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

Information Note on the Court's case-law

No. 161 March 2013

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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/Pages/home.aspx?p=caselaw/analysis&c=>. A hard-copy subscription is available for 30 euros (EUR) or 45 United States dollars (USD) per year, including an index, by contacting the publications service via the on-line form at <http://appform.echr.coe.int/echrrequest/request.aspx?lang=gb>.

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).

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

ISSN 1996-1545

© Council of Europe / European Court of Human Rights, 2013

TABLE OF CONTENTS

ARTICLE 2

Positive obligations
Use of force

Gendarme accused of accidental killing by machine-gun fire during violent demonstration not given criminal penalty: *violations*

Aydan v. Turkey - 16281/10
Judgment 12.3.2013 [Section II]

Facts – The applicants are the widow and mother of A. Aydan, who was fatally wounded on 6 September 2005 by shots fired from a military jeep while he was waiting for a bus close to a demonstration. In July 2006 the Assize Court decided not to impose a criminal penalty on the person who had fired the shots, finding it established that he had exceeded the limits of self-defence while in an excusable state of emotion, fear or panic. The Court of Cassation, followed by the plenary Court of Cassation, upheld that decision.

Law – Article 2 (*substantive aspect*)

(a) *Whether the use of lethal force had been "absolutely necessary"* – The gendarme G.Y., who had fired the fatal shot and who had not been involved in the security operation surrounding the demonstration, had been driving the jeep, accompanied by two of his colleagues, when it had come under attack by demonstrators. G.Y. stated that he had fired through the left window of the vehicle after issuing a verbal warning; however, as his weapon had been on the automatic setting, there had been a burst of seven shots. The Assize Court and the Court of Cassation had considered that G.Y. should not be given a criminal penalty since he had exceeded the limits of self-defence while in an excusable state of emotion, fear or panic within the meaning of Article 27 § 2 of the Criminal Code. That situation was entirely distinct from a case in which an agent had recourse to lethal force based on an honest belief which was perceived to be valid at the time but which subsequently turned out to be mistaken. It was not sufficiently established that the danger created by the demonstrators' attack had been extremely violent; hence, it could not be concluded that G.Y. had acted in the honest belief that his own life and physical integrity, and the lives of his colleagues, had been in danger. This was especially so since there was no evidence in the file that would justify the use of a potentially lethal means of defence such as the firing of random shots into the crowd. Furthermore, while G.Y. claimed to have fired into the air by way of warning in order to avoid injuring anyone, the evidence in the file showed that three bullet marks had been found on a private vehicle. The fourth bullet had struck A. Aydan. It was by no means established that G.Y. had fired a warning shot into the air. In view of the bullet marks, there was no doubt that the burst of gunfire had been capable of causing a tragedy of much greater proportions. Hence, the force used to disperse the demonstrators, which had resulted in the death of A. Aydan, had not been absolutely necessary within the meaning of Article 2.

Conclusion: violation (unanimously).

(b) *Whether the respondent State had taken the necessary measures to reduce as far as possible the adverse consequences of the use of force* – Although it had been acknowledged that G.Y. had knowingly exceeded the limits of self-defence by firing at random into the crowd while in a state of emotion, fear or panic, the domestic courts had decided not to impose a penalty, a decision which amounted neither to a finding of guilt nor to an acquittal. Such an approach was liable to have very dangerous and damaging consequences as it allowed the use of lethal force by agents of the State while in a state of emotion, fear or panic, even though the Court acknowledged that the notion of exceeding the limits of self-defence as such was not unknown in European criminal law. While law-enforcement agents were not *de jure* barred from exceeding the limits of self-defence, their status and function were factors which could be taken into consideration in examining the case.

The Court could not agree with the conclusion of the plenary Court of Cassation according to which the widespread danger created by terrorist acts committed in the region in which the demonstration took place, allied to the "violence of the attack on the accused and his two colleagues" and "the death threats that accompanied it", justified the decision not to convict the person who had fired the fatal shot. With regard to the widespread danger in the region, law-enforcement officials had to possess the appropriate moral, physical and psychological qualities for the effective exercise of their functions (Principle 18 of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted in 1990). This applied *a fortiori* to members of the security forces operating in a region which was marked by extreme tension at the material time and where such disturbances were to be expected. Moreover, the decision not to impose criminal sanctions on a gendarme who had

made unjustified use of his firearm was liable to be interpreted as giving carte blanche to the members of the security forces operating in that region, who had a duty to ensure that such weapons were used only in the appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm (Principle 11(b)). Likewise, the way in which the Criminal Code had been applied was incompatible with the terms of Article 2 of the Convention, according to which the use of force had to be absolutely necessary and strictly proportionate to the aims referred to therein. It would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity. In conclusion, the respondent State had failed in its obligation to safeguard the right to life.

Conclusion: violation (unanimously).

The Court also found a violation of Article 2 in its procedural aspect on account of the lack of an effective investigation, and a violation of Article 6 § 1 on account of the length of the proceedings.

Article 41: EUR 15,000 to the first applicant in respect of pecuniary damage and EUR 50,000 in respect of non-pecuniary damage; EUR 15,000 to the second applicant in respect of non-pecuniary damage.

Positive obligations

Decision to force-feed rather than release prisoner on hunger strike: *inadmissible*

Rappaz v. Switzerland - 73175/10
Decision 26.3.2013 [Section II]

Facts – In 2000 the applicant was sentenced to sixteen months' imprisonment for drug trafficking. He began a hunger strike in prison. He was released for thirty days and then returned to prison and finished serving his sentence without major incident. In 2008 the Cantonal Court sentenced the applicant to five years and eight months' imprisonment for various offences. The day he began serving his sentence in March 2010 he embarked on a hunger strike, seeking the legalisation of cannabis use and protesting against his sentence, which he considered excessively harsh. Arguing that his health was suffering, the applicant applied to be released. On 26 August 2010 the Federal Court rejected his application, finding that force-feeding was a viable alternative to release. In December 2010 the applicant ended his hunger strike without having been force-fed.

Law – Article 2: Where a prisoner went on hunger strike, the potential consequences for his or her state of health would not entail a violation of the Convention provided that the national authorities had duly examined and dealt with the situation. This was particularly the case where the person concerned continued to refuse food and drink despite the deterioration in his or her health. In the present case the administrative and judicial authorities concerned had immediately recognised the risk which the hunger strike posed to the applicant's health and even his life and had taken the measures they deemed necessary in order to avert that risk. Thus, the applicant had first been released for fifteen days. He had subsequently been redetained and after resuming his hunger strike had been transferred to hospital to serve his sentence under medical supervision, before being placed under house arrest. When he was imprisoned again following the Federal Court judgment of 26 August 2010 he had again refused food and drink and had been transferred once more to hospital. The applicant's condition had started to give cause for alarm in October 2010. By that time, he had no longer been in prison but had been admitted to the prison wing of the hospital. There he had been under the constant supervision of a medical team who had kept the authorities informed of any change in the situation and had declared their willingness to "make [the applicant] as comfortable as possible" should he persist with his decision to end his life. Furthermore, in order to prevent further deterioration of the applicant's health, the administrative authority, followed by the Cantonal Court, had ordered that he be force-fed. When the doctor treating the applicant had refused to perform such a step against his patient's will, the Cantonal Court had even gone so far as to serve a formal injunction on him in person, with which he had to comply or face prosecution. It could therefore not be said that the national authorities had not duly examined and dealt with the situation as required by Article 2 of the Convention, nor was their intention to protect the applicant's life open to doubt. Moreover, it had in no sense been established that, while in hospital, the applicant had not received the same care he would have been given had he embarked on a hunger strike outside prison.

Conclusion: inadmissible (manifestly ill-founded).

Article 3: With regard to the decision to force-feed the applicant, it was not established that it had actually been implemented. As to the issue of medical necessity, the order to force-feed the

applicant had been given when his state of health had begun to give cause for alarm, and was to be carried out by a qualified medical team in a hospital setting which was likely to be equipped to deal with such situations; the only objections raised by the doctors had been of an ethical rather than a medical nature. As far as the existence of procedural safeguards was concerned, the regulations governing the situation of prisoners on hunger strike did not lay down specific provisions concerning force-feeding. However, the decisions ordering the doctor treating the applicant to begin force-feeding him had been based on the Federal Court judgment of 26 August 2010, which had examined the issue in depth and had established several principles which henceforth represented the state of Swiss law in this sphere. The Federal Court had also considered the general law and order clause laid down in the Federal Constitution to provide a sufficient legal basis, allowing as it did restrictions to be placed on fundamental rights by means other than legislation in the event of a serious, imminent and direct threat. The Court had already held that a similar provision satisfied the relevant requirements of foreseeability, clarity and proportionality. Accordingly, even if the decision to force-feed the applicant had been implemented – if he had not ended his hunger strike – there were no grounds for asserting *a priori* that this would have resulted in treatment exceeding the minimum threshold of severity required by Article 3 of the Convention. Any such assertion at that juncture would be mere speculation.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Horoz v. Turkey*, no. 1639/03, 31 March 2009, Information Note no. 117; and *Nevmerzhitsky v. Ukraine*, no. 54825/00, 5 April 2005, Information Note no. 74)

ARTICLE 3

Inhuman treatment

Mother's mental suffering faced with the prospect of her son dying in prison from AIDS without adequate medical care: *violation*

Salakhov and Islyamova v. Ukraine - 28005/08
Judgment 14.3.2013 [Section V]

Facts – The second applicant is the mother of the first applicant, who died in August 2008. The first applicant was arrested in November 2007 on suspicion of theft of a mobile phone and placed in pre-trial detention. He had been HIV positive since 2005 and his health sharply deteriorated in March 2008 with constant fever and serious digestive problems. An ambulance was called on several occasions. According to the Government, the authorities only learned of the HIV infection in early June 2008 after a hospital examination. A specialist diagnosed the first applicant with pneumonia and candidosis and concluded that the HIV infection was at the fourth clinical stage, but that there was no urgent need for hospitalisation. On 17 June 2008 the European Court issued an interim measure under Rule 39 of its Rules requiring the first applicant's immediate transfer to hospital for treatment. He was only transferred three days later and was kept under constant guard by police officers and, according to his mother, was continuously handcuffed to his bed. On 4 July 2008 he was found guilty of acquiring the mobile phone by fraud and sentenced to a fine. He remained in detention for two weeks after the verdict as a preventive measure, despite his critical condition. Following his release on 18 July 2008 his health deteriorated and he died on 2 August 2008.

The second applicant subsequently complained to the prosecution authorities that her son had not received timely and adequate medical care in detention and that this had led to his death. In March 2009 a commission set up by the Ministry of Public Health concluded that the hospital bore no responsibility for the first applicant's death. The investigation was subsequently closed and reopened several times. In 2010 a forensic investigation ordered by the prosecutor found, in particular, that at the time of his examination in June 2008 the first applicant had required urgent hospitalisation and in-patient medical treatment. A criminal investigation into the hospital's liability was opened in December 2010.

Law – Article 3 (*the second applicant's complaint*): The second applicant had made every effort to save her son's life by appealing to the hospitals, prosecution authorities and courts. He had, however, remained in detention after the prosecution had agreed to his release on account of the gravity of his condition and even after he received a non-custodial sentence. The second applicant had been reduced to a passive witness of these events in a state of complete helplessness and had seen her justified concerns that the authorities were underestimating the seriousness of her son's condition disregarded. Her efforts to have her son's handcuffs removed during his stay in hospital had also been

fruitless. Lastly, even after his death, the authorities had manifested an equally unacceptable attitude towards the second applicant, in particular, by ignoring her requests for access to her son's medical file.

In sum, a number of factors taken together indicated that the second applicant's rights under Article 3 had been violated: the parent-child bond between her and the first applicant; her active efforts to save his life or at least alleviate his suffering; the cynical, indifferent and cruel attitude demonstrated by the authorities both before the death and during the subsequent investigation; the fact that the second applicant had had to witness her son's slow death without being able to help him in any way; and, lastly, the duration of her suffering (about three months). The second applicant had therefore been a victim of inhuman treatment.

Conclusion: violation (unanimously).

The Court further concluded unanimously that there had been violations of Article 3 in respect of the inadequate medical assistance that had been provided to the first applicant in the detention facilities and the hospital and of his handcuffing in the hospital. It unanimously found violations of Article 2 in respect of the authorities' failure to protect the first applicant's life and to conduct an effective investigation into the circumstances of his death.

Article 34: Despite becoming aware at the latest on the evening of 17 June 2008 of the interim measure issued by the Court, the authorities had waited for one day and decided on 18 June 2008 that no urgent hospitalisation of the first applicant was required. In other words, instead of complying with the indicated interim measure, they had decided to re-evaluate its soundness. And, as they had later acknowledged themselves, that re-evaluation had been erroneous. It was only on 20 June 2008 that the domestic authorities had transferred the first applicant to hospital. The interim measure had thus not been complied with for a period of three days, without any acceptable explanation. The State had therefore failed to meet its obligations under Article 34.

Conclusion: violation (unanimously).

Article 41: EUR 50,000 in respect of the non-pecuniary damage suffered by the first applicant, to be paid to the second applicant in her capacity as his successor in the proceedings before the Court after his death; and EUR 10,000 in respect of the non-pecuniary damage suffered by the second applicant herself.

Inhuman treatment
Degrading treatment

Inadequacy of procedure for protecting health of remand prisoner suffering from serious illness: *violation*

Gülay Çetin v. Turkey - 44084/10
Judgment 5.3.2013 [Section II]

Facts – In February 2007 the applicant, who had been in pre-trial detention since December 2006, began to complain of gastric and digestive problems. In September 2008 the Assize Court found her guilty of intentional homicide and sentenced her to fifteen years' imprisonment. Following an appeal against that decision, she remained in pre-trial detention. In April 2009 she was diagnosed with advanced stomach cancer. All her subsequent applications for provisional release were rejected. In February 2011 the Court of Cassation upheld the applicant's conviction, which became final as a result. In June 2011 proceedings were instituted for the suspension of her sentence, after a medical report had concluded that her illness was incurable and her life would be endangered by attempting to treat her in a prison environment. On 12 July 2011 the applicant died of her illness before the completion of the proceedings she had brought in the hope of securing either provisional release, the suspension of her detention or a presidential pardon.

Law

Article 3: It was not disputed that the applicant's condition had been serious and had deteriorated over time, a fact that raised issues regarding her treatment in a prison environment. While she had been in pre-trial detention, her successive requests for release had all been rejected even though they were supported by medical reports. The courts had refused to implement the applicable procedures for prisoners with serious illnesses, on the ground that only those who had been convicted with final effect were eligible for them. This interpretation was partly due to the imprecise nature of the relevant legal provisions and the lack of a clear rule requiring judges to have due regard to the prisoner's clinical picture when applying the Code of Criminal Procedure. Accordingly, the system for protecting prisoners with diseases had lacked the requisite clarity, foreseeability and effectiveness.

Once her conviction had become final, the applicant had satisfied the practical conditions for applying for the statutory measures aimed at

protecting the health of prisoners with serious illnesses, since by then her disease had reached the terminal phase. Her lawyer had submitted a further application for a presidential pardon and a request for the suspension of her sentence. On 8 April 2011 the hospital department responsible for the applicant had declared that she was unfit to remain in prison. However, the public prosecutor's office, which was required by law to refer the matter to a panel of specialists from the Institute of Forensic Medicine, had waited some twenty days before doing so. Yet there was no indication that the panel was more competent to assess a particular individual's health than the specialist hospital department which had been monitoring her regularly. It was therefore difficult to understand why the Institute had seen fit to re-examine the applicant by transferring her to another city or why it had waited until 8 June 2011 before doing so, when the only issue to be determined was whether the illness diagnosed at the hospital rendered her eligible for a measure provided for by law. Lastly, the forensic medical experts had then taken a further week to submit their report, which had ultimately authorised the applicant's release. The report had not been forwarded to the appropriate public prosecutor but had simply been made available on the Ministry of Justice's official online portal one week after it had been produced on 15 June 2011, and had not been received by the public prosecutor's office until 18 July, six days after the applicant's death. The procedures in question had thus been applied in a manner that placed formalities above humanitarian considerations, thus preventing the applicant, who by that stage was dying, from spending her final days in dignity. Her detention without access to the protection system available in theory in Turkish law had undermined her dignity and caused her hardship exceeding the inevitable level of suffering associated with deprivation of liberty and with cancer treatment.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 3: The facts complained of fell within the scope of Article 3, which had been found to have been breached. The applicant's position as a "pre-trial detainee" was covered by the notion of "other status" in Article 14, and she could claim to have been in a similar situation to "convicted prisoners". Article 14 was therefore applicable in the present case.

Under the applicable legislation, pre-trial detainees were ineligible for the various forms of release. There was therefore a difference in treatment between such prisoners and those serving a final sentence, since the former did not enjoy the same legal protection as the latter if they were suffering from a terminal illness. However, the European Prison Rules[1] stated that no discrimination was permissible between persons who had been remanded in custody and those who had been deprived of their liberty following conviction. Other recommendations also dealt with the issue of treatment of terminally ill people. Accordingly, the Court confirmed the approach it had adopted in the *Laduna v. Slovakia* judgment, which concerned a difference in treatment between remand and convicted prisoners in exercising the right to receive visits. This approach applied *a fortiori* in the present case, which related to the protection of the dignity of prisoners suffering from a disease with a short-term fatal prognosis.

Conclusion: violation (unanimously).

Article 46: The issues raised in the present case were likely to recur whenever a person in pre-trial detention was suffering from a disease with a short-term fatal prognosis. On an exceptional basis, the Court indicated the general measures that might alleviate some of the problems noted regarding the procedural arrangements in place to protect prisoners' health and well-being.

There should be an explicit rule requiring judges to have due regard, when taking decisions concerning pre-trial detainees – who, by definition, were to be presumed innocent – to their state of health and the compatibility of their clinical picture with life in prison, bearing in mind humanitarian considerations.

Furthermore, in the case of detainees whose condition was exceptionally serious, the Court of Cassation should be empowered to release them at any stage of the proceedings before it, in particular where the case was referred to it automatically.

As regards the suspension of sentences on health grounds and applications to the President of Turkey for a pardon on medical grounds, which were essentially based on an assessment of objective medical findings and, by their very nature, on humanitarian considerations, the protection system could ensure that pre-trial detainees suffering from diseases with a short-term fatal prognosis had the opportunity to apply for similar measures to those available to convicted prisoners, whether by establishing new rules or under the existing rules.

1. Recommendation Rec(2006)2 of the Committee of Ministers to the member States of the Council of Europe on the European Prison Rules, adopted on 11 January 2006.

Concerning the official system of forensic medical examinations, the purpose of which was to determine whether a prisoner's illness was compatible with prison life, the existing procedure, which conferred a decisive role on the Institute of Forensic Medicine, should be simplified in order to avoid an excessively formal approach, so that prisoners with terminal illnesses would no longer be left abandoned or made to suffer as a result of delays, errors of judgment or other shortcomings.

The Court left it to the respondent State to take the general measures it considered necessary to achieve the desired aims.

Article 41: EUR 20,000 jointly to the applicant's heirs in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See *Laduna v. Slovakia*, no. 31827/02, 13 December 2011, Information Note no. 147)

Possible force-feeding of prisoner on hunger strike in protest at his detention: *inadmissible*

Rappaz v. Switzerland - 73175/10
Decision 26.3.2013 [Section II]

(See Article 2 above, page 8)

Inhuman treatment
Degrading treatment
Effective investigation

Investigative and procedural flaws resulting in prosecution of domestic-violence case becoming time-barred: *violation*

Valiulienė v. Lithuania - 33234/07
Judgment 26.3.2013 [Section II]

Facts – In February 2001 the applicant applied to a district court to bring a private prosecution after allegedly being beaten by her partner on five separate occasions in January and February 2001. In January 2002 the court forwarded her complaint to the public prosecutor, ordering him to start his own pre-trial criminal investigation; the applicant's partner was then charged with systematically causing the applicant minor bodily harm. The investigation was twice halted by police investigators for lack of evidence, but on each occasion was reopened on appeal on the grounds that it had not been sufficiently thorough. The public prosecutor discontinued the investigation in June 2005 as a legislative reform in May 2003 meant that prosecutions in respect of minor bodily harm now had to be brought by the victim privately unless the case was of public interest or the victim could not protect her rights through a private prosecution. The district court upheld that decision. When the applicant lodged a new request to bring a private prosecution, this was refused without examination of the merits as the prosecution had become time-barred.

Law – Article 3: The applicant had suffered ill-treatment that was sufficiently serious to reach the minimum level of severity required to engage the Government's positive obligation under Article 3. In reaching that conclusion, the Court took into account the physical injuries sustained by the applicant (in the form of bruising and scrapes to the face and body), the aggravating circumstance that the violence had continued over a period of time with five episodes within a month, and the feelings of fear and helplessness to which the applicant had been subjected. On this latter point, it noted that the psychological impact was an important aspect of domestic violence.

The Court went on to examine whether the domestic legal system, and in particular the applicable criminal law, had failed to provide practical and effective protection of the rights guaranteed by Article 3. The Court was satisfied that at the material time Lithuanian law provided a sufficient regulatory framework in that it was a criminal offence to cause minor bodily harm. Although after 1 May 2003 such offences could only be prosecuted on a complaint by the victim, who in turn became the private prosecutor, the public prosecutor nevertheless retained the right to open a criminal investigation if the offence was of public importance or the victim was unable to protect his or her interests.

As to the manner in which the law was implemented in the applicant's case, the applicant had contacted the district court almost immediately with a view to bringing a private prosecution and had provided specific descriptions of each incident and the names of witnesses. While the authorities had initially acted without undue delay, the case was transferred to a public prosecutor after the applicant's partner repeatedly failed to appear at court. Thereafter, the investigation was twice discontinued for lack of evidence only to be reopened after senior prosecutors ruled that it had not been sufficiently thorough. This revealed a serious flaw on the part of the State.

Furthermore, even though the legislation had changed in May 2003, the prosecutor had decided to return the case to the applicant for private prosecution only in June 2005, two years after the legislative reform,. That decision was upheld despite the risk of the prosecution becoming time-barred and despite the fact that, even after the reform, it was still possible for the public prosecutor to pursue the investigation if it was in the public interest. As a result of that decision and even though the applicant acted without delay, her application for a private prosecution was dismissed as being out of time.

The practices at issue in the instant case and the manner in which the criminal-law mechanisms had been implemented had therefore not provided the applicant adequate protection.

Conclusion: violation (six votes to one).

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

(See also: *Opuz v. Turkey*, no. 33401/02, 9 June 2009, Information Note no. 120; *Sandra Janković v. Croatia*, no. 38478/05, 5 March 2009, Information Note no. 117; *Hajduová v. Slovakia*, no. 2660/03, 30 November 2010, Information Note no. 135; *Kalucza v. Hungary*, no. 57693/10, 24 April 2012; and *Đorđević v. Croatia*, no. 41526/10, 24 July 2012, Information Note no. 154)

Degrading treatment

Detention for more than four years of prisoner whose forearms had been amputated: *no violation*

Zarzycki v. Poland - 15351/03
Judgment 12.3.2013 [Section IV]

Facts – The applicant lost both his forearms in an accident and is certified as having a first-degree disability, requiring the assistance of another person. In June 2002 he was remanded in custody on suspicion of a number of offences against a minor and of coercing a person into committing perjury. He was convicted in 2002 and in 2003 the appeal court upheld the first-instance judgment sentencing him to three years' imprisonment. While in custody the applicant was informed of the procedure for obtaining prostheses and given assistance in making the application and seeking reimbursement of the cost. He asked to be fitted with bio-mechanical prostheses, but was unable to afford the non-refundable portion of the price. In July 2003 he was granted leave from serving his sentence to seek orthopaedic care outside the penitentiary system and obtained two basic-type mechanical prostheses free of charge and underwent physiotherapy. He returned to prison in July 2004. In October 2006 he was granted parole and released.

Before the European Court, the applicant complained that, in view of his disability and his special needs, his protracted detention had been in breach of Article 3 of the Convention.

Law – Article 3: Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Where the authorities decided to place and maintain in detention persons with disabilities, they should demonstrate special care in guaranteeing conditions that correspond to the special needs resulting from the disability. In this type of case, three factors in particular had to be taken into account in assessing whether continued detention was compatible with the prisoner's state of health where this was giving cause for concern. These were: (a) the prisoner's condition, (b) the quality of care provided and (c) whether or not the prisoner should continue to be detained in view of his or her state of health. In applying these principles, the Court had already held that detaining persons suffering from a serious physical disability in conditions inappropriate to their state of health or leaving such persons to rely on their cellmates in receiving assistance to relieve themselves, bathe and get dressed or undressed, amounted to degrading treatment.

A series of medical reports which had been drafted both before and after the applicant had been equipped with basic-type mechanical prostheses had clearly stated that he was not self-sufficient and fit to be detained in prison. However, throughout both periods of his detention the authorities had taken steps to ensure the applicant was assisted by his fellow inmates. They had made arrangements within the remand centre to enable the applicant to call on his fellow inmates when the need arose. Other special arrangements had also been made in an attempt to relieve or to make up for the hardships of his detention such as the possibility of taking showers six times a week. Therefore, it could not be said that the authorities had abandoned their obligations towards the applicant and left him to rely entirely on the availability and goodwill of his fellow prisoners.

Moreover, the applicant's condition had clearly not required any specialised care, for which formal nurse training would have been necessary. He was for the most part autonomous, especially after he

started using the prostheses, and the assistance which he needed was limited to common washing and dressing tasks which required higher precision. It was true that the Court had often criticised the scheme of providing routine assistance to a prisoner with a physical disability through cellmates, even if they were volunteers and even if their help had been solicited only when the prison infirmary was closed. In the particular circumstances of the present case, however, the Court did not find any reason to condemn the system which had been put in place by the authorities to secure the adequate and necessary aid to the applicant.

As regards obtaining prostheses, full reimbursement of the cost of the basic-type mechanical prostheses had been approved without any undue delay and the necessary notices had been obtained with regard to the financing of bio-mechanical prostheses, which the applicant had decided to get. Eventually, the applicant had obtained mechanical prostheses free of charge and had undergone the necessary physiotherapy. Thus, the penitentiary authorities had actively looked for, and had succeeded without undue delay in providing, an appropriate solution to the applicant's situation. Moreover, the case did not relate to a systemic problem caused by flaws in the medical-insurance system for providing orthopaedic or prosthetic care to detainees deprived of any financial means. Under the Polish legislation every patient seeking to obtain bio-mechanical prostheses could claim only a very limited refund and had to pay the difference from his or her funds. Consequently, bearing in mind that the basic-type mechanical prostheses had been available and indeed provided to the applicant free of charge and that a refund of a small part of the cost of bio-mechanical prostheses had also been available, the respondent State could not be said to have failed to discharge its obligations under Article 3 by not paying the full costs of a prosthetic device of an advanced type. In conclusion, the Court noted the pro-active attitude of the prison administration *vis-à-vis* the applicant. The authorities had provided the applicant with the regular and adequate assistance his special needs warranted. Moreover, there was no evidence of any incident or positive intention to humiliate or debase the applicant. Therefore, even though a prisoner with amputated forearms was more vulnerable to the hardships of detention, the treatment of the applicant in the circumstances of the present case had not reached the threshold of severity required to constitute degrading treatment contrary to Article 3 of the Convention.

Conclusion: no violation (five votes to two).

ARTICLE 4

Forced labour

Remuneration of a detainee for work performed in prison in the form of a reduction in sentence: *inadmissible*

Floroiu v. Romania - 15303/10
Decision 12.3.2013 [Section III]

Facts – The applicant was sentenced to five years and ten months' imprisonment for theft and, at his own request, was allowed to work, maintaining the prison's vehicle fleet while serving his sentence between December 2007 and January 2012, when he was released on licence. During that time he did 114 days' work. As the work was deemed to involve the day-to day running of the prison, he was not paid but, by way of compensation, received a reduction of 37 days in the sentence remaining to be served.

Before the Court, the applicant complained that he had not been paid for the work he had done while in prison.

Law – Article 4: Since the entry into force in 2006 of the new Execution of Sentences Act, Romanian law had required prisoners' consent before they were assigned work in prison. Moreover, it had been as a result of a request by the applicant himself that a special panel had assigned him the task of maintaining the prison's vehicle fleet. As regards the applicant's lack of remuneration, this did not in itself prevent work of this kind from being regarded as "work required to be done in the ordinary course of detention" within the meaning of Article 4 § 3 (a) of the Convention. In addition, the European Prison Rules[1] referred to the normalisation of prison work as one of the basic principles in this sphere. More specifically, Rule 26.10 stated that "in all instances there shall be equitable remuneration of the work of prisoners".

In the present case, domestic law provided that prisoners could either carry out paid work or, in the case of tasks involving the day-to-day running of the prison, unpaid work entitling them to a reduction of their sentence. Prisoners were able to choose between the two types of work after being

1. Recommendation Rec(2006)2 of the Committee of Ministers to the member States of the Council of Europe on the European Prison Rules, adopted on 11 January 2006.

informed of the conditions governing each type. In return for his 114 days' work maintaining the prison's vehicle fleet, the applicant had been granted a significant reduction in his sentence, amounting to 37 days. Accordingly, the work he had carried out had not been entirely unremunerated. It could therefore be regarded as "work required to be done in the ordinary course of detention" within the meaning of Article 4 § 3 (a) of the Convention.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 5

Article 5 § 1 (b)

Secure fulfilment of obligation prescribed by law

Four hours' detention of football supporter by police to prevent him taking part in a brawl: *no violation*

Ostendorf v. Germany - 15598/08
Judgment 7.3.2013 [Section V]

Facts – The applicant travelled from Bremen to Frankfurt-am-Main with a group of football supporters to attend a football match. Acting on information received from the Bremen police that the supporters were preparing for violence and that the applicant was their leader, the Frankfurt police carried out a search, seized a mouth-protection device and several pairs of sand-filled gloves and placed the group under surveillance. They also ordered the applicant to remain with the group and arrested him when he failed to do so. His mobile phone was seized and he was kept in police custody for four hours before being released an hour after the match ended.

A complaint by the applicant to the Frankfurt police of unlawful detention was dismissed and a subsequent action against the *land* of Hesse also failed after the administrative courts held, in reliance on the Hessian Public Security and Order Act that the applicant's detention had been necessary to prevent the imminent commission of a violent offence.

Law – Article 5 § 1: Despite the relatively short duration of his detention, the applicant had been deprived of his liberty within the meaning of Article 5 § 1. The Frankfurt police had based their assessment that he was preparing to commit violent offences on a number of factual elements: the information they had received from the Bremen police; the devices typically associated with hooligan brawls that had been found on other members of the group; the applicant's contact with a hooligan from Frankfurt; and, lastly, his failure to comply with the order to remain with the group. The police had therefore had sufficient information to assume that the applicant was planning a hooligan brawl during which concrete and specific offences, namely assaults and breaches of the peace, would be committed. His detention could thus be classified as having been effected "to prevent his committing an offence" for the purpose of Article 5 § 1 (c).

Police experience showed that hooligan brawls were usually arranged in advance, but did not take place inside or near the football stadium. Accordingly, seizing the applicant's telephone and separating him from the group would not have sufficed to prevent the brawl. However, in order to comply with Article 5 § 1 (c), detention also had to be "effected for the purpose of bringing [the suspect] before the competent legal authority". The legal basis of the applicant's detention, the Hessian Public Security and Order Act, was aimed exclusively at preventing, not prosecuting, offences and was not aimed at bringing the applicant before a judge in a criminal trial. Article 5 § 1 (c) could not be interpreted also to cover preventive police custody in the circumstances of the applicant's case as this could not be reconciled with Article 5 § 1 (c) as a whole, which was to be read in conjunction with Article 5 § 3. In particular, the term "trial" in Article 5 § 3 did not refer to a judicial decision on the lawfulness of preventive police custody but only to a criminal trial. Nor was the Court convinced by the Government's argument that the State's obligation under Articles 2 and 3 to protect the public from offences should be taken into account in the interpretation of Article 5 § 1 as, while the Convention required States to take reasonable steps within the scope of their powers to prevent ill-treatment, it did not permit them to protect individuals from the criminal acts of others by measures which were themselves in breach of the Convention. The State's positive obligations under the Convention did not, therefore, as such warrant a different or wider interpretation of the permissible grounds for deprivation of liberty that were exhaustively listed in Article 5 § 1. The applicant's detention could not, therefore, be justified under Article 5 § 1 (c).

As to possible justification under Article 5 § 1 (b) as detention "in order to secure the fulfilment of

any obligation prescribed by law", the Court was satisfied that the obligation imposed on the applicant was sufficiently specific and concrete to comply with the requirements of its case-law. In order to ensure that individuals were not subjected to arbitrary detention in such circumstances, it was necessary to ensure, prior to concluding that the obligation at issue had not been satisfied, that those concerned had been made aware of the specific act they were required to refrain from and had shown themselves to be unwilling to comply. In the instant case, the applicant had been made aware that he was required to refrain from arranging a brawl between opposing groups of hooligans and, prior to his arrest, had been ordered to remain with the group of travelling supporters or face arrest. By seeking to evade police surveillance and entering into contact with another hooligan he had shown that he was not willing to comply with his obligation to keep the peace. His detention had therefore served to fulfil the obligation of preventing him from arranging and taking part in a brawl and had not had a punitive character.

In the case of a duty *not* to commit a specific offence at a certain time and place – as opposed to a duty to perform a specific act – the obligation had to be considered as having been "fulfilled" for the purposes of Article 5 § 1 (b) at the latest when it ceased to exist owing to the lapse of the time by which the offence was due to have taken place. It was not excluded that the person concerned might be able to show prior to the moment the offence was due to take place that he or she no longer intended to commit the offence, in which case his or her detention would have to be terminated forthwith. However, there was nothing to suggest that during his time in custody the applicant had indicated any willingness to comply with his duty to keep the peace. His obligation had therefore been fulfilled for the purposes of Article 5 § 1 (b) when it ceased to exist once the match was over and the other hooligans had been dispersed, and it was at that point that he had been released. His detention for four hours had thus been proportionate to the aim of securing the immediate fulfilment of his obligation, in the public interest, not to hinder the peaceful running of a sports event involving a large number of spectators and was justified under Article 5 § 1 (b). It had moreover been lawful under the Hessian Public Security and Order Act.

Conclusion: no violation (unanimously).

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Courts' refusal to examine a claim concerning repayment of a loan made to the trade representation of North Korea: *violation*

Oleynikov v. Russia - 36703/04
Judgment 14.3.2013 [Section I]

Facts – In 1997 the applicant lent USD 1,500 to the Khabarovsk Office of the Trade Counsellor of the Embassy of the Democratic People's Republic of Korea ("the DPRK Trade Counsellor") on the understanding that it would be paid back. After the DPRK Trade Counsellor had failed to repay its debt, the applicant and his counsel sent several letters of claim which remained unanswered. His counsel subsequently wrote to the Russian Ministry of External Affairs, which considered that the DPRK Trade Counsellor had acted on the DPRK's behalf and therefore enjoyed immunity from a lawsuit. It advised the applicant to obtain the consent of a competent North Korean authority before lodging a claim against the DPRK Trade Counsellor with the Russian courts. As the DPRK Embassy refused to answer, the applicant lodged a claim against it with the district court. The claim was returned without examination on the grounds that the Code of Civil Procedure provided for absolute immunity of a foreign State before the Russian courts. In 2004 the regional court upheld that decision on appeal.

Law – Article 6 § 1: The limitation had pursued the legitimate aim of complying with international law in order to promote comity and good relations between States through the respect of national sovereignty. Nevertheless, Russia had signed the 2004 Convention on Jurisdictional Immunities of States and their Property, which endorsed the principle of restricted immunity when a State engages in a commercial transaction with a foreign natural person. Moreover, the President of Russia, the Constitutional Court and the Supreme Commercial Court had acknowledged that restrictive immunity had become a principle of customary law. Finally, the new Code of Commercial Procedure adopted in 2002 provided for restrictive immunity and the 1960 Treaty on Trade and navigation between the USSR and the DPRK subjected all disputes arising out of foreign trade

transactions concluded or guaranteed by the Trade Representation within the territory of the State of sojourn to the jurisdiction of the latter's courts. However, the domestic courts had rejected the applicant's claim without examination, without any analysis of the applicable provisions of the said treaty and the relevant principles of customary international law which under the Constitution form an integral part of the Russian legal system. Indeed, the domestic courts had applied absolute State immunity from jurisdiction without trying to establish whether the claim related to the acts of the DPRK performed in the exercise of its sovereign authority or as a party to a transaction of a private-law nature. Therefore, by rejecting the applicant's claim without examination of the essence of the dispute and without giving relevant and sufficient reasons, and notwithstanding the applicable provisions of international law, the domestic courts had failed to preserve a reasonable relationship of proportionality and had thus impaired the very essence of the applicant's right of access to court.

Conclusion: violation (unanimously).

Article 41: claim in respect of pecuniary damage dismissed; no claim made in respect of non-pecuniary damage.

(See also *Sabeh El Leil v. France* [GC], no. 34869/05, 29 June 2011, Information Note no. 142; and *Cudak v. Lithuania* [GC], no. 15869/02, 23 March 2010, Information Note no. 128)

Article 6 § 3 (a)

Information on nature and cause of accusation

Conviction of applicant without his being informed of recharacterisation of the facts or being able to exercise defence rights in relation to that issue: *violation*

Varela Geis v. Spain - 61005/09
Judgment 5.3.2013 [Section III]

Facts – In 1996 the applicant was indicted for the continuing offence of "genocide" on account of his alleged Holocaust denial, on the basis of Article 607 § 2 of the Criminal Code, and the continuing offence of "incitement to racial discrimination" under Article 510 § 1 of the Criminal Code. Two private parties joined the prosecution. In 1998 the applicant was convicted of those offences. He appealed to the *Audencia Provincial*. In 2007, after a request from the *Audencia Provincial* for a preliminary ruling, the Constitutional Court declared Article 607 of Criminal Code unconstitutional in so far as it concerned genocide denial but found that the remainder of that Article was constitutional. The applicant then asked whether the charge against him under Article 607 § 2 of the Criminal Code remained valid. The *Audiencia Provincial* stated that it was unnecessary to answer his request. The public prosecutor's office withdrew the charge of genocide denial and sought to have the applicant acquitted of the offence under Article 607 of the Criminal Code and convicted only of the offence of incitement to racial discrimination, hatred and violence, under Article 510 § 1 of the Criminal Code. However, the private prosecutors called for the applicant's conviction under Article 607 to be upheld, arguing that his conduct had gone further than mere denial of genocide. In 2008 the *Audiencia Provincial* partly quashed the lower court's judgment, acquitted the applicant of the offence under Article 510 of the Criminal Code and sentenced him to seven months' imprisonment for the offence of justifying genocide, under Article 607 § 2 of the Criminal Code. An *amparo* appeal by the applicant was unsuccessful.

Before the Court, the applicant complained that he had been convicted on appeal of an offence – justifying genocide – which had not formed part of the indictment and of which he had not been convicted at first instance.

Law

Article 17: The Government requested the Court to declare the application inadmissible, arguing that the message conveyed by all the material seized from the applicant was contrary to the spirit and letter of the Convention. The Court reiterated that the purpose of Article 17, in so far as it referred to groups or individuals, was to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying the rights and freedoms set forth in the Convention. The Court observed that in the present case the applicant had not relied on the Convention to justify or perform acts infringing the rights and freedoms set forth therein, but had complained that he had been denied the safeguards afforded by Article 6. Accordingly, Article 17 of the Convention was not applicable.

Conclusion: preliminary objection dismissed (unanimously).

Article 6 § 3 (a) and (b) in conjunction with Article 6 § 1: Article 6 § 3 (a) of the Convention afforded persons charged with a criminal offence the right

to be informed not only of the cause of the accusation, that is to say the acts they were alleged to have committed and on which the accusation was based, but also, in detail, of the legal classification of those acts. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, was an essential prerequisite for ensuring that the proceedings were fair. Moreover, Article 6 § 3 (a) did not impose any special formal requirement as to the manner in which the accused were to be informed of the nature and cause of the accusation against them; nevertheless, it had to be foreseeable. Lastly, sub-paragraphs (a) and (b) of Article 6 § 3 were connected and the right to be informed of the nature and the cause of the accusation had to be considered in the light of the accused's right to prepare their defence.

It could be inferred from the public prosecutor's decision to withdraw the charge of genocide denial that the conduct to which the prosecution related was no different from the conduct that had been decriminalised by the Constitutional Court. In addition, the applicant had already made his submissions at the hearing in the appeal proceedings before he had even become aware of the substance of the private prosecutors' arguments and had never been clearly accused of any conduct amounting to justification of genocide. None of the evidence submitted indicated that the applicant had been informed that the *Audiencia Provincial* had reclassified the alleged offence, or even that the private prosecutors' arguments supporting the charge of justifying genocide had been considered. Nor had it been established that the applicant had been aware of the mere possibility that the *Audiencia Provincial* might amend the charge against him from "denying" to "justifying" genocide. Justification of genocide had not constituted an intrinsic element of the initial accusation known to the applicant from the beginning of the proceedings. In using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the *Audiencia Provincial* should have afforded the applicant the opportunity to exercise his defence rights on that issue in a practical and effective manner, and hence in good time. That had not been the case, as it was only through the judgment on his appeal that the applicant had belatedly learnt of the recharacterisation of the facts.

Conclusion: violation (unanimously).

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

ARTICLE 8

Positive obligations
Respect for family life

Continuing failure to provide information concerning fate of newborn baby in hospital care: *violation*

Zorica Jovanović v. Serbia - 21794/08
Judgment 26.3.2013 [Section II]

Facts – On 28 October 1983 the applicant gave birth to a healthy baby boy in a State-run hospital. Three days later, when she and the baby were about to be discharged, she was informed that her son had died. The applicant attempted to access the hospital nursery where her son had spent the night but was restrained by hospital orderlies. The baby's body was never handed over to the applicant or her family and she has never been provided with an autopsy report or informed when and where her son was allegedly buried. No indication was given as to the cause of death and the death was not registered in municipal records. A criminal complaint filed by the applicant's husband against the hospital staff – following reports in the media about other similar cases – was rejected in October 2003 as unsubstantiated.

Between 2003 and 2010 the authorities took steps to improve procedures in hospitals in the event of the death of a newborn child and to investigate allegations made by hundreds of parents whose babies had gone missing following their supposed deaths in hospital wards, mostly between the 1970s and 1990s. Thus, since 2003 the parents, family or legal representatives of newborns who died in hospital have been obliged to sign a special form stating they have been informed of the death and will personally make funeral arrangements. Furthermore, reports were drawn up by the Ombudsman, the Parliament's investigation committee and a working group set up by the Parliament to assess the situation and propose legislative changes. The reports of the Ombudsman and investigation committee found serious shortcomings, both in the legislation applicable in the 1980s and in the procedures and statutory regulations that applied when a newborn died in hospital (the prevailing medical opinion being that parents should be spared the pain of having to bury their child). They therefore considered that the parents' doubts as to what had really happened to their children were justified. The reports also found that the State's response to the situation had been in-

adequate. In December 2010, however, the Parliamentary working group concluded that no changes to the existing legislation, which by then had already been amended, were necessary (except as regards the collection and usage of medical data). It also noted that Article 34 of the Serbian Constitution made it impossible to extend the applicable prescription period for the prosecution of crimes committed in the past, or to introduce new, more serious, criminal offences and/or harsher penalties.

Law – Article 8

(a) *Admissibility*

(i) *Compatibility* ratione temporis: The applicant's son had allegedly died/gone missing on 31 October 1983, but the Convention had not entered into force in respect of Serbia until 3 March 2004. Nevertheless, the respondent State's alleged failure to provide the applicant with any definitive and/or credible information as to the fate of her son had continued to date. In such circumstances, the applicant's complaint concerned a continuing situation and the Government's objection of lack of jurisdiction *ratione temporis* had to be dismissed. The Court was thus competent to examine the applicant's complaint in so far as it related to the respondent State's alleged failure to fulfil its procedural obligations under the Convention since 3 March 2004, but could also have regard to the facts prior to the ratification inasmuch as they could be considered to have created a continuous situation extending beyond that date or may be relevant for the understanding of facts occurring thereafter.

(ii) *Six-month rule*: The Court reiterated that applicants could not wait indefinitely before lodging their application with the Court in disappearance cases. While allowances had to be made for the uncertainty and confusion which frequently marked the aftermath of a disappearance, applications could be rejected as out of time where there was excessive or unexplained delay on the part of the applicants once they had, or should have, become aware that either no investigation had been instigated or that it had lapsed into inaction or become ineffective and that there was no immediate, realistic prospect of an effective investigation in the future. In the very specific circumstances of the instant case, despite the overall passage of time, it could not be said that the applicant had been unreasonable in awaiting the outcome of developments which could have "resolved crucial factual or legal issues" regarding her complaint, at least not until the presentation of the working group's report in December 2010 when it became obvious that no redress would be forthcoming. Her application lodged in April 2008 was therefore within the six-month time-limit.

(iii) *Exhaustion of domestic remedies*:– The criminal complaint lodged by the applicant's husband on his own and the applicant's behalf was rejected by the public prosecutor's office without any indication as to whether any preliminary investigation had been carried out. In any event, any criminal proceedings would have become time-barred by October 2003 at the latest and so would have been incapable of providing any redress thereafter. A civil claim could not have remedied the situation either as, while the civil courts could have recognised the violation of the applicant's "personal rights" and awarded compensation, they could not effectively provide redress for the applicant's underlying need for information as to "the real fate of her son". The Government's preliminary objection concerning an alleged failure to exhaust domestic remedies was therefore rejected.

Conclusion: admissible (unanimously).

(b) *Merits*

Article 8: The considerations the Court had noted in *Varnava and Others v. Turkey* with respect to a State's positive obligations under Article 3 of the Convention to account for the whereabouts and fate of missing persons were broadly applicable, *mutatis mutandis*, to the very specific context of positive obligations under Article 8 in the instant case.[1]

The applicant still had no credible information as to what had happened to her son. His body had never been transferred to her or her family, and the cause of death was never determined. She had never been provided with an autopsy report or informed of when and where her son had allegedly been buried; his death had never been officially recorded. The criminal complaint filed by the applicant's husband appeared to have been rejected without adequate consideration.

The Serbian authorities had themselves acknowledged on various occasions that there had been serious shortcomings in the legislation and pro-

1. "The finding of such a violation is not limited to cases where the respondent State has been held responsible for the disappearance ... but can arise where the failure of the authorities to respond to the quest for information by the relatives or the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts, may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the whereabouts and fate of a missing person" (*Varnava and Others v. Turkey* [GC], § 200).

cedures concerning the death of newborn babies in hospital, and that the parents had legitimate concerns and were entitled to know the truth about their children's fate. However, despite several seemingly promising official initiatives, the working group report to the Parliament in December 2010 had concluded that no changes were necessary to the already amended legislation, except as regards the collection and usage of medical data. It was clear though that this only improved the situation for the future and effectively offered nothing to parents like the applicant who had endured the ordeal in the past. The applicant had thus suffered a continuing violation of her right to respect for her family life on account of the respondent State's continuing failure to provide her with credible information as to the fate of her son.

Conclusion: violation (unanimously).

Article 46: Given the significant number of potential applicants, the respondent State had to take within one year of the judgment becoming final appropriate measures, preferably by means of a *lex specialis*, to establish a mechanism providing individual redress to all parents in a situation similar to the applicant's. The mechanism was to be supervised by an independent body, with adequate powers, capable of providing credible answers regarding the fate of each missing child and affording adequate compensation. All similar applications already pending before the Court were adjourned for the one-year period without prejudice to the Court's powers to declare any such application inadmissible or strike it out of the list.

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

(See also: *Varnava and Others v. Turkey* [GC], nos. 16064/90 et al., 18 September 2009, Information Note no. 122)

Respect for private life

Lack of entitlement to compensation from State for paralysis caused by vaccine that was recommended but not compulsory:
inadmissible

Baytüre v. Turkey - 3270/09
Decision 12.3.2013 [Section II]

Facts – The applicants are a couple and their child. In line with doctors' recommendations, the child was vaccinated at the age of three months against several illnesses, including poliomyelitis. The vaccination resulted in paralysis of his right foot. The applicants filed a claim for compensation. The court dismissed their claim, holding that no fault on the part of the services of the Ministry of Health had been established. It based its decision, *inter alia*, on an expert report which concluded that the frequency of complications such as that suffered by the applicant was extremely rare and impossible to prevent medically. The applicants lodged an appeal on points of law. They complained, in particular, that the court had not accepted the principle of no-fault liability on the part of the authorities, which, they alleged, would have made it possible to award them compensation. The Supreme Administrative Court upheld the impugned judgment.

Before the European Court, the applicants complained of the refusal by the national courts and State authorities to grant compensation for the damage they had sustained.

Law – Article 8: The scope of Article 8 included questions related to individuals' physical and psychological integrity, their involvement in the choice of medical care provided and their consent thereto, and also access to information enabling them to assess the health risks to which they are exposed. If, however, in the context of a vaccination campaign, the sole aim of which was to protect public health by eradicating infectious diseases, a small number of serious accidents occurred, the State could not be criticised for failing to take due measures to protect those individuals' physical integrity. In the instant case, the case file did not indicate that the vaccine had been inappropriately administered or that adequate measures had not been taken to avoid the risks related to the vaccination from occurring. The applicant had been a victim of an adverse reaction from a recommended vaccine and the Court was conscious of the difficulty inherent in such a situation. However, in a system where vaccination was not compulsory, and in the absence of medical error, the introduction of a compensation system for victims of harm arising from a vaccination was essentially a social-security measure, which fell outside the scope of the Convention. Consequently, the applicants' complaints had to be dismissed as being incompatible *ratione materiae* with the provisions of the Convention.

Conclusion: inadmissible (incompatible *ratione materiae*).

(See also *Trocellier v. France* (dec.), no. 75725/01, 5 October 2006, Information Note no. 90)

Respect for family life

Failure to execute a judgment confirming an order to return underage children to their mother in the United Kingdom: *violation*

Raw and Others v. France - 10131/11
Judgment 7.3.2013 [Section V]

Facts – The first applicant was the mother of three children: D. and A., born of her relationship with a French national, and C. A. and C., who were still minors, were also applicants, while D. had reached his majority without expressing the wish to pursue the proceedings before the European Court. In March 2001 the first applicant, having separated from D. and A.'s father, left France with her children and settled in the United Kingdom. Following the couple's divorce in June 2001, parental authority was granted jointly to both parents and it was decided that D. and A.'s habitual residence was to be with their mother in the United Kingdom. On 28 December 2008, at the end of a visit by the children to France, their father went to the police station to report that the children were upset and feared returning to the United Kingdom. On 2 January 2009 the family judge granted interim custody to the father. The British courts issued an order to return the children which, though upheld by the French authorities in a judgment of 16 April 2009, was never executed.

Law – Article 8: The authorities had waited until the question of the application of Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction had been finally decided before involving themselves fully and with speed in the return of D. and A. to their mother in Great Britain. That provision enabled the authorities of the requested State not to order the child's return where there existed a serious risk that such a return would expose him or her to physical or psychological danger or otherwise place the child in an intolerable situation, or where the child opposed the return. In the instant case, the children's best interests called for a certain level of prudence on the part of the authorities, given that tangible factors gave grounds for considering that their return could be detrimental to them.

The French authorities had initially used various methods to convince the children's father to cooperate in organising their return to the United Kingdom. Several meetings had been organised in order to clarify the conditions in which the return decision would be executed. A meeting between the two children and their mother took place on 4 June 2009 in a neutral setting and in the presence of a social worker, their father, an educator and a psychologist whom they had already met. The mother and sons had been due to leave together for the United Kingdom that afternoon, but the attempt to re-establish contact failed on account of the children's negative reaction. In consequence, the public prosecutor at the court of appeal decided that, as things stood, the children could not be returned to their mother. Nonetheless, the French Central Authority had pursued its efforts, in collaboration with the Central Authority for England and Wales. However, no measure likely to encourage compliance with the judgment of 16 April 2009 had been taken between the autumn of 2009 and 29 April 2010, when the French Central Authority unsuccessfully invited the father to make contact with it for the purpose of arranging a meeting, and it did not appear from the case file that the authorities had subsequently taken any significant steps.

The authorities' decision to give priority to an approach based on cooperation and negotiation was not called into question, especially as Article 7 of the Hague Convention stressed the need to seek an amiable resolution. The decision by the public prosecutor at the court of appeal in June 2009 not to resort to forcible execution of the judgment of 16 April 2009, confirmed in April and August 2010, and the Prefect's decision of August 2009 to refuse the use of police force were not open to criticism. As a general rule, the best interests of children argued against coercive measures being taken against them. However, coercive measures could have been taken against the father in order to encourage him to cooperate more fully. In this respect, the relevant French authorities had not taken any action on the complaint filed by the first applicant on 17 March 2009, alleging failure to return the children, at which point it could have been considered that the approach of cooperation and negotiation was failing to produce results.

The authorities had faced difficulties as a result of the attitude of the children themselves, who had clearly expressed their refusal to return to their mother in the United Kingdom. That attitude, however, had not necessarily been immutable, especially given that on 11 December 2010 A. had voluntarily left his father's home to return to his mother. In addition, under the Hague Convention and EC Regulation no. 2201/2003,[1] the children's

1. Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

objections were not necessarily sufficient to prevent their return.

Having regard to the foregoing, and notwithstanding the margin of appreciation enjoyed by the respondent State in this area, the French authorities had not taken all of the measures that could reasonably have been demanded of them to facilitate execution of the judgment of 16 April 2009, ordering the return of the two children to the United Kingdom.

Conclusion: violation (five votes to two).

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

Withdrawal of parental authority solely on strength of children's uncorroborated allegations of violence: *violation*

B.B. and F.B. v. Germany - 18734/09 and 9424/11
Judgment 14.3.2013 [Section V]

Facts – The applicants were the parents of two minor children. At the age of twelve, their daughter alleged that both she and her eight-year-old brother had been repeatedly and severely beaten by their father. In May 2008 the District Court made an interim order temporarily transferring the applicants' parental rights over their children to the Youth Office. In August 2008 it made a full care order divesting the applicants of their parental rights and in November 2008 the Court of Appeal rejected the applicants' appeal. The children were placed in a children's home, where they remained for over a year without any personal contact with their parents. At the first meeting with the parents, which took place in July 2009, a year and a month after the children's placement in care, the daughter confessed that she had lied to the authorities and that neither child had been beaten. The children were then returned to their parents.

Law – Article 8: The withdrawal of parental authority had interfered with the applicants' right to respect for their family life. The measure conformed to the requirements of domestic law and pursued the legitimate aim of protecting the rights of the two children. As regards the reasons adduced to justify the measures and the decision-making process, the Court noted that the national authorities had had the benefit of direct contact with all the persons concerned and enjoyed a wide margin of appreciation when assessing the need for a care order. They had been confronted with allegations that were at least prima facie credible of severe physical abuse which afforded sufficient reason to make an interim care order immediately to prevent further possible abuse. The interim order issued by the District Court in May 2008 had therefore not violated the applicants' rights under Article 8.

However, the only evidence relied upon by the District Court when making the full care order in August 2008 were the personal statements of the two children. There was no objective evidence of the alleged abuse. Further, while the District Court had the benefit of direct contact with the children, the Court of Appeal had based its assessment exclusively on the case-file, without hearing the children in person. The applicants, for their part, had relied on statements by the children's doctors and by a psychologist, who had examined the boy several times without detecting any signs of abuse. The applicants had also pointed out that the children had regularly attended school and sports activities and it was not contested before the domestic courts that the daughter had a vivid imagination. These facts were capable of casting doubts on the truthfulness of the children's allegations. When deciding whether to make the full care order, the domestic courts had not been under any pressure to render an overly hasty decision since the children had been placed in the safety of a children's home. German family courts were under an obligation to carry out on their own initiative all investigations necessary to establish the relevant facts and the Government had not submitted any factual reasons which might have prevented the domestic courts from further investigating the facts before taking a final decision. Under these circumstances, and having regard to the serious impact the complete withdrawal of the applicants' parental rights had had on the family as a whole, the domestic courts had not provided sufficient reasons for their decision.

Conclusion: violation (unanimously).

Article 41: EUR 25,000 to each applicant in respect of non-pecuniary damage; EUR 1,834.93 jointly to both applicants in respect of pecuniary damage.

Respect for home
Respect for correspondence

Order requiring applicant company to copy all data on server it shared with other companies: *no violation*

Bernh Larsen Holding AS and Others v. Norway - 24117/08
Judgment 14.3.2013 [Section I]

Facts – The three applicant companies (and two other companies) shared a common server for their respective information technology systems. In March 2004 the regional tax authorities requested one of the applicant companies, Bernh Larsen Holding (B.L.H.), to allow tax auditors to make a copy of all data on the server. While B.L.H. agreed to grant access, it refused to supply a copy of the entire server, arguing that it was owned by the second applicant company (Kver) and was also used for information storage by other companies. When Kver in turn opposed the seizure of the entire server, the tax authorities issued a notice that it too would be audited. The two companies then agreed to hand over a backup tape of the data of the previous months, but immediately lodged a complaint with the central tax authority and requested the speedy return of the tape, which was sealed pending a decision on their complaint. After being informed by Kver that three other companies also used the server and were affected by the seizure, the tax authorities notified those companies that they would also be audited. One of them, Increased Oil Recovery (I.O.R.), subsequently lodged a complaint with the central tax authority. In June 2004 the central tax authority withdrew the notice that an audit of Kver and I.O.R. would be carried out, but confirmed that B.L.H. would be audited and was obliged to give the authorities access to the server. That decision was upheld on appeal to the City Court, the High Court and ultimately the Supreme Court.

Law – Article 8: The obligation on the three applicant companies to enable tax auditors to access and copy all data on their shared server constituted interference with their "home" and "correspondence" for the purpose of Article 8. It was unnecessary to determine whether there had also been interference with the companies' "private life" as none of the employees whose personal e-mails and correspondence were allegedly backed up on the server had lodged a complaint. The Court would, however, take the companies' legitimate interest in ensuring the protection of the privacy of persons working for them into account when examining whether the interference was justified.

The interference had a basis in national law and the law in question was accessible. The Court was also satisfied that it was sufficiently precise and foreseeable. The applicant companies had argued that, by taking the backup copy, the tax authorities had obtained the means of accessing great quantities of data which did not contain information of significance for tax assessment purposes and which thus fell outside the remit of the relevant provisions. However, as the Supreme Court had explained, the tax authorities needed, for reasons of efficiency, relatively wide scope to act at the preparatory stage. That was not to say that the relevant provisions had conferred on the tax authorities an unfettered discretion, as the object of an order to access documents was clearly defined. In particular, the authorities could not require access to archives belonging entirely to other taxpayers. Where, however, as here, the applicant companies' archives were not clearly separated, but "mixed", it was reasonably foreseeable that the tax authorities should not have to rely on the taxpayers' own indications of where to find relevant material, but should have access to all data on the server to appraise the matter for themselves. The Court further found that the interference had pursued the legitimate aim of securing the economic well-being of the country.

As to whether the measure had been necessary in a democratic society, there was no reason to call into doubt the Norwegian legislature's view that the review of archives was a necessary means of ensuring efficient verification of information submitted to the tax authorities, as well as greater accuracy in the information so provided. The tax authorities' justification for obtaining access to the server and a backup copy with a view to carrying out a review of its contents on their premises had therefore been supported by reasons that were both relevant and sufficient.

As to proportionality, the procedure whereby the authorities had obtained access to a backup copy of the server had been accompanied by a number of safeguards. One of the applicant companies had been notified of the tax authorities' intention to carry out a tax audit a year in advance, and both its representatives and those of another of the applicant companies had been present and able to express their views when the tax authorities were on-site. The companies were entitled to object to the measure and had done so and the backup copy

had been placed in a sealed envelope and deposited at the tax office pending a decision on their complaint. The relevant legal provisions included further safeguards, in particular the taxpayer's rights to be present when the seal was broken, and to receive a copy of the audit report and the return of irrelevant documents. The material was not reviewed until after delivery of the final judgment of the Supreme Court. Furthermore, once the review had been completed, the backup copy would be destroyed and all traces of the contents deleted from the tax authorities' computers and storage devices. The authorities were not authorised to withhold documents unless the taxpayer agreed.

Finally, the nature of the interference was not of the same seriousness and degree as was ordinarily the case in search and seizure operations carried out under the criminal law. The consequences of a taxpayer's refusal to cooperate were exclusively administrative. Moreover, the measure had in part been made necessary by the applicant companies' own choice to opt for "mixed archives" on a shared server, making the task of separation of user areas and the identification of documents more difficult for the tax authorities.

In sum, despite the lack of a requirement for prior judicial authorisation, the Court found that effective and adequate safeguards against abuse had been in place and a fair balance had been struck between the companies' right to respect for "home" and "correspondence" and their interest in protecting the privacy of persons working for them on the one hand, and the public interest in ensuring efficient inspection for tax assessment purposes on the other.

Conclusion: no violation (five votes to two).

(See also, in a criminal-law context: *Robathin v. Austria*, no. 30457/06, 3 July 2012, Information Note no. 154)

ARTICLE 10

Freedom of expression

Conviction of political activist for insulting French President by waving a satirical placard: *violation*

Eon v. France - 26118/10
Judgment 14.3.2013 [Section V]

Facts – During a visit by the President of France in 2008, the applicant waved a small placard reading "*Casse toi pov'con*" ("Get lost, you sad prick") as the President's party was about to pass by. This was an allusion to a much publicised phrase uttered by the President himself. The phrase had given rise to extensive comment and media coverage and had been widely circulated on the Internet and used as a slogan at demonstrations. The applicant was immediately stopped by the police and was later prosecuted by the public prosecutor for insulting the President. He was found guilty and fined thirty euros, a penalty which was suspended. An appeal on points of law by the applicant was dismissed.

Law – Article 10

(a) *Admissibility (no significant disadvantage)* – The severity of a violation should be assessed taking account of both the applicant's subjective perception and what was objectively at stake in a particular case. The subjective importance of the matter appeared clear to the applicant, who had pursued the proceedings to the end, even after he had been refused legal aid for lack of serious grounds. As to what had been objectively at stake, the case had received widespread media coverage and concerned the issue of whether insulting the head of State should remain a criminal offence, a matter that was regularly debated in Parliament. As to whether respect for human rights as defined in the Convention and the Protocols thereto required an examination of the application on the merits, the Court noted that the case concerned an issue of some significance, both at national level and in terms of the Convention.

Conclusion: preliminary objection dismissed (six votes to one).

(b) *Merits* – The applicant's conviction had amounted to "interference by public authority" with his right to freedom of expression. The interference had been prescribed by law and had pursued the legitimate aim of protecting the reputation of others.

The phrase "*Casse toi pov'con*" appearing on a placard waved by the applicant as the President's party was passing along the public highway was, in literal terms, offensive to the President. However, the phrase should be examined within the overall context of the case, particularly with regard to the status of the person to whom it was addressed, the applicant's own position, its form and the context of repetition of a previous statement.

The Court noted firstly that the restriction on the applicant's freedom of expression had no connection with the interests of freedom of the press. Accordingly, it did not consider it appropriate

to examine the present case in the light of the *Colombani and Others* case, in which it had found that, unlike the position under the ordinary law of defamation, the applicants had been unable to rely on a defence of justification – that is to say, proving the truth of the allegation – to escape criminal liability, a peculiarity which in the Court's view went beyond what was required to protect a person's reputation and rights, even when that person was a head of State or government. In the present case the applicant, who had been accused of using an insulting phrase, had not claimed that the head of State had acted or spoken offensively towards him, and the phrase in question had been an insult rather than an allegation. As a result, he could not have relied on a defence of either provocation or justification. Furthermore, it should be noted that, as under the ordinary law, the domestic courts had examined whether the applicant had acted in good faith, which might have served as justification for his acts, but had ruled out this possibility in view of his political activism and the premeditated nature of the phrase he had used. Lastly, the prosecution had been initiated not by the President himself but by the public prosecutor's office, in accordance with the relevant domestic law. In the light of these factors, the Court considered that it was not necessary to determine whether the criminal classification of the applicant's acts was compatible with the Convention, even if this was regarded as a special measure, since it had not had any particular effects or conferred privileged status on the head of State concerned *vis-à-vis* the right to convey information and opinions concerning him.

Nevertheless, the repetition of the phrase uttered by the President had not targeted the latter's private life or honour; nor had it simply amounted to a gratuitous personal attack against him. The applicant was an activist and former elected representative who had fought a long-running campaign in support of a family of illegal immigrants, who had been deported several days before the head of State's visit.

The Court further noted that by echoing an abrupt phrase that had been used by the President himself and had attracted extensive media coverage and widespread public comment, much of it humorous in tone, the applicant had chosen to express his criticism through the medium of irreverent satire. The Court had observed on several occasions that satire was a form of artistic expression and social commentary which, by its inherent features of exaggeration and distortion of reality, naturally aimed to provoke and agitate. Accordingly, any interference with the right of an artist – or anyone else – to use this means of expression should be examined with particular care. Imposing a criminal penalty for conduct such as that of the applicant in the present case could have a chilling effect on satirical forms of expression relating to topical issues. Such forms of expression could themselves play a very important role in the free discussion of questions of public interest, without which there was no democratic society. Accordingly, the competent authorities' recourse to a criminal penalty had been disproportionate to the aim pursued and unnecessary in a democratic society.

Conclusion: violation (six votes to one).

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

(See *Colombani and Others v. France*, no. 51279/99, 25 June 2002, Information Note no. 43)

ARTICLE 14

Discrimination (Article 3)

Unjustified difference in treatment of remand prisoners compared to convicted prisoners in respect of release on health grounds: *violation*

Gülay Çetin v. Turkey - 44084/10
Judgment 5.3.2013 [Section II]

(See Article 3 above, page 10)

ARTICLE 34

Victim

Standing of non-governmental organisation to lodge application on behalf of deceased mental patient: *relinquishment in favour of the Grand Chamber*

Center of Legal Resources v. Romania - 47848/08
[Section III]

The application was lodged by a non-governmental organisation, the Center for Legal Resources, on behalf of a young Roma man Mr Câmpeanu, who died in 2004 at the age of nineteen. Mr Câmpeanu had been placed in an orphanage at birth after being abandoned by his mother. When still a

young child he was diagnosed as being HIV-positive and as suffering from severe mental disability. On becoming an adult he had to leave the centre for disabled children where he had been staying and underwent a series of assessments with a view to finding a specialised institution able to care for him. After a number of institutions had refused to accept him in the light of his condition, he was eventually admitted to a medical and social care centre, which found him to be in an advanced state of psychiatric and physical degradation, without any antiretroviral medication and suffering from malnutrition. A few days later, as a result of his hyper-aggressive behaviour, he was admitted to a psychiatric hospital. The hospital concerned had previously indicated that it lacked the facilities to treat patients with HIV. There he was seen by a team of monitors from the applicant organisation who reported finding Mr Câmpeanu alone in an unheated room, with a bed but no bedding and dressed only in a pyjama top. Although he could not eat or use the toilet without assistance, the hospital staff had refused to help him, allegedly for fear of contracting the HIV virus. Mr Câmpeanu had stopped eating and refused to take his medication and so was only receiving glucose through a drip. The report concluded that the hospital had failed to provide him with the most basic treatment and care. Mr Câmpeanu died that evening.

The applicant organisation lodged a criminal complaint alleging, *inter alia*, homicide by negligence, but the prosecutor's office decided not to prosecute in a decision that was ultimately upheld by a county court on the grounds of the absence of a causal link between Mr Câmpeanu's treatment and his death. Various bodies who looked into the circumstances surrounding the death concluded that generally the proper procedures had been followed and that Mr Câmpeanu's human rights had not been breached.

In its application to the European Court, the applicant organisation alleges violations of Articles 2, 3, 5, 8, 13 and 14 of the Convention. In response to the Government's contention that it did not have *locus standi* under Article 34 of the Convention to bring the proceedings, the applicant organisation argues that in view of the particular factual circumstances, including Mr Câmpeanu's extreme vulnerability to abuse and the absence of any next of kin willing to act on his behalf, an exception should be made to the strict admissibility requirements normally applicable. Submissions in support of that approach were made by various third-party interveners including the Council of Europe Commissioner for Human Rights.

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies
Six-month period

Negative opinion of Court of Cassation lawyer as to chances of success of appeal: *remedies exhausted; six-month rule observed*

Chapman v. Belgium - 39619/06
Decision 5.3.2013 [Section V]

Facts – In a case concerning the jurisdictional immunity of an international organisation, the applicant did not lodge an appeal on points of law after receiving a negative opinion from counsel at the Court of Cassation that there was no reasonable prospect of success. The judgment of the lower court had not been served on the applicant, so the time for lodging such an appeal had not yet started to run.

Law – Article 35 § 1: As regards the exhaustion of domestic remedies, the assistance of counsel at the Court of Cassation was mandatory in civil matters. The applicant had consulted counsel with a view to lodging an appeal on points of law and had then followed his negative advice. The time for lodging such an appeal had not yet started to run, as the Employment Appeal Tribunal's judgment had not been served on the applicant. This case could thereby be distinguished from *Van Oosterwijck v. Belgium*, in which the Court had declared an application inadmissible for non-exhaustion of domestic remedies. Regard being had, in particular, to the preventive role of the lawyer at the Court of Cassation, in the interest both of that court and of the potential litigants, the applicant had done all that could be reasonably expected of him to exhaust domestic remedies.

As a rule, the six-month period ran from the date of the final decision in the process of exhaustion of domestic remedies. Where, however, an applicant availed himself of an apparently existing remedy and only subsequently became aware of circumstances which rendered the remedy ineffective, it might be appropriate for the purposes of Article 35 § 1 to calculate the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances. The applicant had initiated the process for the lodging of an appeal on points

of law against the judgment of the Employment Appeal Tribunal, but had abandoned that idea after receiving a negative opinion on his prospects of success. The date to be taken into consideration, for the calculation of the six-month period, was thus not 1 February 2005, the date of the Employment Appeal Tribunal's judgment, which had become the final domestic decision in the case, but 27 March 2006, the date of the opinion by counsel at the Court of Cassation informing the applicant that an appeal on points of law was bound to fail. The six-month rule had therefore been complied with, as the application had been lodged on 18 September 2006.

The Court, however, declared inadmissible the applicant's complaint under Article 6 § 1 of the Convention as being manifestly ill-founded.

(See *Van Oosterwijck v. Belgium*, no. 7654/76, 6 November 1980)

Exhaustion of domestic remedies

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

Turgut and Others v. Turkey - 4860/09
Decision 26.3.2013 [Section II]

Facts – Various sets of criminal proceedings have been brought against the applicants since 1999. They complained of the length of the proceedings and of the lack of a domestic legal remedy by which to lodge their complaint.

Law – Article 35 § 1: Following the pilot-judgment procedure applied in the case of *Ümmühan Kaplan v. Turkey*, Law no. 6384 on the settlement, by a compensation award, of "length-of-proceedings" applications lodged with the Court before 23 September 2012 and not yet communicated to the Government was enacted on 9 January 2013. It was designed to render the "reasonable-time" principle effective in domestic law, in accordance with Article 6 § 1 of the Convention and the Court's related case-law. The Law covered all criminal-law, private-law and administrative-law cases that had exceeded a "reasonable time". Accordingly, the Court had to determine whether the applicants were required to use the new remedy. Their application had been lodged before Law no. 6384 had come into force, so the applicants had not at the time had an effective remedy under Turkish law to complain about the length of the proceedings in question.

The main purposes of Law no. 6384, which provided for the creation of a compensation board to rule on any application lodged with it, were to allow the respondent State to redress breaches of the "reasonable-time" requirement and reduce, or even fully absorb, the number of applications registered on the Court's list of cases concerning this systemic or structural problem. As at 31 December 2012 over 3,800 applications lodged with the Court on the same issue had not yet been communicated to the respondent Government. Accordingly, having regard to the nature of Law no. 6384 and the context in which it had been enacted, there were grounds for departing from the general principle that the requirement of exhaustion of domestic remedies had to be assessed with reference to the time when the application was lodged. At this stage of the proceedings, the Court was not in a position to state that the remedy instituted was not effective and accessible. Furthermore, Law no. 6384 had instituted a remedy that was subject to the scrutiny of the Regional Administrative Court and then, if applicable, to that of the Constitutional Court and lastly to the Strasbourg Court. Consequently, the applicants were required – in accordance with Article 35 § 1 of the Convention – to apply to the Compensation Board set up by Law no. 6384 in so far as this was apparently an accessible remedy capable of offering them a reasonable chance of redress for their complaints. That conclusion did not in any way prejudice a possible reexamination of the issue of the effectiveness and reality of the remedy introduced by that Law in the light of practice and the decisions given by the Compensation Board and the domestic courts. In any event, the burden of proof regarding the effectiveness of the remedy would then be on the respondent State.

Conclusion: inadmissible (failure to exhaust domestic remedies).

The Court also held that the applicants' complaint under Article 13 of the Convention was inadmissible as manifestly ill-founded, since the Compensation Board did offer the applicants a remedy to be used within the meaning of Article 13 of the Convention enabling them to complain of the length of proceedings for the purposes of Article 6 § 1.

(See *Ümmühan Kaplan v. Turkey*, no. 24240/07, 20 March 2012, Information Note no. 150)

Article 35 § 3 (b)

No significant disadvantage

Complaint relating to delays in proceedings that actually operated to applicant tenant's advantage: *inadmissible*

Galović v. Croatia - 54388/09
Decision 5.3.2013 [Section I]

Facts – In 1999 the owner of a flat in which the applicant lived obtained a court order for her eviction. That order was upheld on appeal. The applicant then lodged a constitutional appeal which was dismissed just over six years later. In her application to the European Court the applicant complained, *inter alia*, under Article 6 § 1 of the Convention of the length of the proceedings before the Constitutional Court.

Law – Article 35 § 3 (b): The length of the proceedings had in fact benefited the applicant by postponing the enforcement of her eviction for over six years. In the Court's view, this had compensated for or at least significantly reduced the damage normally entailed by the excessive length of civil proceedings, so the applicant had not suffered a "significant disadvantage" in respect of her right to a hearing within a reasonable time. The issue of the length of civil proceedings in Croatia had already been addressed by the Court on numerous occasions so that respect for human rights did not require an examination of the complaint on its merits.

As to whether the case had been "duly considered by a domestic tribunal", both the action for the applicant's eviction and her counterclaim had been "duly considered" at first and second instance and by the Constitutional Court. In addition, the Court noted that under its case-law on Article 13, the right to an effective remedy in respect of an alleged violation of a Convention right by a last-instance judicial authority was implicitly restricted. Thus, for example, the absence of a remedy in respect of a Constitutional Court's decision would not raise an issue under Article 13. Applying that reasoning *mutatis mutandis* to Article 35 § 3 (b) the Court considered that when examining whether the "significant disadvantage" admissibility criterion had been satisfied in cases where what was alleged was a violation of the Convention by a last-instance judicial authority, the Court could dispense with the requirement for the case to have been "duly considered by a domestic tribunal". Otherwise it would be prevented from rejecting any claim, however insignificant, relating to alleged violations imputable to a final national instance. That would be neither appropriate nor consistent with the object and purpose of Article 35 § 3 (b).

Conclusion: inadmissible (no significant disadvantage).

The Court also declared inadmissible as being manifestly ill-founded the applicant's further complaints under Articles 6 § 1, 8, 13 and 14 of the Convention.

ARTICLE 46

Execution of a judgment – General measures

Respondent State required to take general measures to alleviate problems concerning health-care for remand prisoners suffering from serious illness

Gülay Çetin v. Turkey - 44084/10
Judgment 5.3.2013 [Section II]

(See Article 3 above, page 10)

Respondent State required to take appropriate measures to establish a mechanism of redress for all parents of missing newborn children

Zorica Jovanović v. Serbia - 21794/08
Judgment 26.3.2013 [Section II]

(See Article 8 above, page 18)

ARTICLE 1 OF PROTOCOL No. 1

Control of the use of property

Inability to recover "old" foreign-currency savings following dissolution of former SFRY: *case referred to the Grand Chamber*

Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia" - 60642/08
Judgment 6.11.2012 [Section IV]

The applicants are citizens of Bosnia and Herzegovina. Until 1989-90, the former Socialist Federal Republic of Yugoslavia (SFRY) made it attractive for its citizens to deposit foreign currency with its banks by high interest rates and a State guarantee in the event of bankruptcy or "manifest insolvency".

Depositors were also entitled to withdraw their savings with accrued interest at any time. The applicants deposited foreign currency at what was then the Ljubljanska Banka Sarajevo and Investbanka. In 1989-90 the convertibility of the dinar and very favourable exchange rates led to massive withdrawals of foreign currency from commercial banks which prompted the SFRY to take emergency measures to restrict such withdrawals. After the break-up of the SFRY in 1991-92, the "old" foreign-currency deposits remained frozen in the successor States, who however agreed to repay them to domestic banks. In Bosnia and Herzegovina, the Constitutional Court examined numerous individual complaints concerning failures to repay "old" foreign-currency savings at the domestic branches of Ljubljanska Banka Ljubljana and Investbanka. The Constitutional Court found no liability on the part of Bosnia and Herzegovina or its Entities and instead ordered the State to help the clients of those branches to recover their savings from Slovenia and Serbia respectively. In the framework of the negotiations for the Agreement on Succession Issues, negotiations regarding the distribution of the SFRY's guarantees of "old" foreign-currency savings were held in 2001 and 2002. As the successor States could not reach an agreement, however, in 2002 the Bank for International Settlements ("the BIS") informed them that it would have no further involvement in the matter. The applicants complained that they had been unable to withdraw their foreign-currency savings.

In a judgment of 6 November 2012 (see Information Note no. 157), a Chamber of the Court held unanimously that there had been a violation of Article 1 of Protocol No. 1 and a violation of Article 13 of the Convention by Serbia with regard to one of the applicants, but no violation of Article 1 of Protocol No. 1 and no violation of Article 13 by the other States; it also held by a majority (six votes to one) that there had been a violation of Article 1 of Protocol No. 1 and a violation of Article 13 by Slovenia with regard to two of the applicants. The Court considered it appropriate to apply the pilot-judgment procedure, as there were more than 1,650 similar applications pending before it, involving more than 8,000 applicants. The Court concluded that Slovenia and Serbia should undertake all necessary measures within six months from the date on which this judgment became final[1] in order to allow the applicants and all others in their position to be paid back their "old" foreign currency savings under the same conditions as those who had such savings in domestic branches of Slovenian and Serbian banks. The Court also adjourned the examination of all similar cases during this period.

On 18 March 2013 the case was referred to the Grand Chamber at the request of the Governments of Serbia and Slovenia.

1. In view of the referral of the case to the Grand Chamber, the Chamber judgment will not become final (see Article 44 of the Convention).

ARTICLE 3 OF PROTOCOL No. 1

Vote

Blanket ban on prisoners' voting rights: *cases adjourned*

Firth and Others v. United Kingdom - 47784/09 et al.
[Section IV]

The Court has decided to adjourn consideration of more than 2,000 pending applications against the United Kingdom concerning prisoners' right to vote.

In *Hirst v. the United Kingdom (no. 2)* the Grand Chamber found that a blanket ban preventing all convicted prisoners from voting, irrespective of the nature or gravity of their offences, constituted a violation of Article 3 of Protocol No. 1. It did not give any detailed guidance as to the steps which the United Kingdom should take to make its law compatible with the Convention, emphasising that there were numerous ways of organising and running electoral systems and that it was for each member State of the Council of Europe to decide on its own rules. In its Chamber judgment in *Greens and M.T. v. the United Kingdom* the Court again found a violation and held that the Government should bring forward legislative proposals to amend the law and to enact the legislation within a time-frame to be decided by the Committee of Ministers. The Government were granted an extension of time pending the Court's decision in the case of *Scoppola v. Italy (no. 3)*.

The Committee of Ministers has been following the UK Government's progress in complying with the Court's rulings. On 22 November 2012 the UK Government published a draft bill on prisoners' voting eligibility which included three proposals: (1) a ban from voting for those sentenced to four years' imprisonment or more; (2) a ban from voting for those sentenced to more than six months; or (3) a ban from voting for all prisoners (which

would mean maintaining the status quo). The Committee of Ministers is overseeing the progress of this draft bill and has decided to resume consideration of *Hirst (no. 2)* and *Greens and M.T.* at the latest at its September 2013 meeting. In view of the Committee of Ministers' decision, the Court decided to adjourn its consideration of the pending applications against the United Kingdom concerning prisoners' right to vote until, at the latest, 30 September 2013. In the meantime, it invited the Committee of Ministers to keep it regularly informed of progress.

(See: *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, 6 October 2005, Information Note no. 79; *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, 23 November 2010, Information Note no. 135; and *Scoppola v. Italy (no. 3)* [GC], no. 126/05, 22 May 2012, Information Note no. 152)

ARTICLE 4 OF PROTOCOL No. 7

Right not to be tried or punished twice

Conviction for war crimes of a soldier who had previously been granted amnesty: *case referred to the Grand Chamber*

Marguš v. Croatia - 4455/10
Judgment 13.11.2012 [Section I]

A first set of criminal proceedings was brought against the applicant in 1993 in connection with a number of serious offences against civilians, including murder, he had allegedly committed in 1991 as a member of the Croatian army. Those proceedings were terminated in 1997 under the General Amnesty Act, which had entered into force in 1996 and applied to criminal offences committed during the war in Croatia between 1990 and 1996 with the exception of acts amounting to grave breaches of humanitarian law or to war crimes. In 2007 the Supreme Court, on a request for the protection of legality lodged by the State Attorney, found the decision to terminate the proceedings to be in violation of the Amnesty Act. It noted in particular that the applicant had committed the alleged offences as a member of the reserve forces after his tour of duty had terminated, so that there was no significant link between the alleged offences and the war, as required by the Act.

In parallel, the applicant was tried in a second set of criminal proceedings. The proceedings before the county court were conducted by a three-judge panel, which included one judge, M.K., who had also presided over the panel that had terminated the earlier proceedings. During the closing arguments, the applicant was removed from the courtroom, after twice being warned for interrupting the Deputy State Attorney. His lawyer remained in the courtroom. In 2007 the county court convicted him of war crimes against the civilian population and sentenced him to fourteen years' imprisonment. On appeal, the Supreme Court upheld the conviction and increased the sentence to fifteen years' imprisonment. A constitutional complaint by the applicant was dismissed. The domestic courts found that he had killed and tortured Serbian civilians, treated them in an inhuman manner, unlawfully arrested them, ordered the killing of a civilian and robbed the civilian population. Those acts had violated international law, in particular the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War.

In a judgment of 13 November 2012 (see Information Note no. 157), a Chamber of the Court unanimously held that there had been no violation of Article 6 §§ 1 and 3 (c) and no violation of Article 4 of Protocol No. 7. The Chamber accepted the Government's view that the grant of an amnesty to the applicant in respect of acts which had been characterised as war crimes against the civilian population had amounted to a fundamental defect in the proceedings, which had justified the reopening of the proceedings.

On 18 March 2013 the case was referred to the Grand Chamber at the applicant's request.

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

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

Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia" - 60642/08
Judgment 6.11.2012 [Section IV]

(See Article 1 of Protocol No. 1 above, page 28)

Marguš v. Croatia - 4455/10
Judgment 13.11.2012 [Section I]

(See Article 4 of Protocol No. 7 above)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Center of Legal Resources v. Romania - 47848/08
Section III

(See Article 34 above, page 25)

RECENT COURT PUBLICATIONS

Annual Report 2012 of the Court

The Court has just issued the printed version of its Annual Report for 2012. This report contains a wealth of statistical and substantive information such as the Jurisconsult's short survey of the main judgments and decisions delivered by the Court in 2012 (appended to this Information Note) as well as a selection in list form of the most significant judgments, decisions and communicated cases. An electronic version is available on the Court's Internet site (<www.echr.coe.int> – Reports).

Handbook on non-discrimination

A Macedonian version of the *Handbook on European non-discrimination law* and its update has just been published with the help of the Foundation Open Society – Macedonia. Published in 2011, the handbook has been drafted to better disseminate a key aspect of European human-rights law: the standards on non-discrimination. It is available on the Court's website (<www.echr.coe.int> – Case-law).

Прирачник за европското право за недискриминација (Macedonian)

APPENDIX – SHORT SURVEY OF THE MAIN JUDGMENTS AND DECISIONS DELIVERED BY THE COURT IN 2012

[This extract from the *Annual Report 2012 of the European Court of Human Rights* shows/presents a selection of judgments and decisions which either raise new issues or important matters of general interest, establish new principles or develop or clarify the case-law. French below]

Jurisdiction and admissibility

Obligation to respect human rights (Article 1)

The Grand Chamber reiterated the general principles governing the concept of "jurisdiction":

– in relation to events occurring on the high seas on board vessels flying the flag of a State Party to the Convention, the crews of which were composed exclusively of military personnel of that State (*Hirsi Jamaa and Others v. Italy*[1]);

– in relation to events occurring on a part of the national territory over which the State did not exercise effective control, following its approach in *Ilaşcu and Others v. Moldova and Russia*[2] *(Catan and Others v. the Republic of Moldova and Russia*[3]);

– in relation to the exercise of "effective control" by a State over an area situated outside the national territory, even though agents of that State were not directly involved in the acts complained of by the applicants (ibid.).

Thus, the Court found that the facts in issue in *Catan and Others*, cited above, fell within the "jurisdiction" of two member States within the meaning of Article 1 of the Convention.

The case of *Djokaba Lambi Longa v. the Netherlands*[4] was the first concerning the detention in the United Nations Detention Unit in The Hague of a witness called by the International Criminal Court (ICC). The Court considered that persons detained on the territory of a Contracting State on the authority of an international criminal tribunal, under arrangements entered into with a State not party to the Convention, did not fall within the "jurisdiction" of the Contracting State.

In its judgment in *El-Masri v. "the former Yugoslav Republic of Macedonia"*[5], the Court stressed that a Contracting State was to be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities.

Admissibility conditions

Right of individual petition (Article 34)

The Court considered that the criteria governing victim status had to be applied in a flexible manner (*Aksu v. Turkey*[6]). An applicant of Roma origin felt personally offended by expressions used to describe the Roma community, which he considered to be demeaning. Remarks aimed at an ethnic group could cause offence to one of its members even if he or she was not targeted personally. In this case the domestic courts had recognised that the applicant had standing to bring proceedings and had examined the case on the merits. Accordingly, the Court accepted that the applicant had victim status before it on account of the alleged breach of his right to respect for his private life, although he had not been targeted directly by the impugned remarks.

The judgment in *Kurić and Others v. Slovenia*[7] dealt with the issue of "adequate" and "sufficient" redress at domestic level for an alleged violation of the Convention; this was dependent on all the circumstances of the case, regard being had, in particular, to the nature of the violation at stake.

1. [GC], no. 27765/09, ECHR 2012.
2. [GC], no. 48787/99, ECHR 2004-VII.
3. [GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012.
4. (dec.), no. 33917/12, ECHR 2012.
5. [GC], no. 39630/09, ECHR 2012.
6. [GC], nos. 4149/04 and 41029/04, ECHR 2012.
7. [GC], no. 26828/06, ECHR 2012.

In this case concerning Article 8 the Grand Chamber considered, unlike the Chamber, that the acknowledgment of the violations by the national authorities and the issuance of permanent residence permits did not constitute "appropriate" and "sufficient" redress at the national level. The Court based its findings on the characteristics of the case, which created widespread human rights concern (resulting from the "erasure" of the applicants' names from the Slovenian Register of Permanent Residents). It stressed the lengthy period of insecurity and legal uncertainty experienced by the applicants and the gravity of the consequences of the impugned situation for them.

Exhaustion of domestic remedies (Article 35 § 1)

The Court reiterated that it had to take realistic account not only of the existence of formal remedies in the legal system of the State concerned but also of the general legal and political context in which they operated, as well as the personal circumstances of the applicants *(Kurić and Others*, cited above). In this case in particular, the Constitutional Court had noted the existence of a general problem and had adopted leading decisions ordering general measures. However, the domestic authorities had subsequently failed to comply with those decisions over a long period.

Six-month time-limit (Article 35 § 1)

In calculating the time-limit, the Court held that a non-working day should be taken into account as the day of expiry. Compliance with the six-month time-limit had to be assessed in accordance with Convention criteria, independently of domestic rules and practice. With regard to procedure and time-limits, the need for legal certainty prevailed. For their part, applicants needed to be alert with regard to observance of the relevant procedural rules (*Sabri Günes v. Turkey*[8]).

In a judgment concerning an applicant's detention pending trial which was broken down into several non-consecutive periods (*Idalov v. Russia*[9]), the Court clarified its case-law on the application of the six-month rule (see Article 5 § 3 below).

Absence of significant disadvantage (Article 35 § 3 (b))

This criterion is designed to enable the Court to deal swiftly with frivolous applications in order to concentrate on its core task of affording legal protection at European level of the rights guaranteed by the Convention and its Protocols. The Court applied this criterion in a case concerning the length of criminal proceedings (*Gagliano Giorgi v. Italy*[10]). For the first time, it considered that the reduction of the prison sentence imposed on an accused "at least compensated for or substantially reduced the disadvantage normally caused by the excessive length of proceedings". It therefore concluded that the applicant had not suffered any "significant disadvantage" with regard to his right to be tried within a reasonable time.

"Core" rights

Prohibition of torture and inhuman or degrading treatment or punishment (Article 3)

The case of *El-Masri*, cited above, concerned a foreign national suspected of terrorist offences who was held in solitary confinement for twenty-three days in an extraordinary place of detention outside any judicial framework, and his subsequent extra-judicial transfer from one State to another for the purposes of detention and interrogation outside the normal legal system. The Court reiterated that the prosecuting authorities must endeavour to undertake an adequate investigation into allegations of a breach of Article 3 in order to prevent any appearance of impunity and to maintain public confidence in their adherence to the rule of law.

The responsibility of the respondent State was engaged on account of the transfer of the applicant into the custody of the US authorities despite the existence of a real risk that he would be subjected to ill-treatment following his transfer outside the territory.

Expulsion

The disembarkation on the Libyan coast of migrants intercepted on the high seas by a member State was the subject of the judgment in *Hirsi Jamaa and Others*, cited above. The operation had been aimed at preventing landings of irregular migrants along the Italian coast. The difficulties of policing Europe's southern

8. [GC], no. 27396/06, 29 June 2012.
9. [GC], no. 5826/03, 22 May 2012.
10. No. 23563/07, ECHR 2012.

borders in the context of the phenomenon of migration by sea could not absolve a member State of its obligations under Article 3.

The Court reiterated States' obligations arising out of international refugee law, including the *non-refoulement* principle, which was also enshrined in the Charter of Fundamental Rights of the European Union. The applicants had run a real risk of being subjected to treatment contrary to Article 3 in Libya.

This transfer of foreign nationals to Libya had also placed them at risk of arbitrary repatriation to their countries of origin (Eritrea and Somalia), in breach of Article 3. The indirect removal of an alien left the State's responsibility intact, and that State was required to ensure that the intermediary country offered sufficient guarantees against arbitrary *refoulement*, particularly where that State was not a party to the Convention. When the applicants were transferred to Libya, the Italian authorities had known or should have known that there were insufficient guarantees protecting them from the risk of being arbitrarily returned to their countries of origin.

The *Othman (Abu Qatada) v. the United Kingdom*[11] judgment recapitulated the Court's case-law on diplomatic assurances, in a case concerning the proposed expulsion of an alien prosecuted for terrorist offences in his country of origin. The Court examined the content and scope of the assurances given by the destination State, in order to determine whether they were sufficient to protect the applicant against the real risk of ill-treatment on his return.

In *Popov v. France*[12], the detention for fifteen days of two very young children with their parents in a holding centre for aliens pending their removal from the country gave rise to a violation of Article 3. The Court stressed that the extreme vulnerability of children was the decisive factor and took precedence over the status of illegal immigrant. In this case, the length of the period of detention and the conditions of confinement, which were unsuited to the extreme vulnerability of the children, had been bound to have a damaging effect on them.

The case of *S.F. and Others v. Sweden*[13] raised a new issue: that of the risk to which foreign nationals might be exposed in their country of origin on account of their activities in the host country, given that migrants could continue to champion national dissident causes after fleeing the country.

The case concerned fears on the part of Iranian nationals of being subjected to treatment contrary to Article 3 if they were deported to Iran, given their political activities in Sweden, notably the reporting of human rights violations in their country of origin. The Court took account of the extent and visibility of the applicants' political and human rights activities in Sweden and the risk that activists would be identified by the Iranian authorities in the event of their expulsion to Iran.

Prison

Where allegations are made of overcrowding in prison, the State authorities alone have access to information to corroborate or refute them. The documents they produce must be found to be sufficiently reliable. Failing this, the allegations will be deemed to be credible (*Idalov,* cited above). In this case, the overcrowding was such that the applicant's detention did not conform to the minimum standard of three square metres per person established by the Court's case-law.

In the same case the Court held that a prisoner had been subjected to inhuman and degrading treatment because of the overcrowding of the vans transferring him to the courthouse and the conditions in which he had been held at the court on hearing days (ibid.).

Prohibition of slavery and forced labour (Article 4)

The *C.N. and V. v. France*[14] judgment centred on children forced to work as unpaid domestic help. The case concerned two young orphaned sisters from Burundi who were obliged to carry out household and domestic chores without remuneration. The sisters, aged ten and sixteen, had been taken in by relatives in France who threatened them with expulsion to their country of origin. Among other things, the Court clarified the concepts of "forced or compulsory labour" and "servitude" within the meaning of the first and second paragraphs of Article 4.

11. No. 8139/09, ECHR 2012.
12. Nos. 39472/07 and 39474/07, 19 January 2012.
13. No. 52077/10, 15 May 2012.
14. No. 67724/09, 11 October 2012.

The judgment made clear the distinction between "forced labour" and work which could reasonably be expected in the form of help from a family member or person sharing accommodation. "Servitude" constituted a particular category of forced or compulsory labour or, put another way, an "aggravated" form thereof. The essential factor that distinguished servitude from forced or compulsory labour for the purposes of Article 4 of the Convention was the victims' feeling that their condition was immutable and that the situation was unlikely to change. It was sufficient for this feeling to be based on objective circumstances created or perpetuated by the persons responsible.

The Court also reiterated the State's positive obligation to put in place an appropriate legislative and administrative framework in order to combat servitude and forced labour effectively.

In *C.N. v. the United Kingdom*[15] the Court stressed that domestic slavery constituted a specific offence, distinct from trafficking and exploitation of human beings.

Right to liberty and security (Article 5)

The Court pointed out that Article 5 could apply in expulsion cases (*Othman (Abu Qatada),* cited above). A Contracting State would be in violation of Article 5 if it removed an applicant to a State where he or she would be at real risk of a flagrant breach of the rights protected under that Article. However, as with Article 6, a very high threshold applied in such cases.

A flagrant breach of Article 5 would occur only if, for example, the receiving State arbitrarily detained an applicant for many years without any intention of bringing him or her to trial. It might also occur if an applicant would be at risk of being imprisoned for a substantial period in the receiving State, as a result of being convicted after a manifestly unfair trial.

The *El-Masri* judgment applied these principles in relation to the Macedonian authorities, which had handed over into the custody of CIA agents a German national suspected of terrorist offences who was subsequently detained in Afghanistan, although they must have been aware that he ran a real risk of being subjected to a flagrant violation of his rights under Article 5. The Court held that, in this case, the applicant's abduction and detention by CIA agents amounted to "enforced disappearance" as defined in international law. The respondent State was held responsible for the violation of Article 5 to which the applicant had been subjected after being removed from its territory, during the entire period of his captivity in Afghanistan.

Furthermore, while on the territory of the respondent State, the applicant had been placed in solitary confinement in a hotel without any court intervention or any entry being made in the custody records. The Grand Chamber found it "wholly unacceptable that in a State subject to the rule of law a person could be deprived of his or her liberty in an extraordinary place of detention outside any judicial framework". The applicant had been held in unacknowledged detention in complete disregard of the safeguards enshrined in Article 5 of the Convention; this constituted "a particularly grave violation" of his right to liberty and security under that provision.

Deprivation of liberty (Article 5 § 1)

The Grand Chamber expanded upon the circumstances in which a measure was to be regarded as a "deprivation of liberty", thus attracting the protection of Article 5:

– *Stanev v. Bulgaria*[16] concerned the placement in an institution of an adult who lacked legal capacity;

– *Creangă v. Romania*[17], meanwhile, related to a summons to appear at the premises of the prosecution service for questioning in connection with a criminal investigation. In this case, the Court also ruled on the burden of proof with regard to deprivation of liberty.

– The case of *Austin and Others v. the United Kingdom*[18] dealt for the first time with the containment of members of the public within a police cordon during a demonstration taking place in dangerous conditions. The Court held that crowd-control measures should not be used by national authorities to stifle or discourage protest. Police cordons should be imposed and maintained on public-order grounds only in situations where it was necessary in order to prevent serious injury or damage.

The Grand Chamber laid down some markers concerning restrictions on freedom of movement in public places (*Austin and Others*, cited above). Its judgment reviewed commonly occurring restrictions in contemporary societies which, in some circumstances, had to be distinguished from "deprivations of liberty" for the purposes

15. No. 4239/08, 13 November 2012.
16. [GC], no. 36760/06, ECHR 2012.
17. [GC], no. 29226/03, 23 February 2012.
18. [GC], nos. 39692/09, 40713/09 and 41008/09, ECHR 2012.

of Article 5 § 1. However, the use of crowd-control techniques could, in particular circumstances, give rise to a deprivation of liberty in breach of Article 5 § 1. In each case, account had to be taken of the specific context in which the techniques were deployed, as well as the police's duty to maintain order and protect the public. Given the new challenges they now faced, the police must be allowed to fulfil their operational duties, provided they complied with the principle of protecting the individual from arbitrariness.

Lawful detention (Article 5 § 1)

States have a duty to afford vulnerable individuals effective protection against arbitrary detention. The Court's judgment in *Stanev*, cited above, underlined the responsibility of the national authorities with regard to the placement in a psychiatric institution of an adult declared partially incapacitated. In the Court's view, it was essential to assess at regular intervals whether the person's condition continued to justify his or her confinement.

The case of *X v. Finland*[19] concerned the forced administration of medication in treating a person confined to a psychiatric hospital. The case centred on the protection of individuals confined to psychiatric institutions against arbitrary interference with their right to liberty. Forced administration of treatment had to be based on a procedure prescribed by law which afforded proper safeguards against arbitrariness. In particular, the person had to be able to bring proceedings for review of the need for his or her continued treatment. An independent psychiatric opinion on the continuation of treatment against a patient's will – issued by a psychiatrist from outside the institution where the person was confined – also had to be available.

In the *Creangă* judgment, cited above, the Court reiterated its settled case-law according to which, in cases of deprivation of liberty, it was particularly important to comply with the general principle of legal certainty. National law had to clearly define the conditions in which deprivation of liberty was authorised and the application of the law must be foreseeable.

Where individuals' liberty was concerned, the fight against the scourge of corruption could not justify recourse to arbitrariness and areas of lawlessness in places where people were deprived of their liberty (ibid.).

In its decision in *Simons v. Belgium*[20], the Court answered in the negative the question whether there was a "general principle" implicit in the Convention whereby all persons deprived of their liberty must have the possibility of being assisted by a lawyer from the start of their detention. In the Court's view, this was a principle inherent in the right to a fair trial[21], which was based specifically on Article 6 § 3, rather than a general principle which by definition was overarching in nature. Accordingly, the impossibility under the law for accused persons deprived of their liberty to be assisted by a lawyer from the start of their detention was not sufficient to render the detention in question contrary to Article 5 § 1.

In *James, Wells and Lee v. the United Kingdom*[22], the Court dealt for the first time with the issue of programmes in prison to address offending behaviour. The case concerned the rehabilitative courses offered to prisoners serving indeterminate sentences for the protection of the public. The judgment is significant as it establishes benchmarks with regard to the rehabilitative part of sentences being served by offenders considered a danger to the public.

In the Court's view, where a prisoner was in detention solely on the grounds of the risk he posed to the public, regard had to be had to the need to encourage his rehabilitation. In the applicants' case, this meant that they had to be given reasonable opportunities to undertake courses aimed at addressing their offending behaviour and the risks they posed to society. However, very lengthy periods of time had elapsed before the applicants had even been able to embark on the rehabilitative part of their sentences, despite the clear instructions in force.

The finding of a violation of Article 5 § 1 was made in respect of the applicants' continuing detention following the expiry of their minimum term ("tariff") and until steps had been taken to provide them with access to appropriate rehabilitative courses.

Length of detention pending trial (Article 5 § 3)

In a judgment concerning an applicant's detention pending trial which was broken down into several non-consecutive periods (*Idalov*, cited above), the Court clarified its case-law on the application of the six-month rule (Article 35 § 1).

19. No. 34806/04, ECHR 2012.
20. (dec.), no. 71407/10, 28 August 2012.
21. See *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008, and *Dayanan v. Turkey*, no. 7377/03, 13 October 2009.
22. Nos. 25119/09, 57715/09 and 57877/09, 18 September 2012.

That rule was to be applied separately to each period of detention pending trial[23]. Therefore, once at liberty, an applicant was obliged to bring any complaint he or she might have before the Court within six months of the date of actual release. Periods of pre-trial detention which ended more than six months before an applicant lodged a complaint with the Court could not be examined. However, where such periods formed part of the same set of criminal proceedings, the Court, when assessing the reasonableness of the detention for the purposes of Article 5 § 3, could take into consideration the fact that an applicant had previously spent time in custody pending trial.

The Grand Chamber observed that, in order to comply with Article 5 § 3, the judicial authorities had to justify the length of a period of detention pending trial by addressing specific facts and considering alternative "preventive measures", and could not rely essentially and routinely on the gravity of the criminal charges (ibid.).

Speedy review of lawfulness of detention (Article 5 § 4)

Where an individual's liberty is at stake, the Court applies very strict standards in assessing the State's compliance with the requirement of speedy review of the lawfulness of detention under Article 5 § 4 (*Idalov*, cited above).

Right to take proceedings (Article 5 § 4)

The lawfulness of the placement in detention pending deportation of children accompanying their parents is a new issue, dealt with in the judgment in *Popov,* cited above. While the law did not provide for children themselves to be taken into detention in such circumstances, the children concerned found themselves in a legal void preventing them from exercising the remedy available to their parents in order to obtain a decision on the lawfulness of their detention (no removal orders or orders for placement in a holding centre for aliens pending deportation were issued in respect of children). They were therefore deprived of the protection required by the Convention, in breach of Article 5 § 4.

Prohibition of collective expulsion of aliens (Article 4 of Protocol No. 4)

In the case of *Hirsi Jamaa and Others*, cited above, the applicants had not been on the territory of the respondent State when they were expelled, having been intercepted at sea while fleeing their country. The Court therefore examined for the first time the issue of the applicability of Article 4 of Protocol No. 4 to the removal of aliens to a third State, carried out outside national territory.

European States were faced with a new challenge in the form of irregular immigration by sea. The removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which was to prevent migrants from reaching the borders of the State or even to push them back to another State, constituted an exercise of jurisdiction within the meaning of Article 1 of the Convention which engaged the responsibility of the State in question under Article 4 of Protocol No. 4.

In this case, the transfer of the applicants to Libya by Italian military personnel had been carried out without any examination of each individual situation. No identification procedure had been carried out by the Italian authorities, who had merely embarked the applicants onto their military ships and then disembarked them in Libya. The applicants' removal had therefore been of a collective nature, in breach of Article 4 of Protocol No. 4. This is the second judgment in which the Court has found a violation of that Article, after its judgment in *Čonka v. Belgium*[24].

Procedural rights

Right to a fair trial (Article 6)

Applicability (Article 6 § 1)

Is Article 6 § 1 applicable to prisoners' requests for leave of absence (in this case prison leave)? This question was examined in the *Boulois v. Luxembourg* judgment[25]. The prisoner concerned had applied for leave in order to complete administrative formalities and look for work. The Court noted that in the domestic legal system concerned individuals could not claim, on arguable grounds, to possess a "right" within the meaning of Article 6. Other member States took a variety of approaches regarding the status of prison leave and the

23. Compare with the judgment in *Solmaz v. Turkey*, no. 27561/02, 16 January 2007.
24. No. 51564/99, ECHR 2002-I.
25. [GC], no. 37575/04, ECHR 2012.

arrangements for granting it. In more general terms, the Court reaffirmed the legitimate aim of progressive social reintegration of persons sentenced to imprisonment.

Access to court (Article 6 § 1)

The case of *Stanev*, cited above, dealt with the procedural rights of persons declared to be partially lacking legal capacity. In principle, any person declared to be incapacitated had to have direct access to a court in order to seek the restoration of his or her legal capacity, and there was a trend in European countries to that effect. Furthermore, the international instruments for the protection of people with mental disorders attached growing importance to granting such persons as much legal autonomy as possible.

The *Segame SA v. France*[26] judgment concerned a system of tax fines set by law as a percentage of the unpaid tax. The applicant complained that the courts were unable to vary the fine in proportion to the seriousness of the accusations made against a taxpayer (it was set at a fixed rate of 25%). However, the Court acknowledged that the particular nature of tax proceedings implied a requirement of effectiveness, necessary in order to preserve the interests of the State. Furthermore, tax disputes did not form part of the "hard core" of criminal law for Convention purposes.

Fairness of the proceedings (Article 6 § 1)

The Court held for the first time that there would be a flagrant denial of justice in the event of the applicant's expulsion, on account of the real risk that evidence obtained through torture of third parties would be admitted at his trial in the third country of destination *(Othman (Abu Qatada)*, cited above).

The admission of torture evidence was manifestly contrary not just to the provisions of Article 6 of the Convention but to the most basic international standards of a fair trial, and would make the whole trial immoral and illegal. It would therefore amount to a flagrant denial of justice if such evidence were admitted in a criminal trial. The Court did not exclude that similar considerations might apply in respect of evidence obtained by other forms of ill-treatment falling short of torture. Since the establishment of the principle in its 1989 judgment in *Soering v. the United Kingdom*[27], this is the first case in which the Court has held that an applicant's expulsion would amount to a violation of Article 6.

A denial of justice occurs where a person convicted *in absentia* is unable subsequently to obtain a new judgment by a court after being given an opportunity to answer the charges. This settled case-law applies also where a person is declared guilty not in his absence but after his death (*Lagardère v. France*[28]).

Adversarial proceedings (Article 6 § 1)

The *Eternit v. France*[29] decision supplemented the case-law on medical confidentiality and employment law. An employer complained of being unable to gain access to medical documents establishing the work-related nature of an employee's illness.

The Court ruled that an employee's right to respect for medical confidentiality and an employer's right to adversarial proceedings had to coexist in such a way that the essence of neither was impaired. This balance was achieved where the employer contesting the work-related nature of an illness could request the court to appoint an independent medical expert to whom the documents constituting the employee's medical file could be given and whose report, drawn up in accordance with the rules of medical confidentiality, had the purpose of providing clarification to the court and the parties. The fact that an expert report was not ordered in every case in which the employer requested it, but only where the court considered itself insufficiently informed, was compatible with the Convention.

Presumption of innocence (Article 6 § 2)

The impact of a pre-trial detention measure on an individual's employment contract was the subject of the decision in *Tripon v. Romania*[30]. The applicant was dismissed following his placement in pre-trial detention, and hence before being finally convicted, as the Labour Code made it possible to dismiss employees who were placed in pre-trial detention for more than sixty days.

---

26. No. 4837/06, ECHR 2012.
27. 7 July 1989, § 113, Series A no. 161.
28. No. 18851/07, 12 April 2012.
29. (dec.), no. 20041/10, 27 March 2012.
30. (dec.), no. 27062/04, 7 February 2012.

In this case, the applicant's dismissal had therefore been based on an objective factor, namely his prolonged absence from work, rather than on considerations linked to his guilt. The State was free to make that legislative choice, particularly if the legislation provided sufficient safeguards against arbitrary or abusive treatment of the employee concerned. In view of the various safeguards in place, which it listed in its decision, the Court accepted that placement in pre-trial detention for a certain length of time and on those objective grounds could justify dismissal even in the absence of a final criminal conviction.

The extension of the scope of Article 6 § 2 to the compensation proceedings in a case because of their link to the criminal proceedings was dealt with in *Lagardère,* cited above. The civil court had found a person guilty posthumously although the criminal proceedings against him had been extinguished on his death and the criminal courts had made no finding of guilt against him while he was alive. The Court held that there had been a violation of Article 6 § 2.

Defence rights (Article 6 § 3)

In *Idalov*, cited above, all the evidence, including the witness testimony, had been examined in the absence of the accused, who had been ejected from the courtroom for improper conduct. The removal of an accused from the courtroom during his criminal trial and his exclusion throughout the taking of evidence amounted to a breach of Article 6 unless it had been established that he had waived unequivocally his right to be present at his trial. Hence, exclusion for improper conduct had to be attended by certain safeguards: it had first to be established that the accused could reasonably have foreseen what the consequences of his ongoing conduct would be, and he had to be given an opportunity to compose himself. Failing that, and notwithstanding his disruptive behaviour, it could not be concluded unequivocally – as required by the Convention – that the applicant had waived his right to be present at his trial.

Right to an effective remedy (Article 13)

The case of *Hirsi Jamaa and Others*, cited above, concerned Somalian and Eritrean migrants travelling from Libya who were arrested at sea and then returned to Libya on Italian military ships. The applicants alleged that they had not had an effective remedy under Italian law by which to assert their complaints concerning their removal to the third country.

The Court reiterated the importance of guaranteeing anyone subject to a removal measure, the consequences of which were potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the domestic procedures and to substantiate their complaints. The applicants had been deprived of any remedy which would have enabled them to lodge their complaints under Article 3 of the Convention and Article 4 of Protocol No. 4 with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced. There had therefore been a violation of Article 13 taken in conjunction with those two Articles.

The judgment in *De Souza Ribeiro v. France*[31] concerned the expulsion of foreign nationals, alleged to be in breach of their right to respect for their private and family life (Article 8). The applicant had been deported less than an hour after applying to the domestic court of first instance. This had the effect of rendering the available remedies ineffective in practice and therefore inaccessible. While the Court acknowledged the importance of swift access to a remedy, this should not go so far as to constitute an obstacle or unjustified hindrance to making use of it, or take priority over its practical effectiveness. Although States had to take steps to combat illegal immigration, Article 13 did not permit them to deny applicants access in practice to the minimum procedural safeguards needed to protect them against arbitrary expulsion. There had to be genuine intervention by the court.

The Court held that there had been a violation of Article 13 in conjunction with Article 8. An effective possibility had to exist of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality.

The effectiveness of a remedy for the purposes of Article 13 also required that the person concerned should have access to a "remedy with automatic suspensive effect" when expulsion exposed him or her to a real risk of a violation of Article 2 or 3 of the Convention; that requirement also applied to complaints under Article 4 of Protocol No. 4.

31. [GC], no. 22689/07, ECHR 2012.

Right not to be tried or punished twice (Article 4 of Protocol No. 7)

The judgment in *Marguš v. Croatia*[32] (not final) concerned the conviction of a member of the armed forces prosecuted for war crimes who had previously been granted an amnesty. The Court observed that granting amnesty in respect of "international crimes" – which included crimes against humanity, war crimes and genocide – was increasingly considered to be prohibited by international law. The amnesty granted to the applicant in respect of acts which were characterised as war crimes against the civilian population amounted to a "fundamental defect in the proceedings" for the purposes of the second paragraph of Article 4 of Protocol No. 7, justifying the reopening of the proceedings. There had therefore been no breach of that provision.

Civil and political rights

Right to respect for private and family life, the home and correspondence (Article 8)

Applicability

In the Court's view, any negative stereotyping of a group, when it reached a certain level, was capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. Negative stereotyping of this kind could be seen as affecting the private life of members of the group (*Aksu,* cited above). In this case, an applicant of Roma origin had criticised a publication which, he claimed, constituted an attack on the identity of the Roma community and thus an infringement of his private life.

Article 8 was found to be applicable to parental leave and the corresponding allowances since they promoted family life and necessarily affected the way in which it was organised (*Konstantin Markin v. Russia*[33]).

The case of *Hristozov and Others v. Bulgaria*[34] concerned the refusal to allow terminally ill cancer patients to obtain an unauthorised experimental drug. In the Court's view, a regulatory restriction on patients' capacity to choose their medical treatment, with a view to possibly prolonging their lives, fell within the scope of "private life".

Private life

Media coverage of the private life of well-known figures involves competing interests. Two Grand Chamber judgments dealt with the balancing of the right to freedom of expression and the right to respect for one's private life. In these judgments, the Court recapitulated the relevant criteria in relation to this important issue.

In cases requiring such a balancing exercise, the Court considered that the outcome of the application should not, in theory, vary according to whether it was lodged with the Court under Article 8 of the Convention, by the person who was the subject of the article, or under Article 10 by the publisher. Indeed, as a matter of principle these rights deserved equal respect. Accordingly, the margin of appreciation should in theory be the same in both cases.

The case of *Von Hannover v. Germany (no. 2)*[35] concerned the protection of a celebrity's right to the protection of her image (after she had been photographed without her knowledge), set against the press's right to freedom of expression when publishing photographs showing scenes from an individual's private life. It was important, among other things, to determine whether the photograph had been published for entertainment purposes. In order to decide whether it contributed to a debate of general interest, the photograph in question had been considered in the light of the accompanying articles (and not in isolation).

The judgment in *Axel Springer AG v. Germany*[36] concerned the publication of press articles on the arrest and conviction of a well-known television actor. The application, which was lodged under Article 10 (see below), also raised issues in relation to Article 8, in particular the scope of protection of private life when weighed against the public interest in being informed about criminal proceedings.

The *Aksu* judgment, cited above, examined from the standpoint of Article 8 remarks on the subject of the Roma community which were alleged by one of the members of that community to be demeaning. This case

32. No. 4455/10, 13 November 2012.
33. [GC], no. 30078/06, ECHR 2012.
34. Nos. 47039/11 and 358/12, ECHR 2012.
35. [GC], nos. 40660/08 and 60641/08, ECHR 2012.
36. [GC], no. 39954/08, 7 February 2012.

differed from previous cases brought by members of the Roma community which had raised issues of ethnic discrimination. The Court's examination focused on the State's positive obligations and the margin of appreciation of the domestic courts.

The Court sought to ascertain whether the national courts had weighed the right of a member of the Roma community to respect for his private life against a university professor's freedom to publish the findings of his academic research into that community. This balancing of competing fundamental rights guaranteed by Articles 8 and 10 had to be carried out in accordance with the criteria set out in the Court's settled case-law.

The Grand Chamber reiterated that the vulnerable position of Roma meant that special consideration had to be given to their needs and their different lifestyle, both in the relevant regulatory framework and in reaching decisions in particular cases.

The applicant, of Roma origin, also claimed to be the victim of negative stereotypes contained in some dictionaries. Here, the target group was a relevant factor. Thus, in a dictionary aimed at pupils, more diligence was required when giving the definitions of expressions which were part of daily language but which might be construed as humiliating or insulting.

The Court examined for the first time the issue of consensual incest from the standpoint of Article 8 (*Stübing v. Germany*[37]). This case concerned a man's sentencing to a prison term for his incestuous relationship with his younger sister, with whom he had several children. The Court noted the absence of consensus among the Contracting States, the majority of which imposed criminal sanctions on consensual incest between brother and sister, and the absence of a general trend towards decriminalising such acts. It observed that all the legal systems surveyed, including those which did not treat incest as a criminal offence, prohibited brothers and sisters from marrying. It found to be legitimate the reasons given by the German Federal Constitutional Court, namely the protection of morals, the need to protect the structure of the family and accordingly of society as a whole, and the need to protect sexual self-determination.

The Court examined for the first time a system of urban risk areas in which civil liberties could be restricted. Anyone in those areas could be subjected to a preventive body search by police looking for weapons.

The Court took into consideration the legal framework in which the search system operated and the variety of authorities involved. It further noted the tangible results achieved in terms of combating violent crime. Given the legal framework and the system's effectiveness, the domestic authorities had been entitled to consider that the public interest outweighed the disadvantage caused by the interference with private life (*Colon v. the Netherlands*[38] decision).

For the first time, the Court examined on the merits the issue of access for terminally ill cancer patients to an unauthorised experimental treatment (*Hristozov and Others*, cited above). The medicine in question, which had not been clinically tested, was not authorised in any country but was allowed in some countries for compassionate use. The Court observed that there was a clear trend in the Contracting States towards allowing, under certain exceptional conditions, the use of unauthorised medicinal products. However, in the Court's view, that emerging consensus was not based on settled principles in the law of the Contracting States, nor did it appear to extend to the precise manner in which the use of such products should be regulated. Accordingly, States' margin of appreciation was wide, especially with regard to the detailed rules they laid down with a view to achieving a balance between the competing public and private interests.

Family life

The judgment in *Van der Heijden v. the Netherlands*[39] concerned the obligation for an individual to give evidence against her cohabiting partner in criminal proceedings. The case raised two competing public interests: the prosecution of serious crime and the protection of family life from interference by the State. Despite being in a stable family relationship with her partner for several years, the applicant was not dispensed from the obligation to give evidence against him in the criminal proceedings against him, as the State had opted to reserve testimonial privilege to partners in formally recognised unions. The Court noted the States' margin of appreciation in that regard.

States that made provision in their legislation for testimonial privilege were free to limit its scope to marriage or registered partnerships. The legislature was entitled to confer a special status on marriage or registration and not to confer it on other *de facto* types of cohabitation. The Court stressed the importance of the interest in prosecuting serious crime.

37. No. 43547/08, 12 April 2012.
38. (dec.), no. 49458/06, 15 May 2012.
39. [GC], no. 42857/05, 3 April 2012.

The case of *Popov*, cited above, concerned the delicate issue of detention of under-age migrants in a closed centre with a view to their deportation. The Court emphasised the "child's best interests" in that context. There was broad consensus, particularly in international law, that the children's interests were paramount in all decisions concerning them. The Court therefore departed from the precedent established in *Muskhadzhiyeva and Others v. Belgium*[40], on the ground that "the child's best interests could not be confined to keeping the family together"; the authorities had to "take all the necessary steps to limit as far as possible the detention of families with children".

The Court noted that there had been no risk that the applicants would abscond. However, no alternative to detention had been considered, such as a compulsory residence order or placement in a hotel. In the absence of any reason to suspect that the parents and their baby and three-year-old child would seek to evade the authorities, their detention for a period of two weeks in a closed facility was held to be contrary to Article 8.

The judgment in *Trosin v. Ukraine*[41] concerned the very severe restrictions on family visits imposed on life prisoners. There was no justification for an automatic restriction on the number of visits per year without any opportunity of assessing its necessity in the light of each prisoner's particular situation. The same applied to the restriction on the number of adults allowed per visit, the lack of privacy and the exclusion of any physical contact between prisoners and their relatives.

Private and family life

The Court held that "particularly serious reasons" must exist before restrictions on the family and private life of military personnel, especially those relating to "a most intimate part of an individual's private life", could satisfy the requirements of Article 8 § 2. Such restrictions were acceptable only where there was a real threat to the armed forces' operational effectiveness. The respondent Government's assertions as to the existence of such a risk had to be substantiated by specific examples (*Konstantin Markin*, cited above).

The judgment in *Kurić and Others*, cited above, concerned persons deprived of permanent resident status in Slovenia (the "erased" persons) following the country's independence, and the serious consequences for them of the removal of their names from the Register of Permanent Residents. The Court held that the interference in issue had lacked sufficient legal basis. However, its examination did not end there. Noting the particular circumstances of the case and taking account of the far-reaching repercussions of the impugned measure, the Court further examined whether the interference had pursued a legitimate aim and had been proportionate.

Private life and correspondence

The case of *Michaud v. France*[42] dealt with the confidentiality of lawyer-client relations and legal professional privilege, against the background of the incorporation into domestic law of a European Union directive concerning money laundering. A lawyer complained of the obligation for members of the profession to report any "suspicions" they might have concerning their clients, on pain of disciplinary sanctions. Regarding the protection of fundamental rights afforded by the European Union, the Court had held in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*[43] that it was in principle equivalent to that of the Convention system. For the first time, the Court held that this presumption did not apply in the case before it. The case concerned the transposition of a European directive – as opposed to the adoption of a European regulation – and the domestic court had refused to submit a request to the Court of Justice in Luxembourg for a preliminary ruling on the issue whether the obligation for lawyers to report their suspicions was compatible with Article 8 of the Convention. That question had never previously been examined by the Court of Justice, either in a preliminary ruling delivered in the context of another case, or in the context of one of the various actions open to the European Union's Member States and institutions. Hence, the supervisory machinery provided for by European Union law had not come into play.

Legal professional privilege was of great importance, and constituted one of the fundamental principles on which the administration of justice in a democratic society was based. It was not, however, inviolable. It was necessary to weigh its importance against the importance for the member States of combating the laundering of the proceeds of unlawful activities, themselves likely to be used in financing criminal activities, particularly in the spheres of drug trafficking and international terrorism.

40. No. 41442/07, § 98, 19 January 2010.
41. No. 39758/05, 23 February 2012.
42. No. 12323/11, ECHR 2012.
43. [GC], no. 45036/98, ECHR 2005-VI.

Freedom of thought, conscience and religion (Article 9)

In 2011[44], the Court had occasion to revisit its case-law on the applicability of Article 9 to conscientious objectors. The judgment in *Savda v. Turkey*[45] concerned the objections to military service raised on grounds of conscience by a pacifist who did not rely on any religious beliefs. A further characteristic of this case was the absence of a procedure for review by the national authorities of the applicant's request to be recognised as a conscientious objector. In the Court's view, in the absence of such a procedure, the obligation to carry out military service was such as to entail "a serious and insurmountable conflict" with an individual's conscience or his deeply and genuinely held beliefs.

There was therefore an obligation on the State authorities to provide conscientious objectors with an effective and accessible procedure enabling them to have established whether they were entitled to conscientious-objector status, in order to preserve their interests protected by Article 9.

Freedom of expression (Article 10)

The case of *Axel Springer AG*, cited above, concerned an injunction prohibiting a newspaper from reporting on the arrest and conviction of a well-known actor. The Grand Chamber listed the criteria governing the balancing of the right to freedom of expression and the right to respect for private life. In principle, the task of assessing how well a person was known to the public fell primarily to the domestic courts, especially where that person was mainly known at national level. The Court examined whether the actor had been sufficiently well known to qualify as a public figure. The judgment examined the scope of the "legitimate expectation" that his private life would be effectively protected.

Other aspects explored by the judgment included the means by which the journalist had obtained the information, the accuracy of the information, the extent to which the press itself had preserved the actor's anonymity and the content and form of the impugned articles, including the use of "expressions which, to all intents and purposes, were designed to attract the public's attention".

In the case of *Centro Europa 7 S.r.l. and Di Stefano v. Italy*[46], a private television company had been granted a licence for nationwide television broadcasting but was unable to broadcast because no frequencies had been allocated to it by the authorities. The situation had deprived the licence of all practical purpose since the activity it authorised had been impossible to carry out in practice. The Grand Chamber reiterated the general principles governing media pluralism.

In particular, it was necessary to ensure effective pluralism in this very sensitive sector so as to guarantee diversity of overall programme content, reflecting the variety of opinions encountered in the society concerned.

In addition to its negative duty of non-interference, the State had a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism in the media. It was not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market: it was necessary in addition to allow effective access to the market.

A sufficiently precise legal framework was a particularly important requirement in cases concerning the conditions of access to the audiovisual market. Any shortcomings on the part of the State which resulted in reduced competition in the audiovisual sector would be in breach of Article 10.

The judgment in *Mouvement raëlien suisse v. Switzerland*[47] concerned the scope of the right to use public space to conduct poster campaigns. In the Court's view, individuals did not have an unconditional or unlimited right to the extended use of public space, especially in relation to facilities intended for advertising or information campaigns. With regard to freedom of expression there was little scope for restrictions on political speech. However, States had a wide margin of appreciation in regulating speech in commercial matters and advertising.

Hence, the examination by the local authorities of the question whether a poster in the context of a campaign that was not strictly political satisfied certain statutory requirements – for the defence of interests as varied as, for example, the protection of morals, road-traffic safety or the preservation of the landscape – fell within the margin of appreciation afforded to States. The authorities therefore had a certain discretion in granting authorisation in this area.

---

44. *Bayatyan v. Armenia* [GC], no. 23459/03, ECHR 2011.
45. No. 42730/05, 12 June 2012.
46. [GC], no. 38433/09, ECHR 2012.
47. [GC], no. 16354/06, ECHR 2012.

In this case the interference by the public authorities had been limited to prohibiting the display of posters in public areas. The Court acknowledged the necessity of protecting health and morals and the rights of others and preventing crime. The applicant association had been able to continue to disseminate its ideas through its website and through other means such as the distribution of leaflets in the street or in letter boxes. Where they decided to restrict fundamental rights, the authorities had to choose the means that caused the least possible prejudice to the rights in question.

The case of *Vejdeland and Others v. Sweden*[48] concerned the applicants' conviction for "agitation against a national or ethnic group" following the distribution to young pupils of leaflets worded in a manner offensive to homosexuals. This judgment is noteworthy as it is the first time that the Court has applied the principles relating to speech offensive to certain social groups in the context of speech against homosexuals. The Court stressed that discrimination based on sexual orientation was as serious as discrimination based on race, origin or colour.

In *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*[49], the Court held that Article 10 included freedom to receive and impart information and ideas in any language which afforded the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Article 10 protected not only the substance of the ideas and information expressed but also the form in which they were conveyed, irrespective of the language in which they were expressed.

The freedom to receive and impart information or ideas forms an integral part of the right to freedom of expression. For the first time, the Court dealt with the blocking of a website which had the collateral effect of barring access to the entire "Google Sites" domain and all the websites hosted on it (*Ahmet Yıldırım v. Turkey*[50]). The blocking of the websites was the result of a preventive measure taken in the context of criminal proceedings against another individual, unconnected to the applicant's site.

The Court considered that "the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information; it provides essential tools for taking part in activities and discussions concerning political issues or matters of public interest". It held that the domestic courts should have had regard to the fact that such measures – which rendered large amounts of information inaccessible – had a considerable impact on the rights of Internet users and a substantial collateral effect. The Court found a violation of Article 10.

Freedom of assembly and association (Article 11)

The *Eğitim ve Bilim Emekçileri Sendikası* judgment, cited above, concerned proceedings to have a trade union of education-sector employees dissolved on the grounds that its statutes defended teaching in a mother tongue other than Turkish. The union was eventually forced to delete the relevant references from its statutes in order to avoid being dissolved.

In the Court's view, the principle defended by the trade union, whereby the individuals making up Turkish society could be taught in their native languages other than Turkish, was not contrary to fundamental democratic principles. It observed that nothing in the impugned article of the union's statutes could be considered as a call to violence, insurrection or any other form of denial of democratic principles; this was an essential factor to be taken into account. Even assuming that the national authorities had been entitled to consider that teaching in a mother tongue other than Turkish promoted a minority culture, the existence of minorities and different cultures in a country was a historical fact that a democratic society had to tolerate and even protect and support according to the principles of international law. The Court held that there had been a violation of Article 11.

Right to marriage (Article 12)

The judgment in *V.K. v. Croatia*[51] concerned divorce proceedings the length of which was found to be unreasonable from the standpoint of Article 6 § 1. For the first time, the Court held that the failure of the national authorities to conduct divorce proceedings effectively left the petitioner in a state of prolonged uncertainty, thus constituting an unreasonable restriction on the right to marry. It took into account, among other considerations, the fact that the applicant had a well-established intention to remarry, as well as the

48. No. 1813/07, 9 February 2012.
49. No. 20641/05, ECHR 2012.
50. No. 3111/10, ECHR 2012.
51. No. 38380/08, 27 November 2012.

circumstances of the divorce proceedings (the agreement of the spouses to get divorced, the possibility for the courts to take an interim decision and the urgent nature of the proceedings in domestic law).

Prohibition of discrimination (Article 14)

The exclusion of male military personnel from the right to parental leave, accorded to female personnel, raised an important question of general interest from the standpoint of Article 14 read in conjunction with Article 8. In its judgment in *Konstantin Markin*, cited above, the Court ruled on this issue for the first time. The Grand Chamber observed the way in which contemporary European societies had evolved in relation to the question of equality between the sexes with regard to parental leave. The traditional distribution of gender roles in society could not justify the exclusion of men, including servicemen, from the entitlement to parental leave.

In the specific context of the armed forces certain restrictions linked to the importance of the army for the protection of national security might be justifiable, provided they were not discriminatory. It was possible to accommodate legitimate concerns about the operational effectiveness of the army and yet afford military personnel of both sexes equal treatment in the sphere of parental leave, as the example of numerous European countries demonstrated. The relevant comparative-law materials indicated that, in a substantial number of member States, both servicemen and servicewomen were entitled to parental leave. Conversely, a general and automatic restriction applied to a group of people on the basis of their sex – such as the exclusion of male military personnel alone from entitlement to parental leave – was incompatible with Article 14. The prohibition of sex discrimination was of fundamental importance; the right not to be discriminated against on account of sex could not be waived.

The case of *Gas and Dubois v. France*[52] concerned the refusal by the courts of an application by a woman living in a same-sex couple for a simple adoption order in respect of her partner's child, conceived in Belgium via anonymous donor insemination. The reason given for the refusal was that the transfer of parental responsibility to the adoptive parent would deprive the biological mother of all rights in relation to her child and would be against the child's interests, since the biological mother intended to continue raising her.

In the Court's view, the case differed fundamentally from that of *E.B. v. France*[53], which related to the handling of an application for authorisation to adopt a child made by a single homosexual, since French law allowed single persons to adopt. The Court observed that the legal situation of same-sex couples was not comparable to that of married couples for the purposes of second-parent adoption (same-sex marriage is prohibited under French law). Same-sex couples were not treated differently compared with unmarried heterosexual couples, whether or not the latter were in a civil partnership, as the latter would likewise be refused a simple adoption order. The Court held that there had been no violation of Article 14 in conjunction with Article 8.

The case of *Özgürlük ve Dayanışma Partisi (ÖDP) v. Turkey*[54] dealt for the first time with the issue of direct State funding of political parties. The Court defined certain principles regarding systems of public funding for parties based on a minimum level of representation.

The case concerned the refusal to grant public funding to a political party which was not represented in Parliament, on the grounds that it had not attained the minimum level of electoral support required by law. The Court did not find any violation of Article 14 read in conjunction with Article 3 of Protocol No. 1. It noted the very low level of representation of the applicant party and the compensatory effect of other elements of public support available to it, such as tax exemption on various items of income and allocation of broadcasting time during electoral campaigns.

Protection of property (Article 1 of Protocol No. 1)

The judgment in *Centro Europa 7 S.r.l. and Di Stefano,* cited above, reiterated the principles underlying the concept of "possessions" within the meaning of the Convention. The case concerned the granting of a broadcasting licence to a television company whose operations were delayed because no broadcasting frequencies were allocated to it (see Article 10 above).

Right to education (Article 2 of Protocol No. 1)

The case of *Catan and Others,* cited above, concerned the forced closure of schools linked to the language policy of the separatist regime, and harassment by the authorities after the schools reopened. There was no

52. No. 25951/07, ECHR 2012.
53. [GC], no. 43546/02, 22 January 2008.
54. No. 7819/03, ECHR 2012.

evidence to suggest that such measures pursued a legitimate aim. The Grand Chamber stressed the fundamental importance of primary and secondary education for each child's personal development and future success, and reaffirmed the right to be taught in one's national language.

With regard to the acts of a separatist regime not recognised by the international community, the Court examined the question of State responsibility for the infringement of the right to education: the responsibility of the State on whose territory the events occurred, and that of the State which ensured the survival of the administration by virtue of its ongoing military and other support. In the case of the latter State, which had exercised effective control over the administration during the period in question, the fact that it had not intervened directly or indirectly in the regime's language policy did not prevent its responsibility from being engaged.

Right to free elections (Article 3 of Protocol No. 1)

The case of *Sitaropoulos and Giakoumopoulos v. Greece*[55] concerned the place from which citizens living abroad could exercise the right to vote in parliamentary elections. The specific question raised was whether the Convention required Contracting States to put in place a system allowing expatriates to exercise voting rights from abroad.

In general terms, Article 3 of Protocol No. 1 did not provide for the implementation by Contracting States of measures to allow expatriates to exercise their right to vote from their place of residence. Furthermore, as the law currently stood, no obligation or consensus to that effect could be derived either from the relevant European and international law or from the comparative survey of national systems. As to those member States that allowed voting from abroad, there was a wide variety of approaches with regard to the conditions of exercise. The Court summarised its case-law concerning restrictions on the exercise of expatriate voting rights based on the criterion of residence.

The issue of restrictions on convicted prisoners' voting rights was raised again before the Grand Chamber in the case of *Scoppola v. Italy (no. 3)*[56]. The principles articulated in the 2005 judgment in *Hirst v. the United Kingdom (no. 2)*[57] were reaffirmed. The Grand Chamber ruled that a prohibition on the right to vote could be ordered by a judge in a specific decision or could result from the application of the law. What was important was to ensure that the judge's decision or the wording of the law complied with Article 3 of Protocol No. 1 and, in particular, that the system was not excessively rigid.

In this case the Court stressed the legislature's concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account such factors as the gravity of the offence committed and the conduct of the offender. The duration of the measure was also adjusted to the sentence imposed and thus, indirectly, to the gravity of the offence. Accordingly, the prohibition on the right to vote under the system in question did not have the general, automatic and indiscriminate character that had led the Court to find a violation of Article 3 of Protocol No. 1 in *Hirst*.

The judgment in *Communist Party of Russia and Others v. Russia*[58] concerned the media coverage of a general-election campaign. This was the first judgment by the Court dealing directly with the coverage of a national electoral campaign by the major broadcasting media; the coverage had been condemned as unfair by opposition parties and candidates. The Court clarified States' positive obligations in this sphere and the scope of their margin of appreciation.

Right to compensation for a miscarriage of justice (Article 3 of Protocol No. 7)

The *Poghosyan and Baghdasaryan v. Armenia*[59] judgment was the first in which the Court examined on the merits a complaint under Article 3 of Protocol No. 7 and found a violation of that provision. The case concerned the failure to provide compensation to an accused who had been wrongly sentenced to fifteen years' imprisonment and had spent approximately five and a half years in detention before being considered to have been acquitted.

The Court held that compensation was due even where the law or practice of the State concerned made no provision for it. Furthermore, the victim of a judicial miscarriage was entitled to compensation not only for the pecuniary damage caused by the wrongful conviction, but also for any non-pecuniary damage such as distress, anxiety, inconvenience and loss of enjoyment of life.

55. [GC], no. 42202/07, ECHR 2012.
56. [GC], no. 126/05, 22 May 2012.
57. [GC], no. 74025/01, ECHR 2005-IX.
58. No. 29400/05, 19 June 2012.
59. No. 22999/06, ECHR 2012.

Execution of judgments (Article 46)

Pilot judgments[60]

One of the fundamental implications of the pilot-judgment procedure is that the Court's assessment of the situation complained of in a "pilot" case necessarily extends beyond the sole interests of the individual applicants and requires it to examine that case also from the perspective of the general measures that need to be taken in the interest of other potentially affected persons (*Kurić and Others,* cited above).

Even if only a few similar applications are currently pending before the Court, in the context of systemic, structural or similar violations the potential inflow of future cases is also an important consideration in terms of preventing the accumulation of such repetitive cases on the Court's docket (ibid.).

The *Ananyev and Others v. Russia*[61] judgment applied the pilot-judgment procedure in the context of inhuman and degrading conditions of detention of persons awaiting trial. The Court has pointed out in a large number of its judgments that remand in custody should be the exception rather than the norm and should be applied only as a last resort.

Stressing the fundamental nature of the right not to be subjected to inhuman or degrading treatment, the Court decided not to adjourn the examination of similar applications pending before it. It emphasised that adjournment was a possibility rather than an obligation under Rule 61 § 6 of the Rules of Court.

In *Ümmühan Kaplan v. Turkey*[62] the Court decided to apply the pilot-judgment procedure to cases concerning the length of proceedings. It identified a structural and systemic problem in the domestic legal system which was incompatible with Articles 6 § 1 and 13 of the Convention. Within the time-limit specified in the judgment, the respondent State was to put in place an effective domestic remedy providing adequate and effective redress in respect of excessively lengthy proceedings.

General measures

The case of *Aslakhanova and Others v. Russia*[63] concerned abductions and disappearances in the Northern Caucasus in breach of Articles 2, 3, 5 and 13 of the Convention. The Court observed that the situation complained of resulted from systemic problems at national level, for which there was no effective domestic remedy and which required the prompt implementation of comprehensive and complex measures. In the reasoning of its judgment the Court referred to the measures to be taken with regard to the situation of the victims' families and the effectiveness of the investigations, and urged the respondent State to submit a strategy to the Committee of Ministers without delay.

Individual measures

In *Hirsi Jamaa and Others*, cited above, the Court held that there was a risk of ill-treatment in Libya and of arbitrary repatriation. It ruled that the respondent Government was to take all possible steps to obtain assurances from the Libyan authorities that the applicants would not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated.

The case of *Sampani and Others v. Greece*[64] was the first in which Article 46 was applied in relation to education. After finding that there had been discrimination against Roma children, the Court invited the respondent State to take action to provide schooling for them.

Striking out (Article 37)

Further examination of an application concerning an important question of general interest serves to elucidate, safeguard and develop the standards of protection of human rights. Raising those standards and extending human rights jurisprudence throughout the community of the Convention States forms part of the purpose of the Convention system (*Konstantin Markin*, cited above).

---

60. According to Rule 61 § 1 of the Rules of Court: "The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications."
61. Nos. 42525/07 and 60800/08, 10 January 2012.
62. No. 24240/07, 20 March 2012.
63. Nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, 18 December 2012.
64. No. 59608/09, 11 December 2012.