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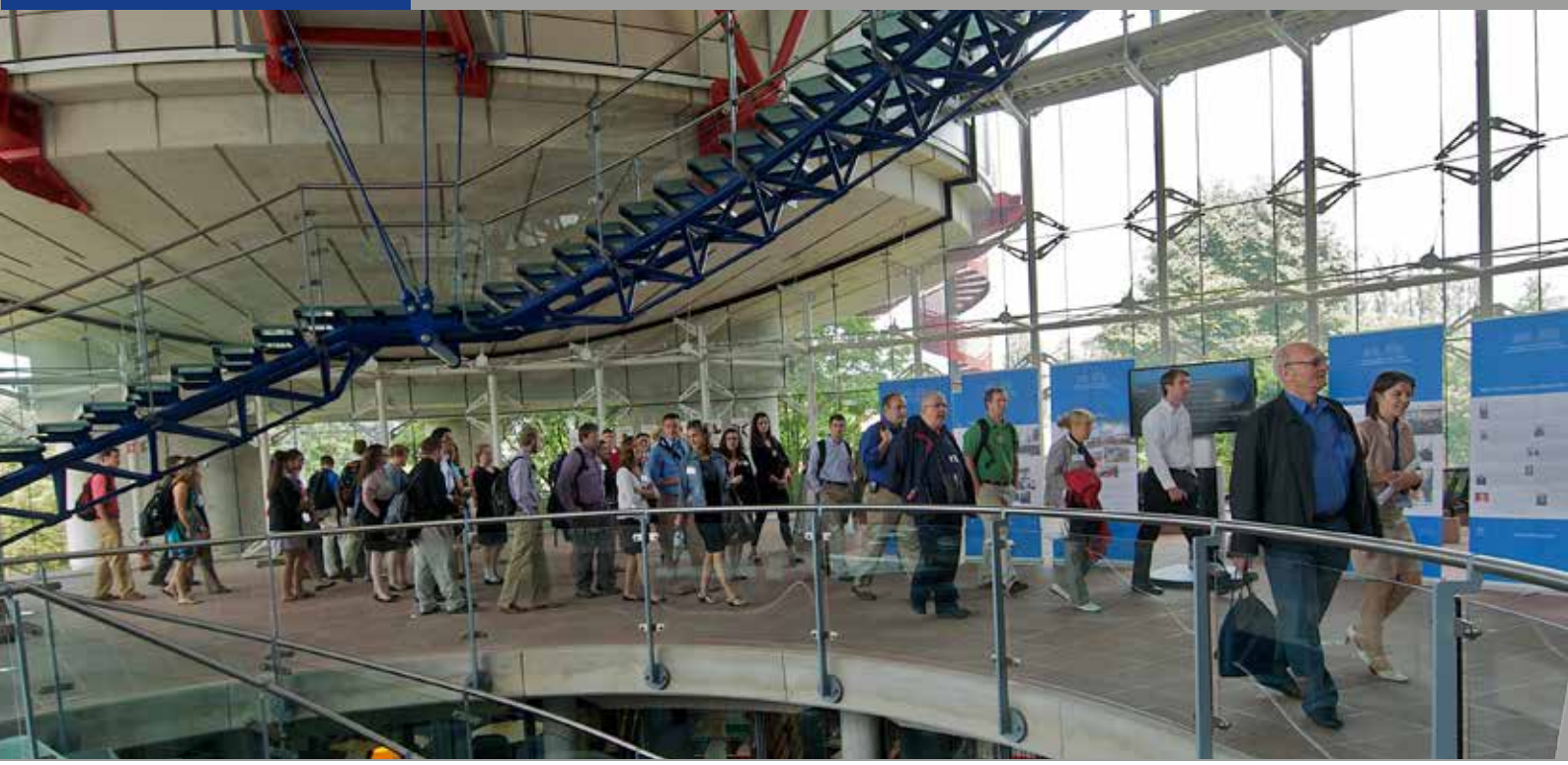

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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Failure to assess risk to life in time in domestic-violence case: *violation*

Talpis v. Italy, 41237/14, judgment 2.3.2017 [Section I]

Facts – In June and August 2012 the police were called out twice to the applicant's home to deal with instances of domestic violence. Her husband was fined for unauthorised possession of a lethal weapon and a knife was seized. The applicant left the matrimonial home and was provided with accommodation by an association. On 5 September 2012 she lodged a criminal complaint for bodily injury, ill-treatment and threats of violence, and requested emergency protection measures.

During her first police interview in April 2013 the applicant altered her statements: she stated that she had been struck but not threatened and that she had since returned to the matrimonial home. In the light of those changes, which the applicant explained on pressure exerted by her husband, the investigation was partly discontinued (in respect of her complaint of ill-treatment and threats of violence) but continued in respect of her complaint of bodily injury (the husband was convicted in October 2015 and ordered to pay a fine).

On 25 November 2013 the police were called out for the third time. A door had been broken down and the floor was strewn with bottles of alcohol, but neither the applicant nor the couple's son showed any traces of violence: the applicant merely stated that her husband had been drinking and needed a doctor, adding that she had lodged a complaint against him in the past but had since changed her allegations. The husband was taken to hospital. The same night he was fined for public drunkenness. He subsequently returned home armed with a kitchen knife, with which he stabbed the applicant several times. Their son had been killed while attempting to stop the attack.

In January 2015 the applicant's husband was sentenced to life imprisonment: in addition to murder and attempted murder, he was found guilty of ill-treatment after witnesses attested to previous acts of violence.

Law

Article 2: The State has a positive obligation to take preventive operational measures to protect an individual whose life is at risk. The existence of a real and immediate threat to life must be assessed with due regard to the specific context of domestic violence: the aim must not be only to protect society in general, but consideration must also be given to the occurrence of successive episodes of violence over time within the family unit. The national authorities should have had regard to the applicant's situation of great mental, physical and material insecurity and vulnerability and assessed the situation accordingly, providing her with appropriate support. In such a context the assailant's rights cannot prevail over the victims' rights to life and physical and mental integrity.

In the instant case, even though investigations were instigated against the applicant's husband for the offences of family ill-treatment, bodily injury and threats of violence, no protection order was issued and the applicant was not heard until September 2012, seven months after lodging her complaint.

Such a delay could only serve to deprive the applicant of the immediate protection necessitated by the situation. Although no further physical violence occurred during that period, the Court could not disregard the fact the applicant, who was being harassed by telephone, lived in great fear while staying at the reception centre.

Although it was true that the applicant had changed some of her statements during the police hearing thus causing the authorities to discontinue part of the investigation, the authorities had failed to conduct any assessment of the risks – including the risk of renewed violence – at a time when a prosecution was still under way for bodily injury. The Court therefore rejected the Government's argument that there had been no tangible evidence of an imminent danger to the applicant's life.

The authorities' delays had deprived the complaint of any effectiveness, creating a situation of impunity conducive to the recurrence of the husband's acts of violence, which reached its peak during the tragic night of 25 November 2013.

During that night the police had nevertheless had to intervene twice, firstly when they inspected the devastated apartment, and secondly when they stopped and fined the applicant's husband for public drunkenness. On neither occasion did they

make any particular attempt to provide the applicant with adequate protection consonant with the seriousness of the situation, even though they knew about the violence inflicted on her by her husband.

The Court could not speculate on how things would have turned out had the authorities adopted a different approach. However, the failure to implement reasonable measures that might realistically have changed the course of events or mitigated the damage caused was sufficient to engage the State's responsibility.

Having been in a position to check, in real time, the husband's police record, the security forces should have known that he constituted a real risk to her, the imminent materialisation of which could not be excluded. Accordingly, the authorities had failed to use their powers to take measures which could reasonably have prevented, or at least mitigated, the materialisation of a real risk to the lives of the applicant and her son. By signally lacking in the requisite diligence, the authorities had failed to comply with their positive obligations.

Conclusion: violation (six votes to one).

Article 3: The applicant could be considered as belonging to the category of "vulnerable persons" entitled to State protection, in view, in particular, of the acts of violence which she had suffered in the past. Those violent acts, which had involved both physical injuries and psychological pressure, were sufficiently serious to be classified as ill-treatment within the meaning of Article 3 of the Convention.

Under the terms of the Council of Europe's Convention on preventing and combating violence against women and domestic violence (Istanbul Convention, which was ratified by Italy and came into force in 2014), special diligence is required in dealing with complaints concerning such violence. In that sphere it is incumbent on the national authorities to consider the victim's situation of extreme mental, physical and material insecurity and vulnerability and, with the utmost expedition, to assess the situation accordingly.

The Court had noted under Article 2 that the authorities' failure to take prompt action had voided the applicant's complaint of any effectiveness, creating a situation of impunity conducive to the recurrence of her husband's acts of violence. In the present case there had been no explanation for the following delays: the seven months of official inertia before the instigation of criminal proceedings; and the three years of criminal proceedings for severe bodily injury after the applicant had lodged her complaint. This judicial inertia was utterly incompatible with the requirements of Article 3 of the Convention.

Conclusion: violation (unanimously).

Article 14 read in conjunction with Articles 2 and 3: The Court referred to its case-law on the gender-discrimination aspect of failures by the authorities to protect women against domestic violence.

The extent of the problem in Italy was highlighted by the conclusions of the United Nations Special rapporteur on violence against women, its causes and consequences, following his official visit to Italy in 2012, by those of the Committee established under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW; 49th session, 2010), and also by those of the National Institute of Statistics (ISTAT, 2014).

The applicant presented prima facie evidence in the form of statistical data demonstrating, first of all, that domestic violence primarily affects women and that despite the reforms implemented a large number of women were being murdered by their partners or former partners (femicide), and, secondly, that the socio-cultural attitudes of tolerance of domestic violence persisted. That prima facie evidence distinguished the present case from that of *Rumor v. Italy* (72964/10, 27 May 2014), the circumstances of which were very different.

The Court had noted under Articles 2 and 3 the domestic authorities' failure to provide the applicant with effective protection and the situation of impunity enjoyed by the perpetrator of the acts of violence. By underestimating, through their lack of response, the seriousness of those acts, the Italian authorities had effectively condoned them. The applicant had therefore been a victim of discrimination as a woman.

Conclusion: violation (five votes to two).

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

(See also *Opuz v. Turkey*, 33401/02, 9 June 2009, Information Note 120; *M.G. v. Turkey*, 646/10, 22 March 2016, Information Note 194; *Halime Kılıç v. Turkey*, 63034/11, 28 June 2016, Information Note 198; see also the factsheet on Domestic violence)

Suicide of a mentally ill man voluntarily admitted to State psychiatric hospital for treatment after suicide attempt: *violation*

Fernandes de Oliveira v. Portugal, 78103/14, judgment 28.3.2017 [Section IV]

Facts – The applicant's son had been voluntarily placed in a State psychiatric hospital for treatment following a suicide attempt in early April 2000. On 27 April 2000 he escaped from the hospital premises and jumped in front of a train. He had already been admitted on several occasions to the same hospital due to his mental disability which was aggravated by an addiction to alcohol and drugs. According to his medical records, the hospital was aware of his previous suicide attempts.

Law – Article 2 (*substantive aspect*): Having regard to the applicant's son's clinical history and in particular the fact that he had attempted to commit suicide three weeks earlier, the hospital staff had had reason to expect that he might try to commit suicide again. Moreover, as he had escaped from the hospital premises on previous occasions, another escape attempt with, in the light of his diagnosis, the possibility of a fatal outcome, should have been foreseen.

The Court was aware of the emerging trend to provide treatment under an "open-door" regime to persons with mental disorders. However this kind of treatment could not exempt the State from its obligations to protect mentally ill patients from the risks they pose to themselves. Accordingly, a fair balance had to be struck between the State's obligations under Article 2 of the Convention and the need to provide medical care in an "open door" regime, taking into account the individual needs regarding the special monitoring of suicidal patients. In this balancing exercise, no difference should be made between voluntary and involuntary admissions: in so far as a voluntary in-patient was under the care and supervision of the hospital, the State's obligations should have been the same, as otherwise voluntary in-patients would be deprived of the protection of Article 2.

The hospital checked whether patients were present during meal and medication times. In addition, there was a mechanism in place for when a patient's absence was noted, which consisted in searching for the missing patient on the hospital premises and informing the police and the family. In the present case, the applicant's son had last been seen some time after 4 p.m. but his absence was not observed until around 7 p.m. when he did not show up for dinner. By then he was already dead. The emergency procedure had thus been ineffective in preventing his escape and, ultimately, his suicide. The risk had been exacerbated by the open and unrestricted access from the hospital grounds to the railway platform.

In the light of the positive obligation to take preventive measures to protect an individual whose life is at risk and faced with a mentally ill-patient who had recently attempted to commit suicide and was prone to escaping, the hospital staff should have been expected to adopt safeguards to ensure that he would not leave the premises and to monitor him on a more regular basis.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been a breach of the procedural aspect of Article 2 because the proceedings had lasted in excess of eleven years for two levels of jurisdiction. The domestic legal mechanisms, seen as a whole, had not secured in practice an effective and prompt response on the part of the authorities' consonant with the State's procedural obligations.

Article 41: EUR 703.80 in respect of pecuniary damage; EUR 25,000 in respect of non-pecuniary damage.

(See *Keenan v. the United Kingdom*, 27229/95, 3 April 2001, Information Note 29; and contrast *Hiller v. Austria*, 1967/14, 22 November 2016)

ARTICLE 3

Inhuman or degrading treatment

Ill-treatment of four-year-old boy by teachers in nursery school: *violation*

V.K. v. Russia, 68059/13, judgment 7.3.2017 [Section III]

Facts – The applicant alleged that, at the age of four, he had been ill-treated by teachers when attending nursery school. On several occasions he had been locked in the dark in the toilets and told that he would be eaten by rats, been forced to stand in the lobby in his underwear and with his arms up for prolonged periods and on one occasion had had his mouth and hands taped with sellotape.

Eye drops had been administered by force without consent or a prescription. He was told that if he complained to his parents he would be subjected to further punishment.

In the Convention proceedings, the applicant complained, *inter alia*, that he had been ill-treated by teachers of a public nursery school and that the investigation into his allegations of ill treatment had been ineffective.

Law – Article 3 (*substantive aspect*): The Court found it established to the requisite standard of proof that the nursery school staff had subjected the applicant to the treatment complained of. Given the applicant's extremely young age at the time, the fact that the treatment had continued for several weeks and that many years afterwards he continued to suffer a form of post-traumatic neurological disorder, and given also that the acts were perpetrated by teachers in a position of authority and control, the cumulative effect of the acts of abuse had rendered the treatment sufficiently serious to be considered inhuman and degrading within the meaning of Article 3 of the Convention.

As to whether the State bore responsibility for the ill-treatment, a public or municipal nursery school provided a public service and had very strong institutional and economic links with the State, and its educational and economic independence was considerably limited by State regulation and regular State inspection. Under Russian law a nursery school's liability, and through it the State's liability, was engaged by the acts or omissions of teachers committed while performing their functions. These factors were sufficient to find that, while performing their functions, teachers of public or municipal nursery schools could be regarded as State agents. The applicant had been ill-treated while in the exclusive custody of a public nursery school which, under State supervision, fulfilled the public service of caring for and educating young children in the spirit of respect and protecting their health and well-being. He was ill-treated during school hours by teachers while fulfilling their duty of care for him. The impugned acts were connected to their role as teachers. Consequently, the State bore direct responsibility for the wrongful acts.

The State was thus responsible under Article 3 on account of the inhuman and degrading treatment to which the applicant had been subjected.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of the procedural aspect of Article 3 as delays in the domestic investigation had led to the prosecution of the teachers concerned becoming time-barred.

Article 41: EUR 25,000 in respect of non-pecuniary damage; EUR 3,000 in respect of pecuniary damage.

Conditions in which asylum-seekers were held in airport transit zone: *violation*

Z.A. and Others v. Russia, 61411/15 et al., judgment 28.3.2017 [Section III]

(See Article 5 § 1 below, page 15)

Inhuman treatment, expulsion

Expulsion to Serbia/Conditions of detention in transit zone: *violation; no violation*

Ilias and Ahmed v. Hungary, 47287/15, judgment 14.3.2017 [Section IV]

(See Article 5 § 1 below, page 13)

Positive obligations (procedural aspect)

Delays in mounting adequate response to acts of domestic violence: *violation*

Talpis v. Italy, 41237/14, judgment 2.3.2017 [Section I]

(See Article 2 above, page 7)

Failure to investigate racially motivated act of violence against victim by association: *violation*

Škorjanec v. Croatia, 25536/14, judgment 28.3.2017 [Section II]

Facts – The applicant and her partner, who was of Roma origin, were assaulted by two individuals who uttered anti-Roma insults immediately preceding and during the attack. The applicant was treated as a witness in the criminal case and not as a victim alongside her partner. In the Convention proceedings the applicant alleged a failure by the domestic authorities to effectively discharge their positive obligations in relation to a racially motivated act of violence against her in breach of Articles 3 and 14.

Law – Article 3 (*procedural aspect*) in conjunction with Article 14: The obligation on the authorities to seek a possible link between racist attitudes and a given act of violence, which was part of the

responsibility incumbent on States under Article 3 taken in conjunction with Article 14, concerned not only acts of violence based on a victim's actual or perceived personal status or characteristics but also acts of violence based on a victim's actual or presumed association or affiliation with another person who actually or presumably possessed a particular status or protected characteristic. In such instances, the authorities had to do what was reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that could be indicative of racially induced violence.

Article 3 required the implementation of adequate criminal-law mechanisms once the level of severity of violence inflicted by private individuals attracted protection under that provision. Those principles applied *a fortiori* in cases of violence motivated by racial discrimination. The Court considered that the Croatian legal system provided adequate legal mechanisms to afford an acceptable level of protection to the applicant in the circumstances. However, in this case, the prosecuting authorities had concentrated their investigation and analysis only on the hate-crime element related to the violence attack against the applicant's partner. They had failed to carry out a thorough assessment of the relevant situational factors and the link between the applicant's relationship with her partner and the racist motive for the attack on them. The applicant had made specific allegations of racially motivated violence directed against her in her criminal complaint. The prosecuting authorities' insistence on the fact that she herself was not of Roma origin and their failure to identify whether she was perceived by the attackers as being of Roma origin, as well as their failure to take into account and establish the link between the racist motive for the attack and the applicant's association with her partner had resulted in a deficient assessment of the circumstances of the case. That impaired the adequacy of the domestic authorities' procedural response to the applicant's allegations of a racially motivated act of violence against her to an extent that was irreconcilable with the State's obligation of taking all reasonable steps to unmask the role of racist motives in the incident.

Conclusion: violation (unanimously).

Article 41: EUR 12,500 in respect of non-pecuniary damage.

(See also, *Šečić v. Croatia*, 40116/02, 31 May 2007, Information Note 97; *Abdu v. Bulgaria*, 26827/08, 11 March 2014, Information Note 172; *Balázs v. Hungary*, 5529/12, 20 October 2015; and *R.B. v. Hungary*, 64602/12, 12 April 2016, Information Note 195)

ARTICLE 4

Trafficking in human beings, forced labour, positive obligations

Inadequate response to human-trafficking through exploitation of vulnerability of unauthorised migrant workers: *violation*

Chowdury and Others v. Greece, 21884/15, judgment 30.3.2017 [Section I]

Facts – The applicants are 42 Bangladeshi nationals. With neither work permits nor residence permits for Greece, they were recruited in 2012-13 as seasonal agricultural workers. Having been promised a wage of EUR 22 per day and housed in deplorable conditions, they worked extremely long hours under the supervision of armed foremen.

As strikes had broken out after several months of unpaid wages, the employers responded with threats and recruited new Bangladeshi migrants. On 17 April 2013 one of their guards opened fire on about a hundred workers who were demanding their wages, seriously injuring some of the applicants.

Proceedings were brought against the employers, the guard who had opened fire and a foreman. In addition to a charge of grievous bodily harm, the prosecutor brought the charges of trafficking in human beings (Article 323A of the Criminal Code). One group of applicants (all of whom had been injured) were recognised by the prosecutor's office as victims of human trafficking and took part in the trial.

In July 2014 the Assize Court imposed prison sentences in respect of grievous bodily harm but dismissed the trafficking charge on the grounds that the applicants had signed up willingly and without losing the freedom of movement enabling them to leave the employer. The public prosecutor at the Court of Cassation refused to lodge an appeal on points of law.

The other group of applicants (those who had not been injured) were not involved in the proceedings before the Assize Court. In May 2013 they had also lodged a complaint, requesting that they too be recognised as victims of trafficking. In August 2014 the prosecutor refused to institute proceedings, on the grounds that the applicants' delay in coming forward cast doubt on the reality of their presence at the time of the events.

The applicants, who considered that they had been subjected to forced or compulsory labour, alleged before the European Court that the authorities had failed to react.

Law – Article 4 § 2

(a) *Applicability* – The concept of trafficking was not limited to sexual exploitation. Exploitation through labour was one of the forms of exploitation targeted by the definition of trafficking in human beings set out in Article 4 (a) of the Council of Europe Convention on Action against Trafficking in Human Beings (Anti-Trafficking Convention), which highlighted the intrinsic relationship between forced or compulsory labour and trafficking in human beings. The same idea came through clearly in the article of the Criminal Code that had been applied in this case.

The victim's prior consent was insufficient to preclude employment being classified as "forced labour". Where an employer abused his or her power or took advantage of workers' situation of vulnerability in order to exploit them, the latter were not offering their labour voluntarily. The question of whether an individual offered his or her labour voluntarily was a factual one, which had to be examined in the light of all the relevant circumstances of a case.

In the present case, the applicants had begun working while they were in a vulnerable situation, as illegal immigrants without resources who ran the risk of being arrested, detained and deported. They undoubtedly realised that if they stopped working they would never receive their salary arrears, which were accumulating on a daily basis.

Even supposing that when they were recruited the applicants had offered their labour voluntarily and had believed in all good faith that they would be paid their wages, the conduct of their employers (threats and violence, especially in response to requests for payment of wages) showed that the situation had subsequently changed.

Thus, while the applicants were not in a situation of servitude, their working conditions clearly allowed for the conclusion that their situation amounted to forced labour and human trafficking, as defined by Article 3 (a) of the Additional Protocol to the United Nations Convention against Transnational Organized Crime (Palermo Protocol) and Article 4 of the Anti-Trafficking Convention.

Conclusion: Article 4 applicable (unanimously).

(b) *Compliance with obligations* – The grounds set out below led the Court to conclude that the respondent State had not fulfilled its positive obligations with regard to human trafficking (to prevent trafficking, protect the victims, carry out an effective investigation and punish those responsible).

The Court drew on the Anti-Trafficking Convention and the manner in which it had been interpreted by the Group of experts on action against trafficking in human beings (GRETA).

(i) *Creation of an appropriate legal and regulatory framework* – This obligation had essentially been met. In particular, Greece had ratified or signed, well before the events giving rise to the present case, the main international instruments (including the Palermo Protocol of December 2000 and the Anti-Trafficking Convention of 16 May 2005) and had transposed the relevant European Union law into the Criminal Code and the Code of Criminal Procedure, with regard both to the punitive aspect and to the protection of victims.

(ii) *Operational measures* – The Anti-Trafficking Convention recommended both preventive measures (strengthening coordination at national level between the various bodies responsible for anti-trafficking and discouraging demand, including through border controls) and protection measures (facilitating identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery).

In the present case, this obligation had not been met: although the authorities had long been aware of the local situation (a report by the Ombudsman had drawn attention to the situation as far back as 2008), their reaction had been on an *ad hoc* basis and no general solution had been provided on the ground.

(iii) *Effectiveness of the investigation and judicial proceedings* – In cases involving exploitation, the

prosecuting and judicial authorities were required to draw – as a matter of urgency and of their own motion, as soon as the situation came to their notice – all the logical consequences from the application of the relevant criminal-law texts, to the extent permitted by their respective powers.

In the present case, the following grounds led to the conclusion that these obligations had not been fulfilled.

(α) *With regard to the applicants who had not taken part in the proceedings before the Assize Court* – As soon as he had factual information indicating that these applicants had been recruited by the same employers and were working in the same conditions as the group of applicants who participated in the proceedings before the Assize Court, the prosecutor had had a duty to investigate their allegations of human trafficking and forced labour. Yet there was nothing in the decision dismissing the complaint to suggest that the prosecutor had genuinely examined this aspect.

In attaching importance to the fact that these individuals had delayed in reporting the matter to the police, the prosecutor had failed to comply with Article 13 of the Anti-Trafficking Convention, which specifically provided for a "recovery and reflection period" of at least 30 days, so that the person concerned could have the time to escape the influence of the traffickers and take an informed decision on cooperation with the authorities.

It was therefore appropriate to dismiss the objection that this group did not have "victim" status and conclude that there had not been an effective investigation.

(β) *With regard to the applicants who had taken part in the proceedings before the Assize Court*

Punitive aspect – The defendants charged with "trafficking in human beings" had been acquitted on the basis of a narrow interpretation which seemed to confuse trafficking with servitude. However, the restriction on freedom of movement, which affected not so much the provision of one's labour as such but rather certain aspects of the victim's life, was not a condition *sine qua non* for classifying a situation as forced labour or even human trafficking.

The public prosecutor at the Court of Cassation had subsequently refused, without providing any reasons, to lodge an appeal against the acquittal judgment.

Furthermore, even with regard to the charge of grievous bodily harm, the prison sentence initially imposed had been commuted to a pecuniary sanction of EUR 5 per day of detention.

Compensatory aspect – Article 15 of the Anti-Trafficking Convention required the Contracting States to provide in their domestic legislation for the right of victims to obtain compensation from the persons who had committed the offence and to take measures to set up a compensation fund.

In the present case, however, even with regard to serious bodily harm, the civil compensation fixed by the Assize Court had not exceeded EUR 43 per injured worker.

Conclusion: violation (unanimously).

Article 41: The difficulty in assessing the pecuniary damage sustained as a result of the unpaid wages and the Assize Court's decision led the Court, ruling on an equitable basis, to award a global sum covering both pecuniary and non-pecuniary damage: EUR 16,000 to each of the applicants who had taken part in the proceedings before the Assize Court and EUR 12,000 to each of the others, in respect of all the damage sustained.

(See the factsheets on Trafficking in Human Beings and Slavery, servitude and forced labour)

ARTICLE 5

ARTICLE 5 § 1

Deprivation of liberty

Twenty-three days' *de facto* confinement in transit zone: *violation*

Ilias and Ahmed v. Hungary, 47287/15, judgment 14.3.2017 [Section IV]

Facts – The applicants, Bangladeshi nationals, arrived in the transit zone situated on the border between Hungary and Serbia and submitted applications for asylum. Their applications were rejected and they were escorted back to Serbia. In the Convention proceedings, they complained *inter alia* that their deprivation of liberty in the transit zone had been unlawful, that the conditions of their allegedly unlawful detention had been inadequate and that their expulsion to Serbia had exposed them to a real risk of inhuman and degrading treatment.

Law – Article 3

(a) *Conditions of detention in the transit zone* – The applicants had been confined to an enclosed area of some 110 square metres for 23 days. Adjacent to that area they had been provided with a room in one of several dedicated containers. The room contained five beds but at the material time the applicants were the only occupants. In its Report to the Hungarian Government the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) had found that the sanitary facilities provided did not call for any particular comment and had gained a generally favourable impression of the health-care facilities. The applicants were no more vulnerable than any other adult asylum-seeker detained at the time. It was true that there were no proper legal grounds for their confinement; and the lack of legal basis for their deprivation of liberty could have contributed to the feeling of inferiority prevailing in the impugned conditions but in view of the satisfactory material conditions and the relatively short time involved, the treatment complained of did not reach the minimum level of severity necessary to constitute inhuman treatment.

Conclusion: no violation (unanimously).

(b) *Expulsion to Serbia* – The Hungarian authorities had relied on a schematic reference to the Government's list of safe third countries. They had disregarded country reports and other evidence submitted by the applicants and imposed an unfair and excessive burden of proof. Owing to a mistake, the first applicant had been interviewed with the assistance of an interpreter in Dari, a language he did not speak, and the asylum authority had provided him with an information leaflet on asylum proceedings that was also in Dari. As a consequence, his chances of actively participating in the proceedings and explaining the details of his flight from his country of origin were extremely limited. The applicants were illiterate, nonetheless all the information they received on the asylum proceedings was contained in a leaflet. It thus appeared that the authorities had failed to provide the applicants with sufficient information on the procedure. A translation of the decision in their case was given to their lawyer two months after the relevant decision had been taken, at a time when they had already left Hungary. The applicants had not had the benefit of effective guarantees which would have protected them from exposure to a real risk of being subjected to inhuman or degrading treatment in breach of Article 3 of the Convention.

Conclusion: violation (unanimously).

Article 5 § 1

(a) *Admissibility* – The Court had to determine whether the placing of the applicants in the transit zone constituted a deprivation of liberty within the meaning of Article 5 § 1. In order to determine whether someone had been deprived of his liberty, the starting-point had to be his specific situation and account had to be taken of a whole range of factors. The notion of deprivation of liberty contained both objective and subjective elements. The objective element included the type, duration and effects, and manner of implementation of the measure in question, the possibility to leave the restricted area, the degree of supervision and control over the person's movements and the extent of isolation. The subjective element included whether the person had validly consented to the confinement in question. The difference between deprivation and restriction upon liberty was one of degree or intensity, and not of nature and substance. The mere fact that it was possible for the applicants to leave the transit zone voluntarily could not rule out an infringement of the right to liberty.

The applicants had been confined for over three weeks. They were confined in a guarded compound which could not be accessed from the outside. They did not have the opportunity to enter Hungarian territory beyond the zone. Accordingly, the applicants had not chosen to stay in the transit zone and thus could not be said to have validly consented to being deprived of their liberty. If the applicants had left Hungarian territory, their applications for refugee status would have been terminated without any chance of being examined on the merits. As such, their confinement to the transit zone amounted to a *de facto* deprivation of liberty.

(b) *Merits* – The first limb of Article 5 § 1 (f) permitted the detention of an asylum-seeker or other immigrant prior to the State's grant of authorisation to enter. Such detention had to be compatible with the overall purpose of Article 5, which was to safeguard the right to liberty and ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion. To avoid being branded as arbitrary, detention under Article 5 § 1 (f) had to be carried out in good faith; it had to be closely

connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention had to be appropriate, bearing in mind that the measure was applicable not to those who had committed criminal offences but to aliens who, often fearing for their lives, had fled their own country; and the length of such detention should not exceed that reasonably required for the purpose pursued.

The applicants' detention in the transit zone had lasted for 23 days. The relevant rules were not circumscribed with sufficient provision and foreseeability. The applicants' detention apparently occurred *de facto*, as a matter of practical arrangement. The applicants had been deprived of their liberty without any formal decision of the authorities solely by virtue of an elastically interpreted general provision of the law – a procedure which fell short of the requirements enounced in the Court's case-law.

Conclusion: violation (unanimously).

The Court also found, unanimously, violations of Article 5 § 4 and Article 13 taken together with Article 3.

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

(See also below *Z.A. and Others v. Russia*, 61411/15 et al., 28 March 2017, Information Note 205)

Detention on the basis of a decision rendered by the Republic of Serbian Krajina: *violation*

Mitrović v. Serbia, 52142/12, judgment 21.3.2017 [Section III]

Facts – In 1994 the applicant was sentenced to 8 years' imprisonment for murder by a court under the control of the Republic of Serbian Krajina, an internationally unrecognised self-proclaimed entity established on the territory of the Republic of Croatia during the wars in the former Yugoslavia. The entity ceased to exist in 1995 and has never been recognised as a State by Serbia. The applicant complained that his detention in a Serbian prison on the basis of that judgment violated Article 5.

Law – Article 5 § 1: The applicant had been convicted of murder by a court which operated outside the Serbian judicial system. He had then been transferred to a Serbian prison to serve his sentence. The Serbian authorities had not conducted proceedings for the recognition of a foreign decision as required by domestic law. Given that the applicant was detained on the basis of a non-domestic decision which had not been recognised domestically, and in the absence of any other basis in domestic law for the detention, the requirement of lawfulness contained in Article 5 § 1 was not met.

Conclusion: violation (unanimously).

Article 41: No claim made in respect of damage.

Asylum-seekers held for lengthy periods in airport transit zone: *Article 5 applicable; violation*

Z.A. and Others v. Russia, 61411/15 et al., judgment 28.3.2017 [Section III]

Facts – The four applicants, who were asylum-seekers, were held in the international transit zone of Sheremetyevo Airport in Russia for periods ranging from five months to one year and ten months after being refused entry into Russia. They had to sleep on a mattress on the floor in the boarding area of the airport, which was constantly lit, crowded and noisy, and were sustained on emergency rations provided by the Russian office of UNHCR. There were no showers. In the Convention proceedings, they complained that they had been unlawfully deprived of their liberty (Article 5 § 1 of the Convention) and of the conditions in which they were held.

Law – Article 5 § 1: Holding aliens in an international zone of an airport involves a restriction on liberty which is not in every respect comparable to that which obtains in detention centres. However, such confinement is acceptable only if it is accompanied by safeguards for the persons concerned and is not prolonged excessively. Otherwise, a mere restriction on liberty is turned into a deprivation of liberty. Account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country. The mere fact that it was possible for the applicants to leave Russia voluntarily could not rule out an infringement of the right to liberty.

The Court rejected the Russian Government's contention that the applicants were not within Russian "jurisdiction" as the international transit was not the territory of the Russian Federation. Even assuming

the applicants were not within Russian territory, holding them in the international transit zone made them subject to Russian law.

On the facts, the applicants, who were asylum-seekers, had remained in the transit zone for considerably lengthy periods (ranging from just over five months to one year and ten months), could not enter Russian territory and did not have the option of entering a State other than that which they had left. Accordingly, they had not chosen to stay in the transit zone and could not be said to have validly consented to being deprived of their liberty. Their confinement in the transit zone thus amounted to a *de facto* deprivation of liberty.

In the absence of any reference by the Government to any provision of Russian law capable of serving as grounds for justifying the applicants' deprivation of liberty, the applicants' lengthy confinement in the transit zone did not have any legal basis in the domestic law. Contrary to the Government's submission, Chapter 5 of Annex 9 to the Convention on International Civil Aviation ("the Chicago Convention"), which concerned "Inadmissible Persons and Deportees", could not serve as a legal basis for a person's detention.

Conclusion: violation (six votes to one).

Article 3: A public space such as the transit zone of an airport, lacking such basic amenities as beds, showers, and areas designated for cooking, was by definition ill equipped to serve as a long-term residence. The Court found it established that while detained in the transit zone the applicants did not have individual beds and did not enjoy access to shower and cooking facilities. In addition, the applicants in the present case endured poor conditions of detention not for days, but for many months in a row. The conditions the applicants were required to endure while being detained for extended periods of time had caused them considerable mental suffering, undermined their dignity, and made them feel humiliated and debased and amounted to inhuman and degrading treatment within the meaning of Article 3.

Conclusion: violation (six votes to one).

Article 41: sums ranging from EUR 15,000 to EUR 26,000 each in respect of non-pecuniary damage.

(See also above *Ilias and Ahmed v. Hungary*, 47287/15, 14 March 2017, Information Note 205)

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Access to court

Excessively formalistic interpretation of procedural rules: *case referred to the Grand Chamber*

Zubac v. Croatia, 40160/12, judgment 11.10.2016 [Section II]

The applicant's late husband was a claimant in civil proceedings. In his statement of claim he gave the value of his claim as 10,000 Croatian Kuna (HRK). During the proceedings he indicated that the value was HRK 105,000 and it was this latter amount that was accepted by the first and second-instance courts. In March 2011 the Supreme Court declared his appeal inadmissible *ratione valoris* considering that, as he had indicated the value of his claim at 10,000 in the statement of claim, the value of the subject-matter in dispute did not reach the statutory threshold of HRK 100,000.

In the Convention proceedings the applicant complained, relying on Article 6 § 1, that her late husband had been deprived of access to the Supreme Court.

In a judgment of 11 October 2016 a Chamber of the Court held, by four votes to three, that there had been a violation of Article 6 § 1. In the Court's view the Supreme Court had interpreted the relevant procedural rules on the value of the subject matter in an excessively formalistic manner thus placing the burden of the lower courts' errors on the applicant and, in doing so, acting contrary to the general principle of procedural fairness inherent in Article 6.

On 6 June 2016 the case was referred to the Grand Chamber at the Government's request.

Access to court, fair hearing

Extension, without valid reason, of time-limit for authorities to appeal: *violation*

Magomedov and Others v. Russia, 33636/09 et al., judgment 28.3.2017 [Section III]

Facts – At first instance the applicants were awarded increases in various allowances and additional benefits to which they were entitled in their capacity as participants in the emergency operations on the site of the Chernobyl nuclear power plant. As the

defendant authorities failed to lodge appeals, the judgments became final ten days after delivery and the execution process began.

The authorities subsequently lodged late appeals, accompanied by applications for leave to appeal out of time. These applications were granted by the domestic courts and the late appeals were accepted.

When the applicants' cases were examined on appeal, the previous judgments, which had been in their favour, were set aside.

Law – Article 6 § 1

(a) *Applications nos. 33636/09, 34493/09, 35940/09, 37441/09 and 38237/09* – The Supreme Court had granted leave to appeal out of time and had accepted the late appeals lodged by the social services on the grounds that the interests of the federal budget were at stake and that no other remedy was by that stage open to them.

With regard to the interests of the federal budget and, more specifically, the failure of the federal funding supervisor to participate in the initial proceedings, the State could not rely on the complexity of its internal organisation to draw consequences that were detrimental only to the applicants.

With regard to the absence of other remedies available to the social services, the delivery of the contested judgments had coincided with the entry into force of a general reform of remedies in Russia, which had introduced an important new requirement, namely the need to use the ordinary appeal process before lodging an application for supervisory review. However, since they had not lodged an appeal, the social services were deprived of access to the supervisory-review procedure, which, prior to 2008, constituted an alternative remedy to an appeal, rather than a consecutive one. It had, however, been open to the social services to anticipate the entry into force of this law with regard to pending proceedings. The risk of any mistake made by a State authority had to be borne by the State, and errors were not to be remedied at the expense of the individual concerned.

Lastly, the Government argued that the setting aside of the final domestic judgments in favour of the applicants had been justified by circumstances of a substantial and compelling character, namely failure to respect the principle of *res judicata*, as judgments had already been delivered on the same question between the same parties. The Court found however that, even supposing that such considerations were relevant to the examination of a case in the context of ordinary appeal proceedings to which, in principle, the granting of leave to appeal out of time gave rise, neither the social services nor the Supreme Court had explained why those arguments could not have been raised before the first-instance courts in the proceedings which had ended with the judgments in favour of the applicants or within the initial time-limit before the contested judgments themselves became final. It was unlikely that the social services had been unaware at that time of the existence of the previous judgments ruling on the method of calculating the same welfare benefits, in which they had themselves been the defendants. Even assuming that the need to correct judicial errors could in principle be a legitimate consideration, this was not to be done in an arbitrary manner and, in any event, the authorities were required to strike, so far as it was possible, a fair balance between the interests of the applicant and the need to ensure the proper administration of justice.

In view of the foregoing, the grant of leave to appeal out of time and the acceptance of the late appeals lodged by the social services had, in the particular circumstances of the case, been in breach of the principle of legal certainty and the applicants' right to a court.

Conclusion: violation (unanimously).

(b) *Applications nos. 28480/13 and 28506/13* – The Ministry of Finance ought to have found out about the existence of the contested judgments by August 2011 at the latest, when it began to make payments pursuant to the judgments, full copies of which had been provided to it in accordance with the Budget Code. Even supposing that the Ministry had had no knowledge of either the first dismissal, in June 2011, of the application for leave to appeal out of time or of the related proceedings as a whole, there was nothing to explain why it had waited more than a year, that is, until 23 October 2012 – date on which the second application for leave to appeal out of time was lodged – to take action. Irrespective of whether or not the State had been duly represented at the contested hearings, it had been its responsibility to be sufficiently, or even especially, diligent, by lodging the application for leave

to appeal out of time as soon as the existence of the contested judgments was discovered, especially if an important public interest was at stake. Yet the domestic courts had not examined this point when granting the applications for leave to appeal out of time. In other words, they had failed to examine whether the entity applying for leave to appeal out of time and submitting a late appeal had discovered the existence of the contested judgment and, in consequence, whether it had acted with sufficient diligence. The fact that nothing in the applicable domestic law at the relevant time indicated that they were required to do so was not such as to dispense them from that obligation from the perspective of the Convention.

