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Life, positive obligations (substantive aspect)

Use of "double seated embrace" technique against drunk elderly man, thereafter left without medical surveillance for more than one hour: *violation*

Semache v. France, 36083/16, judgment 21.6.2018 [Section V]

Facts – In 2009 the applicant's father, aged 69, was arrested by the police for insulting an officer, along with the driver of a car which had been moving eratically; the two men were drunk in charge. During their short but agitated transfer to the police station, an officer immobilised the applicant's father by bending him over, with his head touching his knees (the so-called "double-seated embrace" technique).

On arrival at the police station around 8.45 p.m., the man could hardly stand up, vomited several times and then fell down in his vomit, where he lay handcuffed without verification or medical supervision. Half an hour later it was decided to take him to hospital, but he first waited for 45 minutes in the police van. When they arrived at the hospital just after 10 p.m., the police officers noted that the applicant's father was choking on his vomit. At 10.45 p.m. a doctor recorded cardiac arrest. He remained in a coma and died at 7.30 a.m. the next day.

In an opinion of 2010, the National Ethics and Security Commission (CNDS) took the view that the force used had been excessive and that inadequate care had been provided to the victim at the police station. In 2012 the investigating judge issued a discontinuance decision, upheld by the Investigation Division of the Court of Appeal in 2014, on the grounds, in particular, that the judicial investigation had not confirmed the Commission's findings and that the experts' reports had not established a direct connection between the chest compression during the transfer and the death.

Law

(a) *Admissibility (exhaustion of domestic remedies)* – In a recent case concerning a suicide in police custody, the Court had taken the view that, even for a complaint based on the substantive limb of Article 2, the fact of using the remedy of a criminal complaint and an application to join the proceedings as a civil party before the investigating judge did not exempt the applicants from bringing an action, effective since March 2011 at the latest, to establish State responsibility for the defective operation of the justice system, a more flexible procedure which afforded different prospects of success (see *Benmouna and Others v. France* (dec.), 51097/13, 15 September 2015, Information Note 189).

However, as the applicant in the present case had complained about acts or omissions that might engage the criminal liability of police officers for her father's death, in so far as she had used the above-mentioned remedy and her criminal complaint had led to a number of judicial decisions, thus exhausting the available remedies in that connection, she could not be reproached for failing to bring an additional action against the State (see in particular *Slimani v. France*, 57671/00, 27 July 2004, Information Note 67; and *De Donder and De Clippel v. Belgium*, 8595/06, 6 December 2011, Information Note 147).

(b) *Merits* – Article 2 (*substantive limb*): The case raised two separate questions: first, the negative obligations of the State in terms of the use of force by the police; secondly, the State's positive obligation to take all the necessary measures for the protection of the life of persons under its control.

(i) *The use of force during the transfer to the police station* – The Court accepted that the immobilising of the applicant's father had pursued a legitimate aim – under Article 2 § 2 (a) of the Convention –, i.e. to neutralise him when his agitated state created a risk for his safety and for that of the other passengers in the vehicle and other road users, and that it was strictly proportionate to the danger in question.

The applicant had argued that the technique used was disproportionate in itself.

In the *Saoud v. France* judgment (9375/02, 9 October 2007, Information Note 101), the Court had found that there had been a violation of the Convention as regards a different immobilisation technique but one that also involved chest compression: stomach flat on ground, head turned to one side. However, it had examined the use of the technique in terms not of the State's negative obligations but of its positive obligation to take care of individuals under its control in order to protect their life.

The Court decided to proceed in a similar manner here. It could not be ascertained from the case file whether there had been a direct causal link between the immobilisation technique in question and the death, which had occurred several hours later.

(ii) *Handling of applicant's father at the police station* – First, the police officers could not have been unaware of the victim's condition, the circumstances of his transfer or his resulting weakness.

Secondly, the dangerousness and risk for life of the immobilisation techniques involving a compression of the chest had been acknowledged by the French authorities and was known to the police officers who had arrested and transferred the victim, especially in view of the man's state of mental or physical weakness, or general vulnerability:

– following the *Saoud* judgment, the training of officers now recommended (not only for the prone position technique used in that case, but others) that the person controlled by force should be placed in a "safe lying-down position" with special supervision;

– as regards the "double-seated embrace" technique, this had in fact been banned in France for alien removals.

The authorities had thus been bound by a heightened duty of vigilance. In spite of that, the applicant's father had been left lying on the ground, in his vomit, and handcuffed, without verification or immediate medical supervision for an hour and a quarter.

The Court of Appeal's judgment had merely found on this point that no witness had mentioned a state of unconsciousness, without going further in its analysis of the handling of the victim, and in particular not verifying whether he had been placed in a safe lying-down position.

It thus appeared that, as also stated in the CNDS opinion, the situation of the applicant's father in the police station had been dealt with negligently.

Having regard to the particulars of the case – the victim's age, his general condition and in particular his drunkenness, the fact that he had been manhandled during his transfer and had been subjected for several minutes to a potentially lethal immobilisation technique, and the lack of medical assistance for an hour and a quarter –, the Court took the view that the respondent State had failed in its positive obligation to take the necessary measures for the protection of life. That conclusion was based on the combination of all the above-mentioned factors, and not on a single one taken in isolation.

Conclusion: violation (unanimously).

The Court also found, unanimously, that there had been no violation of Article 2 under its procedural limb.

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

Life, positive obligations (substantive aspect)

Failure to promptly inform parents of adolescent, later found drowned due to own reckless conduct, of his absence from school: *inadmissible*

Ercankan v. Turkey, 44312/12, decision 15.5.2018 [Section II]

Facts – The applicants' fifteen-year-old son skipped school with two other students to go swimming at a nearby dam. He climbed over a bridge enclosed by metal railings, jumped into the river and drowned.

His father filed two criminal complaints, firstly, against a number of teachers at the high school, accusing them of failing to promptly notify him of his son's absence from school and, secondly, against the relevant authorities arguing that they had not taken the necessary safety measures to prevent access to the dam. The public prosecutor decided not to prosecute the teachers or the State officials. The appeal against this decision was dismissed.

Law – Article 2

(a) *Alleged ineffectiveness of the judicial response in the aftermath of the death* – There was no appearance of arbitrariness or other shortcomings in the conduct of the prosecution authorities' investigation that would cast doubt upon its effectiveness. Although the case did not involve an intentional infringement of the right to life, the applicants had not brought a civil or administrative action in addition to the criminal remedies that they had pursued against the relevant State authorities. However, those avenues could have offered them redress independent of the findings in criminal proceedings.

(b) *Alleged failure of the State authorities to safeguard the applicants' son's right to life* – Although

there was no specific regulatory framework at the material time, the relevant authorities had taken the necessary measures that could have been reasonably expected of them in the circumstances to prevent access to the dam and irrigation channel and to warn against the dangers of swimming there. Warning signs were placed along the banks of the river and on the two sides of the bridge where the incident had occurred. Moreover, the top and sides of the bridge were enclosed with iron railings and the dam itself was surrounded with wire fencing to impede entry. Concrete safety barriers were also installed alongside the parts of the channel that adjoined public roads. Noting in particular that the applicants' son had not fallen into the water accidentally but willfully ignored the safety measures, there was no reason to depart from the public prosecutor's finding that the applicants' son had lost his life as a result of his own imprudent conduct and that the State authorities could not be held responsible for his death.

The applicants' complaint against the school authorities did not concern a deficiency in the regulatory framework pertaining to the protection of students' safety at schools. The tragic event had taken place outside the school premises, that is, when he had technically been outside the school's exclusive control. A particular degree of vulnerability would need to be demonstrated, such as a young age, in order to impose on the school authorities a stringent requirement to immediately notify parents of a student's absence. The Court did not exclude the fact that there might be other circumstances where special attention and measures could be required on account of the special needs of a minor student, such as a mental or physical disability, or owing to other factors, such as extreme weather conditions or specific security threats, which could render the student particularly vulnerable outside the school premises regardless of his or her actual age.

The applicants had not demonstrated that their son suffered from any particular vulnerability that the school authorities knew or ought to have known about that would have required them to take immediate action upon noticing his absence. Nor had they mentioned any specific threats outside the school premises that would have exposed him to a real and immediate risk. Although the applicants' son was still legally a child at the time of the events and, therefore, enjoyed all the rights and protection accorded to children, the level of diligence required to protect children from harm had to be necessarily adjusted as they grew older and reached adolescence, and began to exercise increasing levels of responsibility in keeping with their evolving capacities. In the absence of any special factors, the Court considered it difficult to maintain that the failure of school authorities to inform parents immediately of the unauthorised absence from school of a fifteen-year-old high school student could be automatically presumed to have the effect of compromising the student's safety and thus engaging the school's responsibility within the meaning of Article 2 of the Convention. In those circumstances, the applicants' complaints against the school authorities remained unsubstantiated and unfounded.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Bône v. France* (déc.), 69869/01, 1 March 2005, Information Note 73; *Molie v. Romania* (dec.), 13754/02, 1 September 2009; *Koseva v. Bulgaria* (dec.), 6414/02, 22 June 2010; *Gökdemir v. Turkey* (dec.), 66309/09, 19 May 2015; *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, 19986/06, 10 April 2012; and *Kayak v. Turkey*, 60444/08, 10 July 2012, Information Note 154)

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Fair hearing, independent and impartial tribunal

Annulment of final court decisions on privatisation of State company after public statements by President and Prime Minister: *violation*

Industrial Financial Consortium Investment Metallurgical Union v. Ukraine, 10640/05, judgment 26.6.2018 [Section IV]

Facts – In 2004, the applicant company, a Ukrainian joint venture, was founded by private companies owned or controlled by one of the leaders of the then ruling party and the son-in-law of Mr Kuchma, the then President of Ukraine. That same year, the State sold Kryvorizhstal State Metallurgical Enterprise (Kryvorizhstal), one of the world's largest steel manufacturing companies, to the applicant company. The lawfulness of the sale was challenged in several separate sets of proceedings before the courts of general jurisdiction and the commercial courts. By the end of 2004 the proceedings before

the courts of general jurisdiction were completed and the courts of three judicial instances confirmed that the sale was lawful. The proceedings before the commercial courts ended with the decision of the Higher Commercial Court, also favourable to the applicant company, against which the parties did not appeal.

The lawfulness and transparency of the privatisation of Kryvorizhstal was also contested by the political opposition during the 2004 presidential election. Following a series of protests that took place in the immediate aftermath of the run-off vote of the election – events commonly known as the Orange Revolution – the newly elected President Yushchenko and Prime Minister Tymoshenko made public statements that the privatisation of Kryvorizhstal had been unlawful, and that the enterprise would be returned to the State and subsequently resold.

In 2005, the final decisions of the courts of general jurisdiction were annulled following an extraordinary appeal lodged by a private individual who had not participated in the main proceedings. The case was sent for reconsideration, but eventually terminated without a decision on the merits. The decisions adopted in the course of the commercial proceedings were quashed upon an appeal by the Prosecutor General acting in the interests of the State. The proceedings resumed and ended in a final decision by which the privatisation at issue was held unlawful. The State took control of Kryvorizhstal, declared the applicant company's contract invalid, returned the money paid and sold it to Mittal Steel Germany GmbH for a significantly higher price as a result of a new bidding competition.

Law – Article 6 § 1 of the Convention

(a) *Proceedings before the courts of general jurisdiction* – The proceedings before the courts of general jurisdiction had been terminated by the final decision of the Supreme Court and had later been reopened upon an extraordinary appeal by a private individual who had not participated in the original proceedings and thus under the Ukrainian law then in force had not been entitled to lodge such an appeal. The appeal was an "appeal in disguise" rather than a "conscientious effort to make good a miscarriage of justice" and was based essentially on the argument which had already been examined and dismissed in the original proceedings. There had been no "circumstances of a substantial and compelling character" justifying the interference with the final and binding judgment in the applicant company's favour.

(b) *Proceedings before the commercial courts* – No appeal had been lodged against the decision of the Higher Commercial Court within the one-month time-limit provided for by the law, thus the commercial court decisions had a *res judicata* effect. However, upon an appeal lodged by the Prosecutor General more than two months after the expiry of that time-limit those decisions had been quashed. The proceedings had been reopened after a delay of four months, which was substantially shorter that the delays examined in *Ponomaryov v. Ukraine* or *Ustimenko v. Ukraine*. However, that did not mean that, for the purposes of Article 6 § 1, the Supreme Court enjoyed unfettered discretion to consider whether to reopen the proceedings upon the belated appeal of the Prosecutor General.

