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

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

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ARTICLE 1

Jurisdiction of States

Territorial jurisdiction in relation to detention of Iraqi national by coalition of armed forces in Iraq: *relinquishment in favour of the Grand Chamber*

Hassan v. the United Kingdom - 29750/09
[Section V]

Prior to the invasion of Iraq in March 2003 by a coalition of armed forces led by the United States of America, the applicant was a general manager in the national secretariat of the Ba'ath Party and a General in El Quds Army, the private army of the Ba'ath Party. He lived in Umm Qasr, a port city in the region of Basrah. In April 2003, after the British Army had entered into occupation of Basrah, they detained the applicant's brother. According to the applicant, this was done to force the applicant, who was wanted because of his Ba'ath Party connections, to surrender to custody. The Government denied this, stating that it was a case of mistaken identity. The applicant's brother was subsequently taken by United Kingdom forces to Camp Bucca, a detention facility operated by the United States, although parts were also used by the United Kingdom to detain and interrogate detainees. Following interrogation by both US and UK authorities, the applicant's brother was deemed to be of no intelligence value and, according to the records, was released on or around 12 May 2003. According to the applicant, the family had no further news of the applicant's brother until his body was discovered some 700 kilometres away in early September 2003.

In 2007 the applicant brought proceedings in the English administrative court, but these were dismissed after the court found that Camp Bucca was a United States rather than a United Kingdom military establishment.

In his application to the European Court, the applicant alleges that his brother was arrested and detained by British forces in Iraq and was subsequently found dead in unexplained circumstances. He complains under Article 5 §§ 1, 2, 3 and 4 of the Convention that the arrest and detention were arbitrary and unlawful and lacking in procedural safeguards and under Articles 2, 3 and 5 that the United Kingdom authorities failed to carry out an investigation into the circumstances of the detention, ill-treatment and death.

(See also *Al-Skeini and Others v. the United Kingdom* [GC], 55721/07, and *Al-Jedda v. the United Kingdom* [GC], 27021/08, both delivered on 7 July 2011, Information Note 143)

ARTICLE 2

Positive obligations
Life

Authorities' failure to protect life of a detainee who disappeared in life-threatening circumstances: *violation*

Turluyeva v. Russia - 63638/09
Judgment 20.6.2013 [Section I]

Facts – In October 2009 the applicant's son was detained in Grozny by the police following an armed skirmish. He was last seen by his uncle at the police headquarters with signs of beatings on his face. The family have had no news of him since. The applicant lodged a complaint, but it was not until some weeks later that proceedings were opened by a district investigative committee in Grozny on suspicion of murder and the proceedings were still pending at the date of the Court's judgment. Although the Government confirmed that the applicant's son had been taken to the police headquarters they said that he had been released a few hours later. No records of the son's detention, questioning or release were drawn up. According to the applicant, the boy's uncle was harassed and threatened by the local head of police after she lodged her complaint.

Law – Article 2

(a) *Presumption of and responsibility for the death of the applicant's son* – On the basis of the parties' submissions and the documents before it, the Court found it sufficiently established that the applicant's son had been taken by servicemen to the police headquarters in Grozny in the late evening of 21 October 2009. Although the police had alleged that he had subsequently been released, he had not been seen since and his family had not received any news. The criminal investigation had not acquired any evidence of his alleged release. In view of the passage of time and the life-threatening nature of such unrecorded detention in the region, the applicant's son could now be presumed dead. The State was responsible for his death, as the Government had failed to provide any plausible explanation of what had happened to him following

his detention and disappearance more than three years previously.

Conclusion: violation (unanimously).

(b) *Positive obligation to protect life* – Given the Court's numerous previous judgments and international reports on the subject, the Russian authorities had been sufficiently aware of the problem of enforced disappearances in the North Caucasus and its life-threatening implications for detained individuals. As the Government had informed the Council of Europe's Committee of Ministers, in order to comply with the Court's judgments, they had lately taken a number of specific actions to make investigations into this type of crime more efficient, in particular by creating a special unit within the Investigating Committee of the Chechen Republic.

The authorities had become aware no later than December 2009 that the applicant's son had been unlawfully deprived of his liberty in a life-threatening situation. However, key measures which could have been expected in such circumstances had not been taken. In particular, there had been no immediate inspection of the police headquarters or efforts to collect perishable traces or video records from CCTV cameras. Such omissions were particularly regrettable given that the exact location of the suspected crime was known to the authorities. The fact that the suspects were police officers did not relieve the investigating authorities of their obligations. In conclusion, by not acting rapidly and decisively, the authorities had failed to take appropriate measures to protect the applicant's son's life.

Conclusion: violation (unanimously).

(c) *Effectiveness of the investigation* – The investigation had been plagued by numerous delays. In particular, the investigators had not taken statements from the police officers until months later, thus increasing the risk of collusion. The CCTV records at the police headquarters had been lost. Furthermore, the investigation had not had any impact on the police officers' continued service and their ability to put pressure on other actors of the investigation, including witnesses. Of particular concern were the lack of police cooperation with the investigators and the allegations of threats to the uncle. In sum, the investigation had not been effective.

Conclusion: violation (unanimously).

The Court further found a violation of Article 3, on account of the distress and anguish suffered by the applicant, a violation of Article 5 on account of the unacknowledged detention, and a violation of Article 13 in conjunction with Article 2 on account of the lack of legal remedies.

Article 41: EUR 60,000 in respect of non-pecuniary damage.

(See also *Aslakhanova and Others v. Russia*, 2944/06 et al., 18 December 2012, Information Note 158)

Positive obligations
Life
Effective investigation

Failure to take appropriate measures to protect lives of residents of children's home or to conduct effective investigation into deaths caused by conditions there: *violation*

Nencheva and Others v. Bulgaria - 48609/06
Judgment 18.6.2013 [Section IV]

Facts – The nine applicants are the parents of seven of the fifteen children and young adults under the age of twenty-two who died during the winter of 1996/97 in a home for children with severe mental disabilities in the village of Dzhurkovo. Before the Court, they alleged that the State had failed in its positive obligations to protect the lives of the persons in its care, in circumstances which created an imminent threat to their lives and well-being, and to conduct an investigation aimed at identifying those responsible for the deaths.

Law – Article 2: It first had to be established what obligations arose for the respondent State out of the specific circumstances of the present case. All the children and young adults had been entrusted to the care of the State in a specialised public facility and had been under the exclusive supervision of the authorities on account of their particular vulnerability, among other factors. The applicants' children had been subjected to extremely poor conditions: they had had insufficient quantities of food, medicines, clothes and bed linen and lived in rooms that were inadequately heated in the winter. Such conditions had inevitably posed a risk to the lives of vulnerable children suffering from illnesses requiring specific and intensive care. From the month of September, that is, from the early autumn and some three months before the first death in the home, officials at the highest level in the Ministry of Employment and Social Policy and other State institutions had been alerted to the risk to the lives and well-being of the children in the Dzhurkovo home. Moreover, the manager had consistently drawn attention to the serious nature of the conditions and the difficulty of providing

the children with the necessary care, and had appealed for help to numerous public and humanitarian structures. The authorities at several levels had therefore had precise knowledge of the real danger to the well-being of the children in the home. Furthermore – and this was a crucial factor – the tragic events had not occurred in a sudden, one-off and unforeseen manner. There had been a series of deaths and the tragedy at the home had thus been spread over time. Fifteen children and young adults, seven of whom were the applicants' children, had died between 15 December 1996 and 14 March 1997, that is, over a period of around three months. Hence, the present case concerned a situation in which the lives of vulnerable persons in the care of the State had been in danger and of which the authorities had been fully aware. Accordingly, the issue did not just affect the applicants' individual situation but was a matter of public interest. The national authorities had therefore been under a duty to take the appropriate steps as a matter of urgency to protect the children's lives, irrespective of their parents' actions, and to furnish explanations as to the cause of the deaths and the persons who may have been responsible, by means of proceedings instituted of their own motion.

As to the authorities' obligation to take protective action, numerous elements in the case file, namely the failure over a period of several months to respond to the manager's warnings concerning conditions in the home and the apparent lack of prompt and appropriate medical assistance, indicated that the authorities had not taken swift, practical and sufficient measures to prevent the deaths, despite having precise knowledge of the real and imminent threat to the lives of the persons concerned. No official explanation had been provided in that regard.

With regard to the duty to institute an effective official investigation, civil proceedings enabling the applicants to claim and obtain individual compensation could not be deemed to be an adequate response in terms of Article 2 of the Convention such as to ensure that the deterrent effect of the judicial system in place and the significance of the role it was required to play in preventing violations of the right to life were not undermined. The facts of the case pointed to an exceptional situation rather than a routine case of negligence. Therefore, although it had been open to the applicants to establish the facts and obtain compensation, the fact that the taking of civil proceedings for compensation depended solely on the victims' initiative meant that the remedy in question, regardless of the outcome, could not be taken into consideration, since Article 2 imposed an obligation on the Bulgarian authorities in the instant case to conduct an investigation of their own motion.

As to the requirements of diligence and promptness, the official investigation had not commenced until more than two years after the events. Furthermore, the criminal proceedings had subsequently lasted for approximately eight years, including around six years for the preliminary investigation alone. In particular, the prosecuting authorities did not appear to have been active between 2001 and April 2004. It was true that the investigation had been particularly complex. However, the unjustified failure to institute any kind of official proceedings for two years after the tragic events, allied to the length of the preliminary investigation, which had included a period of inactivity of almost four years, had been apt to compromise the effectiveness of the investigation despite the subsequent appearance of diligence on the part of the three judicial bodies concerned. Furthermore, the investigation had not succeeded in establishing the respective importance, as possible factors in the deaths, of each of the failings in the system for protecting the children, bearing in mind in particular their state of health and their natural life expectancy in the conditions in which they had been placed. The delays in the criminal proceedings had also made it impossible to ascertain whether the conduct of other persons responsible for the running of the home might have contributed to the tragic events. Accordingly, the authorities could not be said to have acted with reasonable diligence; this had prevented the swift establishment of the actual causes of the deaths and of a possible link between those causes and the conduct of the various officials responsible.

With regard to the scope of the investigation, the system appeared sufficient in theory to ensure protection of the right to life in the context examined. The Criminal Code made it a punishable offence to cause death through negligence or through a breach of a statutory duty of care in exercising a professional or other activity entailing risks and regulated by law. It was also an offence to knowingly decline to lend assistance to a vulnerable person in danger. The courts had established that the three employees of the children's home who faced charges had done everything in their power to protect the lives of the children; the courts had stated clearly that the malfunctioning of the system had been attributable to the authorities which had failed to respond to the manager's appeals. However, the courts had reached those conclusions in the context of proceedings confined

to the charges against the three employees of the children's home. Their findings had not resulted in action being taken to ascertain whether the failings in the system had stemmed from unlawful acts on the part of the representatives of the authorities for which the latter should have been called to account. The investigation carried out had therefore failed to shed light on the circumstances surrounding the tragic events, to establish all the factors contributing to the deaths and to assess the relative importance of natural factors on the one hand and the failure of the system to furnish a prompt and suitable response to the danger posed to the lives and well-being of the children on the other hand. An analysis of that kind, carried out in a prompt and appropriate manner, would have made it possible to identify any individuals who may have been responsible, so as to prevent a recurrence of such events in the future.

Conclusion: violation (unanimously).