In consequence, the granting of leave to appeal out of time and the acceptance of the late appeal had breached the principle of legal certainty and the applicants' right to a court.

Conclusion: violation (unanimously).

Article 41: Finding of a violation sufficient in itself in respect of non-pecuniary damage; claim in respect of pecuniary damage rejected.

(See also *Trapeznikov and Others v. Russia*, 5623/09 et al., 5 April 2016, Information Note 195, and *Samoylenko and Others v. Russia* (dec.), 58068/13 et al., 21 March 2017)

ARTICLE 6 § 1 (CRIMINAL)

Fair hearing

Reasons for conviction given by judges who had not participated in trial: *violation*

Cerovšek and Božičnik v. Slovenia, 68939/12 and 68949/12, judgment 7.3.2017 [Section IV]

Facts – The applicants were tried and convicted of theft by a single judge. The judge retired from the bench after pronouncing her verdict and without giving written reasons. Three years later, two judges, who had not participated in the trial, gave a written judgment based on the case files. The applicants' convictions were upheld on appeal without any direct rehearing of evidence. In the Convention proceedings the applicants complained under Article 6 § 1 that there had been a breach of their right to a fair trial as the reasons for the verdicts against them had not been given by the judge who had reached them.

Law – Article 6 § 1: A reasoned judgment was important to ensure the proper administration of justice and to prevent arbitrariness. A judge's awareness that he or she had to justify his or her decision on objective grounds provided one of the safeguards against arbitrariness. The duty to give reasons also contributed to the confidence of the public and the accused in the decision reached and allowed possible bias on the part of the judge to be discerned. As recognised through the principle of immediacy in criminal proceedings, the judge's observation of the demeanour of the witnesses and the applicants and her assessment of their credibility must have constituted an important, if not decisive, element in the establishment of the facts on which the applicants' convictions were based. She should have addressed her observations in written grounds justifying the verdicts.

As to the question of whether the judge's retirement, which was allegedly the reason for her failure to provide written grounds, gave rise to exceptional circumstances which justified a departure from the standard domestic procedure, the Court considered that the date of her retirement had to have been known to her in advance. It should have been possible therefore to take measures either for her to finish the applicants' case alone or to involve another judge at an earlier stage in the proceedings. The case was not particularly complex and the applicants had given notice of their intention to appeal as soon as the verdict had been pronounced. That meant that the judge had been immediately aware that she would provide written grounds. It was particularly striking that despite a statutory time-limit of thirty days, the written grounds were not provided for about three years after the pronouncement of the verdicts.

The only way to compensate for the judge's inability to produce reasons justifying the applicants' conviction would have been to order a retrial. When the judge had retired the verdicts had already been pronounced and the applicants' statement and witness testimony constituted relevant information. The courts at higher levels of jurisdiction upheld the first-instance court's judgment without directly hearing any of the evidence. It could not therefore be said that the deficiency at issue had been remedied by the appellate courts.

Conclusion: violation (unanimously).

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

ARTICLE 8

Respect for private and family life, positive obligations

Refusal, on grounds that it was in best interests of the children, to recognise biological father's paternity: *no violation*

R.L. and Others v. Denmark, 52629/11, judgment 7.3.2017 [Section II]

Facts – The first and second applicants were a married couple. In 2004 the wife gave birth to a boy, L., and the husband was registered as the father. In 2005 the applicants legally separated but they continued to legally cohabit until June 2006. In October 2006 the wife gave birth to another boy, S. Although the husband no longer lived with her and had had no sexual contact with her since 2004, he submitted a signed declaration to the State Administration, co-signed by the wife, which stated that together they would take care of and be responsible for S. Consequently, the husband was registered as S.'s father.

In October 2008 the wife informed the husband that another man, E., was the biological father of S. and probably also of L.

The applicants then submitted a formal request that both paternity cases be reopened in order to formally establish E.'s fatherhood. The request was refused by the State Administration in a decision that was ultimately upheld by the High Court. Subsequently, the husband took a DNA test which established that he was not the father of either L. or S. The applicants were refused leave to appeal to the Supreme Court.

Law – Article 8: An attempt by a putative father to officially disavow his paternity concerned his private life. Likewise, the private and family lives of the mother and the children were at issue. Article 8 was thus applicable.

The applicants' requests to reopen the paternity cases were refused because the High Court made a concrete assessment that the conditions set out in the Children Act were not fulfilled. The High Court noted that it was not until November 2008, when lodging the proceedings on paternity, that the applicants had informed the authorities that they had not had sexual contact in the fertile period as regards S. Furthermore, despite being aware all along that he could not be S.'s biological father the husband had continued to treat both children as his own, at least until the end of 2008, by which time L. was almost five and S. was two. Finally, in the case of a reopening of the paternity cases, there was a risk that paternity would not be established and that the children might thus become fatherless. The High Court had thus taken the various interests into account and given weight to what it believed to be the best interests of the children and notably their interest in maintaining the family unit.

The Court was mindful of the wife's assertion that it was in the children's best interests to find out their true identity and it was true that a person has a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of his or her personal identity and to eliminate any uncertainty. However, the wife's views on what would be in the children's best interests were not only opposed to those of the High Court, but also to those of the children's counsel, who pleaded that the paternity cases should not be reopened. The Court could not ignore, either, that the wife, who was best placed to know about any uncertainty regarding the fatherhood of her children, had not taken any initiative to establish their biological identity until November 2008.

Finally, before the domestic courts E. had opposed the reopening of the paternity cases and there was no conclusive evidence that he was the biological father of either boy.

In the light of the foregoing, the High Court had given relevant and sufficient reasons and struck a fair balance between the interests of the applicants and the other individuals concerned and the general interest in ensuring legal certainty in family relationships.

Conclusion: no violation (five votes to two).

(See *Mikulić v. Croatia*, 53176/99, 7 February 2002, Information Note 39; *Odièvre v. France* [GC], 42326/98, 13 February 2003, Information Note 50; *Shofman v. Russia*, 74826/01, 24 November 2005, Information Note 80; *Mizzi v. Malta*, 26111/02, 12 January 2006, Information Note 82; *Kňákal v. the Czech Republic* (dec.), 39277/06, 8 January 2007, Information Note 93; *Phinikaridou v. Cyprus*, 23890/02, 20 December 2007, Information Note 103; *Mandet v. France*, 30955/12, 14 January 2016, Information Note 192)

Deprivation of citizenship for terrorist-related activities: *inadmissible*

K2 v. the United Kingdom, 42387/13, decision 7.2.2017 [Section I]

Facts – The applicant, a naturalised British citizen, left the United Kingdom in breach of his bail conditions after being charged with a public-order offence. While he was out of the country, the Secretary of State for the Home Department made an order for him to be deprived of his citizenship on the grounds that such measure would be conducive to the public good. The applicant was also excluded from the United Kingdom on the ground that he was involved in terrorism-related activities and had links to a number of Islamic extremists. He unsuccessfully challenged both decisions.

In the Convention proceedings, the applicant complained that the measures had breached his right to respect for his family and private life. He further complained that there were inadequate procedural safeguards to ensure effective respect for his Article 8 rights as there was very limited disclosure of the national-security case against him and the exclusion order meant that he was unable to participate effectively in the legal proceedings.

Law – Article 8

(a) *Deprivation of citizenship* – An arbitrary denial of citizenship might, in certain circumstances, raise an issue under Article 8 because of its impact on the private life of the individual (*Genovese v. Malta*, 53124/09, 11 October 2011, Information Note 145). The same principles had to apply to the revocation of citizenship already obtained since this might lead to a similar – if not greater – interference with the individual's right to respect for family and private life (*Ramadan v. Malta*, 76136/12, 21 June 2016, Information Note 197). In determining whether a revocation of citizenship was in breach of Article 8, two separate issues had to be addressed: whether the revocation was arbitrary (which was a stricter standard than that of proportionality) and what the consequences of revocation were for the applicant.

(i) *Arbitrariness* – In determining arbitrariness, the Court had regard to (i) whether the revocation was in accordance with the law; (ii) whether it was accompanied by the necessary procedural safeguards, including whether the person deprived of citizenship was allowed the opportunity to challenge the decision before courts affording the relevant guarantees; and (iii) whether the authorities had acted diligently and swiftly.

It was not suggested that the decision to deprive the applicant of his citizenship was anything other than "in accordance with the law" and there was no evidence of any failure on the part of the Secretary of State to act diligently and swiftly. As regards the remaining issue, whether the necessary procedural safeguards had been in place, the Court noted that the applicant had a statutory right of appeal to the Special Immigration Appeal Tribunal ("SIAC") against the decision to deprive him of citizenship and that the SIAC procedure had been found to afford sufficient guarantees in *I.R. and G.T. v. the United Kingdom* ((dec.), 14876/12 and 63339/12, 28 January 2014, Information Note 171). As to the applicant's contention that his exclusion from the United Kingdom had prevented him from participating effectively in his appeal against the decision to deprive him of citizenship, the Court did not accept that an out-of-country appeal necessarily rendered a decision to revoke citizenship "arbitrary". Article 8 could not be interpreted so as to impose a positive obligation on Contracting States to facilitate the return of every person deprived of citizenship while outside the jurisdiction in order to pursue an appeal against that decision. While the Court did not exclude the possibility that an Article 8 issue might arise where there existed clear and objective evidence that a person was unable to instruct lawyers or give evidence while outside the jurisdiction, it did not consider itself in a positon to call into question the findings of the national courts, which had conducted a comprehensive and thorough examination of the applicant's submissions, on this point. In addition, SIAC had sought out the most independent and objective evidence in the closed national-security case and adopted particular caution in drawing inferences adverse to the applicant. Lastly, the Court could not ignore the fact that the reason the applicant had had to conduct his appeal from outside the United Kingdom was not the Secretary of State's decision to exclude him, but rather his decision to flee the country before he was required to surrender to bail.

The decision to deprive the applicant of his British citizenship was therefore not "arbitrary".

(ii) *Consequences of the revocation* – The applicant was not rendered stateless by the decision to deprive him of his British citizenship as he had obtained a Sudanese passport. Furthermore, he

had left the United Kingdom voluntarily prior to the decision to deprive him of his citizenship; his wife and child were no longer living in the United Kingdom and could freely visit Sudan and even live there if they wished; and the applicant's own natal family could – and did – visit him "reasonably often".

Conclusion: inadmissible (manifestly ill-founded).

(b) *Exclusion from the United Kingdom* – In the light of the Court's findings relating to the consequences of the revocation of the applicant's citizenship, his exclusion did not appear to have a significant adverse impact on his right to respect for his family and private life or upon his reputation. Having regard to the limited nature of the interference, and SIAC's clear findings concerning the extent of his terrorism-related activities, the decision to exclude the applicant from the United Kingdom was not disproportionate to the legitimate aim of protecting the public from the threat of terrorism.

Conclusion: inadmissible (manifestly ill-founded).

Respect for private life

Refusal to comply with mentally disabled adult's wishes regarding his education and place of residence: *no violation*

A.-M. V. v. Finland, 53251/13, judgment 23.3.2017 [Section I]

Facts – In June 2009 a mentor was appointed to deal with the property and financial affairs of the applicant, an intellectually disabled adult. The district court making the order also ruled that the mentor had power to deal with the applicant's personal affairs to the extent that the applicant was unable to understand their significance. Subsequently, the mentor refused, on the basis of a psychologist's report, to permit the applicant to move to a remote village in the North of Finland to live with his former foster parents. The district court subsequently refused a request by the applicant for a change of mentor. In the Convention proceedings, the applicant complained under Article 8 that his personal wishes regarding his place of residence and his education had not been respected and it had not been possible to have his mentor replaced.

Law – Article 8: The interference with the applicant's right to respect for his private life was in accordance with the law and pursued the legitimate aim of protecting his health, interpreted in the broader context of well-being. The Court went on to consider whether the interference had been necessary in a democratic society.

The impugned decision had been taken in the context of a mentor arrangement that had been based on, and tailored to, the applicant's specific individual circumstances following a concrete and careful consideration of all the relevant aspects of the particular situation. In essence, rather than being based on a qualification of the applicant as a person with a disability it was based on the finding, supported by expert evidence, that the effects of the applicant's disability on his cognitive skills rendered him unable adequately to understand the significance and implications of the specific decision he wished to take, so that his well-being and interests required maintaining the mentor arrangement.

The domestic authorities had struck a proper balance between respect for the dignity and self-determination of the individual and the need to protect and safeguard the interests of persons in a particularly vulnerable position. In that connection, the Court noted that (i) there had been effective safeguards in the domestic proceedings to prevent abuse, as required by the standards of international human rights law, ensuring that the applicant's rights, will and preferences were taken into account; (ii) the applicant had been involved at all stages of the proceedings, having been heard in person and able to put forward his wishes; (iii) the interference was proportional and tailored to the applicant's circumstances, and was subject to review by competent, independent and impartial domestic courts; and (iv) the measure was consonant with the legitimate aim of protecting the applicant's health, in the broader sense of his well-being.

Accordingly, the decision of the domestic courts had been based on relevant and sufficient reasons and the refusal to make changes in the mentor arrangements was not disproportionate to the legitimate aim pursued.

Conclusion: no violation (unanimously).