Firstly, the Office of the Prosecutor General had been informed of the original proceedings as early as July 2004, though no representative had attended the court hearings, notwithstanding the Commercial Court's specific order in that regard. Secondly, representatives from different State bodies, who had taken part in the proceedings, had lodged no appeal against the decision of the Higher Commercial Court. In his appeal, the Prosecutor General had not suggested that those representatives had been precluded from defending the State interests at stake in the case, nor that there had been a communication problem within the Government resulting in the information about the outcome of the case not reaching those concerned. Thirdly, no explanation had been given as to why the appeal had been lodged more than a month after the Prosecutor General had allegedly been informed of the said decision. The Government had not argued that the Supreme Court had given consideration to those important aspects. Moreover, the appeal contained no information demonstrating that the lower courts had made judicial errors of the kind amounting to a miscarriage of justice or a fundamental defect.

Finally, the statements by the President and the Prime Minister concerning the privatisation of Kryvorizhstal and the subsequent unjustified decision of the Supreme Court to reconsider the dispute objectively shed conspicuous light on the independence and impartiality of the commercial courts.

In sum, the annulment of the court decisions infringed the principle of legal certainty and the impugned proceedings, seen as a whole and taking into account the statements made by the President and the Prime Minister, had not met the requirements of fairness within the meaning of Article 6 § 1.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1: Even though the impugned annulment of the domestic court decisions had not directly resulted in a change in the applicant company's title to or actual possession of the Kryvorizhstal shares, it arguably constituted an interference with its right to those assets by creating a sitation of legal uncertainty. In any event, unlike the applicants in the cases of *Agrotehservis*, *Ivanova* and *Timotiyevich*, the applicant company had been paid compensation for its lost assets. While the applicant company argued that that sum had not covered the damage it had sustained, no evidence had been submitted in support of that argument.

Moreover, not every procedural shortcoming in a case would take an interference with the right of property outside the scope of the "principle of lawfulness". Unlike certain exceptional cases where the Court had found a violation of Article 1 of Protocol No. 1 on account of the "blatant interference" of the State authorities at the highest level in the court proceedings, the instant case did not concern such kind of interference (compare and contrast *Sovtransavto Holding* and *Agrokompleks*). Furthermore, there was no basis for a finding that the impugned proceedings had been flawed to the extent that their outcome could no longer be accepted or that the decisions issued by the commercial courts had been contrary to the "principle of lawfulness". The applicant company had not demonstrated that it had been denied the opportunity to defend effectively its property rights and interests at stake in the course of the reopened proceedings before the commercial courts. It had not contested the Government's argument that the impugned interference had been in the public interest, nor did it demonstrate that it had been made to bear an excessive individual burden.

Conclusion: no violation (unanimously).

Article 41: claim in respect of pecuniary damage dismissed.

(See also *Diya 97 v. Ukraine*, 19164/04, 21 October 2010; *Ponomaryov v. Ukraine*, 3236/03, 3 April 2008; *Ustimenko v. Ukraine,* 32053/13, 29 October 2015; *Rysovskyy v. Ukraine*, 29979/04, 20 October 2011; *Agrotehservis v. Ukraine*, 62608/00, 5 July 2005; *Ivanova v. Ukraine*, 74104/01, 13 September 2005; *Timotiyevich v. Ukraine*, 63158/00, 8 November 2005; *Sovtransavto Holding v. Ukraine* (dec.), 48553/99, 27 September 2001; and *Agrokompleks v. Ukraine*, 23465/03, 6 October 2011)

ARTICLE 6 § 1 (CRIMINAL)

Fair hearing

Insufficient judicial review of entrapment defence: *violation*

Tchokhonelidze v. Georgia, 31536/07, judgment 28.6.2018 [Section V]

Facts – An individual, acting as an undercover agent, alerted the Department of the Constitutional Security of the Ministry of Internal Affairs ("the DCS") that the applicant, a deputy regional governor at the material time, requested a USD 30,000 bribe in exchange for his help in obtaining a construction permit. Upon court authorisation, her subsequent meetings with the applicant were filmed and telephone conversations tapped. After the hand-over of the money in pre-marked banknotes, the applicant was arrested. He was subsequently convicted of the crime of requesting a bribe in a large amount. His allegations of entrapment were not addressed by the domestic courts.

Law – Article 6 § 1: The Court had to first make a substantive assessment as to whether the DCS had confined itself to "investigating criminal activity in an essentially passive manner" and then secondly, if this substantive test was inconclusive, to assess the procedure by which the plea of incitement was determined by the domestic courts (the procedural test).

There was no evidence that the applicant had committed any corruption-related offences prior to the one in question. The following facts tainted the legality of the police operation mounted against the applicant. The undercover agent had been the DCS's usual collaborator in a number of unrelated criminal investigations and when approaching the applicant for the first time, she had already been acting under the DCS's instructions. However, it was

not the agent who had proposed the bribe; rather on the contrary, it was the applicant who had first requested the pay-off. In such circumstances, it could not be determined with sufficient certainty that the agent had taken an active and decisive role in the creation of the stratagem that instigated the commission of the bribe offence in question. The substantive test was therefore inconclusive.

Regarding the procedural test, the legal framework provided for a possibility to exclude evidence obtained as a result of such an investigative technique. However, when faced with the applicant's arguable claim of entrapment, the Prosecutor's Office had made no attempt to refute his allegations. That could be explained by the objective impossibility to discharge the requisite burden of proof due to the lack of judicial authorisation or supervision as those were not required by the relevant domestic legislation for the covert operation in question. Hence, domestic law did not provide for adequate regulation of such covert operations.

The domestic courts, confronted with the applicant's well-substantiated allegations, had not provided any single reason in their decisions for dismissing them. They had also failed to secure attendance and examination of a key witness, probably another undercover agent engaged by DCS to entrap the applicant. The judicial review of the allegations of entrapment had not been conducted with sufficient respect for the principle of adversarial proceedings.

Due to the absence of a sufficient legislative framework to mount an undercover operation against the applicant, the undercover agent's failure to remain strictly passive in her activity, the prosecutor's failure to discharge the requisite burden of proof, and the insufficiency of the judicial review of the applicant's well-substantiated allegations of entrapment, the conduct of the criminal proceedings against the applicant had not been compatible with the notion of fair trial.

Conclusion: violation (unanimously).

Article 41: EUR 2,500 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Miliniene v. Lithuania*, 74355/01, 24 June 2008, Information Note 109; *Ramanauskas v. Lithuania* [GC], 74420/01, 5 February 2008, Information Note 105; and *Matanović v. Croatia*, 2742/12, 4 April 2017, Information Note 206)

ARTICLE 6 § 3 (d)

Examination of witnesses

Conviction principally based on statements by a deceased victim who had not been questioned by the defendants: *no violation*

Dimitrov and Momin v. Bulgaria, 35132/08, judgment 7.6.2018 [Section V]

Facts – In 1998 a woman lodged a complaint with the police stating that she had been abducted, held captive and raped by the two applicants the previous day. She then on several occasions retracted her statement and sought to have it withdrawn and to have the proceedings terminated.

In December 2000, during questioning by a judge, she reiterated her original version of the events.

In April 2001 both applicants were charged. In May of that year their lawyer requested separate confrontations between the applicants and the victim. The public prosecutor refused the request in July 2001. The victim, who had been suffering from cancer, died of the disease in June 2001.

In 2007 the two applicants were found guilty of abducting the victim, holding her captive, threatening to kill her and raping her.

In the Convention proceedings, they complained of being convicted on the basis of the statement taken from the victim during the preliminary investigation and of having no opportunity at any stage to question her as a witness.

Law – Article 6 §§ 1 and 3 (d)

(a) *Whether there were "strong reasons" for not arranging a confrontation between the applicants and the witness in question* – The victim's death constituted a "strong reason" for not hearing witness evidence from her during the trial and for admitting in evidence the statement she had made before her death.

The first applicant had not been present when the victim was questioned by a judge in December 2000, despite having been informed of the date. However, his absence did not amount to a waiver of his right to question the witness at a later stage in the proceedings, as he did not have a lawyer who could explain the importance of the questioning for the subsequent course of the proceedings. As to the second applicant, although he

could be regarded as having been "charged with a criminal offence" within the autonomous meaning of Article 6 of the Convention, there had been no requirement for him to be given notice of the questioning, given that he had not been placed under formal investigation at that juncture. Hence, the fact that the two applicants had not been present during the questioning did not of itself amount to a violation of Article 6 §§ 1 and 3 (d).

The applicants' lawyer had subsequently requested a confrontation between his clients and the victim. The request had been refused by the prosecutor on the grounds that it was a non-compulsory investigative measure that was not necessary for the establishment of the facts. Furthermore, while the investigating authorities had been aware since April 2000 that the victim was ill and was undergoing chemotherapy, she had stated during questioning in December 2000 that she was feeling well. Unlike in the case of *Schatschaschwili v. Germany* [GC] (9154/10, 15 December 2015, Information Note 191), there was nothing in the present case to indicate that the investigator or the prosecutor had known that the victim might be unable to attend the trial.

In the context of criminal proceedings for rape, the investigating authorities had to be particularly attentive to victims who were in a fragile psychological state, especially when it came to taking their statements and arranging a confrontation with their alleged attackers. In the present case the victim had also been seriously ill and had come under pressure during the investigation to withdraw her complaint and alter her statement. In view of these very specific circumstances, the investigating authorities could not be criticised for not arranging a confrontation between the victim and the two applicants at the preliminary investigation stage.

(b) *Whether the applicants' conviction had been based solely or to a decisive extent on the statement of the witness in question* – The victim's statement had been the decisive evidence in securing the applicants' conviction. However, it had not been the only evidence against them, as the Regional Court had available to it the statements of the police officers who had registered the victim's complaint, the results of the medical examinations and expert opinions and the report on the inspection carried out at the scene. The applicants' conviction had therefore been based on a body of evidence within which the statement in question had not been an isolated element.

(c) *Whether there had been sufficient counterbalancing factors in place to ensure that the criminal proceedings as a whole were fair* – The Regional Court had devoted a significant part of the reasoning in its judgment to the victim's statement, and had ascertained that she could not have had any motive for making unfounded accusations against the two applicants. It had then compared her statement with the other evidence and found it to be corroborated by that evidence and therefore reliable.

The Regional Court had established that the fact that the victim's testimony had been given two years after the events had in no way prevented her statement from being very detailed. The fact that she had altered her version of events during the investigation had been due to the pressure to which she had been subjected by the applicants and persons close to them.

The Regional Court had addressed and rejected the arguments which the applicants and persons close to them had put forward during questioning in an attempt to discredit the victim.

Consequently, the Regional Court's examination of the victim's statement had been careful, objective and comprehensive. The court had thus given detailed reasons for its finding that the statement as a whole was credible and for its subsequent decision to admit the statement as the main evidence against the applicants.

Lastly, the applicants' conviction had been based on a body of evidence within which the statement in question had not been an isolated element. The applicants had played an active part in the proceedings against them, with the help of their lawyer. The Regional Court and the Supreme Court of Cassation had addressed and rejected their arguments in decisions that had contained detailed reasoning and had not been arbitrary.

Conclusion: no violation (unanimously).

(See also *Al-Khawaja and Tahery v. the United Kingdom* [GC], 26766/05 and 22228/06, 15 December 2011, Information Note 147; *Dvorski v. Croatia* [GC], 25703/11, 20 October 2015, Information Note 189; *Przydział v. Poland*, 15487/08, 24 May 2016; and *Simeonovi v. Bulgaria* [GC], 21980/04, 12 May 2017, Information Note 207)

ARTICLE 7

Nulla poena sine lege

Compulsory confiscation of "unlawfully developed" land, regardless of any criminal liability: *violation; no violation*

G.I.E.M. S.r.l. and Others v. Italy, 1828/06 et al., judgment 28.6.2018 [GC]

Facts – The applicants are four companies with legal personality and a director of the fourth company (Mr Gironda).

