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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Compensation award in respect of deaths caused by ordnance belonging to army: *inadmissible*

Akdemir and Evin v. Turkey - 58255/08 and 29275/09
Judgment 17.3.2015 [Section II]

Facts – The applicants are the mothers of three children involved in an incident in 1999 when a device they had found in a bin near a military zone exploded. Two of the children suffered severe injuries and the other died. The public prosecutor's office concluded that the death had been caused by the explosion of a bomb planted in the bin by terrorists, who had prepared it using an explosive device originally belonging to the armed forces. The prosecutor's office issued a permanent search warrant in respect of the perpetrators but discontinued the case in 2009 as the prosecution had become time-barred, observing that despite the ongoing searches, it had not been possible to identify them. After establishing strict liability on the part of the authorities for the explosion, the Supreme Administrative Court upheld the applicants' claims for damages and awarded them compensation. The total amount paid to the mother of the deceased child was equivalent to EUR 22,172, while the two surviving children received a total award equivalent to EUR 83,739.

Law – Article 2 (*substantive aspect*): After finding the authorities liable for the explosion, the domestic courts had awarded substantial damages. The amounts awarded were far from insufficient. The fact that the concurrent liability of the child who had found the explosive device had been taken into account in assessing the compensation did not detract from that observation. Accordingly, there was no need for any further examination of whether the national authorities had fulfilled their positive obligation to protect life, seeing that the proceedings in the administrative courts had led to an acknowledgment that the military authorities had been negligent – by breaching their duties deriving from the obligation to protect the lives of others – and to the award of appropriate amounts by way of redress for the damage caused.

Conclusion: inadmissible (manifestly ill-founded).

The Court found, however, that there had been a violation of Article 6 § 1 on account of the length of the administrative proceedings.

(See also *Oruk v. Turkey*, 33647/04, 4 February 2014, Information Note 171)

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(See Article 34 below, page 16)

ARTICLE 3

Inhuman or degrading treatment

Alleged prison overcrowding: *no violation*

Muršić v. Croatia - 7334/13
Judgment 12.3.2015 [Section I]

Facts – In his application to the European Court, the applicant essentially complained about lack of personal space in the prison where he served a sentence of one year and five months. During his incarceration he was placed in four different cells where he had between three and just over seven square metres of personal space. On occasional non-consecutive short periods, including one period of twenty-seven days, his personal space fell slightly below three sq. m.

Law – Article 3: Pursuant to the principles set out in the *Ananyev and Others v. Russia* judgment, when examining an alleged violation of Article 3 on account of a lack of personal space in prison the Court had to consider whether each detainee had an individual sleeping place in the cell and disposed of at least three sq. m. of floor space, and whether the overall surface area of the cell was such as to allow detainees to move freely between items of furniture. The absence of any of the above elements created in itself a strong presumption that the conditions of detention amounted to degrading treatment, in breach of Article 3.

However, that strong presumption could, in certain circumstances, be rebutted by the cumulative effect

of the detention conditions, although this was hardly likely in the event of a flagrant lack of personal space, of confinement in an altogether inappropriate detention facility or where established structural problems existed. Conversely, it could not be excluded that the presumption would be rebutted, for example, in the case of short and occasional minor restrictions of the required personal space accompanied by sufficient freedom of movement and out-of-cell activities and confinement in an appropriate facility.

In the present case, the Court was mindful that the size of the cells where the applicant had been placed had not always been adequate, as for occasional non-consecutive short periods (including one period of twenty-seven days) he had disposed of slightly less than three sq. m. of personal space. However, this had been accompanied by sufficient freedom of movement and confinement in an appropriate facility. Thus, in the light of the principles set out in *Ananyev*, the conditions of the applicant's detention, though not always adequate, had not reached the threshold of severity required to characterise the treatment as inhuman or degrading within the meaning of Article 3 of the Convention.

Conclusion: no violation (six votes to one).

(See *Ananyev and Others v. Russia*, 42525/07 and 60800/08, 10 January 2012, Information Note 148; see also the Factsheet on Detention conditions and treatment of prisoners)

Degrading treatment

Prison overcrowding and poor conditions of detention: *violation*

Varga and Others v. Hungary - 14097/12 et al.
Judgment 10.3.2015 [Section II]

(See Article 46 below, page 18)

Nineteen-year old soldier forced to line up at parade ground in military briefs: *violation*

Lyalyakin v. Russia - 31305/09
Judgment 12.3.2015 [Section I]

Facts – The applicant, who at the material time was a nineteen-year conscript in the Russian Army, was twice caught trying to escape. Allegedly in order to prevent him making further attempts to escape on the journey back to base, he was forced to undress. After his return, he was brought before the battalion commander and made to stand in front of the battalion wearing only his military briefs.

Law – Article 3 (*material aspect*): The Court reiterated that States have a duty to ensure that a person performs military service in conditions which are compatible with respect for his human dignity, that the procedures and methods of military training do not subject him to distress or suffering of an intensity exceeding the unavoidable level of hardship inherent in military discipline and that, given the practical demands of such service, his health and well-being are adequately secured.

The applicant had remained in his military briefs on two occasions, the first after his unsuccessful attempt to escape and the second a day later, during the lining up of the battalion. The Court accepted that the level of distress suffered by the applicant was less than it would have been had he been stripped naked, that the episode had taken place in summer, was short and had ended with a reprimand. Nevertheless, the respondent Government had not explained why, in particular, the applicant had been required to stand in front of the battalion wearing only his military briefs after he had already been brought under control. While it did not overlook the specific military context of the case and the need to maintain military discipline, the fact remained that the need to use the impugned measure had not been convincingly demonstrated. In these circumstances, the undressing and exposure of the applicant during the lining up of the battalion had the effect of humiliating him. The fact that he was aged nineteen at the time had aggravated the treatment, which constituted degrading treatment within the meaning of Article 3.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been a violation of the procedural aspect of Article 3 for failure to hold an effective investigation into the applicant's allegations of ill-treatment.