Article 41: EUR 10,000 to two of the applicants in respect of non-pecuniary damage; finding of a violation sufficient in respect of the non-pecuniary damage sustained by the remaining applicants.

Effective investigation

Failure to establish the responsibility of the administrative authorities for the death of a thirteen-year old boy in a public place: *violation*

Banel v. Lithuania - 14326/11
Judgment 18.6.2013 [Section II]

Facts – In June 2005 the applicants' thirteen-year old son died from injuries sustained when part of a balcony broke off from a building and fell on him while he was out playing. In September 2006 the applicant made a civil claim for non-pecuniary damage in criminal proceedings that had been instituted as a result of the accident. The prosecutor established that the city municipality had known since February 2005 that the building was in a poor state of repair and two municipal officials were indicted for failing to perform their duties. However, because the municipality was undergoing administrative changes entailing a reallocation of the duties and responsibilities, it emerged that there was no one with specific responsibility for derelict and abandoned buildings and in May 2010, after the investigation had been discontinued and re-opened several times, the charges against the two officials were dropped. Following an appeal by the applicant, the regional court upheld the decision to discontinue the criminal proceedings under the statute of limitations.

Law – Article 2: According to the Court's case-law, the State's obligation to protect the right to life must also involve the taking of reasonable measures to ensure the safety of individuals in public places and, in the event of serious injury or death, to require an effective and independent judicial system to be set up to secure legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim. Therefore, in cases involving non-intentional infringements of the right to life, the aforementioned positive obligations required States to adopt regulations for the protection of people's safety in public spaces and to ensure the effective functioning of that regulatory framework. In that connection, the Court noted that the prosecutor had established that despite knowing the condition of the building the municipality had not complied with its legal duty to care for derelict buildings. On-going administrative reform could not justify inaction on the part of the authorities.

Further, although the national authorities had promptly opened a criminal investigation, the investigating officers had not acted with due diligence when collecting evidence, and had ignored possibilities of identifying those accountable, for example by bringing charges against the managers concerned. In conclusion, the criminal investigation had not been thorough and the domestic authorities had failed to display due diligence in protecting the applicant's son's right to life. Moreover, the legal system as a whole, faced with an arguable case of negligence causing death, had failed to provide an adequate and timely response consonant with Lithuania's obligations under Article 2 of the Convention.

Conclusion: violation (unanimously).

Article 41: EUR 20,000 in respect of non-pecuniary damage; EUR 8,135 in respect of pecuniary damage.

Effectiveness of investigation into death impaired on account of lack of independence of court upholding a decision to discontinue the proceedings: *violation*

Mustafa Tunç and Fecire Tunç v. Turkey - 24014/05
Judgment 25.6.2013 [Section II]

Facts – In February 2004, while he was doing his military service, a sergeant was fatally injured by gunfire. A judicial investigation was opened as a

matter of course. In June 2004 the prosecutor discontinued the proceedings, finding that no third party could be held responsible for the sergeant's death. In October 2004 a military tribunal of the air-force upheld an appeal by the applicants – the sergeant's parents – and ordered the prosecutor to carry out a further investigation. In December 2004 the prosecutor closed the inquiries and sent the file back to the military tribunal, together with a report on the further investigation requested, presenting the measures taken and addressing the shortcomings identified by the tribunal. The military tribunal dismissed a further appeal by the applicants.

The applicants complained that the authorities had failed to carry out an effective investigation into their son's death. They argued in particular that the legislation in force at the relevant time did not confer all the requisite guarantees of independence on the judicial authorities and, more specifically, on the military tribunal which had examined the case at last instance.

Law – Article 2

(a) *Whether the investigation was prompt, appropriate and comprehensive* – The inquiries in question had been carried out with the requisite diligence and the investigation had not been vitiated by any excessive delay. The authorities had taken appropriate measures to collect and preserve the evidence relating to the incident at issue. As regards the examination of witnesses, a number of statements had been taken immediately after the death. There was nothing to suggest that the authorities had failed to examine material witnesses or that the interviews had been conducted inappropriately.

(b) *Whether the investigation was independent* – The investigation had been carried out by the military prosecutor, assisted by detectives from the national gendarmerie. The decision to discontinue the proceedings after the inquiries had been subjected to the scrutiny of the air-force's military tribunal, ruling on an appeal by the applicants. The Court referred to its previous finding in the *Gürkan v. Turkey*[1] judgment that, as composed at the material time, the military tribunal which had convicted the applicant in that case could not be regarded as independent and impartial within the meaning of Article 6 of the Convention, and that there had been a violation of that Article. In so ruling, the Court had pointed to the fact that one of the three judges sitting on the bench of the military tribunal was an officer appointed by his hierarchy and subject to military discipline, and that he did not enjoy the same constitutional safeguards as the two other judges, who were professionals from the judiciary. Those considerations were also valid in the present case, in so far as the tribunal acting as the supervisory body in the investigation at issue had the same composition. In that connection, it was to be noted that the doubts about impartiality in the present case concerned the judicial body responsible for the supervision at last instance of the investigation, and not simply the prosecutor's office. It followed that the procedure could not meet the requirement of independence that was inherent in the national authorities' obligation to carry out an effective investigation into the sergeant's death.

(c) *The participation in the investigation of the deceased's family* – The applicants had enjoyed access to the information emanating from the investigation to a sufficient degree to enable them to participate effectively in the proceedings.

In conclusion, notwithstanding its findings concerning the prompt, appropriate and comprehensive nature of the investigative measures and the effective participation of the applicants, the Court was of the view that there had been a violation of Article 2 under its procedural head, as the military tribunal did not have the requisite independence in its capacity as supervisory body, at last instance, in respect of the judicial investigation.

Conclusion: violation (four votes to three).

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

1. *Gürkan v. Turkey,* 10987/10, 3 July 2012, Information Note 154.

ARTICLE 3

Inhuman treatment

Conditions of storage of the bodies of the applicants' deceased relatives: *no violation*

Sabanchiyeva and Others v. Russia - 38450/05
Judgment 6.6.2013 [Section I]

(See Article 8 below, page 21)

Degrading treatment

Lack of independent access to prison facilities for paraplegic prisoner; lack of organised assistance with his mobility and daily routine: *violation*

Grimailovs v. Latvia - 6087/03
Judgment 25.6.2013 [Section IV]

Facts – In June 2002 the applicant, who had a metal insert in his spine after breaking his back two years earlier, was given a five and a half year prison sentence. In his application to the Court, he complained, *inter alia*, that the prison facilities were unsuitable for him as he was paraplegic and wheelchair-bound. In 2006 he was conditionally released.

Law – Article 3: The applicant had been detained for nearly two-and-a-half years in a regular detention facility which was not adapted for persons in a wheelchair. Although the Government had stated that the applicant had been placed in a special unit for inmates with health problems, the facilities did not appear to have had less architectural or technical barriers than the facilities in the ordinary wings of the prison. A ramp had been installed to facilitate wheelchair access to the outdoor yard, but other areas, such as the canteen, toilets, sauna, library, shop, gym, meeting room and telephone room had remained inaccessible. While the applicant had not been locked up in his cell during the day and could move around in the living area of his unit, his ability to use the facilities had been restricted by his paraplegia. He did not have access to a shower and his weekly visits to the sauna had not provided him an adequate opportunity to maintain his personal hygiene, given its inaccessibility and limited availability. Moreover, no measures had been adopted to alleviate the hardship caused by the inaccessibility of the sanitation facilities while meeting his wife for conjugal visits, which visits could under Latvian legislation last up to forty-eight hours. In exercising their wide margin of appreciation in deciding whether or not to allow conjugal visits, the States had to have due regard to the needs and resources of the community and of individuals. Placing the applicant in facilities where he could not properly wash and use the toilet, even if only for a limited period, could hardly be considered compatible with respect for his human dignity.

The applicant had had to rely on his fellow inmates to assist him with his daily routine and mobility around the prison, even though they had not been trained and did not have the necessary qualifications. Although the medical staff had visited the applicant in his cell for ordinary medical check-ups, they had not provided any assistance with his daily routine. The State's obligation to ensure adequate conditions of detention included making provision for the special needs of prisoners with physical disabilities and the State could not absolve itself from that obligation by shifting the responsibility to cellmates.

In the light of the foregoing considerations and their cumulative effects, the conditions of the applicant's detention in view of his physical disability and, in particular, his inability to have access to various prison facilities, including the sanitation facilities, independently and the lack of any organised assistance with his mobility around the prison or his daily routine, had reached the threshold of severity required to constitute degrading treatment.

Conclusion: violation (unanimously).

The Court also found a violation of Article 3 on account of the lack of an effective investigation into the applicant's allegations of police ill-treatment in September 2001.

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

(See also: *Čuprakovs v. Latvia*, 8543/04, 18 December 2012; *Turzynski v. Poland* (dec.), 61254/09, 17 April 2012; *D.G. v. Poland*, 45705/07, 12 February 2013; *Todorov v. Bulgaria* (dec.), 8321/11, 12 February 2013)

Expulsion

Proposed transfer of Sudanese asylum-seeker from Austria to Hungary under the Dublin II Regulation: *transfer would not constitute a violation*

Mohammed v. Austria - 2283/12
Judgment 6.6.2013 [Section I]

Facts – The applicant was a Sudanese national who arrived in Austria via Greece and Hungary in October 2010 and applied for asylum. His application was rejected in January 2011 under the European Union Dublin II Regulation ("Dublin Regulation") and an order was made for his forced transfer to Hungary. In December 2011 the applicant lodged a second application for asylum (which had no suspensive effect) following adverse reports by the Office of the United Nations High Commissioner for Refugees (UNHCR) on the conditions of asylum-seekers in Hungary and a recent

decision of the Austrian Asylum Court to grant suspensive effect to an appeal in another case in view of the risks of a possible violation of the Convention that had been identified in those reports. The second application for asylum was still pending at the date of the Court's judgment.

Law – Article 3: Reports published in 2011 and 2012 on Hungary as a country of asylum and in particular as regards transferees under the Dublin Regulation were alarming. The UNHCR had identified areas of deficiency relating in particular to (i) prolonged administrative detention of asylum-seekers and the conditions of their detention and (ii) the treatment of asylum applications by transferees.

The Court noted that there was seemingly a general practice of detaining asylum-seekers for a considerable time, partly under conditions that fell short of international and EU standards, and with deficient review procedures. There were also reports of abuse of detained asylum-seekers by officials and of forced medication. Nevertheless, although the UNHCR had advised the Austrian authorities of these problems in a letter of 17 October 2011 and had issued a comprehensive report in April 2012, it had never issued a position paper requesting European Union Member States to refrain from transferring asylum-seekers to Hungary under the Dublin Regulation (as it had done with respect to Greece, see *M.S.S. v. Belgium and Greece* [GC], 30696/09, 21 January 2011, Information Note 137). Furthermore, in a more recent note on the subject issued in December 2012, the UNHCR had appreciatively acknowledged the changes to the law planned by the Hungarian Government and made particular reference to the fact that transferees who applied for asylum immediately upon their arrival in Hungary would no longer be subject to detention. It had also remarked on the reported intention of the Hungarian authorities to introduce additional legal guarantees concerning detention and to ensure unhindered access to basic facilities. Indeed, the number of detained asylum-seekers had declined significantly in 2012. The Court therefore concluded that the applicant would no longer be at a real and individual risk of proscribed treatment in respect of detention if transferred to Hungary.

