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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Muršić v. Croatia - 7334/13
Judgment 12.3.2015 [Section I]

In his application to the European Court, the applicant essentially complained about lack of personal space in the prison where he served a sentence of one year and five months. During his incarceration he was placed in four different cells where he had between three and just over seven square metres of personal space. On occasional non-consecutive short periods, including a period of twenty-seven days, his personal space fell slightly below three sq. m.

In a judgment of 12 March 2015 a Chamber of the Court, by six votes to one, found that there had been no violation of Article 3 of the Convention (see Information Note 183). In particular, it found that the conditions of the applicant's detention, though not always adequate, had not reached the threshold of severity required to characterise the treatment as inhuman or degrading within the meaning of Article 3 of the Convention.

On 7 July 2015 the case was referred to the Grand Chamber at the applicant's request.

HIV-positive prisoners held in poor physical and sanitary conditions and without adequate treatment in prison psychiatric wing: *violation*

Martzaklis and Others v. Greece - 20378/13
Judgment 9.7.2015 [Section I]

Facts – The applicants, who are HIV positive, were detained or continue to be detained in the prison hospital. In a petition sent in October 2012 to the supervising prosecutor responsible for the prison, 45 HIV-positive persons detained in the prison hospital, including the thirteen applicants, complained of their conditions of detention with regard to the physical and sanitary conditions and the medical treatment dispensed. They also complained to the prison hospital board, but received no reply.

Law – Article 3 (*substantive aspect*) taken alone and in conjunction with Article 14: The applicants alleged in particular that they were held in overcrowded rooms with personal living space of less than two square metres. The bathrooms did not comply with minimum hygiene standards, the food was low in nutritional value and the premises were inadequately heated. With regard to their health, they maintained that medication was not prescribed on an individual basis, the hospital had no doctor specialising in infectious diseases and there were delays in transferring patients to outside hospitals. Supplies of the medication prescribed to some of the applicants were frequently interrupted without explanation for periods ranging from a week to a month, while some of the other applicants had not begun treatment.

The Court could not criticise the prison authorities' initial intention to move the HIV-positive prisoners, including the applicants, to the prison hospital in order to provide them with a greater degree of comfort and regular supervision of their medical treatment. Thus, the applicants' situation could not be described as "ghettoisation" since their placement in the psychiatric wing had been justified by the need to improve their monitoring and treatment, protect them against infectious diseases, provide them with better meals and allow them longer exercise periods and access to their own kitchen and washrooms. Hence, although there had been a difference in treatment where they were concerned, it had pursued a "legitimate aim", namely to provide them with more favourable conditions of detention compared with ordinary prisoners.

However, the applicants were simply HIV-positive rather than having full-blown Aids and, as such, did not need to be placed in isolation in order to prevent the spread of a disease or the infection of other inmates. Furthermore, the various findings and comments made at domestic and international level corroborated the applicants' assertions concerning their detention.

In these circumstances the Court found established the inadequate physical and sanitary conditions for persons detained in the prison hospital and the irregularities in the administering of the appropriate treatment. The applicants had been exposed – and in some cases perhaps continued to be exposed – to physical and mental suffering going beyond the suffering inherent in detention. They had been subjected to inhuman and degrading treatment and there had been no objective and reasonable justification for their segregation, which had not been necessary in the circumstances.

Conclusion: violation (unanimously).

The Court further held that there had been a violation of Article 3 taken in conjunction with Article 13 on account of the lack of an effective domestic remedy in respect of the conditions of detention and the medical treatment dispensed in the prison hospital.

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

Failure to provide satisfactory and convincing explanation for serious brain damage sustained by person arrested and detained by law-enforcement officers: *violation*

Ghedir and Others v. France - 20579/12
Judgment 16.7.2015 [Section V]

Facts – On 30 November 2004 the first applicant, who was in a state of drunkenness and had been behaving aggressively towards officers of the general security service (SUGE) of the French national railway company (SNCF), was stopped and questioned by the officers, among them L.P., Y.F. and O.D.B. He was arrested without offering any resistance, following which the SUGE officers forced him to the ground and handcuffed his hands behind his back before frisking him. He was then put in a nearby police vehicle. During the journey to the police station and on arrival he complained of nausea, and he had to be helped out of the vehicle by police officers. On arriving at the police cells, he lost consciousness and fell into a coma. After receiving first aid, he was taken to hospital, where he was examined before undergoing surgery to remove a subdural haematoma and to treat fractures to the skull and ribs.

The first applicant was officially in police custody between 8.15 and 10.10 p.m.

The public prosecutor, after being notified at 8.40 p.m., ordered the opening of an investigation under the *flagrante delicto* procedure into an offence of assault committed by a person in public authority. The police and SUGE officers who had intervened or been present at the time of the arrest were interviewed, but gave conflicting accounts. In December 2004 the public prosecutor asked for a judicial investigation to be opened in respect of L.P., Y.F. and O.D.B. for assault, and they were charged the same day. The applicants (the victim and his brother, mother and father), assisted by counsel, applied to join the proceedings as civil parties.

Between February 2005 and June 2008 the first applicant was admitted to various functional rehabilitation centres. On his release, his degree of permanent partial disability was assessed at 95%. Being unable to perform basic everyday tasks independently, he was confined to a wheelchair and was incapable of any autonomous occupational activity.

In December 2006, in view of the deterioration in the first applicant's health, the three SUGE officers were charged with assault occasioning permanent disability. Evidence was taken from a large number of witnesses, in some cases on the investigating judge's instructions and in other cases directly by the investigating judge. However, the statements taken were not consistent. Expert reports were ordered, but were likewise contradictory.

In February 2010 the investigating judge at the *tribunal de grande instance* discontinued the proceedings, finding that the substantial brain damage suffered by the first applicant had been the result of events occurring before he had been stopped and questioned by the SUGE officers and taken to the police station by police officers. She observed that the investigation had been unable to establish the precise circumstances surrounding those events, or who had been responsible. The applicants appealed against the discontinuance order, but their appeals were rejected.

Law – Article 3 (*substantive aspect*): Having suffered a subdural haematoma, resulting in his losing consciousness and falling into a coma, the first applicant had sustained serious lasting damage, losing the ability to perform basic everyday tasks independently. Such consequences exceeded the level of severity required for his alleged treatment to fall within the scope of Article 3 of the Convention.

The circumstances of the case did not solely concern the first applicant's time in police custody, but also the conditions in which he was arrested by the SUGE officers and handed over to the police officers to be taken to the police station. The Court therefore examined whether his allegations could be substantiated by the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

Even though the first applicant's injuries had become apparent while he was in police custody, following his forcible arrest during which he had been pinned to the ground, the investigation had ruled out the possibility that the blow he had suffered might have resulted from the police offi-

cers' actions. His injuries had therefore been attributed to events occurring prior to his arrest.

However, the investigations by the domestic authorities had not established what these events had actually entailed. Furthermore, the various experts had reached conflicting conclusions. In addition, the statements by the SUGE officers and police officers – which had served as the sole basis for the reconstruction on which the last expert report had relied – were themselves contradictory, with the respective authorities blaming each other for the first applicant's injuries. The statements made by some of the police officers varied considerably over the course of the investigation. The Court found the silences and inconsistencies in the statements surprising, particularly in a case concerning the alleged assault of a person found to be carrying serious injuries while in police custody.

Lastly, as to the justification for the use of force during the first applicant's arrest, there were again contradictions between the different witness statements.

The domestic investigations had therefore yielded conflicting and disturbing evidence, both in the successive expert reports and in the statements about the reasons why the first applicant had been arrested and handed over to the police and the conditions in which this had taken place. The theory that the first applicant had suffered violent blows prior to his arrest – accepted as plausible by the Investigation Division – did not appear sufficiently substantiated to be persuasive in the circumstances of the case.

In view of all these considerations, sufficient inferences could be found in the present case to support a finding of a violation of Article 3, seeing that the domestic authorities had not provided a satisfactory and convincing explanation of the cause of the first applicant's injuries, the symptoms of which had become apparent while he was in police custody.

Conclusion: violation (unanimously).

The Court also held unanimously that there had been no violation of the procedural limb of Article 3, given that as soon as the alleged offence had been detected, a preliminary investigation had been opened, during which several witnesses had given evidence and a re-enactment of the scene had been performed. Later, a judicial investigation had likewise been opened promptly, giving rise to a large number of investigative measures. Furthermore, the final expert report, which had been produced on the basis of a full reconstruction of the events, appeared justified by the requirements of establishing the truth. Lastly, the first applicant, who had brought a civil-party complaint and been represented by counsel, had had the opportunity to apply for investigative measures and to put his case forward.

Article 41: reserved.

Involuntary psychiatric treatment including scientific research: *violation*

Bataliny v. Russia - 10060/07
Judgment 23.7.2015 [Section I]

Facts – The first applicant was diagnosed with neurocirculatory dystonia and suffered from tachycardia and severe headaches. On 25 May 2005 he attempted suicide and was taken to a psychiatric hospital. His parents, the second and third applicants, were not allowed to take him home. The first applicant alleged that he had been beaten one night by nurses and patients. He further claimed that he was included in scientific research entailing treatment with a new antipsychotic medication and was not allowed to have any contact with the outside world. He was discharged from hospital on 9 June 2005. Criminal proceedings regarding the alleged beatings were opened in November 2006 and suspended on four occasions. The proceedings were still pending when the European Court delivered its judgment. From March 2007 onwards the investigation concerning the first applicant's involuntary placement in the psychiatric hospital was discontinued and resumed on several occasions before the applicants were informed in 2012 that the proceedings had become time-barred. In April 2008 a forensic psychiatric examination concluded that the first applicant's involuntary hospitalisation had been justified but not his subsequent stay in the hospital.

Law – Article 3 (*substantive aspect*): The first applicant complained that his forced psychiatric treatment in the absence of an established medical need and in the framework of scientific research amounted to treatment prohibited by Article 3. According to the forensic medical examination 2008, while his initial involuntary hospitalisation had been justified in view of his attempted suicide, his mental state in the following period did not fall under the definition of a "severe" mental disorder or any other acute mental condition and did not require involuntary psychiatric treatment. Since no evidence proving otherwise was produced by the Government, the Court considered that the

medical necessity for the first applicant's involuntary psychiatric treatment had not been convincingly shown. Furthermore, the first applicant had been included in involuntary scientific research of a new drug and was denied all contact with the outside. All of the foregoing must have aroused in him feelings of fear, anguish, and inferiority capable of humiliating and debasing him.

Conclusion: violation (unanimously).

The Court also found a violation of Article 5 § 1 on account of the first applicant's involuntary confinement in the psychiatric hospital, Article 5 § 4 on account of his inability to challenge the lawfulness of his continued detention and Article 3 (under both the substantive and procedural aspects) for his alleged ill-treatment in the psychiatric hospital and the failure to conduct an effective investigation into those allegations.

Article 41: EUR 26,000 to the first applicant in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Gorobet v. Moldova*, 30951/10, 11 October 2011; and the Factsheet on Detention and mental health)

Degrading treatment

Family of asylum seekers with children, including a baby and a disabled child, left homeless and with no means of subsistence for three weeks: *violation*

V.M. and Others v. Belgium - 60125/11
Judgment 7.7.2015 [Section II]

Facts – The applicants are a couple of Roma origin and their five children. Their eldest daughter, who had been mentally and physically disabled from birth, died after the lodging of the application. The family, who came from Serbia, travelled first to Kosovo and then to France, where they lodged an asylum application on discrimination grounds. Their application was rejected in a final decision of June 2010. The family returned to Serbia and then travelled to Belgium, where they lodged a further asylum request in April 2011. Under the European Union's Dublin II Regulation[1], they were served with a decision refusing them leave to remain together with an order to leave the country for France, the country responsible for examining their asylum application. The Belgian authorities stated in particular that there was no evidence that the applicants had left the territory of the European Union Member States for more than three months. The validity of the orders to leave the country was subsequently extended by four months because the mother was pregnant and was about to give birth. The applicants appealed against the decision refusing them leave to remain and the orders to leave the country. The proceedings concluded with a finding that Belgium was responsible for the examination of their asylum application by the Aliens Appeals Board. At the same time, the applicants commenced proceedings seeking regularisation of their immigration status on account of their eldest daughter's medical condition. It was only during the proceedings before the European Court that they learnt of the decision to declare their request inadmissible.

During the asylum proceedings in Belgium the applicants were accommodated in two reception centres. They were expelled from there on 26 September 2011 when the time-limit for enforcement of the orders to leave the country expired. They travelled to Brussels, where voluntary associations directed them to a public square where other homeless Roma families were staying. They remained there from 27 September to 5 October 2011. The accommodation centres for asylum seekers took the view that they could not take in the applicants because the appeal against the decision refusing them leave to remain and the order to leave the country did not have suspensive effect. Following the intervention of the Children's Commissioner for the French-speaking Community, the applicants were taken care of for a few days. After allegedly reporting to a reception centre more than 150 km from Brussels – an assertion contested by the Government – the applicants ended up in a Brussels railway station where they remained, homeless and without any means of subsistence, for three weeks until a charity arranged for their return to Serbia in October 2011. After they had returned to Serbia the condition of the eldest girl deteriorated and she died of a pulmonary infection in December 2011.

In the proceedings before the European Court the applicants complained in particular of the failure, during the period between their eviction from the accommodation centre on 26 September 2011 and their departure for Serbia on 25 October 2011, to provide them with reception facilities to meet their essential needs.

1. Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

Law – Article 3 (*substantive aspect*): Under section 6 of the "Reception" Act, material assistance had to be provided to asylum seekers throughout the asylum proceedings, and was discontinued when the time-limit for enforcement of the order to leave the country expired. At the relevant time, against the background of the "reception crisis", reception centres had been interpreting that provision restrictively in the case of asylum seekers who, like the applicants, were covered by the Dublin procedure. Material assistance to the persons concerned was withdrawn immediately on expiry of the time-limit for execution of the order to leave the country which accompanied the decision refusing to examine their application on the ground that another State had responsibility; this was the case even if an appeal was pending against that decision. Nevertheless, under Belgian law, all forms of material and medical assistance could continue to be provided in exceptional circumstances. At the relevant time, however, the reception network for asylum seekers had reached saturation point and reception centres were implementing a policy of excluding families with children who were in the same situation as the applicants, that is to say, who were unlawfully resident following the issuing of an order to leave the country and pending a final decision on their asylum application. Most of the families concerned found themselves homeless and without any form of assistance.

As to whether the applicants had actually reported to the accommodation centre to which they had been directed following the intervention of the Children's Commissioner, the Court was not in a position to verify what had really happened. However, in the circumstances it was not difficult to imagine that the applicants, who were not familiar with the correct procedure, might have felt overwhelmed by the situation and not have displayed all possible diligence in order to take advantage of an accommodation option located over 150 km from Brussels. If so, that should not count to their disadvantage. On the contrary, it had been for the Belgian authorities to display greater diligence in trying to find accommodation for them.

The situation experienced by the applicants had been particularly serious. This finding was echoed by the findings of the European Committee of Social Rights, which had concluded that situations of this type were in breach of children's right to protection under Article 17 § 1 of the 1996 Revised European Social Charter.

Furthermore, the situation in which the applicants found themselves could have been avoided or at least made shorter if the application to set aside and the request to stay execution of the decisions refusing them leave to remain and ordering them to leave the country had been processed more quickly. The Aliens Appeals Board had not given a decision until more than two months after the applicants had been expelled from the reception facility and more than one month after they had left Belgium.

Consequently, the situation experienced by the applicants gave rise to the same conclusion as in the case of *M.S.S. v. Belgium and Greece* ([GC], 30696/09, 21 January 2011, Information Note 137). The Belgian authorities had not given due consideration to the applicants' vulnerability as asylum seekers and to the vulnerability of their children. Notwithstanding the fact that the crisis had been an exceptional situation, the Belgian authorities had to be regarded as having failed in their obligation not to expose the applicants to conditions of extreme poverty for four weeks, leaving them living on the street, without funds, with no access to sanitary facilities and no means of meeting their basic needs. Thus, the applicants had been the victims of treatment showing a lack of respect for their dignity, a situation that had without doubt aroused in them feelings of fear, anguish or inferiority capable of inducing desperation. Those living conditions, combined with the lack of any prospect of an improvement in their situation, had attained the level of severity required under Article 3 of the Convention and amounted to degrading treatment.

Conclusion: violation (five votes to two).

Article 13 taken in conjunction with Article 3: As they had not been detained with a view to their repatriation, the applicants were not entitled to a stay of execution of their removal under the extremely urgent procedure pending the Aliens Appeals Board's examination of the merits of their application to set aside. Hence, at the same time as the application to set aside, they had lodged a request under the ordinary procedure for a stay of execution of the order to leave the country. They complained of the fact that, since the request in question had not stayed execution of the order to leave the country, the reception centre had on 26 September 2011 discontinued the material assistance they had hitherto received. They had therefore been obliged to leave Belgium and return to the country they had fled without the authorities from whom they had requested protection having examined whether their fears in that country were well founded.

Appeals to the Aliens Appeals Board to have an order to leave the country set aside did not stay execution of the expulsion measure. However, the Aliens Act provided for specific procedures for requesting a stay of execution: an extremely urgent procedure and an "ordinary" procedure. A request lodged under the extremely urgent procedure automatically suspended the expulsion measure. Under Belgian law as applicable at the material time, the Aliens Appeals Board, on the basis of a review of the seriousness of the grounds alleging a violation of the Convention, could order a stay of execution of the impugned decisions within a period of 72 hours, thereby preventing the expulsion of the persons concerned from the country until such time as their arguments were subjected to detailed scrutiny in the context of the application to set aside. Automatic suspension could also be obtained by means of another combination of remedies involving, first, an application to set aside and a request for a stay of execution under the ordinary procedure, submitted within the time-limit of 30 days from notification of the impugned decision, followed by a request for interim measures as a matter of extreme urgency, lodged when a coercive measure was imposed. The Aliens Appeals Board then had a statutory duty to examine, simultaneously and within 72 hours, the request for interim measures as a matter of extreme urgency and the previous request for a stay of execution under the ordinary procedure. The lodging of a request for interim measures as a matter of extreme urgency automatically suspended the expulsion measure. However, according to the Aliens Appeals Board's interpretation of the concept of extreme urgency, both the request for a stay of execution under the extremely urgent procedure and the request for interim measures as a matter of extreme urgency required the existence of a coercive measure – normally, the detention of the persons concerned – in order to be declared admissible and well founded.

This system obliged foreign nationals who faced expulsion, and who maintained that a stay of execution of the expulsion measure was an urgent matter, to lodge a precautionary application, in this instance a request for a stay of execution under the ordinary procedure. That application, which did not have suspensive effect, had to be lodged for the sole purpose of retaining the right to take action when the matter actually attained extreme urgency as defined by the case-law of the Aliens Appeals Board, that is, when a coercive measure was applied against the persons concerned. This system was open to a number of criticisms.

Firstly, it could not be ruled out that, in a system where a stay of execution was granted only on application and on a case-by-case basis, it might be incorrectly refused, especially if the judicial body ruling on the merits set aside the removal order subsequently for failure to comply with the Convention, for instance because it considered after closer examination that the person concerned was in fact at risk of ill-treatment in the receiving country. In such cases the extremely urgent remedy exercised by the person concerned would not be sufficiently effective for the purposes of Article 13. The requirements of Article 13 took the form of a guarantee and not a mere statement of intent or a practical arrangement.

Secondly, while the arrangements under Belgian law might be effective in theory, in practice they were liable to prove very complex and difficult to implement. In the present case the fact that the request for a stay of execution under the ordinary procedure lacked suspensive effect had resulted in the material assistance provided to the applicants being discontinued and had "forced" them to return to the country they had fled without either the Belgian or the French authorities having examined whether their fears were well founded. The applicants had contested the claim that France had responsibility, and a few months later the Aliens Appeals Board had in fact found in their favour on that point. Accordingly, the Belgian system had not afforded the requisite guarantees under Article 13 taken in conjunction with Article 3 with regard to the availability and accessibility of the remedies both in law and in practice.

Thirdly, the system obliged the persons concerned, who were already in a vulnerable position, to take further action *in extremis* at the time of enforcement of the measure. This situation was of particular concern in the case of families accompanied by minor children, bearing in mind that enforcement of the measure in the form of placement in detention, if it could not be avoided, had to be kept to a strict minimum in accordance with the Court's case-law in particular.

Fourthly, the delays in the proceedings in issue could not be disregarded. The application to set aside the order to leave the country had been lodged on 16 June 2011, but the Aliens Appeals Board had not given its judgment – in the applicants' favour – until 29 November 2011. By that time the applicants had returned to the country they had fled, without the Belgian or the French authorities having examined whether their fears, as expressed in the Belgian asylum proceedings,

were well founded. That situation had deprived them in practice of the opportunity to continue the proceedings in Belgium and in France. In view of the nature of the arguments raised before the Aliens Appeals Board and the serious consequences of the decision complained of before that body for the applicants' legal and material situation, the application to set aside had also been an inadequate remedy on account of the length of the proceedings.

Lastly, the applicants had attempted another remedy in a bid to prevent their expulsion, in the form of a request to regularise their residence status on medical grounds. However, it was only later, in the course of the proceedings before the Court, that they had learnt of the decision taken. Hence, they had had no effective remedy by which to appeal against that decision either.

Consequently, the applicants had not had an effective remedy in the sense of an appeal having automatic suspensive effect and enabling their allegations of a violation of Article 3 of the Convention to be examined in a rapid and effective manner.

Conclusion: violation (four votes to three).

The Court further held, unanimously, that there had been no violation of Article 2 of the Convention as the applicants had not demonstrated beyond reasonable doubt that the death of their eldest daughter had been caused by their living conditions in Belgium and that the Belgian authorities had breached any positive obligation in that regard.

Article 41: EUR 22,275 jointly in respect of non-pecuniary damage.

(See also Tarakhel v. Switzerland [GC], 29217/12, 4 November 2014, Information Note 179; and the Factsheet on "Dublin" cases)

ARTICLE 5

Article 5 § 4

Speediness of review

Proceedings which could not result in the applicant's freedom but to another form of detention: *Article 5 § 4 applicable; violation*

Kuttner v. Austria - 7997/08
Judgment 16.7.2015 [Section I]

Facts – In 2005 the applicant was convicted of deliberately causing severe bodily harm to his 80-year-old mother and sentenced to six years' imprisonment. Since the regional court found, in reliance on a psychiatric report, that he was suffering from a grave mental disorder and represented a danger to the public he was subsequently placed in an institution for mentally-ill offenders. A first request by the applicant to be conditionally released from the institution was dismissed in May 2006. In January 2007 the applicant filed a second request for release with the regional court. On 30 July 2007 a court of appeal held that the regional court had not discharged its duty to take a decision within a reasonable time and ordered it to do so by 3 August 2007 at the latest. On 31 July 2007 the regional court ordered, on the basis of fresh expert opinion that he remained a risk, that the applicant should continue to be detained in the institution. The applicant's appeal against that decision was dismissed on 10 September 2007. In September 2009 the regional court ordered in a third set of proceedings the termination of his detention in the institution, suspended the remaining months of his prison sentence and released him subject to a number of conditions.

Law – Article 5 § 4

(a) *Applicability* – The applicant's detention in general was initially covered by both sub-sections (a) and (e) of Article 5 § 1. His application of January 2007 to the regional court was not an application for a review of the lawfulness of his detention in general. Instead, he alleged that the reasons for his detention under Article 5 § 1 (e) of the Convention had ceased to exist. He had requested the lifting of the measure of detention in the institution for mentally-ill offenders, which ran parallel to his prison sentence but could be challenged independently by virtue of the domestic law, even if at the material time this would not have led to his release, but only to his transfer to an ordinary prison.

In cases concerning placement in mental institutions where the reasons initially warranting confinement had ceased to exist, it would be contrary to the object and purpose of Article 5 to interpret paragraph 4 thereof as making that category of confinement immune from subsequent review of lawfulness merely because the initial decision of detention had been taken by a court under Article 5 § 1 (a). This had to be the case even if the review under Article 5 § 4 would not lead to release but to a transfer to an ordinary prison. The reason for guaranteeing a review under Article 5 § 4 was equally important to persons detained in a mental institution regardless of whether or not they were serving sentences of imprisonment for criminal offences. In the Austrian legal system a separate challenge of such confinement was al-

lowed. Article 5 § 4 of the Convention was therefore applicable to the proceedings in question.

Conclusion: Article 5 § 4 applicable (unanimously).

(b) *Merits* – As pointed out by the court of appeal in its decision of 30 July 2007, there had been significant delays in the proceedings before the regional court. Those delays could not be offset by the fact that the court of appeal had issued its appeal decision only four weeks after receiving the applicant's appeal. Taking into account the authorities' conduct and the specific circumstances of the instant case, the interval of sixteen months between the final decisions in the first and the second set of proceedings (May 2006 to September 2007) on the applicant's further detention in a psychiatric institution had not fulfilled the "speediness" requirement.

Conclusion: violation (unanimously).

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

ARTICLE 6

Article 6 § 1 (civil)

Civil rights and obligations

Complaint concerning length of domestic proceedings challenging withdrawal by a judge of photographer's accreditation to take pictures in court: *inadmissible*

Truckenbrodt v. Germany - 49849/08
Decision 30.6.2015 [Section V]

Facts – In the Convention proceedings, the applicant, a journalist, complained under Article 6 of the Convention of the excessive length of proceedings he had brought before the Federal Constitutional Court concerning a decision by a judge to withdraw his accreditation to take pictures when covering a high profile court case.

Law – Article 6 § 1: The Court had already found in a previous case (*MacKay and BBC Scotland v. the United Kingdom*, 10734/05, 7 December 2010) that the right to report matters stated in open court could not be counted among rights which are civil in nature for the purposes of Article 6 § 1. Accordingly, a general reporting restriction had to be regarded as an exercise of public authority which could in no way be regarded as decisive for the private rights and obligations of any one media outlet.

German law did not contain a specific right for a journalist to take photographs in connection with a court hearing. A restriction on the taking of photographs could be imposed by the judge presiding a hearing pursuant to section 176 of the Court's Act, as had occurred in the applicant's case. In the absence of any specific right to take photographs in connection with a court hearing, the decision of the presiding judge on the admission or restriction of journalists to take photographs had to be regarded as the exercise of public authority in maintaining order in court and not as a determination of rights which were civil in nature for the purposes of Article 6 § 1.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 6 § 1 (enforcement)

Access to court

Authorities' failure to examine alternative solutions where *restitutio in integrum* enforcement of a court judgment proved impossible: *violation*

Cıngıllı Holding A.Ş. and Cıngıllıoğlu v. Turkey
- 31833/06 and 37538/06
Judgment 21.7.2015 [Section II]

Facts – The case concerned the transfer and subsequent sale of Demirbank in 2000, Turkey's fifth largest private bank at the time. The applicants were its main shareholders. In December 2000 the Banking Regulation and Supervision Board ("the Board") transferred Demirbank's management and control to the Savings Deposit Insurance Fund ("the Fund") on the ground that Demirbank's assets were insufficient to cover its liabilities and that the continuation of its activities would threaten the security and stability of the financial system. In a judgment of 5 November 2004, the Supreme Administrative Court annulled the takeover of the bank by the Fund finding that the takeover without investigating any further options had been unlawful. In 2001, while the proceedings were pending, the Fund sold Demirbank to the HSBC Bank. The agreement to sell Demirbank was annulled by the Turkish courts in 2004. The applicants requested the Banking Regulation and Supervision Agency ("the Agency") to enforce the court judgments and return Demirbank to its previous owners. In 2006

the Agency informed them that this would be impossible as, following its sale to HSBC, Demirbank had been struck off the commercial register.

Law – Article 6 § 1 of the Convention: A situation might exceptionally arise where the *restitutio in integrum* enforcement of a court judgment, declaring administrative acts unlawful and void, might, as such, prove objectively impossible due to insurmountable factual or legal obstacles. However, in such situations and in accordance with the right of access to court, a member State had, in good faith and on its own motion, to examine other alternative solutions that could remedy the unlawful effects of its acts, in particular the awarding of compensation. The Government had not demonstrated that any actions had been taken by the authorities in an attempt to remedy the applicants' situation in the light of the judgments annulling the transfer of Demirbank and its sale to HSBC. In separate proceedings, which were the source of a related application to the Court (see *Reisner v. Turkey*, 46815/09, 21 July 2015), the Supreme Administrative Court had held in a judgment of 16 March 2009 that the enforcement of the judgment of 5 November 2004 could be secured by the return of the supervisory and executive rights to Demirbank's shareholders, and had not required the restitution of the actual shares which would, in any event, be impossible. The complete inaction by the authorities in responding to the request for the enforcement of the Supreme Administrative Court's judgments had effectively deprived the applicants of their rights of access to court.

Conclusion: violation (six votes to one).

Article 1 of Protocol No. 1: The Board's decision to takeover Demirbank had been clearly taken as a measure to control the banking sector in the country. Although it involved a deprivation of property, in the circumstances the deprivation formed a constituent element of a scheme for controlling the banking industry. It was therefore the second paragraph of Article 1 of Protocol No. 1 which was applicable (control of the use of property).

The takeover of Demirbank by the Fund and its subsequent sale to the HSBC bank had been annulled unlawful by the domestic courts. The interference with the applicants' right to enjoyment of their possessions could not therefore be considered as lawful within the meaning of Article 1 of Protocol No. 1.

Conclusion: violation (unanimously).

Article 41: reserved.

ARTICLE 8

Respect for private and family life
Positive obligations

Lack of legal recognition of same-sex partnerships: *violation*

Oliari and Others v. Italy - 18766/11 and 36030/11
Judgment 21.7.2015 [Section IV]

Facts – The applicants are three couples living in stable same-sex relationships who were not allowed to publish marriage banns because the Italian Civil Code provided that the spouses had to be of the opposite sex. Following an appeal by the first couple, the appeal court made a referral to the Constitutional Court regarding the constitutionality of the legislation. In April 2010 the Constitutional Court declared the applicants' constitutional challenge inadmissible after finding that the right to marriage, as guaranteed by the Italian Constitution, did not extend to homosexual unions and was intended to refer to marriage in its traditional sense. At the same time, that Constitutional Court pointed out that it was for the Parliament to regulate, in time and by the means and limits set by law, the juridical recognition of the rights and duties pertaining to same-sex couples. The appeal was consequently dismissed.

Law – Article 8: The Court had already held in previous cases that relationships of cohabitating same-sex couples living in stable *de facto* partnerships fell within the notion of "family life" within the meaning of Article 8. It also acknowledged that same-sex couples were in need of legal recognition and protection of their relationship, as both the Parliamentary Assembly and the Committee of Ministers of the Council of Europe had further underlined.

The Court considered that the legal protection currently available in Italy to same-sex couples failed to provide for the core needs relevant to a couple in a stable committed relationship. Whereas registration of same-sex unions with the local authorities was possible in about 2% of municipalities, this had a merely symbolic value and did not confer any rights on same-sex couples. Since December 2013 same-sex couples had had the possibility of entering into "cohabitation agreements", which were however rather limited in scope. They failed to provide for some basic needs fundamental to the regulation of a stable relation-

ship between a couple, such as mutual material support, maintenance obligations and inheritance rights. Moreover, such agreements were open to any cohabiting persons which meant that they did not primarily aim to protect couples. Furthermore, they required the couple concerned to be cohabiting, whereas the Court had already accepted that cohabitation was not a prerequisite for the existence of a stable union between partners given that many couples – whether married or in a registered partnership – experienced periods during which they conducted their relationship at long distance, for example for professional reasons.

Hence there existed a conflict between the social realities of the applicants living openly as couples, and their inability in law to be granted any official recognition of their relationship. The Court did not consider it particularly burdensome for Italy to provide for the recognition and protection of same-sex unions and considered that a form of civil union or registered partnership would allow them to have the relationship legally recognised which would be of intrinsic value for the persons involved.

The Court further noted a trend among Council of Europe member States towards legal recognition of same-sex couples, with 24 of the 47 member States having legislated in favour of such recognition. Moreover, the Italian Constitutional Court had pointed out the need for legislation to recognise and protect same-sex relationships, but the Italian legislature had for a long time failed to take this into account thus potentially undermining the authority of the judiciary and leaving the individuals concerned in a situation of legal uncertainty. Such calls by the Italian courts reflected the sentiments of a majority of the Italian population who, according to recent surveys, supported legal recognition of homosexual couples. The Italian Government had not denied the need for legal protection of such couples and had failed to point to any community interests justifying the current situation.

In view of the foregoing, the Court found that Italy had failed to fulfil its obligation to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their union. To find otherwise, the Court would have had to be unwilling to take note of the changing conditions in Italy and reluctant to apply the Convention in a way which was practical and effective.

Conclusion: violation (unanimously).

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

(See also *Schalk and Kopf v. Austria*, 30141/04, 24 June 2010, Information Note 131; *Vallianatos and Others v. Greece* [GC], 29381/09 and 32684/09, 7 November 2013, Information Note 168; and *Hämäläinen v. Finland* [GC], 37359/09, 16 July 2014, Information Note 176)

Respect for private life
Respect for correspondence

Lack of safeguards related to decision to copy and store bank documents: *violation*

M.N. and Others v. San Marino - 28005/12
Judgment 7.7.2015 [Section III]

Facts – In May 2009 the Italian authorities asked the San Marino authorities by letters rogatory for assistance in obtaining documentation and carrying out searches in banks and other institutions potentially related to an ongoing Italian criminal investigation into money laundering. The San Marino court accepted the request and ordered an investigation with the aim of acquiring information and banking documents related to accounts which could be traced back to a San Marino company involved in the ongoing investigation in Italy. The search and seizure operation entailed retaining copies of the documentation and of electronic storage devices, including e-mails, bank statements and cheques. In April 2010 an order was made for Italian citizens who had entered into fiduciary agreements with the company under investigation to be notified of that decision. The first applicant, who was one of the persons affected by the decision, was informed sometime in 2011. He lodged a complaint with the San Marino court on the grounds that he had never been charged with an offence and had no link with the alleged crimes. He also complained that his right to appeal had been violated since persons not charged with an offence were not considered direct victims and thus lacked standing to challenge such an *exequatur* decision. His complaint was declared inadmissible in a decision that was upheld on appeal on the grounds that he was not an "interested party" in relation to the *exequatur* decision and therefore lacked a juridical interest to challenge it.

Law – Article 8

(a) *Applicability* – Information retrieved from banking documents amounted to personal data

concerning an individual, irrespective of whether they concerned sensitive information or professional dealings. In addition, copying constituted acquiring and therefore seizing data, irrespective of whether the original medium remained in place. The copying of the first applicant's bank data and its subsequent storage by the authorities had thus amounted to an interference with his right to respect for both private life and correspondence.

(b) *Merits* – The interference was in accordance with the law since the Code of Criminal Procedure and domestic case-law provided that such measures could be applied to third persons not parties to criminal proceedings. The measure pursued the legitimate aims of crime prevention, the protection of the rights and freedoms of others and the economic well-being of the country.

In assessing the necessity of the measure and the existence of relevant procedural safeguards, the Court firstly noted the wide extent of the *exequatur* order whose impact on third parties had never been assessed. The first applicant was an individual not subject to the ongoing investigation and against whom no clear suspicions had been raised. As regards the first applicant's ability to challenge the impugned decision, he had not become aware of it until more than a year after it was issued and his appeals were never examined on the merits because he was found not to be an "interested party". The Court therefore had to ascertain whether the effects of such an interpretation were compatible with the Convention. The institution of proceedings in itself did not satisfy all the access to court requirements guaranteed by Article 6 § 1 of the Convention. The Government had suggested that the first applicant could have pursued an ordinary civil remedy, but they had failed to show that such a remedy could have led to a timely examination of the *exequatur* decision or to its annulment. While the Court accepted that in smaller jurisdictions it may be more difficult to present examples of domestic case-law as to the practical effectiveness of a remedy, it noted that in the instant case the decision had affected more than a thousand persons and not one example had been shown where such a remedy had been successfully used. Finally, the first applicant had been at a significant disadvantage in the protection of his rights compared to an accused person and had not enjoyed the effective protection of national law.

Conclusion: violation (unanimously).

Article 41: EUR 3,000 to the first applicant in respect of non-pecuniary damage.

(See also *Michaud v. France*, 12323/11, 6 December 2012, Information Note 158; and *Xavier Da Silveira v. France*, 43757/05, 21 January 2010)

Respect for private life

Ban on assisted suicide and voluntary euthanasia: *inadmissible*

Nicklinson and Lamb v. the United Kingdom
- 2478/15 and 1787/15
Decision 23.6.2015 [Section IV]

Facts – The first applicant is the wife of Tony Nicklinson, now deceased, who suffered locked-in syndrome following a stroke. The second applicant was paralysed following a car accident. His condition is irreversible. Both men wished to end their lives but were unable to commit suicide without assistance. They unsuccessfully challenged the statutory ban on assisted suicide and the law on murder, which did not recognise voluntary euthanasia as a defence, before the domestic courts. The Supreme Court found, in particular, that such a sensitive issue was for Parliament to resolve.

Law – Article 8

(a) *First applicant* – In order for the right to respect for private life to be properly secured at domestic level, individuals had to be able to seek to rely on arguments derived from Article 8 in domestic proceedings and to have those arguments considered and, where appropriate, taken into account in the rulings of the domestic courts. The Court's more recent case-law had often tended to view this ancillary aspect of private-life protection as arising under the so-called procedural aspect of Article 8 itself (see, for example, *Koch v. Germany,* 497/09, 19 July 2012, Information Note 154; and *McCann v. the United Kingdom*, 19009/04, 13 May 2008, Information Note 108).

It was well established in the Court's case-law that Article 13 does not go so far as to guarantee a remedy allowing primary legislation to be challenged before a national authority on the ground of being contrary to the Convention. Where, as here, the case concerned a challenge to primary legislation, rather than, as in *Koch* and *McCann*, an individual measure of implementation, it would therefore be anomalous if the procedural aspect of Article 8 extended further than Article 13 so as to require the possibility of challenging primary legislation in cases giving rise to private-life concerns.

However, the Convention was part of the domestic law of the United Kingdom and a procedure existed, under the Human Rights Act, permitting primary legislation to be challenged on the basis of its alleged incompatibility with Article 8. It could therefore be argued that where the State had chosen to provide a remedy in respect of primary legislation, such remedy was subject to the procedural requirements which generally arose under Article 8, and in particular to the requirement set out in *Koch* as to the need for an examination of the merits of the claim. For the Court, however, there was a fundamental problem with extending the procedural protections of Article 8 in that way. The problem arose from the application of the margin of appreciation available to member States in cases concerning challenges to primary legislation under Article 8. The Contracting States were generally free to determine which of the three branches of government should be responsible for taking policy and legislative decisions which fell within their margin of appreciation and it was not for the European Court to involve itself in their internal constitutional arrangements. However, when it concluded in any given case that an impugned legislative provision fell within the margin of appreciation, it would often be the case that the Court was, essentially, referring to Parliament's discretion to legislate as it saw fit in that particular area. Thus, in *Pretty v. the United Kingdom* (2346/02, 29 April 2002, Information Note 41) the Court had held that it was for States to assess the risk and likely incidence of abuse if the general prohibition on assisted suicide were to be relaxed or exceptions created. In the context of the United Kingdom, that assessment had been made by Parliament in enacting the relevant provision of the 1961 Suicide Act, a provision that had been reconsidered several times by Parliament in recent years, having been re-enacted in 2009. If the domestic courts were to be required to give a judgment on the merits of such a complaint this could have the effect of forcing upon them an institutional role not envisaged by the domestic constitutional order. Further, it would be odd to deny domestic courts charged with examining the compatibility of primary legislation with the Convention the possibility of concluding, like the Court, that Parliament was best placed to take a decision on the issue in question in light of the sensitive issues, notably ethical, philosophical and social, which arose. For those reasons, the Court did not consider it appropriate to extend Article 8 so as to impose on the Contracting States a procedural obligation to make available a remedy requiring the courts to decide on the merits of a claim such as the one made in the instant case.

In any event, the majority of the Supreme Court judges had dealt with the substance of the first applicant's claim. They had concluded that she had failed to show that developments since *Pretty* meant that the ban could no longer be considered a proportionate interference with Article 8 rights. The fact that in making their assessment they had attached great significance to the views of Parliament did not mean that they had failed to carry out any balancing exercise. Rather, they had chosen – as they were entitled to do in light of the sensitive issue at stake and the absence of any consensus among Contracting States – to conclude that the views of Parliament weighed heavily in the balance.

Conclusion: inadmissible (manifestly ill-founded).

(b) *Second applicant* – Before the Court of Appeal, challenges had been made to both the prohibition on assisted suicide and the law on murder, which made no exception for voluntary euthanasia. However, before the Supreme Court the second applicant had only pursued his complaint about the ban on assisted suicide and not his argument that there should be a judicial procedure to authorise voluntary euthanasia in certain circumstances. It could not be assumed that the Supreme Court would have disposed of the argument concerning voluntary euthanasia in the same way as it disposed of the claim in respect of the prohibition of assisted suicide.

Conclusion: inadmissible (failure to exhaust domestic remedies).

Respect for family life
Positive obligations

Complete and automatic exclusion of applicant from child's life after it was established he was not the biological father: *violation*

Nazarenko v. Russia - 39438/13
Judgment 16.7.2015 [Section I]

Facts – During their marriage, the applicant and his wife had a daughter A. The couple later divorced and the applicant enjoyed shared custody of the child. Following a challenge to the applicant's paternity, it was established that he was not the child's biological father. As a result, and even though the domestic authorities accepted that he had raised and cared for the child over a period of

five years, he lost all parental rights in respect of the child, including the right to maintain contact with her. His name was removed from the child's birth certificate and the child's family name had to be changed. The domestic law did not provide for any exceptions which would have allowed the applicant, in the absence of any biological links with the child, to maintain any form of relationship with her.

Law – Article 8: A. was born during the applicant's marriage and registered as his daughter. Having no doubts about his paternity of A., the applicant had raised her and provided care for her for more than five years. As established by the childcare authority and expert psychological evidence, there was a close emotional bond between the applicant and A. Their relationship therefore amounted to family life within the meaning of Article 8 § 1. The absence of biological links with a child did not negate the existence of family life for the purposes of that provision (see, as regards foster parents, *Kopf and Liberda v. Austria*, 1598/06, 17 January 2012).

The Court was concerned with the inflexibility of the Russian legal provisions governing contact rights. The Government had not given any reasons why it should have been "necessary in a democratic society" to establish an inflexible list of persons entitled to maintain contact with a child and not to make any exceptions to take account of the variety of family situations and of the best interests of the child. As a result, a person who, like the applicant, was not related to the child but who had taken care of it for a long period and formed a close personal bond with it could not obtain contact rights in any circumstances, irrespective of the child's best interests.

The Court was not convinced that the best interests of children in the sphere of contact rights could be truly determined by a general legal assumption. A fair balancing of the rights of all persons involved necessitated an examination of the particular circumstances of the case. Accordingly, Article 8 could be interpreted as imposing on the member States an obligation to examine on a case by case basis whether it was in the child's best interests to maintain contact with the person, whether biologically related or not, who had taken care of him or her for a sufficiently long period of time. By denying the applicant the right to maintain contact with A. without any examination of the question of whether such contact would have been in A.'s best interests, Russia had failed to comply with that obligation.

A person who had brought up a child for some time as his own should not be completely excluded from the child's life after it was revealed that he was not the biological father unless there were relevant reasons relating to the child's best interests for such exclusion. No such reasons had been advanced in the instant case. It had never been suggested that contact with the applicant would be detrimental to A.'s development. On the contrary, as established by both the childcare authority and expert psychologists, there existed a strong mutual attachment between the applicant and A. and the applicant had taken good care of the child.

In sum, the authorities had failed in their obligation to provide a possibility for the family ties between the applicant and A. to be maintained. The complete and automatic exclusion of the applicant from A.'s life after the termination of his paternity due to the inflexibility of the domestic legal provisions – in particular the denial of contact rights without proper consideration of A.'s best interests – had therefore amounted to a failure to respect the applicant's family life.

Conclusion: violation (unanimously).

Article 41: No claim made in respect of damage.

Failure to consider father's parental rights in child abduction case: *violation*

R.S. v. Poland - 63777/09
Judgment 21.7.2015 [Section IV]

Facts – The applicant and his wife, both Polish nationals, lived in Switzerland with their two children. The couple later separated and the applicant agreed that his wife could take the children on a two-week holiday to Poland in October 2008. However, before leaving, she filed for divorce in the Polish courts. When she and the children arrived in Poland, the Polish court granted her request for interim custody without informing the applicant. She therefore remained with the children in Poland, where she obtained a divorce and was granted full parental authority in July 2012.

Meanwhile, on 24 October 2008 the applicant lodged a request for the return of the children with the Swiss Central Authorities under the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"). The request was transmitted to the competent Polish authority. The Polish District Court refused the request in February 2009 after finding that the children had

not been wrongfully retained since the applicant had agreed to their trip to Poland and an interim custody order had since been granted. Although the Swiss Central Authorities argued that the children's retention had constituted "wrongful removal" within the meaning of Article 3 of the Hague Convention as the Swiss authorities had not been made aware of any limitations on the applicant's custody rights, the Polish Regional Court upheld the decision of the District Court in June 2009.

Law – Article 8: Given that the primary interference with the applicant's right to respect for his family life could not be attributed to an act or omission by the respondent State but rather to the actions of the mother, a private party, the Court had to determine whether the respondent State had complied with any positive obligation it may have been under. The Court noted that in the area of international child abduction, the obligations imposed on the Contracting States by Article 8 of the Convention had to be interpreted in the light, *inter alia*, of the Hague Convention. The Court accepted that the children's removal from Switzerland, to which the applicant had consented, had not been wrongful in itself. However, unlike the domestic courts, it found that their subsequent retention in Poland after the two-week holiday had expired had been wrongful in the absence of consent by the applicant.

The specific sequence of events in the present case, with the interim custody order of the Polish courts intervening after the children had left Switzerland, had resulted in the Polish courts dealing with the applicant's request for their return on the basis that their retention in Poland was lawful, regardless of the fact that, as the Polish courts were aware, the applicant had never agreed to the children's permanent stay there. Under the terms of the Hague Convention, the wrongfulness of the removal and retention derived from actions interfering with the normal exercise of parental rights under the law of the State where the children previously had their habitual residence (in this case, Switzerland), not under the law of the requested State (Poland). Yet, the Polish courts had ignored Swiss law and instead relied on Polish law. Consequently, as a result of the mother's unilateral act, the applicant was deprived of the protection he could otherwise reasonably have expected to enjoy. The provisions of the applicable law were in the present case applied in such a way as to render meaningless the applicant's lack of consent for the children's permanent stay in Poland and the applicant had had no opportunity to be heard on the matter of the interim custody order, which his wife had lodged before leaving Switzerland. Moreover, the applicant's legitimate interests were not taken into account adequately or fairly and his reunification with the children was not implemented swiftly. Instead of the maximum of six weeks laid down by Article 11 of the Hague Convention, six months elapsed between the request for return and the final decision, a period for which the Government had not provided a satisfactory explanation. Lastly, the respondent State had not argued that a return to Switzerland would not have served the best interests of the children. In sum, it had not secured the applicant's right to respect for his family life.

Conclusion: violation (four votes to three).

Article 41: EUR 7,800 in respect of non-pecuniary damage; EUR 3,700 in respect of pecuniary damage.

(See also *X v. Latvia* [GC], 27853/09, 26 November 2013, Information Note 168; see also the Factsheet on International child abductions)

ARTICLE 13

Effective remedy

Absence of effective compensatory remedy in length of proceedings cases: *violation*

Rutkowski and Others v. Poland - 72287/10 et al.
Judgment 7.7.2015 [Section IV]

(See Article 46 below/Voir l'article 46 ci-dessous, page 21)

Lack of effective remedy in asylum proceedings: *violation*

V.M. and Others v. Belgium - 60125/11
Judgment 7.7.2015 [Section II]

(See Article 3 above, page 10)

ARTICLE 14

Discrimination (Article 3)

HIV-positive prisoners held in poor physical and sanitary conditions and without adequate treatment in prison psychiatric wing: *violation*

Martzaklis and Others v. Greece - 20378/13
Judgment 9.7.2015 [Section I]

(See Article 3 above, page 7)

ARTICLE 37

Striking out applications
Continued examination not justified

Acknowledgment of violation in a unilateral declaration: *struck out*

Žarković and Others v. Croatia - 75187/12
Decision 2.7.2015 [Section I]

Facts – The applicants' relative disappeared following military action by the Croatian authorities in 1995. No investigation was opened into the circumstances of his disappearance or death. The applicants brought a civil claim against the State seeking damages but this was dismissed by a municipal court which found that their relative's death had to be considered war damage in the absence of proof that he had been killed by Croatian soldiers or police. The judgment was upheld by a county court which stated that the presence of Croatian army and police itself could not be accepted as proof that the applicants' relative had been killed by them. The Supreme Court dismissed the applicants' appeal and their subsequent constitutional complaint was declared inadmissible.

Law – Article 37: The applicants had alleged that the Croatian authorities had failed, in breach of Articles 2 and 14 of the Convention, to take appropriate and adequate steps to investigate the circumstances of their relative's death. By a letter of 17 December 2014 the Croatian Government made a unilateral declaration acknowledging a violation of those provisions and offered to pay the applicants EUR 18,900 jointly to cover any non-pecuniary damage and costs and expenses. The applicants rejected the offer considering the sum too low and insisted on the examination of their other complaints.

The Court reiterated that it could strike out an application under Article 37 § 1 (c) on the basis of a unilateral declaration by a respondent Government even if the applicant wished the examination of the case to be continued. It noted that the Government had explicitly acknowledged violations of Articles 2 and 14 of the Convention and that the proposed sum was not unreasonable in comparison with the awards made by the Court in similar cases. The complaints raised were based on the Court's clear and extensive case-law finding violations of Articles 2 and 14 of the Convention for inadequate investigations into the killings or ill-treatment of applicants or their relatives. As the Committee of Ministers remained competent to supervise the implementation of judgments, the Court was satisfied that it was not required to continue its examination of the inadequacies in the investigation into the killing of the applicants' relative. Instead, it decided to strike this part of the application out of the list without prejudice to the Government's continuing obligation to conduct an investigation in compliance with the requirements of the Convention.

Conclusion: struck out (unanimously).

Article 6 § 1: The applicants had been afforded the possibility of bringing judicial proceedings for compensation. The domestic courts had examined the applicants' claim on the merits and found that they had failed to prove that the victim had actually been killed by Croatian soldiers. That conclusion of the national court was not arbitrary or manifestly unreasonable.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 46

Pilot judgment – General measures

Respondent State required to take further measures to secure right to a hearing within a reasonable time and to ensure effectiveness of domestic remedy

Rutkowski and Others v. Poland - 72287/10 et al.
Judgment 7.7.2015 [Section IV]

Facts – Following the European Court's judgment in *Kudła v. Poland* ([GC], 30210/96, 26 October 2000, Information Note 23), Poland enacted the Law of 17 June 2004 ("the 2004 Act") with a view to affording domestic remedies in length-of-proceedings cases. The Court subsequently found in a series of cases decided in 2005[1] that these remedies were effective for the purposes of Articles 35 § 1 and 13 of the Convention. However, while a number of applications were rejected in 2005 on grounds of non-exhaustion, it became apparent with time that, in practice, the remedies were proving to be deficient and large numbers of well-founded length-of-proceedings complaints were

1. *Charzyński v. Poland* (dec.), 15212/03, 1 March 2005, Information Note 73; *Ratajczyk* v Poland (dec.), 11215/02, 31 May 2005, Information Note 75; and *Krasuski v. Poland*, 61444/00, 14 June 2005, Information Note 77.

lodged with the Court by persons who had already exhausted the remedies under the 2004 Act.

At the end of 2012 and pending the outcome of the pilot-judgment procedure in the present case the Court put on hold Polish applications alleging exclusively excessive length of judicial proceedings. As of the date of adoption of the judgment in the instant case, 650 cases involving mainly or partly complaints about the length of civil (157 cases) and criminal (493 cases) proceedings were pending before the Court.

All three applicants in the present case complained of the length of domestic proceedings in which they were involved. Before applying to the European Court, they had lodged claims with the domestic courts under the 2004 Act. The first applicant was awarded the equivalent of EUR 500 in respect of criminal proceedings that had lasted almost 8 years. The complaints of both the second and third applicants in respect of civil proceedings that had lasted over 11 and 13 years respectively were dismissed. Applying the so-called "fragmentation of proceedings" principle that had been established by the Polish Supreme Court in a series of judgments between 2005 and 2013, the domestic courts did not take into account the overall length of the proceedings but, in the first and third applicants' cases, only the period starting from the date the 2004 Act had entered into force and, in the second applicant's case, only the period after an appeal court had quashed the judgment at first instance.

In a Resolution of 28 March 2013 the Supreme Court Polish Supreme Court found that in the light of Convention standards the principle of "fragmentation" of proceedings no longer had any basis and that a complaint under the 2004 Act, if limited only to the current stage of proceedings, was not an "effective remedy" within the meaning of Article 13 of the Convention.

In the Convention proceedings all three applicants complained under Article 6 § 1 of the Convention of the length of their proceedings before the Polish courts and under Article 13 that the Polish courts had defectively applied the 2004 Act in that they had refused to acknowledge the excessive length of the proceedings and in consequence to grant them appropriate and sufficient just satisfaction.

Law – Article 6 § 1: The length of the proceedings before the Polish courts in the cases of all three applicants had been unreasonable. While the first applicant's case had been of more than average complexity – involving a large number of accused – this did not justify the entire length of proceedings of 7 years and 10 months at one level of jurisdiction. The cases of the second and third applicants had not been particularly complex and there had been no justification for the delays that had led to proceedings lasting 11 years and 8 months and 13 years and 2 months.

Conclusion: violation (unanimously).

Article 13: Shortly after the introduction of the 2004 Act the Court had examined the remedies it introduced and had found them to be "effective" within the meaning of Articles 13 and 35 § 1 of the Convention. However, in the light of the circumstances of the present case and developments in the Polish judicial practice the Court saw good cause for reconsidering its previous position on the effectiveness of the compensatory remedy under the 2004 Act.

Contrary to the Court's established case-law on the assessment of the reasonableness of the length of proceedings, the Polish courts which heard the applications for compensation under the 2004 Act had not examined the overall length of the proceedings but only selected parts of them. Thus, in the first and third applicants' cases, they had disregarded periods before the entry into force of the 2004 Act, while in the case of the second applicant they had limited their assessment to the level of jurisdiction in which the main proceedings were pending. This approach reflected the so-called principle of "fragmentation of proceedings" established by the Supreme Court in various rulings between 2005 and 2012. The "fragmentation" of the proceedings had decisive consequences for the outcome of the applicants' claims for compensation, which were either rejected in their entirety or, in the first applicant's case, granted only partly.

While States which had introduced remedies in length-of-proceedings cases designed both to expedite proceedings and to afford compensation could award lower amounts than those awarded by the Court such amounts could not be unreasonably low compared with the Court's awards in similar cases. The second and third applicants' claims had been rejected as unjustified even though at the material time the proceedings in each case had been pending for over eleven years and, in accordance with the Court's case-law, should have resulted in domestic awards of compensation reaching 11,000 zlotys each. Likewise, the amount of compensation granted to the first applicant corresponded to only 5.5% of what the Court would have awarded him had there been no domestic remedy. That award thus had to be considered

manifestly unreasonable in the light of the standards set by the Court.

In sum, a complaint under the 2004 Act had failed to provide the applicants with "appropriate and sufficient redress" in terms of adequate compensation for the excessive length of the proceedings in their cases.

Conclusion: violation (unanimously).

Article 46: Since the introduction of the remedy under the 2004 Act in Poland, the Court had delivered 280 judgments finding a breach of the reasonable-time requirement in cases where the applicants had unsuccessfully attempted to obtain a ruling acknowledging that breach and to be granted compensation before the Polish courts. In addition, in 358 similar cases such a breach had been acknowledged by the Government and they had paid compensation under the terms of a friendly settlement or a unilateral declaration. There were currently about 650 similar cases pending before the Court and over 300 Polish cases involving the excessive length of judicial proceedings were pending at the execution stage before the Committee of Ministers.

Having regard to the considerable scale of the problem of excessive length of proceedings in Poland accompanied by the lack of sufficient redress, the Court found that the situation of which the applicants complained amounted to a practice incompatible with the Convention and revealing the existence of a systemic problem. It was therefore appropriate to apply the pilot-judgment procedure.

(a) *Measures required with respect to Article 6 § 1 (reasonable-time)* – The systemic problem that had been identified in the applicants' cases required the implementation of comprehensive, large-scale legislative and administrative actions, involving authorities at various levels. The Court abstained from indicating any detailed measures, however, as the Committee of Ministers was better placed to monitor the measures that needed to be adopted. While welcoming the measures that had previously been adopted in execution of the *Kudła* judgment, the scale and complexity of the problem in Poland required the respondent State to continue to make further, consistent long-term efforts to achieve compliance by the national courts with the "reasonable-time" requirement laid down in Article 6 § 1.

(b) *Measures required with respect to Article 13 (effective remedy)* – The Court had noted two interrelated root causes behind the violation of Article 13 in the instant case: the application by the Polish courts of the "fragmentation of proceedings" practice and the failure by the Polish courts to award compensation in line with the Court's own awards.

The Court accepted that the March 2013 Resolution in which the Polish Supreme Court had decided that in the light of Convention standards the principle of "fragmentation" of proceedings no longer had any basis could be regarded as an important measure aimed at correcting the defective judicial practice and ensuring the Polish courts' compliance with the relevant Convention standards. However, it could not, by itself, suffice to put an end to the systemic situation that had been identified in the applicants' case, especially as it had not yet been established that the lower courts had put it into practice. In contrast, the developments of the Court's caseload in 2013 and 2014 showed an increased inflow of repetitive cases involving length of proceedings and insufficient just satisfaction at domestic level. Nor could the 2013 Resolution resolve the problems of the past raised in the hundreds of cases that were already pending before the Court.

Accordingly, Poland was required to take appropriate general measures to secure the effective implementation of the 2013 Resolution by the Polish courts dealing with complaints under the 2004 Act and their compliance with the Court's standards for the assessment of the reasonableness of the length of proceedings and "appropriate and sufficient redress" for violations of the right to a hearing within a reasonable time.

(c) *Procedural issues* – As regards the procedure to be followed in similar cases and bearing in mind that while awaiting the outcome of the pilot-judgment procedure the processing of Polish cases involving length of judicial proceedings had practically been suspended since the end of 2012, the Court sought a procedural solution which, in accordance with the principle of subsidiarity, would accommodate both the applicants' interests and the need for the Polish State to take without delay appropriate measures addressing the problem underlying their complaints. In view of the significant number of pending cases and the need for global, rapid action, the Court decided to communicate all pending applications where the primary issue concerned the length of judicial proceedings to the respondent Government immediately within the framework of the pilot-judgment procedure.

It was necessary to allow the Government a two-year time-limit to process those communicated applications and afford redress to all victims. The

adversarial proceedings in all those cases would accordingly be adjourned for two years from the date the pilot judgment became final.

As regards future cases lodged after the delivery of the pilot judgment, adversarial proceedings would be adjourned for one year and a decision would be taken on the further procedure at that stage in the light of subsequent developments and, in particular, any measures taken by Poland in execution of the present judgment.

Article 41: awards in respect of non-pecuniary damage of EUR 9,200 to the first applicant, EUR 8,800 to the second applicant and EUR 10,000 to the third applicant.

Respondent State required to introduce effective domestic remedy for complaints of the length of civil proceedings before the domestic courts

Gazsó v. Hungary - 48322/12
Judgment 16.7.2015 [Section II]

Facts – In his application to the European Court the applicant complained of the length of civil proceedings he had been involved in before the domestic courts and of the lack of an effective domestic remedy in such cases.

Law – The Court found, unanimously, violations of Articles 6 § 1 and 13 of the Convention on account of the length of the domestic proceedings and the lack of an effective domestic remedy in that regard.

Article 41: EUR 1,000 in respect of non-pecuniary damage.

Article 46: From Hungary's accession to the Convention system and up to 1 May 2015, more than 200 judgments had involved the finding of a violation by Hungary concerning the excessive length of civil proceedings and the Government had also concluded friendly settlements and submitted unilateral declarations in numerous other cases. A further 400 cases against Hungary concerning the same issue were pending before the Court. It followed that the violations that had been found in the applicant's case were neither prompted by an isolated incident nor attributable to a particular turn of events, but were the consequence of shortcomings of the respondent State. Accordingly, the situation had to be qualified as resulting from a practice incompatible with the Convention.

It was appropriate to apply the pilot judgment procedure, given notably the recurrent and persistent nature of the underlying problems, the number of people affected and the need to grant speedy and appropriate redress at the domestic level. Hungary was required to introduce without delay, and at the latest within one year of the judgment becoming final, a remedy or combination of remedies in the national legal system in respect of the problem of the length of civil proceedings in Hungary. Any similar new cases introduced after the judgment became final would be adjourned for one year pending implementation of the relevant measures by the respondent State.

Abide by judgment

Complaint arising out of failure to comply with a judgment of the Court: *inadmissible*

House of Macedonian Civilisation and Others v. Greece - 1295/10
Judgment 9.7.2015 [Section I]

Facts – In 1990 the members of the Provisional Board of Management of the non-profit association "House of Macedonian Civilisation", which claimed to be "ethnically Macedonian" and to have a "Macedonian national awareness", lodged a request for registration of their association. This request was rejected. By its judgment in the case of *Sidiropoulos and Others v. Greece* (26695/95, 10 July 1998), the European Court found that that rejection violated Article 11 of the Convention.

In 2003 the applicants decided, together with others, to re-establish the association "House of Macedonian Civilisation", the first applicant. The registration of that new association was once again rejected on the ground that the word "Macedonian" was liable to cause confusion both *vis-à-vis* States wishing to contact the applicant association in the exercise of its activities and among any individuals wishing to join the association. The domestic courts added that there was also a risk to public order because the existence of the applicant association could be exploited by persons wishing to promote the creation of a "Macedonian nation", even though such a nation had never historically existed.

Relying on Articles 11 and 46 of the Convention, the applicants complained of the rejection of the first applicant's request for registration.

Law – Article 46: The Court had first of all to examine whether, in addition to Article 11, the complaint should also be assessed separately under

Article 46 of the Convention. In that regard it had had occasion to voice serious doubts as to whether Article 46 § 1 of the Convention could be interpreted as granting the applicant a right which could be asserted under an individual application to the Court. Even though it had jurisdiction to assess whether measures taken by a State to execute one of its judgments were compatible with the substantive provisions of the Convention, the Court considered that in principle it could not assess, under Article 46 § 1, whether a Contracting State had complied with the obligations flowing from one of its own judgments. The new paragraphs 4 and 5 added to Article 46 of the Convention by Article 16 of Protocol No. 14 seemed to confirm that approach.

Furthermore, apart from the fact that not all the applicants in the present case corresponded to those in the case of *Sidiropoulos and Others*, the issues raised under Article 46 § 1 of the Convention were closely linked to those raised under Article 11. Consequently, the Court assessed the complaint solely under the latter provision.

Conclusion: inadmissible (unanimously).

The Court unanimously concluded that there had been a violation of Article 11 of the Convention on account of the refusal to register the association.

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

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Unlawful takeover and sale of a private bank: *violation*

Cıngıllı Holding A.Ş. and Cıngıllıoğlu v. Turkey - 31833/06 and 37538/06
Judgment 21.7.2015 [Section II]

(See Article 6 § 1 (enforcement) above, page 14)

Transposition of European directive likely to entail significant changes in management of certain companies: *inadmissible*

Bolla and Others v. Italy - 44127/09
Decision 19.5.2015 [Section IV]

Facts – The five applicants were all members of the same family. They were also all members of the Board of Management of the Erogasmet Group – which included the company Erogasmet Holding (the sixth applicant) – which operates in the natural gas sector. Erogasmet is a "vertically integrated company", as the Group, which is directed by the applicant holding company, caters for the supply, transport, distribution and storage of natural gas. The European Union adopted its Directive 2003/55/EC[1] in June 2003, requiring the manager of the transport network to be independent, at least as regards its legal form, organisation and decision-making procedure, from other activities unrelated to transport in vertically integrated companies. The Directive was transposed into domestic law via the Integral Text on Unbundling ("TIU"), which laid down a number of subjective and objective incompatibilities as regards those who could be members of the independent body managing activities subject to separation.

The applicants lodged an appeal with the regional administrative court. They submitted that as a result of the incompatibilities laid down in the TIU and the family relationships between them, some of them might have to stand down from their duties as directors in the companies belonging to the Erogasmet Group, putting an end to their career opportunities in those companies. For its part, the applicant holding would no longer be allowed to appoint members of the independent managing body or persons related to them by blood or marriage as managers of the companies in which they were majority shareholders. They submitted that this would render the body's supervisory powers purely illusory. It could force the holding to sell its shares, which would result in the separate ownership of the holding company and the companies it controlled.

Law – Article 1 of Protocol No. 1: It was unnecessary to assess whether an incompatibilities regime applicable to members of the supervisory bodies operating within a company could amount to interference in the rights of that company or of its directors and employees to respect for their property as, even if that was the case and Article 1 of Protocol No. 1 was applicable to the present case, the complaint was nevertheless inadmissible, for the reasons set out below.

It was not contested that the impugned incompatibilities regime had an adequate legal basis in Italian law, namely the TIU. Moreover, as recommended by Directive 2003/55/EC, it pursued the public-

1. Directive 2003/55/EC of the European Parliament and the European Council of 26 June 2003 concerning common rules for the single market in natural gas, abrogating Directive 98/30/EC.

interest aim of ensuring the independence of the agency managing the transport network. The State had a wide margin of appreciation in both deciding on the practical arrangements and assessing whether their consequences were legitimated, in the public interest, by the pursuit of the aim of the law in question.

The "subjective" and "objective" incompatibilities laid down in the TIU did not appear arbitrary or unjustified. They were mainly designed to prevent a member of the independent management body recommended by Directive 2003/55/EC from being in a potential situation of conflict of interest by reason of family relationships, his or her position in the vertically integrated company or economic interests. The fact that Italy had gone beyond the demands of European Union law and that other States had introduced a less strict regime could not by itself give rise to a violation of Article 1 of Protocol No. 1.

Moreover, the incompatibilities introduced could, by their very nature, require a restructuring of the organisational chart within the company in question. That did not, however, mean that the obligation on some of the managers to renounce certain posts or to discharge specific duties necessarily imposed an individual and excessive burden. The same applied to the possible requirement on the company to appoint new managers and to bear the associated expenses.

Finally, the applicant holding company had had ample time to apply to the administrative courts, which had conducted an assessment of the proportionality of the impugned measures, including the incompatibilities regime. Furthermore, the regional administrative court had nullified certain provisions of the TIU. There was nothing in any of the aforementioned proceedings to indicate that the applicant holding company had been deprived of the opportunity to argue its case before the competent courts.

Under these circumstances, even assuming that Article 1 of Protocol No. 1 was applicable in the present case, there was no appearance of a violation of that provision.

Conclusion: inadmissible (manifestly ill-founded).

Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: The concept of "vertically integrated company" by definition covered companies which, like the Erogasmet Group, were characterised by their combination of the activities of gas supply and distribution. By the very nature of things, the requirement to set up a body responsible for managing a transport network independent from the other activities unrelated to transport, and to establish an incompatibilities regime in order to ensure the effectiveness of such independence was likely to apply only to companies of that kind. Vertically integrated companies were therefore not in a comparable situation to other operators in the gas sector.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 4 OF PROTOCOL No. 7

Right not to be tried or punished twice

Conviction and sentencing of taxpayers for tax offences after imposition of tax surcharges in respect of the same facts: *relinquishment in favour of the Grand Chamber*

A and B v. Norway - 24130/11 and 29758/11
[Section I]

Both applicants were indicted for tax offences in respect of amounts they had failed to declare to the tax authorities in their respective tax returns. In separate proceedings the tax authorities amended their tax assessments for the periods concerned and imposed tax surcharges equal to 30% of the tax owed on the undeclared sums. The applicants did not appeal against the revised tax assessments and paid both the outstanding tax and the surcharges. They were subsequently convicted of the tax offences and given a one-year prison sentence. The fact that surcharges had been levied was taken into account by the trial courts when sentencing.

The applicants appealed on the grounds that their convictions and sentence subsequent to the imposition of the surcharges had violated their right under Article 4 of Protocol No. 7 not to be prosecuted and punished twice in respect of the same offence. However, relying in particular on the European Court's decisions in the cases of *R.T. v. Switzerland* and *Nilsson v. Sweden* the Norwegian Supreme Court dismissed the first applicant's appeal after finding that the tax proceedings and the criminal proceedings had been conducted in parallel and were sufficiently connected in substance and time as to be viewed as part of the same set of sanctions. The High Court dismissed the second applicant's appeal on like grounds.

In the Convention proceedings the applicants complained under Article 4 of Protocol No. 7 that they had been prosecuted and punished twice in

respect of the same offence. On 7 July 2015 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber.

(See *R.T. v. Switzerland* (dec.), 31982/96, 30 May 2000, Information Note 18; and *Nilsson v. Sweden* (dec.), 73661/01, 13 December 2005, Information Note 81; see also, *Lucky Dev v. Sweden*, 7356/10, 7356/10, 27 November 2014, Information Note 179)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

A and B v. Norway - 24130/11 and 29758/11 [Section I]

(See Article 4 of Protocol No. 7 above, page 26)

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

Muršić v. Croatia - 7334/13
Judgment 12.3.2015 [Section I]

(See Article 3 above, page 7)

DECISIONS OF OTHER INTERNATIONAL JURISDICTIONS

Court of Justice of the European Union (CJEU)

Installation of electricity meters at an inaccessible height in a district densely populated by Roma

CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia - C83/14
Judgment (Grand Chamber) 16.7.2015

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin prohibits discrimination based on race or ethnic origin as regards, *inter alia,* access to property and services and the provision of property and services.

In 1999 and 2000, CHEZ RB, an electricity distribution company, installed electricity meters for all subscribers in an urban district mainly populated by Roma on pylons forming part of the overhead electricity supply network, at a height of between 6 and 7 metres. In the other districts of the same town (with a lower density of Roma population), CHEZ RB installed its meters at a height of 1.7 m, usually inside the customers' homes or on the house fronts or garden walls. CHEZ RB submitted that the reason for such differential treatment was the increased incidence of tampering with and damage to electricity meters, as well as the many illegal connections to the mains in the district in question.

In 2008 a shopkeeper in the district in question complained to the Commission for Protection against Discrimination (KZD), alleging that the reason why the meters had been installed at an inaccessible height was that most of the inhabitants of the neighbourhood in question were of Roma origin. Even though she was not Roma herself, the shopkeeper considered that she too had been a victim of discrimination because of the impugned practice. The KZD noted that the shopkeeper had indeed suffered discrimination as compared to customers whose meters had been installed in accessible places. CHEZ RB then appealed against that decision. During the proceedings, the Bulgarian Administrative Court requested a preliminary ruling from the CJEU on whether the impugned practice constituted an instance of proscribed discrimination based on ethnic origin.

The CJEU first of all noted that the principle of equal treatment applied not only to persons of a specific ethnic origin but also to individuals who, although they do not themselves belong to the ethnic group in question, were subjected, together with the former, to less favourable treatment or to a particular disadvantage owing to a discriminatory measure.

Secondly, the CJEU emphasised that the presence in the district in question of inhabitants who were not of Roma ethnic origin did not, in itself, preclude the possibility that the practice challenged had been instigated because of the common ethnic origin of most of the inhabitants of that district (namely Roma ethnic origin). Nevertheless, it was incumbent on the Bulgarian court to take account of all the circumstances surrounding that practice in deciding whether it had indeed been instigated on such ethnic grounds and therefore amounted to direct discrimination under the Directive.

The circumstantial evidence to be taken into consideration in this context included the fact that the practice at issue was only utilised in districts lived in mainly by Bulgarian nationals of Roma origin. Similarly, the fact that CHEZ RB had submitted to the KZD that illegal connections and damage were mainly perpetrated by persons of Roma origin might suggest that the practice complained of was based on ethnic stereotypes or prejudices.

The Bulgarian court should also take into account the mandatory, general and long-term nature of the impugned practice, because it affected all the inhabitants of the district in question regardless of whether or by whom their individual meters had been misused. Therefore, the practice in question could be regarded as suggesting that all the inhabitants of the district were considered as potential perpetrators of unlawful actions. In that context, the CJEU pointed out that the practice in question amounted to unfavourable treatment of the inhabitants in question on the grounds of its offensive, stigmatising nature and also the fact that they found it extremely difficult or even impossible to consult their electricity meters in order to verify their consumption.

Thirdly, if the Bulgarian court found that the impugned practice did not constitute direct discrimination based on ethnic origin, the CJEU noted that the practice could, in principle, amount to indirect discrimination. If that practice was instigated solely as a response to unlawful actions committed in the district in question, it would have been based on apparently neutral criteria while at the same time affecting considerably higher proportions of persons of Roma origin. That would have created a particular disadvantage for those persons as compared with others who did not have the same ethnic origin.

In this regard, the CJEU emphasised that protecting the security of the electricity network and appropriately monitoring electricity consumption were legitimate aims which could, in principle, justify such differential treatment. However, that required CHEZ RB to provide proof that the electricity meters in the district had indeed been misused and that the risk of such misuse continued. While acknowledging that the impugned practice was an appropriate means of achieving those aims, the CJEU nevertheless pointed out that the Bulgarian court should assess whether there were any other appropriate but less restrictive means of resolving the problems encountered.

Even if there were no other equally effective means as the impugned practice of achieving the aforementioned aims, the CJEU found that the practice seemed disproportionate to those aims and to the legitimate interests of the residents of the district in question. The Bulgarian court should verify whether that was really the case, having regard in particular to the offensive and stigmatising nature of the practice and the fact that it had deprived the residents of a whole district, for a very long time and without distinction, of the possibility of regularly checking their electricity consumption.

The CJEU judgment and press release can be downloaded at <http://curia.europa.eu>.

For an overview of EU and Council of Europe law in the area of non-discrimination and of the main CJEU and ECHR case-law on the subject, see Handbook on European non-discrimination law and the case-law update (<www.echr.coe.int> – Publications).

Continued detention of person arrested under European arrest warrant after expiry of time-limit for issuing a decision on his surrender

Minister for Justice and Equality v. Francis Lanigan - C237/15 PPU
Judgment (Grand Chamber) 16.7.2015

This case concerned a request by the Irish High Court for a preliminary ruling on the interpretation of Articles 15 and 17 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between EU member States.

In December 2012 the British authorities issued a European arrest warrant in respect of Mr Lanigan regarding criminal proceedings brought against him in the United Kingdom for alleged offences including murder. In January 2013 Mr Lanigan was arrested by the Irish authorities on the basis of the warrant and placed in custody pending a decision on his surrender to the United Kingdom. However, following a series of adjournments resulting from procedural incidents, the Irish High Court was unable to begin its examination of the case until 30 June 2014. In December 2014 Mr Lanigan submitted that the proceedings could not be continued as the time-limits laid down in the Framework Decision for taking a decision on the execution of the warrant (60 days after arrest, with a possible 30-day extension) had expired. The Irish High Court sought a preliminary ruling from

the CJEU on whether the failure to observe the time-limits precluded it from taking a decision on the execution of the warrant and whether Mr Lanigan could be held in custody even though the total duration of the period he had spent in custody exceeded the time-limits.

The CJEU considered that, in the light, *inter alia*, of the central function of the obligation to execute the European arrest warrant and of the absence of any explicit indication to the contrary in the Framework Decision, the executing judicial authority remained required to adopt the decision on the execution of the warrant even where the prescribed time-limits had expired. To abandon the procedure in cases where the time-limits had expired would adversely affect the objective of accelerating and simplifying judicial cooperation and encourage delaying tactics.

As regards the holding of the person in custody, no provision of the Framework Decision provided that he or she had to be released once the applicable time-limits had expired. However, the Framework Decision had to be interpreted in accordance with Article 6 of the Charter of Fundamental Rights, which protects the right to liberty and security. Citing the case-law of the ECHR on Article 5 § 1 (f) of the European Convention on Human Rights (*Quinn v. France*, 18580/91, 22 March 1995; and *Gallardo Sanchez v. Italy*, 11620/07, 24 March 2015, Information Note 183), the CJEU noted that detention ceased if the procedure was not carried out with due diligence. Accordingly, it considered that a person held on the basis of a European arrest warrant could be held in custody only in so far as execution of the warrant was carried out in a sufficiently diligent manner and the total duration of his or her custody was not excessive.

In order to ensure that that was the case, the executing judicial authority was required to carry out a concrete review of the situation at issue, taking account of all the relevant factors with a view to evaluating the justification for the duration of the procedure, including the possible failure to act on the part of the authorities of the member States concerned and any contribution of the requested person to that duration. The sentence potentially faced by or imposed on the requested person, the risk of his absconding and the fact that he had been held for a total period greatly exceeding the stipulated time-limits had also to be taken into consideration.

Lastly, if the executing judicial authority decided to bring the requested person's custody to an end it was required, in accordance with the Framework Decision, to attach to the provisional release of that person any measures it deemed necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his surrender remained fulfilled for as long as no final decision on the execution of the European arrest warrant had been taken.

The CJEU judgment and press release are available at <http://curia.europa.eu>.

For ECHR cases relating to the European arrest warrant procedure, see *Monedero Angora v. Spain* (dec.), 41138/05, 7 October 2008, Information Note 112; and *Stapleton v. Ireland* (dec.), 56588/07, 4 May 2010, Information Note 130.

Absence of right to parental leave for male public servants if their wives do not work

Konstantinos Maïstrellis v. Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton - C222/14
Judgment (Fourth Chamber) 16.7.2015

This case concerned a request by the Greek Council of State for a preliminary ruling on the question whether denying the benefit of parental leave to a male civil servant whose wife is not working is compatible with the Parental Leave Directive,[1] as amended, and the Employment Equality Directive.[2] Greek law provides that a male civil servant is not entitled to paid parental leave if his wife does not work or exercise a profession unless, owing to serious illness or injury, the wife is unable to meet the needs related to the upbringing of the child.

The case pending before the Greek Council of State concerned an application by a judge for nine months' paid parental leave to bring up his infant child which was refused on the grounds that the judge's wife was not working.

In response to the request for a preliminary ruling, the CJEU noted that under the Parental Leave Directive, each of the parents was entitled, individually, to parental leave. That was a minimum requirement from which EU member States could

1. Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.
2. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

not derogate in their legislation or in collective agreements. Accordingly, a parent could not be deprived of the right to parental leave, and the employment status of the spouse could not prevent the exercise of that right. That solution, moreover, complied not only with the objective of the directive, which was to facilitate the reconciliation of the parental and professional responsibilities of working parents, but also with the status of parent leave entitlement as a fundamental social right recognised by the EU Charter of Fundamental Rights.

The CJEU further noted that in Greece mothers who were civil servants were always entitled to parental leave, whereas fathers who were civil servants were only entitled if the mother of their child worked or exercised a profession. Thus, the mere fact of being a parent was not sufficient for male civil servants to gain entitlement to parental leave, whereas it was sufficient for women with an identical status. Far from ensuring full equality in practice between men and women in working life, the Greek legislation was therefore more liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties. It followed that the Greek Civil Service Code introduced, in respect of civil servant fathers who want to take parental leave, direct discrimination on grounds of sex contrary to the Employment Equality Directive.

The CJEU judgment and press release are available at <http://curia.europa.eu>.

For the case-law of the ECHR on the question of discrimination in the right to parental leave, see in particular *Konstantin Markin v. Russia* [GC], 30078/06, 22 March 2012, Information Note 150; for an overview of the legal frameworks of both the European Union and the Council of Europe and of the key jurisprudence of the CJEU and ECHR on non-discrimination law, see the Handbook on European non-discrimination law and its update (<www.echr.coe.int> – Publications).

Obligation to pass civic integration examination prior to family reunification

Minister van Buitenlandse Zaken v. K and A
- C153/14
Judgment (Second Chamber) 16.7.2015

This case concerned a request by the Netherlands Council of State for a preliminary ruling on the interpretation of Directive 2003/86/EC[1] which establishes the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the EU member States. In the Netherlands the relevant legislation subjects the right to family reunification to the passing of a basic civic integration examination comprising a spoken Dutch test, a test of knowledge of Netherlands society and a reading comprehension test. In the proceedings before the Council of State two foreign nationals seeking to join their spouses in the Netherlands complained that they had been refused temporary residence permits for the purposes of family reunification with their spouses after being prevented by health and psychological problems respectively from taking the civic integration examination.

The CJEU noted that in the context of family reunification other than that of refugees and their family members, the directive did not preclude member States from subjecting the granting of authorisation of entry into the territory to the observance of certain integration measures prior to entry. Nevertheless, in so far as the directive concerns only measures of 'integration', such measures could be considered legitimate only if they were capable of facilitating the integration of the sponsor's family members.

The CJEU noted the importance of acquiring knowledge of the language and society of the host Member State, especially in facilitating communication, interaction and the development of social relations as well as access to the labour market and vocational training. It considered, in the light of the level of knowledge required, that the requirement at issue did not, in principle, undermine the aim of family reunification pursued by the directive.

However, integration measures had to be aimed not at filtering persons able to exercise their right to family reunification, but at facilitating the integration of such persons within the member States. Specific individual circumstances, such as age, level of education, economic situation or health, had to be taken into consideration in order to dispense family members unable to take or pass the examination from the requirement to do so. The Netherlands legislation was not capable of dispensing members of a sponsor's family from the requirement to pass the civic integration examination in all possible cases where maintaining that requirement would make family reunification

1. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

impossible or excessively difficult. In addition, the cost of the examination preparation pack (EUR 110), course fees (EUR 350) and of travelling to the closest Netherlands mission to take the examination were capable of making family reunification impossible or excessively difficult.

In sum, EU member States could require third country nationals to pass a civic integration examination consisting in an assessment of basic knowledge both of the language of the Member State concerned and of its society and entailing the payment of various costs before authorising that national's entry into and residence in the territory of the Member State for the purposes of family reunification provided that the conditions of application of such a requirement did not make it impossible or excessively difficult to exercise the right to family reunification.

The CJEU judgment and press release are available at <http://curia.europa.eu>.

See also, with regard to the application of the Netherlands legislation to long-term residents, *P and S v. Commissie Sociale Zekerheid Breda and College van Burgemeester en Wethouders van de gemeente Amstelveen*, CJEU judgment of 2015, Information Note 186.

For an overview of the legal frameworks of both the European Union and the Council of Europe and of the key jurisprudence of the CJEU and ECHR on immigration law, see the Handbook on European law relating to asylum, borders and immigration (<www.echr.coe.int> – Publications).

Inter-American Court of Human Rights

Forced disappearances, torture and other violations of human rights following a military operation

Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia - Series C No. 287
Judgment 14.11.2014[1]

Facts – On 6 November 1985 a guerrilla group known as the 19 April Movement (M19) seized the Colombian Palace of Justice, seat of the Supreme Court of Justice and the Council of State. It entered the compound in the morning firing indiscriminately and taking all those present hostage. The Colombian Government, having decided not to negotiate, commenced a military operation to retake the Palace. The armed forces used machine guns, grenades, rockets and explosives, as well as helicopters and tanks, during the operation. Between 6 and 7 November, three fires broke out in the Palace, one of which totally destroyed the building and probably killed those who may have survived the gunfire and explosions.

In the aftermath, the military authorities searched, interrogated and identified the survivors and separated those they suspected of belonging to M-19 from the others. Those considered "special" or "suspects" by the authorities were transferred to military facilities where some were tortured and then forcibly disappeared. Due to the way the operation was carried out and the subsequent treatment of some of the bodies, no definitive death toll was established. The victims were cafeteria workers, visitors to the Palace of Justice (with the exception of one victim who was a member of M19) and one Auxiliary Justice of the Council of State, all of whom had allegedly survived but were subsequently either detained and tortured, forcibly disappeared and/or extra judicially executed.

After the events at the Palace of Justice, several investigations and proceedings were carried out before military tribunals, ordinary criminal courts, contentious-administrative tribunals, and disciplinary bodies of the Armed Forces and the National Police. Some of these were still ongoing at the time the Inter-American Court rendered its judgment.

Law

(a) *Preliminary objections* – The respondent State raised, among others, an objection to the Inter-American Court's jurisdiction *ratione materiae*. According to Colombia, the applicable law to the facts of the case was not international human rights law, but international humanitarian law as the relevant *lex specialis*. The Inter-American Court rejected that assertion as being inconsistent with its own case-law and a misrepresentation of the relationship between the two legal orders: it could refer to international humanitarian law when interpreting the obligations under the American Convention on Human Rights (ACHR) in order to more precisely define the scope of those obligations.

(b) *Partial acknowledgement of responsibility by the State* – Even though Colombia recognised its international responsibility for certain facts of the case and some of the alleged violations, the Inter-

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

American Court considered it appropriate to make a comprehensive determination of the facts and examine all the violations argued, both because of the egregious nature of the facts and the alleged violations, and to contribute to the reparation of the victims and non-repetition of similar events.

(c) *Substantive provisions of the ACHR*

(i) *Articles 3 (juridical personality), 4(1) (life), 5 (humane treatment) and 7(1) (personal liberty), in relation to Article 1(1) (non-discrimination)* – The Inter-American Court recalled that the disappearance of a person, because her or his whereabouts are unknown, is not the same as a forced disappearance. A forced disappearance is a violation of multiple human rights composed of three concurring elements: (a) the deprivation of liberty; (b) the direct intervention of State agents or their acquiescence; and (c) the refusal to acknowledge the detention and to reveal the fate or whereabouts of the person concerned. A forced disappearance subsists until the whereabouts of the disappeared person are discovered or their remains are reliably identified.

The Inter-American Court reiterated that, in the absence of direct evidence, it is legitimate to use circumstantial evidence, indications and presumptions as grounds for a judgment, provided that conclusions consistent with the facts can be inferred from them. Due to the nature of forced disappearances, which are characterised by the attempt to eliminate all trace and evidence of the fate of the victims, indicative or presumptive evidence is especially important in proving the allegations made. The Inter-American Court also stressed that in order to establish a violation of the rights enshrined in the ACHR, it is not necessary that the State's responsibility be proved beyond any reasonable doubt.

Furthermore, the Inter-American Court stated that there is no bar to using indicative evidence to prove the concurrence of any of the elements of forced disappearance, including the deprivation of liberty. To this end it recalled its previous case-law[1] as well as the ECHR's case-law[2] as examples of cases in which indicative and presumptive evidence was used to prove the deprivation of liberty that led to a person's disappearance. In the instant case, the Inter-American Court found that, if the fact that the victims had exited the Palace of Justice alive in the custody of State agents could be sufficiently proven, this would satisfy the deprivation of liberty element.

After examining several indicative elements, the Inter-American Court concluded that all the circumstances that had emerged since the time of the events were consistent and led to the sole conclusion that ten out of twelve victims were forcibly disappeared. With regard to the remaining two victims, it found particular circumstances that led it to consider that they may have died during the taking and retaking of the Palace of Justice. The Inter-American Court found that the failure to determine the whereabouts of these two victims, due to a lack of due diligence by the State, did not, in itself, constitute a forced disappearance. However, the way in which the bodies of those who died were treated – burial in mass graves without respecting basic standards that would have facilitated their subsequent identification – and the ensuing failure to determine the whereabouts of the victims had entailed a violation of the obligation to ensure their right to life.

The Inter-American Court also concluded that a thirteenth victim, who was seen coming out of the Palace of Justice alive and in the custody of State agents who had denied his survival or detention, had survived the taking and retaking of the Palace of Justice, but was forcibly disappeared for several hours and later extrajudicially executed. The short duration of a forced disappearance did not affect its classification as such.

Conclusion: violation of all rights referenced above regarding eleven victims and violation of Article 4 regarding two victims (unanimously).

(ii) *Articles 5 (humane treatment), 7 (personal liberty) and 11 (privacy), in relation to Article 1(1) (non-discrimination)* – All forms of deprivation of personal liberty should strictly respect the relevant provisions of the ACHR and domestic law, provided that the latter is compatible with the ACHR.

If the substantive and formal aspects of domestic law are not observed when depriving a person of his or her liberty, this deprivation will be unlawful and contrary to the ACHR, in light of Article 7(2). On the other hand, the arbitrariness referred to in Article 7(3) ACHR should not be reduced to "contrary to the law", but should be interpreted more broadly to include elements of irregularity, injustice and unpredictability. The prohibition of arbitrary detention is a non-derogable right and

1. *González Medina and family members v. Dominican Republic,* 27 February 2012, Series C240; and *Osorio Rivera and family members v. Peru*, 26 November 2013, Series C290.
2. *Khadzhialiyev and Others v. Russia,* 3013/04, 6 November 2008, Information Note 113.

cannot be suspended during an internal armed conflict.

In the instant case, while there was no dispute regarding the detention and torture of two of the four victims, Colombia had disputed the circumstances and illegality of the detentions and allegations of torture with respect to the other two. After considering the existing circumstantial elements, it found it sufficiently proven that the two disputed victims had been detained without a court order under suspicion of belonging to or collaborating with the M-19, following which they were subjected to various types of physical and psychological ill-treatment by military authorities.

The Inter-American Court concluded that the deprivation of liberty of three of the victims was not duly registered, was not executed in accordance with the established norms, was not justified by objective and specific reasons and, at the time of the events, was denied by the State. Consequently, it found their deprivation of liberty to be unlawful and arbitrary. The detention of the fourth victim was also unlawful. When arguing that a detention was made *in flagrante delicto*, the State had the burden of proof. In this case, Colombia had failed to provide such evidence.

Under the ACHR, an act constitutes torture when the ill-treatment: (a) is intentional, (b) causes severe physical or mental suffering, and (c) is perpetrated for a purpose or objective. An individual's right to physical and mental integrity can be violated at different levels ranging from torture to other types of abuse or cruel, inhuman or degrading treatment the physical and mental after effects of which vary in intensity according to factors that are endogenous and exogenous to the person which must be analysed in each specific situation.

The Inter-American Court concluded that three of the victims had been subjected to torture, while the remaining victim was subjected to inhuman and degrading treatment, taking into account his own testimony on the severity of the ill-treatment. Furthermore, it found that one victim had been subjected to electric shocks on his genitals which constituted sexual violence and also entailed a violation of Article 11 of the ACHR, while certain ill-treatment suffered by another victim was aggravated due to gender-based violence that constituted violence against women.

Conclusion: violation (unanimously).

(iii) *Articles 8(1) and 25 (fair trial and judicial protection), in relation to Article 1(1) (non-discrimination) of the ACHR and Articles I(b) and XI of the Inter-American Convention on Forced Disappearances and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture* – States are under a positive obligation to investigate human rights violations, in accordance with the rules of due process of law, and to ensure that everything necessary is done to discover the truth of what happened and to prosecute and duly punish those eventually found responsible. In forced disappearance cases, this obligation also entails the duty to carry out all necessary measures to determine the fate of the victim and his or her whereabouts.

The Inter-American Court found that the investigation by the military tribunals of one of the forced disappearances and the torture of two of the victims had violated the right to an ordinary, independent and impartial judge. It also found that Colombia had failed to open an immediate and effective investigation *ex officio* and to carry out the necessary search activities to determine the whereabouts of the victims and had not acted with due diligence during the initial investigation procedures and, to a lesser extent, in the investigations that were currently under way. Lastly, it considered that the investigation had not been carried out within a reasonable time.

Conclusion: violation (unanimously).

(iv) *Articles 4 (life) and 5 (humane treatment)* – The Inter-American Court reiterated that the obligation to ensure the rights to life and personal integrity encompasses an obligation to prevent third parties from violating the protected rights enumerated in the Convention. It found that Colombia had been aware of a real and imminent danger to the justices and employees of and visitors to the Palace of Justice, but had failed to take appropriate, sufficient and opportune measures to counter the danger, because even though it had made an assessment of the security and designed a security plan, the plan was not in operation at the time of the events, when the danger subsisted.

Conclusion: violation (unanimously).

The Inter-American Court also unanimously determined violations of Article 5 of the ACHR (humane treatment) due to the suffering experienced by the victims' next of kin.

(d) *Reparations* – The Inter-American Court ordered the State to (a) carry out the necessary investigations into the various violations identified; (b) conduct a thorough search to determine the whereabouts of the eleven victims whose fate was still unknown; (c) provide appropriate medical, psychological or psychiatric treatment for the

victims; (d) publicise the judgment in newspapers and on radio and television; (e) carry out a public act of recognition of international responsibility; (f) prepare a documentary of the facts of the case; and (g) pay certain sums as compensation for pecuniary and non-pecuniary damage an

d reimburse costs and expenses.

For an overview of the ECHR case-law on disappearances, see the Factsheet on Armed conflicts.

COURT NEWS

Elections

In July the Plenary Court elected Roderick Liddell as Registrar of the Court as from 1 December 2015 for a five-year term of office.

Council of Europe Raoul Wallenberg Prize 2016: call for nominations

Since 2014 the Council of Europe Raoul Wallenberg Prize is awarded every two years in order to reward extraordinary achievements by a single individual, a group of individuals or an organisation in the humanitarian field or in the promotion and defence of human rights. The prize consisting of EUR 10,000 will be awarded at a ceremony to be held at the Council of Europe on 17 January 2016. The Jury consists of seven independent persons with recognised moral standing in the field of human rights and humanitarian work.

The deadline for submission of candidates for the "Raoul Wallenberg" prize 2016 is set for 30 September 2015. The nomination form and Regulations can be downloaded from the Council of Europe's Internet site (<www.coe.int> – Explore – Files).

RECENT PUBLICATIONS

Reports of Judgments and Decisions

Volumes III, IV, V and VI for 2013 as well as the 2013 Index have now been published. The print edition is available from Wolf Legal Publishers (the Netherlands) at <www.wolfpublishers.nl>; <sales@wolfpublishers.nl>. All published volumes and indexes from the *Reports* series may also be downloaded from the Court's Internet site (<www.echr.coe.int> – Case-law).

Translation of the Case-Law Information Note into Turkish

Issues for 2014 of the Court's Case-Law Information Note have just been translated into Turkish, thanks to the Turkish Ministry of Justice. Further issues will be added progressively. The Notes in Turkish can be downloaded from the Court's Internet site (<www.echr.coe.int> – Publications).

Admissibility Guide: new translations

Translations into Croatian and Ukrainian of the third edition of the Practical Guide on Admissibility Criteria have now been published on the Court's Internet site (<www.echr.coe.int> – Case-law).

Praktični vodič kroz uvjete dopuštenosti (cro)

Практичний посібник
щодо прийнятності заяв (ukr)