Article 41: EUR 15,000 in respect of non-pecuniary damage.

Effective investigation

Undue delays in criminal proceedings and failure properly to investigate rape and assault allegations: *violation*

S.Z. v. Bulgaria - 29263/12
Judgment 3.3.2015 [Section IV]

Facts – In September 1999 the applicant was taken to a flat where she was held against her will, beaten and repeatedly raped by a number of men before managing to escape.

A criminal investigation was launched by the prosecution. The applicant identified some of her assailants and two police officers they had allegedly met prior to holding her against her will.

The investigation was closed four times and the case file sent back for further investigation on the grounds that the necessary investigative measures had not been carried out or that procedural irregularities had been committed.

In 2007 seven defendants were committed for trial in the District Court on charges of false imprisonment, rape, incitement to prostitution or abduction for the purposes of coercing into prostitution. Twenty-two hearings were held, about ten of which were adjourned mainly on grounds of irregularities in summoning the accused or witnesses. In a judgment of March 2012, five of the accused were convicted and given prison sentences and fines, one was acquitted and the proceedings against the seventh defendant were discontinued on the grounds that they had become time-barred. The five accused who were convicted and the applicant appealed. Seven hearings before the Regional Court were adjourned on account of the absence of one of the accused or their lawyers. In a final judgment of February 2014, the court set aside one of the convictions and discontinued the proceedings on the grounds that they were time-barred. The prison sentences of some of the other accused were reduced.

Law – Article 3 (*procedural aspect*): The acts of rape and assault inflicted on the applicant fell within the scope of Article 3 of the Convention.

The total length of the criminal proceedings brought following the applicant's complaint came to more than fourteen years for the preliminary investigation and two levels of jurisdiction.

That extremely long period did not appear to be justified on grounds of the complexity of the case. The delays incurred had been due to a lack of diligence on the part of the authorities and, among other things, the investigating authorities had failed to investigate certain aspects of the case, particularly the involvement of individuals whom the applicant had identified as having taken part in the assault.

The excessive length of the proceedings had undeniably had negative repercussions on the applicant, who had clearly been in a very vulnerable psychological condition following the assault. She had been left in a state of uncertainty regarding the possibility of securing the trial and punishment of her assailants, had had to return to the court repeatedly and been obliged to relive the events during the many examinations by the court.

Accordingly, the proceedings could not be regarded as having satisfied the requirements of Article 3 of the Convention. Consequently, the Court rejected the Government's preliminary objection that the application was premature.

Conclusion: violation (unanimous).

Article 46: In more than 45 judgments the Court had already found violations of the obligation to carry out an effective investigation in applications concerning Bulgaria. Moreover, several applications concerning rape cases had recently been struck out of the list following a friendly settlement between the parties or a unilateral declaration by the Government acknowledging a violation of Article 3.

In the majority of those cases the Court had found that there had been substantial delays at the preliminary investigation stage and that no thorough and objective investigation had been carried out. In some situations the delays had resulted in the termination of the proceedings on the grounds that they had become time-barred where the suspects, despite having been identified, had not been formally charged or where, despite the presumed perpetrators being committed for trial and the trial being held, the so-called "absolute" limitation period had expired. Furthermore, in some cases the authorities had not taken account of certain evidence or sought to clarify certain factual circumstances or the involvement of particular individuals in the criminal offence, or the prosecutor had persistently refused to comply with the court's instructions regarding the preliminary investigation.

Accordingly, there was a systemic problem of ineffectiveness of investigations in Bulgaria. However, the complexity of the structural problem found to exist made it difficult to identify the exact causes of the defects found or to pinpoint specific measures that should be implemented in order to improve the quality of investigations. In those circumstances, the Court did not consider itself to be in a position to indicate which individual and general measures should be implemented for the purposes of executing the present judgment. The national authorities, in cooperation with the Committee of Ministers, were the best placed to identify the various causes of the problem and to decide which general measures were required – in practical terms – as a

deterrent to similar future violations, with a view to combating impunity and upholding the rule of law and the trust of the public and victims in the justice system.

Article 41: EUR 15,000 in respect of non-pecuniary damage.

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Detention and preventive measures in the absence of reasonable suspicion of an offence: *violation*

Kotiy v. Ukraine - 28718/09
Judgment 5.3.2015 [Section V]

(See Article 8 below, page 13)

Article 5 § 1 (e)

Persons of unsound mind

Detention as a person of "unsound mind" in the absence of a precise diagnosis of mental state: *inadmissible*

Constancia v. the Netherlands - 73560/12
Decision 3.3.2015 [Section III]

Facts – The applicant was prosecuted for manslaughter following the death of a pupil in a primary school in 2006. In the ensuing criminal proceedings he refused to cooperate in any examination of his mental state, so that no diagnosis of his mental condition was possible. The domestic courts nonetheless found him to be severely disturbed and imposed a 12-year prison sentence followed by detention as a person of "unsound mind" ("TBS order"). The sentence was ultimately upheld by the Supreme Court in 2012.

Law – Article 5 § 1 (e): When considering the applicant as a person of "unsound mind", the domestic courts relied on a number of reports prepared by psychiatrists and psychologists as well as a report based on the criminal file and the audio and audio-visual recordings of interrogations. Although the doctors had been unable to establish a precise diagnosis, they had nevertheless considered that the applicant was severely disturbed, which view the court of appeal found reinforced by its own investigation of the case file. The Court accepted that, faced as they had been with the applicant's complete refusal to cooperate in any examination of his mental state at any relevant time, the domestic courts had been entitled to conclude from the information thus obtained that the applicant was suffering from a genuine mental disorder which, whatever its precise nature, was of a kind or degree that warranted compulsory confinement.

