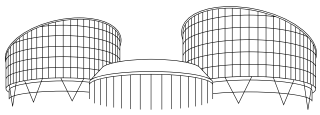

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law

No. 186 June 2015

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ARTICLE 1

Jurisdiction of States

Jurisdiction of Armenia as regards Nagorno-Karabakh and the adjacent occupied territories

Chiragov and Others v. Armenia - 13216/05
Judgment 16.6.2015 [GC]

Facts – The applicants are Azerbaijani Kurds who lived in the district of Lachin, in Azerbaijan. They stated that they were unable to return to their homes and property there, after having been forced to leave in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh.

At the time of the dissolution of the Soviet Union in December 1991, the Nagorno-Karabakh Autonomous Oblast ("the NKAO") was an autonomous province landlocked within the Azerbaijan Soviet Socialist Republic ("the Azerbaijan SSR"). There was no common border between the NKAO and the Armenian Soviet Socialist Republic ("the Armenian SSR"), which were separated by Azerbaijani territory, at the shortest distance by the district of Lachin. In 1989 the NKAO had a population of approximately 77% ethnic Armenians and 22% ethnic Azeris. In the district of Lachin, the majority of the population were Kurds and Azeris; only 5-6% were Armenians. Armed hostilities in Nagorno-Karabakh started in 1988. In September 1991 – shortly after Azerbaijan had declared its independence from the Soviet Union – the Regional Council of the NKAO announced the establishment of the "Nagorno-Karabakh Republic" (the "NKR"), consisting of the territory of the NKAO and the Shahumyan district of Azerbaijan. Following a referendum in December 1991 – boycotted by the Azeri population – in which 99.9% of those participating voted in favour of the secession of the NKR from Azerbaijan, the "NKR" reaffirmed its independence from Azerbaijan in January 1992. Thereafter, the conflict gradually escalated into full-scale war. By the end of 1993 ethnic Armenian forces had gained control over almost the entire territory of the former NKAO as well as seven adjacent Azerbaijani regions. The conflict resulted in hundreds of thousands of internally-displaced people and refugees on both sides. In May 1994 the parties to the conflict signed a ceasefire agreement, which holds to this day. Negotiations for a peaceful solution have been carried out under the auspices of the Organization for Security and Co-operation in Europe (OSCE). However, no final political settlement of the conflict has so far been reached. The self-proclaimed independence of the "NKR" has not been recognised by any state or international organisation. Prior to their accession to the Council of Europe in 2001, Armenia and Azerbaijan both gave undertakings to the Committee of Ministers and the Parliamentary Assembly, committing themselves to the peaceful settlement of the Nagorno-Karabakh conflict.

The district of Lachin, where the applicants lived, was attacked many times during the war. The applicants alleged that troops of both Nagorno-Karabakh and the Republic of Armenia were at the origin of the attacks. The Armenian Government maintained, however, that Armenia did not participate in the events, but that military action was carried out by the defence forces of Nagorno-Karabakh and volunteer groups. In mid-May 1992 Lachin was subjected to aerial bombardment, in the course of which many houses were destroyed. The applicants were forced to flee from Lachin to Baku. Since then they have not been able to return to their homes and properties because of Armenian occupation. In support of their claims that they had lived in Lachin for most of their lives until their forced displacement and that they had houses and land there, the applicants submitted various documents to the Court. In particular, all six applicants submitted official certificates ("technical passports") indicating that houses and plots of land in the district of Lachin had been registered in their names; birth certificates, including those of their children, and/or marriage certificates; and written statements from former neighbours confirming that the applicants had lived in the district of Lachin.

Law

(a) *Preliminary objections*

(i) *Exhaustion of domestic remedies* – The respondent Government had not shown that there was a remedy – whether in Armenia or in the "NKR" – capable of providing redress in respect of the applicants' complaints. The legal provisions referred to by them were of a general nature and did not address the specific situation of dispossession of property as a result of armed conflict or in any other way relate to a situation similar to that of the applicants. None of the domestic judgments submitted related to claims concerning the loss of homes or property by persons displaced in the context of the Nagorno-Karabakh conflict. Furthermore, given that the respondent Government

had denied that their authorities had been involved in the events giving rise to the applicants' complaints or that Armenia exercised jurisdiction over Nagorno-Karabakh and the surrounding territories, it would not have been reasonable to expect the applicants to bring claims for restitution or compensation before the Armenian authorities. Finally, as no political solution to the conflict had been reached and military build-up in the region had escalated in recent years, it was unrealistic to consider that any possible remedy in the unrecognised "NKR" could in practice provide redress to displaced Azerbaijanis.

Conclusion: preliminary objection dismissed (fourteen votes to three).

(ii) *Victim status* – The Court's case-law had developed a flexible approach regarding the evidence to be provided by applicants who claimed to have lost their property and homes in situations of international or internal armed conflict. A similar approach was reflected in the UN "Principles on Housing and Property Restitution for Refugees and Displaced Persons" (Pinheiro Principles). The most significant pieces of evidence supplied by the applicants were the technical passports. Being official documents, they all contained drawings of houses and stated their sizes and measurements etc. The sizes of the plots of land in question were also indicated. The passports were dated between 1985 and 1990 and contained the applicants' names. They also included references to the respective land allocation decisions. In the circumstances, they provided prima facie evidence of title to property equal to that which had been accepted by the Court in many previous cases. The applicants had submitted further prima facie evidence with regard to property, including statements by former neighbours. The documents concerning the applicants' identities and residence also lent support to their property claims. Moreover, while all but the sixth applicant had failed to present title deeds or other primary evidence, regard had to be had to the circumstances in which they had been compelled to leave the district, abandoning it when it had come under military attack. Accordingly, the applicants had sufficiently substantiated their claims that they had lived in the district of Lachin for major parts of their lives until being forced to leave and that they had been in possession of houses and land at the time of their flight.

Under the Soviet legal system, there was no private ownership of land, but citizens could own residential houses. Plots of land could be allocated to citizens for special purposes such as farming or construction of individual houses. In such event, the citizen had a "right of use", limited to the specific purpose, which was protected by law and could be inherited. There was therefore no doubt that the applicants' rights in respect of the houses and land represented a substantive economic interest. In conclusion, at the time they had had to leave the district of Lachin, the applicants had held rights to land and houses which constituted "possessions" within the meaning of Article 1 of Protocol No. 1. There was no indication that those rights had been extinguished afterwards. Their proprietary interests were thus still valid. Moreover, their land and houses also had to be considered their "homes" for the purposes of Article 8 of the Convention.

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

(iii) *Jurisdiction of Armenia* – In the Court's view, it was hardly conceivable that Nagorno-Karabakh – an entity with a population of less than 150,000 ethnic Armenians – would have been able, without substantial military support from Armenia, to set up a defence force in early 1992 capable – against Azerbaijan and its population of seven million – of establishing control of the former NKAO and of conquering before the end of 1993 the whole or major parts of seven surrounding Azerbaijani districts. In any event, Armenia's military involvement in Nagorno-Karabakh was, in several respects, formalised in 1994 through the Agreement on Military Co-operation between the Governments of the Republic of Armenia and the Republic of Nagorno-Karabakh which provided, in particular, that conscripts of Armenia and the "NKR" could do their military service in the other entity. The Court noted also that numerous reports and public statements, including from current and former members of the Armenian Government, demonstrated that Armenia, through its military presence and by providing military equipment and expertise, had been significantly involved in the Nagorno-Karabakh conflict from an early date. Statements from high-ranking officials who had played a central role in the dispute in question were of particular evidentiary value when they acknowledged facts or conduct which appeared to go against the official stance that the armed forces of Armenia had not been deployed in the "NKR" or the surrounding territories and could be construed as a form of admission. Armenia's military support had continued to be decisive for control over the territories in question. Furthermore, it was evident from the facts established in the case that Armenia

had given the "NKR" substantial political and financial support; its citizens were moreover required to acquire Armenian passports to travel abroad, as the "NKR" was not recognised by any State or international organisation. In conclusion, Armenia and the "NKR" were highly integrated in virtually all important matters and the "NKR" and its administration survived by virtue of the military, political, financial and other support given to it by Armenia. Armenia thus exercised effective control over Nagorno-Karabakh and the surrounding territories.

Conclusion: preliminary objection dismissed (fourteen votes to three).

(b) *Merits*

Article 1 of Protocol No. 1: The applicants held rights to land and to houses which constituted "possessions" for the purposes of that provision. While the applicants' forced displacement from Lachin fell outside the Court's temporal jurisdiction, the Court had to examine whether they had been denied access to their property after the entry into force of the Convention in respect of Armenia in April 2002 and whether they had thereby suffered a continuous violation of their rights.

There had been no legal remedy, whether in Armenia or in the "NKR", available to the applicants in respect of their complaints. Consequently, they had not had access to any legal means by which to obtain compensation for the loss of their property or to gain physical access to the property and homes they had left behind. Moreover, in the Court's view, it was not realistic in practice for Azerbaijanis to return to Nagorno-Karabakh and the surrounding territories in the circumstances which had prevailed for more than twenty years after the ceasefire agreement. Those circumstances included in particular a continued presence of Armenian and Armenian-backed troops, ceasefire breaches on the line of contact, an overall hostile relationship between Armenia and Azerbaijan and so far no prospect of a political solution. There had accordingly been a continuing interference with the applicants' right to peaceful enjoyment of their possessions.

As long as access to the property was not possible, the State had a duty to take alternative measures to secure property rights, as was acknowledged by the relevant international standards issued by the United Nations and the Council of Europe. The fact that peace negotiations under the auspices of the OSCE were ongoing – which included issues relating to displaced persons – did not free the Government from their duty to take other measures, especially having regard to the fact that the negotiations had been ongoing for over twenty years. It would therefore be important to establish a property claims mechanism which would be easily accessible and provide procedures operating with flexible evidentiary standards to allow the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of the enjoyment of their rights. While the Government of Armenia had had to provide assistance to hundreds of thousands of Armenian refugees and internally displaced persons, the protection of that group did not exempt the Government from its obligations towards Azerbaijani citizens such as the applicants who had had to flee as a result of the conflict. In conclusion, as concerns the period under consideration, the Government had not justified denying the applicants access to their property without compensation. There had accordingly been a continuing violation of the applicants' rights under Article 1 of Protocol No. 1.

Conclusion: violation (fifteen votes to two).

Article 8 of the Convention: All the applicants were born in the district of Lachin. Until their flight in May 1992 they had lived and worked there for all or major parts of their lives. Almost all of them had married and had children in the district. Moreover, they had earned their livelihood there and their ancestors had lived there. They had built and owned houses there in which they lived. It was thus clear that the applicants had long-established lives and homes in the district. They had not voluntarily taken up residence anywhere else, but lived as internally displaced persons in Baku and elsewhere out of necessity. In the circumstances of the case, their forced displacement and involuntary absence from the district of Lachin could not be considered to have broken their links with the district, notwithstanding the length of time that had passed since their flight. For the same reasons as those which led to its findings under Article 1 of Protocol No. 1, the Court found that the denial of access to the applicants' homes constituted a continuing unjustified interference with their right to respect for their private and family lives and their homes.

Conclusion: violation (fifteen votes to two).

Article 13 of the Convention: The Armenian Government had failed to prove that a remedy capable of providing redress to the applicants in

respect of their Convention complaints and offering reasonable prospects of success was available.

Conclusion: violation (fourteen votes to three).

Article 41: reserved.

Jurisdiction of Azerbaijan as regards a disputed area near Nagorno-Karabakh on the territory of Azerbaijan

Sargsyan v. Azerbaijan - 40167/06
Judgment 16.6.2015 [GC]

Facts – The applicant and his family, ethnic Armenians, used to live in the village of Gulistan, in the Shahumyan region of the Azerbaijan Soviet Socialist Republic ("the Azerbaijan SSR"), where he had a house and a plot of land. According to his submissions, his family was forced to flee from their home in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh.

At the time of the dissolution of the Soviet Union in December 1991, the Nagorno-Karabakh Autonomous Oblast ("the NKAO") was an autonomous province landlocked within the Azerbaijan SSR. In 1989 the NKAO had a population of approximately 77% ethnic Armenians and 22% ethnic Azeris. The Shahumyan region shared a border with the NKAO and was situated north of it. According to the applicant, prior to the conflict, 82% of the population of Shahumyan were ethnic Armenians. Armed hostilities in Nagorno-Karabakh started in 1988. In September 1991 – shortly after Azerbaijan had declared its independence from the Soviet Union – the Regional Council of the NKAO announced the establishment of the "Nagorno-Karabakh Republic" ("NKR"), consisting of the territory of the NKAO and the Shahumyan district of Azerbaijan. Following a referendum in December 1991, which was boycotted by the Azeri population and in which 99.9% of those participating voted in favour of the secession of the NKR from Azerbaijan, the "NKR" reaffirmed its independence from Azerbaijan in January 1992. Thereafter, the conflict gradually escalated into full-scale war. By the end of 1993, ethnic Armenian forces had gained control over almost the entire territory of the former NKAO as well as seven adjacent Azerbaijani regions. The conflict resulted in hundreds of thousands of internally-displaced people and refugees on both sides. In May 1994 the parties to the conflict signed a ceasefire agreement, which holds to this day. Negotiations for a peaceful solution have been carried out under the auspices of the Organization for Security and Co-operation in Europe (OSCE). However, no final political settlement of the conflict has so far been reached. The self-proclaimed independence of the "NKR" has not been recognised by any state or international organisation. Prior to their accession to the Council of Europe in 2001, Armenia and Azerbaijan both gave undertakings to the Committee of Ministers and the Parliamentary Assembly, committing themselves to the peaceful settlement of the Nagorno-Karabakh conflict.

Shahumyan, where Mr Sargsyan's family lived, did not form part of the NKAO, but was later claimed by the "NKR" as part of its territory. In 1991 special-purpose militia units of the Azerbaijan SSR launched an operation in the region with the stated purpose of "passport checking" and disarming local Armenian militants in the region. However, according to various sources, the Azerbaijan SSR militia units used this as a pretext to expel the Armenian population from a number of villages in the region. In 1992, when the conflict escalated into war, the Shahumyan region came under attack by Azerbaijani forces. The applicant and his family fled Gulistan following heavy bombing of the village. He and his wife subsequently lived as refugees in Yerevan, Armenia.

In support of his claim that he had lived in Gulistan for most of his life until his forced displacement, the applicant submitted a copy of his former Soviet passport and his marriage certificate. He also submitted a copy of an official certificate ("technical passport") indicating that a two-storey house in Gulistan and more than 2,000 square metres of land were registered in his name, photographs of the house, and written statements from former officials of the village council and former neighbours confirming that he had a house and a plot of land in Gulistan.

Law

(a) *Preliminary objections*

(i) *Exhaustion of legal remedies at domestic level* – In view of the conflict and the resulting absence of diplomatic relations between Armenia and Azerbaijan and the closing of the borders there could be considerable practical difficulties in the way of a person from one country in bringing legal proceedings in the other. The Government of Azerbaijan had failed to explain how the legislation on the protection of property would apply to the situation of an Armenian refugee who wished to claim restitution or compensation for the loss of property left behind in the context of the conflict.

They had not provided any example of a case in which a person in the applicant's situation had been successful before the Azerbaijani courts. The Government had thus failed to prove that a remedy capable of providing redress in respect of the applicant's complaints was available.

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

(ii) *Jurisdiction and responsibility of Azerbaijan* – It was undisputed that Gulistan was situated on the internationally recognised territory of Azerbaijan. Accordingly, a presumption arose under the Court's case-law that Azerbaijan had jurisdiction over the village. It was therefore for the respondent Government to show that exceptional circumstances existed which would limit their responsibility under Article 1 of the Convention. Gulistan and the Azerbaijani military forces were located on the north bank of a river while the "NKR" positions were located on the south bank. On the basis of the material before the Court it was not possible to establish whether there had been an Azerbaijani military presence in Gulistan – although there were a number of indications – throughout the period falling within its temporal jurisdiction which had commenced in April 2002, when Azerbaijan ratified the Convention. It was significant to note, however, that none of the parties had alleged that the "NKR" had any troops in the village.

The Court was not convinced by the respondent Government's argument that, since the village was located in a disputed area, surrounded by mines and encircled by opposing military positions, Azerbaijan had only limited responsibility under the Convention. In contrast to other cases in which the Court had found that a State had only limited responsibility over part of its territory due to occupation by another State or the control by a separatist regime, it had not been established that Gulistan was occupied by the armed forces of another State.

Taking into account the need to avoid a vacuum in Convention protection, the Court did not consider that the respondent Government had demonstrated the existence of exceptional circumstances of such a nature as to qualify their responsibility under the Convention. The situation in the instant case was more akin to that which had existed in *Assanidze v. Georgia* in that from a legal standpoint the respondent Government had jurisdiction as the territorial state and full responsibility under the Convention, even though they might encounter difficulties at a practical level in exercising their authority in the area of Gulistan. Such difficulties would have to be taken into account when it came to assessing the proportionality of the acts or omissions complained of by the applicant.

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

(b) *Merits*

Article 1 of Protocol No. 1: The Court's case-law had developed a flexible approach regarding the evidence to be provided by applicants who claimed to have lost their property and homes in situations of international or internal armed conflict. A similar approach was reflected in the UN "Principles on Housing and Property Restitution for Refugees and Displaced Persons" (Pinheiro Principles).

In the instant case, the applicant had submitted a technical passport established in his name and relating to a house and land in Gulistan, including a detailed plan of the house. It was not contested that a technical passport was, as a rule, only issued to the person entitled to the house. It thus constituted, in the Court's view, prima facie evidence that he held title to the house and the land, which evidence had not convincingly been rebutted by the Government. Moreover, the applicant's submissions as to how he had obtained the land and permission to build a house were supported by statements from a number of family members and former villagers. While those statements had not been tested in cross-examination, they were rich in detail and demonstrated that the people concerned had lived through the events described. Last but not least, the Court had regard to the circumstances in which the applicant had been compelled to leave when the village had come under military attack. It is hardly astonishing that he had been unable to take complete documentation with him. Accordingly, taking into account the totality of the evidence presented, the Court found that the applicant had sufficiently substantiated his claim that he had a house and a plot of land in Gulistan at the time of his flight in 1992.

In the absence of conclusive evidence that the applicant's house had been completely destroyed before the entry into force of the Convention in respect of Azerbaijan, the Court proceeded on the assumption that it still existed, though in a badly damaged state. In conclusion, there was no factual basis for the Government's objection *ratione temporis*.

Under the Soviet legal system, there was no private ownership of land, but citizens could own residen-

tial houses. Plots of land could be allocated to citizens for special purposes such as farming or the construction of individual houses. In such cases, the citizen had a "right of use" limited to the specific purpose which was protected by law and could be inherited. There was therefore no doubt that the applicants' rights in respect of the houses and land represented a substantive economic interest. Having regard to the autonomous meaning of Article 1 of Protocol No. 1, the applicant's right to personal property of the house and his "right of use" in respect of the land constituted "possessions" under that provision.

While the applicant's forced displacement from Gulistan fell outside the Court's temporal jurisdiction, the Court had to examine whether the respondent Government had breached his rights in the ensuing situation, which had continued after the entry into force of the Convention in respect of Azerbaijan.

At the date of the Court's judgment, more than one thousand individual applications lodged by persons who had been displaced during the conflict were pending before the Court, slightly more than half of which were directed against Armenia and the remainder against Azerbaijan. While the issues raised fell within the Court's jurisdiction as defined in Article 32 of the Convention, it was the responsibility of the two States involved to find a political settlement of the conflict. Comprehensive solutions to such questions as the return of refugees to their former places of residence, repossession of their property and/or payment of compensation could only be achieved through a peace agreement. Indeed, prior to their accession to the Council of Europe, Armenia and Azerbaijan had given undertakings to resolve the Nagorno-Karabakh conflict through peaceful means. The Court could not but note that compliance with the above accession commitment was still outstanding.

The instant case was the first in which the Court had had to rule on the merits of a complaint against a State which had lost control over part of its territory as a result of war and occupation, but which at the same time was alleged to be responsible for refusing a displaced person access to property in an area remaining under its control.

The Court examined whether the respondent Government had complied with their positive obligations under Article 1 of Protocol No. 1 and whether a fair balance between the demands of the public interest and the applicant's fundamental right of property had been struck. The applicant's complaint raised two issues: firstly, whether the respondent Government were under an obligation to grant him access to his house and land in Gulistan and, secondly, whether they were under a duty to take any other measures to protect the applicant's property right and/or to compensate him for the loss of its use.

International humanitarian law did not appear to provide a conclusive answer to the question whether the Government were justified in refusing the applicant access to Gulistan. Having regard to the fact that Gulistan was situated in an area of military activity and at least the area around it was mined, the Court accepted the respondent Government's argument that refusing civilians, including the applicant, access to the village was justified by safety considerations. However, as long as access to the property was not possible, the State had a duty to take alternative measures in order to secure property rights – and thus to strike a fair balance between the competing public and individual interests concerned – as was acknowledged by the relevant international standards issued by the United Nations (Pinheiro Principles) and the Council of Europe. The Court underlined that the obligation to take alternative measures did not depend on whether or not the State could be held responsible for the displacement itself.

The fact that peace negotiations under the auspices of the OSCE were ongoing – which included issues relating to displaced persons – did not free the respondent Government from their duty to take other measures, especially having regard to the fact that the negotiations had been ongoing for over twenty years. It would therefore be important to establish a property claims mechanism which would be easily accessible and provide procedures operating with flexible evidentiary standards to allow the applicant and others in his situation to have their property rights restored and to obtain compensation for the loss of the enjoyment of their rights. While the respondent Government had had to provide assistance to hundreds of thousands of internally displaced persons (Azerbaijanis who had had to flee from Armenia and from Nagorno-Karabakh and the surrounding districts) the protection of that group did not exempt the respondent Government entirely from its obligations towards Armenians such as the applicant who had had to flee as a result of the conflict. In that connection, the Court referred to the principle of non-discrimination laid down in Article 3 of the above-mentioned Pinheiro Principles.

In conclusion, the impossibility for the applicant to have access to his property in Gulistan without

the Government taking any alternative measures in order to restore his property rights or to provide him with compensation had placed an excessive burden on him. There had accordingly been a continuing violation of his rights under Article 1 of Protocol No. 1.

Conclusion: violation (fifteen votes to two).

Article 8 of the Convention: The applicant's complaint encompassed two aspects: lack of access to his home in Gulistan and lack of access to his relatives' graves. Having regard to the evidence submitted by the applicant (a copy of his former Soviet passport and his marriage certificate, and a number of witness statements), the Court found it established that he had lived in Gulistan for the major part of his life until being forced to leave. He thus had had a "home" there. His prolonged absence could not be considered to have broken the continuous link with his home. Furthermore, as the applicant must have developed most of his social ties in Gulistan, his inability to return to the village also affected his "private life". Finally, his cultural and religious attachment with his late relatives' graves in Gulistan could also fall within the notion of "private and family life".

Referring to its findings under Article 1 of Protocol No. 1, the Court held that the same considerations applied in respect of the applicant's complaint under Article 8. His lack of access to his home and his relatives' graves in Gulistan without the respondent Government taking any measures in order to address his rights or at least provide compensation had placed a disproportionate burden on him. There had accordingly been a continuing violation of Article 8 of the Convention.

Conclusion: violation (fifteen votes to two).

Article 13 of the Convention: The respondent Government had failed to prove that a remedy capable of providing redress to the applicant in respect of his Convention complaints and offering reasonable prospects of success was available. Moreover, the Court's findings under Article 1 of Protocol No. 1 and Article 8 of the Convention related to the State's failure to create a mechanism which would allow him to have his rights in respect of property and home restored and to obtain compensation for the losses suffered. There was therefore a close link between the violations found under Article 1 of Protocol No. 1 and Article 8 on the one hand and the requirements of Article 13 on the other. There had accordingly been a continuing breach of Article 13 of the Convention.

Conclusion: violation (fifteen votes to two).

Article 41: reserved.

(See *Assanidze v. Georgia* [GC], 71503/01, 8 April 2004, Information Note 63)

ARTICLE 2

Positive obligations (substantive aspect)

Decision to discontinue nutrition and hydration allowing patient in state of total dependence to be kept alive artificially: *no violation*

Lambert and Others v. France - 46043/14
Judgment 5.6.2015 [GC]

Facts – The applicants are the parents, a half-brother and a sister of Vincent Lambert, who sustained head injuries in a road-traffic accident in September 2008, which left him tetraplegic and in a state of complete dependency. He receives artificial nutrition and hydration which is administered enterally. In September 2013 the doctor in charge of Vincent Lambert initiated the consultation procedure provided for by the "Leonetti" Act on patients' rights and end-of-life issues. He consulted six doctors, one of whom had been chosen by the applicants, convened a meeting with virtually all the care team, and held two meetings with the family which were attended by Vincent Lambert's wife, parents and eight siblings. Following those meetings, Vincent Lambert's wife Rachel and six of his brothers and sisters argued in favour of withdrawing treatment, as did five of the six doctors consulted, while the applicants opposed such a move. The doctor also held discussions with François Lambert, Vincent Lambert's nephew. On 11 January 2014 the doctor in charge of Vincent Lambert decided to discontinue his patient's artificial nutrition and hydration.

The *Conseil d'État*, hearing the case on the basis of an urgent application, observed that the last assessment of the patient dated back two and a half years, and considered it necessary to have the fullest information possible on Vincent Lambert's state of health. It therefore ordered an expert medical report which it entrusted to three recognised specialists in neuroscience. Furthermore, in view of the scale and difficulty of the issues raised by the case, it requested the National Medical Academy, the National Ethics Advisory Committee, the National Medical Council and Mr Jean Leonetti

to submit general observations to it as *amici curiae*, in order to clarify in particular the concepts of unreasonable obstinacy and sustaining life artificially. The experts examined Vincent Lambert on nine occasions, conducted a series of tests and familiarised themselves with the entire medical file and with all the items in the judicial file of relevance for their report. They also met all the parties concerned. On 24 June 2014 the *Conseil d'État* held that the decision taken by Vincent Lambert's doctor on 11 January 2014 to withdraw artificial nutrition and hydration had been lawful.

Following a request for application of Rule 39 of the Rules of Court, the Court decided to indicate that execution of the *Conseil d'État* judgment should be stayed for the duration of the proceedings before it. On 4 November 2014 a Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber.

The applicants submitted in particular that the withdrawal of Vincent Lambert's artificial nutrition and hydration was in breach of the State's obligations under Article 2.

Law – (a) *Admissibility*

(i) *Standing to act in the name and on behalf of Vincent Lambert*

(α) *Regarding the applicants* – A review of the case-law revealed two main criteria: the risk that the direct victim would be deprived of effective protection of his or her rights, and the absence of a conflict of interests between the victim and the applicant. Regarding the first criterion, the Court did not discern any risk that Vincent Lambert would be deprived of effective protection of his rights since it was open to the applicants, as Vincent Lambert's close relatives, to invoke before the Court on their own behalf the right to life protected by Article 2. As to the second criterion, the Court noted that one of the key aspects of the domestic proceedings had consisted precisely in determining Vincent Lambert's wishes. In those circumstances it was not established that there was a convergence of interests between the applicants' assertions and what Vincent Lambert would have wished. Accordingly, the applicants did not have standing to raise the complaints under Article 2 in the name and on behalf of Vincent Lambert.

(β) *Regarding Rachel Lambert (Vincent Lambert's wife)* – No provision of the Convention permitted a third-party intervener to represent another person before the Court. Furthermore, according to Rule 44 § 3 (a) of the Rules of Court, a third-party intervener was any person concerned "who [was] not the applicant". Accordingly, Rachel Lambert's request had to be refused.

(ii) *Whether the applicants had victim status* – The next-of-kin of a person whose death allegedly engaged the responsibility of the State could claim to be victims of a violation of Article 2 of the Convention. Although Vincent Lambert was still alive, there was no doubt that if artificial nutrition and hydration were withdrawn, his death would occur within a short time. Accordingly, even if the violation was a potential or future one, the applicants, in their capacity as Vincent Lambert's close relatives, were entitled to rely on Article 2.

(b) *Merits* – Article 2 (*substantive aspect*): Both the applicants and the Government made a distinction between the intentional taking of life and "therapeutic abstention", and stressed the importance of that distinction. In the context of the French legislation, which prohibited the intentional taking of life and permitted life-sustaining treatment to be withdrawn or withheld only in certain specific circumstances, the Court considered that the present case did not involve the State's negative obligations under Article 2, and decided to examine the applicants' complaints solely from the standpoint of the State's positive obligations.

In order to do this, the following factors were taken into account: the existence in domestic law and practice of a regulatory framework compatible with the requirements of Article 2; whether account had been taken of the applicant's previously expressed wishes and those of the persons close to him, as well as the opinions of other medical personnel; and the possibility to approach the courts in the event of doubts as to the best decision to take in the patient's interests. The Court also took account of the criteria laid down in the Council of Europe's Guide on the decision-making process regarding medical treatment in end-of-life situations.

No consensus existed among the Council of Europe member States in favour of permitting the withdrawal of artificial life-sustaining treatment, although the majority of States appeared to allow it. While the detailed arrangements governing the withdrawal of treatment varied from one country to another, there was nevertheless consensus as to the paramount importance of the patient's wishes in the decision-making process, however those wishes were expressed. Accordingly, States should be afforded a margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as to the means of striking a balance between the

protection of patients' right to life and the protection of their right to respect for their private life and their personal autonomy.

(i) *The legislative framework* – The provisions of the Leonetti Act, as interpreted by the *Conseil d'État*, constituted a legal framework which was sufficiently clear, for the purposes of Article 2 of the Convention, to regulate with precision the decisions taken by doctors in situations such as that in the present case, by defining the concepts of "treatment that could be withdrawn or limited" and "unreasonable obstinacy" and by detailing the factors to be taken into account in the decision-making process. Accordingly, the State had put in place a regulatory framework apt to ensure the protection of patients' lives.

(ii) *The decision-making process* – Although the procedure under French law was described as "collective" and included several consultation phases (with the care team, at least one other doctor, the person of trust, the family or those close to the patient), it was the doctor in charge of the patient who alone took the decision. The patient's wishes had to be taken into account and the decision itself had to be accompanied by reasons and was added to the patient's medical file.

The collective procedure in the present case had lasted from September 2013 to January 2014 and, at every stage of its implementation, had exceeded the requirements laid down by law. The doctor's decision, which ran to thirteen pages, had provided very detailed reasons and the *Conseil d'État* had held that it was not tainted by any irregularity.

French law as it currently stood provided for the family to be consulted (and not for it to participate in taking the decision), but did not make provision for mediation in the event of disagreement between family members. Likewise, it did not specify the order in which family members' views should be taken into account, unlike in some other countries. In the absence of consensus on this subject the organisation of the decision-making process, including the designation of the person who took the final decision to withdraw treatment and the detailed arrangements for the taking of the decision, fell within the State's margin of appreciation. The procedure in the present case had been lengthy and meticulous, exceeding the requirements laid down by the law, and although the applicants disagreed with the outcome, that procedure had satisfied the requirements flowing from Article 2 of the Convention

(iii) *Judicial remedies* – The *Conseil d'État* had examined the case sitting as a full court, which was highly unusual in injunction proceedings. The expert report had been prepared in great depth. In its judgment of 24 June 2014 the *Conseil d'État* had begun by examining the compatibility of the relevant provisions of the Public Health Code with Articles 2, 8, 6 and 7 of the Convention, before assessing whether the decision taken by Vincent Lambert's doctor had complied with the provisions of the Code. Its review had encompassed the lawfulness of the collective procedure and compliance with the substantive conditions laid down by law, which it considered – particularly in the light of the findings of the expert report – to have been satisfied. The *Conseil d'État* noted in particular that it was clear from the experts' findings that Vincent Lambert's clinical condition corresponded to a chronic vegetative state, that he had sustained serious and extensive damage whose severity, coupled with the period of five and a half years that had passed since the accident, led to the conclusion that it was irreversible and that there was a "poor clinical prognosis". In the view of the *Conseil d'État*, these findings confirmed those made by the doctor in charge. After stressing "the particular importance" which the doctor must attach to the patient's wishes, the *Conseil d'*État also sought to ascertain what Vincent Lambert's wishes had been. As the latter had not drawn up any advance directives or designated a person of trust, the *Conseil d'État* took into consideration the testimony of his wife, Rachel Lambert. It noted that she and her husband, who were both nurses with experience of patients in resuscitation and those with multiple disabilities, had often discussed their professional experiences and that on several such occasions Vincent Lambert had voiced the wish not to be kept alive artificially in a highly dependent state. The *Conseil d'État* found that those remarks – the tenor of which was confirmed by one of Vincent Lambert's brothers – had been reported by Rachel Lambert in precise detail and with the corresponding dates. It also took account of the fact that several of Vincent Lambert's other siblings had stated that these remarks were in keeping with their brother's personality, past experience and views, and noted that the applicants had not claimed that he would have expressed remarks to the contrary. Lastly, the *Conseil d'État* observed that the consultation of the family, prescribed by law, had taken place.

It was the patient who was the principal party in the decision-making process and whose consent must remain at its centre; this was true even where the patient was unable to express his or her wishes.

The Council of Europe's Guide on the decision-making process regarding medical treatment in end-of-life situations recommended that the patient should be involved in the decision-making process by means of any previously expressed wishes, which may have been confided orally to a family member or close friend. Furthermore, in the absence of advance directives or of a "living will", a number of countries required that efforts be made to ascertain the patient's presumed wishes, by a variety of means (statements of the legal representative or the family, other factors testifying to the patient's personality and beliefs, and so forth).

In those circumstances, the *Conseil d'État* had been entitled to consider that the testimony submitted to it was sufficiently precise to establish what Vincent Lambert's wishes had been with regard to the withdrawal or continuation of his treatment.

(iv) *Final considerations* – The Court found both the legislative framework laid down by domestic law, as interpreted by the *Conseil d'État*, and the decision-making process, which had been conducted in meticulous fashion in the present case, to be compatible with the requirements of Article 2. As to the judicial remedies that had been available to the applicants, the Court reached the conclusion that the present case had been the subject of an in-depth examination in the course of which all points of view could be expressed and all aspects had been carefully considered, in the light of both a detailed expert medical report and general observations from the highest-ranking medical and ethical bodies.

Consequently, the domestic authorities had complied with their positive obligations flowing from Article 2 of the Convention, in view of the margin of appreciation left to them in the present case.

Conclusion: no violation (twelve votes to five).

(See also the Factsheet on End of life and the ECHR)

Alleged failure of authorities to prosecute a journalist in respect of a newspaper article that was alleged to have put applicant's life at risk: *no violation*

Selahattin Demirtaş v. Turkey - 15028/09
Judgment 23.6.2015 [Section II]

Facts – At the material time the applicant was a member of the DTP, a former pro-Kurdish political party, and a member of Parliament. In November 2007 he requested a criminal investigation against the author of an article entitled "Turk, here is your enemy" on the grounds that it was insulting and constituted incitement to violence. In the article, the author had listed a series of terrorist related deaths and accused DTP members of being the "real murderers", mentioning the applicant by name. On 7 December 2007 the public prosecutor decided not to bring criminal proceedings after noting in his decision that the article had been published as a result of terrorist acts carried out by the PKK (Workers' Party of Kurdistan), an internationally recognised terrorist organisation, that it expressed the author's opinion while offering proposals with a view to eradicating the terrorist group and that it fell within the freedom of the media. The applicant challenged that decision pointing out that DTP members mentioned by name in the article had been marked as targets on account of their political opinions. Although the applicant's challenge was unsuccessful, the Ministry of Justice applied to the Court of Cassation for the prosecutor's decision to be quashed on the grounds that the article should not have been protected as it did not fall within the scope of the right to freedom of expression. That application was dismissed by the Court of Cassation.

Law – Article 2 (*substantive aspect*): The Court recalled that not every claimed risk to life can entail a Convention requirement for the authorities to take operational measures to prevent that risk from materialising. It had to be established whether there was a real and immediate risk to the life of the applicant, which was known or ought to have been known to the Turkish authorities and whether in response they had done all that could reasonably be expected of them to avoid that risk.

In his first petition to the public prosecutor's office the applicant's representative had not alleged that the applicant had faced a real immediate risk to his life or that he had received actual threats from third parties following the publication of the impugned article. Nor was it claimed that there had been a campaign of violence or intimidation in respect of which the national authorities had failed to take measures to protect the applicant. The applicant had not referred to any actual or attempted physical violence placing his life in danger. There was no indication that the national authorities should have taken operational measures to protect the applicant without him having requested such protection. The applicant's complaint concerned the failure of the national authorities to punish the author of the impugned article, not the lack of operational

measures to prevent a real and immediate risk to his life. Consequently, the State's positive obligation under Article 2 of the Convention was not engaged.

Conclusion: no violation (six votes to one).

(See also *Osman v. the United Kingdom*, 23452/94, 28 October 1998; and *Dink v. Turkey*, 2668/07 et al., 14 September 2010, Information Note 133)

ARTICLE 3

Inhuman or degrading punishment

Continued detention under whole life order following clarification of Secretary of State's powers to order release: *case referred to the Grand Chamber*

Hutchinson v. the United Kingdom - 57592/08
Judgment 3.2.2015 [Section IV]

Following his conviction in September 1984 of aggravated burglary, rape and three counts of murder, the applicant was sentenced to life imprisonment with a recommended minimum tariff of 18 years. In December 1994 the Secretary of State informed him that he had decided to impose a whole life term. Following the entry into force of the Criminal Justice Act 2003, the applicant applied for a review of his minimum term of imprisonment. In May 2008 the High Court found that there was no reason for deviating from this decision given the seriousness of the offences. The applicant's appeal was dismissed by the Court of Appeal in October 2008. In his application to the European Court, the applicant alleged that the whole life order with no prospects of release had violated Article 3 of the Convention.

By a judgment of 3 February 2015 (see Information Note 182), a Chamber of the Court concluded by six votes to one that there had been no violation of Article 3 because, following a recent judgment of the Court of Appeal, domestic law did provide to an offender sentenced to a whole life order hope and the possibility of release in the event of exceptional circumstances which meant that the punishment was no longer justified.

On 1 June 2015 the case was referred to the Grand Chamber at the applicant's request.

Effective investigation

Failure to take action in response to complaints concerning the alleged ill-treatment of a journalist: *violation*

Mehdiyev v. Azerbaijan - 59075/09
Judgment 18.6.2015 [Section I]

Facts – In 2007 the applicant, a journalist, published two articles critical of the situation in the Nakhchivan Autonomous Republic ("the NAR"). The subsequent events are in dispute. According to the applicant, on 22 September 2007 the head of the district department of the Ministry of National Security ("the MNS") accused him of having published defamatory articles, following which he was arrested and taken to MNS premises where he was kicked and punched by five MNS agents. After his release at 2 a.m. the following day he immediately informed a newspaper of his arrest. Since it was too early in the day to see a doctor, he asked relatives to take photographs of his injuries. Later that morning he was rearrested by the police who wanted to know why he had informed the press of his arrest. According to the Government, however, the applicant was arrested for having used loud and abusive language in public.

Later that day, a District Court sentenced the applicant to fifteen days' administrative detention for obstructing the police. He was then examined by a doctor but was not provided with a medical report. According to the applicant, he was deprived of food and water and received no bedding during his detention. He was forced to spend nights outside on the concrete walkway, was continuously handcuffed and suffered badly from mosquito bites. On 27 September 2007 he was released and treated in hospital, but was not given an official medical certificate. The applicant produced an unsigned medical record dated 1 October 2007 which stated that he had a broken rib but did not provide any further information.

On 3 October 2007 the applicant lodged a criminal complaint with the District Prosecutor's Office relying on Articles 3, 5 and 10 of the Convention. He subsequently lodged further complaints with the Prosecutor's General Office, the Ministry of Internal Affairs, the Ombudsman, the District Court, the Supreme Court of NAR, the Supreme Court of Azerbaijan and the Judicial Legal Council. Although he was informed that his complaints had been forwarded to the competent investigating authority, no action was ever taken.

Law – Article 3

(a) *Procedural aspect* – The Court was called upon to determine whether the national authorities had failed to conduct an effective official investigation into an arguable claim of ill-treatment by the police in breach of Article 3. It noted at the outset that the complaints the applicant had lodged with the domestic bodies had not led to criminal inquiries and no action had been taken by the domestic courts even though sufficient information regarding the identity of the alleged perpetrators and the date, place and nature of the alleged ill-treatment had been provided. The applicant had thus had an arguable claim that had required the authorities to conduct an effective investigation into his allegations.

Notwithstanding the information by the Prosecutor General's Office and the Ministry of Internal Affairs that the applicant's complaints had been forwarded to the investigating authorities for examination, no criminal inquiry had ever been initiated. The prosecuting authorities had not ordered the applicant's forensic examination, or heard the applicant, the alleged perpetrators of the ill-treatment or any other possible witnesses. Finally, the Government had provided no explanation for the failure to conduct an investigation. Accordingly, there had been no effective investigation into the applicant's claim of ill-treatment.

Conclusion: violation (unanimously).

(b) *Substantive aspect* – As regards the applicant's alleged ill-treatment by agents of the MNS, the Court had to assess whether his allegations were supported by appropriate evidence. The applicant had presented a detailed description of his ill-treatment, photographs taken by his family allegedly directly after his release from detention and an unsigned medical record of 1 October 2007. However, that evidence was insufficient for the Court to determine "beyond reasonable doubt" that the applicant had been subjected to the alleged treatment by agents of the State.

Conclusion: no violation (six votes to one).

The Court also held by six votes to one that there had been no violation of Articles 5 or 10 of the Convention.

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

ARTICLE 4

Article 4 § 2

Forced labour
Compulsory labour

Requirement imposed by the authorities on an army medical officer, despite a stay of execution of the decision, to pay a fee in order to be allowed to resign before the end of his period of service: *violation*

Chitos v. Greece - 51637/12
Judgment 4.6.2015 [Section I]

Facts – The applicant received training as an army medical officer in respect of which he had undertaken, pursuant to the relevant legislation, to serve in the armed forces for a period corresponding to three times the duration of his studies – that is to say 18 years. He subsequently acquired a specialist qualification as an anaesthetist at the expense of the army, which added a further five years to his period of service. The applicant decided to resign. The army informed him that he had to serve a further nine years and four months or else pay the State a fee of approximately EUR 107,000. The Court of Audit granted him a provisional stay of execution of that decision. The application to set aside the decision was dismissed, and the applicant then lodged an appeal on points of law. The Tax Office nevertheless asked the applicant to pay the amount in question, with a surcharge of some EUR 2,500 for miscellaneous expenses. In October 2009 the stay of execution was upheld. In May 2010 the applicant was informed that interest for late payment had been added and that he would consequently have to pay approximately EUR 112,000 before 31 May. He paid the sum requested within the time-limit.

In December 2011 the Court of Audit, sitting in plenary session, partly upheld the appeal on points of law and referred the case to a different Chamber. In December 2013, the Court of Audit ruled that the applicant's five years of specialisation should be included in the overall period of compulsory service and consequently reduced the amount of the fee to some EUR 50,000. The State thus refunded approximately EUR 60,000 to the applicant.

Law – Article 4 § 2

(a) *Scope of the case* – Article 4 § 3 (b) of the Convention states that service of a military character is not considered as forced or compulsory

labour. After consulting the relevant international instruments and the full text of Article 4 § 3 (b) of the Convention, the Court considered that the latter did not cover work performed by regular members of the armed forces.[1]

(b) *Observance of Article 4 § 2 – The* applicant must have been aware of the obligation to serve the army for a specific number of years after obtaining his diploma in return for his free studies, the salary he had been paid and the provision of social benefits normally payable to regular servicemen during their training.

The States had a margin of appreciation in calculating the length of compulsory service by officers trained by the army and in determining the procedure for interrupting such service. The State's concern to secure a return on investment in the training of army and medical corps officers and to guarantee sufficient support for an appropriate time in relation to the army's needs justified prohibiting officers from resigning for a certain time and making their early departure subject to a fee to cover expenses incurred during their training.

The obligation on medical officers wishing to leave the army before the end of the compulsory service period to pay the State certain sums in order to reimburse the expenses incurred in training them was fully justified in the light of the privileges which they enjoyed as compared with civilian medical students, such as job security and a steady salary. Thus the actual principle of buying back the remaining years of service did not raise any issues under the proportionality principle.

However, when the applicant had resigned he had been informed by the army that he had to pay the State a fee of some EUR 107,000 for the additional years which he should have served. Nevertheless, the Court of Audit finally reduced the amount of the fee to be paid to the State to approximately EUR 50,000. That amount could not be deemed unreasonable, given that it totalled less than two-thirds of the sum which had been received during the period in question. Moreover, the Court of Audit had stayed the execution of the army's decision.

In May 2010, however, the tax department of the Ministry of Finance ordered the applicant to pay the sum due, together with approximately 13% interest charges. If the applicant had not agreed to pay the whole sum, that sum would have been increased even further owing to the length of time required by the Court of Audit to reach a decision.

Furthermore, the May 2007 decision had not provided for paying the debt in instalments, even though that was permitted by the relevant legislation.

Having regard to those circumstances, the applicant had been forced to act under duress. The authorities had overridden two judicial decisions binding upon them and persisted in implementing their initial decision of May 2007, which had stipulated that the payment procedure could not be suspended under any appeal lodged by the applicant. By requiring the latter to pay immediately the sum of approximately EUR 110,000, increased to approximately EUR 112,000 with interest, the tax authorities had placed a disproportionate burden on him.

Conclusion: violation (unanimously).

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

(See also Factsheet on Slavery, servitude and forced labour)

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Preventive detention of convicted prisoner until judgment became final, even after his prison sentence had expired: *violation*

Ruslan Yakovenko v. Ukraine - 5425/11
Judgment 4.6.2015 [Section V]

(See Article 2 of Protocol No. 7 below, page 41)

Continued detention without a judicial decision of a juvenile subject to correctional proceedings: *violation*

Grabowski v. Poland - 57722/12
Judgment 30.6.2015 [Section IV]

Facts – The applicant, a minor at the time, was arrested on 7 May 2012 on suspicion of committing a number of armed robberies. He was initially detained in a police establishment for children and then, by way of a court order, was placed in a

1. See, to converse effect, *W., X., Y. and Z. v. the United Kingdom*, 3435/67 et al., Commission decision of 19 July 1968.

shelter for juveniles for a period of three months (until 7 August 2012).

In July 2012 a district court ordered that his case be examined in correctional proceedings under the Juvenile Act. Once such an order is issued, the family courts' common practice in Poland is not to issue a separate decision extending the placement in a shelter for juveniles. The family courts consider that such an order constitutes of itself a basis for extending the placement of a juvenile in a shelter.

Upon the expiry of the three-month period of his detention, the applicant applied for release. However, in a decision of 9 August 2012, the district court dismissed his application excluding the possibility of any alternative security measure on the ground that he had been accused of committing criminal acts with the use of a dangerous object.

The applicant remained in the shelter until the judgment in his case was delivered on 9 January 2013 in the correctional proceedings. In that judgment the district court found that the applicant had committed the offences of which he stood accused and ordered his placement in a correctional facility, suspended for a two-year probationary period. That judgment was not appealed against and became final.

Law – Article 5 § 1: Between the date the order placing the applicant in a juvenile shelter expired (7 August 2012) and the district court's decision of 9 January 2013 ordering the applicant's release, there had been no judicial decision authorising the applicant's continued detention. During that period the applicant had continued to be detained in a shelter for juveniles solely on the basis of the fact that a judge had issued an order referring the applicant's case for examination in the correctional proceedings under the Juvenile Act.

The Juvenile Act, by reason of the absence of any precise provisions requiring the family court to order the prolongation of the placement of a juvenile in a shelter for juveniles once the case is referred to correctional proceedings and when the earlier decision authorising the placement in the shelter for juveniles expires, did not satisfy the test of the "quality of the law" for the purposes of Article 5 § 1 of the Convention. The deficient provisions of the Juvenile Act at the relevant time permitted the development of a practice where it was possible to prolong the placement in a shelter for juveniles without a specific judicial decision. Such practice was in itself contrary to the principle of legal certainty. The applicant's detention was therefore not "lawful" within the meaning of Article 5 § 1.

Conclusion: violation (unanimously).

Article 5 § 4: The decision of 9 August 2012 dismissing the applicant's application for release had not explained the legal basis for his continued detention in the shelter for juveniles, but simply referred to the fact that he was accused of serious criminal acts. Those reasons had been perfunctory and, more importantly, had not addressed the crucial argument of why the applicant's continued detention in the shelter for juveniles had not been based on a judicial decision.

Conclusion: violation (unanimously).

Article 46: The problems detected in the instant case could subsequently give rise to other well-founded applications and called for general measures at national level. Indeed, certain statistics indicated that, as of December 2012, there were apparently 340 juveniles placed in shelters in a similar situation to that of the applicant. Moreover, the issues identified in his case had already been raised in 2013 by the Ombudsman and brought to the attention of the Minister of Justice, who had agreed that the existing practice was unsatisfactory and required legislative amendment. However, no specific action had so far been taken by the Government. Poland had therefore to take legislative or other appropriate measures to stop the practice of detaining juveniles, who were subject to correctional proceedings, without a specific judicial decision and to ensure that each and every deprivation of liberty of a juvenile was authorised by a specific judicial decision.

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

ARTICLE 6

Article 6 § 1 (criminal)

Fair hearing

Failure to inform person interviewed as a witness, but later convicted, of her right to remain silent: *no violation*

Schmid-Laffer v. Switzerland - 41269/08
Judgment 16.6.2015 [Section II]

Facts – In 2001 the applicant's husband, from whom she was in the process of divorcing, was murdered by the man with whom she was in a

relationship. The next day she was interviewed as a witness without being taken into custody. At no point did the interviewing officer inform her of her right to remain silent. He incidentally asked her whether she had ever envisaged resolving marital problems by violent means. She then recounted in detail all she had done during the day of the murder. She also admitted that, with her lover, as a joke, she had envisaged the idea of acting violently towards her husband and that she had participated in the ploy to draw him to the scene of the crime. She was arrested about three weeks later and interviewed once again. She confessed to having incited her companion to murder her husband. Her confessions were reiterated over the following days. A number of confrontations with her companion were held in the presence of her lawyer. She retracted her confessions and subsequently continued to deny her involvement. She was sentenced to seven and a half years' imprisonment on the basis, in particular, of her statements, those of her companion and the testimony of other people, including her partner's brother and his wife, the applicant's father and a colleague of the latter.

Before the European Court, the applicant complained that she had not been informed at her first interview of her right to remain silent.

Law – Article 6 § 1

(a) *Admissibility* – The manner in which the applicant's interview was conducted at the police station, in particular the question whether she had ever envisaged violence against her husband, was such as to affect her position in the subsequent proceedings. It followed that the applicant could rely on the safeguards of Article 6 § 1 of the Convention already at that stage of the proceedings.

(b) *Merits* – The applicant's first police interview was, as such, capable of undermining the fairness of the subsequent criminal proceedings. The police had a duty to inform her of her rights not to incriminate herself and to remain silent. However, that interview had been of little importance among the other evidence. Her conviction had been based in particular on her companion's statements, which had been considered credible by the domestic courts. Those statements were corroborated by the statements of a number of others. In other words, the conviction had not been decided on the sole basis of the information obtained during the interview at issue. Moreover, the applicant, who was duly represented by a lawyer before the domestic courts and before the Court, had failed to state exactly which statements made at that point had subsequently been relied on by the Swiss courts in convicting her. It could be observed, lastly, that the applicant had not incriminated herself on that occasion and that she had remained at liberty. Consequently, the proceedings against the applicant had not been unfair as a whole.

Conclusion: no violation (unanimously).

Conviction for membership of an illegal organisation based on the statements of an anonymous witness whom the accused had been unable to question: *violation*

Balta and Demir v. Turkey - 48628/12
Judgment 23.6.2015 [Section II]

Facts – The applicants were sentenced to approximately six years' imprisonment for membership of an illegal organisation, on the basis of the statements of an anonymous witness whose evidence had been taken in private. The witness claimed to have identified the applicants as members of the PKK (the Workers' Party of Kurdistan). The applicants had no opportunity to question him at any stage in the proceedings.

The applicants appealed unsuccessfully on points of law against the Assize Court judgment convicting them.

Law – Article 6 § 1 taken in conjunction with Article 6 § 3 (d): In *Al-Khawaja and Tahery v. the United Kingdom*, the Court had spelt out the criteria to be applied in cases where the issue of the fairness of the proceedings arose in relation to the testimony of a witness who was not present during the trial. It had found that this type of complaint had to be examined from three angles.

(a) *Whether there had been good reason for the applicants' inability to question the witness or have him questioned* – Neither the Assize Court judge who had questioned the witness during a private hearing nor the trial court had given reasons as to why they had preserved the witness's anonymity or why his evidence had not been heard with the defence present. Likewise, there was nothing in the file to demonstrate that they had sought to ascertain whether the anonymous witness had objective reasons to be fearful, bearing in mind that a fear of reprisals did not exempt the courts from the requirement to examine the reasons for granting anonymity. Hence, it could not be said that there had been good reason for the applicants' inability to question the witness or have him questioned.

(b) *The importance of the anonymous witness evidence in securing the applicants' conviction* – The domestic courts had taken into account a number of items of evidence in convicting the applicants of membership of an illegal organisation. While the testimony of the anonymous witness was not the sole evidence on which their conviction had been based, it had nonetheless been decisive. The finding that organic links existed between the applicants and the illegal organisation had been based mainly on the statements of the anonymous witness to the effect that the applicants belonged to the organisation. The remaining evidence had centred on their visit to the offices of a political party and their involvement in demonstrations in support of the PKK, which did not constitute decisive evidence of their membership of the organisation in question. Accordingly, given the weakness of the remaining evidence on which the Assize Court had based its judgment, it was undeniable that the testimony of the anonymous witness had played a decisive role in finding the applicants guilty of membership of an illegal organisation.

(c) *Whether there were sufficient procedural safeguards to counterbalance the difficulties caused to the defence* – The judge who had taken the evidence from the anonymous witness had known the witness's identity and did not appear to have verified his credibility or the reliability of his testimony with a possible view to providing information to the Assize Court.

Hence, since the witness never appeared before the Assize Court, the latter had not had a chance directly to assess his credibility and the reliability of his testimony. Even after an individual claiming to be the anonymous witness had appeared at the trial and had sent a letter capable of casting doubt on the reliability of his testimony, the court had not sought to verify whether this person was in fact the anonymous witness and whether his decision to give evidence had been voluntary.

Furthermore, the applicants and their lawyers had not been given the opportunity at any stage in the proceedings to question the anonymous witness and to cast doubt on his credibility, although this could have been done without disregarding the legitimate interest in preserving a witness's anonymity. The witness could have been questioned in a room away from the hearing room, with an audio and video link enabling the accused to put questions to him. The Assize Court had not followed that procedure, provided for by domestic law, and had offered no explanation in that regard.

Lastly, it did not appear from the reasons given by the domestic courts in their decisions that they had sought to ascertain whether less restrictive measures would suffice to achieve the aim of protecting the anonymous witness.

It was true that the testimony of the anonymous witness had been read out during the Assize Court trial and that the persons concerned had thus had an opportunity to comment on his statements. However, that option was not a proper substitute for the appearance and direct questioning of a witness in order to challenge his truthfulness and reliability by means of cross-examination.

Accordingly, it could not be said that the procedure followed before the authorities in the present case had afforded safeguards to the applicants capable of counterbalancing the handicaps under which the defence had laboured.

Consequently, regard being had to the overall fairness of the proceedings, the applicants' defence rights had been restricted to an extent incompatible with the requirements of a fair trial.

Conclusion: violation (unanimously).

Article 41: EUR 2,000 to each of the applicants in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See *Al-Khawaja and Tahery v. the United Kingdom* [GC], 26766/05 and 22228/06, 15 December 2011, Information Note 147; see also *Hulki Güneş v. Turkey*, 28490/95, 19 June 2003, Information Note 54)

Article 6 § 1 (disciplinary)

Access to court

No possibility of judicial appeal against a disciplinary penalty imposed on school teachers: *communicated*

Karakaş and Deniz v. Turkey - 29426/09 and 34262/09
[Section II]

The first and second applicants were teachers in a State school. Following disciplinary inquiries into various incidents, they were each reprimanded. Their requests to reconsider the measure were dismissed.

The applicants complain of their inability, at the time of the events, to lodge a judicial appeal against

the disciplinary sanction imposed on each of them in the form of a reprimand. They allege a breach of their right of access to a court in that regard.

Communicated under Article 6 § 1 of the Convention.

Article 6 § 2

Presumption of innocence

Use of the expression "the accused/convicted person" following reopening of trial, and reference to the applicants' criminal conviction after the proceedings had been reopened: *violation*

Dicle and Sadak v. Turkey - 48621/07
Judgment 16.6.2015 [Section II]

Facts – The applicants were MPs in the Turkish Grand National Assembly and members of the political party DEP (Party of Democracy), dissolved by the Constitutional Court. They were sentenced by the Security Court in December 1994 to 15 years' imprisonment for membership of an illegal organisation.

In the judgment *Sadak and Others v. Turkey* of 17 July 2001, the European Court, on an application from the applicants and two other individuals, found violations of Article 6 § 1 on account of a lack of independence and impartiality of the State Security Court, and a violation of Article 6 § 3 (a), (b) and (d) of the Convention, taken together with paragraph 1, on account of the failure to inform the applicants in a timely manner of the reclassification of the charges against them, together with their inability to examine or have examined witnesses against them.

In February 2003 a law reforming a number of laws came into force. It provided for the reopening of criminal proceedings following a finding of a violation by the Court. The applicants, relying on the Court's judgment in their case, requested the reopening of their trial.

In April 2004, after deciding that the applicants' trial should be reopened, the Security Court reiterated its judgment of 8 December 1994. In its reasoning it mainly used the terms "the accused/convicted person" to refer to the applicants. In June 2004 the applicants appealed on points of law against that judgment. In the same month the Court of Cassation ordered the applicants' release. Then in a judgment of July 2004 it quashed the judgment of April 2004, finding that the violation found by the European Court in its judgment of 17 July 2001 had not been remedied.

The case was referred to the Assize Court. In March 2007, after taking note in particular of the Court of Cassation's argument that the procedure for reopening the judgment was a procedure that was completely independent of the first, the Assize Court confirmed the applicants' convictions of December 1994. It nevertheless reduced their prison sentence to seven years and six months. It referred to them in its judgment as "the accused/convicted person".

In the meantime, in June 2007, the applicants registered their names as independent candidates to stand in the parliamentary elections of July 2007. Among other things they provided a criminal record, which showed their conviction in December 1994 by the State Security Court and the Assize Court's decision of May 2007 refusing to rule on the request of the first convicted applicant to obtain a document certifying that he had served his sentence in full.

In a decision of July 2007 the Higher Electoral Board refused their candidatures on the ground that their criminal convictions precluded their eligibility.

Law

Article 6 § 2 of the Convention

(a) *Concerning the use of the term "the accused/convicted person" instead of merely the term "the accused"* – In July 2004 the Court of Cassation had indicated that the reopening of the proceedings constituted a procedure that was completely independent of the initial proceedings against the applicants. All the procedural rules had to apply as if it were a new case, when it came to hearings, the notification of the indictment to the applicants or the new interviews to be conducted.

The Assize Court had certainly noted that the reopening of the trial constituted a procedure that was completely independent of the first. That being said, it had nevertheless continued to refer to the applicants as "the accused/convicted person" when it had not yet ruled, in the light of the evidence and the submissions for the defence, on their guilt. In the context of the reopening of the proceedings, the applicants' guilt was not legally established until 27 February 2008, when the Court of Cassation upheld the Assize Court judgment of 9 March 2007.

The fact that the applicants had been recognised as guilty and sentenced to seven and a half years' imprisonment could not remove their initial right to be presumed innocent until the legal establishment of their guilt.

Thus, the use by the courts, in the context of the reopening of the proceedings, of the term "the accused/convicted person" to refer to the applicants, even before any judgment on the merits of their case, had impaired the applicants' right to be presumed innocent.

(b) *Concerning the indication of the criminal conviction on the applicants' criminal record after the reopening of the trial* – The indication of the first conviction had been maintained on the applicants' criminal record even though the Court had found a violation of certain provisions of the Convention in its judgment, which had led to the acceptance by the competent domestic courts, in accordance with the law in force, of the request for the reopening of the trial submitted by the applicants.

Therefore, according to the Court of Cassation, where the proceedings were reopened, the case was to be heard as if it were being adjudicated upon for the first time. The European Court of Human Rights took the view that the new proceedings were independent of the first.

The indication in question, which presented the applicants as guilty whereas, in the context of the reopening of the proceedings, they should in principle have been regarded merely as presumed to have committed offences for which the judgment still had to be rendered, raised an issue with regard to the applicants' right to be presumed innocent, as guaranteed by Article 6 § 2 of the Convention.

Consequently, the Government's assertion that the deletion of the applicants' first conviction from their criminal record could take place only after the sentencing in the reopened proceedings was problematic. It ran counter to the Court of Cassation's reasoning and the Court's well-established case-law in such matters. In that connection there was a fundamental difference between the fact of saying that someone was merely suspected of committing a criminal offence and an unequivocal declaration, in the absence of a final conviction, that the person had committed the offence as charged. In the present case, the indication on the criminal record had had such declaratory value.

Conclusion: violation (five votes to two).

Article 3 of Protocol No. 1: The applicants had each submitted their candidature to the Higher Electoral Board to stand for the parliamentary elections of July 2007 as independent candidates. The Board had rejected their candidatures on the ground that their criminal records showed their convictions by the Security Court in December 1994 and that they did not therefore fulfil the statutory requirements.

There had thus been interference with the applicants' exercise of their right to stand for election under Article 3 of Protocol No. 1.

The legal question to be settled was thus whether the considerations of the Assize Court in its decision of May 2007, according to which the applicants had not yet served the totality of their prison sentences imposed by the Security Court in December 1994, satisfied the requirements of the law.

The Court examined the applicants' complaint in the light of the reasoning it had developed under Article 6 § 2 of the Convention. When proceedings were reopened following a judgment of the European Court finding a violation, the question arising was that of the foreseeability of the effects of the national law. In that connection, it could be seen from the Court of Cassation's judgment of July 2004 that where proceedings were reopened the case had to be heard as if the proceedings were completely independent of the first. The case in question thus had to be heard as if the court were adjudicating upon it for the first time. The Court found that the retention of the applicants' initial conviction on their criminal record, after the reopening of the proceedings, had breached their right to be presumed innocent under Article 6 § 2.

That being said, the Court was of the opinion that, first, the application by the Assize Court in its decision of May 2007 of the statutory provisions in question and the interpretation by the Court of Cassation in its judgment of July 2004 concerning the consequences of the reopening of proceedings following a finding of a violation by the European Court and, second, the retention of the impugned indication on the applicants' criminal record, did not satisfy the criterion of foreseeability of the law within the meaning of the Court's case-law. The interference was not therefore prescribed by law. Accordingly, it was not necessary to ascertain whether the interference pursued a legitimate aim or if it was proportionate to that aim.

Accordingly, the manner in which the impugned national legislation in force at the material time had been applied in the present case had restricted the applicants' rights to stand for election under Article 3 of Protocol No. 1 to the point of impairing those rights in their very substance.

Conclusion: violation (five votes to two).

Article 41: EUR 6,000 to each of the applicants for non-pecuniary damage.

(See *Sadak and Others v. Turkey (no. 1)*, 29900/96 et al., 17 July 2001, Information Note 32)

Article 6 § 3 (c)

Defence through legal assistance

Delayed access to a lawyer during police questioning owing to exceptionally serious and imminent threat to public safety: *case referred to the Grand Chamber*

Ibrahim and Others v. the United Kingdom - 50541/08 et al.
Judgment 16.12.2014 [Section IV]

The first three applicants were arrested and refused legal assistance for periods of between four and eight hours to enable the police to conduct with them so-called "safety interviews" in relation to explosive devices found in the London public transportation system two weeks after a bomb attack in London in July 2005. The fourth applicant was initially interviewed by the police as a witness, but eventually started to incriminate himself by explaining his encounter with one of the suspected bombers shortly after the attacks. The police did not, at that stage, arrest and advise him of his right to silence and to legal assistance, but continued to question him as a witness and took a written statement.

In their applications to the European Court the applicants complained that their lack of access to lawyers during their initial police questioning and the admission in evidence at trial of their statements had violated their right to a fair trial under Article 6 §§ 1 and 3 (c) of the Convention.

In a judgment of 16 December 2014 (see Information Note 180), a Chamber of the Court found, by six votes to one, that there had been no violation of Article 6 §§ 1 and 3 (c). In particular, the Court found that there had been an exceptionally serious and imminent threat to public safety that provided compelling reasons justifying the temporary delay of all four applicants' access to lawyers and that no undue prejudice had been caused to the applicants' right to a fair trial as a result of the failure to provide them access to a lawyer.

On 1 June 2015 the case was referred to the Grand Chamber at the applicants' request.

Article 6 § 3 (d)

Examination of witnesses

Conviction for membership of an illegal organisation based on the statements of an anonymous witness whom the accused had been unable to question: *violation*

Balta and Demir v. Turkey - 48628/12
Judgment 23.6.2015 [Section II]

(See Article 6 § 1 (criminal) above, page 23)

ARTICLE 8

Respect for private and family life
Respect for home

Denial of access to homes to Azerbaijani citizens displaced in the context of the Nagorno-Karabakh conflict: *violation*

Chiragov and Others v. Armenia - 13216/05
Judgment 16.6.2015 [GC]

(See Article 1 above, page 9)

Impossibility for an Armenian citizen displaced in the context of the Nagorno-Karabakh conflict to gain access to his home and relatives' graves: *violation*

Sargsyan v. Azerbaijan - 40167/06
Judgment 16.6.2015 [GC]

(See Article 1 above, page 12)

Respect for private and family life

Ban on long-term family visits to life prisoners: *violation*

Khoroshenko v. Russia - 41418/04
Judgment 30.6.2015 [GC]

Facts – The applicant is currently serving a sentence of life imprisonment. During the first ten years of

detention in a special-regime correctional colony, he was placed under the strict regime, implying, *inter alia*, restrictions on the frequency and length of visits and a limitation on the number of visitors, and various surveillance measures in respect of those meetings. The applicant could correspond in writing with the outside world, but there was a complete ban on telephone calls except in an emergency.

Law – Article 8: The measures in respect of the visits to which the applicant was entitled during the ten years spent in prison under a strict regime amounted to interference with his right to respect for his "private life" and his "family life" within the meaning of Article 8.

The applicant's detention under the strict regime within the special-regime correctional colony had a clear, accessible and sufficient legal basis.

For ten years, the applicant had been able to maintain contact with the outside world through written correspondence, but all other forms of contact had been subject to restrictions. He had been unable to make any telephone calls other than in an emergency, and could receive only one visit from two adult visitors every six months, and then for four hours. He was separated from his relatives by a glass partition and a prison guard had been present and within hearing distance at all times.

The restrictions, imposed directly by law, had been applied to the applicant solely on account of his life sentence, irrespective of any other factors. The regime had been applicable for a fixed period of ten years, which could be extended in the event of bad behaviour, but could not be shortened. The restrictions had been combined within the same regime for a fixed period and could not be altered.

A sentence of life imprisonment could only be handed down in Russia for a limited group of extremely reprehensible and dangerous actions and, in the case at hand, the authorities had had, among other things, to strike a delicate balance between a number of private and public interests. The Contracting States enjoyed a wide margin of appreciation in questions of penal policy. It could not therefore be excluded, in principle, that the gravity of a sentence could be tied, at least to some extent, to a type of prison regime.

According to the regulations at European level on the visiting rights of prisoners, including life-sentence prisoners, the national authorities were under an obligation to prevent the breakdown of family ties and to provide life-sentence prisoners with a reasonably good level of contact with their families, with visits organised as often as possible and in as normal a manner as possible. Although there was a considerable variation in practices regarding the regulation of prison visits, those in the Contracting States set out a minimum frequency of prison visits for life-sentence prisoners of no lower than once every two months. Further, the majority of the Contracting States did not draw any distinction between prisoners on the basis of their sentence and a generally accepted minimum frequency of visits was not less than once a month. In this context, the Russian Federation appeared to be the only jurisdiction within the Council of Europe to regulate the prison visits of all life-sentence prisoners as a group by combining an extremely low frequency of prison visits and the lengthy duration of such a regime.

That situation had the consequence of narrowing the margin of appreciation left to the respondent State in the assessment of the permissible limits of the interference with private and family life in this sphere.

In contrast to the Russian Constitutional Court in its decision of June 2005, the European Court considered that the regime had involved a combination of restrictions which considerably worsened the applicant's situation compared with that of an average Russian prisoner serving a long-term sentence. Those restrictions could not be seen as inevitable or inherent in the very concept of a prison sentence.

The Government submitted that the restrictions were aimed at "the restoration of justice, reform of the offender and the prevention of new crimes". The applicant had been able to have only one cell mate throughout the relevant period and had belonged to a group of life-sentence prisoners who served their sentences separately from other detainees. The Court was struck by the severity and duration of the restrictions in the applicant's case and, more specifically, by the fact that, for an entire decade, he had been entitled to only two short visits a year.

The Court's case-law had consistently taken the position that, in general, prisoners continued to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention fell expressly within the scope of Article 5 of the Convention, and that a prisoner did not forfeit his or her Convention rights merely because he or she had been detained following conviction.

Thus, the relevant Russian legislation did not take the interests of the convict and his or her relatives and family members adequately into account, as required by Article 8 of the Convention, the content of other international-law instruments concerning family visits and the practice of international courts and tribunals, which invariably recognised as a minimum standard for all prisoners, without drawing any distinction between life-sentence and other types of prisoners, the right to an "acceptable" or "reasonably good" level of contact with their families.

Referring to the Constitutional Court's decisions, the Government had contended that the restrictions served to reform the offender. The applicant's prison regime did not pursue the aim of reintegration, but was rather aimed at isolating him. However, the Code of Execution of Criminal Sentences mentioned the possibility for a life-sentence prisoner to request release on parole after serving a period of twenty-five years. The very strict nature of the applicant's regime prevented life-sentence prisoners from maintaining contacts with their families and thus seriously complicated their social reintegration and rehabilitation instead of fostering and facilitating it. This was also contrary to the recommendations of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) in this area and to Article 10 § 3 of the International Covenant on Civil and Political Rights, in force with respect to Russia since 1973, and also several other instruments.

Thus, the interference with the applicant's private and family life resulting from the application for a long period, solely on account of the gravity of his sentence, of a regime characterised by such a low frequency of authorised visits, had been, as such, disproportionate to the aims invoked by the Government. The effect of this measure had been intensified by the long period of time it was applied, and also by various rules on the practical arrangements for prison visits, such as the ban on direct physical contact, separation by a glass wall or metal bars, the continuous presence of prison guards during visits, and the limit on a maximum number of adult visitors. This had made it especially difficult for the applicant to maintain contact with his child and elderly parents during a time when maintaining family relationships had been particularly crucial for all the parties involved. In addition, certain of his relatives and members of the extended family had simply been unable to visit him in prison throughout this entire period.

Having regard to the combination of various long-lasting and severe restrictions on the applicant's ability to receive prison visits and the failure of the regime on prison visits to give due consideration to the principle of proportionality and to the need for rehabilitation and reintegration of long-sentence prisoners, the measure in question had not struck a fair balance between the applicant's right to the protection of his private and family life, on the one hand, and the aims referred to by the respondent Government on the other. It followed that the respondent State had overstepped its margin of appreciation in this regard.

Conclusion: violation (unanimously).

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

(See also the Factsheet on Detention conditions and treatment of prisoners)

Removal of a child born abroad as a result of a surrogacy arrangement entered into by a couple later found to have no biological link with the child: *case referred to the Grand Chamber*

Paradiso and Campanelli v. Italy - 25358/12
Judgment 27.1.2015 [Section II]

The applicants are a married couple. In 2006 they obtained authorisation to adopt a child. After unsuccessfully attempting to have a child through *in vitro* fertilisation, they decided to have recourse to a gestational surrogacy arrangement in order to become parents. To that end, they contacted a Moscow-based clinic specialising in assisted-reproduction techniques and entered into a surrogacy agreement with a Russian company. After successful *in vitro* fertilisation in May 2010 – supposedly carried out using the second applicant's sperm – two embryos "belonging to them" were implanted in the womb of a surrogate mother. A baby was born in February 2011. The surrogate mother gave her written consent to the child being registered as the applicants' son. In accordance with Russian law, the applicants were registered as the baby's parents. In line with the provisions of the Hague Convention Abolishing the Requirement for Legalisation for Foreign Public Documents of 5 October 1961 ("the Hague Convention"), an apostille was placed on the Russian birth certificate, which did not refer to the surrogacy arrangement.

In May 2011, having requested that the Italian authorities register the birth certificate, the applicants were placed under investigation for "misrepresentation of civil status" and violation of the adoption legislation, in that they had brought the child into the country in breach of the law and of their authorisation to adopt, which had ruled out the adoption of such a young child. On the same date the public prosecutor requested the opening of proceedings to release the child for adoption, since he was to be considered as having been abandoned. In August 2011 a DNA test was carried out at the court's request. It showed that, contrary to the applicants' submissions, no genetic link existed between the second applicant and the child. In October 2011 the minors' court decided to remove the child from the applicants. Contact was forbidden between the applicants and the child. In April 2013 the court held that it was legitimate to refuse to register the Russian birth certificate and ordered that a new birth certificate be issued, indicating that the child had been born to unknown parents and giving him a new name. The proceedings for the child's adoption were still pending. The domestic court held that the applicants did not have standing to act in those proceedings.

By a judgment of 27 January 2015 (see Information Note 181), a Chamber of the Court held that the child's removal had amounted to a breach of Article 8 of the Convention on account, *inter alia*, of the hasty conclusion that the intended parents would not have been capable of bringing up the child and of the failure to take adequate account of the latter's interests, in that he had had no legal existence for more than two years.

On 1 June 2015 the case was referred to the Grand Chamber at the Government's request.

Respect for private life

Legislation preventing health professionals assisting with home births: *case referred to the Grand Chamber*

Dubská and Krejzová v. the Czech Republic - 28859/11 and 28473/12
Judgment 11.12.2014 [Section V]

The applicants wished to give birth at home, but under Czech law health professionals are prohibited from assisting with home births. The first applicant eventually gave birth to her child alone at home while the second applicant delivered her child in a hospital. The Constitutional Court dismissed the first applicant's complaint for failure to exhaust the available remedies but expressed doubts as to the compliance of the relevant Czech legislation with Article 8 of the Convention.

In their applications to the European Court, the applicants complained of a violation of Article 8 as mothers had no choice but to give birth in a hospital if they wished to be assisted by a health professional.

In a judgment of 11 December 2014 (see Information Note 180), a Chamber of the Court, by six votes to one, found that there had been no violation of Article 8 of the Convention. In particular, it found that, in adopting and applying the policy relating to home births, the authorities had not exceeded the wide margin of appreciation afforded to them or upset the requisite fair balance between the competing interests.

On 1 June 2015 the case was referred to the Grand Chamber at the applicants' request.

Finding of paternity based *inter alia* on alleged father's refusal to submit to DNA tests: *inadmissible*

Canonne v. France - 22037/13
Decision 2.6.2015 [Section V]

Facts – In 1982 a married woman who was in the middle of a divorce gave birth to a daughter. At the time she worked in the same group of companies as the applicant. In 1988 she married another man, who acknowledged paternity of the daughter. The couple divorced in 1997. In 2002 the daughter, who had by now attained her majority, brought proceedings against the applicant, seeking a judicial declaration of paternity. The court ordered DNA tests, which the applicant refused to undergo. Faced with this refusal and basing its conclusion on various pieces of evidence, the court found that the applicant was the father.

Before the European Court, the applicant complained, in particular, that the fact of inferring his paternity from his refusal to submit to DNA tests had breached his right to respect for private life.

Law – Article 8: Article 8 of the Convention was applicable to the applicant's case in two respects. Firstly, in that both the recognition and the setting

aside of a parent-child relationship directly affected the identity of the man or woman whose parenthood was in issue. Secondly, in that the taking of a blood sample entailed by the domestic courts' order for expert evidence amounted to interference with physical integrity, and in that an individual's genetic data was part of his or her intimate identity. In consequence, the recognition by the domestic courts of a parent-child relationship based, among other things, on the applicant's refusal to submit to the genetic testing they had ordered amounted to interference in the exercise of his right to respect for his private life. That interference had been in accordance with the law and was intended to guarantee the daughter the full enjoyment of her right to respect for private life, which included not only the right to know her parentage, but also the right to legal recognition of the parent-child relationship.

In several previous cases[1] the Court had found violations of the rights guaranteed to children by Article 8 on account of domestic courts' inability to prevent the procedure for a declaration of paternity being hampered by the alleged father's refusal to undergo DNA tests. The domestic courts' finding in the present case had been in line with that case-law.

In the present case, the person attempting to establish that the applicant was her father was already an adult when she brought the domestic proceedings. However, although it followed that the best interests of the child had not been at stake, this did not weaken her right under Article 8 to know who her parents were and to have that fact recognised, a right which did not cease to exist over time.

Moreover, in establishing the parent-child relationship, the domestic courts had not relied solely on the applicant's refusal to submit to the genetic testing that had been ordered. In addition to the written comments and statements from each of the parties before them, they had taken into account documents and witness statements. The refusal was only an "additional piece of evidence", which merely confirmed a conclusion that had already partly been established in the light of the other evidence. In finding as they did, the domestic courts had not exceeded the wide margin of appreciation available to them.

Conclusion: inadmissible (manifestly ill-founded).

1. *Mikulić v. Croatia*, 53176/99, 7 February 2002, Information Note 39; and *Ebru and Tayfun Engin Çolak v. Turkey*, 60176/00, 30 May 2006.

(See also the Factsheet on Children's Rights, under the heading "Right to know one's origins")

ARTICLE 10

Freedom of expression

Criminal conviction on account of the use of the word "*kelle*" ("mug" in Turkish) when referring to visual portrayals of the founder of the Turkish Republic before a limited audience: *violation*

Özçelebi v. Turkey - 34823/05
Judgment 23.6.2015 [Section II]

Facts – The applicant, a navy commander, was charged before a military court with insulting the memory of Atatürk. He was accused of having used the word "*kelle*" to a non-commissioned officer in November 1997 while pointing at images of Atatürk.

In June 1998 the military court sentenced him to one year's imprisonment and refused to suspend the sentence. It noted that the term "*kelle*" usually referred to the head, but that it could also have a slang meaning which indicated the head of animals. The court then stated that the words "head" or "bust" should have been used, rather than the term "*kelle*", which the applicant had deliberately used with the intention of insulting the memory of the founder of the Republic of Turkey.

At the end of lengthy proceedings, during which, *inter alia*, the military court had ruled that it did not have jurisdiction and transferred the case to the civilian courts, the criminal court complied in August 2013 with the Court of Cassation's judgment, namely one year's imprisonment, commuted to a fine, and decided to suspend execution of the fine for a period of three years.

Law – Article 10: The applicant's conviction by the domestic courts for insulting the memory of Atatürk on account of his use of the term "*kelle*" to refer to representations of the founder of the Republic of Turkey amounted to interference in the applicant's exercise of his right to freedom of expression. The interference had been prescribed by the law criminalising insults to the memory of Atatürk. The applicant's conviction had been intended to protect the reputation and rights of others.

Atatürk was an emblematic figure in modern Turkey, and the Turkish Parliament had chosen to criminalise certain acts which it considered insulting to his memory and injurious to the feelings of Turkish society.

In the present case, although the term "*kelle*" could admittedly have a pejorative connotation in Turkish, the domestic courts had not specified how its use, in the circumstances of the case, had been insulting to Atatürk's memory. Indeed, before relinquishing the case, the military court had based its judgment convicting the applicant, of June 1998, on grounds which were not used by the civilian courts in their judgments reaching a similar conclusion. These courts had not conducted any analysis of the context in which the impugned comments had been made. In particular, they had not taken into consideration the fact that the applicant had made them in a confined space and before a select group of persons. Thus, apart from the non-commissioned officer to whom he was speaking and three other servicemen present during the incident, no one had been aware of the applicant's remarks. In addition, there was nothing to indicate that he had had any intention or verifiable wish to make them public. Thus, the circumstances in which the impugned remarks had been made considerably limited their impact, so that they could not be considered as representing in themselves an attack of any gravity on Atatürk's reputation.

As to the nature and severity of the punishment, at the close of lengthy proceedings involving several procedural developments and which lasted almost sixteen years, the applicant had ultimately been convicted and sentenced to one year's imprisonment, commuted to a suspended fine. Although none of the sentences imposed on the applicant had ultimately been executed, it remained the case that he had been under the threat of a prison sentence, imposed, moreover, on two occasions. Thus, the fact of sentencing the applicant to a prison sentence, even if it had been commuted to an alternative measure that was still suspended, amounted, in the context of Article 10 of the Convention, to a sanction which was disproportionate to the aim pursued.

Having regard to the foregoing, the grounds relied upon by the domestic courts to justify the impugned interference had not been sufficient, and it had been disproportionate to the legitimate aim pursued. The applicant's conviction for defamation had not been "necessary in a democratic society".

Conclusion: violation (unanimously).

Article 41: claim made out of time.

Lawyer's conviction for defamatory remarks against a judge made in a letter sent to several judges of the same court: *no violation*

Peruzzi v. Italy - 39294/09
Judgment 30.6.2015 [Section IV]

Facts – In 2001 the applicant, who was a lawyer at the time, wrote to the Supreme Council of the Judiciary complaining of the conduct of Judge X of the Lucca District Court. He subsequently sent a "circular letter" to several judges of the same court reproducing the content of the first letter, but without referring to Judge X by name. The first part of the circular letter gave details of the decisions adopted by the judge in question in the context of a set of inheritance proceedings, while the second part dealt with what the applicant deemed to be unacceptable conduct on the part of judges, including "wilfully committing errors with malice or gross negligence or through lack of commitment". Judge X lodged a complaint against the applicant for defamation. In 2005 the District Court sentenced the applicant to four months' imprisonment for defamation and insult. It considered that the applicant had overstepped the limits of his right to criticise by alleging that Judge X had committed errors "wilfully"; this constituted a serious affront to the honour of the judge in question. In the District Court's view, there was no doubt that Judge X had been the subject of the accusations contained in the circular letter. The applicant appealed. In 2007 the Court of Appeal replaced the custodial sentence imposed on the applicant by a fine of EUR 400. The applicant was also ordered to pay EUR 15,000 to Judge X in respect of non-pecuniary damage. In 2008 the Court of Cassation dismissed an appeal on points of law by the applicant.

Law – Article 10: The issue in the present case concerned remarks made by a lawyer outside the courtroom, as in the case of *Morice v. France* ([GC], 29369/10, 23 April 2015, Information Note 184).

The Court could not accept the applicant's argument that the criticisms contained in his circular letter had not been directed against Judge X, but against the Italian judicial system in general. The letter in question had contained whole passages taken from the letter which the applicant had written to the Supreme Council of the Judiciary complaining about Judge X's conduct, and had summarised the main points of the judicial dispute in the context of which, according to the applicant,

Judge X had made unjust decisions. Although the second part of the letter had been written in the form of "general considerations" concerning conduct that was unacceptable for judges, it could not fail to be interpreted as criticism of the behaviour of Judge X, in view of the first part of the letter, which had contained details of the decisions adopted in the inheritance proceedings.

The Court therefore sought to ascertain whether the complaints concerning Judge X had overstepped the limits of permissible criticism in a democratic society. The first criticism of the judge made by the applicant, namely that he had adopted unjust and arbitrary decisions, had not amounted to excessive criticism since the remarks constituted value judgments, the truth of which, according to the Court's case-law, was not susceptible of proof. This criticism had had some factual basis, given that the applicant had represented one of the parties to the inheritance proceedings in question. However, the second criticism, to the effect that the judge was "biased" and had committed errors "wilfully ... with malice or gross negligence or through lack of commitment", implied that Judge X had disregarded his ethical obligations as a judge or had even committed a criminal offence (the adoption by a judge of a decision he or she knew to be erroneous could constitute an abuse of official authority). In any event, the circular letter had denied that Judge X possessed the qualities of impartiality, independence and objectivity which characterised the exercise of judicial functions. The applicant had not sought at any stage to prove the reality of the specific conduct of which he accused Judge X and had not produced any evidence demonstrating an element of malice in the decisions of which he complained. In the Court's view, his allegations of wrongful conduct on the part of Judge X had been based solely on the fact that the judge had rejected the applicant's claims in the interests of his clients. Moreover, the applicant had sent the letter without awaiting the outcome of the case he had brought against Judge X before the Supreme Council of the Judiciary.

The applicant's criticisms had not been made at the hearing or in the context of the inheritance proceedings before the courts, a fact which distinguished the present case from that of *Nikula v. Finland* (31611/96, 21 March 2002, Information Note 40). The letter had been sent to Judge X and numerous judges of the Lucca District Court in a context unrelated to any step in the proceedings; this had been bound to undermine Judge X's reputation and professional image.

Lastly, the custodial sentence originally imposed on the applicant had been replaced on appeal by a small fine of EUR 400 which, moreover, had been waived. Similarly, the amount of compensation awarded to Judge X (EUR 15,000) could not be regarded as excessive. The applicant's conviction for the defamatory remarks made in his circular letter, and the penalty imposed on him, had therefore not been disproportionate to the legitimate aims pursued, namely to protect the reputation of others and maintain the authority and impartiality of the judiciary. The reasons given by the Italian courts had been relevant and sufficient to justify such measures.

Conclusion: no violation (five votes to two).

Freedom to impart information

Award of damages against internet news portal for offensive comments posted on its site by anonymous third parties: *no violation*

Delfi AS v. Estonia - 64569/09
Judgment 16.6.2015 [GC]

Facts – The applicant company owned one of the largest Internet news portals in Estonia. In 2006, following the publication of an article on the portal concerning a ferry company, a number of comments containing personal threats and offensive language directed against the ferry-company owner were posted under the article. Defamation proceedings were instituted against the applicant company, which was ultimately ordered to pay EUR 320 in damages.

In a judgment of 10 October 2013 (see Information Note 167), a Chamber of the Court found unanimously that there had been no violation of Article 10.

On 17 February 2014 the case was referred to the Grand Chamber at the applicant company's request.

Law – Article 10: This was the first case in which the Court had to examine a complaint concerning user-generated expressive activity on the Internet. Acknowledging important benefits that could be derived from the Internet in the exercise of freedom of expression, the Court reiterated that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights. Moreover, the Court observed that, in the present case,

the impugned comments constituted hate speech and direct incitement to violence, that the applicant company's news portal was one of the biggest Internet media in the country and that there had been public concern about the controversial nature of the comments it attracted. Therefore, the scope of examination of the case was limited to the assessment of the "duties and responsibilities" of Internet news portals, in the light of Article 10 § 2, when they provided for economic purposes a platform for user-generated comments on previously published content and some users engaged in clearly unlawful forms of speech.

The Court was satisfied that domestic legal instruments made it foreseeable that a media publisher running an Internet news portal for an economic purpose could, in principle, be held liable under domestic law for the uploading of clearly unlawful comments on its portal. As a professional publisher, the applicant company was in fact in a position to assess the risks related to its activities and must have been able to foresee the legal consequences which these could entail. Therefore, the interference in issue was "prescribed by law" within the meaning of Article 10 of the Convention.

As regards the necessity of the interference with the applicant company's freedom to impart information, the Court attached particular weight to the professional and commercial nature of the applicant's news portal, and to the fact that it had an economic interest in the posting of comments. Moreover, only the applicant company had the technical means to modify or delete the comments published on the news portal. Against this background, the applicant company's involvement in making public the comments on its articles on the portal went beyond that of a passive, purely technical service provider.

As to whether the liability of the actual authors of the comments could serve as an alternative to the liability of the Internet news portal, the Court recalled that anonymity on the Internet, although an important value, had to be balanced against other rights and interests. In reaching this conclusion, it was mindful of the interest of Internet users in not disclosing their identity, but also pointed to the sometimes very negative effects of an unlimited dissemination of information on the Internet. In this regard, the Court referred to a judgment in which the Court of Justice of the European Union (CJEU) had found that the individual's fundamental rights, as a rule, overrode the economic interests of the search engine operator and the interests of other Internet users.[1] Moreover, the Internet allowed for different degrees of anonymity, with providers sometimes being the only ones able to identify Internet users that wished to remain anonymous *vis-à-vis* the public. In the present case, the uncertain effectiveness of measures allowing the establishment of the identity of the authors of the comments, coupled with the lack of instruments put in place by the Internet portal with a view to making it possible for a victim of hate speech to effectively bring a claim against the authors of the comments, supported the domestic courts' view that the injured person had to have the choice of bringing a claim against the applicant company or the authors of the comments.

As to the measures taken by the applicant company to tackle the publication of unlawful comments on its portal, an obligation for large news portals to take effective measures to limit the dissemination of hate speech and speech inciting violence could not be equated to "private censorship". In fact, the ability of a potential victim of such speech to continuously monitor the Internet was more limited than the ability of a large commercial Internet news portal to prevent or remove unlawful comments. Notwithstanding certain mechanisms to deal with comments amounting to hate speech or speech inciting to violence actually in place on the applicant company's website, which could function in many cases as an appropriate tool for balancing the rights and interests of all involved, they had been insufficient in the specific circumstances of the case, as the unlawful comments had remained online for six weeks.

Finally, a sanction of EUR 320 imposed on the applicant company could by no means be considered disproportionate to the breach established by the domestic courts. It also did not appear that the applicant company had had to change its business model as a result of the domestic proceedings. It followed from the above that the domestic courts' imposition of liability on the applicant company had been based on relevant and sufficient grounds and had not constituted a disproportionate restriction on its right to freedom of expression.

Conclusion: no violation (fifteen votes to two).

(See also *Krone Verlag GmbH & Co. KG v. Austria (no. 4)*, 72331/01, 9 November 2006; *K.U. v. Finland*, 2872/02, 2 December 2008, Information Note 114; *Ahmet Yıldırım v. Turkey*, 3111/10,

1. Joined Cases C-236/08 to C-238/08, *Google France SARL and Google Inc.*, CJEU judgment of 23 March 2010 (grand chamber).

18 December 2012, Information Note 158; see also the Factsheet on Hate Speech)

ARTICLE 11

Form and join trade unions

Refusal to register a group of self-employed farmers as a trade union: *no violation*

Manole and "Romanian farmers direct" v. Romania - 46551/06
Judgment 16.6.2015 [Section III]

Facts – In January 2006 the first applicant, a farmer, and 48 other individuals held a constituent general meeting at which they decided to form a trade union called "Romanian Farmers Direct". The first applicant was elected as its president.

The first applicant subsequently applied to the District Court to have the group registered as a trade union for the purpose of acquiring legal personality. According to its statutes, the main aim of the union would be to defend the interests of its members, who were farmers or persons who provided services, including transport, to farmers. The District Court declared the application for registration inadmissible on the ground that only employees and public servants could form trade unions. The appeals against that decision were dismissed.

Law – Article 11: The refusal to register the applicants as a trade union-type association amounted to interference with the exercise of their right to form and join trade unions. The interference had been prescribed by a law which was accessible and foreseeable and according to which only employees and public servants were entitled to set up trade union organisations; this excluded self-employed farmers. The interference had pursued a legitimate aim, namely to safeguard the economic and social order by maintaining a distinction between trade unions and other kinds of associations.

At the time of the events, self-employed farmers had enjoyed the same rights of association as any other self-employed persons carrying on a profession or occupation in industry or in other sectors of the economy. This was in line with Convention No. 11 of the International Labour Organization (ILO) on the right of association (agriculture), which had been ratified by Romania in 1930. As self-employed farmers, the first applicant and the other persons who had sought to register as a trade union were entitled in the same way as other self-employed persons to join trade unions but not to form them.

In view of the sensitive social and political issues linked to rural employment and the high degree of divergence between national systems in that regard, the Contracting States should be afforded a wide margin of appreciation as to the manner in which they secured the right of freedom of association to self-employed farmers. Moreover, under the current legislation farm employees and the members of cooperatives had the right to form trade unions and to belong to them.

Furthermore, in the light of the general comments of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), adopted in 2012 and published in 2013, concerning the application by Romania of Convention No. 87 on Freedom of Association and Protection of the Right to Organise, the Court did not find sufficient grounds to infer that the exclusion of self-employed farmers from entitlement to form trade unions constituted a breach of Article 11 of the Convention.

The legislation in force at the time of the events, like that currently in force, had in no way restricted the applicants' right to form professional associations. Moreover, the Court had no evidence in the present case to suggest that, if the persons concerned were to form an association, it would lack the essential prerogatives enabling it to defend the collective interests of its members in dealings with the public authorities.

Under the domestic legislation, farmers' organisations enjoyed essential rights enabling them to defend their members' interests in dealings with the public authorities, without needing to be established as trade unions. In agriculture as in the other sectors of the economy, that form of association was henceforth reserved solely for employees and members of cooperatives.

In sum, the refusal to register the applicants as a trade union had not overstepped the national authorities' margin of appreciation in this sphere and had therefore not been disproportionate.

Conclusion: no violation (unanimously).

(See also the Factsheet on Trade union rights)

ARTICLE 13

Effective remedy

Lack of effective remedy in respect of loss of homes and property by persons displaced in the context of the Nagorno-Karabakh conflict: *violation*

Chiragov and Others v. Armenia - 13216/05
Judgment 16.6.2015 [GC]

(See Article 1 above, page 9)

Lack of effective remedy in respect of loss of homes or property by persons displaced in the context of the Nagorno-Karabakh conflict: *violation*

Sargsyan v. Azerbaijan - 40167/06
Judgment 16.6.2015 [GC]

(See Article 1 above, page 12)

ARTICLE 14

Discrimination (Article 8)

Refusal to reinstate former KGB employee based on legislation previously found to be contrary to the Convention: *violation*

Sidabras and Others v. Lithuania - 50421/08 and 56213/08
Judgment 23.6.2015 [Section II]

Facts – The three applicants were former employees of the Lithuanian branch of the KGB. Following a law introduced in 1998 (the so-called "KGB Act"), providing that former KGB employees were banned from taking up certain private sector jobs for a period of ten years, the applicants were dismissed from their posts and banned from applying for public-sector and various private-sector posts. They subsequently brought proceedings before the domestic courts, which were unsuccessful. In its judgments in *Sidabras and Džiautas v. Lithuania* and *Rainys and Gasparavičius v. Lithuania* the Court held that the ban violated Article 14 taken in conjunction with Article 8 of the Convention. Following those judgments, the applicants initiated new domestic proceedings claiming that they were still unable to find employment in the private sector because the KGB Act had not been amended. However, their complaints were unsuccessful.

Law – Article 14 in conjunction with Article 8

(a) *Admissibility* – The respondent Government had argued that the applicants' complaint should be declared inadmissible as being mainly related to issues previously examined by the Court.

The Court noted, however, that following the Court's above-mentioned judgments, the first and second applicants (Mr Sidabras and Mr Džiautas) had lodged applications with the Lithuanian administrative courts claiming damages for arbitrary discrimination. In the wake of those administrative court proceedings, the Supreme Administrative Court had unequivocally acknowledged that the Convention and the Court's case-law could be directly relied upon when defending human rights at the domestic level, and that in the hierarchy of legal norms the Convention took priority over national laws. The third applicant (Mr Rainys) had also initiated new domestic proceedings, seeking reinstatement in his previous job. However, although the third applicant's dismissal had been found to be contrary to the Convention, he had been unable to obtain reinstatement because the KGB Act remained in force.

In the light of the continuous existence of that Act, the elements referred to above and the contradictory conclusions of the highest courts of administrative and general jurisdiction constituted in the Court's view "relevant new information" within the meaning of Article 35 (2) (b) of the Convention concerning the Convention rights of former KGB employees capable of giving rise to a fresh violation of Article 14 taken in conjunction with Article 8. Furthermore, although the Council of Europe's Committee of Ministers had begun its monitoring of the execution of the Court's judgments in the applicants' cases, a final resolution had not yet been adopted. Accordingly, the complaints were compatible *ratione materiae* with the Convention and its Protocols.

(b) *Merits*

(i) *First and second applicants* – Pursuant to the principles laid down in *Rainys and Gasparavičius*, the Court had to determine whether the first two applicants had sufficiently demonstrated that the KGB Act still prevented them from obtaining private-sector employment, so as to reverse the burden of proof and to require the Government to disprove the existence of a discriminatory measure in violation of Article 14 taken in conjunction with

Article 8. In the first applicant's case, the domestic court had concluded that there was no proof that, after the Court's judgment of 2004, he had been prevented from obtaining a private sector job because of the restrictions contained in the KGB Act. Furthermore, the first applicant had not provided any particular information as to who had refused to employ him as a result of those restrictions, or when. Having regard to the documents in the Court's possession, there was nothing to contradict the domestic court's conclusion that the first applicant had been unemployed either for justified reasons or for having refused a number of job offers. As to the second applicant, he had acknowledged that he had been a trainee lawyer since 2006 and had never attempted to obtain other private sector employment. He had thus failed to substantiate his claim that he had continued to be discriminated against on account of his status. In the light of the foregoing, the first two applicants had not plausibly demonstrated that they had been discriminated against after the Court's judgments in their cases.

Conclusion: no violation in respect of the first and second applicants (four votes to three).

(ii) *The third applicant* – The domestic courts had acknowledged that the third applicant's dismissal had been contrary to the Convention. However, at the same time they had failed to order his reinstatement, without providing a proper explanation. Moreover, they had stated explicitly that "while the KGB Act ... is still in force, the question of reinstating the third applicant … may not be resolved favourably". In the light of this statement, and of the lack of reasoning by the domestic courts, the State had not convincingly demonstrated that the domestic courts' reference to the KGB Act had not been the decisive factor forming the legal basis on which the third applicant's claim for reinstatement had been rejected.

Conclusion: violation in respect of the third applicant (unanimously).

Article 41: EUR 6,000 to the third applicant in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See *Sidabras and Džiautas v. Lithuania*, 55480/00 and 59330/00, 27 July 2004, Information Note 67; and *Rainys and Gasparavičius v. Lithuania*, 70665/01 and 74345/01, 7 April 2005; see also *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], 32772/02, 30 June 2009, Information Note 120)

Conclusion of registered partnership and civil marriage before different authorities:
communicated

Dietz and Suttasom v. Austria - 31185/13
Hörmann and Moser v. Austria - 31176/13
[Section I]

The applicants, two homosexual couples, applied to the Office for Matters of Personal Status to contract a civil marriage, adding that if they were not permitted to marry, they wished to apply for a registered partnership, but only if it was concluded before the Office for Matters of Personal Status. Their application for the conclusion of a civil marriage was dismissed as, under the Civil Code, civil marriage could only be concluded by two persons of the opposite sex. The Office for Matters of Personal Status also dismissed their application for a registered partnership as such a partnership could only be concluded before the District Administrative Authority. The applicants unsuccessfully appealed against that decision before the administrative authorities and the domestic courts.

The applicants complain under Article 14 read in conjunction with Article 8 of the Convention that they were discriminated against on grounds of their sexual orientation, because registered partnerships (which are open exclusively to same-sex couples) are concluded before the District Administrative Authorities, while civil marriage (which can only be concluded by two persons of the opposite sex) is contracted before the Office for Matters of Personal Status.

Communicated under Article 14 read in conjunction with Article 8.

ARTICLE 34

Locus standi

Absence of standing of close relatives to complain in the name and on behalf of patient in state of total dependence

Lambert and Others v. France - 46043/14
Judgment 5.6.2015 [GC]

(See Article 2 above, page 15)

ARTICLE 35

Article 35 § 1

Effective domestic remedy – Russia

New Cassation appeal procedure introduced by Law no. 353-FZ constituted an effective remedy requiring exhaustion: *inadmissible*

Abramyan and Yakubovskiye v. Russia - 38951/13 and 59611/13
Decision 12.5.2015 [Section I]

Facts – The applicants, who were members of a cooperative of boat users, were sued by a municipality in 2012 for allegedly illegally purchasing land on which they built boathouses. The first-instance court found against the applicants, but that judgment was quashed on appeal. However, although the judgment in the applicants' favour had become legally binding, under the domestic law the municipality could lodge a cassation appeal with the Presidium of the Regional Court. In 2013 the applicants lost their case in first cassation at regional level and their boathouses were demolished shortly thereafter. In their applications to the European Court, the applicants complained that the quashing of a final court judgment in their favour had breached the principle of legal certainty and their rights under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

Law – Article 35 § 1: The Government had argued that the applications should be declared inadmissible since they had been lodged outside the six-month time-limit and the applicants had failed to exhaust all effective domestic remedies. By assessing the admissibility of the applicants' complaints, the Court had the possibility to examine for the first time a new cassation procedure which had been introduced in the domestic law in 2012.

(a) *Whether the supervisory-review procedure with the Presidium of the Supreme Court constituted a remedy to be exhausted* – As to the alleged failure by the applicants to lodge a supervisory review application with the Presidium of the Supreme Court, the Court noted that such a review application could only be lodged by a party if his or her cassation appeal had previously been examined on the merits by the Civil Chamber of the Supreme Court. However, in the circumstances of the applicants' case, in which such examination had not taken place, the supervisory review application could not be considered a remedy accessible to them. The Government's argument that the applicants had failed to exhaust the domestic remedies was therefore dismissed.

(b) *Whether the new procedure introduced by Law no. 353-FZ had been a remedy that required exhaustion and was relevant for the calculation of the six-month time-limit* – The applicants had lodged their applications more than six months after the dismissal of their cassation appeal by a single judge of the Supreme Court and less than six months after the dismissal decision was upheld by the Deputy President of the Supreme Court. The Court thus had to determine on which date the final decision had been taken in the case for the purpose of the six-month time-limit.

In its case-law concerning Russia, the Court had consistently held that a decision taken by a second-instance court at regional level under the former domestic law was a final national decision for the purposes of Article 35 of the Convention and the starting-point for calculation of the six-month time-limit. Supervisory-review applications to higher courts of general jurisdiction – namely, the presidia of the regional courts, the Civil Chamber of the Supreme Court and the Presidium of that court, and decisions taken by them on supervisory review – had not been considered relevant for the purposes of calculating that time-limit. However, the cassation appeal in the applicants' case had been exercised under a new procedure introduced in 2012. In order to establish whether the applicants' complaints had been lodged in time, the Court had to assess whether the new procedure had been a remedy requiring exhaustion by the applicants under Article 35 § 1 and thus relevant for the calculation of the six-month time-limit.

The Court examined several aspects of the new cassation procedure and found that it could no longer be considered an extraordinary remedy. In particular, the reform limited the cassation procedure to only two levels of jurisdiction and provided for specific time-limits for each stage of the examination of the case, thus removing uncertainty caused by the previous supervisory-review system. Moreover, the new cassation procedure allowed the parties to submit to the domestic authorities, including the Supreme Court, the substance of their Convention complaint and seek relief. The new procedure was thus to be considered an ordinary appeal on points of law. Therefore, it was justified to require persons intending to lodge a complaint about an alleged violation of their Convention rights to first use both cassation appeals under the new procedure. In line with the

principle of subsidiarity, the recognition of the cassation procedure as a remedy to be exhausted would from now on allow potential applicants to first submit their grievances to the highest domestic judicial body which would have an adequate opportunity to consider a complaint about an alleged violation of the Convention in civil cases and remedy any such violation before examination by the Court. However, the effective functioning of the cassation system for the review of binding and enforceable judgments would depend on strict compliance with the time-limits laid down in the domestic law and on effective access to the Supreme Court, which had to be available not only in theory but also in practice.

As to the applicants' complaint to the Deputy President of the Supreme Court, since it was a remedy which depended on an official's discretionary power and was not subject to any time-limit, it had to be considered an extraordinary remedy which the applicants were not required to exhaust for the purposes of Article 35.

Accordingly, the final decision at national level in the applicants' case had been the decision of the judge of the Supreme Court, which had been delivered more than six months before they had lodged their applications with the Court. The applications had thus been lodged out of time and had to be rejected under Article 35.

Conclusion: inadmissible (out of time).

(See also *Tumilovich v. Russia* (dec.), 47033/99, 22 June 1999, Information Note 7; *Denisov v. Russia* (dec.), 33408/03, 6 May 2004, Information Note 64; *Martynets v. Russia* (dec.), 29612/09, 5 November 2009, Information Note 124)

ARTICLE 46

Execution of judgment – General measures

Respondent State required to take legislative measures to stop the practice of detaining juveniles subject to correctional proceedings without a judicial decision

Grabowski v. Poland - 57722/12
Judgment 30.6.2015 [Section IV]

(See Article 5 § 1 above, page 21)

ARTICLE 1 OF PROTOCOL No. 1

Possessions
Peaceful enjoyment of possessions
Positive obligations

Armenia's failure to take measures to secure property rights of Azerbaijani citizens displaced in the context of the Nagorno-Karabakh conflict: *violation*

Chiragov and Others v. Armenia - 13216/05
Judgment 16.6.2015 [GC]

(See Article 1 above, page 9)

Azerbaijan's failure to take measures to secure property rights of an Armenian citizen displaced in the context of the Nagorno-Karabakh conflict: *violation*

Sargsyan v. Azerbaijan - 40167/06
Judgment 16.6.2015 [GC]

(See Article 1 above, page 12)

Peaceful enjoyment of possessions

Loss of disability benefits due to newly introduced eligibility criteria: *case referred to the Grand Chamber*

Béláné Nagy v. Hungary - 53080/13
Judgment 10.2.2015 [Section II]

In 2001 the applicant was granted a disability pension, which was withdrawn in 2010 after her degree of disability was re-assessed at a lower level using a different methodology. She underwent further examinations in the following years and was eventually assessed at the qualifying level. However, new legislation which entered into force in 2012 introduced additional eligibility criteria, which the applicant did not fulfill and which related to the duration of the social security cover. As a consequence, although her degree of disability would otherwise have entitled her to a disability allowance under the new system, her applications were refused.

In a judgment of 10 February 2015 (see Information Note 182) a Chamber of the Court held, by four votes to three, that there had been a violation of Article 1 of Protocol No. 1. In particular, it held

that the applicant had been totally divested of her disability care due to a drastic and unforeseeable change in the conditions of her access to disability benefits.

On 1 June 2015 the case was referred to the Grand Chamber at the Government's request.

ARTICLE 3 OF PROTOCOL No. 1

Stand for election

Arbitrary refusal to register independent candidate in parliamentary elections: *violation*

Tahirov v. Azerbaijan - 31953/11
Judgment 11.6.2015 [Section I]

Facts – The applicant wished to stand as an independent candidate in the parliamentary elections of November 2010. As required by the Electoral Code, he collected more than 450 voter signatures in support of his candidacy and submitted them to the Constituency Electoral Commission. In October 2010 his candidacy was refused by the Constituency Electoral Commission since, according to an expert working group established by the commission, a number of signatures were invalid, either because they had been executed by the same person or because information relating to the voter's address was incomplete.

The applicant lodged a complaint with the Central Electoral Commission ("the CEC") arguing that in accordance with the Electoral Code he should have been invited to participate in the process of examining the signatures. He further alleged that the finding that 172 signatures had been "executed by the same person" had been based on expert evidence as to probability without any further factual verification and that he should have been given the opportunity to rectify any incomplete addresses. In support of his complaint, he submitted written statements by 91 voters whose signatures had been declared invalid affirming the authenticity of their signatures.

The CEC dismissed the applicant's complaint after its own working group found that 178 out of the 600 signatures he had submitted were invalid. The applicant was not invited to participate in that process either. The domestic courts dismissed the applicant's appeal as unsubstantiated, without examining his arguments in detail.

Law – Article 37 § 1 of the Convention: Various types of alleged violations of the rights protected under Article 3 of Protocol No. 1 had been the subject of recurrent and relatively numerous complaints to the Court in cases against Azerbaijan after each parliamentary election. This appeared to disclose the existence of systemic or structural issues which called for adequate general measures by the authorities. No such measures were mentioned in the unilateral declaration that had been submitted by the respondent Government in the instant case. The declaration thus did not provide a sufficient basis for concluding that respect for human rights as defined in the Convention and its Protocols did not require the Court to continue its examination of the case.

Conclusion: Government's request to strike the application out of the list dismissed (unanimously).

Article 3 of Protocol No. 1: The requirement of collecting 450 supporting signatures for nomination as a candidate had pursued the legitimate aim of reducing the number of fringe candidates.

The Court went on to examine whether the procedure laid down by the Azerbaijani Electoral Code for verifying compliance with that eligibility condition had been conducted in a manner which provided sufficient safeguards against arbitrariness. In that connection, it noted that an OSCE report concerning the Parliamentary Elections of 7 November 2010 in Azerbaijan had expressed concerns about the impartiality of Constituency Electoral Commissions, the transparency of the registration process and the refusals of registration based on minor technical mistakes. According to the report, most of the complaints received by the CEC challenging refusals had been dismissed without proper examination. Indeed, after the 2010 elections, the European Court itself had received around 30 applications, including the applicant's, by candidates who had been refused registration owing to the invalidation of supporting signatures. While the refusal to register the applicant's candidacy – as well as that of many other candidates – had resulted from the alleged inauthenticity of supporting signatures, the Government had not provided specific information about the qualifications and credentials of the working-group experts who had examined the applicant's signature sheets. In the Court's view, the lack of clear and sufficient information about the professional qualifications and the criteria for the selection and appointment of working-group experts charged with the task of examining signature sheets was a factor that could seriously undermine overall confidence in the fairness of the procedure of candidate registration and of the elections in general. In any event, the

experts had found that there was only a probability that a number of signatures were not authentic, without even specifying how high that probability was. They had not requested any further investigation, although the CEC regulations on electoral commissions' working groups had provided for possible additional steps in order to clarify the situation.

The applicant's right to stand for election should not hinge on probabilities and vague opinions, but should be defined by clearly established criteria for compliance with the eligibility conditions. The electoral commissions' conclusions had therefore been arbitrary. Moreover, none of the procedural guarantees against arbitrariness provided for by the Electoral Code – such as the candidate's right to be present during the examination of signature sheets or to receive the examination report 24 hours before the relevant electoral commission's meeting – had been respected. The applicant had therefore been deprived of the opportunity to provide relevant explanations, correct any shortcomings in the signature sheets and to challenge the findings of the working groups throughout the process, a situation which, according to the OSCE report, seemed to be of a systemic nature.

Furthermore, neither the CEC nor the domestic courts had addressed any of the well-founded arguments put forward by the applicant or provided proper reasoning in their judgments. Moreover, contrary to the requirements of the electoral law, the CEC had failed to ensure the applicant's presence at its meeting. The conduct of the electoral commissions and courts had revealed an apparent lack of genuine concern for upholding the rule of law and protecting the integrity of the election. The applicant had thus not been provided with sufficient safeguards to prevent an arbitrary decision refusing his registration as a candidate.

Conclusion: violation (unanimously).

Article 41: EUR 7,500 in respect of non-pecuniary damage.

Refusal of candidatures for parliamentary election on grounds of the candidates' criminal record, after their trial had been reopened: *violation*

Dicle and Sadak v. Turkey - 48621/07
Judgment 16.6.2015 [Section II]

(See Article 6 § 2 above, page 25)

ARTICLE 2 OF PROTOCOL No. 7

Right of appeal in criminal matters

Applicant dissuaded from lodging an appeal against conviction since any appeal would have delayed his release: *violation*

Ruslan Yakovenko v. Ukraine- 5425/11
Judgment 4.6.2015 [Section V]

Facts – On 12 July 2010 the applicant was found guilty of grievous bodily harm and sentenced to four years and seven months' imprisonment. The court ordered that the applicant should remain in a pre-trial detention centre (SIZO) as a preventive measure pending the entry of the judgment into force. On 15 July 2010 the term of the applicant's sentence expired since he had already spent a long period in pre-trial detention. He requested the SIZO administration to release him, but his request was rejected. On 27 July 2010 the fifteen-day time-limit for lodging appeals against the judgment of 12 July expired, and, in the absence of any appeal, the judgment became final. The applicant was released on 29 July 2010, when the SIZO received the court's order to execute the final judgment.

Law – Article 5 § 1 of the Convention

(a) *The applicant's detention from 15 to 27 July 2010* – The applicant's detention during this period had taken place after the delivery of the judgment in his criminal case, but was still considered "pre-trial detention" under the domestic legislation. The judgment of 12 July 2010 provided for two separate measures involving the applicant's deprivation of liberty: firstly, a prison sentence, and, secondly, the applicant's detention as a preventive measure until the judgment became final. While the prison sentence was to expire three days later, the second measure was to last for at least twelve days longer, given the fifteen-day time-limit for lodging appeals. In the event of an appeal, the duration of the applicant's detention would have been even longer and would have depended on the examination of the case by the appellate court. Accordingly, the applicant's detention during the period in question, even though it had taken place after the prison sentence had been served in full, could be regarded as an "other measure involving deprivation of liberty", which had taken place "after conviction" in the meaning of Article 5 § 1 (a).

The Court saw no indication that the applicant's detention pending the entry into force of the judgment of 12 July 2010 was contrary to the

domestic law. However, the judgment contained no reasoning as to what had led the sentencing court to keep the applicant in detention as a preventive measure for a period that would clearly exceed the duration of the prison sentence imposed. While there might be special considerations that warranted – irrespective of the duration of the prison sentence – the applicant's deprivation of liberty as a preventive measure aimed at ensuring his availability for the judicial proceedings at the appellate level, no such considerations had been mentioned in or could be inferred from the judgment. On the contrary, the court had noted the applicant's cooperation with the investigation and decided, on that ground, to apply a milder sanction than legally envisaged. Accordingly, and as the respondent Government had admitted, the applicant's continued detention after the expiry of his imprisonment sentence had been unjustified and was thus in breach of Article 5 § 1.

(b) *The applicant's detention from 27 to 29 July 2010* – It had taken the domestic authorities two days to arrange for the applicant's release after there ceased to exist grounds for his detention with the entry into force of the judgment of 12 July 2010. The Ukrainian authorities had thus failed to deploy all modern means of communication to keep to a minimum the delay in implementing the decision to release the applicant. The applicant's detention during that period had therefore not been justified under Article 5 § 1.

Conclusion: violation (unanimously).

Article 2 of Protocol No. 7: The domestic courts had considered it necessary to keep the applicant in detention as a preventive measure pending the entry into force of the first-instance court's judgment even after the prison sentence imposed on him by that judgment had already expired. In the absence of any appeal, the period in question had lasted for twelve days. Had the applicant decided to appeal, this would have delayed the entry into force of the judgment for an unspecified period. Accordingly, the realisation of the applicant's right to appeal would have been at the price of his liberty, especially as the length of his detention would have been unspecified. That circumstance had infringed the very essence of his right embodied in Article 2 of Protocol No. 7.

Conclusion: violation (unanimously).

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

RULES OF COURT

The following Rules of Court were amended with immediate effect by the Plenary Court on 1 June 2015:

– Rule 8 § 1 (through the addition of a temporary Rule 8 § 1 *bis* governing the term of office of any President of Section elected between 1 June and 31 December 2015)

– Rule 77 § 3 (procedure for delivery and notification of judgments)

– Rule 90 (procedure for signature and delivery of advisory opinions)

The updated version of the Rules of Court is available on the Court's Internet site (<www.echr.coe.int> – Official texts).

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

Hutchinson v. the United Kingdom – 57592/08
Judgment 3.2.2015 [Section IV]

(See Article 3 above, page 19)

Ibrahim and Others v. the United Kingdom
- 50541/08 et al.
Judgment 16.12.2014 [Section IV]

(See Article 6 § 3 (c) above, page 27)

Paradiso and Campanelli v. Italy - 25358/12
Judgment 27.1.2015 [Section II]

(See Article 8 above, page 29)

Dubská and Krejzová v. the Czech Republic
- 28859/11 and 28473/12
Judgment 11.12.2014 [Section V]

(See Article 8 above, page 30)

Béláné Nagy v. Hungary - 53080/13
Judgment 10.2.2015 [Section II]

(See Article 1 of Protocol No. 1 above, page 39)

DECISIONS OF OTHER INTERNATIONAL JURISDICTIONS

Court of Justice of the European Union (CJEU)

Obligation on long-term residents to pass civic integration examination entailing substantial fees and possible fine

P and S v. Commissie Sociale Zekerheid Breda and College van Burgemeester en Wethouders van de gemeente Amstelveen - C-579/13
Judgment (Second Chamber) 4.6.2015

Directive 2003/109/EC[1] provides that member States must grant long-term resident status to third-country nationals who have resided legally and continuously within their territory for five years immediately prior to the submission of the relevant application.

The case originated in a request for a preliminary ruling made to the Court of Justice of the European Union (CJEU) by the Central Appeals Tribunal (*Centrale Raad van Beroep*) of the Netherlands as to whether these long-term residents could be required to sit a civic integration examination, on pain of a fine. If the persons concerned do not pass the examination, a new date is set and the fine is increased.

The CJEU noted that the civic integration obligation consisting in passing the examination was not a condition for acquiring or conserving long-term resident status, but merely gave rise to the imposition of a fine on those persons who did not pass the examination within the prescribed period. Furthermore, it could not be disputed that the acquisition of knowledge of the language and society of the host member State encouraged interaction and the development of social relations between nationals of the Member State concerned and third-country nationals and made it easier for the latter to access the labour market and vocational training.

However, the means of implementing the civic integration obligation must not jeopardise the achievement of the objectives pursued by the Directive. In that connection the CJEU considered that regard should be had, in particular, to the level of knowledge required to pass the examination, the accessibility of the courses and material necessary to prepare for it, the amount of the registration fees, and also specific individual circumstances such as age, illiteracy or level of education.

The CJEU noted in particular that the amount of the fine was relatively high (EUR 1,000) and could be increased, without any limit, until the person concerned had passed the examination. In addition, the costs incurred in preparing for the examination, and in particular the registration fee (EUR 230), were borne by the third-country nationals concerned and had to be paid each time they sat the examination.

In those circumstances, the payment of a fine, in addition to payment of the costs incurred in relation to the examinations sat, was liable to jeopardise the achievement of the objectives pursued by the Directive and hence to deprive it of its effectiveness.

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

For an overview of EU and Council of Europe law in the sphere of non-discrimination and the key case-law of the CJEU and the Strasbourg Court in this regard, see the Handbook on European non-discrimination law and the update thereto (<www.echr.coe.int> – Publications).

See also the communicated case *Ahdour v. the Netherlands*, 45140/10, currently pending before the Strasbourg Court.

Inter-American Court of Human Rights

Right to communal property of indigenous peoples and obligation to delimit, demarcate and provide collective property title over their lands

Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v. Panama - Series C No. 284
Judgment 14.10.2014[2]

Facts – Between 1972 and 1976 a hydroelectric dam was constructed in the Alto Bayano region in Panama, for which part of an indigenous reserve was flooded and its inhabitants resettled. The

1. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

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

resettlement took place between 1973 and 1975, as the State provided alternative lands adjacent to the reserve for the indigenous communities affected. On 8 July 1971 Decree no. 156 was issued establishing a "Special Fund for Compensation and Assistance to the indigenous peoples of Bayano". Between 1975 and 1980 the Panamanian authorities signed four main agreements with indigenous representatives regarding compensation to be paid by the State for the flooding and resettlement. In subsequent years, various meetings took place between indigenous and State representatives with the principal objective of finding a solution to conflicts over land that had arisen between indigenous peoples and non-indigenous farmers (*colonos*) and of recognising land rights of the Kuna and Emberá peoples.

At the beginning of the 1990s, the incursion of non-indigenous people into the lands of the Kuna and Emberá communities increased and conflicts in the region intensified. At least as of 1990, members of the Kuna and Emberá peoples undertook various actions to obtain compliance with the agreements, legal recognition of their lands and protection from incursions. Also, representatives of the Kuna people started administrative evacuation procedures, as well as criminal proceedings for incursion and environmental damage, while Emberá representatives started administrative procedures to obtain collective property title over their lands.

On 12 January 1996 the "Comarca Kuna of Madungandí" was established by Law no. 24 and between April and June 2000 its physical demarcation was carried out. Subsequently, on 23 December 2008 Law no. 72 was approved, establishing a procedure for the provision of a collective property title over indigenous lands not included in already existing reserves (*comarcas*). Regarding the Emberá lands, in 2011 and 2012 the Panamanian land registration authority (ANATI) issued various resolutions suspending application proceedings for private property titles within these lands. In August 2013 the authority provided a private property title to an individual within lands allocated to the Piriatí Emberá community. On 30 April 2014 the State provided a collective property title to this community over land located in Tortí in the Chepo District of Panama.

The case before the Inter-American Court concerned the alleged international responsibility of Panama, *inter alia*, for a continuing violation of the collective property rights of the indigenous Kuna and Emberá and their members following the flooding of their ancestral lands and their resettlement as a result of the construction of the hydroelectric dam.

Law

(a) *Preliminary objections* – The State presented three preliminary objections: (1) failure to exhaust domestic remedies, (2) lack of jurisdiction *ratione temporis*, and (3) lack of jurisdiction because of "statute of limitations". All of these regarded the presumed failure by the State to pay damages to the indigenous peoples relating to the flooding of the reserve and the resettlement of its inhabitants. The Inter-American Court unanimously rejected the first preliminary objection, considering that it had not been presented at the adequate procedural moment or in a precise manner. It accepted, by five votes to one, the second preliminary objection, considering that Panama had ratified the American Convention on Human Rights (ACHR) on 22 June 1978 and recognised the jurisdiction of the Inter-American Court on 9 May 1990. It established that the facts of the case relating to the flooding, resettlement, domestic provisions regarding compensation, as well as agreements signed by the State and the indigenous representatives, remained outside of its temporal jurisdiction because they had occurred before 1990. Regarding the third preliminary objection, the Inter-American Court considered, by five votes to one, it unnecessary to pronounce itself, taking into account its acceptance of the second preliminary objection.

(b) *Substantive provisions of the American Convention on Human Rights (ACHR)*

Article 21 (property), in relation to Article 1(1) (non-discrimination): The Inter-American Court reiterated its case-law according to which, *inter alia*: (1) the traditional possession of lands by indigenous peoples has equivalent effects to a title of ownership ("*dominio pleno*") provided by the State; (2) traditional possession provides indigenous peoples with the right to obtain official recognition of their property and its registration; and (3) the State must delimit, demarcate and provide collective property title over their lands to members of indigenous communities. It considered that these elements of communal property refer to the ancestral territories of indigenous peoples, which implies traditional occupation of land. However, the State's obligations to guarantee the enjoyment of the right to property of indigenous peoples over alternative lands are necessarily the same as otherwise the enjoyment of the right to communal property of the Kuna and Emberá peoples would be restricted due to the lack of a prolonged occupat-

ion or ancestral relation with the lands assigned to them, when such lack of occupation was precisely the consequence of the resettlement carried out by the State itself, for reasons external to the will of the indigenous peoples.

The Inter-American Court reiterated that Article 21 of the ACHR protects the strong bond that indigenous peoples have with their lands and that a failure by the State to delimit and effectively demarcate the borders of indigenous territory can create a climate of permanent uncertainty for its members. Taking into consideration domestic provisions, as well as treaties signed by Panama, it determined that at least since 1990, when Panama recognised the jurisdiction of the Inter-American Court, the State had the obligation to delimit, demarcate and provide legal title over the lands assigned to the Kuna and Emberá peoples.

Accordingly, Panama had violated Article 21 of the ACHR, in particular, for not having delimited, provided legal title over or demarcated the lands of the Kuna and Emberá peoples for periods of between 6 and 24 years after 1990 (when Panama recognised the jurisdiction of the Inter-American Court).

Conclusion: violation (unanimously).

Article 2 (adopt domestic legal provisions), in relation to Articles 21, 8 and 25 (property, fair trial and judicial protection): Panama had not complied with its obligation to adopt domestic legal provisions, because it had not adopted provisions that permitted the delimitation, demarcation and provision of collective property title prior to 2008. Until 2008 there had existed in Panama a practice of providing title through the creation of indigenous reserves by means of laws specific to each case, rather than through the existence of a generic regulation that established a procedure for providing collective property title to indigenous peoples. For the period since 2008, when Law no. 72 was adopted, the State had not violated Article 2.

Conclusion: violation for the period 1990-2008 (unanimously).

Articles 8(1) and 25 (fair trial and judicial protection), in relation to Article 1(1) (non-discrimination): The Inter-American Court declared a violation of Articles 8(1) and 25, in relation to the Emberá communities and their members, considering that the administrative actions undertaken by them had not received a response that permitted an adequate determination of their rights. With regard to the Kuna people and its members, it found a violation of the right to a hearing within a reasonable time (Article 8(1)) in relation to two sets of criminal proceedings and one set of administrative proceedings regarding the evacuation of illegal occupants.

Conclusion: violation (unanimously).

Article 2 (adopt domestic legal provisions), in relation to Articles 8 and 25 (fair trial and judicial protection): Regarding the alleged violation of Article 2, in relation to the protection of indigenous territories from intruders, the Inter-American Court considered that the State's incompliance had not been demonstrated because no evidence or arguments had been presented that permitted the conclusion that generic recourses included in domestic legislation for the eviction of illegal occupants and criminal prosecution of those who undertake illegal actions in the territories would not be adequate to achieve the objective sought by the indigenous communities, nor why these would not produce the same result as a specific recourse for the protection of the collective property of indigenous peoples. Moreover, it considered that it had not been demonstrated that already existing crimes in Panamanian law would not permit the protection of indigenous peoples' rights with the same efficacy, nor how the lack of a specific criminal proceeding or type of crime would have affected the rights of the indigenous communities in this particular case.

Conclusion: no violation (unanimously).

Article 24 (equal protection of the law), in relation to Article 1(1) (non-discrimination): The Inter-American Court unanimously decided not to pronounce itself regarding the alleged violation of Article 24, considering that it had not been demonstrated how allegations had translated into specific violations, apart from those already established in the judgment. Also, no evidence had been presented that would indicate a difference in treatment between indigenous peoples – specifically the alleged victims in this particular case – and non-indigenous peoples, in relation to procedures recognising property title over land.

(c) *Reparations* – The Inter-American Court considered the indigenous peoples and their respective members as victims for the purposes of reparations and, apart from establishing that the judgment *per se* constituted a form of reparation, ordered the State to (a) publish the judgment and its summary, and transmit the same by radio; (b) carry out a public act of recognition of international responsibility regarding the facts of the case; (c) demarcate the lands of certain indigenous

communities whose lands had not yet been demarcated (Ipetí and Piriatí Emberá) and provide collective property title to the Ipetí community over its lands; (d) adopt the measures necessary to leave without effect the private property title that had been provided to an individual within the Emberá Piriatí territory, and (e) pay certain sums as compensation for pecuniary and non-pecuniary damage, and reimburse costs and expenses, including to the Victims' Legal Assistance Fund.

COURT NEWS

Notification by Ukraine of intention to derogate from certain Convention provisions

On 9 June 2015 the Secretariat General of the Council of Europe received notification from Ukraine of its intention to derogate under Article 15 of the Convention (derogation in time of emergency) from its obligations under Articles 5 (right to liberty and security), 6 (right to a fair trial), 8 (right to respect for private and family life) and 13 (right to an effective remedy) of the Convention in certain areas of the Donetsk and Luhansk *oblasts* in view of the current situation in the country.

As Council of Europe Secretary General Thorbjørn Jagland stated in response to the notification, Council of Europe standards, including those laid down by the Convention, continue to apply in Ukraine.

Elections

During its summer session held from 22 to 26 June 2015, the Parliamentary Assembly of the Council of Europe elected four new judges to the Court: Armen Harutyunyan in respect of Armenia, Mārtiņš Mits in respect of Latvia, Georges Ravarani in respect of Luxembourg, and Stéphanie Mourou-Vikström in respect of Monaco. They will begin their nine-year terms in office between 1 August and 1 November 2015.

RECENT PUBLICATIONS

Guide on how to find and understand the case-law of the ECHR

The case-law of the Court covers a wide range of subjects arising out of the application of the provisions of the Convention and its Protocols. In order to report on how to make the best use of the available research materials, the Court has just published a guide entitled "Finding and understanding the case-law of the ECHR".

This guide can be downloaded from the Court's Internet site (<www.echr.coe.int> – Case-Law – Useful Links).

Guide on Article 6 (civil limb): Turkish translation

The Guide on the civil limb of Article 6 (Right to a fair trial) has been translated into Turkish by the Turkish Ministry of Justice. This translation can be downloaded from the Court's Internet site (<www.echr.coe.int> – Case-Law).

6. madde rehberi – Adil yargilanma hakki (medeni hukuk yönü) (tur)

Handbook on European data protection law: new translations

Translations into Czech and Georgian of the Handbook – which was published jointly by the Court and the European Union Agency for Fundamental Rights (FRA) in 2014 – are now available. The Georgian translation has been supported by the European Law Students' Association Georgia (ELSA Georgia) and supervised by The University of Georgia's law.

The 21 linguistic versions of the Handbook can be downloaded from the Court's Internet site (<www.echr.coe.int> – Publications).

Příručka evropského práva v oblasti ochrany údajů (cze)

მონაცემთა დაცვის ევროპული სამართლის სახელმძღვანელო (geo)

Combating discrimination on grounds of sexual orientation or gender identity

Hate crime and violence against lesbian, gay, bisexual, or transgender (LGBT) people are among the most persistent human rights challenges. To respond to these violations of fundamental human rights, the Council of Europe helps its members put in place a sound legal and policy framework, based on best international practices.

Recent initiatives include an online database on good practices and promising policies on combatting discrimination on grounds of sexual orientation or gender identity and a new publication on

the case law of the ECHR on sexual orientation and gender identity. This publication looks at the key articles of the Convention under which violations of LGBT rights might fall. It also analyses solutions applicable at the European level, and those which are decided largely by states, for example, relating to adoption and marriage.

More information can be found on the Council of Europe's Internet site (<www.coe.int> – Promoting human rights).

ECRI Annual Report 2014

The European Commission against Racism and Intolerance (ECRI) has just published its 2014 annual report, which identifies dramatic increases in anti-Semitism, Islamophobia, online hate speech and xenophobic political discourse. It also reports that Protocol No.12, which supplements the European Convention on Human Rights by prohibiting discrimination in general, has still only been ratified by 18 of the 47 member States of the Council of Europe.

This report can be downloaded from the ECRI Internet site (<www.coe.int/ecri> – Publications).

Annual Report by the Secretary General of the Council of Europe on the state of human rights, democracy and the rule of law in Europe

Drawn up at the request of the Committee of Ministers and based on the findings of the Council of Europe's monitoring bodies, this second report by the Secretary General provides an in-depth analysis of the state of human rights, democracy and the rule of law in Europe. It also assesses the capacities of the member States to guarantee and enhance democratic security within their borders and, collectively, across the continent.

This report can be downloaded from the Council of Europe's Online Resources Internet site (<https://edoc.coe.int/>).

FRA Annual Report 2014

The EU Agency for Fundamental Rights (FRA) has just issued an Annual Report entitled "Fundamental rights: challenges and achievements in 2014". Most of the chapters concern matters on which the FRA and the Council of Europe and/or the Court have worked together: equality and non-discrimination; racism, xenophobia and related intolerance; Roma integration; asylum, borders, immigration and integration; information society, privacy and data protection; the rights of the child; access to justice including rights of crime victims.

This report can be downloaded from the FRA Internet site (<http://fra.europa.eu> – Publications)