As to the issue of sufficient access to asylum proceedings in Hungary and the risk of *refoulement* to a third country, the Court took particular note of reports that asylum-seekers transferred there under the Dublin Regulation had to reapply for asylum upon arrival and that such a renewed application was treated as a second asylum application without suspensive effect. There was also a seemingly automatic process of handing out deportation orders upon entry and thus a real risk of *refoulement* without the merits of the asylum claim being examined. However, the applicant had not substantiated any individual risk of being subjected to treatment contrary to Article 3 if he returned to Sudan and in any event, as the transferring State, Austria was not required to conduct an analysis of the underlying flight reasons, but only to establish whether another EU Member State had jurisdiction under the Dublin Regulation and to examine whether there were any general reasons or other obstacles that would require a stay of transfer. Lastly, it appeared that under the changes that had been made to Hungarian law and practice transferees now had sufficient access to and could await the outcome of asylum proceedings in Hungary, provided they applied for asylum immediately.

Conclusion: no violation in the event of transfer (unanimously).

Article 13 in conjunction with Article 3: The applicant had made two applications for asylum in Austria. At the time of the first application in 2010, he did not have an arguable claim under Article 3 of the Convention, since the criticism voiced with regard to the situation of asylum-seekers in Hungary was not widely known at that time. However, the order for the applicant's transfer to Hungary was not scheduled to be enforced until almost a year after it was made, by which time the applicant had (in December 2011) lodged a second application for asylum based on the reports on the situation of asylum-seekers in Hungary that had come to light in the meantime. Under Austrian law, that second asylum application did not have suspensive effect. In the Court's view, however, in view of the passage of time before it was lodged and the intervening change of circumstances, that second application could not prima facie be considered abusively repetitive or entirely manifestly ill-founded and its lack of suspensive effect meant that the applicant had been denied access to an effective remedy against the enforcement of the order for his forced transfer.

Conclusion: violation (unanimously).

Article 41: finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage; no claim made in respect of pecuniary damage.

Proposed deportation of Christian family to Iraq: *deportation would not constitute a violation*

M.Y.H. and Others v. Sweden - 50859/10
Judgment 27.6.2013 [Section V]

Facts – The applicants, who were Iraqi nationals, applied for asylum in Sweden after fleeing their country of origin because, as Christians living in a predominantly Muslim neighbourhood in Baghdad, they feared persecution. They stated that they had been subjected to threats and demands for money from masked men and that an attempt had been made to kidnap a member of their family when they had been unable to pay the sum demanded. The Swedish Migration Board rejected their applications and that decision was upheld by the Migration Court on the grounds that the evidence did not suggest that there was an individualised threat against the applicants upon return.

Law – Article 3: While the international reports on Iraq attested to a continuing difficult situation, including indiscriminate and deadly attacks by violent groups, and discrimination and heavy-handed treatment by the authorities, it appeared that the overall situation was slowly improving. Indeed, the applicants did not claim that, by itself, the general situation in Iraq precluded their return; instead, it was that situation combined with the fact that they were Christians that put them at real risk of being subjected to prohibited treatment. However, while noting that Christians formed a vulnerable minority that had been subjected to escalating and targeted attacks in the southern and central parts of Iraq, the Court noted that an internal relocation alternative was available in the Kurdistan Region. According to international sources this was a relatively safe area in which large numbers of Christians had found refuge and where their rights were generally considered to be respected.

The Court reiterated that as a precondition to relying on an internal flight or relocation alternative, certain guarantees had to be in place: persons due to be expelled had to be able to travel to the area concerned, gain admittance and settle there, particularly if in the absence of such guarantees there was a possibility of their ending up in a part of the country of origin where there was a real risk of ill-treatment. As regards entry to the Kurdistan Region, difficulties that had been faced by some at the checkpoints did not seem to be relevant for Christians, who, it appeared, were given preferential treatment. There was also evidence to suggest that no-one was required to have a sponsor, whether for entry or for continued residence. While various sources had attested that people relocating to the Kurdistan Region could face difficulties, for instance, in finding proper jobs and housing, the evidence before the Court suggested that there were jobs available and that settlers had access to health care and to financial and other support from the UNHCR and local authorities. In any event, there was no indication that the general living conditions in the region for Christian settlers would be unreasonable or in any way amount to treatment prohibited by Article 3. Nor was there a real risk of their ending up in other parts of Iraq. Relocation to the Kurdistan Region was thus a viable alternative for a Christian fearing persecution or ill-treatment in other parts of Iraq. Lastly, there was nothing in the applicants' personal circumstances to indicate that they would be at risk in the Kurdistan Region, especially bearing in mind that the incidents to which they had been subjected had all occurred in Baghdad.

Conclusion: deportation would not constitute a violation (five votes to two).

(See also, on the question of internal flight alternatives: *Salah Sheekh v. the Netherlands*, 1948/04, 11 January 2007, Information Note 93; *Sufi and Elmi v. the United Kingdom*, 8319/07, 28 June 2011, Information Note 142; and two judgments – *D.N.M. v. Sweden*, 28379/11, and *S.A. v. Sweden*, 66523/10, both delivered on the same day as the instant case of *M.Y.H. and Others v. Sweden* – in which the applicants alleged that they would be at risk of honour-related crimes if deported to Iraq. In both cases, the Court found that although the evidence indicated that the applicants might not receive effective protection from the authorities, as honour killings were often committed with impunity in Iraq, and although it was unclear whether relocation in the Kurdistan Region was a viable option for persons such as the applicants who were Sunni Muslims, it would nevertheless be possible, on the facts, for them to relocate elsewhere in Iraq where they would not be in danger of persecution from the families and clans who had threatened them. Lastly, for another case on the risk of honour-related crime in the country of destination, see *N. v. Sweden*, 23505/09, 20 July 2010, Information Note 132)

ARTICLE 5

Article 5 § 3

Brought promptly before judge or other officer

48 hours' police custody following 18 days' deprivation of liberty on board vessel arrested on high seas: *violation*

Vassis and Others v. France - 62736/09
Judgment 27.6.2013 [Section V]

Facts – The applicants were crew-members of a ship that was intercepted by the French Navy off the African coast on suspicion of transporting drugs. The vessel was escorted to France, where it arrived eighteen days later. On the applicants' arrival, a preliminary investigation was opened and they were taken into police custody. They were presented to a judge about forty-eight hours later.

Law – Article 5 § 3: The police custody had followed a period of eighteen days of deprivation of liberty within the meaning of Article 5 of the Convention, and the applicants had had to wait a further forty-eight hours to be brought for the first time before a "judge or other officer" as provided in Article 5 § 3 with its autonomous meaning. The circumstances of the case did not justify such a delay. The interception had been planned in advance and the ship suspected of being used for international drug trafficking had been under close surveillance since January 2008. Moreover, there was no doubt that the eighteen days required for the applicants' transfer had allowed their arrival on French soil to be prepared sufficiently. In view of the length of that period, without judicial supervision, there had been no justification for subsequently placing the applicants in police custody for the forty-eight hours in question; in addition, the existence of those specific circumstances made the promptness requirement of Article 5 § 3 even stricter than in the more usual situation where the deprivation of liberty started with the police custody itself. The applicants should thus have been brought, as soon as they arrived in France and without delay, before a "judge or other officer authorised by law to exercise judicial power". The case-law allowing for the first appearance before a judge to take place after two or three days, without breaching the rule on promptness, did not mean that the authorities could freely dispose of such a period in order to complete the prosecution case file.

Conclusion: violation (unanimously).

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

(See *Medvedyev and Others v. France* [GC], 3394/03, 29 March 2010, Information Note 128; and *Rigopoulos v. Spain* (dec.), 37388/97, 12 January 1999, Information Note 2)

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Decision of Netherlands courts to decline jurisdiction to hear claim against the UN arising out of the Srebrenica massacre: *inadmissible*

Stichting Mothers of Srebrenica and Others v. the Netherlands - 65542/12
Decision 11.6.2013 [Section III]

Facts – The applicants are a foundation established under Netherlands law to bring proceedings on behalf of relatives of victims of the 1995 Srebrenica massacre, and ten nationals of Bosnia and Herzegovina who are surviving relatives of people killed in the massacre. The massacre occurred during the 1992-95 war in Bosnia and Herzegovina, when the town of Srebrenica, which was part of a UN Security Council declared "safe area", came under attack by the Bosnian Serb Army (VRS). More than 7,000 Bosnian Muslims died in the operation which an under-strength and under-equipped battalion of the UN Protection Force (UNPROFOR), made up of lightly-armed Netherlands soldiers, was unable to stop. In addition, despite a request from the battalion's commander for air support, the UN made no decisive use of air power.

The applicants brought civil proceedings against the Netherlands State and the UN before a regional court in the Netherlands, but in July 2008 the court held that there was no obligation on the Netherlands Government under international law to enforce the prohibition of genocide through its civil law and that it had no jurisdiction to hear the claim against the UN. On 13 April 2012 the Netherlands Supreme Court confirmed that under the applicable provisions of the UN Charter and

of the Convention on the Privileges and Immunities of the United Nations, the UN had far-reaching immunity and could not be summoned before the national courts of the countries that were parties to the latter Convention. The UN's immunity was absolute and intended to ensure its functioning in complete independence. The main proceedings against the Netherlands State were resumed and were still pending at the date of the Court's decision.

In their application to the European Court the applicants complained, *inter alia*, that the granting of immunity to the UN had violated their right of access to court, contrary to Article 6 of the Convention. They further complained that the Netherlands Supreme Court had rejected in summary reasoning their request for a preliminary ruling to be sought from the Court of Justice of the European Union.

Law – Article 6 § 1

(a) *Standing of the applicant foundation* – Although set up for the purpose of promoting the interests of surviving relatives of victims of the Srebrenica massacre, the applicant association had not itself been affected by the matters complained of under Articles 6 and 13 and could not, therefore, claim to be a "victim" of a violation of those provisions for the purpose of Article 34.

Conclusion: inadmissible in respect of the applicant foundation (incompatible *ratione personae*).

(b) *Immunity of the United Nations* – The Court underlined that the scope of the case before it was limited to the question whether the remaining applicants' right of access to a court under Article 6 had been violated by the Netherlands courts' decisions. The attribution of responsibility for the Srebrenica massacre or its consequences did not fall within the scope of the application.

As to the nature of the immunity enjoyed by the UN, the Court noted that it was not its role to seek to define authoritatively the meaning of provisions of the UN Charter and other international instruments. It nevertheless had to examine whether there had been a plausible basis in those instruments for the matters complained of. Since operations established by UN Security Council Resolutions under Chapter VII of the UN Charter were fundamental to the mission of the UN to secure international peace and security, the Convention could not be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the UN. To bring such operations within the scope of domestic jurisdiction would mean to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the UN in this field, including with the effective conduct of its operations.

Concerning the applicants' argument that, since their claim was based on an act of genocide for which they held the UN (and the Netherlands) accountable, the immunity protecting the UN should be lifted, the Court found that international law did not support the position that a civil claim should override immunity from suit for the sole reason that it was based on an allegation of a particularly grave violation of a norm of international law. The International Court of Justice (ICJ) had clearly stated this in respect of the sovereign immunity of foreign States in its *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* judgment of 3 February 2012. In the Court's opinion this also held true as regards the immunity enjoyed by the UN.