The link between the original conviction and the measure involving the applicant's confinement in a custodial clinic, required for Article 5 § 1 (a) to continue to apply, could eventually be broken if future decisions in this respect did not rely on grounds that were consistent with the objectives of the sentencing court. In those circumstances, a detention that was lawful at the outset would be transformed into an arbitrary deprivation of liberty incompatible with Article 5.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Varbanov v. Bulgaria*, 31365/96, 5 October 2000; and the Factsheet on Detention and mental health)

Article 5 § 1 (f)

Extradition

Undue delays in extraditing applicant to stand trial in requesting State: *violation*

Gallardo Sanchez v. Italy - 11620/07
Judgment 24.3.2015 [Section IV]

Facts – The applicant is a Venezuelan national. In April 2005, having been charged with arson by the Greek authorities, he was placed in detention pending extradition by the Italian police pursuant to an arrest warrant issued under the European Convention on Extradition. He was extradited to Greece in October 2006.

The applicant complained before the European Court of the length of his detention pending extradition.

Law – Article 5 § 1 (f): The applicant's detention pending extradition had been in conformity with domestic law and had been justified on grounds of the State's duty to comply with its international

commitments and the existence of a risk that the applicant might abscond.

However, the applicant had been placed in detention pending extradition in order to enable the Greek authorities to prosecute him. In that connection it was necessary to distinguish between two forms of extradition in order to specify the level of diligence required for each. These were extradition for the purposes of enforcing a sentence and extradition enabling the requesting State to try the person concerned. In the latter case, as criminal proceedings were still pending the person subject to extradition was to be presumed innocent; furthermore, at that stage their ability to exercise their defence rights in the criminal proceedings for the purposes of proving their innocence was considerably limited, or even non-existent; lastly, the authorities of the requested State were debarred from undertaking any examination of the merits of the case. For all those reasons, the protection of the rights of the person concerned and the proper functioning of the extradition proceedings, including the duty to prosecute the individual concerned within a reasonable time, required the requested State to act with special diligence.

In the present case the detention pending extradition had lasted approximately one year and six months and considerable delays attributable to the Italian authorities had occurred at the different stages of the extradition proceedings, though the case had not been particularly complex. Accordingly, having regard to the nature of the extradition proceedings, instituted for the purpose of prosecuting the applicant in a third State, and the unjustified nature of the delays by the Italian courts, the applicant's detention had not been "lawful" within the meaning of Article 5 § 1 (f) of the Convention.

Conclusion: violation (unanimously).

Article 41: no claim made in respect of damage.

(See also the Factsheet on Expulsions and extraditions and the Handbook on European law relating to asylum, borders and immigration)

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Requirement to attempt to settle a civil claim as a necessary prelude to contentious proceedings against the State: *no violation*

Momčilović v. Croatia - 11239/11
Judgment 26.3.2015 [Section I]

Facts – By virtue of Section 186(a) of the Civil Procedure Act, any party wishing to bring a court action against the Croatian State must first submit a request for settlement to the competent State Attorney's Office. Failure to do so will result in the action being declared inadmissible.

In January 1998 the applicants submitted a request to the State Attorney's Office for settlement of a claim for damages for the unlawful killing of one of their relatives by a soldier. When their request was refused they brought a civil action in a municipal court. However, that action was deemed to have been withdrawn when their representative failed to attend the hearings. In May 2005 the applicants lodged a fresh claim for damages in a different municipal court, but it was declared inadmissible because they had failed to comply with the obligation to lodge a prior request for settlement with the competent State Attorney's Office.

Law – Article 6: The Court was called upon to examine whether the restriction of the right to access to court imposed by the procedural requirement to attempt to settle a case prior to instituting civil claims against the State had resulted in a limitation impairing the very essence of that right. The settlement requirement was provided for by law and pursued the legitimate aim of securing judicial economy by avoiding long and expensive court proceedings and by reducing the number of cases. As to the proportionality of that requirement, the Court noted that the applicants' first civil action had been considered withdrawn due to their inactivity and failure to lodge a timely appeal. Following such a withdrawal and before instituting a new set of proceedings, the applicants were again required to fulfil the pre-condition of a friendly settlement attempt. In view of the refusal of the first request for settlement, it was impossible to say what the outcome of a second friendly settlement attempt would have been after such a substantial period of time had passed. The requirement was neither unreasonable in itself nor did it lead to a legal prejudice for the applicant's claim. This limitation had not, therefore, impaired the very essence of their right to access to court.

Conclusion: no violation (unanimously).

Article 6 § 1 (criminal)

Criminal charge
Fair hearing

Alleged entrapment leading to conviction for copyright infringement: *inadmissible*

Volkov and Adamskiy v. Russia - 7614/09 and 30863/10
Judgment 26.3.2015 [Section I]

Facts – In the context of police operations aimed at exposing individuals involved in the distribution of counterfeit software, the applicants were contacted by two undercover police officers who asked to have software installed on their computers. The applicants acquired and then installed unlicensed software on the officers' computers. They were subsequently convicted of copyright infringement.

In the Convention proceedings the applicants complained that the police had incited them to commit the offence, in breach of their right to a fair trial (Article 6 § 1 of the Convention).

Law – Article 6 § 1 (*both applicants*): The Court reiterated that in cases of alleged entrapment the Court had to first establish whether the offence would have been committed without the authorities' intervention. The applicants had been engaged in a lawful business activity and the police had got in contact with them as ordinary customers would have done. The applicants had spontaneously bought or downloaded, and then installed unlicensed software on the undercover agents' computers, without any explicit request or unlawful incitement on the part of the police. Moreover, they had both openly informed the police officers that the software was counterfeit and that it would have been much more expensive to install licensed software.

The present case was therefore distinguishable from other Russian cases on entrapment because it was the applicants' own deliberate conduct and not the unlawful or arbitrary actions of the police that had been the determinative factor in the commission of their offences.

Conclusion: inadmissible (manifestly ill-founded).

Article 6 § 1 in conjunction with Article 6 § 3 (c) (*Mr Volkov*): During his appeal hearing, Mr Volkov had not been assisted by a lawyer as he could not afford to retain his trial lawyer or appoint another one of his choosing.

Given the broad powers of the appellate court to review his case in full, Mr Volkov could have substantially benefitted from legal counsel in order to at least have his sentence reduced. Under domestic law, the right to legal representation extended to appeal proceedings if, *inter alia*, the defendant did not waive it in writing. If the defendant could not afford to pay a lawyer, it was incumbent on the authorities to appoint him one. From the case file it appeared that Mr Volkov had not waived his right to legal assistance in the appeal proceedings. Although he had not requested to have a legal aid lawyer appointed, his conduct could not of itself relieve the authorities of their obligation to provide him with an effective defence.

Bearing in mind that the domestic authorities were aware of the fact that the applicant had no retainer agreement with his trial lawyer, they had been under a duty to appoint a legal aid counsel for the appeal hearing or to adjourn the hearing until such time as the applicant could be adequately represented.

Conclusion: violation (unanimously).

Article 41: EUR 4,000 in respect of non-pecuniary damage.

(See, for a similar case on police entrapment, *Kuzmickaja v. Lithuania* (dec.), 27968/03, 10 June 2008; see also the Factsheet on Police arrest and assistance of a lawyer)

Article 6 § 3 (c)

Defence through legal assistance
Free legal assistance

Lack of legal assistance for accused at criminal appeal hearing: *violation*

Volkov and Adamskiy v. Russia - 7614/09 and 30863/10
Judgment 26.3.2015 [Section I]

(See Article 6 § 1 (criminal) above)

ARTICLE 8

Respect for private and family life

Detention and preventive measures outside the country where the applicant worked and lived with his family: *violation*

Kotiy v. Ukraine - 28718/09
Judgment 5.3.2015 [Section V]

Facts – In April 2008 the Kyiv Police Department instituted criminal proceedings against the applicant in connection with financial fraud and listed him as a wanted person on the grounds that he did not live at his registered place of residence in Ukraine and his whereabouts were unknown. The applicant had in fact by then been working and living with his family in Germany for several years. In November 2008, while attending the migration service department in Kharkiv to renew his international travel passport, he was arrested and escorted to the district police department in Kyiv, where he was arrested after questioning. The applicant was released after ten days after signing a written undertaking not to leave his registered place of residence in Ukraine and surrendering his passports. The applicant lodged complaints with the District Court against his unlawful arrest and detention, the alleged violation of procedural rules by the investigator and an interference with his family and professional life. In December 2011 the preventive measures were lifted and the passports returned.

Law – Article 5 § 1: The Court had to identify whether the applicant's detention had been arbitrary and incompatible with the purpose of Article 5 § 1. When questioned at the police department in November 2008 he had not been free to leave. Given the existence of a coercive element, the Court found that he had been deprived of his liberty within the meaning of Article 5 § 1. His arrest had not been formalised through an arrest report until several hours later and the report had merely repeated general grounds for the arrest without demonstrating reasonable suspicion of the commission of a criminal offence. Nor did the report justify the applicant's preliminary detention during questioning for the specific purposes laid down in the domestic law for applying such measures. The Court did not accept a justification based on the applicant's listing as a wanted person since he could not be considered as having been in hiding while living in Germany. It therefore found the applicant's detention between 14 and 24 November 2008 incompatible with Article 5 § 1.

Conclusion: violation (unanimously).

Article 8: As a result of his undertaking not to abscond and the surrender of his passports, the applicant had been unable to travel to Germany where his family lived and where he pursued his professional activities. As to the justification for that interference, pursuant to Article 234 of the Code of Criminal Procedure, the applicant could have challenged the investigator's decisions before the prosecutor or the court. However, the Court did not consider that the possibility of challenging the decision before the prosecutor afforded adequate safeguards ensuring a proper review while a challenge before a court would only have been possible at the stage of the preliminary hearing of the criminal case or its consideration on the merits and could not be considered a timely remedy. During the investigation period of three years and seven months, no other judicial remedy had been available to the applicant. As a result, the domestic law did not meet the requirements of the quality of law for the purpose of the Convention.

In addition, although the interference pursued the legitimate aim of preventing crime, it had been extensive. The fact that the applicant was unemployed at the material time did not mitigate the fact that he had been temporarily prevented from returning to Germany to resume his family and private life. Furthermore, the domestic authorities had not considered other non-custodial preventive measures available under domestic law and no effective remedies had been available. Since signing the written undertaking not to abscond, the applicant had not been asked to take part in any investigatory procedure. In sum, his right to respect for his private and family life had not been balanced with the public interest in ensuring the effective investigation of a criminal case.

Conclusion: violation (unanimously).

The Court also found a violation of Article 5 § 5 of the Convention.

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

Respect for private life

Gender reassignment surgery made conditional on proof that the person concerned was no longer able to procreate: *violation*

Y.Y. v. Turkey - 14793/08
Judgment 10.3.2015 [Section II]

Facts – The applicant, Y.Y., was registered at the time of the application as being of the female sex. Early on in life Y.Y. became aware of feeling more like a boy than a girl, regardless of anatomical features.

Y.Y. thus applied for authorisation to undergo gender reassignment surgery, but in 2006 it was denied by a domestic court, applying Article 40 of the Civil Code, on the sole ground that Y.Y. was not permanently unable to procreate.

The applicant ultimately obtained authorisation to undergo the operation in 2013, five years and seven months after the first request was denied. The domestic courts then granted the request without considering whether or not the applicant was permanently unable to procreate.

Law – Article 8: The possibility for transsexuals to undergo gender reassignment surgery existed in many member States of the Council of Europe, like the legal recognition of their new sexual identity. In some States the legal recognition of the new gender remained subject to surgical reassignment and/or an incapacity to procreate. In a number of States the sterility or infertility was assessed after the medical or surgical gender reassignment process.

In the present case, it was established that inability to procreate was a requirement that had to be met prior to the process of gender reassignment and was thus a prerequisite for the relevant surgery. The domestic court had relied on that condition in refusing to allow the applicant to undergo the physical change requested, despite the fact that the applicant had already been in a process of gender conversion, as could be seen from the on-going psychological support and masculine social behaviour.

The Court could not understand why the inability to procreate of a person wishing gender reassignment surgery had to be established even before the physical sex change process had begun.

The Government, while defending the conformity of the domestic courts' decisions with the law, argued that neither the legislation in question nor the conditions of its implementation required the applicant to undergo prior medical procedures of sterilisation or hormonal therapy. The Court did not see how, except by undergoing sterilisation, the applicant could have satisfied the requirement of permanent infertility while having the biological capacity to procreate.

In any event, the Court did not find it necessary to rule on the question of the applicant's access to medical treatment which would have enabled him to satisfy that requirement. The Court took the view that, in any event, the principle of respect for the applicant's physical integrity precluded any obligation for him to undergo treatment aimed at such permanent sterilisation.

In the circumstances of the case and having regard to the wording of the applicant's complaint, it sufficed for the Court to observe that the applicant had challenged, before both the domestic courts and this Court, the indication in the legislation that a permanent inability to procreate was a requisite for authorisation to undergo gender reassignment.

That prerequisite did not appear necessary, as the Government had argued, for the protection of the general interest and the interests of the individual, to justify the regulation of gender reassignment operations. Consequently, even supposing that the rejection of the initial request for access to such surgery was based on a relevant ground, it was not based on a sufficient ground. The resulting interference with the applicant's right to respect for his private life could not therefore be considered "necessary" in a democratic society.

The change of approach of the domestic court which, in May 2013, had granted the applicant authorisation to undertake gender reassignment surgery, even though he still had the ability to procreate, supported that finding.

In denying the applicant, for many years, the possibility of undergoing such an operation, the State had thus breached the applicant's right to respect for his private life.

Conclusion: violation (unanimously).

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

(The present case concerns the compatibility with Article 8 of the conditions imposed on a person wishing to change sex. For previous cases, where the Court had been asked to ascertain whether or not restrictions imposed on operated transsexuals on the exercise of their Article 8 rights were justified, see, for example, *Christine Goodwin v. the United Kingdom* [GC], 28957/95, 11 July 2002, Information Note 44; *Van Kück v. Germany*, 35968/97, 12 June 2003, Information Note 54; and *Hämäläinen v. Finland* [GC], 37359/09, 16 July 2014, Information Note 176.)

Disclosure to hospital medical services of patient's HIV positive status: *inadmissible*

Y v. Turkey - 648/10
Decision 17.2.2015 [Section II]

Facts – In February 2008 the applicant was taken to hospital by ambulance in an unconscious state.

The ambulance crew, informed by his family that he was HIV-positive, passed on this information to the hospital staff.

In May 2008 the applicant filed a complaint with the public prosecutor against the medical staff of the hospital working in the emergency and intensive care units. He argued among other things that the information concerning his state of health had breached his right to the secrecy of his private life and had constituted an unlawful disclosure of medical data.

He was unsuccessful in his administrative and judicial complaints.

Law – Article 8: The information concerning the applicant's HIV-positive status fell within his private life, given that it was of a personal and sensitive nature, directly concerning his health.

The applicant had not himself informed the hospital to which he was admitted that he was HIV-positive. His family had informed the ambulance crew, who in turn had told the hospital's medical and administrative staff.

Turkish domestic law guaranteed the right to respect for private life and the confidentiality of medical information, penalising any breach of that principle. Moreover, medical secrecy was not binding on doctors alone, but also more generally anyone who, on account of their position or profession, received information on the health of a patient.

In the circumstances of the present case, having regard to the documents in the file and the applicant's state of unconsciousness when he was admitted to hospital, there was nothing to suggest that the dissemination of the information in question had not been justified by the applicant's strict interest in terms of diagnosis or treatment to be provided, or on needs related to the safety of the hospital staff. Accordingly, the sharing of information concerning the applicant's HIV-positive status between the various members of the medical personnel could not be regarded as breaching his right to respect for his private life. In addition, there was no evidence to show that individuals not involved in his medical care had been informed of his HIV-positive status.

Moreover, the applicant had asked the administrative courts to ensure the confidentiality of the proceedings. It could be seen from the decisions of those courts that they had not ruled on that request. Each of those decisions mentioned the applicant's name. Only the decision of the Administrative Court declining jurisdiction mentioned that he was HIV-positive. But there was nothing to suggest that this decision had been published or publicised or that it had been accessible to the public. Accordingly, the indication of the applicant's HIV-positive status in that decision alone could not in itself be capable of breaching his right to respect for his private life.

Conclusion: inadmissible (manifestly ill-founded).

Respect for family life

Annulment of adoption order, 31 years after its issue and at the request of the adoptee's sister: *violation*

Zaieț v. Romania - 44958/05
Judgment 24.3.2015 [Section III]

Facts – The applicant was adopted at the age of 17. Her adoptive mother had another adopted daughter. Following the death of the mother, in 2003 the two sisters were jointly granted title to land which had previously been unlawfully expropriated from their family. Pursuant to an action brought by the applicant's sister, in 2004 a county court declared the applicant's adoption null and void. This decision was upheld on appeal in 2005.