(See also the Factsheet on Persons with disabilities and the European Convention on Human Rights)

Respect for private life, positive obligations

Alleged failure by domestic authorities to hold service provider responsible for content of third-party comments on blog: *inadmissible*

Pihl v. Sweden, 74742/14, decision 7.2.2017 [Section III]

Facts – In September 2011 the applicant was accused in a blog post run by a small non-profit association of being involved in a Nazi party. The following day a comment accusing the applicant of being a "hash-junkie" was posted by an anonymous third party. Following a request by the applicant both the blog post and the comment were removed and the association published a new post apologising for the mistake. The applicant brought civil proceedings against the association alleging, *inter alia*, under section 5 of the Act on Responsibility for Electronic Bulletin Boards[1] that it was responsible for failing to remove the comment sooner than it had done. That action was dismissed on the grounds that the comment, though defamatory, was not covered by the legislation. An application to the Chancellor of Justice for damages for the State's failure to fulfil its positive obligation to protect the applicant's private life was likewise dismissed.

In the Convention proceedings the applicant complained under Article 8 of the Convention that the fact that Swedish legislation prevented him from holding the association responsible for the defamatory comment had violated his right to respect for his private life.

Law – Article 8: The State had achieved a fair balance between the applicant's right to respect for his private life under Article 8 and the association's right to freedom of expression guaranteed by Article 10.

In so finding, the Court noted (i) the comment did not concern the applicant's political views and had nothing to do with the content of the original blog post and so could hardly have been anticipated by the association; (ii) though offensive, the comment did not amount to hate speech or incitement to violence; (iii) the association was a small non-profit association, unknown to the wider public, and it was thus unlikely that it would attract a large number of comments or that the comment about the applicant would be widely read; (iv) the association had removed the blog post and the comment a day after being notified by the applicant (it remained on the blog for about nine days in total) and had published a new blog post with an explanation for the error and an apology; (v) although the applicant had obtained the IP-address of the computer used to submit the comment, he had not taken any further measures to try to obtain the identity of the author; (vi) the chilling effect on freedom of expression caused by internet liability for third-party comments could be particularly detrimental for a non-commercial website; and (vi) the scope of responsibility of those running blogs was regulated by domestic law and the applicant's case had been duly considered on its merits both by the domestic courts and the Chancellor of Justice.

Conclusion: inadmissible (manifestly ill-founded).

(See also, under Article 10 of the Convention, *Delfi AS v. Estonia* [GC], 64569/09, 16 June 2015, Information Note 186; and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, 22947/13, 2 February 2016, Information Note 193)

Respect for family life

Lack of due regard to impact on family life when allocating prisoners to remote penal facilities: *violation*

Polyakova and Others v. Russia, 35090/09 et al., judgment 7.3.2017 [Section III]

Facts – The applicants, prisoners and their families, had been affected by decisions of the Russian Federal Penal Authority ("the FSIN") on prisoners' allocation to post-conviction penal facilities. In the Convention proceedings, they alleged, in particular, violations of Article 8 on account of the lack of an effective opportunity for them to maintain family and social ties during imprisonment in remote penal facilities.

Law – Article 8: While punishment remained one of the aims of imprisonment, the emphasis in European penal policy was on rehabilitation. According to the European Prison Rules, national authorities were under an obligation to prevent the breakdown of family ties and provide prisoners with a reasonably good level of contact with their families, with visits organised as often as possible and

1. Section 5 of the Act on Responsibility for Electronic Bulletin Boards requires service providers to erase and prevent the dissemination of messages that infringe certain provisions of the criminal law or third-party copyright.

in as normal a manner as possible. The margin of appreciation left to the respondent State in the assessment of the permissible limits of the interference with private and family life in the sphere of regulation of visiting rights of prisoners had been narrowing.

It was common ground between the parties that there had been an interference with the applicants' right to respect for family life. The applicants argued that that interference had not been in accordance with the law.

Even where the geographical distance between a prisoner's home and a penal facility was identical in respect of two prisoners, the capacity of their relatives to visit them could be radically disparate. What was required of the domestic law in the field of geographical distribution of prisoners was not that it defined a yardstick to measure the distance between a prisoner's home and a penal facility or exhaustively listed grounds for derogation from the applicable general rules, but rather that it provided for adequate arrangements for an assessment by the executive authority of that prisoner's and his or her relative's individual situation.

(a) *Initial allocation to a remote penal facility* – The relevant domestic law established a general rule on geographical distribution of prisoners in Russia, according to which prisoners should be allocated to penal facilities, located in either their home region or conviction region (the general distribution rule). The law provided for an automatic exception to the general distribution rule, in respect of a specific category of prisoners (those convicted of crimes such as kidnapping, aggravated human-trafficking and terror attacks) as it empowered the FSIN to freely allocate an individual belonging to such a category to a penal facility located anywhere in Russia irrespective of his or her place of residence or conviction. Nothing in the domestic law enabled that person or his family to foresee the manner of its application. The scope of such discretion conferred was not defined with sufficient clarity to give the individual adequate protection against arbitrary interference. There were no safeguard mechanisms that could counterbalance the FSIN's extensive discretion or any mechanisms to weigh the competing individual and public interests and assess the proportionality of the relevant restriction to the rights of the persons concerned.

While the Convention did not grant prisoners the right to choose their place of detention, States had to aim to maintain and promote prisoners' contacts with the outside world. To achieve that aim, domestic law should provide a prisoner (or where relevant, his or her relatives) with a realistic opportunity to advance before the domestic authorities reasons against his or her allocation to a particular penal facility, and to have them weighed against any other considerations in the light of the requirements of Article 8. The domestic authorities had to perform, before deciding on allocation to a penal facility, an individual assessment of a prisoner's situation.

(b) *Transfer to another facility* – The applicants had attempted to obtain a prisoner transfer to another facility located closer to their respective families' homes. The relevant rules provided that a prisoner should serve their sentence in its entirety in the same penal facility. That rule was applicable regardless of whether the initial allocation of a prisoner had been made pursuant to the general distribution rule or as an exception to it. The FSIN's response to the applicants indicated that their personal situations and their interest in maintaining family ties were not considered by the executive authority as grounds for warranting their transfer. The FSIN agencies' interpretation of the provision had been inconsistent and that was illustrative of the unpre*dicta*bility of the manner in which the law could be applied by the executive.

(c) *Judicial review of the FSIN's decisions* – In the light of the continuous detention rule, the FSIN's decisions on allocation of prisoners led to long-term consequences. It followed that, unless another decision was taken at a later point, the impact on a convicted person's family life of the FSIN's decision to allocate a convicted person to a remote penal facility, as well as the impact on his or her family, could be very long-lasting, if not lifelong. The impugned interference with the applicants' right to respect for family life would, by its very nature, call for particularly searching scrutiny by an independent judicial authority.

The applicants had complained about the FSIN's decisions to the domestic courts. However, their arguments concerning the adverse impact of imprisonment in a remote penal facility on their family and social ties were dismissed as altogether irrelevant. The domestic courts failed to carry out a balancing exercise in order to genuinely review the proportionality of the impugned interference in the

light of the criteria established by the Court's case-law under Article 8.

(d) *Conclusion* – The Russian domestic legal system did not afford adequate legal protection against possible abuses in the field of geographical distribution of prisoners and the applicants were deprived of the minimum degree of protection to which they were entitled under the rule of law in a democratic society. Accordingly, the relevant provisions did not satisfy the quality of law requirement and it was not necessary to examine whether the other requirements of paragraph 2 of Article 8 had been complied with.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 6 § 1 in respect of one of the applicants.

Article 41: sums ranging from EUR 652 to EUR 7,800 each in respect of non-pecuniary damage.

(See *Khodorkovskiy and Lededev v. Russia*, 11082/06 and 13772/05, 25 July 2013, Information Note 165)

Respect for home

Search and seizure operation carried out at home and office in occupier's absence on basis of widely drafted, non-judicial, warrant: *violation*

Modestou v. Greece, 51693/13, judgment 16.3.2017 [Section I]

Facts – In September 2010, as part of a preliminary police investigation, the applicant's home was searched and two computers and hundreds of documents were seized on the orders of the public prosecutor.

In November 2012 the applicant applied to the Indictment Division of the Court of Appeal to have the search declared null and void, the seizure order lifted and the seized items returned. However, his application was dismissed in February 2013. The court's decision was based, *inter alia*, on an assessment of whether a search and seizure operation could be carried out in the context of a preliminary police investigation. The applicant unsuccessfully appealed against that decision.

Law – Article 8: The search by the investigating officers of the applicant's private home and business premises and the seizure of several documents and computers belonging to him amounted to interference, in accordance with the law, with his right to respect for his home.

The search had been carried out as part of a preliminary police investigation, prior to the institution of criminal proceedings against the applicant. Its purpose had been to seek evidence and indications of involvement in a criminal organisation. Accordingly, it had pursued the aims of preventing disorder and crime.

A search carried out during a preliminary police investigation had to be accompanied by adequate and sufficient safeguards ensuring that it was not used as a means of providing the police with compromising evidence relating to individuals who had yet to be identified as suspects in relation to an offence.

The search warrant issued by the public prosecutor had been worded in general terms. There might be situations where it was impossible to draw up a warrant with a high degree of precision, as in the present case, where the search had been ordered with a view to gathering evidence relating to suspicions of criminal activity involving several individuals over long periods.

However, in such cases, and in particular – as in the present case – where domestic law did not provide for prior judicial scrutiny of the lawfulness and necessity of the investigative measure in question, other safeguards should be in place, particularly in terms of the execution of the search warrant, so as to offset any inadequacies in the issuing and content of the warrant.

The search in the present case had been accompanied by certain procedural safeguards. Firstly, it had been ordered by the public prosecutor at the Court of Appeal, who had issued a search warrant and had delegated the task to the police headquarters. Secondly, the search had been carried out by a police officer accompanied by a deputy prosecutor.

The applicant had not been present at any time during the search, which had lasted for twelve and a half hours, and it was not clear from the file whether the investigating officers had attempted to inform him of their presence or of their actions, even though the Code of Criminal Procedure required the person carrying out the search to invite the occupant of the premises to attend. Even assuming that the authorities had intended to employ a surprise effect by not informing the applicant in advance, there had been nothing to stop them from attempting to contact him, in compliance with the law, during the search itself, which had extended over several hours.

Lastly, there had been no immediate retrospective judicial review. The search had led to the seizure of two computers and hundreds of documents, and it had never been established whether all the documents concerned were directly linked to the offence under investigation. On the basis of the wording of the warrant, questions could also arise as to whether the applicant had been informed of the background to the search, which would have enabled him to make sure that the search was limited to the investigation of the offence mentioned in the warrant and to complain of any abuses in that regard. The Indictment Division of the Court of Appeal, to which the applicant had applied, had given its decision more than two years after the events and had devoted most of it to determining whether a search and seizure operation could be carried out during a preliminary police investigation. The domestic authorities had therefore fallen short of their obligation to provide "relevant and sufficient" reasons to justify issuing the search warrant.

In these circumstances, the measures complained of had not been reasonably proportionate to the legitimate aims pursued, bearing in mind the interest of a democratic society in ensuring respect for the home.

Conclusion: violation (unanimously).

Article 41: EUR 2,000 in respect of non-pecuniary damage.

(See also *Smirnov v. Russia*, 71362/01, 7 June 2007, Information Note 98; and *Gutsanovi v. Bulgaria*, 34529/10, 15 October 2013, Information Note 167)

ARTICLE 10

Freedom of expression

Arrest and prosecution of parents petitioning for right for children to receive education in Kurdish: *violation*

Döner and Others v. Turkey, 29994/02, judgment 7.3.2017 [Section II]

Facts – In December 2001 the applicants filed petitions with the education directorates requesting that their children be provided with education in the Kurdish language in the public elementary schools they attended. The applicants' houses were subsequently searched on suspicion that their action had been instigated by an illegal armed organisation (the PKK). Although no incriminating materials were found, the applicants were arrested and detained – all of them for four days and some were remanded in custody for almost one month. All but one of the applicants were charged and tried before a State Security Court with aiding and abetting an illegal armed organisation. They were eventually acquitted.

In the Convention proceedings, the applicants complained, *inter alia*, that they had been subjected to criminal proceedings for using their constitutional right to file a petition, despite the absence of any provisions in domestic law criminalising such conduct. They alleged a violation of Article 7 of the Convention.

Law – Article 10: As the master of characterisation to be given in law to the facts of the case the Court considered that the Article 7 complaint fell to be examined under Article 10. It declared inadmissible as manifestly ill-founded the complaint of the applicant who was not prosecuted, as he had not in fact submitted a petition requesting education in Kurdish and could not therefore be considered to have been exercising his right to freedom of expression.

As regards the remaining applicants, the string of measures they had faced – notably their arrest and deprivation of liberty – for merely petitioning the State authorities on a matter of "public interest" had amounted to an interference with the exercise of their right to freedom of expression. The fact that they were ultimately acquitted did not deprive them of their victim status as the State Security Court had neither acknowledged nor afforded redress for the alleged breach of their right.

It was unnecessary to determine whether the interference was prescribed by law or pursued a legitimate aim as, in any event, it had not been necessary in a democratic society. It was apparent from the arguments put forward by the public prosecutor and the Government that the applicants had faced the measures not on account of the substance of their requests, but because they had allegedly submitted them as part of a collective action instigated by an illegal armed organisation. While the Court did not underestimate the difficulties to which the fight against terrorism gave rise, that fact alone did not absolve the national authorities from their obligations under Article 10 of the Convention. Accordingly, although freedom of expression could

be legitimately curtailed in the interests of national security, territorial integrity and public safety, those restrictions still had to be justified by relevant and sufficient reasons and respond to a pressing social need in a proportionate manner.

In the instant case, however, the relevant State authorities had failed to use as a basis for the measures an acceptable assessment of the relevant facts and to apply standards that were in conformity with the principles embodied in Article 10. In so finding, the Court noted (i) that the petitions requesting education in Kurdish in elementary schools were submitted amidst a public debate in Turkey regarding the social and cultural rights of Turkish citizens of Kurdish ethnic origin, and thus concerned a matter of "public interest"; (ii) the State authorities had not displayed the requisite restraint in resorting to criminal proceedings where a debate on a question of public interest was concerned, but had instead used the legal arsenal available to them in an almost repressive manner; (iii) neither the views expressed in the petitions nor the form in which they were conveyed raised doubts regarding the peaceful nature of the applicants' request and the fact that it may have coincided with the aims or instructions of an illegal armed organisation did not remove the request from the scope of protection of Article 10; and (iv) while the applicants were still on trial, the Foreign Language Education and Teaching Act (Law no. 2923) was in fact amended to provide for such education, at least on a private basis initially.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 5 §§ 3, 4 and 5 of the Convention in respect of the applicants' detention.

Article 41: EUR 6,500 to the applicant whose complaint under Article 10 was declared inadmissible and EUR 10,000 to each of the other applicants in respect of non-pecuniary damage.

Editor fined for publishing allegations of child abuse against person standing for election: *violation*

Ólafsson v. Iceland, 58493/13, judgment 16.3.2017 [Section I]

Facts – The applicant, the editor of a web-based media site, published allegations made by two sisters that a relative of theirs, who was standing for election, had sexually abused them as children. The relative lodged defamation proceedings against the applicant and requested that a number of the statements be declared null and void. The Supreme Court found statements consisting of insinuations that the relative was guilty of having abused children to be defamatory and ordered the applicant to pay compensation. In the Convention proceedings, the applicant complained under Article 10 of a breach of his right to freedom of expression.

Law – Article 10: The issue of sexual violence against children was a serious topic of public interest. By running for office in general elections, the relative had to have been considered to have inevitably and knowingly entered the public domain and to have laid himself open to closer scrutiny of his acts. A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that could insult or provoke others or damage their reputation was not reconcilable with the press's role of providing information on current events, opinions and ideas. Punishment of a journalist for assisting in the dissemination of statements made by another person in an interview could seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there were particularly strong reasons for doing so. The journalist who had written the articles had tried to establish the sisters' credibility and the truth of the allegations by interviewing several relevant people and the relative had been given the opportunity to comment on the allegations. In those circumstances, being aware that the applicant was the editor, not the journalist, the Court considered that the applicant had acted in good faith and had made sure that the article had been written in compliance with ordinary journalistic obligations to verify a factual allegation. It was clear that the disputed statements originated from the sisters. They had previously written a letter containing part of the allegations and sent it to their extended family, the police and child protection services. They had published that letter and all the impugned statements on their own website before the articles were published by the editor.

It had been open to the relative under domestic law to bring defamation proceedings against the sisters and it was significant that he had opted to institute proceedings against the applicant editor only. Although the compensation the applicant had been ordered to pay was not a criminal sanc-

tion and the amount did not appear harsh, in the context of assessing proportionality, irrespective of whether or not the sanction imposed was a minor one, what mattered was the very fact of judgment being made against the person concerned, even where such a ruling was solely civil in nature. Any undue restriction on freedom of expression effectively entailed a risk of obstructing or paralysing media coverage of similar questions.

Conclusion: violation (unanimously).

Article 41: no claim made in respect of damage.

Summary dismissal of company director for publicly responding to criticism by her chairman in the press: *violation*

Marunić v. Croatia, 51706/11, judgment 28.3.2017 [Section II]

Facts – The applicant was the director of a municipal company providing public utility services. She was summarily dismissed from her post after making statements to the media defending herself a week after the company chairman had publicly criticised her work in a press article. The decision to dismiss her was taken on the grounds that she had made allegations to the press (concerning the unlawful collection of parking fees from land not owned by the municipality) that were damaging to the company's reputation. The applicant's claims in respect of unfair dismissal were dismissed by the Supreme Court on the grounds that she had portrayed the company in an extremely negative light and should have raised any concerns she had about the company's practices with the appropriate authorities rather than airing them in the media.

In the Convention proceedings, the applicant complained of a breach of her right to freedom of expression.

Law – Article 10: The applicant's dismissal on account of her statements to the press had interfered with her right to freedom of expression. The interference was prescribed by law and pursued the legitimate aim of protecting the reputation or rights of others.

As to whether it had been necessary in a democratic society, while a duty of loyalty, reserve and discretion normally prevented employees from publicly criticising the work of their employers, crucially in the applicant's case it was another officer of the company who was the first to resort to the media and to publicly criticise the applicant's work. In such specific circumstances the applicant could not have been expected to remain silent and not to defend her reputation in the same way. It would be to overstretch her duty of loyalty to require otherwise.

Accordingly, several of the criteria that normally applied to cases concerning freedom of expression in the workplace (see, for example, *Guja v. Moldova* [GC], 14277/04, 12 February 2008, Information Note 105; *Wojtas-Kaleta v. Poland*, 20436/02, 16 July 2009, Information Note 121; and *Heinisch v. Germany*, 28274/08, 21 July 2011, Information Note 143) were either inapplicable or of limited relevance to the applicant's case. In particular, the Government's arguments that the applicant had other effective, but more discreet, means of protecting her reputation, and had been motivated exclusively by the wish to protect her public image rather than to inform the public of matters of general concern were thus irrelevant.

On the facts, the applicant's statements in reply to those of the chairman were not disproportionate and had not exceeded the limits of permissible criticism. In that connection, the Court noted that (i) the operation of a municipal public utility company was a matter of general interest for the local community; (ii) the applicant's statement implying that the company had been unlawfully charging for parking was to be seen not as a statement of fact but as a value judgment which had a sufficient factual basis because it could reasonably be argued that collecting parking fees on someone else's land was unlawful; (iii) her statement was directly relevant to the aim of defending her professional reputation against what she saw as groundless criticism; and (iv) her call for an audit and an investigation by the prosecuting authorities did not insinuate that the company had been engaged in criminal activities, but was intended to dispel any uncertainty about the way she had been running the company. In these circumstances, the interference with the applicant's freedom of expression in the form of her summary dismissal had not been necessary in a democratic society to protect the reputation and rights of the company.

Conclusion: violation (unanimously).

Article 41: EUR 1,500 in respect of non-pecuniary damage; no award in respect of pecuniary damage as domestic law permitted a reopening of the proceedings in the light of the finding of a violation.

ARTICLE 14

Discrimination (Articles 2 and 3)

Shortcomings in protection of woman against domestic violence: *violation*

Talpis v. Italy, 41237/14, judgment 2.3.2017 [Section I]

(See Article 2 above, page page 7)

Discrimination (Article 3)

Failure to investigate racially motivated act of violence against victim by association: *violation*

Škorjanec v. Croatia, 25536/14, judgment 28.3.2017 [Section II]

(See Article 3 above, page page 10)

ARTICLE 35

ARTICLE 35 § 1

Exhaustion of domestic remedies

Failure to exhaust new judicial remedy enabling members of the national legal service to contest their removal from office: *inadmissible*

Çatal v. Turkey, 2873/17, decision 7.3.2017 [Section II]

Facts – Following the failed attempted coup during the night of 15 to 16 July 2016, the High Council of Judges and Prosecutors suspended 2,735 judges from office, including the applicant, on 16 July 2016.

On 21 July 2016 a state of emergency was declared. During that period the Council of Ministers, in a meeting chaired by the President of the Republic, adopted 21 legislative decrees.

Article 3 of Legislative Decree no. 667 provided that the High Council of Judges and Prosecutors had power to remove from office judges who were considered to belong or be affiliated or linked to terrorist organisations, or to organisations, structures or groups whose activities the National Security Council had established as being harmful to national security.

In August 2016 the High Judiciary Council, sitting in plenary session, applied that provision and removed 2,847 judges, including the applicant, from office.

In September 2016 an appeal by the applicant against the decision was dismissed in November 2016 by the High Council of Judges and Prosecutors.

Law – Article 35 § 1: In November 2016 the Supreme Administrative Court declined jurisdiction to examine the merits of an application for judicial review lodged by a judge who had been removed from office following a decision of the High Council of Judges and Prosecutors and remitted the case to the competent administrative court. After the present application had been lodged, Legislative Decree no. 685, adopted on 2 January 2017 and published in the Official Gazette on 23 January 2017, designated the Supreme Administrative Court as court of first instance for the purposes of examining appeals lodged against measures taken under Article 3 of Legislative Decree no. 667. Accordingly, persons against whom such measures had been taken were then able to apply to the Supreme Administrative Court directly within 60 days of the date on which the decisions against them became final. The applicant thus had the possibility, under Article 1 § 4 of the transitional provisions of Legislative Decree no. 685, of applying to the Supreme Administrative Court within 60 days of the date of publication of the legislative decree in question.

There was a new statutory provision available to the applicant enabling her to give the domestic courts an opportunity to remedy, at national level, a problematical situation arising from a legal dispute regarding judicial scrutiny of measures removing judges from office.

The decisions of the Supreme Administrative Court could in turn be challenged before the Constitutional Court by means of an individual application, and following an application to the Constitutional Court and its rulings, anyone could, if necessary, lodge a complaint with the European Court under the Convention.

In view of the foregoing and of the nature of Legislative Decree no. 685 and the context in which it was adopted, an exception could justifiably be made to the general principle according to which the condition of exhaustion of domestic remedies had to be assessed at the time of introduction of the application. Consequently, the onus was on a person considering him or herself to be the victim

of an alleged violation of the provisions of the Convention to test the limits of that new remedy.

Accordingly, the remedy established by Legislative Decree no. 685 was *a priori* an accessible remedy capable of providing appropriate redress and offering reasonable prospects of success. That conclusion did not in any way prejudice a possible re-examination of the question of the effectiveness of the remedy in question, and particularly the ability of the national courts to establish consistent case-law complying with the Convention requirements. Moreover, the Court retained its ultimate power of scrutiny of any complaint submitted by applicants who, in accordance with the principle of subsidiarity, had exhausted the available domestic remedies.

In sum, it was incumbent on the applicant, who complained of a violation of her Convention rights on account of the measure removing her from office, to apply to the domestic courts, as required by Article 35 § 1 of the Convention.

Conclusion: inadmissible (failure to exhaust domestic remedies).

(See also *Demir v. Turkey* (dec.), 51770/07, 16 October 2012, Information Note 156; and *Uzun v. Turkey* (dec.), 10755/13, 30 April 2013, Information Note 163)

ARTICLE 35 § 3 (a)

Abuse of the right of application

Convention complaint based on evidence obtained unlawfully by use of force: *inadmissible*

Koch v. Poland, 15005/11, decision 7.3.2017 [Section IV]

Facts – In an attempt to prove that he was not the father of their youngest daughter, the applicant removed hair samples from both his former wife and the daughter. He was later convicted of an attack on his former wife's physical integrity after it was established that he had used force to pull out the hair. In the Convention proceedings, he complained under Articles 6 and 8 of the Convention that he had not been able to bring proceedings before the domestic courts to disavow his paternity.

Law – Article 35 § 3 (a): In principle any conduct on the part of an applicant that is manifestly contrary to the purpose of the right of individual application as provided for in the Convention and which impedes the proper functioning of the Court or the proper conduct of the proceedings before it can be considered an abuse of the right of application.

It was established in the domestic criminal proceedings that the applicant had obtained the DNA samples by force, without consent, and he had been convicted of an attack on his former wife's physical integrity as a result. The way in which the applicant had attempted to vindicate his Article 8 rights at the domestic level had thus blatantly violated the rights and values protected by the Convention. Thus, in the exceptional circumstances of the instant case, by invoking Article 8 before the Court on the basis of evidence obtained in violation of other people's Convention rights, the applicant had abused his right of individual petition.

Conclusion: inadmissible (abuse of the right of petition).

ARTICLE 41

Just satisfaction

Award of non-pecuniary damage in the absence of a properly submitted claim

Nagmetov v. Russia, 35589/08, judgment 30.3.2017 [GC]

Facts – The applicant had complained to the Court about his son's death caused by a tear-gas grenade fired during a demonstration against corruption of public officials. In a judgment of 5 November 2015 a Chamber of the Court held, unanimously, that there had been a violation of Article 2 both in its substantive and procedural aspects. The Chamber took note of the fact that the applicant had not submitted a claim for just satisfaction within the prescribed time-limit, and stated that no award would normally be made. However, referring to the powers conferred on it by Article 41 and previous cases in which the Court had exceptionally found it equitable to award compensation, even where no such claim had been made, the Chamber decided to make an award of EUR 50,000 in respect of non-pecuniary damage.

On 14 March 2016 the case was referred to the Grand Chamber at the Government's request.

Law – The Grand Chamber held unanimously, that there had been a violation of Article 2 of the Convention under its substantive and procedural limbs.

Article 41

(a) *Whether there was a just satisfaction claim* – Article 41 did not impose any procedural requirements, non-compliance with which would circumscribe the Court's decision on the matter of just satisfaction. However, certain requirements were contained in the Rules of Court and the Practice Direction on Just Satisfaction Claims, both of which were intended to establish a procedural framework for organising the Court's activity and assisting it in the exercise of its judicial function. The Court's prevailing practice was that applicants' indications of wishes for reparation mentioned in the application form in respect of alleged violations could not palliate the ensuing failure to articulate a claim for just satisfaction during the communication stage of the proceedings.

The applicant's indication of a wish for eventual monetary compensation as expressed at the initial non-contentious stage of the procedure before the Court did not amount to a claim within the meaning of the Rules of Court and it was uncontested that no claim for just satisfaction had been made during the communication procedure in the proceedings before the Chamber.

(b) *Whether the Court had competence to make a just-satisfaction award in the absence of a properly made claim and whether it was appropriate to make such an award* – While it would not normally consider of its own motion the question of just satisfaction, neither the Convention nor the Protocols thereto precluded the Court from exercising its discretion under Article 41. The Court therefore remained empowered to afford, in a reasonable and restrained manner, just satisfaction on account of non-pecuniary damage arising in the exceptional circumstances of a given case, where a claim had not been properly made. The exercise of such discretion should always take due account of the basic requirement of adversarial procedure and in such cases it was appropriate to seek the parties' submissions. In such exceptional situations it was first necessary to ascertain that a number of prerequisites had been met, before weighing the compelling considerations in favour of making an award.

(i) *Prerequisites* – Particular importance was to be attached to indications unequivocally showing that an applicant had expressed a wish to obtain monetary compensation. It was further necessary to ascertain that there was a causal link between the violation and the non-material harm arising from the violation of the Convention.

(ii) *Compelling considerations* – On the basis of its conclusions concerning the prerequisites, the Court would then examine whether there were compelling considerations in favour of making an award. It was appropriate to take into account the particular gravity and the particular impact of the violation of the Convention and, if pertinent in the particular circumstances of a given case, the overall context in which the breach occurred. Further, the Court needed to ascertain whether there were reasonable prospects of obtaining adequate reparation, in terms of Article 41 of the Convention, at the national level.

It was common ground between the parties that the applicant had sustained non-material harm arising from the violation of Article 2 and that there was a causal link between the violation and the harm. The applicant's interest in obtaining compensation had been expressed. The question was whether any compelling considerations made it necessary to afford him just satisfaction. The Court considered that the finding of a violation would not constitute in itself sufficient just satisfaction. There was no indication, and the respondent Government had not argued otherwise, that the domestic law allowed adequate reparation to be sought and obtained within a reasonable time in respect of the Court's findings concerning the death inflicted on the applicant's son and the defects in the investigation.

As such, the Grand Chamber was satisfied that the case disclosed exceptional circumstances which called for a just satisfaction award in respect of non-pecuniary damage, notwithstanding the absence of a properly made claim.

Conclusion: EUR 50,000 in respect of non-pecuniary damage (fourteen votes to three).

PENDING GRAND CHAMBER

Referrals

Zubac v. Croatia, 40160/12, judgment 11.10.2016 [Section II]

(See Article 6 § 1 (civil) above, page 16)

OTHER JURISDICTIONS

Court of Justice of the European Union (CJEU)

Application to embassy in non-EU State for short-term humanitarian visa with a view to applying for asylum after arrival in Member State – Fundamental Rights Charter inapplicable

X and X v. État belge, C-638/16 PPU, judgment 8.3.2017 (Grand Chamber)

In the context of a dispute between two Syrian nationals on the one hand and the Belgian Immigration Office on the other, the Belgian Council for asylum and immigration proceedings referred the following two questions to the CJEU:

– Whether a State's "international obligations" potentially justifying the grant of applications for visas with limited territorial validity cover all the rights guaranteed by the Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and the Geneva Convention on Refugees.

– Accordingly, whether a member State to which such an application has been made is required to issue the visa where a risk of infringement of Article 4 and/or Article 18 of the Charter or another international obligation by which it is bound is established; and whether the existence of links between the applicant and the member State to which the visa application was made affect the answer to that question.

Facts – The applicants in the main case were a couple with small children living in Aleppo (Syria). In October 2016 they travelled to the Belgian Embassy in Beirut (Lebanon) to apply for a visa on humanitarian grounds, explaining that they subsequently intended to apply for asylum once they had arrived in Belgium. The Immigration Office rejected their application, which was based on Article 25 of the Visa Code, on the ground that their intended stay exceeded the 90 days allowed by that provision. The applicants having requested an urgent stay of execution of the rejection decision, the referring court:

– asked whether the implementation of the visa policy could be regarded as the exercise of "jurisdiction" within the meaning of Article 1 ECHR, thus allowing the applicants to rely on Article 3 ECHR, and whether a right of entry could follow from Article 3 ECHR and Article 33 of the Geneva Convention; and

– noted that the implementation of Article 4 of the Charter depended on the application of EU law, without being territorially limited.

Law – The interpretation requested by the referring court formally concerned Article 25, paragraph 1 (a) of Regulation (EC) No. 810/2009 establishing a Community Code on Visas (the "Visa Code"). As the Court had consistently held, the fact that a question submitted by the referring court referred only to certain provisions of EU law did not preclude it from extending its examination to the entire body of EU law relevant to the case pending before it.

In the present case, the CJEU noted at the outset that the Visa Code had been adopted on the basis of a provision of the EC Treaty concerning visas for short stays of no more than three months; and that under Articles 1 and 2, the objective thereof was to establish the procedures and conditions for issuing visas for transit or intended stays not exceeding 90 days in any 180-day period. However, it was apparent that the applicants in the main proceedings had submitted applications for visas on humanitarian grounds with a view to applying for asylum in Belgium immediately upon their arrival there and, thereafter, to being granted a residence permit with a period of validity not limited to 90 days. Such applications, even if formally submitted on the basis of Article 25 of the Visa Code, fell outside the scope of that code.

In addition, since no measure had been adopted, to date, by the EU legislature with regard to the conditions governing the issue by member States of long-term visas and residence permits to third-country nationals on humanitarian grounds, the applications at issue in the main proceedings fell solely within the scope of national law.

As the situation in the main proceedings was not governed by EU law, the Charter of Fundamental Rights was not applicable.

The CJEU added that, to conclude otherwise:

– would be tantamount to allowing third-country nationals to lodge applications for visas on the basis of the Visa Code, which was intended for short-stay visas, in order to obtain international protection, thus undermining the general structure of the

system established by Regulation No. 604/2013; and

– would mean that member States were required, *de facto*, to allow third-country nationals to submit applications for international protection to the representations that were within the territory of a third country. The Visa Code was not intended to harmonise the laws of member States on international protection and the measures adopted by the European Union that governed the procedures for applications for international protection (Directive 2013/32 and Regulation 604/2013) excluded from their scope applications made to the representations of member States.

In those circumstances, the Belgian authorities were wrong to describe the applications at issue in the main proceedings as applications for short-term visas.

In conclusion: An application for a visa with limited territorial validity made on humanitarian grounds by a third-country national to the representation of the member State of destination, within the territory of a third country, with a view to lodging, immediately upon his or her arrival in that member State, an application for international protection, did not fall within the scope of the Visa Code but, as European Union law currently stood, solely within that of national law.

Limitations on right to apply for restriction of public access to personal data in companies register

Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v. Salvatore Manni, C-398/15, judgment 9.3.2017 (Second Chamber)

In the context of a dispute between a property developer and the local Chamber of Commerce, the Italian Court of Cassation referred a number of preliminary questions to the CJEU asking whether EU law could, or indeed should, enable an individual mentioned in a companies register to request the competent authority to restrict, on the expiry of a period following the winding-up of the company in question, access to the personal data concerning him.

The case involved the interpretation of Directive 95/46/EC on the protection of personal data, in conjunction with the directive on registers of companies (Directive 68/151/EEC at the relevant time).

Facts – A property developer, Mr Manni found that his properties in a complex were not selling. A ratings agency had given him a negative risk assessment based on data readily availably in the companies register, showing that he had run a similar company that was wound up and struck off the companies register in 2005 after becoming insolvent in 1992. In 2007 he brought proceedings against the local Chamber of Commerce, which was responsible for keeping the register, requiring it to erase, anonymise or block the data linking him to the liquidation of his previous company, together with an order that that Chamber compensate him for the damage he had suffered by reason of the injury to his reputation. The court upheld that claim and an appeal on points of law was lodged with the referring court.

Law – Under Directive 68/151, the identity of persons having the power to bind the company concerned in respect of third parties or participating in its governance, with their dates of appointment and resignation, must be available in a companies register. The fact that the information was provided as part of a professional activity did not mean that it could not be characterised as personal data. By transcribing and keeping that information in the register and communicating it to third parties, the authority responsible for maintaining that register carried out "processing of personal data" within the meaning of Directive 95/46, which sought to ensure compliance with Articles 7 (respect for private life) and 8 (protection of personal data) of the EU Charter of Fundamental Rights.

The general conditions for the legality of such processing were met, because the companies register satisfied several grounds for legitimation provided for in Directive 95/46 (including the existence of a public interest). The question was whether the authority responsible for keeping the register should, after a certain period had elapsed since a company ceased to trade, and on the request of the data subject, either erase or anonymise that personal data, or limit their disclosure.

Directive 95/46 provided that personal data should be kept for no longer than was necessary for the purposes for which the data were processed. Where the data were stored for longer periods for historical, statistical or scientific use, States had to lay down appropriate safeguards. Under the Directive States had to grant the data subject the right

to object at any time, on compelling legitimate grounds relating to his particular situation, to the processing of data relating to him, save where otherwise provided by national legislation.

The purpose of the register provided for by the Directive was to protect, in particular, the interests of third parties in relation to joint stock companies and limited liability companies, since the only safeguards they offered to third parties were their assets. In order to guarantee legal certainty in the internal market, it was important that any person wishing to establish and develop trading relations with companies situated in other member States should be able easily to obtain essential information relating to the powers of persons authorised to represent them, thus requiring that all the relevant information should be expressly stated in the register. This disclosure was intended to enable any interested third parties to inform themselves without having to establish a right or an interest requiring to be protected, and therefore not being limited in particular merely to creditors of the company concerned.

As to how that purpose was to be fulfilled after the company concerned had been dissolved, the Directive made no express provision in that regard. However, even after the dissolution of a company, rights and legal relations relating to it continued to exist. Thus, in the event of a dispute, the data in the register might be necessary in order, *inter alia*, to assess the legality of an act carried out on behalf of that company during the period of its activity or so that third parties could bring an action against the members of the decision-making bodies or against the liquidators of that company.

In view of the considerable heterogeneity in the limitation periods provided for by the various national laws in the different areas of law, it seemed impossible, at present, to identify a single time limit, as from the dissolution of a company, at the end of which the inclusion of such data in the register and their disclosure would no longer be necessary.

Accordingly, member States could not guarantee that natural persons had the right to obtain, as a matter of principle, after a certain period of time from the dissolution of the company concerned, the erasure of personal data concerning them, which had been entered in the register pursuant to the Directive, or the blocking of that data from the public.

That interpretation did not result in disproportionate interference with the fundamental rights of the persons concerned.

First, the disclosure concerned only a limited number of personal data items, namely those relating to the identity and the respective functions of persons having the power to represent the company concerned or take part in its administration, supervision or control.

Secondly, as already pointed out, since the only safeguards that joint-stock companies and limited liability companies offered to third parties were their assets, thus constituting an increased economic risk for the latter, it appeared justified that natural persons who choose to participate in trade through such a company should be required to disclose the data relating to their identity and functions within that company, especially since they were aware of that requirement when they decided to engage in such activity.

Finally, even though it followed from the foregoing that, in the weighting to be carried out, in principle, the need to protect the interests of third parties in relation to joint-stock companies and limited liability companies and to ensure legal certainty, fair trading and thus the proper functioning of the internal market took precedence, it could not be excluded that there might be specific situations in which the overriding and legitimate reasons relating to the specific case of the person concerned justified exceptionally that access to personal data entered in the register should be limited, upon expiry of a sufficiently long period after the dissolution of the company in question, to third parties who could demonstrate a specific interest in their consultation. Nevertheless, in keeping with the wording of Directive 95/46 (the proviso that national law does not lay down a provision to the contrary), the final decision was a matter for the national legislatures.

Assuming that national law permitted such applications, it would be for the national court to assess, having regard to all the relevant circumstances and taking into account the time elapsed since the dissolution of the company concerned, the possible existence of legitimate and overriding reasons which might exceptionally justify limiting third parties' access to the data concerning the property developer in the companies register. In any event, such a reason could not be derived from the alleged

inability to sell, in view of the legitimate interest of purchasers in having the information at issue.

In conclusion: As EU law currently stood, it was for the member States to determine whether the natural persons referred to in the Directive were entitled to apply to the authority responsible for keeping, respectively, the central register, commercial register or companies register to determine, on the basis of a case-by-case assessment, if it was exceptionally justified, on compelling legitimate grounds relating to their particular situation, to limit, on the expiry of a sufficiently long period after the dissolution of the company concerned, access to personal data relating to them in that register, to third parties who could demonstrate a specific interest in consulting that data.

Restrictions on wearing Islamic headscarf at place of work in a private company

Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV, C-157/15, judgment 14.3.2017 (Grand Chamber)

Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA, C-188/15, judgment 14.3.2017 (Grand Chamber)

In both these cases the CJEU had received preliminary questions (from the Belgian Court of Cassation and French Court of Cassation respectively) on the compatibility with Directive 2000/78 establishing a general framework for equal treatment in employment and occupation ("the Directive") of certain restrictions imposed by a private employer on the wearing of the Islamic headscarf.

Facts – The two main cases stemmed from the dismissal of the female employee in question. In the first, the company had laid down a general rule prohibiting the visible wearing of any political, philosophical or religious symbol in the workplace. In the second, the employer had informed the employee, prior to her recruitment as a trainee then as a staff member, that the wearing of a religious headscarf could be problematic when she was in contact with customers. The two employees brought proceedings to challenge the ground of dismissal, arguing that it was discriminatory. The matter went up to the referring courts.

Law – Under the relevant provisions (Articles 1 and 2), the purpose of the Directive was to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment, meaning that there could be no direct or indirect discrimination whatsoever on any of the grounds referred to.

The Directive contained no definition of the concept of "religion". However, the EU legislature had referred in the preamble to the Directive: first, to fundamental rights, as guaranteed by the European Convention on Human Rights (ECHR), and second, to the constitutional traditions common to the member States, as general principles of EU law.

Among the rights resulting from those common traditions, as reaffirmed in the EU Charter of Fundamental Rights, was the right to freedom of conscience and religion enshrined in Article 10(1) of the Charter, which corresponded to the right guaranteed in Article 9 of the ECHR and had the same meaning and scope.

In so far as the ECHR and, subsequently, the Charter used the term "religion" in a broad sense, that concept in Article 1 of the Directive had to be interpreted as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public.

(a) *G4S Secure Solutions* – The question in essence was as follows: whether the prohibition on wearing an Islamic headscarf, which arose from an internal rule of a private undertaking imposing a blanket ban on the visible wearing of any political, philosophical or religious sign in the workplace, constituted direct discrimination.

The internal rule at issue in the main proceedings referred to the wearing of visible signs of political, philosophical or religious beliefs and therefore covered any manifestation of such beliefs without distinction. The rule therefore had to be regarded as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, *inter alia*, to dress neutrally, which precluded the wearing of such signs. It was not evident that the internal rule had been applied differently to the complainant as compared to any other worker. Accordingly, an internal rule such as that at issue in the main proceedings did not introduce a difference of treatment that was directly based on religion or belief.

That being said, it was not inconceivable that the referring court might find a difference of treatment that was indirectly based on religion or belief, if it were established — which was for the referring court to ascertain — that the apparently neutral obligation it encompassed resulted, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage.

However, under Article 2(2)(b)(i) of the Directive, such a difference of treatment would not amount to indirect discrimination if it was objectively justified by a legitimate aim and if the means of achieving that aim were appropriate and necessary.

(i) *Legitimate aim* – An employer's wish to project an image of neutrality (political, philosophical or religious) towards customers related to the freedom to conduct a business that was recognised in Article 16 of the Charter and was, in principle, legitimate, notably where the employer involved in the pursuit of that aim only those workers who were required to come into contact with the employer's customers. That legitimacy was, moreover, borne out by the case-law of the European Court of Human Rights in relation to Article 9 of the ECHR (*Eweida and Others v. United Kingdom*, no. 48420/10, judgment of 15 January 2013, Information Note 159).

(ii) *Appropriateness* – The fact that workers were prohibited from visibly wearing signs of political, philosophical or religious beliefs was appropriate for the purpose of ensuring that a policy of neutrality was properly applied, provided that that policy was genuinely pursued in a consistent and systematic manner.

It was for the referring court to ascertain whether the company had, prior to the employee's dismissal, established a general and undifferentiated policy of prohibiting the visible wearing of signs of political, philosophical or religious beliefs in respect of members of its staff who came into contact with its customers.

(iii) *Necessity* – It was for the referring court:

– to ascertain whether the prohibition concerned only those employees who interacted with customers, and if so, whether the prohibition could be considered strictly necessary for the purpose of achieving the aim pursued;

– to further ascertain, taking into account the inherent constraints to which the undertaking was subject, and without it being required to take on an additional burden, whether it would have been possible for the employer, faced with such a refusal, to offer her a post not involving any visual contact with those customers, instead of dismissing her;

– to take into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what was strictly necessary.

In conclusion: the prohibition on wearing an Islamic headscarf, which arose from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, did not constitute direct discrimination based on religion or belief.

Such an internal rule might constitute indirect discrimination if it were established that the apparently neutral obligation it imposed resulted, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it was objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim were appropriate and necessary, which it was for the referring court to ascertain.

(b) *Bougnaoui and ADDH* – The referring court had asked, in essence, whether the willingness of an employer to take account of the wishes of a customer no longer to have that employer's services provided by a worker wearing an Islamic headscarf constituted a genuine and determining occupational requirement.

It was not clear from the order for reference whether the referring court's question stemmed from a finding of a difference of treatment based directly on religion or belief, or on a finding of a difference of treatment based indirectly on those criteria. The CJEU thus considered the following two situations:

(i) *Case of dismissal based on non-compliance with a rule in force and applied coherently within the undertaking* – This was the situation obtaining in the case of G4S Secure Solutions (above) and it would be for the referring court to ascertain the points indicated in that judgment.

(ii) *Case of dismissal not based on the existence of a coherently applied internal rule* – Under Article 4(1) of the Directive member States were entitled to stipulate that a difference of treatment based on a characteristic related to any of the grounds referred

to in Article 1 did not constitute discrimination where such a characteristic constituted a genuine and determining occupational requirement, provided that the requirement was proportionate. That appeared to be the case here, under the French Labour Code, although this was for the referring court to ascertain. That being said, the CJEU reiterated or explained as follows:

– that it was not the ground on which the difference of treatment was based (among those referred to in the Directive) but "a characteristic related to that ground" which had to constitute a genuine and determining occupational requirement;

– that, in accordance with the preamble to the Directive, it was only in very limited circumstances that a characteristic related, in particular, to religion might constitute a genuine and determining occupational requirement;

– and that, according to the actual wording of the Directive, such a characteristic might constitute such a requirement only "by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out".

It followed from the foregoing that the concept of a "genuine and determining occupational requirement" referred to a requirement that was objectively *dicta*ted by the nature of the occupational activities concerned or of the context in which they were carried out. It could not, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.

In conclusion: The willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf could not be considered a genuine and determining occupational requirement.

Inter-American Court of Human Rights (IACtHR)

Protection of human rights defenders against violations of the right to life and forced displacement

Case of Yarce and Others v. Colombia, Series C No. 325, judgment 22.11.2016

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

Facts – The case relates to events which occurred in 2002 in the context of Colombia´s internal armed conflict, when military operations were conducted to take control of the neighbourhood known as "Commune 13" in Medellin City. The applicants, five female human-rights defenders and their families, were victims of widespread and systematic violence, as well as intra-urban forced displacement. In particular, three of the applicants were detained after being identified as collaborators of the *guerrillas* before being released as there was not enough evidence against them. Ms Yarce was murdered in 2004. The remaining applicants were forcefully displaced from their places of residence. Three of them left in 2002 along with their families following threats by paramilitary forces, while another left after Ms Yarce was killed. Two of the applicants also lost their houses, which were occupied and destroyed by paramilitary groups.

Law

(a) *Articles 4(1) (Right to Life) and 5(1) (Right to Personal Integrity) of the American Convention on Human Rights (ACHR) in conjunction with Article 1(1) (Obligation to Respect and Ensure Rights) thereof, and Article 7 of the Inter-American Convention on The Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará")* – It is for the State authorities who become aware of a situation of special risk to determine or assess whether a person who is the target of threats and harassment requires measures of protection or to refer the case to the competent authority to do so, and also to offer the person at risk timely information on the measures available. The adequacy of protective measures for human-rights defenders requires three elements to be satisfied; the measures must be: (i) in accordance with the functions human-rights defenders carry out; (ii) subject to a risk assessment; and (iii) able to be modified according to the variation of the risk level.

In the present case, the State had known that Ms Yarce faced a risk because of her activities as a community leader due to the complaints filed. Indeed, this had led the Colombian authorities to issue a protection order in 2003. In the particular circumstances of the case, the decision to liberate a person previously detained on account of an accusation by the victim was tantamount to heightening the risk factors for her. Moreover, the State had

not adopted any further protective measures to mitigate the risk and the 2003 protection order did not satisfy the three abovementioned elements. Lastly, the State had been under a special duty to protect female human-rights defenders, owing to its knowledge of the context of systemic violence against them. Thus, Colombia had infringed its duty to prevent the violation of the right to life to the detriment of Ms Yarce. This, in turn, had affected the personal integrity of her children.

Conclusion: violation (unanimously).

(b) *Articles 5, 11 (Right to Honour and Dignity), 17 (Rights of the Family), 19 (Rights of the Child), 21 (Right to Property) and 22 (Rights to Freedom of Movement and Residence) of the ACHR, in conjunction with Article 1(1) thereof, and Article 7 of the Convention of Belém do Pará* – Freedom of movement is an essential condition for the free development of a person. The ACHR protects a person's right not to be forcibly displaced within a State Party, as well as not to be expelled from the territory of the State in which he or she is lawfully present. Forced displacement is a complex phenomenon, which affects various human rights, and the situation of displacement ought to be understood as "a *de facto* situation of vulnerability" likely to create particular and disproportionate harm to women. Such a situation obliges States to adopt positive measures to reverse the effects of this situation of vulnerability. As such, States ought to adopt measures that will facilitate the safe and voluntary return of displaced persons to their residence or their voluntary resettlement elsewhere. In situations of forced displacement, States also have the obligation to ensure that families, especially those with children, are reunited.

In the instant case, the State had failed to ensure the voluntary, safe return of the applicants. In addition, the limited scope of the State´s assistance had contributed to the harm the applicants suffered following their forced displacement. Moreover, Colombia's lack of protection of their abandoned residences, which were latter occupied and destroyed by paramilitary groups, constituted a violation of their right to property. Finally, while the Inter-American Court acknowledged the differentiated impact of forced displacement on women, it did not find specific grounds leading to a violation of the Convention of Belém do Pará.

Conclusion: violation of Articles 5, 11, 17, 19, 21 and 22 of the ACHR, in relation to Article 1(1) thereof; no violation of Article 7 of the Belém do Pará Convention (unanimously).

(c) *Article 16 (Freedom of Association) of the ACHR in conjunction with Article 1(1) thereof* – The ACHR includes the right of individuals to set up and participate freely in non-governmental organisations, associations or groups involved in human-rights monitoring, reporting and promotion. The Inter-American Court found that, given the important role of human-rights defenders in democratic societies, the free and full exercise of this right imposes upon the State the duty to create the legal and factual conditions for them to be able to freely perform their task. In this case, the applicants were not able to pursue their work as human-rights defenders freely, owing to the State's omission to guarantee the necessary conditions for them to return safely to "Commune 13". As a result, their right to freedom of association had been violated.

Conclusion: violation (unanimously).

(d) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered the State to: (i) adopt the necessary measures to pursue an investigation, in order to identify, judge, and where appropriate, punish those responsible for the forced displacement of one of the applicants and her family members; (ii) provide medical and psychological treatment to the victims; (iii) publish the judgment and its official summary; (iv) publicly acknowledge its international responsibility; (v) implement a programme, course or workshop through the corresponding state entities in "Commune 13", aimed at promoting and explaining the work of human-rights defenders; and (vi) pay compensation in respect of pecuniary and non-pecuniary damage, as well as costs and expenses.

COURT NEWS

Elections

On 20 March 2017 the Court elected a new Vice-President – Linos-Alexandre Sicilianos (Greece) for a three-year term. It also elected Robert Spano (Iceland) as Section President for a two-year term. The two judges will take up their respective duties on 1 May 2017.

2017 René Cassin advocacy competition

The final round of the 32nd edition of the René Cassin competition, which takes the form of a mock-trial, in French, concerning rights protected by the European Convention on Human Rights, took place at the Court in Strasbourg on 24 March 2017.

Thirty university teams from nine countries (Austria, Belarus, Belgium, France, Luxembourg, the Netherlands, Romania, Russia and Switzerland) competed on the theme of health and European human-rights law. Students from the Bruges *Collège d'Europe* (Belgium) were declared the winners after beating a rival team from Aix-Marseilles University in the final round.

Further information about this year's competition and previous contests can be found on the René Cassin competition Internet site (www.concours-cassin.eu).

RECENT PUBLICATIONS

Annual Report 2016 of the ECHR

The Court has just issued the print version of its Annual Report for 2016. This report contains a wealth of statistical and substantive information such as the Jurisconsult's overview of the main judgments and decisions delivered by the Court in 2016. It can be downloaded from the Court's Internet site (www.echr.coe.int – The Court).

The Court in facts and figures 2016

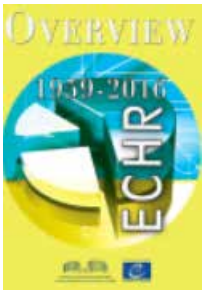
This document contains statistics on cases dealt with by the Court in 2016, particularly judgments delivered, the subject-matter of the violations found and violations by Article and by State. It can be downloaded from the Court's Internet site (www.echr.coe.int – The Court).

The ECHR in facts & figures 2016 (eng)

Overview 1959-2016

This document, which gives an overview of the Court's activities since it was established, has been updated. It can be downloaded from the Court's Internet site (www.echr.coe.int – The Court).

Overview 1959-2016 (eng)



Factsheets: new translations

The Factsheets on Austerity measures and on Migrants in detention have just been translated into Greek. All factsheets can be downloaded from the Court's Internet site (www.echr.coe.int – Press).

Μέτρα λιτότητας (gre)

Μετανάστες υπό κράτηση (gre)

Case-Law Guides: Albanian translation

The Court has recently published on its Internet site (www.echr.coe.int – Case-law) an Albanian translation of the Guide on Article 5 (right to liberty and security).

Udhëzues rreth nenit 5 – E drejta për lirinë dhe për sigurinë personale (alb)

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

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

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

ENG

www.echr.coe.int

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

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE