faith, culture and personal convictions. She added that she wore this clothing of her own accord in public and in private, but not systematically. She was thus content not to wear it in certain circumstances but wished to be able to wear it when she chose to do so. Lastly, her aim was not to annoy others but to feel at inner peace with herself. Since 11 April 2011, the date of the entry into force of Law no. 2010-1192 of 11 October 2010 throughout France, it had been against the law to conceal one's face in a public place.

Law – Article 8 and Article 9: The ban on wearing, in public places, clothing designed to conceal one's face raised issues with regard to the right to respect for the private life (Article 8 of the Convention) of women who wished to wear the full-face veil for reasons relating to their beliefs; and to the extent that the ban was complained of by individuals such as the applicant who were thus prevented from wearing in public places clothing that they were required to wear by their religion, it particularly raised an issue with regard to the freedom to manifest one's religion or beliefs (Article 9).

The Law of 11 October 2010 confronted the applicant with a dilemma: either she complied with the ban and thus refrained from dressing in accordance with her approach to religion, or she refused to comply and would face criminal sanctions.[1] There had thus been an "interference" or a "limitation" prescribed by law as regards the exercise of rights protected by Articles 8 and 9 of the Convention.

The Government had argued that the interference pursued two legitimate aims: "public safety" and "respect for the minimum set of values of an open democratic society". However, the second paragraph of Articles 8 and 9 did not expressly refer to the second of those aims or to the three values invoked by the Government in that connection.

The Court accepted that the legislature had sought, by adopting the ban in question, to address concerns of "public safety" within the meaning of the second paragraph of Articles 8 and 9.

As regards the second aim, "respect for the minimum set of values of an open democratic society",[2] the Court was not convinced by the Government's submission in so far as it concerned respect for gender equality. A State Party could not invoke gender equality in order to ban a practice that was defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those Articles, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms. Moreover, in so far as the Government thus sought to show that the wearing of the full-face veil by certain women shocked the majority of the French population because it infringed the principle of gender equality as generally accepted in France, the Court referred to its reasoning (below) as to the other two values that they had invoked.

Secondly, respect for human dignity could not legitimately justify a blanket ban on the wearing of the full-face veil in public places. The clothing in question might be perceived as strange by many of those who observed it, but it was the expression of a cultural identity which contributed to the pluralism inherent in democracy.

Thirdly, in certain conditions, what the Government had described as "respect for the minimum requirements of life in society" – or of "living together", as stated in the explanatory memorandum accompanying the Bill – could be linked to the legitimate aim of the "protection of the rights and freedoms of others". The respondent State took the view that the face played an important role in social interaction. The Court was therefore able to accept that the barrier raised against others by a veil concealing the face was perceived by the respondent State as breaching the right of others to live in a space of socialisation which made living together easier. That being said, in view of the flexibility of the notion of "living together" and the resulting risk of abuse, the Court had to engage in a careful examination of the necessity of the impugned limitation.

First, it could be seen clearly from the explanatory memorandum accompanying the Bill that it was

1. See *Dudgeon v. the United Kingdom*, 7525/76, 22 October 1981.

2. See *Leyla Şahin v. Turkey* [GC], 44774/98, 10 November 2005, Information Note 80; and *Ahmet Arslan and Others v. Turkey*, 41135/98, 23 February 2010, Information Note 127.

not the principal aim of the ban to protect women against a practice which was imposed on them or would be detrimental to them.

As regards the question of necessity in relation to public safety, within the meaning of Articles 8 and 9, the Court understood that a State might find it essential to be able to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud. However, in view of its impact on the rights of women who wished to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal the face could be regarded as proportionate only in a context where there was a general threat to public safety. The Government had not shown that the ban introduced by the Law of 11 October 2010 fell into such a context. As to the women concerned, they were thus obliged to give up completely an element of their identity that they considered important, together with their chosen manner of manifesting their religion or beliefs, whereas the objective alluded to by the Government could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property had been established, or where particular circumstances entailed a suspicion of identity fraud. It could not therefore be found that the blanket ban imposed by the Law of 11 October 2010 was necessary, in a democratic society, for public safety, within the meaning of Articles 8 and 9 of the Convention.

The Court then examined the questions raised by the need to meet the minimum requirements of life in society as part of the "protection of the rights and freedoms of others". It took the view that the ban in question could be regarded as justified in its principle solely in so far as it sought to guarantee the conditions of "living together".

In the light of the number of women concerned, about 1,900 women in relation to the French population of about sixty-five million and to the number of Muslims living in France, it might seem excessive to respond to such a situation by imposing a blanket ban. In addition, there was no doubt that the ban had a significant negative impact on the situation of women who, like the applicant, had chosen to wear the full-face veil for reasons related to their beliefs. A large number of actors, both international and national, in the field of fundamental rights protection had found a blanket ban to be disproportionate. The Law of 11 October 2010, together with certain debates surrounding its drafting, might have upset part of the Muslim community, including some members who were not in favour of the full-face veil being worn. In this connection, the Court was very concerned by the fact that the debate which preceded the adoption of the Law of 11 October 2010 was marked by certain Islamophobic remarks. It was admittedly not for the Court to rule on whether legislation was desirable in such matters. It nevertheless emphasised that a State which entered into a legislative process of this kind took the risk of contributing to the consolidation of the stereotypes which affected certain categories of the population and of encouraging the expression of intolerance, when it had a duty, on the contrary, to promote tolerance. Remarks which constituted a general, vehement attack on a religious or ethnic group were incompatible with the values of tolerance, social peace and non-discrimination underlying the Convention and did not fall within the right to freedom of expression that it protected.

However, the Law of 11 October 2010 did not affect the freedom to wear in public any garment or item of clothing – with or without a religious connotation – which did not have the effect of concealing the face. The impugned ban mainly affected Muslim women who wished to wear the full-face veil. Nevertheless, the ban was not expressly based on the religious connotation of the clothing in question but solely on the fact that it concealed the face.[3]

As to the fact that criminal sanctions were attached to the ban, the sanctions provided for by the legislature were among the lightest that could be envisaged, consisting of a fine at the rate applying to second-class petty offences (currently EUR 150 maximum), with the possibility for the court to impose, in addition to or instead of the fine, an obligation to follow a citizenship course.

By prohibiting everyone from wearing clothing designed to conceal the face in public places, the respondent State had to a certain extent restricted the reach of pluralism, since the ban prevented certain women from expressing their personality and their beliefs by wearing the full-face veil in public. However, the Government had indicated that it was a question of responding to a practice that the State deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of "living together". From that perspective, the respondent State was seeking to protect a principle of interaction between individuals, which in its

3. Contrast *Ahmet Arslan and Others v. Turkey*, op. cit.

view was essential for the expression not only of pluralism, but also of tolerance and broadmindedness, without which there was no democratic society. It could thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constituted a choice of society.

In such circumstances, the Court had a duty to exercise a degree of restraint in its review of Convention compliance, since such review would lead it to assess a balance that had been struck by means of a democratic process within the society in question. In matters of general policy, on which opinions within a democratic society might reasonably differ widely, the role of the domestic policy-maker had to be given special weight. In the present case France thus had a wide margin of appreciation.

This was particularly true as there was no European consensus as to the question of the wearing of the full-face veil in public. While, from a strictly normative standpoint, France was very much in a minority position in Europe, it had to be observed that the question of the wearing of the full-face veil in public was or had been a subject of debate in a number of European States. In addition, this question was probably not an issue at all in a certain number of member States, where this practice was uncommon.

Consequently, having regard in particular to the breadth of the margin of appreciation afforded to the respondent State in the present case, the Court found that the ban imposed by the Law of 11 October 2010 could be regarded as proportionate to the aim pursued, namely the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others". The impugned limitation was therefore "necessary in a democratic society". This conclusion held true with respect both to Article 8 of the Convention and to Article 9.

Conclusion: no violation (fifteen votes to two).

Article 14 of the Convention taken together with Article 8 or Article 9: The applicant had complained of indirect discrimination. As a Muslim woman who for religious reasons wished to wear the full-face veil in public, she belonged to a category of individuals who were particularly exposed to the ban in question and to the sanctions for which it provided.

A general policy or measure that had disproportionately prejudicial effects on a particular group might be considered discriminatory even where it was not specifically aimed at that group and there was no discriminatory intent. This was only the case, however, if such policy or measure had no "objective and reasonable" justification, that is, if it did not pursue a "legitimate aim" or if there was not a "reasonable relationship of pro

portionality" between the means employed and the aim sought to be realised. In the present case, while it might be considered that the ban imposed by the Law of 11 October 2010 had specific negative effects on the situation of Muslim women who, for religious reasons, wished to wear the full-face veil in public, this measure had an objective and reasonable justification.

Conclusion: no violation (unanimously).

(For further information on religious symbols and clothing, see the Court's factsheet at <www.echr.coe.int> – Press)

Respect for private life
Positive obligations

Failure to provide alleged father of child with adequate opportunity to give evidence in person: *violation*

Tsvetelin Petkov v. Bulgaria - 2641/06
Judgment 15.7.2014 [Section IV]

Facts – In March 2002 the applicant's former wife brought a claim on behalf of her child to establish that he was the child's father. As the applicant did not appear in court, a lawyer was appointed *ex officio* to represent him. In a judgment of 16 December 2002 the City Court declared the applicant the biological father of the child. The applicant learned of the judgment in April 2004, but his application for the proceedings to be reopened was refused on the grounds that the correct procedure for summoning him had been observed and a legal representative had been appointed to represent him.

Law – Article 8: The domestic authorities had been faced with a conflict between the competing interests of the child born out of wedlock, the child's mother and the applicant as the putative father. The crucial issue was whether the applicant's personal participation in the proceedings had been indispensable for the effective exercise of his right to private life.

The outcome of the proceedings for establishing the applicant's paternity had had direct and profound consequences for his private life. It was true that the authorities' decision to proceed with the

hearing in the case, as opposed to adjourning it until the applicant was located, may have pursued the legitimate aim of conducting the proceedings with the necessary speediness. However, their positive obligations under Article 8 had required them to strike a fair balance between the interests and rights of all parties.

The authorities had summoned the applicant via a publication in the State Gazette after discovering that he no longer lived at his permanent address. However, there was no evidence that they had made inquiries with the address registry office or sought to establish by other means whether he had any other address. In fact, they had ultimately found him at the permanent address in April 2004.