Law – Article 8: The annulment of the adoption order, 31 years after it had been issued and 18 years after the death of her adoptive mother, amounted to an interference with the applicant's right to respect for her family life. According to the law in force at the material time, after an adoptee obtained full legal capacity, only he or she could seek annulment of the adoption. However, the appeal court did not raise this objection during the proceedings. It was thus doubtful whether the measure applied by the authorities had been in accordance with the law. Moreover, the annulment of the applicant's adoption did not serve the interests of either the adopted child or the adoptive mother. The main consequence of the annulment was the disruption of the applicant's family tie with her already deceased mother and the loss of her inheritance rights to the benefit of her sister. Taking into account that the annulment proceedings had been brought by the latter in order to keep the inherited land for herself, it was doubtful whether the impugned decisions pursued a legitimate aim.

As to whether the measure had been necessary in a democratic society, the Court recalled that where the existence of a family tie had been established the State must in principle enable it to be maintained. Splitting up a family was an interference of

a very serious order and had to be supported by sufficiently sound and weighty considerations, not only in the interests of the child but also with respect to legal certainty.

In the present case, the domestic courts had annulled the applicant's adoption on the ground that its only aim had been the furtherance of the patrimonial interests of the adoptive mother and the applicant, not to ensure a better life for the applicant. However, the legal provisions governing adoption were primarily aimed at benefiting and protecting children. In this context, the annulment of an adoption was not envisaged as a measure against the adopted child and could not be interpreted in the sense of disinheriting an adopted child. Moreover, under the domestic law only the adopted child could challenge the validity of the adoption after obtaining full legal capacity. If subsequent evidence revealed that a final adoption order was based on fraudulent or misleading evidence, the interests of the child should remain paramount in establishing a process to deal with any damage caused to the adoptive parent as a result of the wrongful order. Therefore, the domestic courts' decision had not been supported by relevant and sufficient reasons justifying such interference with the applicant's family life.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 1 of Protocol No. 1.

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

ARTICLE 13

Effective remedy

Absence of suspensive effect of application to Aliens Appeals Board for judicial review of deportation order or of refusal of leave to remain: *struck out following friendly settlement*

S.J. v. Belgium - 70055/10
Judgment (striking out) 19.3.2015 [GC]

(See Article 37 below, page 17)

Ineffective remedies against poor detention conditions: *violation*

Varga and Others v. Hungary - 14097/12 et al.
Judgment 10.3.2015 [Section II]

(See Article 46 below, page 18)

ARTICLE 34

Locus standi

Standing of non-governmental organisation to lodge an application on behalf of deceased mentally-ill detainee

Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania - 2959/11
Judgment 24.3.2015 [Section III]

Facts – The application was lodged by an NGO named the Association for the Defence of Human Rights in Romania – Helsinki Committee, on behalf of a prisoner Mr Garcea, who died in 2007.

While serving a seven-year sentence, Mr Garcea was diagnosed with a mental illness and other health problems and was under regular supervision of the prison medical service. He had been in contact with the applicant association since the beginning of his prison term. In August 2004 he inserted a nail into his forehead and in early 2005 attempted suicide. Mr Garcea alleged that he was beaten up on several occasions and handcuffed and chained to a hospital bed. The applicant association lodged complaints with the domestic authorities after visiting him, stating that the lack of medical treatment amounted to torture and urging the prison authorities to stop using force against him. In June 2007 Mr Garcea inserted another nail into his forehead and was operated on in a civilian hospital. After his final return to the prison hospital he died there in July 2007.

The applicant association lodged an administrative complaint with the prison administration requesting an investigation into Mr Garcea's medical treatment. The prosecutor's office decided not to prosecute the prison doctors. Concerning the allegations of ill-treatment through improper medical care a court of appeal ordered that the investigation be continued in February 2011 after finding that the conditions that had precipitated Mr Garcea's death had to be established.

Law – Article 34: The Government submitted that the applicant association did not have *locus standi* as it did not fulfil the *ratione personae* criteria and was not able to show a strong link with Mr Garcea. The Court recalled its recent judgment in the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* in which it had established that in exceptional circumstances and in cases of allegations of a serious nature, it should be open

to associations to represent victims, in the absence of a power of attorney and notwithstanding that the victim may have died before the application was lodged under the Convention. As in that case, serious allegations of violations of Articles 2, 3 and 13 of the Convention had been made in respect of a person with no known relatives and suffering from mental illness. Even though, unlike Mr Câmpeanu, Mr Garcea could have lodged a complaint during his lifetime and had a relatively close connection with the association that represented him, the Court nevertheless considered that the applicant association had standing as his *de facto* representative.

Conclusion: preliminary objection dismissed (unanimously).

Article 2 (*procedural aspect*): The Court was called upon to determine whether the national authorities had fulfilled their obligation to conduct an effective investigation into Mr Garcea's death. The pending domestic proceedings had already lasted for more than seven years. Furthermore, the court of appeal had found that the investigation had not been thorough since essential questions had not been answered by the prosecutor. The prosecutor's office itself had failed to deal with the complaint of ill-treatment in detention lodged by the applicant association. The ineffectiveness of the investigation and the time it had taken the authorities to establish the circumstances of Mr Garcea's death thus amounted to a procedural breach of Article 2.

Conclusion: violation (unanimously).

The Court found no violation under the substantive aspect of Article 2 owing to a lack of medical evidence establishing the responsibility of the State "beyond reasonable doubt".

Article 41: no claim made in respect of damage.