As regards the argument that there was no alternative jurisdiction competent to entertain the applicants' claim against the UN, the Court agreed that no such alternative means existed either under Netherlands national law or under the law of the UN. However, it did not follow that in the absence of an alternative remedy the recognition of immunity in itself constituted a violation of the right of access to a court. The fact that the UN had so far not made available any modes of settlement of claims relating to the acts and omissions of UNPROFOR was not imputable to the Netherlands and the nature of the applicants' claims did not require the Netherlands to step in.

Finally, the Court considered it more appropriate to examine the applicants' complaint that the State of the Netherlands was seeking to impute responsibility for the failure to prevent the Srebrenica massacre entirely to the UN, thereby attempting to evade its accountability, under Article 6 rather than under Article 13. The Court could not find it established that the applicants' claims against the Netherlands State – the proceedings in respect of which were still pending – would necessarily fail.

In conclusion, the granting of immunity to the UN had served a legitimate purpose and was not disproportionate.

Conclusion: inadmissible (manifestly ill-founded).

The Court also rejected as manifestly ill-founded the applicants' complaint that the Supreme Court of the Netherlands had dismissed on summary reasoning their request for a preliminary ruling to be sought from the Court of Justice of the European

Union. Having already found that the UN enjoyed immunity from national jurisdiction under international law, the Supreme Court had been entitled to consider a request for a preliminary ruling redundant without going further into the matter.

Conclusion: inadmissible (manifestly ill-founded).

Equality of arms

Communication of reporting judge's draft decision to public rapporteur in proceedings before *Conseil d'Etat*: *inadmissible*

Marc-Antoine v. France - 54984/09
Decision 4.6.2013 [Section V]

Facts – The applicant complained that during the proceedings before the *Conseil d'Etat*, unlike the "public rapporteur" (*rapporteur public*) at the *Conseil d'Etat*, he had not been given a copy of the draft decision of the reporting judge.

Law – Article 6 § 1: Firstly, the draft decision of the reporting judge, who was a member of the court responsible for examining the case, was not a document submitted by a party that might influence the court's decision but rather an element produced within the court in the process of preparing the final decision. The adversarial principle enshrined in Article 6 § 1 of the Convention could not apply to an internal working document of that nature, which was confidential.

Concerning the fact that the document had been transmitted to the public rapporteur, the latter was a member of the *Conseil d'Etat*, just like his colleagues on the bench, the only difference between them being the special duties temporarily vested in him. Furthermore, in carrying out his duty as public rapporteur, which consisted in publicly and independently giving his opinion on the questions raised by the different cases and how they might best be resolved, he made an analysis of the case file comparable to that made by the reporting judge. Irrespective of whether he shared the views of the reporting judge, the public rapporteur used that judge's draft decision in determining the position he would publicly submit to the court. Thus the conclusions of the public rapporteur, in so far as they relied on the analysis made by the reporting judge, were such as to enable the parties to appreciate the key elements of the case and the court's assessment of them, thereby giving them an opportunity to reply before the judges reached their decision. Consequently, this procedural particularity, which gave the parties a glimpse of the line of thought developed by the court, and an opportunity to make their final observations before the court reached its decision, did not adversely affect the fairness of the proceedings. In addition, the applicant had failed to show in what respect the public rapporteur might be considered as an adversary or a party to the proceedings, which he would have needed to do in order to be able to claim a breach of the equality of arms principle.

The third-party interveners – the *Conseil d'Etat* and Court of Cassation Bar and the National Bar Council, two organisations representative of the professionals responsible for defending people in the domestic courts, particularly the administrative courts – disagreed with the applicant's submissions and supported the Government's position. Wanting the present system to be maintained, and warning of the adverse effects its disappearance would have, they considered that it offered better guarantees to the parties, while helping to ensure the quality of administrative justice in France.

In any event, the transmission of the draft decision to the public rapporteur had by no means placed the applicant at any disadvantage, or been prejudicial to the defence of his civil interests, which were the only interests in issue in these administrative proceedings.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Kress v. France* [GC], 39594/98, 7 June 2001, Information Note 31)

Article 6 § 2

Presumption of innocence

Reasoning of civil courts based to decisive extent on comments made by prosecutor as to guilt when discontinuing criminal proceedings on technical grounds: *violation*

Teodor v. Romania - 46878/06
Judgment 4.6.2013 [Section III]

Facts – In 2001 the commercial company which employed the applicant as its executive director lodged a criminal complaint, accusing him of having issued forged documents to obtain the reimbursement of expenses. In 2003 it suspended his employment contract pending the outcome of those criminal proceedings. In 2005 the prosecutor's office decided to discontinue the proceedings on the ground that the limitation period had expired. At the same time, it concluded that the case file

clearly indicated that the applicant had used forged documents to obtain the reimbursement of expenses and that his use of money advanced by the company other than for the intended purpose constituted the offences of falsification of documents and abuse of office. On the basis of the above conclusions, the employer lifted the suspension of the applicant's employment contract but refused to pay his salary for the period he had been suspended, and then dismissed him. The applicant challenged those two decisions before the domestic courts, but without success.

Law – Article 6 § 2: The question was whether the civil courts had acted in such a way or used such language in their reasoning as to cast doubts on the applicant's innocence and thus infringed the principle of the presumption of innocence. Although a mere reference to the content of a prosecutor's decision to discontinue proceedings could not in itself suffice to conclude that the individual concerned was criminally responsible for the offence with which he had been charged, repetition without any qualification or reservation could leave room for doubt as to his innocence if other arguments were not added by the civil courts. In the instant case, the domestic courts quoted extensively from the prosecutor's 2005 decision with regard to whether the applicant had committed the offences with which he was accused, without seeking to depart from that decision's findings. Thy the applicant for failing to use the remedies set out in the Code of Criminal Procedure "to have his innocence established" or "have set aside the finding of guilt against him". Yet those provisions pertained to the criminal sphere and clearly concerned a person's criminal responsibility. In so doing, the civil courts, which had full jurisdiction, had not used their powers to establish the facts and the applicant's possible disciplinary liability in terms corresponding exclusively to the civil sphere. In addition, in the proceedings on the applicant's dismissal, the civil courts had stressed the fact that expiry of the limitation period "did not mean that a guilty verdict was eliminated, but only prevented application of a criminal sanction". Yet such a statement as to guilt could easily lead the reader to conclude that, had the limitation period not expired, the applicant would necessarily have been convicted of the charges against him. Thus, despite the civil courts' references to the Labour Code, it remained the case that they had employed language which overstepped the bounds of the civil forum, thereby casting doubt on the applicant's innocence. In conclusion, the civil courts' use of the prosecutor's decision to close the criminal proceedings against the applicant in order to dismiss his actions in respect of his employment relationship justified the extension of the scope of Article 6 § 2 to the two sets of civil proceedings. The civil courts' decisive reliance on the decision to discontinue the criminal proceedings, and the terminology they used were incompatible with the presumption of innocence. The Government's preliminary objection *ratione materiae* was accordingly dismissed.

Conclusion: violation (five votes to two).

Article 41: EUR 3,500 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

ARTICLE 8

Positive obligations
Respect for private life
Respect for family life

Placement of child on account of mother's financial situation and without taking into account subsequent change in circumstances: *violation*

R.M.S. v. Spain - 28775/12
Judgment 18.6.2013 [Section III]

Facts – On 23 August 2005 the applicant's daughter, aged three years and ten months at the time, was taken away from her mother at the request of a social worker after the applicant had visited the social services department seeking financial assistance because of her straitened circumstances. Two days later the competent provincial department issued a provisional decision declaring the child to have been abandoned. On 30 August 2005 the applicant was informed that the department had assumed guardianship of her daughter and that the latter had been placed in a children's home. The applicant saw her daughter for the last time on 27 September 2005. In June 2006 administrative procedures were set in motion with a view to having the child placed with a foster family.

Law – Article 8: The decision to place the child in a home and the subsequent decisions to withdraw the applicant's contact rights completely and permanently and to transfer the child to another home had all been taken on the basis of the social worker's report dated October 2005. However, that report should have been followed swiftly by a detailed assessment of the child's situation and her relationship with her parents, in accordance with the rules

in force. The Court was not persuaded by the reasons considered by the administrative authorities and the domestic courts to provide ample justification for automatically issuing a guardianship order and declaring the child to have been abandoned, in particular the child's allegedly serious condition, her supposed lack of emotional attachment to her mother and the claim that the latter's violent conduct during contact visits was disrupting the child's stability and development. The courts had not substantiated the reasons given. No consideration had been given to the fact that the child had been very young when she was separated from her mother, to the existing emotional bond between mother and child or to the length of time that had elapsed since their separation and the attendant consequences for both of them. The guardianship order had been made because of the applicant's difficult financial situation at the time, without any account being taken of subsequent changes in her circumstances. The applicant had simply been faced with a shortage of funds, a situation which the national authorities could have helped remedy by means other than the complete break-up of the family, a measure of last resort to be applied only in the most serious cases. The role of the social welfare authorities was precisely to help persons in a precarious situation find ways of overcoming their difficulties. The courts had refused to take into account the change in the applicant's financial circumstances which she had sought to invoke in order to appeal against the declaration that her daughter had been abandoned, confining themselves instead to upholding the declaration adopted by the administrative authorities.

The decision to place the child in care had been consistently opposed by the applicant with the support of the prosecutor responsible for minors. However, the child's placement in a foster family with a view to her adoption had been ordered in 2009 on the sole grounds of the lack of contact between the child and her mother over a period of several years, although the contact between them had ceased precisely as a result of the administrative and judicial decisions taken. Furthermore, the alternative proposal to entrust the child to the care of her great-uncle had been rejected without reasons being given. The Court considered that a care order should normally be regarded as a temporary measure, to be discontinued as soon as circumstances permitted, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parent and the child. The applicant had been forced to prove that she was a good mother to her child. When she had submitted evidence to that end, the competent courts had considered, without any supporting arguments, that it was insufficient to outweigh the opinion of the administrative authorities, which had in the meantime been upheld by a judicial decision.

The applicant's vulnerability at the time her daughter was taken into care might have played an important role in understanding the situation of the child and her mother. The subsequent change in the applicant's financial circumstances did not appear to have been taken into consideration by the judge in 2009. The follow-up report issued in 2011 by the child protection services had noted that, almost six years after being separated from the applicant, the child had settled well in her foster family, which met all her material and emotional needs. In that connection the length of time that had elapsed – the result of the administrative authorities' inaction – coupled with the inaction of the domestic courts, which had not found to be unreasonable the grounds advanced by the authorities for depriving a mother of her daughter for financial reasons alone, had been a decisive factor in precluding any possibility of the applicant and her daughter being reunited as a family. Regard being had to these considerations and notwithstanding the respondent State's margin of appreciation in the matter, the authorities had failed to make adequate and effective efforts to secure the applicant's right to live with her child and had thereby breached her right to respect for her private and family life.

Conclusion: violation (unanimously).

Article 41: EUR 30,000 in respect of non-pecuniary damage.

Respect for private life

Unjustified disclosure of confidential medical data relating to refusal by Jehovah's Witnesses to undergo a blood transfusion: *violation*

Avilkina and Others v. Russia - 1585/09
Judgment 6.6.2013 [Section I]

Facts – Following several complaints against a religious organisation, in 2007 a St Petersburg Deputy City Prosecutor asked that all medical institutions report every refusal of a blood transfusion by Jehovah's Witnesses. When the second applicant underwent chemotherapy in a public hospital following a non-blood management treatment plan, her doctors informed the prosecutor's

office of her case. Likewise, the fourth applicant's medical records were disclosed to a prosecutor's office after she refused the use of foreign blood for surgical treatment in a state hospital. In subsequent court proceedings, the domestic courts found the disclosure of the applicant's medical data to have been lawful.

Law – Article 8: Recalling that the protection of personal data, including medical information, was of fundamental importance to the enjoyment of the right to respect for private life, the Court acknowledged that the interests of a patient and the community as a whole in protecting the confidentiality of medical data might be outweighed by the interests of investigating crime and in the publicity of court proceedings. The competent national authorities also enjoyed a margin of appreciation in this area, whose scope depended on the nature and seriousness of the interests at stake and the gravity of the interference. However, the applicants were not suspects or accused in any criminal proceedings and the prosecutor was merely conducting an investigation into the activities of a religious organisation in response to complaints received by his office. Nor did the medical facilities where the applicants underwent treatment report any instances of alleged criminal behaviour on the part of the applicants. In particular, it had been open to the medical professionals providing treatment to the second applicant, who was two years old at the material time, to apply for judicial authorisation for a blood transfusion had they believed her to be in a life-threatening situation. Likewise, there was nothing to suggest that the fourth applicant's refusal of a blood transfusion was the result of pressure by other adherents of her religious beliefs and not the expression of her true will. There was consequently no pressing social need for requesting the disclosure of the confidential medical information concerning the applicants. In fact, there were other options available to the prosecutor to follow up on the complaints he had received, such as trying to obtain the applicants' consent for the disclosure of their medical data or questioning them about the matter. Despite this, the prosecutor had chosen to order the disclosure of their confidential medical information without giving the applicants any notice or opportunity to object or appeal.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 each to the second and fourth applicants in respect of non-pecuniary damage.

Taking and retention of DNA profiles of convicted criminals for use in possible future criminal proceedings: *inadmissible*

Peruzzo and Martens v. Germany - 7841/08 and 57900/12
Decision 4.6.2013 [Section V]

Facts – The first applicant had been convicted of several drug-related offences when a district court ordered cellular material to be taken from him with a view to determining his DNA profile for identification purposes in any future criminal proceedings. This decision was reached in view of the seriousness of the offences he had committed and his negative criminal prognosis. In the second applicant's case a district court ordered the taking of DNA samples on account of his repeated commission of violent offences. Pursuant to domestic law any cellular material obtained was to be used only for the purpose of establishing a DNA profile. The identity of the individual from whom the sample was obtained could not be disclosed to the experts charged with drawing up the profile, and they were furthermore under an obligation to take adequate measures to prevent any unauthorised use of any material examined. The cellular material itself had to be destroyed without delay once it was no longer needed for the purpose of establishing the DNA profile. Only the DNA profiles extracted from the cellular material could be kept in the Federal Criminal Police Office's database and then only for a maximum of ten years, subject to regular review.

Law – Article 8: In recent years DNA records had doubtless made a substantial contribution to law enforcement and the fight against crime. Nevertheless, the protection of personal data was of fundamental importance for the enjoyment of the right to respect for private life. The domestic law therefore had to afford appropriate safeguards to prevent any use of personal data which might be inconsistent with the guarantees of Article 8. In the case of *S. and Marper v. the United Kingdom*[1], which concerned the retention of the DNA records of two applicants who had not been convicted of a criminal offence, the Court had been struck by the blanket and indiscriminate nature of the power of retention of DNA records in England and Wales that enabled the material to be retained without limit of time and irrespective of the nature or gravity of the offence or the personal circumstances

1. *S. and Marper v. the United Kingdom* [GC], 30562/04 and 30566/04, 4 December 2008, Information Note 114.

of the individual concerned. However, the applicants' cases were to be distinguished from that case for several reasons. Firstly, under the domestic law DNA records could only be taken, stored and retained from persons who had been convicted of serious criminal offences and were likely to be the subject of criminal proceedings in the future. The domestic courts had based their findings that the offences committed by the applicants had reached the requisite threshold of gravity on the particular circumstances of each case and had provided relevant and sufficient reasons for their assumption that criminal investigations with respect to similar offences were likely to be conducted against them in the future so that the taking of DNA samples and the retention of the extracted DNA profiles were justified and proportionate. Furthermore, the Court was satisfied that the domestic law afforded appropriate safeguards against the blanket and indiscriminate taking and retention of DNA samples and profiles and adequate guarantees of the effective protection of retained personal data from misuse and abuse. Consequently, the domestic rules on the taking and retention of DNA material from persons convicted of offences reaching a certain level of gravity as applied in the case of the applicants had struck a fair balance between the competing public and private interests and fell within the respondent State's acceptable margin of appreciation.

Conclusion: inadmissible (manifestly ill-founded).

Respect for private life
Respect for family life

Statutory ban on returning bodies of terrorists for burial: *violation*

Sabanchiyeva and Others v. Russia - 38450/05
Judgment 6.6.2013 [Section I]

Facts – Early in the morning of 13 October 2005 law-enforcement agencies in the town of Nalchik were attacked by armed insurgents. The fighting continued into the following day leaving more than 100 dead, the majority from the ranks of the assailants. The applicants are relatives of some of the deceased insurgents.

The applicants, who took part in their identification, alleged that the bodies were kept in appalling conditions (piled up, naked and decomposing for want of adequate refrigeration). Under legislation introduced in Russia following the terrorist attack on the Nord-Ost Theatre in Moscow in October 2002 the bodies of terrorists were not handed over to relatives and the place of burial was not disclosed. In April 2006, having established the involvement of the insurgents in the attack, the investigating authority discontinued the criminal proceedings owing to the deaths of the suspects in the attack. In June 2006, pursuant to the decision not to return the bodies of the deceased to their families, 95 corpses of presumed terrorists were cremated. Some of the applicants contested the legislation governing the interment of terrorists. In June 2007 the Constitutional Court ruled that the measure in question was justified as the burial of terrorists could serve as propaganda for terrorist ideas and also cause offence to relatives of the victims, creating the preconditions for heightened inter-ethnic and religious tension. It upheld the impugned legislation as being in conformity with the Constitution but at the same time interpreted it as requiring that the authorities not bury bodies unless a court had confirmed the competent authority's decision.

Law – Article 3: The conditions in which the applicants' relatives' bodies were stored may have caused the applicants suffering, as the Government had admitted that the local facilities were insufficient to contain all the corpses for the first four days after the attack and that even thereafter they had had to be piled up on top of each another for storage in refrigerator wagons. However, those shortcomings had been the result of logistical difficulties caused by the events of October 2005 and by the high number of casualties. There had been no purposeful intention to subject the applicants to inhuman treatment or to cause them psychological suffering. In other words, the emotional distress of the applicants had been comparable to that of any family member of a deceased person in a comparable situation.

Conclusion: no violation (unanimously).

Article 8: In Russia the relatives of deceased people willing to organise interment generally enjoyed a statutory guarantee of having the bodies returned promptly to them for burial after the cause of the death had been established. The authorities' refusal to return the bodies in the instant case had thus constituted an exception from the general rule. Moreover, it had clearly deprived the applicants of an opportunity to organise and take part in their relatives' burial or to know the location of the gravesite for potential visits. The decisions not to return the bodies to their families had therefore constituted interference with the applicants' private

and family life (with the exception of one applicant, who was not officially married to one of the victims but had lived with him for several months, in whose case the decision constituted interference with her private life only).

The refusal of the authorities to return the bodies was based on the Suppression of Terrorism Act and the 2003 Decree governing the burial of terrorists and thus had a legal basis in Russian law. That decision had legitimate aims, namely preventing disorder during the burials by supporters or opponents of the insurgents, protecting the feelings of the relatives of the victims of terrorism and minimising the psychological impact on the population.

The States faced particular challenges from terrorism and terrorist violence. However, the Court found it difficult to agree that the goals referred to by the Government, albeit legitimate, constituted a viable justification for denying the applicants any participation in the funeral ceremonies or at least some kind of opportunity for paying their last respects. Indeed, the complete ban on disclosing the location of the graves had permanently cut any link between the applicants and their deceased relatives' remains. Moreover, when deciding not to return the bodies, the authorities had not used a case-by-case approach or taken into account the individual circumstances of each of the deceased and those of their family members, as the applicable law treated all these questions as irrelevant. On the contrary, the decisions had been purely automatic and ignored the authorities' duty to ensure that any interference with the right to respect for private and family life was justified and proportionate in the individual circumstances of each case. In the absence of such an individualised approach, the refusal mainly appeared to have had a punitive effect on the applicants by shifting the burden of blame for the terrorist activities from the deceased to them. The respondent State had thus overstepped any acceptable margin of appreciation in that regard.

Conclusion: violation (five votes to two).

Article 13 in conjunction with Article 8: The Court noted the absence of any effective judicial supervision of the authorities' decisions not to return the bodies to their families. Although the 2007 ruling of the Constitutional Court had improved the applicants' situation, the Russian courts remained competent to review only the formal lawfulness of the measures and not the need for the measure as such. Therefore, the legislation had not provided the applicants with sufficient procedural safeguards against arbitrariness. Indeed, they had not enjoyed an effective possibility of appealing owing to the authorities' refusal to provide them with a copy of the decisions and the limited competence of the courts to review them.

Conclusion: violation (five votes to two).

The Court unanimously found no violation of Article 14 in conjunction with Article 8 and no violation of Article 38 § 1.

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

(See also *Maskhadova and Others v. Russia*, 18071/05, 6 June 2013)

Respect for family life

Order for return of child made pursuant to Brussels IIa Regulation without any examination of the merits in the requested State: *inadmissible*

Povse v. Austria - 3890/11
Decision 18.6.2013 [Section I]

Facts – The case concerned the enforcement under the Brussels IIa Regulation of an Italian court order for the return of a child who had been taken to Austria by its mother. Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels IIa Regulation") simplifies the procedure for the return of children who have been victims of wrongful removal or retention. It provides for judgments on return that have been certified in the State of origin to be recognised and enforceable in all other European Union Member States without any further procedure being required.

In the instant case, the second applicant returned to her native Austria with her daughter (the first applicant) after leaving the child's father with whom she had been living in Italy on account of his allegedly violent behaviour. Following a lengthy court battle in Austria and Italy, the father was awarded sole custody by an Italian court, which also ordered the child's return to Italy. In the enforcement proceedings in Austria, the Austrian Supreme Court upheld an order for the child's return after noting that at an earlier stage of the proceedings the Court of Justice of the European

Union (CJEU) had clarified in a preliminary ruling that where a certificate of enforceability had been issued under Article 42(1) of the Brussels IIa Regulation, the requested court was required to proceed to enforcement and that any questions relating to the merits of the return decision, in particular the question whether the requirements for ordering a return were met, had to be raised before the courts of the requesting State. According to the Supreme Court, the second applicant's argument that the first applicant's return would lead to serious harm for the child and entail a violation of Article 8 of the Convention was therefore not relevant in the proceedings before the Austrian courts but had to be raised before the competent Italian courts.

Law – Article 8: It was undisputed that the Austrian courts' decisions ordering the enforcement of the Italian courts' return orders had interfered with the applicants' right to respect for their family life within the meaning of Article 8. The interference was "in accordance with the law" as the Austrian courts' decisions were based on Article 42 of the Brussels IIa Regulation, which was directly applicable in Austrian law, and it pursued the legitimate aim of protecting the rights of others and the general-interest objective of securing European Union law compliance by a Contracting Party.

As to the necessity for the interference, the Court reiterated that a State will be presumed not to have departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of an international organisation which provides equivalent protection to that afforded by the Convention. The Court had already found in previous cases that the protection of fundamental rights afforded by the European Union is in principle equivalent to that of the Convention system as regards both the substantive guarantees offered and the mechanisms controlling their observance. Nevertheless, a State will be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it has exercised State discretion, and the presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.

In the instant case, the Austrian courts had not been exercising any discretion when they ordered the enforcement of the return orders (contrast the position in *M.S.S. v. Belgium and Greece*). Furthermore, the Austrian Supreme Court had duly made use of the control mechanism provided for in European Union law by asking the CJEU for a preliminary ruling (contrast the position in *Michaud v. France*). That ruling had made it clear that where the courts of the State of origin of a wrongfully removed child had ordered the child's return and had issued a certificate of enforceability, the courts of the requested State could not review the merits of the return order, or refuse enforcement on the ground that the return would entail a grave risk for the child owing to a change in circumstances since the delivery of the certified judgment. Any such change had to be brought before the courts of the State of origin, which were also competent to decide on a possible request for a stay of enforcement. It was thus clear from the CJEU's ruling that within the framework of the Brussels IIa Regulation it was for the Italian courts to protect the fundamental rights of the parties. The Italian Government had indicated that it was still open to the applicants to request a review of the return order before the Italian courts and that legal aid was in principle available. Further, should any action before the Italian courts fail, the applicants would ultimately be in a position to lodge an application with the Court against Italy. In sum, the Court could not find any dysfunction in the control mechanisms for the observance of the applicants' Convention rights. Consequently, the presumption that simply by fulfilling its obligations as an EU member State under the Brussels IIa Regulation Austria had complied with the Convention had not been rebutted.

Conclusion: inadmissible (manifestly ill-founded).

(See also *M.S.S. v. Belgium and Greece* [GC], 30696/09, 21 January 2011, Information Note 137; and *Michaud v. France*, 12323/11, 6 December 2012, Information Note 158)

Expulsion

Refusal to renew residence visa because of applicant's debts and dependence on public funds: *violation*

Hasanbasic v. Switzerland - 52166/09
Judgment 11.6.2013 [Section II]

Facts – The applicants are a couple from Bosnia and Herzegovina. The wife had lived in Switzerland since 1969 and the husband since 1986. They had two children together. In 2004 Mr Hasanbasic told the immigration authorities that he was leaving Switzerland for good to return to his home country,

where he had had a house built. His settlement permit was accordingly cancelled. He returned to Switzerland four months later, with a tourist visa, and lived with his wife. Mrs Hasanbasic submitted an application for him to be allowed to stay in the country under the family reunion programme, but her request was rejected, *inter alia* because the family was dependent on welfare and had accumulated debts to the tune of some EUR 133,300, and Mr Hasanbasic had been convicted of nine criminal offences between 1995 and 2002.

Law – Article 8: The interference with the applicants' private and family life was in accordance with the law and pursued the legitimate aims of the country's economic well-being, the prevention of disorder or crime and the protection of the rights and freedoms of others. The fundamental principles applicable to the expulsion of a person for committing a criminal offence, when that person had spent a considerable length of time in the country, were well-established in the Court's case-law and had recently been brought to the fore, for example in the *Üner*, *Maslov* and *Emre* cases[1]. The present case differed from these other cases in so far as the applicants' complaint about the Swiss authorities' refusal to renew the settlement permit relied firstly on the family's strong roots in Swiss society, considering that they had lived there for so long. The husband's criminal record seemed only to have played a secondary role in the domestic authorities' decision. In any event, the above-mentioned principles had to be applied, *mutatis mutandis*, in such a situation.

At the time of the Federal Court's decision in 2009 the applicants had been living in Switzerland without interruption for forty and twenty-three years respectively, except for the four months in 2004. Furthermore, since 1979 Mrs Hasanbasic had held a permit of a more permanent type than a simple residence permit. For many years, therefore, Switzerland had been the centre of the applicants' private and family life.

The husband had been convicted several times between 1995 and 2002, and sentenced to fines not exceeding 400 Swiss francs (CHF) and to a total of seventeen days' imprisonment, for road-traffic offences and trespassing. These were not serious offences and had to be placed in perspective. In addition, the applicant had committed no other offences since 2002. He could therefore not be considered a danger or a threat to security or public order.

What seemed to have played a major role in the authorities' assessment of the interests in issue were the sizable debts the family had accrued and the considerable amount of money they had received in welfare benefits (a total of about CHF 333,000, or EUR 277,500). The economic well-being of the country was expressly provided for in the Convention as a legitimate aim justifying interference with the right to respect for private and family life. The Swiss authorities were therefore justified in taking into account the applicants' debts and their dependence on the welfare system in so far as that dependence affected the country's economic well-being. However, this was only one factor among many to be taken into consideration by the Court.

It was true that, considering the children's ages, as the applicants had not shown that there were any further elements of dependency between them and their children, involving more than the normal emotional bonds, they could not rely on family ties under Article 8. Family ties were not completely devoid of relevance, however, when analysing the applicants' family situation. The fact that the husband was able to visit Switzerland from time to time, with the proper authorisation, could by no means be considered to replace the applicants' right to live together.

The applicants had a large social network in Switzerland and, considering how long they had lived there, to have to return to their country of origin would doubtless have placed them in some difficulty. It was true that they had had a house built back in their country of origin, and that one of the children from Mr Hasanbasic's former marriage, and his sister, were living there. And in August 2004 the applicant had told the Swiss authorities that he was returning permanently to Bosnia and Herzegovina, which was one of the domestic authorities' main reasons for refusing to renew his residence permit. That argument had to be assessed in the light of subsequent developments, however. Furthermore, Mr Hasanbasic's health had declined seriously, leaving him in need of constant treatment. The possibility that removing him from his familiar surroundings in Switzerland might adversely affect his already declining health and cause new medical complications could not be ruled out. Consequently, although the applicant's state of health was not sufficient in itself to compel the Swiss authorities to renew his residence permit, it could not be completely ignored in the general

1. *Üner v. the Netherlands* [GC], 46410/99, 18 October 2006, Information Note 90; *Maslov v. Austria* [GC], 1638/03, 23 June 2008, Information Note 109; *Emre v. Switzerland*, 42034/04, 22 May 2008.

balance of interests in issue. Lastly, the fact that the applicant would not receive an invalidity pension if he returned to his country of origin might adversely affect his situation.

So, while the economic well-being of the country could indeed be a legitimate reason for refusing to renew a residence permit, that reason should be placed in perspective in the light of all the circumstances of the case. In this instance, regard being had in particular to the considerable length of time the applicants had spent in Switzerland and their undeniable social integration there, the measure in issue had not been justified by a pressing social need and was not proportionate to the legitimate aims pursued. The respondent State had therefore overstepped its margin of appreciation.

Conclusion: violation (unanimously).

Article 41: no claim made in respect of damage.

ARTICLE 10

Freedom of expression
Freedom to receive information

Refusal to allow a non-governmental organisation access to intelligence information despite a binding decision directing disclosure: *violation*

Youth Initiative for Human Rights v. Serbia - 48135/06
Judgment 25.6.2013 [Section II]

Facts – The applicant was a non-governmental organisation which monitored the implementation of transitional laws with a view to ensuring respect for human rights, democracy and the rule of law. In October 2005 it requested the Serbian intelligence agency to inform it how many people had been subjected to electronic surveillance by that agency in 2005. Relying on the Freedom of Information Act 2004 the agency refused. The applicant complained to the Information Commissioner, who found that the agency had broken the law and ordered it to make the requested information available to the applicant within three days. The agency's appeal was dismissed. In September 2008 the agency notified the applicant that it did not hold the information requested.

Law – Article 10: The notion of "freedom to receive information" embraced a right of access to information. The Court had also held that when a non-governmental organisation, such as the present applicant, was involved in matters of public interest, it was exercising a role as a public watchdog of similar importance to that of the press. The applicant's activities thus warranted similar Convention protection to that afforded to the press. As the applicant had obviously been involved in the legitimate gathering of information of public interest with the intention of imparting it to the public and thereby contributing to the public debate, there had been an interference with the applicant's right to freedom of expression. The exercise of freedom of expression could be subject to restrictions, but any such restrictions had to be in accordance with domestic law. The restrictions imposed by the intelligence agency in the present case had not met that criterion. The domestic body that had been set up precisely to ensure compliance with the Freedom of Information Act 2004 had examined the case and decided that the information sought had to be provided to the applicant. Although the intelligence agency had eventually responded that it did not hold the information, that response was unpersuasive in view of the nature of the information (the number of people subjected to electronic surveillance by that agency in 2005) and the agency's initial response. The obstinate reluctance of the Serbian intelligence agency to comply with the order of the Information Commissioner had thus been in defiance of domestic law and was tantamount to arbitrariness.

Conclusion: violation (unanimously).

Article 46: The respondent State must ensure, within three months of the European Court's judgment becoming final, that the applicant is provided with the requested information.

Article 41: Finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

(See also *Társaság a Szabadságjogokért v. Hungary*, 37374/05, 14 April 2009, Information Note 118; and *Kenedi v. Hungary*, 31475/05, 26 May 2009, Information Note 119)

ARTICLE 11

Freedom of peaceful assembly

Criminal conviction for organising illegal demonstration that ended in violence: *violation*

Gün and Others v. Turkey - 8029/07
Judgment 18.6.2013 [Section II]

Facts – On 14 February 2005 the Security Directorate stated that it had received information to the effect that on the following day, the anniversary of the arrest of Abdullah Öcalan, head of the terrorist organisation the PKK, unlawful demonstrations were going to be staged in Cizre. The Directorate stated that, in the past, on the occasion of similar demonstrations or statements to the press, troublemakers had campaigned in support of the terrorist organisation or its leader. The same day, the events and demonstrations due to be held between 14 and 20 February 2005 were suspended. However, on 15 February a group of around two hundred people gathered in order to march and make a statement to the press and the public. Although the demonstrators were ordered to disperse, the statement was read out and the gathering broke up without police intervention. However, clashes ensued between the police and a group of around ten demonstrators. The applicants, having been identified as the organisers of the demonstration, were each sentenced to one year and six months' imprisonment and to payment of a criminal fine on the basis of section 28(1) of the Assemblies and Demonstrations Act and the decree suspending all demonstrations between 14 and 20 February 2005.

Law – Article 11: The applicants' conviction amounted to interference with their right to freedom of assembly. The interference had pursued the legitimate aims of preventing disorder and crime and protecting public safety.

As to whether the interference had been necessary, on the day of the unlawful demonstration, well before it had taken place, the police and the administrative authorities had been able to make the necessary arrangements to preserve public safety and prevent disorder. Furthermore, the police had not stopped the press statement from being read out and had not dispersed the crowd until it had been read. Hence, the demonstration attended by the applicants had been tacitly tolerated or had at least not been prohibited in practice, and the applicants' intentions had been peaceful. The persons concerned had therefore been allowed to exercise their right to peaceful assembly, given that they had been able to attend the demonstration in question during which the press statement had been read out, and the national authorities had displayed the level of tolerance required towards such a gathering.

However, the applicants had not been convicted of throwing stones at the police officers or inciting the demonstrators to violence. They had been convicted on account of having led the demonstration as such, which had been staged in breach of the legislation, rather than on account of specific actions amounting to a criminal offence committed during the demonstration, which had passed off peacefully. It was legitimate, on grounds of public order and national security, for the holding of assemblies to be subject to authorisation and for the movement of persons during peaceful assemblies to be regulated. However, as the Government had submitted only general statistics, it could not be established whether the situation prevailing at the time of the events in Cizre had been tense and thus liable to give rise to a series of riots or disturbances sparked by such demonstrations. Furthermore, the damage to persons and property caused by a group of unidentified individuals following the demonstration in question was not a decisive factor justifying the suspension of all events and demonstrations for one week. The evidence in the file also made clear that the applicants' intentions had been wholly peaceful. Moreover, the police had never arrested the perpetrators of the acts in question, nor did there appear to have been a police investigation aimed at identifying and arresting them. Lastly, the sentence imposed had been excessive in so far as it was liable to discourage persons belonging to an association or a political party from exercising their right to demonstrate under Article 11 of the Convention, for fear of criminal sanctions. The freedom to take part in a peaceful assembly was of such importance that it could not be restricted in any way, even for the leaders or members of a lawful political party, so long as the persons concerned did not themselves commit any reprehensible act on such an occasion. Accordingly, a fair balance had not been struck between, on the one hand, the general interest requiring the protection of public safety and, on the other, the applicants' freedom to demonstrate. The criminal conviction imposed on the applicants could not be reasonably regarded as meeting a "pressing social need".

Conclusion: violation (unanimously).

Article 41: EUR 7,500 to each of the applicants in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

ARTICLE 34

Hinder the exercise of the right of petition

Prison administration's refusal to pay postage for dispatch of prisoner's letters to the European Court: *no violation*

Yepishin v. Russia - 591/07
Judgment 27.6.2013 [Section I]

Facts – The applicant, who was serving a prison sentence in a correctional colony, complained that the colony authorities had refused to assist him with postage costs he could not afford for correspondence with the European Court. According to the Government, the authorities had twice paid for letters to be sent to the Court, but the supervising prosecutor had then informed the applicant's representative that no federal budget funds had been allocated to provide free stationery to inmates. The applicant subsequently received money, stamps and envelopes from an NGO.

Law – Article 34: Not providing a prisoner with the resources required to correspond with the Court could contribute to a finding of a breach of the State's obligations under Article 34 of the Convention[1]. However, the Court did not consider the facts complained of by the applicant sufficient to disclose any prejudice in the presentation of his application. Although the authorities had on a number of occasions refused to pay the postage, it did not appear to have been excessively burdensome for him to bear the expenses himself. The applicant had been found fit for work and could have accepted employment that had been offered by the correctional colony. The fact that the applicant's representative had sent him stamps and envelopes and cash to pay for the postage did not raise an issue under Article 34. Accordingly, the Government had not failed to comply with their obligation under that provision.

Conclusion: no violation (unanimously).

The Court found a violation of Article 3 on account of the conditions of the applicant's detention and a violation of Article 13 on account of the lack of an effective remedy to complain about the conditions of detention.

Article 41: EUR 19,000 in respect of non-pecuniary damage.

1. See *Cotleț v. Romania*, 38565/97, § 71, 3 June 2003, Information Note 53.

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies
Effective domestic remedy – Bulgaria

Establishment in accordance with Court pilot judgment of domestic remedy affording compensation in length-of-proceedings cases and requiring exhaustion: *inadmissible*

Balakchiev and Others v. Bulgaria - 65187/10
Valcheva and Abrashev v. Bulgaria - 6194/11 and 34887/11
Decisions 18.6.2013 [Section IV]

Facts – In two pilot judgments (*Finger* and *Dimitrov and Hamanov*) delivered on 10 May 2011, the Court required the respondent State to introduce effective legal remedies, conforming to the principles laid down in the Court's case-law, for the excessive length of civil, administrative and criminal proceedings. In response, Bulgaria put in place two new compensatory remedies: an administrative remedy, governed by the new sections 60a et seq. of the Judiciary Act 2007 Act ("the 2007 Act"), for concluded proceedings, and a judicial one, governed by a new section 2b of the State and Municipalities Liability for Damage Act 1988 ("the 1988 Act"), for pending proceedings.

The issue before the European Court in the present cases was whether the applicants, who complained of the length of civil proceedings (*Balakchiev*) and of criminal proceedings (*Valcheva and Abrashev*), were first required to exhaust these new remedies, which were untested and had been introduced after their applications to the Court were lodged.

Law – Article 35 § 1: The Court had to determine whether the new remedies, taken alone or together, were available and effective. As regards procedural guarantees, it noted in particular that the 2007 Act did not provide for a contentious procedure, and that the enforceability of a possible decision to grant compensation was open to doubt. However, the administrative remedy governed by the 2007 Act was only the first limb of the system of remedies introduced by the Bulgarian authorities. Indeed, the amended 1988 Act provided for a fully judicial procedure which could result in a legally binding decision by a court. Therefore, claims under the 1988 Act would benefit from the full panoply of the normal judicial procedure applicable to the examination of civil actions.

The other characteristics of the new remedies, namely their costs, their speediness, their scope as well as the amount and prompt payment of compensation, did not give rise to any general concerns. The Court found in particular that, although some aspects of the administrative and judicial procedures laid down in the 2007 Act and the 1988 Act might call for clarification, this would be a question of interpretation and practice by the Bulgarian authorities and courts. Therefore, it could not be assumed at this stage that the authorities and the courts would not give proper effect to the new provisions. Moreover, mere doubts about the effective functioning of a newly created remedy did not dispense applicants from having recourse to it.

The Court also found that the remedies operated retrospectively as they provided redress in respect of delays preceding their introduction, both in pending cases before the Bulgarian courts and to people who had already lodged an application with the Court in which they had raised complaints in relation to unreasonably lengthy proceedings.

The remedies appeared to be available not only to persons who were party to proceedings which ended after they became operational – 1 October and 15 December 2012, respectively – but also to persons who were party to proceedings which ended less than six months before 15 December 2012, and to persons, such as the applicants in the present cases, who lodged applications with this Court before those dates.

The Court therefore considered that, taken together, an application for compensation under the 2007 Act and a claim for damages under the 1988 Act could be regarded as effective domestic remedies in respect of the allegedly unreasonable length of proceedings before the civil, criminal and administrative courts in Bulgaria. Hence, the applicants were, in line with the Court's well-established case-law in relation to post-pilot judgment remedies, required to turn to the newly introduced remedies. As they had apparently not brought any proceedings under the new provisions of the 2007 Act or the 1988 Act and no special circumstances absolved them from doing so, they had failed to exhaust domestic remedies.

Conclusion: inadmissible (failure to exhaust domestic remedies).

(See *Finger v. Bulgaria*, 37346/05, and *Dimitrov and Hamanov v. Bulgaria*, 48059/06, both delivered on 10 May 2011, Information Note 141; and *Turgut and Others v. Turkey* (dec.), 4860/09, 26 March 2013, Information Note 161)

Exhaustion of domestic remedies
Effective domestic remedy – Turkey

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

Demiroğlu and Others v. Turkey - 56125/10
Decision 4.6.2013 [Section II]

Facts – In March 2009 the applicants brought proceedings in the district court against their employer, seeking payment of unpaid salaries and bonuses. In July 2009 the court found in their favour. In October 2009 the judgment became final as no appeal had been lodged on points of law. In November of the same year the applicants applied again to the district court, this time seeking redress in respect of the additional damage established during the first set of proceedings. In a judgment which became final in June 2010 the court granted their request. To date, neither court decision has been executed in spite of the enforcement proceedings instituted by the applicants. In an application lodged with the European Court on 16 August 2010 the applicants complained of the failure to execute the judgments.

Law – Article 35 § 1: In January 2013 the National Assembly had enacted Law no. 6384 on the resolution, by means of compensation, of certain applications lodged with the Court prior to 23 September 2013, including those concerning the non-enforcement or delayed enforcement of judicial decisions. Applications to the compensation commission under that Law had to be lodged within six months from the date of its entry into force or, failing that, within one month from the date of notification of the Court's decision on inadmissibility. It was therefore open to the applicants to lodge an application for compensation.

As to whether that remedy was sufficient, the commission, which was made up mostly of judges, had to rule on all applications submitted to it within nine months. Individuals could apply to the commission with a view to obtaining a ruling as to the non-enforcement or delayed enforcement of judicial decisions in their favour and receiving just satisfaction to cover the damage sustained. In dealing with applications the commission had to take the case-law of the Strasbourg Court into consideration and give a reasoned decision. The compensation awarded by the commission had to be paid by the Justice Ministry within three months from the date on which the commission's decision became final. In addition, applications were subject to review by the Ankara Regional Court, the

Constitutional Court and ultimately the Strasbourg Court. Lastly, the commission's decisions, once final, had to be notified to the relevant judicial or administrative authority. If the decision which was the subject of the application to the commission was still unenforced, it had to be enforced swiftly by the authority concerned. The application for compensation put in place by the Turkish legislature was thus designed to remedy complaints concerning non-enforcement or delayed enforcement of judicial decisions, in accordance with the principles established by the Court's case-law in that sphere. In those circumstances, there was currently no reason to suppose that the remedy introduced by the compensation legislation would not afford the applicants the opportunity to obtain redress in respect of their grievances, or that the remedy would not offer any reasonable prospects of success.

On 31 January 2012 almost 1,200 applications stemming from the same problem were still pending before the Court. The remedy introduced by Law no. 6384 had been created with the aim of dealing with the large numbers of similar repetitive cases against Turkey which posed a growing threat to the Convention system. It formed part of the measures taken following the application of the pilot-judgment procedure in the case of *Ümmühan Kaplan*[1]. The respondent State had therefore fulfilled its role within the Convention system by resolving this type of problem at national level. In so doing it had secured to the persons concerned the rights and freedoms defined in the Convention, offering them more rapid redress and at the same time easing the burden on the Court, which would otherwise have had to deal with a large number of applications that were similar in substance. The Court reiterated that its task to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto was not necessarily best achieved by repeating the same findings in large series of cases. Furthermore, taking into consideration the nature of Law no. 6384 and the context in which it had been enacted, there were grounds for departing from the general principle whereby the assessment of whether domestic remedies had been exhausted was carried out with reference to the date on which the application was lodged.

Consequently, in accordance with Article 35 § 1 of the Convention, the applicants had to apply to the compensation commission set up under Law no. 6384 in so far as this appeared on the face of it to be an accessible remedy capable of offering them reasonable prospects of having their grievances redressed.

Conclusion: inadmissible (failure to exhaust domestic remedies).

1. *Ümmühan Kaplan v. Turkey*, 24240/07, 20 March 2012, Information Note 150.

ARTICLE 37

Article 37 § 1 (c)

Continued examination not justified

Careful examination of applicant's case by domestic courts: *struck out*

K.A.S. v. the United Kingdom - 38844/12
Decision 4.6.2013 [Section IV]

Facts – The applicant, a mother of six children, and her former husband were under investigation by the United Kingdom and the United States authorities for the sale of chemicals used for the manufacture of illegal drugs. In 2006 an indictment was filed against them in the US, which requested their extradition. Having carefully examined the circumstances of the case and the best interests of the child, the UK courts concluded that the applicant's extradition would not violate her rights under Article 8 of the Convention. The applicant then lodged an application with the European Court, which granted an interim measure under Rule 39 of the Rules of Court preventing her extradition while the proceedings before the Court were pending. The applicant subsequently informed the Court that she had reached a plea agreement with the US authorities and wished to withdraw her application to the Court.

Law – Article 37 § 1: Before striking out a case, the Court had to consider whether there were any circumstances regarding respect for human rights as defined in the Convention and its Protocols which would require the continued examination of the case, including in cases where the applicant wished to withdraw his or her application. Such circumstances have been held to exist when the continued examination of an application contributed to elucidating, safeguarding and developing the standards of protection under the Convention or when there was a new issue of concern or paucity of case-law on a particular subject. However, the Court considered that it should be slow to find that such circumstances existed where a case had been the subject of careful and detailed

examination by the domestic courts. The applicant's case had been examined at three levels of jurisdiction, all of which had given careful consideration not just to her case, but to the general approach to be taken to Article 8 in extradition cases. Therefore, notwithstanding the general importance of the issue initially presented to it, the Court was satisfied that there were no circumstances which would justify its continued examination of the applicant's case.

Conclusion: struck out of the list (majority).

ARTICLE 41

Just satisfaction

Direction that a Contracting State, not party to the proceedings, should not claim back compensation it had paid to applicant out of sum awarded against respondent State in respect of non-pecuniary damage

Trévalec v. Belgium - 30812/07
Judgment (just satisfaction)
25.6.2013 [Section II]

Facts – In a judgment on the merits of 14 June 2011 (see Information Note 142), the Court had found that there had been a violation of Article 2 under its substantive head on the ground that Belgium had failed to fulfil its positive obligation to protect the right to life of the applicant, a French national who had sustained severe injuries, and had reserved the question of just satisfaction. The applicant had obtained from the French compensation fund for victims of terrorism and other offences (the CIVI) a significant sum covering both the pecuniary and non-pecuniary damage for which Belgium had been found responsible in that judgment.

Law – Article 41: The Court found reasonable the CIVI's award in respect of pecuniary damage. As to the non-pecuniary damage and in the circumstances of the case, the Court considered it appropriate to award the applicant an additional EUR 50,000. Noting that the compensation fund would be entitled to ask the applicant to reimburse part of the amount that he had been paid in so far as it corresponded to the amount of the Court's award, the Court found that it was fair to stipulate that the said amount should not be claimed back from him.

ARTICLE 46

Execution of a judgment

Respondent State granted seven-month extension of time to introduce domestic remedy in length-of-criminal-proceedings cases

Michelioudakis v. Greece - 54447/10
Judgment 3.4.2012 [Section I]

In the *Michelioudakis v. Greece* judgment of 3 April 2012 (see Information Note 151) a Chamber of the Court found a violation of Article 6 § 1 in that criminal proceedings lasting more than seven years had failed to satisfy the "reasonable time" requirement, and a violation of Article 13 as the remedy which the applicant could have used in the administrative courts had not been effective or available. Having regard in particular to the chronic and persistent nature of such problems and the large number of people in Greece affected by them, and also to the urgent need to afford rapid and adequate redress at national level to those concerned, the pilot-judgment procedure was applied. The Court considered that the national authorities should, within one year, introduce an effective domestic remedy, or set of remedies, capable of affording adequate and sufficient redress for the unreasonable length of criminal proceedings. The Court also decided that, for a period of one year from the date on which its judgment became final (3 July 2012), proceedings in all cases relating solely to the length of criminal proceedings in the Greek courts were to be adjourned.

On 18 June 2013 a Chamber of the Court unanimously adopted a proposal to allow a request for the deadline of 3 July 2013 by which the Government were to adopt the general measures referred to in the pilot judgment to be put back by roughly seven months, until 30 January 2014.

ARTICLE 1 OF PROTOCOL No. 1

Possessions

Ban on donating embryos for scientific research: *communicated*

Parrillo v. Italy - 46470/11
Decision 28.5.2013 [Section II]

In 2002 the applicant and her partner had recourse to medically assisted procreation techniques and

five embryos were produced. In November 2003 the applicant's partner died. The applicant wishes to donate the *in vitro* embryos to assist scientific research into ways of curing diseases that are difficult to treat. However, section 13 of Law no. 40 of 19 February 2004 prohibits experiments on human embryos, even for the purposes of scientific research, making any such offence punishable by a sentence of between two and six years' imprisonment. The applicant submits that the embryos in question were created prior to the entry into force of the above-mentioned Law, and that it was therefore entirely legal for her to store the embryos by means of cryopreservation without having them implanted immediately.

Notice of the application was given under Article 1 of Protocol No. 1, in respect of the applicant's complaint that Law no. 40/2004 prohibited her from donating her embryos for scientific research, obliging her to keep them in a state of cryopreservation until they were no longer viable; and under Article 8, in respect of her complaint that such interference infringed her right to respect for her private life.

The application was also inadmissible *ratione materiae* under Article 10, since the applicant's complaint – that the prohibition of embryo donation amounted to a breach of freedom of expression, a fundamental aspect of which was freedom of scientific research – concerned a right which was not vested in her directly, but rather in those operating in the sector in question, namely researchers and scientists.

Peaceful enjoyment of possessions

Forfeiture of applicant's bail notwithstanding his acquittal: *no violation*

Lavrechov v. the Czech Republic - 57404/08
Judgment 20.6.2013 [Section V]

Facts – In 2001 the applicant, a Russian national, was charged in the Czech Republic with insider trading and fraud and taken into pre-trial custody. The following year he was released on bail subject to the payment of the equivalent of EUR 400,000 as security. The trial was subsequently conducted in his absence as he had been out of the country for a lengthy period and had failed to maintain contact with the trial court regarding the conduct of the trial or to forward an address for service. Although the applicant was ultimately acquitted of the offences charged, the security was forfeited as he had failed to respect the conditions of his bail.

Law – Article 1 of Protocol No. 1: The forfeiture of the bail constituted interference with the applicant's property rights. The measure had complied with the requirement of lawfulness and pursued the legitimate aims of ensuring the proper conduct of criminal proceedings and of fighting crime and crime prevention, which undoubtedly fell within the general interest. While bail of approximately EUR 400,000 was substantial, the time for discussing the proportionality of the amount was when the bail was set, rather than when it was forfeited. In the instant case, the applicant had not contended that the amount was unreasonable and had been able to provide the security swiftly and without undue hardship. The main issue in the case was whether his acquittal should have been taken into account when deciding whether to forfeit the bail.

The purpose of bail is to ensure the proper conduct of criminal proceedings, and in particular to ensure the accused appears at the hearing. In the instant case, the conduct of the proceedings was significantly hampered by the applicant's failure to comply with the bail conditions. He failed to appear at any of the scheduled hearings or to assist the court in any way, even though he must have been aware that he was in breach of his bail conditions. This had resulted in the length of the proceedings being considerably extended and serious difficulties in attempts to serve the applicant with documents. The fact that the applicant was later acquitted did not in itself mean that his prosecution had been illegal or was otherwise tainted. Different standards of proof were required for a conviction (usually proof beyond reasonable doubt) and a prosecution (usually reasonable suspicion of the commission of a crime). There could therefore well be cases of reasonable suspicion which at trial did not result in a conviction beyond reasonable doubt. Nevertheless, in such situations the State still had a legitimate interest in ensuring that individuals in respect of whom there existed a reasonable suspicion did not try to evade justice or undermine the smooth conduct of the proceedings. Accordingly, the outcome of the proceedings had no direct relevance to the question whether the security for bail should be forfeited. The question was rather whether forfeiture was proportionate given the breach of the bail conditions during the proceedings. Even though the applicant might have had objective reasons owing to the theft of his passport for not attending the initial hearings, the decision to hold the trial *in absentia* was not

taken until two years and eight months after he acquired a new passport. In these circumstances, the domestic courts' finding that the applicant had been avoiding criminal prosecution by staying out of the country for several years did not seem unreasonable. As the applicant must have been aware that he had been in breach of his bail conditions for a substantial period, he should have informed the court clearly and unequivocally of his address in Russia and remained in regular contact, but this he had failed to do. Lastly, forfeiture had been ordered after full adversarial proceedings, and the domestic courts had carefully scrutinised the pertinent issues and given comprehensive reasons for their decisions. The procedural requirements of Article 1 of Protocol No. 1 had thus been complied with. In the circumstances, therefore, the decision to forfeit the applicant's bail had struck a "fair balance" between the demands of the general interest of the community and the requirements of the applicant's rights.

Conclusion: no violation (six votes to one).

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Hassan v. the United Kingdom - 29750/09 [Section V]

(See Article 1 above, page 7)

COURT NEWS

Elections

During its summer plenary session held from 24 to 28 June 2013, the Parliamentary Assembly of the Council of Europe elected two new judges to the Court: Róbert Ragnar Spanó in respect of Iceland and Egidijus Kūris in respect of Lithuania. Judges Spanó and Kūris will begin their nine-year terms in office on 1 November 2013.

Seminar

The Court and the European Union Fundamental Rights Agency (FRA) organised a seminar on the occasion of the launch of the *Handbook on European law relating to asylum, borders and immigration*. This joint seminar was held on 11 June 2013 at the Human Rights Building in Strasbourg. More information about the seminar and speakers are available on the Court Internet site (www.echr.coe.int – The Court – Events).

The handbook – the second joint publication by the Court and the FRA – is currently available in four languages (English, French, German and Italian), with seven further language versions (Bulgarian, Croatian, Greek, Hungarian, Polish, Romanian and Spanish) to follow later this year. It can be downloaded from the Court's Internet site (www. echr.coe.int – Publications).

Recent developments in the areas of case-law information, judicial training and general outreach

The Court is currently implementing an ambitious case-law translations programme. The HUDOC database (http://hudoc.echr.coe.int) now contains almost 6,000 case-law translations in 25 languages and some of the Court's handbooks exist in over 20 languages.

A three-year project supported by the Human Rights Trust Fund ("Bringing Convention standards closer to home: Translation and dissemination of key ECHR case-law in target languages") aims to improve the understanding and domestic implementation of ECHR standards by commissioning translations ensuring their dissemination to legal professionals in Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Republic of Moldova, Montenegro, Serbia, "the former Yugoslav Republic of Macedonia", Turkey and Ukraine. Translations have also been commissioned into Russian and in the course of 2013 the Registry intends to outsource texts into additional languages (Bulgarian, Greek, Hungarian and Spanish).

For an overview of other recent developments in the areas of case-law information, judicial training and general outreach visit the Court's Internet site (www.echr.coe.int – Case-law).

RECENT PUBLICATIONS

Information in Arabic

In order to make its information accessible to as many people as possible, the Court provides translations in non-European languages, such as Arabic and Chinese. Arabic translations of the European Convention on Human Rights and the publications "Questions and answers", "The ECHR in 50 questions" and "The Court in brief" are already available on the Court's Internet site (www.echr.coe.int).

The Convention (ara)

The Court in brief (ara)

The ECHR in 50 questions (ara)

Questions and answers (ara)