Under Italian planning law, where the offence of "unlawful site development" is materially made out, the criminal court is bound, whether or not the defendants have been convicted, to confiscate the developed land (and any buildings thereon), even when it is in the possession of a third party (except one proving to have acted in good faith).

The applicants complained that they had been affected by confiscation measures without having been formally convicted (either because neither the company nor its directors had ever been prosecuted; or because only the directors had been prosecuted; or because the criminal proceedings had become time-barred – this being the case of Mr Gironda).

Law – Article 7 of the Convention

(a) *Applicability* – A review of the question in the light of the following criteria led the Grand Chamber to confirm the conclusion reached by the Chamber in *Sud Fondi srl and Others v. Italy* (dec.) (75909/01, 30 August 2007, Information Note 100): as the confiscation measures could be regarded as "penalties" within the meaning of Article 7 of the Convention, that Article was applicable, even in the absence of criminal proceedings for the purposes of Article 6.

That conclusion did not rule out the possibility for the domestic authorities to impose "penalties" (within the autonomous meaning of that concept) through procedures other than those classified as "criminal" under domestic law.

(i) *Had the confiscations been imposed following convictions for criminal offences?* – Even though no prior criminal conviction had been handed down against the applicant companies or their representatives, the impugned confiscation measure was nevertheless attached to a "criminal offence" based on general legal provisions. In any event, a different conclusion in relation to this criterion would not in itself be decisive.

(ii) *Classification of confiscation in domestic law* – Article 44 of the Construction Code, which governed the confiscation measure at issue in the present case, bore the heading "Criminal sanctions".

(iii) *The nature and purpose of the confiscation measure* – The nature and purpose of the confiscation of the applicants' property had been punitive, as the confiscation measure was a mandatory sanction, not subject to proof of genuine harm or a specific risk for the environment, and could thus be applied even in the absence of any actual activity to transform the land.

(iv) *The severity of the effects of the confiscation* – The impugned confiscation measure was a particularly harsh and intrusive sanction. Within the boundaries of the site concerned, it applied not only to the land that was built upon (or was intended to be built upon) or in respect of which a prohibited change of use was found, but also to all the other plots of land making up the site. Moreover, no compensation was due.

(v) *Procedures for adopting and enforcing the confiscation measure* – The measure was ordered by the criminal courts. The Court was not persuaded by the argument that the criminal courts acted "in the place of the administrative authority". The criminal court's role was not simply to verify that no site development had been carried out in the absence of or in breach of planning permission, but also to ascertain whether the development, authorised or not, was compatible with all the other applicable rules (the planning regulations). In other words, the criminal court acted independently of the administrative authority, whose position it could disregard.

(See also *Varvara v. Italy*, 17475/09, 29 October 2013, Information Note 167)

(b) *Compliance with the safeguards of Article 7*

(i) *Whether the impugned confiscation measures required a mental element* – The Grand Chamber confirmed that Article 7 required, for the purposes of punishment, a mental link demonstrating an element of personal liability on the part of the perpetrator of the offence, without which the penalty could not be regarded as foreseeable.

Nevertheless, this requirement did not preclude the existence of certain forms of objective liability stemming from presumptions of liability. In principle the Contracting States remained free to penalise a simple or objective fact as such, irrespective of whether it resulted from criminal intent or from negligence. Presumptions of fact or of law were acceptable, provided they did not have the effect of making it impossible for an individual to exonerate himself from the accusations against him. As the Convention had to be read as a whole, those principles from the Article 6 § 2 case-law also applied under Article 7.

(ii) *The absence of a formal "conviction"* – Article 7 precluded the imposition of a criminal sanction on an individual without his personal criminal liability being established and declared beforehand. Otherwise the principle of the presumption of innocence guaranteed by Article 6 § 2 of the Convention would also be breached.

The Court, emphasising that its judgments all had the same legal value (as their binding nature and interpretative authority did not depend on the formation by which they were rendered), stated that the *Varvara* judgment did not, however, lead to the conclusion that confiscation measures for unlawful site development necessarily had to be accompanied by convictions decided by "criminal" courts within the meaning of domestic law. The applicability of Article 7 did not have the effect of imposing the "criminalisation" by States of procedures which, in exercising their discretion, they had not classified as falling strictly within the criminal law. It was necessary and sufficient for the declaration of criminal liability to comply with the safeguards provided for in Article 7, provided it stemmed from proceedings complying with Article 6.

The Court nevertheless had to ascertain whether the impugned confiscation measures at least required a formal declaration of criminal liability in respect of the applicants. Since the applicant companies had not been prosecuted themselves, the question whether the declaration of criminal liability required by Article 7 had to meet formal requirements arose only in respect of Mr Gironda.

It was necessary to take into account, first, the importance in a democratic society of upholding the rule of law and public trust in the justice system, and secondly, the object and purpose of the rules applied by the Italian courts. The relevant rules sought to prevent the impunity which would stem from a situation where, by the combined effect of complex offences and relatively short limitation periods, the perpetrators of such offences systematically avoided prosecution and, above all, the consequences of their misconduct.

In the Court's view, where the courts found that all the elements of the offence of unlawful site development were made out (as in Mr Gironda's case), while discontinuing the proceedings solely on account of statutory limitation – and provided that the rights of the defence were respected –, those findings could be regarded as constituting, in substance, the "conviction" required by Article 7 for the imposition of a penalty.

(iii) *Whether the confiscation measure could be imposed on the applicant companies, which were not parties to the proceedings* – Having regard to the principle that a person could not be punished for an act engaging the criminal liability of another, a confiscation measure that was applied, as in the present case, to individuals or legal entities which were not parties to the proceedings was incompatible with Article 7 of the Convention.

Since Italian law, as in force at the time, did not provide for the liability of legal entities, limited-liability companies could not, as such, be "parties" to criminal proceedings, in spite of their distinct legal personality. Accordingly, they could not be legally "represented" in the context of the relevant criminal proceedings in the present case. The companies thus remained "third parties" in relation to those proceedings. Nevertheless the acts (and ensuing liability) of their respective legal representatives had been directly attributed to those companies.

Conclusions: violation in respect of the applicant companies (fifteen votes to two); no violation in respect of Mr Gironda (ten votes to seven).

Article 1 of Protocol No. 1: The complaint was examined under the second paragraph of that provision.

As to the aim pursued, an examination of the current state of the confiscated property made it doubtful that the confiscation had actually contributed to the protection of the environment.

Any interference with the right to the peaceful enjoyment of one's possessions had to take account of the following:

(i) It had to be proportionate, as assessed in the light of a number of factors: the possibility of less restrictive alternative measures such as the demolition of structures that were incompatible with the relevant regulations or the annulment of the devel-

opment plan; the limited or unlimited nature of the sanction (depending on whether it affected both developed and undeveloped land, and even areas belonging to third parties); and the degree of culpability or negligence on the part of the applicants (or the relationship between their conduct and the offence in question).

(ii) Procedural safeguards, affording the individual a reasonable opportunity of putting his or her case and discussing the relevant matters, in adversarial proceedings that complied with the principle of equality of arms.

The automatic application of the impugned confiscation measure – save in respect of *bona fide* third parties – was clearly ill-suited to these principles:

(i) it did not allow the courts to ascertain which instruments were the most appropriate in relation to the specific circumstances of the case or, more generally, to weigh the legitimate aim against the rights of those affected by the sanction; and

(ii) as the applicant companies had not been parties to the related proceedings, none of the above-mentioned procedural safeguards had been available to them.

Conclusion: violation in respect of all the applicants (unanimously).

Article 6 § 2 of the Convention (Mr Gironda): The applicant had been declared guilty in substance in spite of the fact that the prosecution of the offence in question had become statute-barred; this constituted a breach of his right to be presumed innocent.

Conclusion: violation in respect of Mr Gironda (sixteen votes to one).

Article 41: reserved.

(See also *Sud Fondi srl and Others v. Italy*, 75909/01, 20 January 2009, Information Note 115)

ARTICLE 8

Respect for private and family life

Legal prohibition, for persons born of sperm or ova donation, to access donor's identity: *communicated*

Gauvin-Fournis v. France, 21424/16 [Section V]
Silliau v. France, 45728/17 [Section V]

The applicants were born as a result of artificial insemination using donor sperm. When they reached adulthood their parents told them how they had been conceived. The applicants then took steps to discover the identity of their respective biological fathers (or obtain certain non-identifying information) but their efforts were thwarted by the legal rules on egg and sperm donation, as French law prohibits the disclosure of the donor's identity and only doctors are permitted to provide certain non-identifying information, for the purposes of treatment. The *Conseil d'État* has taken the view that the rules on the anonymity of egg and sperm donation are designed to protect the private and family life of donors, recipients and their families, and that the legislature made a balanced assessment of the risks inherent in lifting secrecy. The applicants maintain that these rules infringe their right to be informed of their origins and are discriminatory.

Cases communicated under Article 8, taken alone and in conjunction with Article 14 of the Convention.

Respect for private life

Arbitrary invalidation of Russian passports issued to former Soviet nationals: *violation*

Alpeyeva and Dzhalagoniya v. Russia, 7549/09 and 33330/11, judgment 12.6.2018 [Section III]

Facts – The first applicant moved to Russia in 1994 after the Russian embassy in Kyrgyzstan had put a stamp in her Soviet passport confirming that she had obtained Russian citizenship. In 2001 a Russian internal passport was issued to her, however, in 2006, when she applied for an international passport, it was seized on the grounds that she had never properly acquired Russian citizenship.

In 1998, the second applicant, who had been living in Russia since the disintegration of the Soviet Union, received an insert in his Soviet passport, confirming his Russian citizenship. He was issued a Russian passport in 2002. However, in 2010, when he turned 45 and, as required by domestic law, applied to exchange his passport, he was refused on the grounds that the authorities could not find any registration proving that he had ever been granted Russian citizenship.

Both applicants unsuccessfully challenged these decisions before the domestic courts. They were subsequently granted Russian citizenship, the first applicant in 2010 and the second in 2013.

Law – Article 8: While the instant case concerned the domestic authorities' findings that the applicants had never properly acquired Russian citizenship, the Court applied the principles concerning arbitrary denial or revocation of citizenship (see *Karassev v. Finland* (dec.), 31414/96, 12 January 1999, Information Note 2; *Genovese v. Malta*, 53124/09, 11 October 2011, Information Note 145; *Ramadan v. Malta*, 76136/12, 21 June 2016, Information Note 197; and *K2 v. the United Kingdom* (dec.), 42387/13, 7 February 2017, Information Note 205)

The impugned decisions had deprived the applicants of their legal status in Russia and effectively rendered them stateless persons. They had been left without any valid identity document, which entailed considerable consequences for their everyday life, as Russian citizens had to prove their identity unusually often, even when performing such mundane tasks as exchanging currency or buying train tickets. Moreover, an internal passport was required for more crucial needs, such as finding employment or receiving medical care (as established in *Smirnova v. Russia*, 46133/99 and 48183/99, 24 July 2003, Information Note 55). For the second applicant, his failure to complete the mandatory exchange of his passport was also considered an administrative offence. Hence, the impugned decisions amounted to an interference with the applicants' right to respect for private life.

The decisions had however been in accordance with the law and the applicants had availed themselves of the possibility to contest them before the domestic courts, which had examined their claims at two levels of jurisdiction. The applicants, who had not alleged any procedural shortcomings, had thus been afforded the necessary procedural safeguards.

Having regard to the Ombudsman's reports on the practice of seizing passports from former citizens of the USSR who had moved to Russia from CIS countries, the documents confirming the applicants' citizenship could very well have been irregularly issued. However that was not through any fault of their own but due to the lack of streamlined procedures, and a unified database, and also because of errors committed by the State officials.

Due to the authorities' mishandling of procedures related to the granting of citizenship, the applicants had found themselves not only in a situation comparable to that in the *Smirnova* case, but also faced consequences affecting their social identity far more fundamentally as they had been deprived of any legal status in Russia. They had become stateless persons and remained so until 2010 and 2013 respectively. It had taken the authorities from 2007, when the Ombudsman had drawn attention to the issue, until 2013 for the general problem to be solved. Since the authorities' oversight had resulted in consequences for the applicants so severely affecting their private life, it amounted to an arbitrary interference. The authorities had thus failed to act diligently.