The applicant had been declared the father of the child in the absence of a DNA test. In that context, the Court did not lose sight of the fact that a DNA test had been the scientific method available at the time for accurately determining paternity of a child and its probative value had substantially outweighed any other evidence presented by the parties to prove or disprove the biological paternity. Ensuring effective respect for the applicant's right to private life had meant giving him an opportunity to present his case, including by providing DNA evidence. Given the subject matter in dispute, his personal participation in the proceedings had been crucial for the reliability of the outcome and his representation by his *ex officio* lawyer had not been sufficient to secure the effective, proper and satisfactory presentation of his case.

Consequently, the authorities had not struck a fair balance between the applicant's right to private life and the right of the child to have a father established, and of the mother to have child support awarded.

Conclusion: violation (unanimously).

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

Respect for family life
Positive obligations

Delays and lack of transparency in family reunification proceedings: *violation*

Tanda-Muzinga v. France - 2260/10
Judgment 10.7.2014 [Section V]

Facts – In the year 2000 the applicant, a Congolese national, was granted refugee status under the mandate of the Office of the United Nations High Commissioner for Refugees in Cameroon (UNHCR Cameroon). According to his certificate of refugee status, he was accompanied by his wife, who also had such a certificate, and by his children Vanessa and Michelle. The couple had a third child, Benjamin, who was born in Yaoundé (Cameroon) in 2004, but the applicant was absent when his son was born, having left Cameroon in order to apply for asylum in France, where he obtained refugee status in 2007. He then applied for long-stay visas for his wife and his three children for the purposes of family reunification. In May 2008, having received no news since completing the application to the French Consulate in Cameroon three months previously, the applicant commenced legal proceedings. It was only in August of the same year, during a hearing, that he learnt that the birth certificates of Benjamin and Michelle were being contested. In the context of another application the Government argued that the applicant had abandoned his family. At the hearing concerning the applicant's appeal on points of law to the *Conseil d'État*, the "public rapporteur" suggested in his closing arguments, which were not available in writing, that the applicant should seek judicial rectification in Cameroon of the children's civil status documents. Following difficulties encountered by the applicant's wife in obtaining such rectification, the Consulate again refused to issue the visas. Further checks carried out in 2010 established that Benjamin's birth certificate had been authenticated but that the doubtful authenticity of the birth certificate produced for Michelle – which had been double-checked – had prompted the consular authorities to maintain their refusal to issue visas to the whole family. After the Court had given notice of the application to the Government, the urgent-applications judge ordered a stay of execution of the implicit refusal, on the ground that no reasons had been given. In November 2010 UNHCR Cameroon's lawyer sent the applicant and the French authorities the original copy of a judgment of the Yaoundé *tribunal de grande instance* of 3 June 2010 reissuing Michelle's birth certificate. In a letter dated January 2011 the Government informed the Court that the French consular authorities, in December 2010, had issued the long-stay visas requested by the applicant's wife and children.

Law – Article 8

(a) *Admissibility* – The applicant's family had been able to join him once the visas were issued. However, this had taken three and a half years after his request for family reunification. The national

authorities had not explicitly recognised, either in the domestic proceedings or before the Court, that there had been a violation of the applicant's Convention rights during that period. Moreover, the decision to issue the visas had not been followed by redress for the purposes of the Court's case-law. Accordingly, the applicant could still claim to be a "victim" within the meaning of Article 34 of the Convention.

In so far as the family had been reunited, the substantive facts complained of by the applicant had ceased to exist. It remained to be ascertained whether the possibility of leading family life following the issuing of the visas was sufficient to erase the possible consequences of the situation of which the applicant complained. The French authorities had not issued the visas enabling the family to be reunited until three and a half years after the application for family reunification and following six years of separation. During that time the applicant had taken all the necessary legal steps to establish his parent-child relationship with Michelle and Benjamin in order to overcome the obstacles to the reunification of the family, which had also suffered an ordeal as a result of the lengthy separation following his departure from Cameroon. In view of that long period of uncertainty and of the serious consequences of the separation for the applicant and his family, the Court considered that the effects of a possible violation of the Convention had not been sufficiently redressed for it to find that the matter had been resolved within the meaning of Article 37 § 1 (b) of the Convention. Furthermore, in the instant case, the applicant's children had been minors and had been separated from the applicant for over six years in difficult circumstances following their flight from the Democratic Republic of Congo. This had necessarily entailed serious consequences for which their subsequent reunification had not been sufficient to compensate. The Government's request for the application to be struck out of the list of cases was therefore also rejected.

(b) *Merits* – The national authorities were faced with a delicate task when having to assess the authenticity of civil status documents, on account of the difficulties arising in some cases from failings on the part of the civil status authorities in some of the migrants' countries of origin, and the associated risks of fraud. The national authorities were in principle best placed to establish the facts on the basis of the evidence gathered by or submitted to them, and they therefore had to be allowed a measure of discretion in that regard. Nevertheless, in view of the decision to grant the applicant refugee status and the subsequent recognition of the principle of family reunification, it had been of crucial importance that the visa applications be examined promptly, attentively and with particular diligence. In the circumstances of the case the respondent State had been under an obligation, in order to respond to the applicant's request, to institute a procedure that took into account the events that had disrupted and disturbed his family life and had led to his being granted refugee status. The Court therefore decided to focus its examination on the quality of that procedure and to do so from the standpoint of the "procedural requirements" of Article 8 of the Convention.

The Court observed at the outset that the applicant's family life had been discontinued purely because he had fled, out of a real fear of persecution. Accordingly, and contrary to the consistent assertions of the Ministry concerned during the urgent proceedings and the proceedings on the merits, the applicant could not be held responsible for the separation from his family. The arrival of his wife and his children, who were aged three, six and thirteen at the time of the request for reunification and were themselves refugees in a third country, had therefore been the only means by which family life could resume.

It had been essential for the national authorities to take into consideration the applicant's vulnerability and his particularly difficult personal history, to pay close attention to his arguments of relevance to the outcome of the case, to inform him of the reasons against reunification of the family and, lastly, to take a rapid decision on the visa applications. Owing to the fact that the explanations and reasons that were required by law had not been provided until September 2008, that is, fifteen months after his first request for family reunification, the applicant had not been in a position to understand the precise objections to his plans. The competent authorities, which had been aware of the application to the Cameroonian courts to have Michelle's birth certificate reissued, had not seen fit to enquire as to the progress of that application when they refused for the second time to issue the visas. Following a further check in 2010 they had eventually found the legal parent-child relationship between the applicant and Benjamin to be established, although this had been contested in the same way as the relationship with his daughter Michelle. The applicant had encountered numerous difficulties in participating effectively in the procedure and putting forward "other elements" of proof of a parent-child relationship, although he had declared his family ties from the start of his

asylum application and OFPRA had certified the composition of the family in documents that were deemed to be authentic, immediately after his application for family reunification. Furthermore, UNHCR, convinced of the authenticity of their case, had assisted the applicant and later his family from the time of their flight from the Democratic Republic of Congo until the conclusion of the proceedings. The Ministry of Foreign Affairs of Cameroon had also approved the travel papers of the applicant's wife, which stated that she was accompanied by her three children, and had subsequently approved Michelle's travel papers. The applicant had also adduced other evidence of his continuing contact with his family. This had not been without relevance; the applicant could reasonably have expected that it would be seen as attesting to his past family life and that the national authorities would give it due consideration. Lastly, it had taken almost three and a half years for the authorities to cease contesting the parent-child relationship between the applicant and his children. This was excessive, in view of the applicant's particular circumstances and what was at stake for him in the verification procedure.

All the above factors demonstrated the distressing and apparently hopeless situation of the applicant. The accumulation and protracted nature of the numerous hurdles he encountered during the procedure had left him in a state of severe depression, after he had already undergone traumatic experiences that had been the reason for granting him refugee status.

In view of all these considerations, and notwithstanding the margin of appreciation left to the State in the matter, it was clear that the national authorities had not given due consideration to the applicant's specific situation and that the decision-making process had not been attended by the guarantees of flexibility, promptness and effectiveness required in order to secure his right to respect for his family life under Article 8 of the Convention. Accordingly, the State had omitted to strike a fair balance between the applicant's interests and its own interest in controlling immigration.

Conclusion: violation (unanimously).

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

(See also the judgments delivered on 10 July 2014: *Senigo Longue and Others v. France*, 19113/09; and *Mugenzi v. France*, 52701/09)

Positive obligations

Damage to health as a result of prolonged exposure to asbestos in Government run ship yard: *violation*

Brincat and Others v. Malta - 60908/11 et al.
Judgment 24.7.2014 [Section V]

(See Article 2 above, page 11)

ARTICLE 9

Manifest religion or belief

Ban on wearing religious face covering in public: *no violation*

S.A.S. v. France - 43835/11
Judgment 1.7.2014 [GC]

(See Article 8 above, page 25)

ARTICLE 10

Freedom of expression

Conviction of a journalist for the publication of materials covered by the secrecy of a pending investigation: *violation*

A.B. v. Switzerland - 56925/08
Judgment 1.7.2014 [Section II]

Facts – On 15 October 2003 the applicant, a journalist, published an article in a weekly magazine about criminal proceedings that had been brought against a motorist who had been remanded in custody after an incident in which he had rammed his car into pedestrians, killing three of them and injuring eight others, before throwing himself off the Lausanne Bridge. The article described the defendant's background and gave a summary of the questions put to him by the police and the investigating judge, together with his own statements, and was illustrated by a number of photographs of letters he had sent to the judge. The article also contained a brief summary of statements by the defendant's wife and doctor. Criminal proceedings were brought against the journalist on the initiative of the public prosecutor for publication of confidential documents. In June 2004

the investigating judge sentenced him to a suspended term of one month's imprisonment, which the Lausanne Police Court subsequently replaced by a fine of 4,000 Swiss francs (about EUR 2,667). The applicant's appeals against his conviction were unsuccessful.

Law – Article 10: The fining of the applicant for using and reproducing evidence from the judicial investigation file in his article had constituted an interference with his right to freedom of expression. That interference was prescribed by law. The measure at issue had pursued the legitimate aims of preventing the "disclosure of evidence received in confidence", of "maintaining the authority and impartiality of the judiciary" and of protecting "the reputation (and) rights of others".

The article had been based on court proceedings in connection with an incident which, having taken place in exceptional circumstances, had immediately aroused public interest and had led to widespread media interest in the case and in how it was being dealt with by the criminal justice system. In the impugned article the applicant looked at the defendant's character and tried to understand his *animus*, while highlighting the manner in which the police and court authorities were dealing with the defendant, who seemed to have psychiatric problems. Such an article thus addressed a matter that was in the general interest.

The applicant, an experienced journalist, could not have been unaware that the documents which had come into his possession were covered by the confidentiality of the judicial investigation. In those circumstances, he had been required to comply with the statutory provisions applicable in such matters.

Concerning the weighing up of the interests at stake, the Court noted that the Federal Court had confined itself to finding that both the premature disclosure of the defendant's statements and his letters to the judge had necessarily impaired the rights of the accused to be presumed innocent and to have a fair trial. However, the question whether the accused was guilty as charged was not the subject of the article at issue and the first hearing on the charges had not taken place until more than two years after its publication. In addition, a single judge had presided over the defendant's trial. The Government had not therefore established how the disclosure of this type of confidential information could have had a negative influence on the defendant's right to be presumed innocent or on the outcome of his trial.

The Government had alleged that the disclosure of the documents covered by the confidentiality of the investigation had interfered with the defendant's right to respect for his private life. However, the defendant had failed to use any of the remedies that had been available to him under Swiss law through which he could have sought redress for the damage to his reputation. The second legitimate aim relied on by the Government thus necessarily became less persuasive in the circumstances of the case. The Government had not therefore sufficiently justified the sanction imposed on the applicant on account of the disclosure of personal information concerning the accused.

As regards the Government's criticism about the form of the article at issue, it had to be borne in mind that Article 10 of the Convention protected not only the substance of the ideas and information expressed, but also the form in which they were conveyed. It was consequently not for the Court, any more than for the national courts, to substitute its own views for those of the press as to what technique of reporting should be adopted by journalists.

Lastly, while the fine had been imposed for a "petty offence", the lowest category of offences provided for in the Swiss Criminal Code, and harsher sanctions, including a prison sentence, could have been envisaged for that offence, the chilling effect of the fine, even though it was inherent in any criminal sanction, was not insignificant in the present case. In that connection, the fact of a person's conviction might in some cases be more important than the minimal nature of the penalty imposed. The Court thus regarded the fine imposed as disproportionate to the aim pursued.

In view of the foregoing, the applicant's conviction did not meet a "pressing social need". Whilst the grounds for the conviction were "relevant", they were not "sufficient" to justify such an interference with the applicant's right to freedom of expression.

Conclusion: violation (four votes to three).

Article 41: no claim made in respect of damage.

(See also *Dupuis and Others v. France*, 1914/02, 7 June 2007, Information Note 98)

Pre-trial detention for over a year of investigative journalists accused of aiding and abetting a criminal organisation: *violation*

Nedim Şener v. Turkey - 38270/11
Şık v. Turkey - 53413/11
Judgments 8.7.2014 [Section II]

(See Article 5 § 3 above, page 21)

Injunction against newspaper restraining further publication of article concerning former head of government: *violation*

Axel Springer AG v. Germany (no. 2) - 48311/10
Judgment 10.7.2014 [Section V]

Facts – The applicant was the limited company Axel Springer AG. Among other activities, it was the publisher of the mass-circulation daily newspaper *Bild*. The German Chancellor Gerhard Schröder, in power since 1998, had lost early parliamentary elections. On 9 December 2005 it was announced that he had been had been appointed chairman of the supervisory board of a German-Russian consortium (NEGP). The contract for construction of a pipeline to be built by this consortium had been signed ten days before the early election.

In its edition of 12 December 2005 *Bild* published a front-page article with the headline: "What does he really earn from the pipeline project? Schröder must reveal his Russian salary". The former Chancellor applied to the regional court for an injunction prohibiting any further publication of a passage describing the suspicions of Mr Thiele, deputy president of the FDP Liberal Democrat Party, namely that the former Chancellor had resigned from his political functions because he had been offered a lucrative position in the consortium and that the decision to call early elections had been taken with that sole aim, motivated by self-interest. The regional court ordered the newspaper not to re-publish the disputed part of the article. That judgment was upheld by the court of appeal, and a constitutional appeal by the applicant company against the court of appeal's judgment was dismissed.

Law – Article 10: The disputed passage, which posed the question of whether the former Chancellor had wished to divest himself of his office on account of the position he had been offered in the consortium, was clearly of considerable public interest, given the former Chancellor's high profile and the subject-matter of the report. Accordingly, freedom of expression had to be interpreted broadly in this case.

The German courts had forbidden the passage in question on the ground that it did not meet the relevant criteria for reporting suspicions.

In the article, the applicant company had reported comments undoubtedly made by Mr Thiele. The questions raised by him were more akin to a value judgment than to factual allegations that were susceptible to proof.

The questions covered by the injunction were made in a political context of general interest, did not allege that the former Chancellor had committed a criminal office and might have had a basis in various facts. Moreover, a head of government had numerous opportunities to publicise his or her political choices and to inform the public of them. Thus, the article had not been required to contain elements in support of the former Chancellor, and his office did not enable him to enjoy significantly greater tolerance than that extended to private citizens.

Further, although the applicant company had published the disputed passage in its newspaper, the questions themselves had been raised by a politician and member of the German Parliament. A newspaper could not be required to verify systematically the merits of every comment made by one politician about another where such comments were made in a context of public political debate. The former Chancellor could have brought judicial proceedings against the person who had made the impugned comments. Accordingly, having regard to the manner in which the newspaper had obtained Mr Thiele's comments and taking account of the very recent nature of the announcement about the former Chancellor, issued three days prior to the article's publication, and also of the generally transient nature of news events, there was no indication that the applicant company was not entitled to publish these comments without carrying out other preliminary checks. Equally, it could not be argued that no attempt had been made to contact the former Chancellor or that he had not had an opportunity to react to such questions.

With regard to the manner of publication, the article did not contain expressions concerning the former Chancellor which, by their very nature, could raise an issue under the Court's case-law.

As to the impact of the publication, the *Bild* newspaper was published nationally, and had one of the highest circulation figures in Europe.

Lastly, with regard to the severity of the penalty imposed, the applicant company had merely been the subject of a civil-law injunction against further publication of one passage from the article. Nonetheless, this prohibition could have had a chilling effect on the exercise of the applicant company's freedom of expression.

Regard being had to the foregoing, the applicant company had not exceeded the limits of journalistic freedom in publishing the impugned passage. It had not been established that there existed any pressing social need for placing the protection of the reputation of the former Chancellor above the applicant company's right to freedom of expression and the general interest in promoting this freedom where issues of public interest were concerned. It followed that the interference in question had not been "necessary in a democratic society".

Conclusion: violation (unanimously).

Article 41: no claim made in respect of damage.

ARTICLE 13

Effective remedy

Absence of suspensive effect of application to Aliens Appeals Board for judicial review of deportation order or of refusal of leave to remain: *case referred to the Grand Chamber*

S.J. v. Belgium - 70055/10
Judgment 27.2.2014 [Section V]

On 30 July 2007, when the applicant, a Nigerian national, was eight months pregnant, she lodged an application for asylum in which she stated that she had fled her country after the family of the child's father had tried to put pressure on her to have an abortion. In May 2010 the Commissioner General for Refugees and Stateless Persons rejected the asylum application because of inconsistencies in the applicant's account. That decision was upheld by the Aliens Appeals Board.

The applicant was diagnosed as HIV positive in August 2007 and has been undergoing treatment since that time.

In the meantime the applicant lodged an application for leave to remain on medical grounds which was rejected on the grounds that she could be treated in Nigeria. An order to leave the country was served on her. The applicant lodged a request under the extremely urgent procedure for a stay of execution of the measure, together with an application to set aside the decisions in question. The request for a stay of execution was rejected by the Aliens Appeals Board. The applicant lodged an appeal on points of law with the *Conseil d'*État against the judgment of the Aliens Appeals Board, alleging that the risk of serious and irreversible harm in the event of her return to Nigeria, and the presence of her two young children – born in April 2009 and November 2012 – had not been specifically taken into consideration, and that appeals to the Aliens Appeals Board were ineffective. On 24 December 2010 the time-limit for leaving the country was extended by the Aliens Office for one month. On 6 January 2011 the *Conseil d'*État declared the appeal against the Aliens Appeals Board judgment inadmissible. According to the information in the file, the application to set aside the decisions of the Aliens Office is still pending before the Aliens Appeals Board.

In a judgment of 27 February 2014 a Chamber of the Court held unanimously that there had been a violation of Article 13 taken in conjunction with Article 3, as the applicant had not had an effective remedy in the sense of one which had automatic suspensive effect and by which she could obtain an effective review of her arguments alleging a violation of Article 3 of the Convention, given that applications to the Aliens Appeal Board to set aside an order to leave the country or a refusal of leave to remain did not suspend enforcement of the removal order. The Chamber also held unanimously that enforcement of the decision to deport the applicant to Nigeria would not entail a violation of Article 3 and that, even supposing that the Court had jurisdiction to examine the complaint of a violation of Article 8, there had been no violation of that provision.

On 7 July 2014 the case was referred to the Grand Chamber at the request of the Government and the applicant.

ARTICLE 14

Discrimination (Articles 8 and 9)

Ban on wearing religious face covering in public: *no violation*

S.A.S. v. France - 43835/11
Judgment 1.7.2014 [GC]

(See Article 8 above, page 25)

Discrimination (Article 3 of Protocol No. 1)

Ineligibility to stand for election without declaration of affiliation to one of constitutionally defined "constituent peoples": *violation*

Zornić v. Bosnia and Herzegovina - 3681/06
Judgment 15.7.2014 [Section IV]

(See Article 46 below, page 41)

ARTICLE 33

Inter-State application

Collective expulsion of Georgian nationals by Russian authorities from October 2006 to January 2007

Georgia v. Russia (no. 1) - 13255/07
Judgment 3.7.2014 [GC]

(See Article 4 of Protocol No. 4 below, page 46)

ARTICLE 34

Locus standi

Standing of non-governmental organisation to lodge application on behalf of deceased mental patient

Centre of Legal Resources v. Romania - 47848/08
Judgment 17.7.2014 [GC]

Facts – The application was lodged by a non-governmental organisation, the Centre for Legal Resources (CLR), on behalf of a young Roma man Mr Câmpeanu, who died in 2004 at the age of 18. Mr Câmpeanu had been placed in an orphanage at birth after being abandoned by his mother. When still a young child he was diagnosed as being HIV-positive and as suffering from severe mental disability. On reaching adulthood he had to leave the centre for disabled children where he had been staying and underwent a series of assessments with a view to being placed in a specialised institution. After a number of institutions had refused to accept him because of his condition, he was eventually admitted to a medical and social care centre, which found him to be in an advanced state of psychiatric and physical degradation, without any antiretroviral medication and suffering from malnutrition. A few days later, he was admitted to a psychiatric hospital after displaying hyper-aggressive behaviour. The hospital concerned had previously said that it did not have the facilities for patients with HIV. There he was seen by a team of monitors from the CLR who reported finding him alone in an unheated room, with a bed but no bedding and dressed only in a pyjama top. Although he could not eat or use the toilet without assistance, the hospital staff refused to help him for fear of contracting HIV. He was refusing food and medication and so was only receiving glucose through a drip. The CLR monitors concluded that the hospital had failed to provide him with the most basic treatment and care. Mr Câmpeanu died that same evening.

According to a 2004 report by the CPT,[1] in the winters of 2003 and 2004 some 109 patients died in suspicious circumstances at the psychiatric hospital in question, the main causes of death being cardiac arrest, myocardial infarction and bronchopneumonia, and the average age of the patients who died being 56, with a number being under 40. The CPT found that some of the patients were not given sufficient care. It also noted a lack of human and material resources at the hospital as well as deficiencies in the quality and quantity of the food and a lack of heating.

Law – Article 34: The Court dismissed the Government's preliminary objection that the CLR had no standing to lodge the application. It accepted that the CLR could not be regarded as a victim of the alleged Convention violations as Mr Câmpeanu was indisputably the direct victim while the CLR had not demonstrated a sufficiently "close link" with him or established a "personal interest" in pursuing the complaints before the Court to be

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

considered an indirect victim. However, in the exceptional circumstances of the case and bearing in mind the serious nature of the allegations, it had to have been open to the CLR to act as Mr Câmpeanu's representative, even though it had no power of attorney to act on his behalf and he had died before the application was lodged.

In so finding, the Court noted that the case concerned a highly vulnerable young Roma man suffering from severe mental disabilities and HIV infection who had spent his entire life in State care and died in hospital through alleged neglect. In view of his extreme vulnerability, he had been incapable of initiating proceedings in the domestic courts without proper legal support and advice. At the time of his death Mr Câmpeanu had no known next-of-kin. Following his death, the CLR had brought domestic proceedings with a view to elucidating the circumstances of his death. It was of considerable significance that neither its capacity to act nor its representations on Mr Câmpeanu's behalf before the domestic medical and judicial authorities were questioned or challenged in any way. The State had not appointed a competent person or guardian to take care of his interests despite being under a statutory obligation to do so. The CLR had become involved only shortly before his death – at a time when he was manifestly incapable of expressing any wishes or views regarding his own needs and interests, let alone on whether to pursue any remedies. Finding that the CLR could not represent Mr Câmpeanu in these circumstances carried the risk that the respondent State would be allowed to escape accountability through its own failure to comply with its statutory obligation to appoint a legal representative. Moreover, granting CLR standing to act as Mr Câmpeanu's representative was consonant with the Court's approach in cases concerning the right to judicial review under Article 5 § 4 of the Convention in the case of "persons of unsound mind" (Article 5 § 1 (e)). In such cases, it was essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. The CLR thus had standing as Mr Câmpeanu's *de facto* representative.

Conclusion: preliminary objection dismissed (unanimously).

Article 2: The decisions regarding Mr Câmpeanu's placements were mainly based on which establishment was willing to accommodate him rather than on where he would be able to receive appropriate medical care and support. Mr Câmpeanu was first placed in a medical and social care centre which was not equipped to handle patients with mental health problems. Ultimately he was admitted to a psychiatric hospital, despite the fact that it had previously refused to admit him because it did not have facilities to treat HIV. The transfers from one unit to another had taken place without any proper diagnosis and aftercare and in complete disregard of Mr Câmpeanu's actual state of health and most basic medical needs. Of particular note was the authorities' failure to ensure he received antiretroviral medication. He had mainly been treated with sedatives and vitamins and no meaningful examination had been conducted to establish the causes of his mental state, in particular his sudden aggressive behaviour.

The Court underlined that for his entire life Mr Câmpeanu had been in the hands of the authorities, which were therefore under an obligation to account for his treatment. They had been aware of the appalling conditions in the psychiatric hospital, where a lack of heating and proper food and a shortage of medical staff and medication had led to an increase in the number of deaths in the winter of 2003. Their response had, however, been inadequate. By deciding to place Mr Câmpeanu in that hospital, notwithstanding his already heightened state of vulnerability, the authorities had unreasonably put his life in danger, while the continuous failure of the medical staff to provide him with appropriate care and treatment was yet another decisive factor leading to his untimely death. In sum, the authorities had failed to provide the requisite standard of protection for Mr Câmpeanu's life.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of the procedural limb of Article 2 for failure to carry out an effective investigation into the circumstances surrounding his death and a violation of Article 13 in conjunction with Article 2 on account of the failure to secure and implement an appropriate legal framework that would have enabled Mr Câmpeanu's allegations relating to breaches of his right to life to have been examined by an independent authority.

Article 46: Recommendation that Romania envisage general measures to ensure that mentally disabled persons in comparable situations are afforded independent representation, enabling them to have Convention complaints relating to their health and treatment examined before a court or other independent body.

Article 41: No claim made in respect of damage.

(For more information on persons with disabilities, see the Court's factsheet at <www.echr.coe.int> – Press)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies

Inapplicability of obligation to exhaust owing to administrative practice of arresting, detaining and expelling Georgian nationals: *preliminary objection dismissed*

Georgia v. Russia (no. 1) - 13255/07
Judgment 3.7.2014 [GC]

(See Article 4 of Protocol No. 4 below, page 46)

Alleged failure to exhaust civil remedy affording no compensation in respect of non-pecuniary damage: *preliminary objection dismissed*

Brincat and Others v. Malta - 60908/11 et al.
Judgment 24.7.2014 [Section V]

(See Article 2 above, page 11)

Exhaustion of domestic remedies
Effective domestic remedy – Turkey

Non-exhaustion of a new accessible and effective constitutional remedy: *inadmissible*

Koçintar v. Turkey - 77429/12
Decision 1.7.2014 [Section II]

Facts – The applicant was held in pre-trial detention from 16 February 2009 to 6 March 2014. He made various applications to the Assize Court for release but they were dismissed.

Law – Article 35 § 1: Following the amendments to the Constitution that came into force in September 2012, the right of individual application to the Turkish Constitutional Court had been introduced in the national legal system, conferring jurisdiction on that court to examine applications by individuals claiming to have suffered infringements of their fundamental rights and freedoms as protected by the Turkish Constitution and the European Convention on Human Rights and the Protocols thereto. The Court had already examined this new remedy in a case concerning a different complaint[1] and had concluded that it was effective. It was not necessary to re-examine all the aspects of this new remedy. However, in view of the nature of the complaint forming the subject of the present case, some aspects of the remedy had to be re-examined in the light of the particular circumstances, such as the accessibility of the remedy, the Constitutional Court's temporal jurisdiction and the effect of its judgments on the deprivation of liberty at issue.

As to the accessibility of this remedy, only decisions that had become final could be the subject of an individual complaint. In cases concerning pre-trial detention, the end of the period referred to in Article 5 § 3 of the Convention was the day on which the charge was determined at first instance or the detainee was released. It should also be noted that a person complaining about the length of pre-trial detention could apply to the Constitutional Court at any time during the detention and did not have to wait until the detention ended before lodging the complaint. The remedy had therefore been accessible.

The Turkish Constitutional Court's jurisdiction *ratione temporis* had begun on 23 September 2012 and it was clear from the judgments already delivered that it accepted an extension of its jurisdiction *ratione temporis* to situations involving a continuing violation which had begun before the introduction of the right of individual application and had carried on after that date. Accordingly, the applicant's detention even in the period before 23 September 2012 came within the Constitutional Court's temporal jurisdiction.

To be effective, a remedy in respect of the length of pre-trial detention for the purposes of Article 5 § 3 of the Convention had to offer the prospect of the impugned deprivation of liberty being ended. Where the Constitutional Court found a violation of the right to liberty as guaranteed by Article 19 of the Constitution and the applicant remained in detention, it transmitted the judgment containing

1. *Uzun v. Turkey* (dec.), 10755/13, 30 April 2013, Information Note 163.

that finding to the appropriate court so that it could take the necessary action; the judgment was binding. Although the Court was not currently aware of any cases – other than the few examples submitted by the Government – where detainees had been released following a judgment in which the Constitutional Court had found a violation, there was no cause to doubt that such judgments would be effectively implemented. It could thus be concluded that a constitutional complaint to the Turkish Constitutional Court could in principle lead to the detainee's release.

The Court therefore did not have any evidence to suggest that the remedy in question was not capable of affording appropriate redress for the applicant's complaint under Article 5 § 3 of the Convention, or that it did not offer reasonable prospects of success. The applicant had consequently been required to lodge an individual complaint with the Constitutional Court.

Conclusion: inadmissible (failure to exhaust domestic remedies).

ARTICLE 37

Special circumstances requiring further examination

Unilateral declarations in individual cases not addressing systemic problem: *request to strike out rejected*

Gerasimov and Others v. Russia - 29920/05 et al.
Judgment 1.7.2014 [Section I]

Facts – The applicants are all Russian nationals living in various regions of the Russian Federation. They obtained binding judicial decisions ordering the State authorities to provide them with housing or various services in kind, but the enforcement of those judgments was considerably delayed. Some of the judgments remain unenforced. In the proceedings before the European Court, in all but two cases the Government submitted unilateral declarations acknowledging the lengthy enforcement of the judgments in the applicants' favour and offering them monetary compensation.

Law – Article 37: The unilateral declarations submitted by the Government had ignored a key aspect of the case – the right to an effective domestic remedy – which had been explicitly raised by the Court in respect of all the applications when they were communicated to the Government.

The Court had also raised a question of principle as to the existence of a systemic problem arising both from delayed enforcement of domestic judgments imposing obligations in kind on the State authorities and the lack of domestic remedies in respect of such delays and a pilot judgment procedure had accordingly been set in motion. The Government's declarations did not contain any undertaking to address this crucial issue under the Convention, although it still affected a very large group of people in Russia, including the applicants. While the material before the Court revealed certain initiatives seeking to rectify the situation, they did not in any way engage the Government vis-à-vis either the Court or the applicants. The acceptance of the Government's request to strike the present "pilot" applications out of the Court's list would leave the current situation unchanged without any guarantee that a genuine solution would be found in the near future.

Conclusion: requests to strike out rejected (unanimously).

Article 13: The Court had already concluded in previous judgments that there was no effective domestic remedy in Russian law, either preventive or compensatory, allowing for adequate and sufficient redress in the event of prolonged non-enforcement of judicial decisions against the State authorities. That had also been the rationale behind two legislative proposals which had been tabled before and after the *Burdov* pilot judgment with a view to setting up a special judicial compensatory mechanism to ensure adequate redress for such repetitive violations at the domestic level.

The Government had opted for radically restricting the scope of the Compensation Act to judgments awarding monetary payments against the State. As a result, the effective domestic remedy set up by the Compensation Act was not available to the applicants in the present cases. The Court found no tangible element in the Government's submissions to overrule the widely shared view that those remedies were ineffective in the applicants' cases. The Government had not pointed to any major development in the domestic case-law demonstrating the contrary. The Court found it beyond any dispute that the Compensation Act was not applicable to the present applications, all of which concerned judgments ordering the authorities to provide housing or comply with other obligations in kind. The applicants had thus had no effective remedy available at the domestic level in respect of their arguable complaints.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been violations of Article 6 on account of the delays in enforcement of the binding judgments in the applicants' favour and of Article 1 of Protocol No. 1 of the Convention in respect of six of the applicants on account of an unjustified interference with their right to peaceful enjoyment of their possessions.

Article 46

(a) *General measures* – The Court's findings in respect of domestic remedies revealed essentially a legal problem that lent itself to resolution through an amendment of the domestic legislation. The Court considered that its findings imposed on the respondent State a legal obligation to set up, within one year of the date on which the judgment became final, an effective domestic remedy or combination of such remedies accessible to all persons in the applicants' position.

(b) *Redress to be granted in similar cases* – Proceedings on all new applications lodged after the delivery of the present judgment and concerning the non-enforcement or delayed enforcement of domestic judgments imposing obligations in kind on the State authorities would be adjourned for a maximum period of two years.

As regards applications lodged before delivery of the present judgment, the respondent State was required to grant redress within two years provided the applications had been or would be communicated to the Government. In the Court's view, such redress could be achieved through implementation *proprio motu* by the authorities of an effective domestic remedy or through *ad hoc* solutions such as friendly settlements or unilateral remedial offers in line with the Convention requirements. These cases were adjourned in the meantime.

Article 41: awards ranging from EUR 900 to EUR 9,000 in respect of non-pecuniary damage.

(See *Burdov v. Russia (no. 2)*, 33509/04, 15 January 2009, Information Note 115)

ARTICLE 38

Obligation to furnish all necessary facilities

Failure to produce documentary evidence despite Court assurances regarding confidentiality: *failure to comply with Article 38*

Al Nashiri v. Poland - 28761/11
Husayn (Abu Zubaydah) v. Poland - 7511/13
Judgments 24.7.2014 [Section IV]

(See Article 3 above, page 13)

ARTICLE 41

Just satisfaction

Award in respect of pecuniary damage sustained by company in liquidation to be paid to its shareholders

OAO Neftyanaya Kompaniya Yukos v. Russia - 14902/04
Judgment (just satisfaction) 31.7.2014 [Section I]

Facts – The case concerned tax and enforcement proceedings brought in 2004 against the Russian oil company, OAO Neftyanaya Kompaniya Yukos (Yukos), which eventually led to its liquidation in 2007.

In a Chamber judgment of 20 September 2011 (see Information Note 144), the Court found a violation of Article 6 §§ 1 and 3 (b) of the Convention in respect of the tax-assessment proceedings in 2000 on the grounds that Yukos had been given insufficient time to prepare its case before the lower courts. It also found two violations of Article 1 of Protocol No. 1 in that (a) the assessment of the penalties relating to 2000 and the doubling of the penalties for 2001 had been unlawful and (b) the Russian authorities had failed to strike a fair balance in the enforcement proceedings between the legitimate aims sought and the measures employed – in particular by being inflexible regarding the pace of the proceedings and obliging Yukos to pay excessive fees.

The Court reserved the question of just satisfaction.

Law – Article 41

(a) *Pecuniary damage*

(i) *Violation of Article 6* – The Court could not speculate on what the outcome of the tax proceedings in 2000 might have been had the violation of the Convention not occurred. There was thus insufficient proof of a causal link between the violation found and the pecuniary damage allegedly sustained by Yukos.

Conclusion: no award (unanimously).

(ii) *Violations of Article 1 of Protocol No. 1* – Yukos had paid the penalties in the tax assessment for the years 2000 and 2001 which had been found unlawful by the Court, as well as a 7% enforcement fee on these penalties. The Court assessed the amount of pecuniary damage to Yukos resulting from those payments at EUR 1,299,324,198.

Furthermore, the disproportionate character of the enforcement proceedings had significantly contributed to Yukos' liquidation – even if the liquidation had not been caused by the shortcomings in those proceedings alone, as the company alleged. In its judgment on the merits the Court had found, in particular, that the 7% enforcement fees Yukos had had to pay for the years 2000 to 2003 had been out of all proportion to the expenses which could have been expected. The Court accepted an indication by the Russian Government, according to which an appropriate rate for the enforcement fee would have been 4%. The Court thus calculated the difference between an enforcement fee at that latter rate and the fee actually paid, and deducted from that amount the fees for 2000 and 2001, which it had already found to be unlawful in their entirety. On that basis, and after taking inflation into account, the Court assessed the amount of pecuniary damage resulting from the disproportionate character of the enforcement proceedings at EUR 566,780,436.

Conclusion: overall award of EUR 1,866,104,634 (majority).

(iii) *Distribution of the award* – Since Yukos had ceased to exist following its liquidation, the award was to be paid to its shareholders and their legal successors and heirs, as the case might be, in proportion to their nominal participation in the company's stock.

In reaching that conclusion, the Court rejected two arguments made by the Government.

The first argument was that such a payment would be unjust in view of the involvement of management and some of the shareholders in the alleged tax fraud. However, given the nature of the violation found, the Court did not consider this reference to allegedly fraudulent conduct to be relevant. Yukos had already been held liable for the actions described in the various tax and enforcement proceedings and there was no reason to reduce the amount of the award to take account of conduct for which the company had already been punished.

As to the Government's second point, that at the time of its liquidation Yukos still had a huge unpaid debt to the tax authorities and other creditors, the Court noted that instead of giving Yukos time to pay, the domestic authorities had precipitated matters by auctioning its main production unit and liquidating it, notwithstanding the risk of being subsequently unable to recover some of the company's liabilities. Moreover, any liabilities that Yukos may have had in respect of its creditors had been met or extinguished in the enforcement and liquidation proceedings in 2007, and there was nothing to suggest that either it or its shareholders had any remaining liability to creditors under domestic law.

Conclusion: award to be paid to shareholders and heirs (majority).

(b) *Non-pecuniary damage* – Finding of violations constituted sufficient just satisfaction (unanimously).

(c) *Execution* – Russia was required to produce, in co-operation with the Committee of Ministers and within six months from the date on the instant judgment became final, a comprehensive plan with a binding time frame for distribution of the award of just satisfaction.

ARTICLE 46

Pilot judgment – General measures

Slovenia and Serbia required to take measures to enable applicants and all others in their position to recover "old" foreign-currency savings

Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia - 60642/08
Judgment 16.7.2014 [GC]

Facts – The applicants are citizens of Bosnia and Herzegovina. Until 1989-90, the former Socialist Federal Republic of Yugoslavia (SFRY) made it attractive for its citizens to deposit foreign currency with its banks by high interest rates and a State guarantee in the event of bankruptcy or "manifest insolvency". Depositors were also entitled to withdraw their savings with accrued interest at any time. The first and second applicants deposited foreign currency at what was then the Ljubljanska Banka Sarajevo and the third applicant at the Tuzla branch of Investbanka. Following reforms in 1989-90, Ljubljanska Banka Sarajevo became a branch of Ljubljanska Banka Ljubljana, which took over the former's rights, assets and liabilities. Investbanka

became an independent bank with headquarters in Serbia and branches, including the Tuzla branch, in Bosnia and Herzegovina. During this period, the convertibility of the dinar and very favourable exchange rates led to massive withdrawals of foreign currency from commercial banks which prompted the SFRY to take emergency measures to restrict such withdrawals. After the break-up of the SFRY in 1991-92, the "old" foreign-currency deposits remained frozen in the successor States, who however agreed to repay them to domestic banks. In Bosnia and Herzegovina, the Constitutional Court examined numerous individual complaints concerning failures to repay "old" foreign-currency savings at the domestic branches of Ljubljanska Banka Ljubljana and Investbanka. The Constitutional Court found no liability on the part of Bosnia and Herzegovina or its Entities and instead ordered the State to help the clients of those branches to recover their savings from Slovenia and Serbia respectively. In the framework of the negotiations for the Agreement on Succession Issues, negotiations regarding the distribution of the SFRY's guarantees of "old" foreign-currency savings were held in 2001 and 2002. As the successor States could not reach an agreement, however, in 2002 the Bank for International Settlements informed them that it would have no further involvement in the matter. The applicants complained that they had been unable to withdraw their foreign-currency savings.

Law – Article 1 of Protocol No. 1: In its admissibility decision the Chamber found that the statutory guarantee of the SRFY in respect of the "old" foreign currency savings in Ljubljanska Banka Ljubljana and Investbanka had not been activated until the dissolution of the SFRY and that the relevant liability had therefore not shifted from those banks to the SFRY before its dissolution. The Grand Chamber endorsed the Chamber's finding in this respect. Moreover, it stressed that the two banks had remained liable for the "old" foreign currency savings in their Bosnian-Herzegovinian branches since the dissolution of the SFRY. The Court went on to examine whether Slovenia and Serbia were responsible for the failure of those banks to repay their debts to the applicants.

The Slovenian Government had nationalised Ljubljanska Banka Ljubljana and transferred most of its assets to a new bank, while at the same time confirming that the old Ljubljanska Banka remained liable for "old" foreign-currency savings in its branches in the other successor States. Indeed Slovenia had become the sole shareholder of the old Ljubljanska Banka, which was administered by a Government agency. In addition, Slovenia was to a large extent responsible for the bank's inability to service its debts (as it had transferred most of its assets to another bank) and there was evidence in the case-file that most of the funds of the Sarajevo branch of Ljubljanska Banka Ljubljana had ended up in Slovenia. It was therefore responsible for the debt of the Ljubljanska Banka Ljubljana to the first and second applicants.

As to Investbanka, it was State-owned by Serbia and controlled by a Serbian Government Agency. Moreover, at one point the bank had been required to write off its considerable claims against State-owned and socially-owned companies to its own and its stakeholders' detriment. Serbia had thus disposed of Investbanka's assets as it considered fit, which led the Court to conclude that there were sufficient grounds to deem Serbia responsible for Investbanka's debt to the third applicant.

As to the applicants' inability to freely dispose of their "old" foreign-currency savings since 1991-92, the explanation of the Serbian and Slovenian Governments for the delay essentially concerned their duty to negotiate that question in good faith with the other successor States, as required by international law. However, the duty to negotiate did not prevent the successor States from adopting measures to protect the savers' interests. The Croatian Government had repaid a large part of its citizens' "old" foreign-currency savings in Ljubljanska Banka Ljubljana's Zagreb branch and the Macedonian Government had repaid the total amount of "old" foreign currency savings in the Skopje branch of that bank. At the same time, those two Governments had never abandoned their position that the Slovenian Government should eventually be held liable, and continued to claim compensation at the inter-State level in the context of the succession negotiations. Furthermore, the Slovenian and Serbian Governments insisted that during State succession negotiations the liability for debts of banks in Bosnia and Herzegovina was to be decided under the territoriality principle. The Court disagreed recalling the "equitable proportion" principle which was to be applied under international law on State succession.

Although certain delays in repayment of the above debts could be justified in exceptional circumstances, and despite a wide margin of appreciation left to the respondent States in this area, the applicants' continued inability to freely dispose of their savings for over twenty years had been disproportionate and thus in breach of Article 1 of Protocol No. 1.

The Court emphasized that the above conclusions did not imply that no State would ever be able to rehabilitate a failed bank without incurring direct responsibility for that bank's debt under Article 1 of Protocol No. 1. Given its context, the situation in the present case was unique and different from other cases concerning rehabilitation of an insolvent privately-owned bank.

Conclusions: violation by Slovenia with regard to the first and second applicants (unanimously); violation by Serbia with regard to the third applicant (unanimously); no violation as regards the other respondent States (fifteen votes to two).

The Court also found, unanimously, a violation of Article 13 of the Convention by Slovenia in respect of the first two applicants and by Serbia in respect of the third applicant.

Article 46: There were more than 1,850 similar applications, introduced on behalf of more than 8,000 applicants, already pending before the Court, and thousands of potential applicants. For that reason, it was appropriate to apply the pilot-judgment procedure to the applicants' case. In view of the systemic problem identified, the Court considered that general measures at national level were undoubtedly called for in the execution of the present judgment. Notably, within one year and under the supervision of the Committee of Ministers, Slovenia and Serbia must make necessary arrangements, including legislative amendments, in order to allow the applicants and all other persons in their position to recover their "old" foreign-currency savings under the same conditions as their nationals who held such savings in the domestic branches of Slovenian and Serbian banks. While there was no need to indicate that all affected persons should be afforded redress for the damage incurred as a result of their inability to freely dispose of their savings for more than twenty years, the Court pointed out that it may reconsider this issue should either of the respondent States fail to apply the general measure indicated above. Finally, the Court decided to adjourn the examination of similar cases against Serbia and Slovenia for one year.

Article 41: EUR 4,000 each to the first, second and third applicants in respect of non-pecuniary damage.

Respondent State required to provide effective domestic remedies in cases of non-enforcement or delayed enforcement of judgments imposing obligations in kind

Gerasimov and Others v. Russia - 29920/05 et al.
Judgment 1.7.2014 [Section I]

(See Article 37 above, page 37)

Execution of judgment – General measures

Respondent State required to take general measures to ensure independent representation for the mentally disabled

Centre of Legal Resources v. Romania - 47848/08
Judgment 17.7.2014 [GC]

(See Article 34 above, page 34)

Respondent State required to establish without delay political system in which all citizens have the right to stand for elections without discrimination

Zornić v. Bosnia and Herzegovina - 3681/06
Judgment 15.7.2014 [Section IV]

Facts – Under the Bosnian Constitution, only persons declaring affiliation with a "constituent people" – defined by the Constitution as Bosniacs, Croats or Serbs – have the right to stand for election to the State Parliament (House of Peoples) and the Presidency of Bosnia and Herzegovina. The applicant, an active participant in the political life of the country, does not wish to declare affiliation with any of the "constituent peoples" as she considers herself a citizen of Bosnia and Herzegovina. She is thus ineligible to stand for election to either office.

Law – Article 14 in conjunction with Article 3 of Protocol No. 1, and Article 1 of Protocol No. 12: In the earlier case of *Sejdić and Finci v. Bosnia and Herzegovina* the Court had found the constitutional provisions discriminatory in that they excluded person of Roma or Jewish origin from standing for election. In the present case the applicant had been excluded from standing for election because of her decision not to declare affiliation with any of the "constituent people" as defined by the Constitution. Irrespective of the reasons for her decision, for the reasons set out in *Sejdić and Finci* there had been a breach of her Convention rights.

Conclusions: violation of Article 14 in conjunction with Article 3 of Protocol No. 1 (six votes to one); violations of Article 1 of Protocol No. 12 (unanimously).

Article 46: The finding of a violation in the present case was a direct result of the authorities' failure to introduce measures to ensure compliance with the judgment given by the Grand Chamber in *Sejdić and Finci*. The failure of the respondent State to introduce constitutional and legislative proposals to put an end to the current incompatibility of the Constitution and the electoral law with the Convention was an aggravating factor as regards the State's responsibility under the Convention for the existing state of affairs as well as a threat to the future effectiveness of the Convention machinery. The execution of the *Sejdić and Finci* judgment was still under the supervision of the Committee of Ministers, which had regularly examined domestic developments and called for a speedy end to the existing situation of non-compliance. Despite three interim resolutions adopted by the Committee of Ministers urging the national authorities to take all necessary steps with a view to full execution of the *Sejdić and Finci* judgment, the respondent State had not yet changed the legislation. The Court encouraged the speedy and effective resolution of the situation in a Convention-compliant manner. Eighteen years after the end of the tragic conflict in Bosnia and Herzegovina time had come for a political system which would provide every citizen of that country with the right to stand for elections to the Presidency and the House of Peoples without discrimination based on ethnic affiliation.

(See *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 27996/06 and 34836/06, 22 December 2009, Information Note 125)

(For more information on the right to free elections, see the Court's factsheet at <www.echr.coe.int> – Press)

Respondent State required to provide adequate procedures to review lawfulness of detention pending removal and to limit length of such detention

Kim v. Russia - 44260/13
Judgment 17.7.2014 [Section I]

Facts – The applicant was a stateless person who was born in the Uzbek Soviet Socialist Republic in 1962. In July 2011 he was arrested by the Russian authorities for not being in possession of an identity document; he was found guilty of an administrative offence and placed in a detention centre for aliens pending his expulsion. However, the Russian authorities were unable to remove him to Uzbekistan, as the Uzbek authorities failed to respond to their repeated inquiries regarding the issuance of a travel document. Finally, in February 2013 the Uzbek Embassy informed the Russian authorities that the applicant was not an Uzbek national. He was eventually released from the detention centre following the expiry of the maximum two-year time-limit allowed for enforcing expulsion orders.

Law – Article 5 § 1 (f): The only steps taken by the Russian authorities during the applicant's detention had been to write to the Uzbek Embassy in Moscow on five occasions to request a travel document. While they could not compel the Embassy to issue such a document, there was no indication that they had pursued the matter vigorously or asked the Embassy to expedite its delivery. Indeed, it had taken them more than four months just to contact the Embassy. Moreover, upon receipt of the Embassy's letter in February 2013 informing them that the applicant was not an Uzbek national, the Russian authorities would have been aware that expulsion to Uzbekistan was no longer a realistic prospect, so that his detention thereafter could no longer be said to have been effected with a view to his deportation.

From the outset the Russian authorities had been under an obligation to consider whether detention with a view to removal was, or continued to be, justified. This was especially true in the case of the applicant, whose situation, as a stateless person without access to consular assistance and with no financial resources or family connections in Russia, was particularly vulnerable. However, he had not had any effective remedy by which to contest the lawfulness and length of his detention, and the Government had not pointed to any other normative or practical safeguard. It followed that the Russian legal system had not afforded a procedure capable of preventing the risk of arbitrary detention pending expulsion. Lastly, since the maximum penalty for an administrative offence was 30 days' detention, the "preventive" measure had in fact been much more serious than the "punitive" one.

The foregoing considerations were sufficient to enable the Court to conclude that the grounds for the applicant's detention had not remained valid for the whole period of his detention due to the lack of a realistic prospect of his expulsion and the domestic authorities' failure to conduct the proceedings with due diligence.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been violations of Article 3 of the Convention on account of the applicant's conditions of detention and of Article 5 § 4 on account of the lack of adequate review procedures for detention pending expulsion.

Article 46

(a) *General measures* – The respondent State was required to take general measures (a) to enable individuals to institute proceedings for the examination of the lawfulness of their detention pending removal in the light of the developments in the removal proceedings (Article 5 § 4) and (b) to limit detention periods so that they remained connected to the ground of detention applicable in an immigration context (Article 5 § 1 (f)).

(b) *Individual measures* – In addition to being stateless, the applicant appeared to have no fixed residence and no identity documents and so was at risk of a new round of prosecution following his release. The Government was therefore required to take steps to prevent him from being re-arrested and put in detention for offences resulting from his status as a stateless person.

(See also *Azimov v. Russia*, 67474/11, 18 April 2013, Information Note 162)

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

Ataykaya v. Turkey - 50275/08
Judgment 22.7.2014 [Section II]

(See Article 2 above, page 9)

Execution of judgment – Individual measures

Respondent State required to seek assurances that US authorities would not impose death penalty in respect of applicant following extraordinary rendition

Al Nashiri v. Poland - 28761/11
Judgment 24.7.2014 [Section IV]

(See Article 3 above, page 13)

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Inability to recover "old" foreign-currency savings following dissolution of former SFRY: *violation*

Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia - 60642/08
Judgment 16.7.2014 [GC]

(See Article 46 above, page 39)

Conversion of service pension into service allowance with consequent reduction in net income: *inadmissible*

Markovics and Others v. Hungary - 77575/11, 19828/13 and 19829/13
Decision 24.6.2014 [Section II]

Facts – These three applications concerned the restructuring of retired servicemen's pensions in Hungary. By virtue of paragraph 5(1) of Act no. CLXVII, which entered into force on 1 January 2012, service pensions of persons born in or after 1955 were transformed into a "service allowance" which, unlike the pensions, was subject to personal income tax. As a result of this change, the applicants suffered a reduction in their net income after tax with the first applicant's income dropping by 16% and the second and third applicants' by 12% each.

In their applications to the European Court the applicants complained under Article 1 of Protocol No. 1, taken alone and in conjunction with Articles 13 and 14 of the Convention, that the abolition of their service pensions amounted to an unjustified and discriminatory interference with the peaceful enjoyment of their possessions for which there was no effective domestic remedy.

Law – Article 1 of Protocol No. 1, taken alone and in conjunction with Articles 13 and 14 of the Convention: The core issue of the three applications was the conversion of the service pensions into an allowance which was subject to the general personal income tax rate. That conversion had interfered with the applicants' right to the peaceful enjoyment of their possessions and pursued the legitimate aim

of serving the general interest of economic and social policies.

Rather than totally losing their entitlements, however, the applicants had continued to receive an allowance. The amount of benefits they received had been decreased in comparison to their previous pensions but the reduction was reasonable and commensurate. The applicants had not been totally divested of their only means of subsistence or placed at risk of having insufficient means with which to live. The curtailing of the benefits had not, therefore, imposed an excessive or disproportionate burden on the applicants or impaired the essence of their right to the peaceful enjoyment of their possessions.

As to the complaint under Article 14, even assuming that the legislation had resulted in a difference in treatment, it could be seen as respecting a reasonable relation of proportionality between the aim pursued (the rationalisation of the pension system) and the means employed (a commensurate reduction of benefits).

Lastly, as regards the alleged lack of an effective remedy before the domestic courts, the Court reiterated that Article 13 of the Convention did not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention.

Conclusion: inadmissible (manifestly ill-founded).

(For more information on work-related rights, see the Court's factsheet at <www.echr.coe.int> – Press)

Deprivation of property

Failure to consider other means of paying compensatory award when making transfer of property order: *violation*

Milhau v. France - 4944/11
Judgment 10.7.2014 [Section V]

Facts – In 2001 the applicant's wife filed for divorce. In 2005 the court granted the divorce on grounds of fault by the applicant alone. The domestic courts noted that the termination of the marriage created a disparity in the former spouses' pecuniary circumstances, which had to be offset by the payment of a compensatory financial provision to the applicant's former wife. In spite of the applicant's substantial and varied property portfolio, the domestic courts held that this compensatory award was to take the form of a villa which he owned separately. In appealing on points of law, the applicant submitted, in particular, that while Article 275 of the Civil Code authorised the judge to order that a property be relinquished, such a provision could only be implemented where it was impossible for the person liable for the compensatory financial award to fulfil that obligation in another way, failing which the right to property guaranteed by Article 1 of Protocol No. 1 would be breached.

Law – Article 1 of Protocol No. 1: It was common ground that there had been a "deprivation of possessions" on account of a compulsory, integral and final transfer of ownership. The Court also considered it established that there had been interference in the applicant's right to peaceful enjoyment of his possessions. Moreover, the enforced award had a legal basis. The law on compensatory financial awards, which had made it possible for the courts to order payment of this compensatory award through the compulsory transfer of the debtor's ownership rights, had sought to correct abuses in relation to the legislature's initial intention, which had been to favour payment of the compensatory award in a lump sum. This measure pursued a legitimate aim, namely that of settling rapidly the financial consequences of divorce and limiting the likelihood of further proceedings once it had been pronounced. The interference had therefore been in the public interest.

The domestic courts had interpreted the law as authorising them to use compulsory transfer of one of the applicant's assets as a means of payment of the compensatory financial provision, without having to take account of the overall value of his property holdings or his willingness to suggest other assets as a means of payment. The courts' decision to order compulsory transfer of the villa as payment of the compensatory award could not have been based on the applicant's inability to pay his debt by other means: it was clear from the various decisions of the regional and appeal courts, which contained particularly ample reasoning on this point, that the applicant owned substantial assets which would have enabled him to settle his debt by paying a lump sum. Accordingly, the legitimate aim pursued by the law could have been achieved without needing to resort to the impugned measure in question. Furthermore, the Constitutional Council, ruling on a preliminary question on constitutionality concerning the provisions of the Civil Code, admittedly submitted after the material time but with relevant content identical

to that applicable in the present case, had validated the option of payment by compulsory transfer of ownership of a property only where such an arrangement was used as an "alternative" in those cases where payment of a lump sum did not appear sufficient to guarantee payment of the compensatory award.

In view of the foregoing, the fair balance which had to be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights had not been achieved. In the present case, the applicant had "borne an individual and excessive burden", which could have been rendered legitimate only if he had had the possibility of paying his debt by another means available to him under the law, namely the payment of a sum of money or the transfer of his property rights over one or several other properties.

Conclusion: violation (unanimously).

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

Control of the use of property

Obligation under protected tenancy legislation for landlord to let property for indefinite period without adequate rent: *violation*

Statileo v. Croatia - 12027/10
Judgment 10.7.2014 [Section I]

Facts – The applicant owned a 66 square metre flat in Split occupied by a tenant who had been granted a specially protected tenancy in the 1950s. Specially protected tenancies were abolished in 1996 by the Lease of Flats Act, which provided that the holders of such tenancies in respect of privately owned flats were to become "protected tenants". Private owners were required to enter into lease contracts of indefinite duration with the former holders of specially protected tenancies at a "protected rent" that was significantly lower than the market rent. The applicant was subsequently ordered by the domestic courts to grant a lease to his former specially protected tenant at a monthly rent of approximately EUR 14. In his application to the European Court he complained under Article 1 of Protocol No. 1 that he had been unable to regain possession of his flat or charge a market rent.

Law – Article 1 of Protocol No. 1: The interference with the applicant's property rights constituted a measure of control of the use of his property and was aimed at promoting the economic well-being of the country and the protection of the rights of others. Under the system established by the Lease of Flats Act, landlords had little or no influence on the choice of tenant or the essential terms of the lease such as its duration or the rights to terminate. Landlords who intended to move into the flat or install members of their family were allowed to terminate only if they had no other accommodation and were entitled to permanent social assistance or were over sixty and the tenants owned suitable accommodation in the same municipality. Such rules left little or no possibility for landlords to regain possession as the likelihood of protected tenants leaving voluntarily was generally remote. Moreover, landlords were under obligations to maintain the flat in a condition suitable for habitation and to pay a condominium fee to cover the costs of maintaining the building in which the flat was located.

The landlords' right to derive profits from the flat was subject to statutory restrictions. They were entitled to receive a protected rent, which was sometimes lower than the condominium fee they had to pay for maintenance. In addition, they had to pay income tax on the rent received, while the market value of the property dropped because of the protected tenancy. The amount of rent received by the applicant was about 25 times lower than the market rent and thus grossly disproportionate. While it was true that the States enjoyed a wide margin of appreciation in measures such as the control of rent levels, the margin was not unlimited and the consequences of such measures could not be contrary to the Convention standards. The Court recognised that, in the context of the fundamental reform of the country's political, legal and economic system during the transition for the socialist regime to a democratic state, the had Croatian authorities faced an exceptionally difficult task in having to balance the rights of landlords and the protected tenants who occupied their flats for a long time. However, the Court was unable to discern a demand of general interest capable of justifying such comprehensive restrictions on the applicant's property rights. In the present case there had been no fair distribution of the social and financial burden resulting from the reform of the housing sector. Instead, a disproportionate and excessive individual burden was placed on the applicant as a landlord as he was required to bear most of the social and financial costs of providing

housing for the protected tenant and his family. The Croatian authorities had thus failed to strike the requisite balance between the general interests of the community and the protection of the applicant's property rights.

Conclusion: violation (unanimously).

Article 41: EUR 8,200 in respect of pecuniary damage and EUR 1,500 in respect of non-pecuniary damage.

(See also *Hutten-Czapska v. Poland* [GC], 35014/97, 19 June 2006, Information Note 87; *Amato Gauci v. Malta*, 47045/06, 15 September 2009; *Lindheim and Others v. Norway*, 13221/08 and 2139/10, 12 June 2012, Information Note 153; and, for a case where the tenant complained of the impact of housing reforms on his rights, *Berger-Krall and Others v. Slovenia*, 14717/04, 12 June 2014, Information Note 175)

ARTICLE 4 OF PROTOCOL No. 4

Prohibition of collective expulsion of aliens

Collective expulsion of Georgian nationals by Russian authorities from October 2006 to January 2007: *administrative practice in breach*

Georgia v. Russia (no. 1) - 13255/07
Judgment 3.7.2014 [GC]

Facts – The case concerned the arrest, detention and expulsion from Russia of large numbers of Georgian nationals from the end of September 2006 to the end of January 2007. The facts of the case were disputed.

According to the Georgian Government, during that period more than 4,600 expulsion orders were issued by the Russian authorities against Georgian nationals, of whom more than 2,300 were detained and forcibly expelled, while the remainder left by their own means. This represented a sharp increase in the number of expulsions of Georgian nationals per month.

In support of their allegation that the increase in expulsions was the consequence of a policy specifically targeting Georgian nationals, the Georgian Government submitted a number of documents that had been issued in early and mid-October 2006 by the Russian authorities. These documents, which referred to two administrative circulars issued in late September 2006, purportedly ordered staff to take large-scale measures to identify Georgian citizens unlawfully residing in Russia, with a view to their detention and deportation. The Georgian Government also submitted two letters from Russian regional authorities that had been sent to schools in early October 2006 asking for Georgian pupils to be identified.

The Russian Government denied these allegations. They said they had simply been enforcing immigration policy and had not taken reprisal measures. As regards the number of expulsions, they only kept annual or half-yearly statistics that showed about 4,000 administrative expulsion orders against Georgian nationals in 2006 and about 2,800 between 1 October 2006 and 1 April 2007. As to the documents referred to by the Georgian Government, the Russian Government maintained that the instructions had been falsified. While confirming the existence of the two circulars, they disputed their content while at the same time refusing – on the grounds that they were classified "State secret" – to disclose them to the European Court. They did not dispute that letters had been sent to schools with the aim of identifying Georgian pupils, but said this had been the act of overzealous officials who had subsequently been reprimanded.

Various international governmental and non-governmental organisations, including the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE), reported in 2007 on the expulsions of Georgian nationals, pointing to coordinated action between the Russian administrative and judicial authorities.

Law – Article 38: The Russian Government had refused to provide the Court with copies of two circulars issued by the authorities at the end of September 2006 on the grounds that they were classified materials whose disclosure was forbidden under Russian law. The Court had already found in a series of previous cases relating to documents classified "State secret" that respondent Governments could not rely on provisions of national law to justify a refusal to comply with a Court request to provide evidence.[1] In any event, the Russian Government had failed to give a specific explanation for the secrecy of the circulars and, even assuming legitimate security interests for not disclosing the circulars existed, possibilities existed under Rule 33 § 2 of the Rules of Court to limit public access

1. *Davydov and Others v. Ukraine*, 17674/02 and 39081/02, 1 July 2010; *Nolan and K. v. Russia*, 2512/04, 12 February 2009, Information Note 116; and *Janowiec and Others v. Russia* [GC], 55508/07 and 29520/09, Information Note 167.

to disclosed documents, for example through assurances of confidentiality. The Court therefore found that Russia had fallen short of its obligation to furnish all necessary facilities to assist the Court in its task of establishing the facts of the case.

Conclusion: failure to comply with Article 38 (sixteen votes to one).

Article 35 § 1 (*exhaustion of domestic remedies*): From October 2006 a coordinated policy of arresting, detaining and expelling Georgian nationals had been put in place in the Russian Federation. That policy amounted to an administrative practice meaning, in line with the Court's settled case-law, that the rule requiring exhaustion of domestic remedies did not apply.

In so finding, the Court noted that there was nothing to undermine the credibility of the figures indicated by the Georgian Government: 4,600 expulsion orders against Georgian nationals, of whom approximately 2,380 were detained and forcibly expelled. The events in question – the issuing of circulars and instructions, mass arrests and expulsions of Georgian nationals, flights with groups of Georgian nationals from Moscow to Tbilisi and letters sent to schools by Russian officials with the aim of identifying Georgian pupils – had all occurred during the same period in late September/early October 2006.

The concordance in the description of those events in the reports of international governmental and non-governmental organisations was also significant. Moreover, in view of the Court's finding of a violation of Article 38, there was a strong presumption that the Georgian Government's allegations regarding the content of the circulars ordering the expulsion specifically of Georgian nationals were credible.

As regards the effectiveness and accessibility of the domestic remedies, the material before the Court indicated there had been real obstacles in the way of Georgian nationals seeking to use the remedies that existed, both in the Russian courts and following their expulsion to Georgia. They had been brought before the courts in groups. Some had not been allowed into the courtroom, while those who were complained that their interviews with the judge had lasted an average of five minutes with no proper examination of the facts. They had subsequently been ordered to sign court decisions without being able to read the contents or obtain a copy. They did not have an interpreter or a lawyer and, as a general rule, were discouraged from appealing by both the judges and the police officers.

Conclusion: existence of administrative practice (sixteen votes to one); preliminary objection dismissed (sixteen votes to one).

Article 4 of Protocol No. 4: Georgia alleged that its nationals had been the subject of a collective expulsion from the territory of the Russian Federation. The Court reiterated that for the purposes of Article 4 of Protocol No. 4 collective expulsion was to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure was taken following, and on the basis of, a reasonable and objective examination of the particular case of each individual member of the group.[2] Unlike the position under Article 1 of Protocol No. 7, Article 4 of Protocol No 4 was applicable even if those expelled were not lawfully resident on the territory concerned.

The Court took note of the concordant description given by the Georgian witnesses and international governmental and non-governmental organisations of the summary procedures conducted before the Russian courts. It observed in particular that, according to the PACE Monitoring Committee, the expulsions had followed a recurrent pattern all over the country and that in their reports the international organisations had referred to coordination between the administrative and judicial authorities.

During the period in question the Russian courts had made thousands of expulsion orders expelling Georgian nationals. Even though, formally speaking, a court decision had been made in respect of each Georgian national, the Court considered that the conduct of the expulsion procedures during that period, after the circulars and instructions had been issued, and the number of Georgian nationals expelled from October 2006 onwards had made it impossible to carry out a reasonable and objective examination of the particular case of each individual.

While every State had the right to establish its own immigration policy, problems with managing migration flows could not justify practices incompatible with the State's obligations under the Convention.

The expulsions of Georgian nationals during the period in question had not been carried out following, and on the basis of, a reasonable and

2. See *Čonka v. Belgium*, 51564/99, 5 February 2002, Information Note 39; see also *Sultani v. France*, 45223/05, 20 September 2007, Information Note 100; and *Hirsi Jamaa and Others v. Italy* [GC], 27765/09, 23 February 2012, Information Note 149.

objective examination of the particular case of each individual. This amounted to an administrative practice in breach of Article 4 of Protocol No. 4.

Conclusion: administrative practice in breach of Article 4 of Protocol No. 4 (sixteen votes to one).

The Grand Chamber also found, by sixteen votes to one, that the arrests and detention of Georgian nationals in Russia during the period in question were part of a coordinated policy of arresting, detaining and expelling Georgian nationals and thus arbitrary. As such they amounted to an administrative practice in breach of Article 5 § 1 of the Convention. By the same majority, it found that the absence of effective and accessible remedies for Georgian nationals against the arrests, detentions and expulsion orders had violated Article 5 § 4, while the conditions of detention in which Georgian nationals were held (overcrowding, inadequate sanitary and health conditions and lack of privacy), amounted to an administrative practice in breach of Article 3. The Court also found violations of Article 13 in conjunction with Article 5 § 1 (thirteen votes to four) and in conjunction with Article 3 (sixteen votes to one).

The Court found (by sixteen votes to one) no violation of Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens), since that provision expressly referred to "aliens lawfully resident in the territory of a State" and it had not been established that during the period in question there had also been arrests and expulsions of Georgian nationals lawfully resident in the territory of the Russian Federation. Lastly, it found no violation of Article 8 and Articles 1 and 2 of Protocol No. 1 (unanimously).

Article 41: question reserved.

(For more information on collective expulsions of aliens, see the Court's factsheet at <www.echr.coe.int> – Press)

ARTICLE 1 OF PROTOCOL No. 12

General prohibition of discrimination

Ineligibility to stand for election without declaration of affiliation to one of constitutionally defined "constituent peoples": *violations*

Zornić v. Bosnia and Herzegovina - 3681/06
Judgment 15.7.2014 [Section IV]

(See Article 46 above, page 41)

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

S.J. v. Belgium - 70055/10
Judgment 27.2.2014 [Section V]

(See Article 13 above, page 33)

COURT NEWS

Election of Judges

A new webpage has been designed on the Council of Europe Parliamentary Assembly's Internet site. This webpage is dedicated to the election of judges at the Court and offers information about the election procedure and about forthcoming elections of judges by contracting Parties. It can be accessed from the PACE Internet site: <http://website-pace.net/en_GB/web/as-jur/echr-judges-election>.

Reinforcement of the independence of the Court

During its summer 2014 session, the Parliamentary Assembly of the Council of Europe (Committee on Legal Affairs and Human Rights) studied additional measures that could be taken in order to reinforce the independence of the European Court of Human Rights. It stressed that the independence and authority of the Court was contingent upon the political will and commitment of all member States to ensure that the Court was provided with the financial means to effectively implement its human rights mandate.

More information (adopted texts and video of the debate) can be found on the PACE Internet site: <http://assembly.coe.int/nw/Home-EN.asp> – Committee of Legal Affairs and Human Rights.

RECENT PUBLICATIONS

Handbook on European non-discrimination law

Translations in Azerbaijani and Russian of the handbook – published jointly by the Court and

the European Union Agency for Fundamental Rights (FRA) in 2011 – has been published, thanks to a joint European Union/Council of Europe programme. The 30 linguistic versions can be downloaded from the Court's Internet site (<www.echr.coe.int>– Publications).

Ayrı-seçkilik əleyhinə Avropa hüququ üzrə məlumat kitabı (aze)

Руководство по европейскому антидискриминационному праву (rus)

Your application to the ECHR

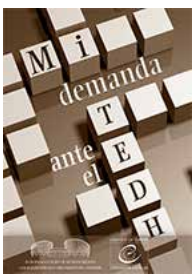
Intended to answer the main questions that applicants might ask, especially once their application has been sent to the Court, this pamphlet has now been translated into Bulgarian, Italian, Russian and Spanish. All linguistic versions can be downloaded from the Court's Internet site (<www.echr.coe.int> – The Court – General presentation).

Вашата жалба до ЕСПЧ: Как се подава жалба и как ще бъде разгледана тя (bul)

Il mio ricorso alla CEDU: Come presentarlo e in che modo lo stesso viene gestito (ita)

Ваша жалоба в ЕСПЧ: как подать жалобу и как она будет рассматриваться (rus)

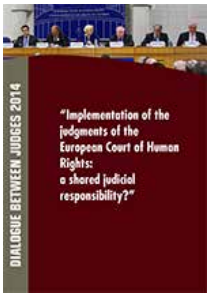
Mi demanda ante el TEDH: Cómo presentarla y desarrollo del procedimiento (spa)



Dialogue between judges 2014

The publications in the Dialogue between judges series are a record of the proceedings of seminars held annually to mark the opening of the judicial year of the Court. This year some 250 eminent figures from the European judicial scene attended a seminar on the theme "Implementation of the judgments of the ECHR: a shared judicial responsibility?".

The proceedings of the 2014 seminar have now been published on the Court's Internet site (<www.echr.coe.int> – Publications).



The ECHR: Questions and answers for lawyers

The Council of Bars and Law Societies of Europe (CCBE), based in Brussels, has produced a practical guide directed at lawyers intending to bring a case before the Court. This pamphlet contains information and practical advice to guide them in proceedings both before national courts prior to application to the ECHR and before the Strasbourg Court itself, and during the enforcement of the Court's judgment.

With a foreword by Dean Spielmann, President of the ECHR, this guide can be downloaded in English, French and Italian from the CCBE's Internet site (<www.ccbe.eu> – Documents – Publications).

The ECHR: Questions and answers for lawyers – 2014 (eng)

La CEDH : questions et réponses destinées aux avocats – 2014 (fra)

La CEDU: domande e risposte per avvocati – 2014 (ita)