ARTICLE 37

Striking out applications

Application concerning absence of suspensive effect of application for judicial review of deportation order or of refusal of leave to remain: *struck out following friendly settlement*

S.J. v. Belgium - 70055/10
Judgment (striking out) 19.3.2015 [GC]

Facts – On 30 July 2007, when the applicant, a Nigerian national, was eight months pregnant, she lodged an application for asylum in which she stated that she had fled her country after the family of the child's father had tried to put pressure on her to have an abortion. In May 2010 the Commissioner General for Refugees and Stateless Persons rejected the asylum application because of inconsistencies in the applicant's account. That decision was upheld by the Aliens Appeals Board.

The applicant was diagnosed as HIV positive in August 2007 and has been undergoing treatment since that time.

In the meantime the applicant lodged an application for leave to remain on medical grounds which was rejected on the basis that she could be treated in Nigeria. An order to leave the country was served on her. The applicant lodged a request under the extremely urgent procedure for a stay of execution of the measure, together with an application to set aside the decisions in question. The request for a stay of execution was rejected by the Aliens Appeals Board. The applicant lodged an appeal on points of law with the *Conseil d'État* against the judgment of the Aliens Appeals Board, alleging that the risk of serious and irreversible harm in the event of her return to Nigeria, and the presence of her two young children – born in April 2009 and November 2012 – had not been specifically taken into consideration, and that appeals to the Aliens Appeals Board were ineffective. On 24 December 2010 the time-limit for leaving the country was extended by the Aliens Office for one month. On 6 January 2011 the *Conseil d'État* declared the appeal against the Aliens Appeals Board judgment inadmissible. According to the information in the file, the application to set aside the decisions of the Aliens Office is still pending before the Aliens Appeals Board.

In a judgment of 27 February 2014 a Chamber of the Court held unanimously that there had been a violation of Article 13 taken in conjunction with Article 3, as the applicant had not had an effective remedy in the sense of one which had automatic suspensive effect and by which she could obtain an effective review of her arguments alleging a violation of Article 3 of the Convention, given that applications to the Aliens Appeal Board to set aside an order to leave the country or a refusal of leave to remain did not suspend enforcement of the removal order. The Chamber further held by a majority that enforcement of the decision to deport the applicant to Nigeria would not entail a violation of Article 3. It held unanimously that, even supposing that the Court had jurisdiction to examine

the complaint of a violation of Article 8, there had been no violation of that provision.

On 7 July 2014 the case was referred to the Grand Chamber at the request of the Government and the applicant.

Law – Article 37: In August 2014 the Court received a proposal for a friendly settlement from the Government, in which the latter stressed the strong humanitarian considerations weighing in favour of regularising the applicant's residence status and that of her children.

In September 2014 the applicant decided to accept the proposal made by the Belgian State, subject to three conditions: that she and her three children be granted unconditional and indefinite leave to remain, that she be awarded compensation in an amount of EUR 7,000 in respect of the pecuniary and non-pecuniary damage she had sustained, and that the residence permit be issued to her in person. The Government informed the Court that they agreed to the conditions stipulated by the applicant, and on 6 January 2015 the applicant and her children were issued with residence permits granting them indefinite leave to remain.

The Court further considered that the settlement was based on respect for human rights as defined in the Convention and its Protocols.

Conclusion: struck out (sixteen votes to one).

ARTICLE 46

Pilot judgment – General measures

Respondent State required to provide time frame for implementation of preventive and compensatory remedies in respect of inadequate detention conditions

Varga and Others v. Hungary - 14097/12 et al.
Judgment 10.3.2015 [Section II]

Facts – The applicants were current or former detainees who had spent part of their detention in cells allowing them less than 3 square metres of living space, in which the lavatory was separated from the living area only by a curtain and the living quarters were infested with insects and had no adequate ventilation or sleeping facilities. They also had very limited access to the shower and could spend little time outside their cells.

Law – Article 13 read in conjunction with Article 3: The Government suggested two remedies the applicants could have used in respect to the conditions of detention: a civil action in damages for the violation of personality rights and a complaint to the governor of the penitentiary and the public prosecutor. However, in the Court's view neither of these legal avenues satisfied the requirements of an effective remedy. The first, though accessible, was ineffective in practice, in that it did not afford plaintiffs adequate compensation for periods of detention spent in poor conditions. As to the second, its capacity to produce a preventive effect had not been convincingly demonstrated in practice.

Conclusion: violation (unanimously).

Article 3: The problem of overcrowding affecting the prisons where the applicants were or had been held had previously been recognised by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and had not been disputed by the Government. The Court found that several aspects of the applicants' detention, such as poor hygiene and lack of privacy, combined with the lack of personal space due to overcrowding, showed that the conditions of detention went beyond the threshold tolerated by Article 3. Moreover, in the case of the fourth applicant the lack of space was so severe as to constitute in itself treatment contrary to the Convention.

Conclusion: violation (unanimously).

Article 46: Taking into account the recurrent and persistent nature of the problem of detention conditions in Hungary, which had already been condemned by the Court in several cases,[1] the large number of people it had affected or was capable of affecting and the urgent need to grant them speedy and appropriate redress at the domestic level, the Court considered it appropriate to apply the pilot-judgment procedure.

The respondent Government were therefore encouraged to promptly provide an effective remedy or a combination of remedies, both preventive and compensatory in nature and guaranteeing genuinely effective redress for Convention violations originating in prison overcrowding.

While recalling the general and individual measures already indicated in previous cases, the Court

1. *Szél v. Hungary*, 30221/06, 7 June 2011; *István Gábor Kovács v. Hungary*, 15707/10, 17 January 2012; *Hagyó v. Hungary*, 52624/10, 23 April 2013; and *Fehér v. Hungary*, 69095/10, 2 July 2013.

stressed that the most appropriate solution for the problem of overcrowding would be the reduction of the number of prisoners by more frequent use of non-custodial punitive measures and minimising recourse to pre-trial detention. To this end, the Court pointed to the recommendations of the Committee of Ministers inviting States to encourage prosecutors and judges to use as widely as possible alternatives to detention and redirect their criminal policy towards the reduced use of imprisonment. As to the specific options for preventive and compensatory remedies, a reduced prison sentence offered adequate redress to poor material conditions of detention, provided that the reduction was carried out in an express and measurable way.

While no specific time-limit for implementing the proposed suggestions was set, the Government were urged to act as soon as possible and to produce a time frame presenting the remedies within six months from the date the judgment became final. It was not appropriate to adjourn the examination of similar cases pending the implementation of relevant measures.

Article 41: awards ranging from EUR 3,400 to 26,000 to each applicant in respect of non-pecuniary damage.

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

Execution of judgment – General measures

Respondent State required to identify and take general measures to improve effectiveness of criminal investigations into allegations of rape and assault

S.Z. v. Bulgaria - 29263/12
Judgment 3.3.2015 [Section IV]

(See Article 3 above, page 8)

COURT NEWS

Brussels Conference 2015

At the High-level Conference meeting in Brussels on 26 and 27 March 2015 the 47 member States of the Council of Europe reaffirmed their support to the European Convention on Human Rights and approved a series of measures to improve the implementation of the judgments of the Court.

Government representatives unanimously adopted the Brussels Declaration, together with an accompanying Action Plan.

The Declaration welcomes the results of the ECHR reform process so far, notably the huge drop in cases pending before the Court, but adds that additional measures are now needed to deal with challenges including repetitive applications resulting from the non-execution of judgments.

The Action Plan subsequently outlines a number of steps to be taken by the Council of Europe, the European Court of Human Rights and national authorities to help ensure that judgments from the Court are quickly and effectively put into practice.

Best practice examples of support for the Court's case-law information activities

Over recent years the Court has developed a network of partners which assist in different ways in disseminating information relating to its case-law. This new section of the Information Note will present examples of such support which in turn may inspire partners in other parts of Europe to take similar action. Should your organisation wish to contribute to this section please contact: <publishing@echr.coe.int>. The Editorial Board reserves the right to refuse or edit contributions.

• *The German Foundation for International Legal Cooperation (IRZ) supporting translations and dissemination of the Court's publications*

The IRZ (Deutsche Stiftung für internationale rechtliche Zusammenarbeit e.V. – <http://irz.de/index.php/en/>) was founded in 1992 to assist transition countries in Europe with reform of their respective legal systems. Since 2000, the IRZ has been actively operating in the successor States of the former Yugoslavia, via funding allocated by the German Federal Foreign Office from the German contribution to the Stability Pact for South-Eastern Europe. IRZ activities include providing consultation services relating to law-making procedures, supporting the training and education of lawyers and legal practitioners and producing specialist publications in the countries' own national languages. A prime focus of the IRZ in this region has been the promotion of human rights, in particular dissemination of knowledge about the Court and the Convention through training events for prospective lawyers and legal practitioners, but also through manuals and dedicated coverage in

specialised legal journals published in the region (see, for example, <www.antidiskriminacija.info> and <www.evropskopravo.info>). Topics relating to the Convention also appear regularly in the *New legal review magazine for regional, German and European law* (available at <http://pravosudje.ba/vstv/faces/vijesti.jsp?id=34307>).

As part of the cooperation between IRZ and the Court on promoting public awareness of Convention standards IRZ translates various Court publications into national languages, which are then made available on the Court's website (<www.echr.coe.int>) but are also distributed in print regionally. These activities are accompanied by awareness-raising conferences, hosted in cooperation with key local organisations such as national academies of judges, bar associations and the ombudsman's office (see, for example, <http://irz.de/index.php/en/macedonia>).

Publications so far translated and published by the IRZ include the Macedonian version of the Admissibility Guide; the Bosnian (pending), Croatian (update – pending) and Serbian versions of the Handbook on European non-discrimination law (refer here also to a brief report at <http://irz.de/index.php/en/serbia>); the Macedonian version of the Guide on Article 5 of the Convention; and the Macedonian version of the research report on positive obligations under Article 10 of the Convention. Further translations are underway, including the Macedonian version of the Handbook on European data protection law.

Contact person at IRZ for the translations mentioned above: Dr. Stefan Pürner, Head of Section, <puerner@irz.de>, tel. +49.228.9.555.103.

RECENT PUBLICATIONS

Case-law research reports

A new research report entitled "National security and case-law of the Court" has just been published in French only on the Court's Internet site (<www.echr.coe.int> – Case-Law). Translation into English is pending.

Handbook on European law relating to asylum, borders and immigration: new translations

Published jointly by the Court and the European Union Agency for Fundamental Rights (FRA), this second handbook focuses on law covering the situation of third-country nationals in Europe and covers a broad range of topics, including access to asylum procedures, forced returns, detention and restrictions to freedom of movement

Seven new translations of this handbook are now available: Czech, Estonian, Latvian, Lithuanian, Slovakian, Slovenian, and Swedish. The Handbook can be downloaded from the Court's Internet site (<www.echr.coe.int>).

Příručka o evropských právních předpisech v oblasti azylu, hranic a přistěhovalectví (cze)

Euroopa varjupaiga-, piiri- ja sisserändeõiguse käsiraamat (est)

Rokasgrāmata par Eiropas tiesībām patvēruma, robežu un imigrācijas jomā (lav)

Europos prieglobsčio, sienų ir imigracijos teisės vadovas (lit)

Príručka o európskom práve v oblasti azylu, hraníc a imigrácie (slo)

Priročnik o evropski zakonodaji v zvezi z azilom, mejami in priseljevanjem (slv)

Handbok om europeisk rätt rörande asyl, gränser och invandring (swe)