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

Information Note on the Court's case-law

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ARTICLE 5

Article 5 § 1 (f)

Extradition

Lack of a sufficiently accessible, precise and foreseeable procedure under San Marino law to avoid arbitrary detention pending extradition: *violation*

Toniolo v. San Marino and Italy - 44853/10
Judgment 26.6.2012 [Section III]

Facts – In August 2009 the Italian authorities sought the applicant's extradition from San Marino, *inter alia*, on suspicion of money laundering. The applicant was arrested and placed in preventive detention on the basis of the bilateral Convention on Friendship and Good Neighbourhood between Italy and San Marino of 1939. The Italian Embassy subsequently informed the San Marino authorities that they would follow the procedure laid down by the European Convention on Extradition of 1957, which San Marino had also ratified. The applicant sought to have the arrest warrant set aside on the grounds that there had been no urgent reasons, as required by the 1939 Convention, to justify his preventive detention. The appeal judge dismissed that complaint, finding that the 1957 Convention prevailed over the 1939 Convention under which the extradition process had started. In September 2009 the applicant requested his release because the thirty days stipulated by the 1939 Convention had expired, but his request was rejected, again on the grounds that it was the 1957 Convention which prevailed. An order for the applicant's extradition was made in September 2009 and he was later extradited to and detained in Italy before being released in February 2010.

Law – Article 5 § 1 (f)

(a) *Complaint against San Marino* – The applicant's detention amounted to detention with a view to extradition and therefore fell under Article 5 § 1 (f). Both the 1939 Convention and the 1957 Convention were applied at different stages of the extradition procedure, without any clear indication as to which applied to the applicant's case, that question being left to the discretion of the authorities and to the subsequent, first-time, interpretation of the domestic courts. The uncertainty as to which of the two conventions was applicable made it difficult to accept that the legal system provided a precise and foreseeable application of the law. Moreover, the 1957 Convention on which the Government had relied referred back to domestic law in relation to the rules regulating the extradition procedure and did not itself lay down a comprehensive procedure offering safeguards against arbitrariness in the requested State. The San Marino legislation did not provide such a procedure either. In sum, the domestic law did not lay down a procedure that was sufficiently accessible, precise and foreseeable in its application to avoid the risk of arbitrary detention pending extradition. Accordingly, the applicant's detention as a result of the extradition order had not complied with a procedure prescribed by law.

Conclusion: violation (unanimously).

(b) *Complaints against Italy*

(i) *Detention in Italy*: In so far as the applicant had complained that his detention following his transfer to the Italian authorities was unlawful, the Court noted that his detention in Italy had its basis in the order of an Italian court and had the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence (Article 5 § 1 (c)).

Conclusion: inadmissible (manifestly ill-founded).

(ii) *Detention in San Marino*: The Court reiterated that an act instigated by a requesting country on the basis of its own domestic law and followed-up by the requested country in response to its treaty obligations could be attributed to the requesting country. It followed that, as the requesting country, Italy had been under an obligation to ensure that the arrest warrant and extradition request were valid as a matter of Italian law. However, the unlawfulness in the present case had arisen not from a failure to comply with Italian domestic legal requirements, but from the (lack of) quality of San Marino law on the matter. Consequently Italy's responsibility could not be engaged.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 41: No claim made in respect of damage.

ARTICLE 5 § 3

Guarantees to appear for trial

Statutory prohibition on release on bail for persons accused of particular classes of offence: *violation*

Piruzyan v. Armenia - 33376/07
Judgment 26.6.2012 [Section III]

Facts – The applicant was arrested in October 2006 and detained on a charge of banditry. His detention was subsequently extended several times on the grounds that he was liable to abscond or obstruct the investigation, and that further investigative measures were necessary and the proceedings were still pending. The applicant was also refused bail on the grounds that he was accused of an offence classified under domestic law as a "grave crime" and so was precluded by Article 143 § 1 of the Code of Criminal Procedure from applying for bail, which could be ordered only in respect of persons accused of crimes of "minor or medium gravity". The applicant was eventually released in December 2007 after the charges against him were dropped.

Law – Article 5 § 3

(a) *Impossibility of release on bail* – When deciding whether to release or detain a suspect, the authorities were obliged to consider alternative measures to ensure his or her appearance at trial. The Court had previously found a violation of Article 5 § 3 of the Convention in a number of cases in which an application for bail was refused automatically by virtue of domestic law. In the instant case, the applicant's requests were dismissed on the ground that Article 143 § 1 of the Code of Criminal Procedure precluded release on bail for offences classified as grave or particularly grave. Such automatic rejection of the applicant's bail applications, devoid of any judicial control of the particular circumstances of his detention, was incompatible with the guarantees of Article 5 § 3.

Conclusion: violation (unanimously).

(b) *Reasons for continued detention* – In order to justify the applicant's successive remands in custody, the domestic courts had relied, firstly, on the risk of his absconding and obstructing the proceedings and, secondly, on the fact that the investigation was not yet complete and the proceedings were still pending. As to this latter point, the Court pointed out that the need to carry out further investigations or the fact that the proceedings had not yet been completed did not fall within any of the acceptable reasons for detaining a person pending trial for the purposes of Article 5 § 3. As to the risk of the applicant's absconding or obstructing the proceedings, the domestic courts had confined themselves to repeating these grounds in their decisions in an abstract and stereotyped way, without indicating why they considered them to be well-founded. A general reference to the serious nature of the offence with which the applicant had been charged could not be considered sufficient justification. The domestic courts had therefore failed to give "relevant and sufficient" reasons for the detention.

Conclusion: violation (unanimously).

The Court also found a violation of Article 3 on account of the applicant's placement in a metal cage during hearings; a violation of Article 5 § 1 on account of the lack of a legal basis for the applicant's detention between 19 February and 12 March 2007; and two violations of Article 5 § 4 on account of a failure to ensure adversarial proceedings and equality of arms, and on account of a refusal to examine an appeal against detention on the sole ground that the criminal case was no longer considered to be at the pre-trial stage.

Article 41: EUR 8,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

ARTICLE 6

Article 6 § 1 (criminal)

Access to court

Inability for domestic courts to adjust rate of administrative fine set by law: *no violation*

Segame SA v. France - 4837/06
Judgment 7.6.2012 [Section V]

Facts – The applicant company is a public limited company which ran an art gallery. In 1993 the Paris Commercial Court issued orders for its judicial reorganisation and subsequent liquidation. The following year the tax authorities sent it two supplementary tax assessments, concerning, in particular, demands for tax arrears. These assessments were accompanied by a fine equal to 100% of the unpaid tax. During the proceedings, a legislative amendment reduced the rate of the fine from 100% to 25%; the tax authorities applied this new provision to the applicant company. In 1998 the applicant company applied to the courts for exemption from the assessments and alleged, *inter alia*, that the fine was incompatible with Article 6 § 1 of the Convention, since it could not be adjusted by the court to take account of the seriousness of the taxpayer's conduct in line with

a scale the legislature should have laid down. The application was dismissed, the *Conseil d'Etat* holding, in particular, that the tax courts had full jurisdiction in accordance with Article 6 § 1 and that that provision did not require, in cases where the legislature had fixed a flat rate for the fine in question, that the courts should have power to substitute a lower rate.

Law – Article 6 § 1: The applicant company had been able to bring proceedings for exemption from the supplementary tax assessment and penalties, and subsequently to lodge an ordinary appeal and an appeal on points of law. This was a full appellate procedure in which the administrative courts enjoyed wide powers to examine all the factual and legal aspects and not only set aside or validate an administrative decision, but also to amend it, or even substitute their own decision for that of the authorities while ruling on the taxpayer's rights. In tax matters, they could exempt the taxpayer from the taxes and penalties imposed, amend the sum demanded to the extent permitted by law and, in respect of penalties, substitute a higher or lower rate, again to the extent permitted by law. The applicant company's had complained that the administrative courts had not, in the absence of any statutory provision, had jurisdiction to adjust the amount of the fine imposed in respect of the unpaid tax. The Court noted, however, that the legislation itself made the fine proportionate to a certain extent to the seriousness of the taxpayer's conduct since it was fixed as a percentage of the unpaid tax and the applicant company had had ample opportunity to challenge the base used for calculating it. The applicant company had therefore been able to put forward all the factual and legal arguments it considered relevant. The Court further noted that, owing to their special nature, tax proceedings had to be effective in order to preserve the State's interests and that such proceedings did not form part of the hard core of criminal law for the purposes of the Convention.

Conclusion: no violation (unanimously).

Article 6 § 2

Presumption of innocence

Finding of guilt after expiration of limitation period: *no violation*

Constantin Florea v. Romania - 21534/05
Judgment 19.6.2012 [Section III]

Facts – In 1996 the public prosecutor's department opened an investigation against the applicant on charges of fraud, forgery and using forged official documents. In 2004 the first-instance court found that the applicant had committed the offences with which he was charged, but went on to discontinue the criminal proceedings after noting that the limitation period for all of the charges had expired in November 2003. As regards the civil aspect of the proceedings, it ordered the applicant to reimburse the State. The first-instance court's judgment was upheld following an ordinary appeal and an appeal on points of law, on the grounds that it "had been established with certainty that the accused had committed the offences with which he was charged".

Law – Article 6 § 2: Previous cases that had come before the Court had concerned cases in which appeal courts that had discontinued proceedings owing to the expiry of the limitation period had simultaneously overturned an acquittal by the lower court while ruling for the first time on the issue of guilt without respecting the rights of the defence in the proceedings before them. In the instant case, however, the first-instance court had considered the factual and legal aspects of the case and examined the question of the applicant's criminal and civil guilt in its entirety. His criminal guilt had been established in proceedings which had not been found to be unfair within the meaning of the Convention and in which a failure to respect the rights of the defence had not been substantiated. As to the civil aspect of the case, the first-instance court had ruled on the civil claim and had made an order against the applicant after establishing that the constitutive elements of liability in tort were present. The first-instance court had given sufficient reasons for its order, which could not be considered arbitrary.

Conclusion: no violation (unanimously).

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

Article 41: EUR 1,200 in respect of non-pecuniary damage; claim for pecuniary damage dismissed.

ARTICLE 8

Positive obligations
Respect for private life

Lack of clear statutory provisions criminalising act of covertly filming a naked child: *no violation*

E.S. v. Sweden - 5786/08
Judgment 21.6.2012 [Section V]

Facts – In 2002, when the applicant was fourteen years old, she discovered that her stepfather had hidden a video camera in the laundry basket in the bathroom. The camera was directed at the spot where the applicant had undressed before taking a shower. She took it to her mother who burned the film without anyone seeing it. The incident was reported in 2004 when the mother heard that the applicant's cousin had also experienced incidents with the stepfather. The stepfather was prosecuted and in 2006 convicted by a district court of sexual molestation under Chapter 6, section 7 of the Penal Code, as worded at the material time. His conviction was, however, overturned on appeal after the court of appeal found that his act did not come within the definition of the offence of sexual molestation. The court of appeal went on to point out that the conduct might have constituted the separate offence of attempted child pornography, but did not consider the issue further in the absence of any charge. The Supreme Court refused leave to appeal.

Law – Article 8: The matter had been examined in criminal proceedings before three levels of jurisdiction, before which the applicant had been represented by counsel and had had the possibility of claiming damages. With regard to the outcome of the domestic proceedings, the court of appeal had found that the act could not constitute sexual molestation under the Penal Code. Nevertheless, there were no indications that it had been clear to the prosecuting authorities or to the district court that the stepfather's act was not covered by the provision on sexual molestation. For its part, the court of appeal had pointed out that the act might, at least in theory, constitute the offence of attempted child pornography. It was not for the Court to speculate on why such a charge had not been brought against the stepfather. In sum, it could not be concluded that at the relevant time the stepfather's act was not in theory covered by the Penal Code. Nor could it be concluded that any procedural requirements had made it impossible for the applicant to enjoy practical and effective protection by the Penal Code, and civil-law remedies had also been available to her.

The question remained whether the absence of a provision in the Penal Code on attempted covert or illicit filming had constituted a significant flaw in the domestic legislation. In this connection, the Court reiterated that increased vigilance in protecting private life was necessary to contend with new communication technologies which made it possible to store and reproduce personal data. Sweden had, however, taken active steps to combat the general problem of illicit or covert filming of individuals by issuing a proposal to criminalise certain acts of such filming in situations where the act violated the personal integrity of the person filmed. Therefore, having regard to the special circumstances of the case, and notably the fact that at the relevant time the stepfather's act had in theory been covered by the provision in the Penal Code concerning sexual molestation and by the provision on attempted child pornography, the Swedish legislation and practice and their application in the instant case had not suffered from flaws so significant as to amount to a breach of Sweden's positive obligations.

Conclusion: no violation (four votes to three).

Respect for private life
Respect for family life

Failure to regulate residence of persons who had been "erased" from the permanent residents register following Slovenian independence: *violation*

Kurić and Others v. Slovenia - 26828/06
Judgment 26.6.2012 [GC]

Facts – The eight applicants had previously been citizens of both the former Yugoslavia and one of its constituent republics other than Slovenia. They had acquired permanent residence in Slovenia, but, following its independence, had either not requested Slovenian citizenship or had had their application refused. On 26 February 1992, pursuant to the newly enacted Aliens Act, their names were deleted from the Register of Permanent Residents and they became aliens without a residence permit. Some 25,000 other people were in the same situation. According to the applicants, none of them were ever notified of the decision to deregister them and they only discovered at a later stage that they had become aliens, when they

attempted to renew their identity documents. The erasure of their names from the register had serious and enduring negative consequences: some of the applicants became stateless, while others were evicted from their apartments, could not work or travel, lost all their personal possessions and lived for years in shelters and parks. Still others were detained and deported from Slovenia. In 1999 the Constitutional Court declared unconstitutional certain provisions of the Aliens Act, as well as the automatic "erasure" from the register, after finding that under the impugned legislation, citizens of former Yugoslavia had been in a less favourable legal position than other aliens who had lived in Slovenia since before its independence, in that there was no legal instrument regulating the transition of their legal status to the status of aliens living in Slovenia. Following the Constitutional Court's decision, a new law was adopted to regulate the situation of the "erased". In a decision of 2003 the Constitutional Court declared certain provisions of the new law unconstitutional, in particular since they failed to grant the "erased" retroactive permanent residence permits or to regulate the situation of those who had been deported.

In a judgment of 13 July 2010 a Chamber of the Court held unanimously that there had been a violation of Articles 8 and 13 (see Information Note no. 132).

Law

Article 34 (*victim status*): Decisions or measures that were favourable to applicants were not in principle sufficient to deprive them of "victim" status. In cases concerning the deportation or extradition of non-nationals, the regularisation of an applicant's stay or the fact that the applicant was no longer under the threat of being deported or extradited was in principle "sufficient". However, an applicant's "victim" status could also depend on the level of compensation awarded at domestic level, where appropriate, or at least on the possibility of seeking and obtaining compensation for the damage sustained. One of the characteristics of the present case was the widespread human-rights concern created by the "erasure". Furthermore, this situation had lasted for some twenty years. The acknowledgment of the human-rights violations and the issuance of permanent residence permits to six of the applicants did not constitute "appropriate" and "sufficient" redress for them, having regard to the lengthy period in which they had experienced insecurity and legal uncertainty and to the gravity of the consequences of the "erasure" for them. In addition, none of their claims for compensation had yet been successful. Their prospects of receiving compensation appeared, for the time being, to be too remote to have any relevance. Accordingly, the applicants who had been awarded permanent residence permits could still claim to be "victims" of the alleged violations.

Conclusion: victim status upheld (unanimously).

Article 8: The "erasure" and its repercussions had had an adverse effect on the applicants and continued to do so, amounting to interference with their private and family life. The "erasure" of the applicants' names from the register, together with the names of more than 25,000 other citizens of former Yugoslavia, had resulted from the combined effect of two provisions of the independence legislation. The two legal instruments in question had been accessible to any interested persons. However, the applicants could not reasonably have expected that their status as aliens would make their residence on Slovenian territory unlawful and would lead to such an extreme measure as the "erasure". Furthermore, the "erasure" had been carried out automatically and without prior notification, and the applicants had not been given the opportunity to challenge it before the competent domestic authorities or to give explanations as to the reasons for their failure to apply for Slovenian citizenship. In addition, the Constitutional Court had held that the transfer of the names of the "erased" from the Register of Permanent Residents to the Register of Aliens without a Residence Permit had had no basis in domestic law. Lastly, there had been a legal vacuum in the legislation in force at the time as there had been no procedure whereby the applicants could apply for permanent residence permits. The relevant legislation and administrative practice had therefore lacked the requisite standards of foreseeability and accessibility. Admittedly, the Legal Status Act had been passed in order to regularise the situation of the "erased". However, the Constitutional Court had found that certain provisions of the Act were unconstitutional, and it had taken more than seven years for that decision, ordering general measures, to be complied with. It followed that, at least until 2010, the domestic legal system had failed to regulate clearly the consequences of the "erasure" and the residence status of those who had been subjected to it. Therefore, not only had the applicants not been in a position to foresee the measure complained of, but they had also been unable to envisage its repercussions on their private and/or family life. The interference in issue had thus not been in accordance with the law.

However, in the particular circumstances of the present case, the Court also considered it necessary to examine whether this interference had pursued a legitimate aim and had been proportionate to it. The aim of the independence legislation and the measures taken in respect of the applicants could not be dissociated from the wider context of the dissolution of the former Yugoslavia, Slovenia's independence in 1991 and the establishment of an effective political democracy, which entailed the formation of a "corpus of Slovenian citizens" with a view to the parliamentary elections. The authorities had sought to create a "corpus of Slovenian citizens" and thus to protect the interests of the country's national security, a legitimate aim within the meaning of Article 8 § 2 of the Convention. However, as to whether the measures in question had been proportionate, the legal vacuum in the independence legislation had deprived the applicants of their legal status, which had previously given them access to a wide range of rights. An alien lawfully residing in a country might wish to continue living in that country without necessarily acquiring its citizenship. However, the Slovenian legislature had failed to enact provisions aimed at permitting citizens of former Yugoslavia holding the citizenship of one of the other republics to regularise their residence status if they had chosen not to take Slovenian citizenship or had not applied for it. Such provisions would not have undermined the legitimate aims pursued. Accordingly, the measures complained of had been neither in accordance with the law nor necessary in a democratic society to achieve the legitimate aim of protecting national security.

Conclusion: violation (unanimously).

Article 14 taken in conjunction with Article 8: There had been a difference in treatment between two groups – "real" aliens and citizens of former Yugoslav republics other than Slovenia – who had been in a similar situation in respect of residence-related matters. This difference in treatment, based on nationality, had placed a disproportionate and excessive burden on citizens of former Yugoslavia.

Conclusion: violation (unanimously).

The Court also found a violation of Article 13 taken in conjunction with Article 8.

Article 46: In the absence of any settled domestic practice, it would be premature at this stage to examine whether the reforms and the various steps taken by the Government had achieved the result of satisfactorily regulating the residence status of the "erased". In any event, the whole category of the "erased" were still denied compensation for the infringement of their fundamental rights. Moreover, the assessment of the situation complained of extended beyond the sole interests of the applicants and required the case to be examined also from the perspective of the general measures that needed to be taken in the interests of other potentially affected persons. The present case was therefore suitable for the adoption of the pilot-judgment procedure. Only a few similar applications lodged by "erased" persons were currently pending before the Court, but in the context of systemic, structural or similar violations their number was likely to increase considerably. The respondent State should therefore, within one year, set up an *ad hoc* domestic compensation scheme. The examination of all similar applications would be adjourned pending the adoption of that measure.

Article 41: EUR 20,000 awarded in respect of non-pecuniary damage to each of the six applicants whose case was declared admissible; question of compensation for pecuniary damage reserved.

Respect for family life

Lack of in-depth examination of all relevant factors when deciding to return applicant's child under the Hague Convention on the Civil Aspects of International Child Abduction: *case referred to the Grand Chamber*

X v. Latvia - 27853/09
Judgment 13.12.2011 [Section III]

In 2005 the applicant gave birth to a daughter in Australia while living with her partner T. The child's birth certificate did not state the father's name and no paternity test was ever carried out. In 2008 the applicant left Australia with her daughter and returned to her native Latvia. T. then filed a claim with the Australian courts seeking to establish his parental rights in respect of the child, claiming that the applicant had fled Australia taking the child without his consent, contrary to the Hague Convention on the Civil Aspects of International Child Abduction. The Australian court decided that T. and the applicant had joint custody of the child and that the case would be further reviewed once the child was returned to Australia. Once the competent Latvian authorities received notification from the Australian authorities, they heard representations from the applicant, who contested the applicability of the Hague Convention claiming that she had been the child's sole guardian. The Latvian courts granted T.'s

request and the applicant was ordered to return the child to Australia within six weeks. In March 2009 T. took the child from the applicant and returned with her to Australia. Ultimately, the Australian courts ruled that T. was the sole guardian and that the applicant was only allowed to visit the child under the supervision of a social worker and was not allowed to speak to the child in Latvian.

In a judgment of 13 December 2011 a Chamber of the Court found, by five votes to two, that there had been a violation of Article 8 of the Convention (see Information Note no. 147).

On 4 June 2012 the case was referred to the Grand Chamber at the Government's request.

ARTICLE 9

Freedom of conscience

Absence of statutory framework or a procedure to establish right to conscientious objection: *violation*

Savda v. Turkey - 42730/05
Judgment 12.6.2012 [Section II]

Facts – In May 1996 the applicant, a Turkish national, was conscripted into the army and incorporated into his regiment. In August 1996, however, he deserted. In November 1997 he was arrested in possession of a weapon, convicted of aiding and abetting the PKK (Worker's Party of Kurdistan) and sentenced to a prison term. In November 2004, after serving his sentence, he was returned to his regiment to complete his military service but refused to wear military uniform. He then declared himself a conscientious objector. A series of criminal proceedings were brought before the military Courts In the meantime, he continued to refuse to join his regiment and deserted on several occasions. In April 2008 the applicant was exempted from military service and discharged from his regiment, after being diagnosed with an anti-social personality disorder.

Law – Article 9: Since the Grand Chamber's judgment in the case of *Bayatyan v. Armenia*,[1] opposition to military service, where motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constituted a conviction of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.

In the instant case, the applicant complained about shortcomings by the State. No convincing or compelling reason justifying the failure to recognise the right to conscientious objection in respect of compulsory military service had been put forward. The reference to concepts such as public safety, the prevention of disorder or protection of the rights of others was not sufficient to explain why recognition of this right was incompatible with the State's general duty. As to the absence of a procedure which would have enabled the applicant to establish whether he met the conditions for recognition of a right to conscientious objector status, the applicant had not referred to any religious conviction, but said that he subscribed to a pacifist and anti-military philosophy. The Government had argued that the applicant could not be recognised as a conscientious objector. The question that arose, therefore, was to what extent the applicant's objection to military service fell within the ambit of Article 9. It was noted that the applicant's request had not been examined by the domestic authorities. The Court therefore considered that, in the absence of a procedure to examine such requests, the obligation to carry out military service was such as to entail a serious and insurmountable conflict between that obligation and an individual's deeply and genuinely held beliefs. In the light of its case-law on Article 8 of the Convention, which had repeatedly emphasised the State's positive obligation to provide a regulatory framework of adjudicatory and enforcement machinery to protect the right to private life, the Court considered that there was a positive obligation on the authorities to make available to the applicant an effective and accessible procedure which would have enabled him to have established whether he was entitled to conscientious-objector status, in order to protect the applicant's interests as guaranteed by Article 9. A system that did not provide for alternative service or for a procedure as described above failed to strike the proper balance between the general interest of society and that of conscientious objectors. It followed that the relevant authorities had failed to comply with their obligation under Article 9.

Conclusion: violation (unanimously).

The Court also concluded, unanimously, that there had been a violation of Article 3, as the applicant had been subjected to degrading treatment, and a violation of Article 6 § 1, given that the applicant, as a conscientious objector, had been required to

1. *Bayatyan v. Armenia* [GC], no. 23459/03, 7 July 2011, Information Note no. 143. For more information about conscientious objection, see the Factsheet on this subject.

appear before a military court that was incompatible with the principle of the independence and impartiality of the courts.

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

ARTICLE 10

Positive obligations
Freedom to impart information

Failure to allocate radiofrequencies to licensed television broadcaster: *violation*

Centro Europa 7 S.r.l. and Di Stefano v. Italy - 38433/09
Judgment 7.6.2012 [GC]

Facts – The applicants are a company and its statutory representative. In July 1999 the Italian authorities granted the applicant company a licence for nationwide terrestrial television broadcasting, authorising it to install and operate an analogue television network covering 80% of national territory. As regards the allocation of frequencies, the licence referred to the 1998 national frequency allocation plan, stating that the applicant company should bring its installations into line with the requirements of the "assignment plan" within twenty-four months and should conform to the "adjustment programme" drawn up by the Communications Regulatory Authority. From 2000 onwards, the applicant company made several applications to the administrative courts, complaining about the failure to allocate it any broadcasting frequencies. In May 2008 the *Consiglio di Stato* ordered the Government to deal with the request for the allocation of frequencies. In January 2009 it also ordered the appropriate ministry to pay the applicant company approximately EUR 1,000,000 in compensation, calculated on the basis of its legitimate expectation of being allocated frequencies.

Law – Article 10: The authorities' failure to allocate frequencies to the applicant company had deprived its licence of all practical purpose since the activity it authorised had been *de facto* impossible to carry out for nearly ten years. There had therefore been interference with the applicant company's exercise of its right to impart information or ideas. Furthermore, having been awarded a broadcasting licence, it could reasonably have expected the authorities to adopt, within twenty-four months, the instruments needed to regulate its activities, provided that it upgraded its installations. However, the frequency allocation plan had not been implemented until December 2008 and the applicant company had been allocated a single channel to broadcast its programmes, with effect only from the end of June 2009. In the meantime, several operators had continued on a provisional basis to use various frequencies that were supposed to have been allocated to new operators under the national plan. The *Consiglio di Stato* had held that this state of affairs was due to essentially legislative factors. A series of laws had successively extended the period during which the existing "over-quota" channels could continue to broadcast at both national and local level. The other operators had therefore been prevented from participating in the early stages of digital television. Moreover, these laws, which were couched in vague terms, had postponed the expiry of the transitional scheme with reference to events occurring on dates which were impossible to foresee. In addition, the Court of Justice of the European Union had noted that these measures by the national legislature had entailed the successive application of transitional arrangements structured in favour of the incumbent networks, and that this had had the effect of preventing operators without broadcasting frequencies from accessing the television broadcasting market even though they had a licence. Accordingly, the domestic legislative framework had lacked clarity and precision and had not enabled the applicant company to foresee with sufficient certainty when it might be allocated the frequencies in order to start broadcasting. As a result, the laws in question did not satisfy the foreseeability requirements. Lastly, the authorities had not observed the deadlines set in the licence, thereby frustrating the applicant company's expectations. The Government had not shown that the company had had effective means at its disposal to compel the authorities to abide by the law and the Constitutional Court's judgments. Accordingly, the applicant company had not been afforded sufficient guarantees against arbitrariness. This shortcoming had resulted, among other things, in reduced competition in the audiovisual sector. It therefore amounted to a failure by the State to comply with its positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective media pluralism.

Conclusion: violation (sixteen votes to one).

The Court also held, by fourteen votes to three, that there had been a violation of Article 1 of Protocol No. 1, finding that the applicant company's legitimate expectation – notably the operation of an analogue television network by virtue of the licence – had had a sufficient basis to constitute a

"possession". Given that the Court had already held under Article 10 that the interference with the applicant company's rights had not had a sufficiently foreseeable legal basis within the meaning of its case-law, it could only reach the same finding in relation to Article 1 of Protocol No. 1.

Article 41: EUR 10,000,000 to the applicant company in respect of pecuniary and non-pecuniary damage.

Freedom of expression

Convictions for illegal assembly for hanging dirty laundry outside Parliament building: *violation*

Tatár and Fáber v. Hungary - 26005/08 and 26160/08
Judgment 12.6.2012 [Section II]

Facts – The applicants were prosecuted and fined for illegal assembly after staging a political protest which involved hanging laundry – symbolising "the nation's dirty laundry" – on a fence surrounding the Parliament building in Budapest. The protest, which lasted just 13 minutes, was attended by a small number of journalists who had learnt of the event from the applicants' website and turned up to ask questions. In finding the applicants guilty of the offence, the domestic courts ruled that the protest had amounted to an "organised event" under section 6 of the Assembly Act, not a cultural event, and that the authorities should therefore have been given the statutory three days' prior notice.

Law – Article 10: The impugned event, which had involved only two people and lasted a very short time, constituted predominantly an expression and thus fell within the scope of Article 10. The imposition of a fine had interfered with the applicants' right to freedom of expression and pursued the legitimate aims of ensuring public safety, protecting the rights of others and preventing disorder.

It was not, however, necessary to consider whether the interference was prescribed by law as, in any event, it had not been necessary in a democratic society. The applicants' protest could not be considered tantamount to an assembly. The mere fact that an "expression" occurred in public did not necessarily turn the event into an assembly. Like "association", "assembly" had an autonomous meaning for Convention purposes, with the classification in national law being no more than a starting-point. An "assembly" constituted a specific form of communication of ideas in which the gathering of an indeterminate number of persons with the identifiable intention of being part of the communicative process could in itself be an intensive expression of an idea. In such cases, support for the idea is expressed through the very presence of a group of people, particularly in a place accessible to the general public. An assembly could also serve the exchange of ideas between speakers and participants. In the applicants' case, these constitutive elements of an "assembly" had been absent. Even though the event had been advertised on the Internet, there had been no intention to recruit participants other than a few journalists. The aim of the "political performance" had been to send out a message through the media rather to encourage the direct gathering of protestors (which in any event would have been virtually impossible to achieve in 13 minutes).

By qualifying the expressive interaction of the two applicants as an assembly, the authorities had brought the Assembly Act into play with the attendant obligation to notify the authorities of the event. While notification might be justified in certain cases to enable the authorities effectively to coordinate and facilitate the holding of an assembly, there had been no such need in the instant case, as there was nothing to indicate that either public order or the rights of others were affected. The national authorities' approach to the concept of assembly did not correspond to the rationale of the notification rule and the application of that rule to an "expression" – rather than only to "assemblies" – was liable to create a prior restraint that was incompatible with the free communication of ideas.

The authorities had, therefore, not given "relevant and sufficient" reasons for the interference with the applicants' freedom of expression.

Conclusion: violation (unanimously).

Article 41: EUR 1,500 each in respect of non-pecuniary damage.

Absolute prohibition on filming an interview with an inmate inside prison: *violation*

Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland - 34124/06
Judgment 21.6.2012 [Section V]

Facts – In August 2004 the applicant, a radio and television broadcasting company, requested per-

mission to film a prisoner serving a sentence for murder, with a view to broadcasting the interview in a feature on the trial of another person accused in the same case. The prisoner concerned, whose case had attracted a great deal of media interest, had agreed to the interview. The request was refused, for reasons concerning the need to maintain peace, order and security in the prison and to ensure equal treatment among the prisoners. The applicant company lodged various appeals against the decision, but to no avail.

Law – Article 10: The refusal to authorise the applicant company to film inside a prison for a television programme, notably to interview a detainee, had amounted to interference with freedom of expression. The interference had been provided for by law and pursued the aims of preventing disorder and protecting the rights of others. However, as freedom of expression in the context of a television broadcast devoted to a subject of particular public interest was in issue, the margin of appreciation open to the Swiss authorities in determining whether or not the offending measure met a "pressing social need" had been narrow. There had, on the face of it, been grounds to consider that the rejection of the applicant company's request was necessary in a democratic society – in particular with regard to the presumption of innocence of a person whose trial was imminent, and the interests of the proper administration of justice. However, the domestic authorities should have properly examined whether, for reasons concerning security and the rights of the other detainees, the refusal of permission to film inside the prison had been actually and effectively necessary in the present case.

In particular, they should have taken into consideration the concessions the applicant company had been prepared to make, such as filming at a time when the other detainees were working, and keeping the interview short. In its appeals the applicant company had suggested that the interview might be filmed in the visiting room, which could have been kept closed for the occasion. The domestic authorities did not appear, however, to have taken these arguments into account. That being so, the argument that the filming would have interfered with the private lives of the other detainees appeared neither relevant nor sufficient to justify the interference with the applicant company's freedom of expression. Concerning the need to maintain order and security in the prison, neither the domestic authorities nor the Government had explained how, in practice, order and security in the prison could have been effectively threatened, especially if the interview had been filmed in the restricted conditions proposed by the applicant company, by a single cameraman accompanied by one journalist, whose presence would hardly have been likely to disturb the functioning of the establishment or threaten security there.

Furthermore, Article 10 protected not only the substance of the ideas and information expressed but also the means by which they were conveyed. It was therefore not for the domestic courts or for the Court to substitute their own views for those of the media as to what technique of reporting journalists should adopt. Thus the fact that a telephone interview with the prisoner had been broadcast by the applicant company in a programme that was available on its web site was not relevant: different means and techniques had been used for the interview, it had not had such a direct impact on viewers and it had been broadcast in the framework of another programme. Accordingly, broadcasting the interview had not in any way remedied the interference caused by the refusal of permission to film in the prison.

It was true that the national authorities were better placed than the Court to decide whether and to what extent allowing outsiders into a prison was compatible with order and security there. However, having regard in particular to the rather summary reasoning given by the national authorities and the absence in their decisions of any real balancing of the interests involved, they had failed to demonstrate convincingly that the absolute ban imposed on the applicant company's filming in the prison had been strictly proportionate to the aims pursued.

Conclusion: violation (five votes to two).

Article 41: no award.

ARTICLE 11

Freedom of association

Ban on activities of Islamist association for advocating the use of violence: *inadmissible*

Hizb Ut-Tahrir and Others v. Germany - 31098/08
Decision 12.6.2012 [Section V]

Facts – The applicant association was established in Jerusalem in 1953 and has been active in Germany since the 1960s. It describes itself as a "global Islamic political party and/or religious society". The second applicant was the association's representative in the proceedings before the European

Court. In January 2003 the Federal Ministry of the Interior issued a decision prohibiting the applicant association's activities in Germany and ordering the confiscation of its assets on the grounds that its activities were directed against the principle of international understanding and it had advocated the use of violence. An application to have that decision set aside was rejected by the Federal Administrative Court. The Federal Constitutional Court refused to admit the association's constitutional complaint for adjudication.

Law – Article 11: The Court reiterated that by virtue of Article 17 of the Convention it was not possible for groups or individuals to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention. The Federal Administrative Court had concluded from a careful analysis of a number of articles published by the applicant association and public statements by the second applicant that the applicant association had denied the State of Israel's right to exist and called for its violent destruction and for the banishment and killing of its inhabitants. In particular, the second applicant had repeatedly justified suicide attacks in which civilians were killed in Israel, and neither he nor the association had distanced themselves from that stance during the proceedings before the Court. The applicant association had thus attempted to deflect the right to freedom of assembly and association under Article 11 from its real purpose by employing that right for ends which were clearly contrary to the values of the Convention, notably the commitment to the peaceful settlement of international conflicts and to the sanctity of human life. Consequently, by reason of Article 17, the association could not benefit from the protection afforded by Article 11.

Conclusion: inadmissible (incompatible *ratione materiae*).

The Court also declared the applicant association's other complaints (under Articles 6, 13 and 14 of the Convention and under Article 1 of Protocol No. 1) inadmissible.

ARTICLE 13

Effective remedy

Inability to claim compensation in respect of non-pecuniary damage sustained as a result of ill-treatment by the police: *violation*

Poghosyan and Baghdasaryan v. Armenia - 22999/06
Judgment 12.6.2012 [Section III]

(See Article 3 of Protocol No. 7 below, page 24)

ARTICLE 14

Discrimination (Article 8)

Impossibility of second-parent adoption in same-sex couple: *relinquishment in favour of the Grand Chamber*

X and Others v. Austria - 19010/07
[Section I]

The first and third applicants are two women living in a stable relationship and the second applicant is the third applicant's minor son. The first applicant wished to adopt the second applicant in order to create a legal relationship between them without severing his relationship with his mother and they concluded an adoption agreement to this end. However, the domestic courts refused to approve the adoption agreement, finding that adoption by one person had the effect of severing the family-law relationship with the biological parent of the same sex.

In their application to the European Court, the applicants complain under Article 14 in conjunction with Article 8 that they have been discriminated against in relation to step-child adoption on account of the first and third applicants' sexual orientation.

ARTICLE 17

Destruction of rights and freedoms

Ban on activities of Islamist association for advocating the use of violence: *inadmissible*

Hizb Ut-Tahrir and Others v. Germany - 31098/08
Decision 12.6.2012 [Section V]

(See Article 11 above, page 16)

ARTICLE 34

Victim

Non-transferability, in absence of moral interest in outcome of proceedings or other compelling reason, of strictly personal rights under Article 3: *inadmissible*

Kaburov v. Bulgaria - 9035/06
Decision 19.6.2012 [Section IV]

Facts – The applicant's father was allegedly ill-treated at the hands of the police in 1997. In subsequent criminal proceedings, the domestic courts concluded that he had resisted arrest and that the use of physical force had been justified. The applicant's father died in 2000 and the applicant intervened in a pending civil action in damages his late father had instituted against the State and which were ultimately dismissed.

Law – Article 34: The applicant complained of ill-treatment of his father at the hands of the authorities and a failure to conduct an effective investigation. Although the Court normally permitted the next-of-kin to pursue proceedings before it where the original applicant had died after the introduction of the application, the situation was different when the direct victim died before bringing his or her complaint before the Court. In cases where the alleged violation was not closely linked to disappearance or death, the Court had a more restrictive approach and held that rights under certain Convention provisions were strictly personal and non-transferable. In the applicant's case there was no causal link between the alleged ill-treatment of his late father and the latter's death, which had occurred while the domestic criminal and civil proceedings were still pending. However, the focus of both of those sets of proceedings and of the applicant's Court application had been strictly personal rights under Article 3 of the Convention. The Court did not exclude that it might recognise the transferability of complaints under Article 3 to applicants who complained about treatment concerning a deceased relative. However, such applicants would have to show either a strong moral interest in the outcome of the domestic proceedings, going beyond a mere pecuniary interest, or other compelling reasons such as an important general interest requiring an examination of their case. The applicant had not put forward any such reasons and the domestic proceedings in which he had taken part concerned primarily the issue of compensation. The notion of "victim" under Article 34 of the Convention was an autonomous one and did not depend on rules of domestic law. Furthermore, the applicant had lodged his application many years after the end of the investigation, the effectiveness of which might have been the only issue of general interest in the case.

Conclusion: inadmissible (absence of victim status).

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies

Constitutional remedy available only after prior use of ineffective remedy: *preliminary objection dismissed*

István and Ištvánová v. Slovakia - 30189/07
Judgment 12.6.2012 [Section III]

Facts – In their application to the European Court, the applicants complained of the length of civil proceedings. The Government contended that they had failed to exhaust domestic remedies as, although they had made a complaint under Article 127 of the Constitution, this had been rejected by the Constitutional Court on the grounds that they had not afforded the district court concerned adequate opportunity to remedy the situation under the Courts Act.

Law – Article 35 § 1 (*exhaustion of domestic remedies*): The remedy established under Article 127 of the Constitution was in general considered a remedy requiring exhaustion for the purposes of Article 35 § 1 of the Convention in length-of-proceedings cases and offered redress of both a preventive and a compensatory nature. However, the ultimate effect for an applicant might change when the availability of redress under that provision became dependent on his first lodging a complaint with the president of the court under the Courts Act. Such a complaint did not give rise to compensation and was comparable to a similar type of complaint that could be made under the State Administration of Courts Act, which had been found not to be an effective remedy. Furthermore, there were inconsistencies in the Constitutional Court's case-law regarding the period that had to elapse before a constitutional complaint could be made. The applicants' situation regarding the exhaustion of remedies before the Constitutional Court had thus

depended on a number of variables without reliable guidance or a predictable outcome. Such a situation could not be considered compatible with the principle of legal certainty.

Conclusion: preliminary objection dismissed (fives votes to two).

Article 6 § 1: The period to be taken into consideration had lasted approximately six years and five months for two levels of jurisdiction and was excessive.

Conclusion: violation (five votes to two).

The Court also found a violation of Article 13 in conjunction with Article 6 § 1.

Article 41: EUR 3,250 in respect of non-pecuniary damage.

Six-month period

Non-working day taken into account when determining expiry date of six-month time-limit under Convention criteria, irrespective of position under domestic law: *preliminary objection allowed*

Sabri Güneş v. Turkey - 27396/06
Judgment (preliminary objection)
29.6.2012 [GC]

Facts – The *dies ad quem*, that is, the day on which the six-month time-limit expired, was a Sunday. The applicant had therefore lodged his application with the Court on the first subsequent working day, which was the Monday.

In a judgment of 24 May 2011 a Chamber of the Court considered that the time-limit should be extended to the first subsequent working day. Accordingly, the applicant having complied with the six-month time-limit, his case was examined and the Court found by five votes to two that there had been a violation of Article 6 § 1.

Law – Article 35 § 1: The question was whether, when the *dies ad quem* was a Saturday, a Sunday or any other official holiday or day considered to be an official holiday, the time-limit should be extended to include the first working day thereafter.

In its judgment the Chamber had pointed out that the Court had always taken domestic law and practice into account when determining the *dies a quo*, and decided to apply the same approach to the *dies ad quem*. However, in the Grand Chamber's view, an analysis of the case-law of the Convention institutions revealed that while taking domestic law and practice into account was, admittedly, an important aspect, it was not decisive in determining the starting point of the six-month period. The six-month rule was an autonomous rule which had to be interpreted and applied in each case in such a manner as to ensure the effective exercise of the right of individual petition. Moreover, application by the Court of its own criteria in calculating time-limits, independently of domestic rules, tended to ensure legal certainty, proper administration of justice and thus, the practical and effective functioning of the Convention mechanism. In fact, if in determining the *dies ad quem* the Court were bound to take account of domestic law and practice, it would have to draw up a full schedule of official holidays in the forty-seven States Parties to the Convention. Furthermore, having regard to the numerous means of communication now available to potential applicants (post, fax, electronic communication, Internet, and so on), the six-month time-limit was, now more than ever, sufficient to enable them to consider whether to lodge an application and, if so, to decide on the content thereof. In so far as it was difficult to conclude that there was a general consensus between Council of Europe Member States as regards the calculation of time-limits, the Court considered that it should follow its established approach. In the light of the foregoing, the Court saw no reason to justify departing from that approach.

That being so, since the final decision of the Supreme Military Administrative Court of 16 November 2005 had been served on the applicant on 28 November 2005, the time-limit laid down by Article 35 § 1 had started to run on the following day, 29 November, and expired at midnight on Sunday 28 May 2006. The application had been lodged on 29 May 2006, that is, after the expiry of the above-mentioned time-limit. As far as the Court was concerned, the fact that the last day of the six-month time-limit fell on a Sunday and that in such circumstances, under domestic law, time-limits were extended to the following working day, did not affect the determination of the *dies ad quem*. In keeping with the Court's well-established case-law, compliance with the six-month time-limit was determined using criteria specific to the Convention. Furthermore, there was no indication in this case that the applicant, who had been represented by a lawyer who should have been aware of the Court's case-law in this regard, could not have foreseen that the *dies ad quem* would fall on a non-working day and acted accordingly. Consequently, because this application had been lodged more than six months after service of the

final domestic decision within the meaning of Article 35 § 1, the Court was unable to examine the merits of the case.

Conclusion: preliminary objection allowed (out of time).

ARTICLE 46

Pilot judgment
General measures

Respondent State required to set up a compensation scheme securing adequate redress to "erased" persons

Kurić and Others v. Slovenia - 26828/06
Judgment 26.6.2012 [GC]

(See Article 8 above, page 10)

ARTICLE 1 OF PROTOCOL No. 1

Control of the use of property

Obligation of landowner opposed to hunting on ethical grounds to tolerate hunting on his land and to join a hunting association: *violation*

Herrmann v. Germany - 9300/07
Judgment 26.6.2012 [GC]

Facts – The applicant is the owner of two landholdings in Germany. Under the Federal Hunting Act he is therefore automatically a member of a hunting association and is obliged to tolerate hunting on his land. As he is opposed to hunting on ethical grounds, he lodged a request with the hunting authority seeking to terminate his membership of the hunting association. The request was refused. An identical request was subsequently rejected by the administrative courts. In December 2006 the Federal Constitutional Court refused to admit a constitutional complaint by the applicant for adjudication, finding, in particular, that the legislation in question pursued legitimate aims and did not impose an excessive burden on landowners. It took the view that the impugned provisions were aimed at preserving game in a manner adapted to the rural environment and ensuring healthy and varied wildlife, and that compulsory membership of a hunting association was an appropriate and necessary means of achieving those aims and did not infringe the applicant's property rights or his right to freedom of conscience or freedom of association. The Constitutional Court added that, in so far as the legislation in question was binding on all landowners, the applicant's right to equal treatment had not been breached either.

In a judgment of 20 January 2011 (see Information Note no. 137), a Chamber of the Court held, by four votes to three, that there had been no violation of Article 1 of Protocol No. 1, as the Government had struck a fair balance between the protection of the right of property and the requirements of the general interest.

Law – Article 1 of Protocol No. 1: The obligation for the applicant to tolerate hunting on his land interfered with the exercise of his right to the peaceful enjoyment of his property. The German hunting legislation could be said to constitute a means of controlling the use of property in accordance with the general interest within the meaning of Article 1 of Protocol No. 1.

In the cases of *Chassagnou and Others v. France* and *Schneider v. Luxembourg*,[1] the Court had held that imposing on a landowner opposed to the hunt on ethical grounds the obligation to tolerate hunting on his or her property was liable to upset the fair balance between protection of the right of property and the requirements of the general interest and to impose a disproportionate burden on the person concerned. Since the adoption of those two judgments, several European countries had amended their legislation or case-law to enable landowners to object to hunting on their land or to terminate their membership of a hunting association subject to certain conditions. It therefore remained to be determined whether the situation arising out of the provisions of the Federal Hunting Act as applied in the instant case differed significantly from the factual and legal situation in the above-mentioned cases. With regard to the objectives of the legislation concerned, the Court noted that the aims of the German Federal Hunting Act included the management of game stocks, which, in turn, was aimed at maintaining varied and healthy game populations. In that regard, it did not differ significantly from the former laws in France and Luxembourg, which had pursued comparable objectives. Although the German legislation imposed certain obligations on persons who engaged in hunting,

1. *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, 29 April 1999, Information Note no. 5; *Schneider v. Luxembourg*, no. 2113/04, 10 July 2007.

the fact remained that hunting was primarily carried out by private individuals as a leisure activity, just as used to be the case in France and Luxembourg. As to the territorial scope of the legislation and the possibility of exemption from compulsory membership of a hunting association, the German hunting legislation applied nationwide, whereas the French law had been applicable only to certain *départements*. However, the German *Länder* could enact hunting laws that departed from the federal legislation, although they had not hitherto done so. Furthermore, all three laws provided, or had provided, for similar territorial exceptions for enclosed areas, nature reserves and game reserves. Certain differences between the laws, such as differential treatment under German law depending on the size of the plot of land, could not be considered decisive. As to the compensation awarded to landowners in return for the use of their land for hunting, the legislation in Germany and Luxembourg, unlike the French law, provided for members of the association to receive a proportionate share of the profits from the leasing of hunting rights. In Germany, compensation was granted only when explicitly requested. The Court considered that it did not sit comfortably with the notion of respect for an ethical objection to require the objector to apply to the authorities for compensation in respect of the very matter forming the basis for his or her objection. In any event, the German Federal Hunting Act left no room for the ethical convictions of landowners opposed to hunting to be taken into account.

In view of these considerations, the situation encountered in Germany was not substantially different from those examined by the Court in the cases of *Chassagnou and Others* and *Schneider*. Accordingly, the Court saw no reason to depart from its findings in those cases, namely that the obligation to tolerate hunting on their property imposed a disproportionate burden on landowners opposed to hunting for ethical reasons.

Conclusion: violation (fourteen votes to three).

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

Statutory right for lessees under ground leases to demand indefinite extension of lease on pre-existing conditions: *violation*

Lindheim and Others v. Norway - 13221/08 and 2139/10
Judgment 12.6.2012 [Section IV]

Facts – In the post-war area, limited resources for the purchase of real estate in Norway made so called ground-lease arrangements attractive for people wishing to own a home. For landowners, such arrangements offered means of obtaining a steady income from their land without making any investments and an attractive alternative to selling at a time of moderate price levels. Some 300,000 to 350,000 ground-lease contracts were entered into, mainly for private homes. Following the rise of real-estate prices in the 1980s the legislature found it necessary to intervene to protect the interests of lessees who had invested in their homes but could not afford to purchase the land (by redeeming the lease). By virtue of section 33 of the Ground Lease Act 1996, as amended in 2004, anyone holding a long lease of land for use as a permanent or holiday home is entitled at the expiry of the contractual term to claim an extension of the lease on the same conditions as those applicable under the original lease and without limitation in time. Rent can be increased only in line with general inflation, not the rising cost of land. In a leading judgment of 21 September 2007, the Supreme Court ruled that the amended section 33 was compatible with the Constitution.

The applicants owned plots of land that had been let prior to 1976 under ground-lease contracts for permanent or holiday homes for periods of between 40 and 99 years. In their applications to the European Court they complained that by virtue of the legislation as amended, their lessees had been able to demand an indefinite extension of their leases on the same conditions as before.

Law – Article 1 of Protocol No 1: The interference with the applicants' possessions resulting from the application of the amended section 33 of the Ground Lease Act was lawful and constituted control of the use of property for the purposes of Article 1 of Protocol No. 1. The Norwegian Parliament's view that there was a legitimate need, on grounds of social policy, to protect the interests of leaseholders who were financially unable to exercise their statutory right of redemption was not manifestly unreasonable. The interference could therefore be deemed to be in accordance with the general interest.

Turning to the proportionality of the measure, the Court noted that the Norwegian Parliament had been confronted with the particularly complex task of trying to reconcile competing interests that were markedly different in nature: on the one hand, the lessor's interest in negotiating rent that reflected market values and, on the other, the lessee's interest

in continuing the lease at the end of the term in view of his or her financial investment in the constructions on the land. In view of the very large number of ground-lease contracts in Norway (in excess of 300,000), it was understandable that the legislative process should have emphasised the need to have clear and foreseeable solutions and to avoid costly and time-consuming litigation on a potentially massive scale.

Nevertheless, the Court was not satisfied that the respondent State, notwithstanding its wide margin of appreciation, had struck a fair balance between the general interest of the community and the applicants' property rights. In this connection, it noted that no specific assessment had been made of whether the amendment to section 33 achieved such a balance between the lessors' and lessees' interests; the level of rent received by the applicants was strikingly low (less than 0.25% of the market value of the plots concerned); the legislation appeared to go beyond situations of potential financial hardship and social injustice and to apply generally whenever a lease came up for renewal, irrespective of the lessee's financial means; extensions were of indefinite duration and the rent could be increased only in the light of the consumer price index, not the value of the land; lastly, only the lessee could choose to terminate a lease agreement, either by rescinding the contract or by redeeming (purchasing under preferential conditions) the plot of land. A disproportionate burden had thus been placed on the applicant lessors.

Conclusion: violation (unanimously).

Article 46: The respondent State was required to take appropriate legislative and/or other general measures to secure in its domestic legal order a mechanism which would ensure a fair balance between the interests of the lessors and the general interests of the community, in accordance with the principles of protection of property rights under the Convention and having regard to the shortcomings the Court had identified in its judgment.

Article 41: The Court dismissed the applicants' claims for compensation equal to the market value of the undeveloped plots less the capitalised value of the rent payable under the Ground Lease Act. It considered that, in the particular circumstances of the case, having regard to the complexity of the issues with which the Norwegian Parliament was confronted, to the Court's indication of legislative and/or other general measures and to the principle of legal certainty inherent in the law of the Convention, the respondent State should be dispensed from liability with regard to legal acts or situations that predated the instant judgment. However, it awarded the applicants compensation for the costs they had had to pay the opposing parties in the domestic proceedings.

ARTICLE 3 OF PROTOCOL No. 1

Free expression of opinion of people
Choice of the legislature

Allegations of biased media coverage of parliamentary elections: *no violation*

Communist Party of Russia and Others v. Russia - 29400/05
Judgment 19.6.2012 [Section I]

Facts – The applicants are two Russian political parties – the Communist Party of the Russian Federation and the Russian Democratic Party "Yabloko" – and six Russian nationals. In December 2003, during the election of members to the State Duma all of them positioned themselves as opposition parties and candidates. The pro-government forces were represented essentially by the United Russia Party, which obtained a majority of the votes (over 37%) and formed the biggest grouping in Parliament with 224 seats. The Communist Party won 12.6% of the vote and obtained 52 seats, and accordingly formed the second biggest grouping in the Duma. Yabloko obtained 4.3% of the vote. Since this was less than the statutory 5% minimum threshold, it did not obtain any seats in parliament. Only one of the six individual applicants was elected as an MP. The five main nationwide broadcasting companies covered the elections. Three of them were directly controlled by the State, and corporations affiliated with the State were major shareholders of the other two. During the electoral campaign each State broadcasting company was required to provide the competing candidate parties with one hour of free airtime per working day on each TV or radio channel they controlled. In addition, parties and candidates could buy a certain amount of paid airtime for campaigning on an equal footing with the others. Besides "campaigning", all channels were involved in reporting on the elections in various news items. The applicants maintained that the media coverage was unfair, that the five major TV channels in fact campaigned for the ruling party, that airtime was allocated unevenly and that the information disseminated was not neutral. Many observers monitoring the elections

noted that the TV media coverage was unfavourable to the opposition. The applicants lodged a series of complaints with the administrative authorities and courts on different grounds related to these allegations, but to no avail.

Law – Article 13: The applicants had complained not of one or several isolated cases of unlawful campaigning, but of the entire media policy of five broadcasters over a period of three months. They had tried to have the results of the elections invalidated. It had been within the powers of the Supreme Court to annul the results of the elections if it had detected serious breaches of electoral law, including those related to the alleged unlawful campaigning. Therefore the applicants had had access to a legal remedy capable of satisfying their claim, at least in theory. Their allegations had been reviewed at two levels of jurisdiction by the Supreme Court of Russia, the highest judicial body in electoral matters, which had had full jurisdiction over the case and had been entitled *inter alia* to invalidate the results of the elections. The independence of the Supreme Court as such had not been called into question. Furthermore, no serious flaws in the procedure before the Supreme Court were detected which would have made that remedy ineffective. The applicants had been well prepared for the hearings, had gathered and produced extensive material in support of their claims and had been able to make long oral and written submissions. The sampling method applied by the Supreme Court to examine the materials submitted by the applicants did not seem arbitrary or manifestly unreasonable. In particular, the Supreme Court had examined recordings of the five television channels for fourteen days and delivered a reasoned judgment. In sum, the proceedings before the Supreme Court had afforded the basic guarantees inherent in Article 13. Russian law had provided the applicants with a remedial legal mechanism capable of addressing their grievances under Article 3 of Protocol No. 1.

Conclusion: no violation (unanimously).

Article 3 of Protocol No. 1: As a matter of principle the Court was competent to examine complaints about the allegedly unequal media coverage of elections under Article 3 of Protocol No. 1. As regards the alleged media manipulation by the Government, in previous cases under Article 3 of Protocol No. 1 the Court had had to consider a specific legislative provision or a known administrative measure. In the present case the applicants had claimed that the *de jure* neutrality of five nationwide channels had not existed *de facto*. The Court noted, however, that the Supreme Court had not found that the media coverage had been equal in all respects, but had found in essence that no proof of political manipulation had been adduced, and that no causal link between media coverage and the results of the elections had been shown. The SPS political party, which had obtained generally positive media coverage, had not even passed the minimal electoral threshold, while the Rodina political block had obtained a much better score at the elections despite poor media coverage. Therefore, the Supreme Court's arguments in this part did not appear arbitrary or manifestly unreasonable. Moreover, the applicants had not adduced any direct proof of abuse by the Government of their dominant position in the capital or management of the TV companies concerned. Nor had they sufficiently explained how it was possible, on the basis of the evidence and information available and in the absence of complaints of undue pressure by the journalists themselves, to distinguish between Government-induced propaganda and genuine political journalism and/or routine reporting on the activities of State officials. It followed that the applicants' allegations of abuse by the Government had not been sufficiently proven.

The next question was thus whether the State had been under any positive obligation under Article 3 of Protocol No. 1 to ensure that media coverage by the State-controlled mass-media was balanced and compatible with the spirit of "free elections", even where no direct proof of deliberate manipulation had been found. The system of electoral appeals put in place in the present case had been sufficient to comply with the State's positive obligation of a procedural character. Turning to the substantive aspect, the State had been under an obligation to intervene in order to open up the media to different viewpoints. The applicants had obtained some measure of access to the nationwide TV channels; thus, they had been provided with free and paid airtime, with no distinction made between the different political forces. The amount of airtime allocated to the opposition candidates had not been insignificant. Similar provisions regulated access of parties and candidates to regional TV channels and other mass media. In addition, the opposition parties and candidates had been able to convey their political message to the electorate through the media they controlled. The arrangements which existed during the 2003 elections had guaranteed the opposition parties and candidates at least minimum visibility on TV. As regards the allegation that the State should have ensured neutrality of the audio-visual media, the

applicants' claims had not been sufficiently substantiated. Certain steps had been taken to guarantee some visibility of opposition parties and candidates on Russian TV and to secure editorial independence and neutrality of the media. Probably, these arrangements had not secured *de facto* equality. However, when assessed in the light of the specific circumstances of the 2003 elections as they had been presented to the Court, and regard being had to the margin of appreciation enjoyed by the States under Article 3 of Protocol No. 1, it could not be considered established that the State had failed to meet its positive obligations in this area to such an extent that it had amounted to a violation of that provision.

Conclusion: no violation (unanimously).

ARTICLE 3 OF PROTOCOL No. 7

Compensation

Inability of victim of miscarriage of justice to claim compensation in respect of non-pecuniary damage: *violation*

Poghosyan and Baghdasaryan v. Armenia - 22999/06
Judgment 12.6.2012 [Section III]

Facts – In 1999 the first applicant was found guilty of murder and rape and sentenced to fifteen years' imprisonment. However, he continued to protest his innocence and in 2004 his conviction was quashed and he was released from prison. Two of the police officers who had dealt with the initial investigation into the murder were subsequently convicted of exceeding their powers after a regional court found that they had ill-treated the first applicant in order to extract a confession. In separate civil proceedings, the first applicant was awarded compensation in respect of lost earnings, but his claim in respect of non-pecuniary damage was dismissed on the grounds that damage of that type was not covered by the Civil Code.

Law – Articles 3 and 13 of the Convention: The existence of an actual breach of another provision of the Convention was not a prerequisite for the application of Article 13. All that was required for that provision to apply was an arguable claim in terms of the Convention. The first applicant had undoubtedly had such a claim as the domestic courts had unequivocally established that he had been ill-treated by the police. Article 13 was therefore applicable despite the fact the Court could not examine the first applicant's substantive complaint under Article 3 because his ill-treatment had occurred before the Convention entered into force in respect of Armenia. The Court had found in previous cases that compensation in respect of non-pecuniary damage should in principle be available as part of the range of possible remedies for violations of Articles 2 and 3, the most fundamental provisions of the Convention. Since no such compensation had been available to the first applicant under the domestic law, he had been deprived of an effective remedy.

Conclusion: violation (unanimously).

Article 3 of Protocol No. 7: Inasmuch as the first applicant's conviction had been quashed and he had applied for compensation after the date Protocol No. 7 had entered into force in respect of Armenia, the Court had temporal jurisdiction in respect of this complaint and Article 3 of Protocol No. 7 was applicable. While that provision guaranteed payment of compensation according to the law or the practice of the State concerned, compensation was due even where the domestic law or practice made no provision for such compensation. Furthermore, the purpose of Article 3 of Protocol No. 7 was not merely to recover any pecuniary loss caused by wrongful conviction but also to provide a person convicted as a result of a miscarriage of justice with compensation for any non-pecuniary damage such as distress, anxiety, inconvenience and loss of enjoyment of life. No such compensation had been available to the first applicant.

Conclusion: violation (unanimously).

Article 41: EUR 30,000 to the first applicant in respect of non-pecuniary damage.

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

The following cases have been referred to the Grand Chamber in accordance with Article 43 § 2 of the Convention:

X v. Latvia - 27853/09
Judgment 13.12.2011 [Section III]

(See Article 8 above, page 12)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

X and Others v. Austria - 19010/07
[Section I]

(See Article 14 above, page 17)

COURT NEWS

Elections

During its Summer session held from 25 to 29 June 2012, the Parliamentary Assembly of the Council of Europe elected five new judges to the Court: Aleš Pejchal in respect of the Czech Republic, Johannes Silvis in respect of the Netherlands, Krzysztof Wojtyczek in respect of Poland, Helena Jäderblom in respect of Sweden and Paul Mahoney in respect of the United Kingdom. With the exception of Judge Jäderblom, whose term in office will start within three months after 26 June 2012, the newly elected judges will begin their terms on 1 November 2012.

The Court has elected a new Vice-President – Dean Spielmann (Luxembourg) – and elected a new Section President – Ineta Ziemele (Latvia). They have been elected for a three-year term and will take up their respective duties on 13 September 2012.

New version of Court's HUDOC case-law data base

A new version of HUDOC – funded by voluntary contributions from the Governments of Cyprus, Denmark, Germany and Norway – was launched on 25 June 2012. The new version allows users to find the case-law they are looking for more intuitively via its easy-to-use interface. It offers users many new features including the ability to drill down easily to the judgments they are looking for via refiners. New content has been added such as legal summaries of more significant cases. An additional importance category has been created to enable users to focus their search on cases selected for the Court's official *Reports of Judgments and Decisions*. Documents can be downloaded in both Word and PDF format and users can create their own specific RSS line feeds.

To access the new system please click on the link below: http://hudoc.echr.coe.int/sites/eng

RECENT COURT PUBLICATIONS

Dialogue between judges 2012

The publications in the Dialogue between judges series are a record of the proceedings of seminars held annually to mark the opening of the judicial year of the Court. This year some 200 leading judicial figures from across Europe debated the theme "How can we ensure greater involvement of national courts in the Convention system?".

The proceedings from the Dialogue between judges 2012 have just been published in CD-Rom format which includes the speeches from the main participants, the webcast debates as well as the previous editions of the Dialogue. They are also available on the Court's Internet site (<www.echr.coe.int> – The Court – Events at the Court).

Practical guide on admissibility criteria

New German, Estonian, Georgian, Italian, Lithuanian and Romanian translations of the guide as updated in 2011 have now been published on the Court's Internet site (<www.echr.coe.int> – Case-Law). They were produced with the cooperation or support of the Governments of Liechtenstein, Estonia, Georgia, Italy, Lithuania and the Republic of Moldova respectively.

Hanbook on European non-discrimination law: Case-law update

An update of the case-law cited in the Handbook on non-discrimination law was recently published in English. The French version is now also available on the Court's Internet site (<www.echr.coe.int> – Case-Law).