Conclusion: violation (unanimously).

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

Respect for private life, positive obligations

Refusal to oblige media to anonymise online archive material about a crime at the request of its perpetrators in view of their imminent release: *no violation*

M.L. and W.W. v. Germany, 60798/10 and 65599/10, judgment 28.6.2018 [Section V]

Facts – In 1993 the applicants were convicted of the murder of a well-known actor and sentenced to life imprisonment. In 2007, with the date of their release from prison approaching, they brought proceedings against several media organisations, requesting that they anonymise archive documents which were accessible on their Internet sites and dated from the time of the trial (an article, a file and the transcription of an audio report).

In 2009 and 2010, while acknowledging that the applicants had a considerable interest in no longer being confronted with their conviction, the Federal Court of Justice ruled in favour of the media organisations, on the grounds that:

– the crime and the trial had attracted considerable media attention at the time; the public had an interest in being informed, which included the possibility of carrying out research into past events; it was part of the media's role to participate in forming democratic opinion by making their archives available;

– the applicants had attempted fairly recently to have the proceedings in their case reopened; barely three years prior to their release, they had called on the press to transmit information about their

most recent application for a retrial; until 2006 the web site of the second applicant's criminal-defence lawyer had included multiple reports about his client;

– the documents in question had been placed under headings which clearly indicated that these were not new reports;

– it was necessary to take account of the risk that, in the absence of sufficient staff and time to examine requests for material to be rendered anonymous, the media would refrain from including in their reports identifying elements that could subsequently become unlawful.

The applicants considered that this approach failed to take account of the power of search engines.

Law – Article 8: The initial infringement of the applicants' private life resulted in the present case from the decision by the media organisations concerned to publish the information and, especially, to keep it available on their web sites, even without the intention of attracting the public's attention. The existence of search engines merely exacerbated the interference.

However, the obligations of search engines with regard to the individual concerned by an item of information could be different from those of the entity which originally published the information. In consequence, the balancing of the competing interests could result in different outcomes, depending on whether the deletion request was made against the entity which had originally published the information (whose activity was generally at the heart of what freedom of expression was intended to protect), or against a search engine (whose main interest was not in publishing the initial information about the person concerned, but in facilitating identification of all available information about him or her and creating a profile of it).

For the reasons set out below, the Court concluded that the refusal to grant the applicants' request had not been in breach of the German State's positive obligations to protect the applicants' private lives. In view (i) of the national authorities' margin of appreciation in such matters when weighing up divergent interests, (ii) of the importance of maintaining the availability of reports whose lawfulness had not been contested when they were initially published, and (iii) of the applicants' conduct *vis-à-vis* the press, the Court discerned no strong reasons which would require it to substitute its view for that of the Federal Court of Justice.

(a) *The contribution to a debate of general interest, and the issue of anonymisation on request* – Notwithstanding their importance, the rights of a person who had been the subject of a publication available on the Internet had also to be balanced against the public's interest – protected by Article 10 of the Convention – in being informed about past events and contemporary history through the press's public digital archives.

In the present case, the availability of the impugned reports on the media organisations' web sites at the time that the applicants lodged their requests continued to contribute to a debate of general interest which had not been diminished by the passage of a few years.

Admittedly, the applicants were not requesting the deletion of the material, but its anonymisation. Firstly, however, the approach to covering a given subject was a matter of journalistic freedom; it was left to journalists to decide what details (such as the full name of the person concerned) ought to be included to ensure the credibility of a publication, provided that these decisions corresponded to the profession's ethical and deontological norms. Secondly, the obligation to assess at a later stage the lawfulness of a report following a request from the individual concerned – necessarily implying a weighing up of all the interests at stake – would entail a risk that the press would prefer to refrain from preserving such reports in their online archives or to omit the identifying elements that were likely to be concerned by any such request.

(b) *The degree to which the person concerned was well known and the subject of the report* – Admittedly, with the passage of time, the public's interest in the crime in question had declined. However, the applicants had returned to the public eye when they attempted to have their criminal trial reopened and had contacted the press in this regard. Thus, they were not simply private individuals who were unknown to the public.

As regards the subject of the reports (the conduct of the criminal trial at the relevant time, or one of the applications to have the proceedings reopened), it was capable of contributing to a debate in a democratic society.

(c) *The prior conduct of the person concerned with regard to the media* – The applicants' attempts to

challenge their conviction had gone well beyond the mere use of the remedies available under German criminal law. As a result of their own conduct *vis-à-vis* the press, less weight was to be attached in the present case to the applicants' interest in no longer being confronted with their convictions through the medium of archived material on the web sites of a number of media organisations. It followed that, even in the light of their impending release, they could no longer entertain a legitimate expectation of having the reports anonymised, or even of being forgotten online.

(d) *The content, form and consequences of the publication* – The impugned texts described, in an objective manner, a judicial decision. Admittedly, certain of the articles in question provided details about the defendants' lives. However, such details formed part of the information that criminal-law judges were regularly required to take into consideration in assessing the circumstances of the crime and the elements of individual guilt, and in consequence generally formed part of the deliberations during public hearings. Furthermore, these articles did not reflect an intention to present the applicants in a disparaging way or to harm their reputation.

As to the extent of their publication, given their position in the architecture of the web sites in question, the impugned reports were not likely to attract the attention of those Internet users who were not seeking information about the applicants. Equally, there was nothing to suggest that maintaining access to those reports had been intended to re-disseminate information about the applicants.

As to the fact that the Internet intensified information and rendered it ubiquitous – in that, irrespective of the initial level of dissemination, the impugned material could be found on the Internet permanently, particularly through the use of search engines –, the applicants made no submissions as to any attempts by them to contact the operators of search engines requesting that they reduce the traceability of the relevant information. Moreover, the Court considered that it was not required to pronounce on the possibility that the domestic courts could have ordered measures that would be less restrictive with regard to the media organisations' freedom of expression, given that these had not been part of the deliberations before those courts in the domestic proceedings nor, indeed, in the proceedings before the Court.

(e) *The circumstances in which the photos were taken* – The contested photographs did not contain any compromising elements. The likelihood that the photographs would lead third parties to recognise the applicants was also reduced by the fact that they showed the applicants' appearance as it had been thirteen years prior to their release.

Conclusion: no violation (unanimously).

(See the research report on Internet in the Court's case-law and, more specifically, *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, 3002/03 and 23676/03, 10 March 2009, Information Note 117; *Timpul Info-Magazin and Anghel v. Moldova*, 42864/05, 27 November 2007; *Węgrzynowski and Smolczewski v. Poland*, 33846/07, 16 July 2013, Information Note 165 ; see also the judgment by the Court of Justice of the European Union in *Google Spain SL and Google Inc.*, C-131/12, 13 May 2014, Information Note 174)

Respect for family life

Court order to return six-year old child, who had been in applicants' care since birth, to biological parents: *inadmissible*

Antkowiak v. Poland, 27025/17, decision 14.6.2018 [Section I]

Facts – A pregnant woman, who the applicants – a married couple – had found on the Internet, agreed to give up her child for adoption. In February 2011, after giving birth to a baby boy, she signed a declaration to this effect and the child has been living with the applicants since he left the hospital. However, three weeks later, she changed her mind and lodged a request with a district court for the immediate return of the child. In the meantime, her partner recognised the paternity of the baby. Her request was dismissed and during the next years, the applicants and the biological parents have been engaged in proceedings for custody and parental rights over the child. In 2013 the biological parents were granted contact rights.

In December 2016, while acknowledging that the solution was contrary to the boy's will, a regional court ordered his return to his biological family. Enforcement proceedings in respect of this decision are still pending. At the same time, the applicants instituted new proceedings to restrict the biological parents' parental rights and to become the child's foster parents. In August 2017, referring

to a fresh expert psychologist's opinion, a district court ordered that the boy should reside with the applicants pending the outcome of the proceedings.

Law – Article 8: The applicants had neither expressly nor in substance submitted any complaints on behalf of the child. Accordingly, the only issue to be determined in the instant case was whether there had been a breach of the applicants' own rights under Article 8 of the Convention.

While there were no biological ties between the applicants and the child, he had been in their constant care since birth, for more than six years so far. Given the close personal ties between them and the fact that the applicants had assumed their roles as parents *vis-à-vis* the child, such a relationship fell within the notion of family life. The court order to return the child to his biological parents constituted an interference with the applicants' right to respect for their family life. The interference was in accordance with the law and was intended to protect the child's "rights and freedoms".

Regarding the necessity of the impugned measure, the regional court had concluded that the child's return to his biological parents, though it would cause him suffering, was the only way to regulate his situation in the long term and to avoid more emotional complications in the future. It had taken into account the child's young age and the fact that it had not been too late to give him a chance to be raised in his biological family. While initially the authorities had had some doubts regarding the parenting skills of the biological parents, eventually both couples had been deemed fit to raise the child. The authorities had taken measures to enable the child to develop bonds with his biological parents and thus to facilitate the family reunification. The domestic courts had thus had to make a difficult choice between allowing the applicants to continue their relationship with the boy and taking measures with a view to bringing about the boy's reunion with his biological family. As required by international law, their primary consideration had always been the child's best interest. While the Court acknowledged the emotional hardship caused to the applicants, their rights could not override the best interests of the child. The national authorities had provided relevant and sufficient reasons within their margin of appreciation and the impugned measure had therefore been "necessary in a democratic society".

As to the decision-making process, the case had been examined at two levels of jurisdiction. Numerous witnesses had been heard and several expert opinions had been obtained. Faced with diverging expert opinions as to which decision would be in the child's best interest, the domestic courts had provided extensive reasons for their findings and addressed the arguments raised by the applicants. The applicants had been fully involved and legally represented throughout the proceedings. Moreover, the Ombudsman for Children's Rights had intervened in the proceedings, maintaining that there had been no grounds to deprive the biological parents of their parental rights. While the length of the decision-making process had clearly not contributed to the protection of the child's best interests, the process itself had been fair and capable of safeguarding the applicants' rights under Article 8.

Conclusion: inadmissible (manifestly ill-founded).

Respect for correspondence

Proportionality and safeguards of Swedish legislation on signals intelligence: *no violation*

Centrum för rättvisa v. Sweden, 35252/08, judgment 19.6.2018 [Section III]

Facts – The applicant is a Swedish not-for-profit organisation who represents clients in litigation against the State and otherwise, who claim that their rights and freedoms under the Convention and under Swedish law have been violated. Due to the nature of its function as a non-governmental organisation scrutinising the activities of State actors, it believes that there is a risk that its communication through mobile telephones and mobile broadband has been or will be intercepted and examined by way of signals intelligence.

Law – Article 8: The contested legislation on signals intelligence instituted a system of secret surveillance that potentially affected all users of mobile telephone services and the internet, without their being notified about the surveillance. No domestic remedy provided detailed grounds in response to a complainant who suspected that he or she had their communications intercepted. Therefore, the mere existence of the contested legislation amounted in itself to an interference with the exercise of the applicant's rights under Article 8. The relevant legislation was reviewed as it stood at the time of the examination by the Court. The measures permit-

ted by Swedish law pursued legitimate aims in the interest of national security by supporting Swedish foreign, defence and security policy. While States enjoyed a wide margin of appreciation in deciding what type of interception regime is necessary to protect national security, the discretion afforded to them in operating an interception regime was necessarily narrower. In *Roman Zakharov v. Russia* [GC], the Court had identified minimum safeguards that both bulk interception and other interception regimes had to incorporate in order to be sufficiently foreseeable to minimise the risk of abuses of power. Adapting those minimum safeguards where necessary to reflect the operation of a bulk interception regime dealing exclusively with national security issues, the Court assessed the impugned interference from the standpoint of the following criteria:

(i) *Accessibility of domestic law* – All legal provisions relevant to signals intelligence had been officially published and were accessible to the public.

(ii) *Scope of application of signals intelligence* – The eight purposes for which signals intelligence could be conducted were adequately indicated in the Signals Intelligence Act. Signals intelligence conducted on fibre optic cables could only concern communications crossing the Swedish border in cables owned by a communications service provider. Communications between a sender and a receiver in Sweden were not to be intercepted, regardless whether the source had been airborne or cable-based. The National Defence Radio Establishment (FRA) could also intercept signals as part of its development activities which could lead to data not relevant for the regular foreign intelligence being intercepted and read. However, the development activities were essential for the proper functioning of the foreign intelligence and the information obtained could be used only in conformity with the purposes established by law and the applicable tasking directives. Provisions applicable to the regular foreign intelligence work were also relevant to the development activities and to any interception of communications data. The Data Protection Authority had found no evidence that personal data had been collected for other purposes than those stipulated for the signals intelligence activities. While the Police authorities were allowed to issue detailed tasking directives for signals intelligence, the Foreign Intelligence Act clearly excluded the use of foreign intelligence to solve tasks in the area of law enforcement or crime prevention. Consequently, the law indicated the scope of mandating and performing signals intelligence conferred on the competent authorities and the manner of its exercise with sufficient clarity.

(iii) *Duration of secret surveillance measures* – The Signals Intelligence Act clearly indicated the period after which a permit would expire and the conditions under which it could be renewed but not the circumstances in which interception had to be discontinued. Nevertheless, any permit was valid for a maximum of six months and a renewal required a review as to whether the conditions were still met. Although the Foreign Intelligence Inspectorate was not tasked with inspecting every signals intelligence permit, it could decide that an intelligence interception should cease, if during an inspection it was evident that the interception was not in accordance with a permit. The permits concerned the collection of intelligence related to threats to national security and did not target individuals suspected of criminal conduct. The FRA continuously reviewed whether the specific personal data it had intercepted was still needed for its signals intelligence activities. In these circumstances, the safeguards in place adequately regulated the duration, renewal and cancellation of interception measures.

(iv) *Authorisation of secret surveillance measures* – While the privacy protection representative could not appeal against a decision by the Foreign Intelligence Court or report any perceived irregularities to the supervisory bodies, the presence of the representative at the court's examinations compensated, to a limited degree, for the lack of transparency concerning that court's proceedings and decisions. Additionally, the FRA's signals intelligence was subject to a system of prior authorisation whereby the FRA had to submit for independent examination an application for a permit to conduct surveillance in respect of each intelligence collection mission. The task of examining whether the mission was compatible with applicable legislation and whether the intelligence collection was proportional to the resultant interference with personal integrity was entrusted to a body whose presiding members were or had been judges. Furthermore, the supervision of the Foreign Intelligence Court was extensive as the FRA, in its applications, had to specify not only the mission request in question and the need for the intelligence sought but also the signal carriers to which access was needed and the search

terms that would be used. The judicial supervision performed by the Foreign Intelligence Court was of crucial importance in that it limited the FRA's discretion by interpreting the scope of mandating and performing signals intelligence. Finally, the FRA itself could decide to grant a permit, if it was feared that the application of a permit from the Foreign Intelligence Court might cause delay or other inconveniences of essential importance for one of the specified purposes of the signals intelligence. However, such a decision had to be followed by an immediate notification to and a subsequent rapid review by the Foreign Intelligence Court where the permit could be changed or revoked. Therefore, the provisions and procedures relating to the system of prior court authorisation, on the whole, provided important guarantees against abuse.

(v) *Procedures to be followed for storing, accessing, examining, using and destroying the intercepted data* – Personnel at the FRA treating personal data were security cleared and, if secrecy applied to the personal data, subject to confidentiality. They were under an obligation to handle the personal data in a safe manner and could face criminal sanctions if personal data were mismanaged. Furthermore, the FRA had to ensure that personal data was collected only for certain expressly stated and justified purposes, determined by the direction of the foreign intelligence activities through tasking directives. The personal data treated also had to be adequate and relevant in relation to the purpose of the treatment and no more than was necessary for that purpose could be processed. All reasonable efforts had to be made to correct, block and destroy personal data which was incorrect or incomplete in relation to the purpose. Several provisions regulated the situations when intercepted data had to be destroyed. While it was necessary for the FRA to store raw material before it could be manually processed, the Court stressed the importance of deleting such data as soon as it was evident that it lacked pertinence for a signals intelligence mission. In sum, the legislation provided adequate safeguards against abuse of treatment of personal data and thus served to protect individuals' personal integrity.

(vi) *Conditions for communicating the intercepted data to other parties* – The legislation did not indicate that possible harm to the individual concerned had to be considered, only in very broad terms mentioned that the data could be communicated to "other states or international organisations" and there was no provision requiring the recipient to protect the data with similar safeguards as those applicable under Swedish law. Also the situation where data could be communicated – when necessary for "international defence and security cooperation" – opened up a wide scope of discretion. While those factors gave some cause for concern with respect to the possible abuse of the rights of individuals, they were sufficiently counterbalanced by the supervisory elements.

(vii) *Supervision of the implementation of secret surveillance measures* – The Court found no reason to question the independence of the Foreign Intelligence Inspectorate. The supervision of the Inspectorate was efficient, open to public scrutiny and of particular value in ensuring that signals intelligence was performed in a manner which offered adequate safeguards against abuse. Furthermore, if the Data Protection Authority found personal data was or could be processed illegally, it took remedial action through remarks to the FRA and could also apply to an administrative court to have illegally processed personal data destroyed. The supervisory elements provided by the Foreign Intelligence Inspectorate and the Data Protection Authority fulfilled the requirements on supervision in general. Moreover, the Parliamentary Ombudsmen and the Chancellor of Justice had general supervisory responsibilities in regard to the FRA.

(viii) *Notification of secret surveillance measures and available remedies* – While the requirement to notify the subject of secret surveillance measures concerned natural persons and was thus not applicable to the applicant, and as it was, in any event, devoid of practical significance due to secrecy, the Court found it pertinent to examine the issue of notification together with the remedies available in Sweden.

The remedies available for complaints relating to secret surveillance did not include the recourse to a court, save for an appeal against the FRA's decisions on disclosure and corrective measures, remedies found to be ineffective. Furthermore, there did not appear to be a possibility for an individual to be informed of whether his or her communications had actually been intercepted or, generally, to be given reasoned decisions. Nevertheless, there were several remedies by which an individual could initiate an examination of the lawfulness of measures taken during the operation of the signals intel-

ligence system, notably through requests to the Foreign Intelligence Inspectorate, the Parliamentary Ombudsmen and the Chancellor of Justice. The aggregate of remedies, although not providing a full and public response to the objections raised by a complainant, had to be considered sufficient in the present context. In reaching that conclusion, the Court attached importance to the earlier stages of supervision of the regime, including the detailed judicial examination by the Foreign Intelligence Court of the FRA's requests for permits to conduct signals intelligence and the extensive and partly public supervision by several bodies, in particular the Foreign Intelligence Inspectorate.

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In sum, although there was scope for improvement in some areas, the Swedish system of signals intelligence, examined *in abstracto*, revealed no significant shortcomings in its structure and operation, which were proportionate to the aim pursued, and provided adequate and sufficient guarantees against arbitrariness and the risk of abuse. That finding did not preclude a review of the State's liability under the Convention where, for example, the applicant had been made aware of an actual interception.

Conclusion: no violation (unanimously).

(See also *Kennedy v. the United Kingdom*, 26839/05, 18 May 2010, Information Note 130; and *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015 Information Note 191)

ARTICLE 10

Freedom of expression

Shortcomings in judicial review of reprimand imposed on academic following unauthorised participation in TV show: *violation*

Kula v. Turkey, 20233/06, judgment 19.6.2018 [Section II]

Facts – The applicant, a professor specialising in the German language, taught translation at a provincial university. He was invited to appear on a TV show in Istanbul, and informed his superiors. However, the director of the translation course expressed doubts about the connection between the applicant's speciality field and the subject of the TV programme ("The cultural structure of the European Union and the traditional structure of Turkey – Comparing identities and modes of behaviour – Likely problems and suggested solutions"), whereupon the Faculty Dean decided that his involvement in the TV programme was inappropriate. Having been informed of that decision, the applicant nevertheless took part in the TV programme. Two weeks later, just after a colloquy in Istanbul which he had been authorised to attend, the applicant once again spoke on the same TV show, this time without informing his superiors in advance.

The applicant was given a reprimand by the Vice-Chancellor of the University for his actions. The disciplinary board noted that, even in the case of a research professor, participation in a TV programme of this kind had to be subject to some form of scrutiny. The disciplinary transgression used as the formal basis for the administrative sanction imposed on the applicant (the reprimand) was a breach of the statutory prohibition on leaving his "town of residence" without his superiors' authorisation.

Law – Article 10

(a) *Existence of interference with the freedom of expression* – A whole series of factors convinced the Court that, behind its formal grounds, the real reason for the sanction had been the applicant's unauthorised participation in the TV programme in question. Neither the applicant nor the university authorities had ever really considered things from the angle of his "leaving" his town of residence.

Therefore, the main issue in this case was the applicant's use of his right to freedom of expression as an academic. That question had indubitably concerned the applicant's academic freedom, which covered freedom of expression and of action, freedom to communicate information, and freedom to "conduct research and distribute knowledge and truth without restriction". The sanction imposed, however minimal, could have had an impact on the applicant's exercise of his freedom of expression, and even have had a chilling effect on it.

(b) *Justification of the interference* – For the reasons set out below, the Court found that, although the interference had been prescribed by law, it had not been accompanied by the requisite safeguards to be deemed "necessary in a democratic society", which made it unnecessary for the Court to examine whether the interference had pursued a legitimate aim.

The present case concerned both an *ex post facto* disciplinary sanction (for unauthorised participation in a TV programme outside the applicant's town of residence) and a prior restriction (the rejection of the request to participate in the first TV programme).

In neither case had an explanation ever been provided of why the applicant's participation in the programme had been inappropriate.

At the time of the request for authorisation to participate in the first TV programme, the Dean had provided no reasons for his decision to reject it, and his subsequent letter in reply to the applicant's request for explanations had merely referred to the translation course director's misgivings about the extent of his knowledge concerning the subject of the programme.

When the disciplinary sanction had been imposed, the only reason given was a cursory reference to the relevant legal provision (concerning the applicant's unauthorised departure from his town of residence), without any further information on the factual grounds for the sanction.

In their decisions the university authorities had at no point argued, for example, that the applicant's unauthorised departure had disrupted the public university service; or that the applicant had abandoned his duties in order to appear on the TV programme in question; or that he had, in taking part in the latter, acted or spoken in a manner detrimental to the university's reputation.

Furthermore, the subsequent judicial decisions had not been based on "relevant and sufficient" grounds for establishing whether the sanction imposed on the applicant had been necessary, in the circumstances of the case, for the aim pursued, even though the applicant had explicitly relied on academic freedom in support of his appeals

The administrative court and the Supreme Administrative Court (which upheld the first-instance judgment) ought to have conducted – as, in fact, they could have done under the law on the procedure applicable to administrative cases – a broader assessment than a mere formal review of lawfulness under the disciplinary regulations relied upon by the university authorities.

In the instant case, the judgments delivered failed to show how the domestic courts had carried out their task of, on the one hand, balancing the different competing interests and, on the other, preventing *ultra vires* action by the university authorities. The same shortcomings had also hampered the Court in effectively conducting its own scrutiny.

Conclusion: violation (unanimously).

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

Freedom of expression

Administrative fine for disclosure of secret military information in the context of journalistic investigation: *violation*

Gîrleanu v. Romania, 50376/09, judgment 26.6.2018 [Section IV]

Facts – In 2005, the applicant, a journalist, received from a colleague a CD containing a copy of secret documents, which had been leaked from the Romanian military unit in Afghanistan a year before. Subsequently he discussed the content with the Romanian Armed Forces and Intelligence Service and shared it with some fellow journalists and other persons.

In 2006, after the media had drawn attention to the leak, criminal proceedings were instituted against several persons. The applicant was arrested and spent two days in police custody. His house was searched and the hard-drive of his computer seized.

In 2007, after the leaked documents had been de-classified, the prosecutor's office found that the breach of the Law on national security committed by the applicant was not serious enough to require criminal sanctions but ordered him to pay an administrative fine of about EUR 240 and judicial costs of around EUR 600. The applicant unsuccessfully challenged this decision.

Law – Article 10

(i) *Applicability and the existence of interference* – It was in his capacity as a journalist working in the field of the armed forces and the police that the applicant had received the leaked documents and contacted the authority which had produced them, as well as his colleagues and other people who, he believed, had knowledge about the subject. All the above actions could be considered as part of a journalistic investigation. The applicant had been arrested, investigated and fined for gathering and sharing secret information. Article 10 of the Convention was therefore applicable and the sanctions

imposed constituted an interference with his right of freedom of expression.

(ii) *Whether the measure had been according to law and in pursuance of a legitimate aim* – The interference was prescribed by law and pursued the legitimate aim of protecting national security.

(iii) *Whether the measure was necessary in a democratic society* – Regarding the interests at stake, the impugned documents and the leak, which had given rise to much debate in the media and internal inquiry within the Ministry of Defence, were likely to raise questions of public interest. However, as acknowledged by the prosecutor, the information was outdated and its disclosure was not likely to endanger national security. Moreover, the documents had been de-classified. The Government had thus not succeeded in demonstrating that the actions of the applicant were capable of causing considerable damage to national security.

Considering the applicant's conduct, he was not a member of the armed forces on which specific "duties and responsibilities" were incumbent. He had not obtained the information by unlawful means; nor had he actively sought to obtain it. Moreover, the information had already been seen by other people before reaching the applicant. In addition, his first step after coming into possession of the information in question was to discuss it with the institution concerned by the leak. It did not appear from the investigation whether the latter had tried to recover the documents or warn about possible dangers in the event of their disclosure.

Regarding the judicial review of the imposed measure, the courts had not considered any of the specific elements of the applicant's conduct. They had also failed to verify whether the said information could indeed have posed a threat to military structures in Afghanistan and hence had not weighed the interest in maintaining confidentiality of the documents in question against the interests of a journalistic investigation and the public's interest in being informed of the leak and maybe even of the actual content of the documents.

In cases concerning criminal sanctions for the disclosure of classified military information the Court had held that the margin of appreciation was to be left to the domestic authorities in matters of national security. However, the applicant in the current case was a journalist claiming to have made the disclosure in the context of a journalistic investigation and not a member of the military who collected and transmitted secret military information to foreign nationals or to private companies.

Although the imposed fine was relatively low and it was unclear whether the judicial costs had actually been paid, the domestic courts had held as established that the applicant had intentionally committed a criminal offense against national security. The fact of having been subject to a conviction could in some cases be more important than the minor nature of the penalty imposed. The sanctions had furthermore been aimed at preventing the applicant from publishing and sharing the classified information. However, after the documents had been de-classified, the decision whether to impose any sanctions against the applicant should have been more thoroughly weighed.

In sum, the imposed measures had not been reasonably proportionate to the legitimate aim pursued in view of the interests of a democratic society in ensuring and maintaining freedom of the press.

Conclusion: violation (unanimously).

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

(See also *Dammann v. Switzerland*, 77551/01, 25 April 2006, Information Note 85)

ARTICLE 11

Freedom of association

Legislation introducing restrictions on trade unions' strike actions and the imposition of compulsory arbitration: *inadmissible*

Association of Academics v. Iceland, 2451/16, decision 15.5.2018 [Section II]

Facts – The applicant is an association of trade unions of university graduates in Iceland. Before the Court, it represents its 18 member unions, many in the public health care sector. In December 2014 collective bargaining commenced between individual member unions and the Icelandic State, with the member unions authorising the applicant association to represent them in collective bargaining with the Icelandic State. In February 2015 the existing collective agreement between the member unions and the Icelandic State formally lapsed, subsequently, 17 of the 18 member unions voted to

take collective action in the form of temporary and long-term strikes. The strike actions lasted between 11 and 67 days.

In June 2015, the Icelandic Parliament passed an Act which prohibited strike actions by the 18 unions, further work stoppages or any other measures designed to compel an arrangement to end the labour dispute which differed from the provisions of the Act. The Act also stipulated that, if a collective agreement between the parties was not signed by 1 July 2015, an arbitration tribunal would be appointed to determine the wages and employment terms of the union members, the decision being binding as a collective agreement upon the parties. In August 2015 the tribunal issued its decision, prolonging the validity of the existing collective agreements, with certain amendments to union members' wages and employment terms.

The applicant association unsuccessfully challenged the Act before the domestic courts.

Law – Article 11: The restrictions on the member unions' strike actions and the imposition of compulsory arbitration constituted an interference with their right to freedom of association. The interference was prescribed by law and, having regard to the effect of the strikes on the patient care, pursued the legitimate aim of being in the interest of public safety and for the protection of the rights of others.

Assessing the necessity of the impugned measures the applicant association's member unions had in fact exercised two essential elements of freedom of association, namely the right for a trade union to seek to persuade the employer to hear what it had to say on behalf of its members and the right to engage in collective bargaining. The applicant association, on behalf of its member unions, had started negotiations with the Icelandic State in February 2015. Moreover, after the dispute had been referred to the State Conciliation and Mediation Officer, the parties had 24 meetings to try to reach an agreement and the Act had not restricted the member unions' right to collective bargaining immediately, when it entered into force. The parties did have 15 days to reach an agreement, before the process provided for in the Act would be instigated. Furthermore, the applicant association's union members had been able to take strike action for between 11 and 67 days before they were restricted by the Act. All attempts to bring the dispute to an end by negotiations could thus be regarded as exhausted at the time when the disputed Act had been enacted. Although the process of collective bargaining and strike action had not led to the outcome desired by the applicant's member unions and their members, this did not mean that their Article 11 rights were illusory.

As regards the fact that the disputed Act applied to all of the applicant association's member unions, and not only to the unions on strike at the time the Act had been passed, it was not a disproportionate measure as the associations had themselves decided to negotiate jointly and take various measures collectively in order to apply further pressure on the opposing party. If the legislation had only applied to the unions already on strike, it would not have prevented other unions from employing measures of the same kind for the benefit of the whole. Thus, the disputed Act did not go further than necessary in this respect.

The Supreme Court had evaluated the evidence presented in the case and weighed the interests at stake by applying the principles laid down in the Court's case-law. It had acted within its margin of appreciation and struck a fair balance between the measures imposed and the legitimate aim pursued.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Dilek and Others v. Turkey*, 74611/01 et al., 17 July 2007; *Demir and Baykara v. Turkey* [GC], 34503/97, 12 November 2008, Information Note 113; *Enerji Yapi-Yol Sen v. Turkey*, 68959/01, 21 April 2009, Information Note 118; *Hrvatski liječnički sindikat v. Croatia*, 36701/09, 27 November 2014, Information Note 179; *Federation of Offshore Workers' Trade Unions and Others v. Norway* (dec.), 38190/97, 27 June 2002, Information Note 43; *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 31045/10, 8 April 2014, Information Note 173; and *Trade Union in the Factory "4th November" v. the former Yugoslav Republic of Macedonia* (dec.), 15557/10, 8 September 2015)

ARTICLE 14

Discrimination (Article 1 of Protocol No. 1)

Lack of compensation for expropriation of squatter houses of internally displaced persons who had been provided with free temporary accommodation: *communicated*

Mammadov and Others v. Azerbaijan, 57978/14 [Section V]

(See Article 1 of Protocol No. 1 below)

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Compulsory confiscation of "unlawfully developed" land, regardless of any criminal liability: *violation*

G.I.E.M. S.r.l. and Others v. Italy, 1828/06 et al., judgment 28.6.2018 [GC]

(See Article 7 above, page 13)

Peaceful enjoyment of possessions

Annulment of final court decisions on privatisation of State company after public statements by President and Prime Minister: *violation*

Industrial Financial Consortium Investment Metallurgical Union v. Ukraine, 10640/05, judgment 26.6.2018 [Section IV]

(See Article 6 § 1 (civil) above, page 8)

Deprivation of property

Lack of compensation for expropriation of squatter houses of internally displaced persons who had been provided with free temporary accommodation: *communicated*

Mammadov and Others v. Azerbaijan, 57978/14 [Section V]

Following the occupation of their homes by Armenian forces, the applicants, internally displaced persons (IDPs), moved to Baku, built squatter houses and settled therein. The houses were expropriated and demolished for the construction of an electricity depot. The applicants were provided with free temporary housing due to their status as IDPs but no compensation was paid to them, whereas other residents of demolished squatter houses in the same area were paid monetary compensation.

Communicated under Article 1 of Protocol No. 1, taken separately and in conjunction with Article 14 of the Convention.

Control of the use of property

Temporary prohibition on commercial mussel seed fishing to comply with European Union directives: *no violation*

O'Sullivan McCarthy Mussel Development Ltd v. Ireland, 44460/16, judgment 7.6.2018 [Section V]

Facts – The applicant company is engaged in the cultivation of mussels in Castlemaine harbour, obtaining the necessary licences and permits each year. The harbour became subject to two EU directives seeking to protect the environment.

In December 2007 the Court of Justice of the European Union (CJEU) delivered a judgment in *Commission v. Ireland* (C-418/04) declaring that Ireland had failed to fulfil its obligations under the aforementioned directives. In view of the judgment, the authorities considered that it was not legally possible to permit commercial activity in Castlemaine harbour until the necessary assessments had been completed, thus prohibiting mussel seed fishing from June 2008. In October 2008, following successful negotiations between the Government and the European Commission, the applicant company was able to resume mussel seed fishing, however, natural predators had already decimated the mussel seed. Since mussels needed two years to grow to maturity, the applicant company sustained financial loss in 2010, having no mussels for sale.

It instituted unsuccessful compensation proceedings against the State.

Law – Article 1 of Protocol No. 1: The complaint was within the scope of Article 1 of Protocol No. 1 as the case concerned a "possession", namely the underlying aquaculture business of the applicant company. The temporary prohibition of part of the applicant company's activities, which was to be regarded as a restriction placed on a permit and connected to the usual conduct of business, amounted to an interference with its right to the peaceful enjoyment of its possessions, including the economic interests connected with the underlying business and was declared admissible. Unlike in cases previously decided by the Court, the authorisation, which was subject to conditions, had not been withdrawn or revoked. The nature of the interference was considered a "control of the use of property".

Concerning the lawfulness of the interference, there was no uncertainty about the nature and

scope of the restrictions that were applied to the harbour in 2008, nor about their legal basis. The applicant company had had continuing contact with the Government and been informed of all relevant developments. As an economic operator active for many years in the aquaculture sector, it had not been claimed that the applicant company was not aware of the protracted pre-contentious phase of the legal proceedings involving the European Commission and the respondent State, or of the infringement judgment of the CJEU.

The interference had the clear aim to protect the environment and the impugned measures taken had been adopted to ensure the respondent State's compliance with its obligations under EU law, which was a legitimate general-interest objective of considerable weight.

As the respondent State had not been wholly deprived of a margin of manoeuvre with regard to how to achieve compliance with the relevant EU directive and the CJEU judgment, the *Bosphorus* presumption of equivalent protection did not apply.

Considering the justification for the interference, the applicant company was engaged in a commercial activity that was subject to strict and detailed regulation by the domestic authorities, and operated in accordance with the conditions stipulated in the authorisations granted to it from year to year. This included the condition that it was not permitted to fish for mussel seed in an area where such activity had been prohibited by the Minister. Furthermore, it was relevant to the Court's assessment that the Supreme Court had been unanimous in finding that there was no legal basis for the applicant company to entertain a legitimate expectation of being permitted to operate as usual in 2008, following the finding by the CJEU that Ireland had failed to fulfil its relevant obligations under EU law.

Secondly, the applicant company was a commercial operator and therefore could not disclaim all knowledge of relevant legal provisions and developments. Rather, it could be expected to display a high degree of caution in the pursuit of its activities, and to take special care in assessing the risks that might be attached. However, the applicant company had purchased its new boat in May 2008, though it should have been aware of a possible risk of interruption of its usual commercial activities at least from December 2007, when the CJEU infringement judgment had been delivered.

Moreover, the Court was not in a position to find, as an established fact, that the applicant company's loss of profits in 2010 was the inevitable and immitigable consequence of the temporary closure of the harbour in 2008. The applicant company's activities had not been completely interrupted in 2008 and the State had succeeded in obtaining the agreement of the Commission to allow mussel seed fishing to resume at a much earlier stage, namely from October 2008. While this had not avoided the delayed loss in relation to 2008, the following year the applicant company had been able to resume its usual activities.

The fact that the respondent State had been found not to have fulfilled its obligations under EU law should not be taken, for the purposes of Article 1 of Protocol No. 1, as diminishing the importance of the aims of the impugned interference, or as lessening the weight to be attributed to them. Until the CJEU had handed down its judgment it was difficult to see how the respondent State could have known of the extent and consequences of the infringement thereby established. The Court saw no basis to second-guess the technical assessment of qualified authorities which had ruled out the possibility to open the harbour earlier. Even though the environmental assessments had eventually demonstrated that the blanket ban was not necessary, the State was required, as a matter of EU law, to be concerned not with unproven risk but rather with proven absence of risk. Achieving compliance on the nationwide scale, and within an acceptable timeframe, with the respondent State's obligations under EU law attracted a wide margin of appreciation for the domestic authorities. Although the applicant company saw an anomaly, and even arbitrariness, in the fact that one type of activity (mussel seed fishing) had been prohibited while another similar activity (the harvesting of mature mussels) had not, it was first and foremost for the domestic authorities, within their margin of appreciation, to decide the nature and extent of the measures required. The partial restriction applied to commercial activities in the harbour, as opposed to a total one, was to the benefit rather than the detriment of the applicant company.

In sum, the Court was not persuaded that the impugned interference had constituted an individual and excessive burden for the applicant company, or that the respondent State had failed in its efforts to find a fair balance between the general

interest of the community and the protection of individual rights.

Conclusion: no violation (unanimously).

The Court also found unanimously no violation of Article 6 § 1 with regard to the duration of the domestic proceedings.

(See also *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], 45036/98, 30 June 2005, Information Note 76; *Malik v. the United Kingdom*, 23780/08, 13 March 2012; and *Avotiņš v. Latvia* [GC], 17502/07, 23 May 2016, Information Note 196)

OTHER JURISDICTIONS

European Union – Court of Justice (CJEU) and General Court

Obligation to recognise a homosexual marriage concluded in another member State of the EU for the sole purpose of obtaining a derived right of residence for a third-country national

Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne, C-673/16, judgment 5.6.2018 (CJEU, Grand Chamber)

Two men who had lived together for four years – an American and Romanian citizen and an American citizen – were married in Brussels in November 2010.

In December 2012 the couple asked the Romanian authorities about the procedure and conditions under which the spouse who was a non-EU national could, as a member of the EU national's family, obtain the right to reside lawfully in Romania for more than three months. In January 2013 the authorities informed them that the spouse who was a non-EU national had only a right of residence for three months because same-sex marriage was not recognised and an extension of the non-EU national's right of temporary residence could not be granted on grounds of family reunion.

The couple applied to the Romanian courts for a declaration of discrimination on the ground of sexual orientation as regards the exercise of the right of freedom of movement within the EU. The Romanian Constitutional Court, before which an objection of unconstitutionality had been raised, asked the CJEU whether the term "spouse" in Directive 2004/38/EC[1], read in the light of the Charter of Fundamental Rights of the European Union, applied to a non-EU national who was lawfully married, in accordance with the law of a member State other than the host State, to an EU citizen of the same sex; and whether that non-EU national should therefore be granted a right of residence for a period of longer than three months.

In its judgment the CJEU reiterated that Directive 2004/38 governed only the conditions under which an EU citizen could enter and reside in member States other than that of which he or she was a national and did not confer a derived right of residence on third-country nationals who were family members of an EU citizen in the member State of which that citizen was a national. However, where, during the genuine residence of an EU citizen in a member State other than that of which he or she was a national, family life was created or strengthened in that member State, Article 21, paragraph 1, of the Treaty on European Union required that that citizen's family life in the member State in question should be able to continue when he or she returned to the member State of which he or she was a national, through the grant of a derived right of residence to the third-country national family member concerned.

The conditions for granting such a derived right of residence should not be stricter than those laid down by Directive 2004/38 for the grant of a derived right of residence to a third-country national who was a family member of an EU citizen who had exercised his or her right of freedom of movement by settling in a member State other than that of which he or she was a national.

Directive 2004/38 specifically mentioned the "spouse" as a "family member". The term "spouse" was gender-neutral and could therefore cover the same-sex spouse of the EU citizen concerned.

Nevertheless, a person's status, which was relevant to the rules on marriage, fell within the competence of the member States, and EU law did not detract

1. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

from that competence. The member States were free to decide whether or not to allow marriage for persons of the same sex. However, a member State could not rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with an EU citizen of the same sex in another member State in accordance with the law of that State. The freedom of movement of EU citizens who had already made use of that freedom should not vary from one member State to another, depending on national law.

Be that as it may, freedom of movement for persons could be restricted independently of the nationality of the persons concerned, provided that such restrictions were based on objective public-interest considerations and were proportionate to a legitimate objective pursued by national law. In that connection, public policy as a justification had to be interpreted strictly, with the result that its scope could not be determined unilaterally by each member State without any control by the EU institutions. Thus, a restriction could be justified only where it was in accordance with the right to respect for private and family life as guaranteed by Article 7 of the Charter and Article 8 of the European Convention on Human Rights (the relationship of a homosexual couple could fall within the notions of "private life" and "family life" in the same way as the relationship of a heterosexual couple in the same situation – see the ECHR judgments in *Vallianatos and Others v. Greece* [GC], 29381/09 and 32684/09, 7 November 2013, Information Note 168; and *Orlandi and Others v. Italy*, 26431/12 et al., 14 December 2017, Information Note 213).

The obligation for a member State to recognise, for the sole purpose of granting a derived right of residence to a third-country national, a same-sex marriage concluded in another member State in accordance with the law of that State did not undermine the institution of marriage in the first member State, that institution being defined by national law. Such recognition did not require the member State in question to provide for the institution of same-sex marriage in its national law, and was confined to the obligation to recognise such marriages concluded in another member State in accordance with the law of that State, for the sole purpose of enabling the persons concerned to exercise the rights they enjoyed under EU law. Accordingly, an obligation to recognise such marriages did not undermine the national identity or pose a threat to the public policy of the member State concerned. Lastly, the derived right of residence had to be granted for a period of longer than three months.

European Union – Court of Justice (CJEU) and General Court

Requirement of an effective remedy with automatic suspensory effect before a judicial body to challenge the rejection of an application for international protection

Sadikou Gnandi v. État belge, C-181/16, judgment 19.6.2018 (CJEU, Grand Chamber)

In 2014 a Togolese citizen's application to the Belgian authorities for international protection was rejected and he was ordered to leave the country. He lodged appeals against the decision rejecting his application and the order requiring him to leave the country. The second appeal is currently pending before the Belgian *Conseil d'État*. The latter court asked the CJEU whether Directive 2008/115/EC[2] on returning illegally staying non-EU nationals, read in conjunction with Directive 2005/85/EC[3] on refugee status and in the light of the principle of *non-refoulement* and the right to an effective remedy, both enshrined in the Charter of Fundamental Rights of the European Union, precluded the adoption of a return decision in respect of an applicant for international protection as soon as his application had been rejected at first instance by the authority responsible, and before the legal remedies available to him against that rejection had been exhausted.In its judgment the CJEU reiterated that an order to leave a territory constituted a return decision within the meaning of Directive 2008/115. Member States in principle issued a return decision to any third-country national staying illegally on their territory. However, an applicant for international protection was allowed to remain in the member State, for the sole purpose of the procedure, until the adoption of the decision

2. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

3. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

at first instance rejecting the application for international protection. The right to remain ended as soon as the application for international protection was rejected at first instance by the authority responsible. From that moment, the applicant's stay became illegal. However, provision could be made for rules allowing an applicant to remain in the territory pending the outcome of an appeal against the rejection of the application for international protection.

Directive 2008/115 was not based on the notion that the illegality of the stay and, accordingly, the applicability of the Directive presupposed that there was no lawful possibility for a non-EU national to remain in the territory of the member State concerned. The main objective of the Directive was the establishment of an effective removal and repatriation policy that fully respected the fundamental rights and dignity of the persons concerned. Member States could adopt a decision on the ending of a legal stay together with a return decision, in a single administrative act.

However, in relation to a return decision and a possible removal decision, the protection inherent in the right to an effective remedy and in the principle of *non-refoulement* had to be guaranteed by according the applicant for international protection the right to an effective remedy with automatic suspensory effect before one judicial body at least. Subject to strict compliance with that requirement, the mere fact that the stay of the person concerned was categorised as being illegal as soon as his or her application for international protection had been rejected at first instance by the authority responsible, and that a return decision could therefore be adopted following that rejection decision or together in a single administrative act, did not infringe the principle of *non-refoulement* or the right to an effective remedy.

Member States were required to provide an effective remedy against a decision rejecting an application for international protection, in accordance with the principle of equality of arms, which meant, in particular, that all the effects of the return decision had to be suspended during the period allowed for lodging such an appeal and, if such an appeal was lodged, until it was determined. In that regard, it was not sufficient for the member State concerned to refrain from enforcing the return decision. On the contrary, it was necessary, in particular, that the period for voluntary departure should not start running as long as the person concerned was allowed to stay and that, during that period, he or she should not be placed in pre-deportation detention. In addition, the person concerned was to retain his or her status as an applicant for international protection until a final decision had been adopted in relation to his or her application. Furthermore, member States had to allow applicants to rely on any change in circumstances occurring after the adoption of the return decision which could have a significant bearing on the assessment of their situation. Lastly, member States were required to ensure that applicants were informed in a transparent manner of the observance of those guarantees.

In the present case, the *Conseil d'État* had indicated that even though the return decision could not be enforced before the appeal lodged by the Togolese national had been determined, the decision still adversely affected him in so far as it required him to leave Belgian territory. Subject to verification by the referring court, it thus appeared that the requirement for the return procedure to be suspended pending the outcome of such an appeal was not met.

(As regards the ECHR case-law, see also *Gebremedhin [Gaberamadhien] v. France*, 25389/05, 26 April 2007, Information Note 96; *De Souza Ribeiro v. France* [GC], 22689/07, 13 December 2012, Information Note 158; and the Handbook on European law relating to asylum, borders and immigration)

European Union – Court of Justice (CJEU) and General Court

Prohibition on requiring the annulment of any marriage preceding the change of gender in order to obtain a retirement pension at the age laid down for persons of the acquired gender

MB v. Secretary of State for Work and Pensions, C-451/16, judgment 26.6.2018 (CJEU, Grand Chamber)

MB was born a male in 1948 and married a woman in 1974. She began to live as a woman in 1991 and underwent sex-reassignment surgery in 1995. However, she did not hold a full gender recognition certificate, since domestic legislation required her marriage to be annulled before such a certifi-

cate could be granted.[4] MB and her wife wished to remain married for religious reasons.

MB reached the age of 60 in 2008 and applied for a United Kingdom retirement pension. Under domestic law, a woman born before 6 April 1950 becomes eligible for a State retirement pension at the age of 60, and a man born before 6 December 1953 becomes eligible at the age of 65. MB's application was rejected on the ground that, in the absence of a full gender recognition certificate, she could not be treated as a woman for the purposes of determining her statutory pensionable age. MB challenged that decision in the United Kingdom courts. The Supreme Court of the United Kingdom asked the CJEU whether Directive 79/7/EC[5] precluded national legislation from requiring that a person who had changed gender should not be married to a person of the gender that he or she had acquired as a result of that change, in order to be able to claim a State retirement pension as from the statutory pensionable age applicable to persons of his or her acquired gender.

In its judgment the CJEU observed that, while marriage and the legal recognition of change of gender were matters falling within the competence of the member States with regard to civil status, the member States had to comply with Directive 79/7, which prohibited all discrimination on grounds of sex as regards social security, including in relation to old-age and retirement pensions. However, the Directive provided for an exception by allowing member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions, and the United Kingdom had made use of that exception.

The CJEU confirmed its case-law to the effect that Directive 79/7, in view of its purpose and the nature of the rights which it sought to safeguard, was also applicable to discrimination arising from gender reassignment. In that regard, persons who had lived for a significant period as persons of a gender other than their birth gender and who had undergone a gender reassignment operation must be considered to have changed gender.

The CJEU noted that the requirement to have an existing marriage annulled in order to receive a State retirement pension as from the statutory pensionable age for persons of the gender concerned was applicable only to persons who had changed gender. National legislation therefore afforded less favourable treatment to a person who had changed gender after marrying than to a married person who had retained his or her birth gender.

The CJEU observed that the statutory retirement pension scheme in the United Kingdom protected against the risk of old age by conferring on the individual concerned the right to a retirement pension acquired on the basis of the contributions paid during his or her working life, irrespective of marital status. Thus, in the light of the subject matter of the retirement pension and the conditions under which it was granted, the situation of a person who had changed gender after marrying and that of a married person who had kept his or her birth gender were comparable.

Moreover, the purpose of the marriage annulment condition – namely, to avoid marriage between persons of the same sex – was unrelated to the retirement pension scheme. As a result, that purpose did not affect the comparability of the situation of a person who had changed gender after marrying and that of a married person who had kept his or her birth gender, in the light of the subject matter of the retirement pension and the conditions under which it was granted. That interpretation was not invalidated by the ECHR judgment in *Hämäläinen v. Finland* (37359/09, 16 July 2014, Information Note 176), to which the United Kingdom Government had referred in order to contest the comparability of the situation of those persons.

Therefore, it had to be held that the national legislation at issue in the main proceedings afforded less favourable treatment, directly based on sex, to a person who had changed gender after marrying than to a married person who had kept his or her birth gender, even though those persons were in comparable situations.

According to the CJEU's case-law, this difference in treatment was not covered by any of the exceptions exhaustively set out in Directive 79/7 (see, to similar effect, the judgment of 27 April 2006 in

4. The Marriage (Same Sex Couples) Act 2013, which came into force on 10 December 2014, allows persons of the same sex to marry. Schedule 5 of the Act amended section 4 of the Gender Recognition Act 2004. Gender recognition panels are now required to issue a full gender recognition certificate to a married applicant if the applicant's spouse consents.

5. Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

Sarah Margaret Richards v. Secretary of State for Work and Pensions, C-423/04). Consequently, the national legislation constituting direct discrimination on grounds of sex was prohibited by the Directive.

In conclusion, Directive 79/7 had to be interpreted as precluding national legislation which required a person who had changed gender not only to fulfil physical, social and psychological criteria but also to satisfy the condition of not being married to a person of the gender that he or she had acquired as a result of that change, in order to be able to claim a State retirement pension as from the statutory pensionable age applicable to persons of his or her acquired gender.

(As regards the ECHR case-law, see also *Christine Goodwin v. the United Kingdom* [GC], 28957/95, 11 July 2002, Information Note 44; *Grant v. the United Kingdom,* 32570/03, 23 May 2006, Information Note 86; the factsheet on Gender identity issues; and the Handbook on European non-discrimination law)

Inter-American Court of Human Rights (IACtHR)

Arbitrary separation of a family and irregularities during international adoption procedures

Ramírez Escobar et al. v. Guatemala, Series C No. 351, judgment 9.3.2018

[This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. It relates only to the merits and reparations aspects of the judgment. A more detailed, official abstract (in Spanish only) is available on that Court's website: www.corteidh.or.cr.]

The case happened within a broader context of serious irregularities in adoption procedures in Guatemala, which consisted of the absence of proper institutional oversight and inadequate regulation that allowed criminal networks to profit from international adoptions. On 9 January 1997 Osmín Tobar Ramírez and J.R., sons of Flor de María Ramírez Escobar aged respectively seven and five, were taken from the home they shared with their mother and institutionalised in a children's home, after authorities received an anonymous complaint that they were alone and had been abandoned. Their mother was out working at the time. The day after, Ms Ramírez Escobar appeared before the competent judge and requested that her children be returned. However, her claims were dismissed and after several socio-economic studies about her and her family were performed with serious irregularities, a domestic court declared that the children should be considered abandoned.

The court granted legal guardianship to the institution where they were residing and ordered that the brothers be included in its adoption programme. They were subsequently adopted in June 1998 by two different families from the United States of America under an administrative procedure, before a public notary, as allowed under Guatemalan law. The applicants (Osmín and his parents) claimed before the Inter-American Court of Human Rights (hereafter, "the Court") that the children's adoption had violated the minimum requirements to be compatible with the American Convention on Human Rights (ACHR) and that the judicial remedies available had been ineffective in restoring and ensuring their rights.

Merits

Articles 11(2) (right to privacy), 17(1) (rights of the family), 19 (rights of the child), 8(1) (right to a fair trial) and 25(1) (right to judicial protection), in conjunction with Articles 1(1) (obligation to respect and ensure rights without discrimination) and 2 (domestic legal effects) of the ACHR: Firstly, regarding the decision to declare the children in a state of abandonment, the Court reiterated that the separation of a child from their biological family is only admissible when it is duly justified in the best interest of the child and should, when possible, be temporary. Taking into account the ECHR's judgment in the case of *R.M.S. v. Spain*, the Court analysed if the national authorities adopted all necessary and adequate measures that could reasonably be demanded to ensure that the children could lead a normal family life within their own family. It concluded that the separation of the Ramírez family was carried out after an insufficient investigation and as such the decision breached both domestic law and the applicants' right to be heard. Moreover, the Court determined that the judicial decisions that ordered the separation lacked an adequate and sufficient basis to determine that it was carried out in the best interest of the children and that the procedure to determine a child's state of abandonment was incompatible with the ACHR.

Secondly, the Court established States' obligations in the context of international adoptions by interpreting Article 19 of the ACHR in conjunction with the relevant provisions of the Convention on the Rights of the Child and the opinions of the Committee of the Rights of the Child. In this regard, it considered that for international adoptions to be compatible with the ACHR, States must verify that a

set of substantive and procedural requirements are met, namely, that: (i) the children are legally eligible for adoption; (ii) their best interest was taken into account as a determining and primary consideration; (iii) their right to be heard has been guaranteed; (iv) the children could not receive adequate care in their country of origin or habitual residence; and (v) the placement does not result in improper financial gain for anyone involved. The Court concluded that the international adoptions in this case did not meet these requirements.

Thirdly, the Court determined that the decision to separate the children from their biological family was based on discriminatory justifications regarding their economic situation, gender-based stereotypes about parental responsibilities and their grandmother's sexual orientation. In reaching this conclusion, the Court referenced the ECHR's judgments in the cases of *Saviny v. Ukraine*, *Soares de Melo v. Portugal*, *K. and T. v. Finland* [GC], and *Kutzner v. Germany*, among others, stating that poverty alone cannot justify the separation of children from their families and that the mere fact that children may be placed in a more suitable environment does not *per se* justify a separation measure, given that States may provide financial aid and social counselling.

Conclusion: violation (unanimously).

Articles 6(1) (freedom from slavery), 8 (right to a fair trial) and 25 (right to judicial protection) of the ACHR: The Court recognised that Article 6(1) of the ACHR includes the prohibition of human trafficking of children for adoption purposes. However, it considered it lacked sufficient evidence to determine if the illegal adoptions in this case constituted human trafficking. Notwithstanding, it established that the failure to investigate whether human trafficking had occurred, despite the parents' complaints and circumstantial factors, constituted a violation of the right of access to justice.

Conclusions: no violation of Article 6(1); violation of Articles 8 and 25 (unanimously).

Article 7(1) (right to personal liberty) of the ACHR: The Court determined that the institutionalisation of children may constitute a restriction to their personal liberty when their freedom of movement is restricted beyond what would seem a reasonable imposition by a family to assure their wellbeing. Additionally, referencing the ECHR's judgment in *Scozzari and Giunta v. Italy* [GC], it emphasised that the fact children are under custody of the State should not entail losing relationships with their family. In this case, the Court concluded that the institutionalisation of Osmín Tobar Ramírez constituted an arbitrary restriction on his personal liberty because the State did not demonstrate that such a measure was necessary. Furthermore, the Court found that the State failed to adequately regulate, supervise and oversee the institution where he was kept and thus did not ensure that his residential care was carried out in accordance with his rights as a child.

Conclusion: violation (unanimously).

Reparations – The Court established that the judgment constituted *per se* a form of reparation and ordered, among others, that Guatemala: (i) adopt all necessary and adequate measures to facilitate the restitution of family ties between Osmín Tobar Ramírez and his parents, and initiate some form of family reunification between J.R., Osmín and their mother; (ii) modify Osmín's birth certificate, in such a way as to reinstitute legal family ties and other rights to which he was entitled at the time of his birth; (iii) conduct criminal, administrative and disciplinary investigations regarding the facts of the case; (iv) carry out a public act of acknowledgment of the State's international responsibility; (v) develop a video documentary about the facts of the case, their context and the violations declared in the judgment; and (vi) adopt a national programme to effectively ensure adequate State supervision and control over the institutionalisation of children.

(As regards the ECHR case-law, see *R.M.S. v. Spain*, 28775/12, 18 June 2013, Information Note 164; *Saviny v. Ukraine*, 39948/06, 18 December 2008, Information Note 114; *Soares de Melo v. Portugal*, 72850/14, 16 February 2016, Information Note 193; *K. and T. v. Finland* [GC], 25702/94, 12 July 2001, Information Note 32; *Kutzner v. Germany*, 46544/99, 26 February 2002, Information Note 39; and *Scozzari and Giunta v. Italy* [GC], 39221/98 and 41963/98, 13 July 2000, Information Note 20)

COURT NEWS

Elections

During its summer session held from 25 to 29 June 2018, the Parliamentary Assembly of the Council of Europe elected Gilberto Felici judge of the Court in respect of San Marino. His nine-year term in office will commence no later than three months after his election.

On 18 June 2018, the Court elected Vincent A. De Gaetano (Malta) as Section President for a two-year term commencing on 1 September 2018.

Forum of the SCN 2018

On 8 June 2018 the Court held the second Focal Points Forum of the Superior Courts Network (SCN). Representatives of 59 different courts from 33 countries met each other and their Registry counterparts for a one-day working session which included, *inter alia*, the entry into force of Protocol No. 16 to the Convention and its practical implementation.

The SCN was born out of the desire to create a more structured and effective dialogue between the Strasbourg Court and the national Superior Courts, a dialogue focused on exchanging information on Convention case-law and related matters. The SCN was launched in October 2015 and its membership has risen to 68 courts from 35 States at the end of June 2018.

More information on the SCN's web page (www.echr.coe.int – The Court).

RECENT PUBLICATIONS

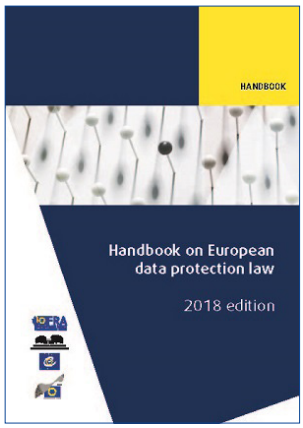
Overview of the Court's case-law: translation into Croatian

The Overview of the case-law of the Court for 2016 has been translated into Croatian. The Overviews can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law).

Pregled sudske prakse Suda u 2016. godini (hrv)

Handbook on European data protection law: 2018 edition

A new edition of the Handbook on European data protection law, completed in April 2018, has been published jointly by the Council of Europe, the Court, the European Data Protection Supervisor and the European Union Agency for Fundamental Rights (FRA). Translations into French and other languages are under way. This 2018 edition in English can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law).



The Information Note, compiled by the Court's Case-Law Information and Publications Division, contains summaries of cases examined during the month in question which the Registry considers as being of particular interest. The summaries are not binding on the Court.

In the provisional version the summaries are normally drafted in the language of the case concerned, whereas the final single-language version appears in English and French respectively. The Information Note may be downloaded at www.echr.coe.int/NoteInformation/en. For publication updates please follow the Court's Twitter account at twitter.com/echrpublication.

The HUDOC database is available free-of-charge through the Court's Internet site (http://hudoc.echr.coe.int/sites/eng). It provides access to the case-law of the European Court of Human Rights (Grand Chamber, Chamber and Committee judgments, decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions).

ENG

www.echr.coe.int

The European Court of Human Rights is an international court set up in 1959 by the member States of the Council of Europe. It rules on individual or State applications alleging violations of the rights set out in the European Convention on Human Rights of 1950.

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE