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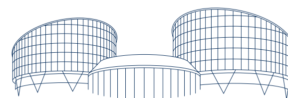

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COUR EUROPÉENNE DES DROITS DE L'HOMME

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ARTICLE 3

Degrading treatment

Meals served to a prisoner incompatible with the diet prescribed by doctors: *violation*

Ebedin Abi v. Turkey, 10839/09, judgment 13.3.2018 [Section II]

Facts – The applicant, who was detained in prison from April 2008 to March 2009, suffered from type 2 diabetes and coronary artery disease. As a result, he was obliged to follow a diet that was low in calories, beef and saturated fats and suitable for diabetics. However, during his prison stay the meals served to him were based mainly on beef and carbohydrates. He complained to the prison authorities, who refused his request to provide meals that were in keeping with the diet prescribed for him by doctors.

The applicant therefore applied to the post-sentencing judge, who granted his request after observing that the prison authorities had simply provided the applicant and thirty-seven other prisoners who had health problems with the same meals served to prisoners in good health, but with a lower salt and spice content.

However, the prosecutor appealed against that decision to the Assize Court, arguing that the prison authorities had been unable to prepare and provide a special menu owing to a lack of funds. The Assize Court allowed the appeal.

Law – Article 3: The prison where the applicant had been detained had been unable to provide meals that met the specific dietary requirements of prisoners with health problems, notwithstanding the relevant medical prescriptions, in view of the amount of the daily allowance per prisoner.

This practice could in no way be justified on economic grounds, given that the law in force at the relevant time provided for a separate budget for prisoners in poor health. However, neither the prosecutor nor the Assize Court had sought to ascertain whether the prison management had approached the competent authorities with a view to obtaining an increase in the daily allowance.

Furthermore, the applicant could not have been expected to procure his own meals in order to adhere to the diet prescribed for him, as he would have had to bear the costs. The applicant's state of health should not impose a heavier economic burden on him than that borne by prisoners in good health. A solution entailing costs to the applicant was incompatible with the State's duty to organise its prison system in such a way as to respect prisoners' human dignity, notwithstanding the logistical and financial difficulties.

Firstly, then, the authorities had omitted to take the necessary measures to protect the applicant's health.

Secondly, with regard to the issue of the deterioration in the applicant's health as a result of his inability to follow the diet prescribed by doctors, the applicant had made use of all the available remedies in order to present his complaints to the national authorities. He had then raised these issues before the Court following the final domestic ruling. The national authorities had therefore failed to respond adequately to the applicant's repeated requests to be provided with meals that met his requirements in view of his state of health.

Bearing in mind that persons in detention were unable to obtain medical treatment whenever they wished and in a hospital of their own choosing, the domestic authorities should have arranged for a specialist to study the standard menu offered by the prison and for the applicant to undergo a medical examination at the same time specifically geared to his complaints. In reality, the authorities had not sought to establish whether the food being provided to the applicant was suitable or whether the failure to adhere to the diet prescribed for him had had an adverse impact on his health.

Hence, these shortcomings meant that the domestic authorities had not taken the requisite measures for the protection of the applicant's health and well-being. They had thus failed to ensure that the applicant's conditions of detention were adequate and respected his human dignity.

The Court therefore dismissed the Government's preliminary objection as to the applicability of Article 3 of the Convention.

Conclusion: violation (unanimously).

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

(See also the Factsheet on Prisoners' health-related rights)

ARTICLE 5

ARTICLE 5 § 1

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Refusal by assize courts to release applicants despite Constitutional Court finding detention

to be unlawful (context of Article 15 derogation): *violations*

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(See Article 15 below, page 14)

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Civil rights and obligations, oral hearing

Lack of reasons for failure to hold oral hearing in proceedings concerning public call for tenders: *Article 6 applicable; violation*

Mirovni Inštitut v. Slovenia, 32303/13,
judgment 13.3.2018 [Section IV]

Facts – As a result of the Government's call for tenders, the applicant, a private research institute, was not awarded funding and unsuccessfully challenged this decision before the domestic courts. Despite the applicant's request, no hearing was held, without any reasons being given.

Law – Article 6 § 1

(a) *Applicability* – The Court had previously excluded the applicability of Article 6 to procedures concerning a call for tenders by the domestic authorities, pointing out that the latter enjoyed a discretionary power and that the substantive law of the State concerned did not confer to the applicants a right to be awarded the tender. However, in *Regner v. the Czech Republic,* it distinguished, *inter alia*, a situation where the authorities had a purely discretionary power to grant or refuse an advantage or privilege, with the law conferring on the person concerned the right to apply to the courts, which, where they found that the decision was unlawful, could set it aside. In such a case, Article 6 § 1 was applicable on condition that the advantage or privilege, once granted, gave rise to a civil right. Those principles were relevant to the instant case where the applicant institute clearly enjoyed a procedural right to the lawful and correct adjudication of the tenders. Should the tender have been awarded to the applicant institute, the latter would have been conferred a civil right. Therefore, the civil limb of Article 6 § 1 was applicable.

(b) *Merits* – It was necessary to establish whether there were any exceptional circumstances which justified dispensing with an oral hearing in the instant case. The applicant institute had expressly requested to hold a hearing and to hear a witness in respect of the facts relevant for the assessment of the impartiality of persons involved in the determination of the tender. Those matters were disputed between the parties and the proposed witness evidence was thus relevant for the outcome of the proceedings. However, the Administrative Court, which had acted as the first and the only judicial instance with full jurisdiction, had neither acknowledged the applicant institute's request, nor given any reasons for not granting it. While the domestic law allowed to dispense with a hearing in a limited number of situations, in the absence of any explanation, it was difficult for the Court to ascertain whether the Administrative Court had simply neglected to deal with the applicant institute's request or whether it had intended to dismiss it and, if so, for what reasons. It was also difficult to draw any conclusions as to the legal basis for not holding a hearing and how the relevant legal provision was interpreted against the factual background of the case. The proceedings in the instant case had therefore not been fair.

Conclusion: violation (unanimously).

Article 41: EUR 4,800 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See *Regner v. the Czech Republic* [GC], 35289/11, 19 September 2017, Information Note 210)

Civil rights and obligations, access to court

Absence of universal jurisdiction of civil courts in torture cases: *Article 6 applicable; no violation*

Naït-Liman v. Switzerland, 51357/07,
judgment 15.3.2018 [GC]

Facts – In 2001 a former Minister of the Interior of the Republic of Tunisia was briefly hospitalised in Switzerland. The applicant, a Tunisian political refugee who had been resident in Switzerland since 1993, lodged a criminal complaint against him for acts of torture allegedly inflicted in 1992 in the premises of the relevant Ministry in Tunisia. As the related proceedings were discontinued on the grounds that the former Minister had left Switzerland, the applicant then brought a civil claim for compensation against him and against the Tunisian State. However, the Swiss courts held that they did not have jurisdiction: Swiss law did not enshrine universal civil jurisdiction for acts of torture, and jurisdiction on the grounds of a "forum of necessity" was only accepted where the "case" had a sufficient connection with Switzerland. In particular, the Federal Supreme Court considered that it had to place itself at the time of the alleged events, that is in 1992 – thus setting aside the ties subsequently formed by the applicant with Switzerland –, and held that the term "case" ought to be understood in the restricted sense of a "set of facts" (in other words, it was the alleged facts rather than the person of the applicant which had to have a sufficient connection with Switzerland).

Law – Article 6 § 1

(a) *Applicability* – The applicability of Article 6 § 1 in civil matters depended on the existence of a dispute relating to "rights and obligations" which, arguably at least, could be said to be recognised under domestic law.

However – in addition to Article 41 of the Swiss Code of Obligations, which recognised the general principle of civil liability for unlawful acts –, Article 14 of the United Nations Convention against Torture (integrated into Switzerland's legal system on its ratification in 1986) guaranteed the right of victims of acts of torture to obtain redress and to fair and adequate compensation.

The fact that the respondent State did not actually contest the existence of such a right, but rather its extra-territorial application, was immaterial. The dispute could relate not only to the actual existence of a right but also to its scope and the manner of its exercise. In the Court's view, this question of territorial jurisdiction went to the substance of the case and was not decisive for the applicability of Article 6.

Conclusion: Article 6 applicable (sixteen votes to one).

(b) *Merits* – Switzerland had not imposed an excessive or illegitimate restriction on the right of access to a court.

(i) *Legitimacy of the aims pursued* – Several legitimate concerns could be noted on the part of the authorities, related to the principles of the proper administration of justice and maintaining the effectiveness of domestic judicial decisions: (i) the problem for the courts in gathering and assessing the evidence; (ii) the difficulty of enforcing judgments; (iii) the risk of encouraging forum-shopping, which would entail an excessive workload for the Swiss courts, especially in a context of budgetary restrictions; (iv) as a subsidiary consideration, the potential diplomatic difficulties.

(ii) *Proportionality of the restriction* – "Jurisdiction" was the power of an entity to rule on a question of law arising in a particular context of a dispute. It was necessary to distinguish the two grounds of jurisdiction to be considered here:

– the "universal" nature of jurisdiction referred to an absence of the required connection between the jurisdiction applied to and the "case" or impugned situation. In its absolute form, universal jurisdiction consisted in eliminating any connecting factor *ratione personae* or *ratione loci* to the forum State. The Convention against Torture provided for such jurisdiction in criminal matters (Article 5(2)), but was more ambiguous in civil matters (Article 14);

– jurisdiction under a "forum of necessity" referred to the residual jurisdiction, as an exception to the usual rules of domestic law, where proceedings abroad proved impossible or excessively difficult in law or in practice.

However, international law did not oblige Switzerland to open its courts to the applicant on either of those grounds.

The absence of a binding norm of international law left the Swiss authorities a wide margin of appreciation, which had not been exceeded by either the legislature or the courts. No arbitrary or manifestly unreasonable elements were apparent in the Federal Supreme Court's interpretation of the relevant legal provisions. Having regard to that conclusion, the Court did not consider it necessary to examine the possible immunities from jurisdiction from which the respondents to the applicant's claim might have benefited.

That being stated, this conclusion did not call into question the broad consensus within the interna-

tional community on the existence of a right for victims of acts of torture to obtain appropriate and effective redress, nor the fact that the States were encouraged to give effect to this right by endowing their courts with jurisdiction to examine such claims for compensation, including where they were based on facts which occurred outside their geographical frontiers. In this respect, the efforts by States to make access to a court as effective as possible for those seeking compensation for acts of torture were commendable.

However, it did not appear unreasonable for a State which established a forum of necessity to make its exercise conditional on the existence of certain connecting factors with that State, to be determined by it in compliance with international law and without exceeding the margin of appreciation afforded to the State under the Convention.

Nonetheless, given the dynamic nature of this area, the Court did not rule out the possibility of developments in the future. Accordingly, and although it concluded that there had been no violation of Article 6 § 1 in the present case, the Court invited the States Parties to the Convention to take account in their legal orders of any developments facilitating effective implementation of the right to compensation for acts of torture, while assessing carefully any claim of this nature so as to identify, where appropriate, the elements which would oblige their courts to assume jurisdiction to examine it.

Conclusion: no violation (fifteen votes to two).

ARTICLE 8

Respect for family life

Alleged procedural failings in the domestic court's decision to remove children from their parents: *no violation*

Wetjen and Others v. Germany, 68125/14 and 72204/14,
Tlapak and Others v. Germany, 11308/16 and 11344/16, judgments 22.3.2018 [Section V]

Facts – In both cases, the applicants were members of the Twelve Tribes Church, a religious community where it was alleged various forms of corporal punishment were used in the upbringing of children. The domestic court received video footage which demonstrated such treatment, although none of the applicants were shown.

In *Wetjen and Others*, a preliminary investigation was initiated in which witnesses confirmed corporal punishment was used in the upbringing of children in the community. Subsequently, the domestic court made an interlocutory order withdrawing the applicant parents' rights to decide where their children should live, and to take decisions regarding the children's health, schooling and professional training, and transferred those rights to a youth office. The children were also taken into care on the basis that there was a reasonable likelihood that they would be subjected to corporal punishment.

Upon judicial review the interlocutory order was upheld. The court of appeal affirmed that it had been necessary to take the children out of the community and that there had been no other less infringing measure which ensured that the children would not be harmed.

In *Tlapak and Others*, the court of appeal upheld an order by the family court in main proceedings transferring the parents' right to decide where their two daughters should live and to take decisions regarding their health and schooling to the youth office. It found that the parents would continue to use corporal punishment on the children in the future since that parenting method was already firmly established and that no less severe measures were available as the parents had already left Germany with their son and refused to return to live there permanently, thus making it impossible for the authorities to provide sufficient support or to effectively monitor the position.

In the Convention proceedings, the applicants in both cases complained that there had been procedural failings by the domestic courts and that the measures constituted, *inter alia*, a violation of the right to respect for their family life, under Article 8 of the Convention.

Law – Article 8

(a) *Wetjen and Others (interlocutory proceedings)* – The interlocutory order and the withdrawal of some parental rights constituted an interference with the applicants' right to respect for their family life. However, the interference was in accordance with the law and pursued a legitimate aim, namely, protecting the "health or morals" and the "rights and freedoms" of the children.

In order to avoid any risk of ill-treatment and degrading treatment of children, the Court considered it commendable for member States to prohibit

in law all forms of corporal punishment of children (German law contained such a prohibition) and to enforce such provisions by proportionate measures. It therefore found that the risk of systematic and regular caning had constituted a relevant reason to withdraw parts of the parents' authority and to take the children into care. The domestic courts had complied with the procedural requirements implicit in Article 8 and their conclusions – that caning was or could be used by the applicant parents and that the applicant children would be at risk of being caned – were based on a sufficient factual foundation and were not arbitrary or unreasonable. The withdrawal of parental authority was limited to areas that were strictly necessary and to applicant children that were of an age where corporal punishment could be expected and were therefore in a real and imminent risk of degrading punishment.

In addition the Court emphasised the importance of the domestic courts giving detailed reasons why no other option was available to protect the children which entailed less of an infringement of each family's rights. They found that the parents had not shown any willingness to refrain from disciplining the children and that greater assistance from the youth office would not ensure their safety at all times. Moreover, even if the parents were willing to refrain from corporal punishment and able to resist pressure from the community, they would not be able to ensure that other community members would not cane the children when supervising them. The Court agreed any assistance by the youth office could not have effectively protected the children, as corporally disciplining the children was based on their unshakeable dogma.

In sum, there were "relevant and sufficient" reasons for the measures. Based on fair proceedings, the domestic courts had struck a balance between the interests of the applicant children and those of the applicant parents which aimed at protecting the best interests of the children and did not fall outside the margin of appreciation granted to the domestic authorities.

Conclusion: no violation (unanimously).

(b) *Tlapak and Others (main proceedings)* – The domestic courts had given detailed reasons why there was no other option entailing less of an infringement of each family's rights available to effectively protect the children. Moreover, the court of appeal had correctly pointed out that in the situation the parents had created by leaving the country during the proceedings, the detriment to the best interests of the children could no longer be averted by more lenient measures since the competent authorities would not be able to sufficiently monitor and enforce such measures.

Conclusion: no violation (unanimously).

ARTICLE 10

Freedom of expression

Prison sentence for setting fire to a large photograph of royal couple turned upside down: *violation*

Stern Taulats and Roura Capellera v. Spain, 51168/15 and 51186/15, judgment 13.3.2018 [Section III]

Facts – In September 2007, while the King was on an official visit to Girona, which was followed by an anti-monarchist and separatist demonstration, a rally took place on a square in the city where the applicants set fire to a large photograph of the royal couple which they had turned upside down.

In July 2008 the criminal judge of the *Audiencia Nacional* convicted the applicants of the offence of insulting the Crown, sentencing them to fifteen months' imprisonment in lieu of a EUR 2,700 fine imposed on each of them. The applicants were to serve the prison term in the event of total or partial non-payment of the fine.

The Criminal Chamber of the *Audiencia Nacional* upheld that judgment.

When the judgment became final, the applicants paid their fines. They subsequently lodged an *amparo* appeal with the Constitutional Court, which delivered judgment in July 2015, finding that the offence with which the applicants had been charged had not been covered by the exercise of the freedoms of expression and of opinion in so far as they had been guilty of incitement to hatred and violence against the King and the monarchy.

Law – Article 10: The impugned conviction had amounted to an interference with the applicants' right to freedom of expression, which interference was prescribed by law and pursued a legitimate aim, that is to say the protection of the reputation or rights of others.

The Constitutional Court's judgment had called in question the manner in which the applicants had expressed their political criticism, that is to say the fact that they had used fire and had displayed a large photograph which they had previously turned upside down. The Constitutional Court considered that such a mode of expression had overstepped the bounds of freedom of expression and fallen within the sphere of hate speech and incitement to the use of violence.

The three factors cited by the Constitutional Court were symbolic, and were clearly and obviously related to the concrete political criticism levelled by the applicants, targeting the Spanish State and its monarchic form: the effigy of the King of Spain was the symbol of the monarch as the head of the State apparatus; the use of fire and the fact of turning the photograph upside down expressed radical refusal or rejection, and those two actions had expressed criticism of a political or other nature; the size of the photograph had apparently been intended to ensure the visibility of the action in question, which had been carried out on a public square. The offence with which the applicants had been charged had been one of the increasing numbers of provocative "staged events" which were being used to attract media attention and which went no further than recourse to a certain permissible degree of provocation in order to transmit a critical message in the framework of freedom of expression.

The applicants' intention had not been to incite people to commit acts of violence against the person of the King, even though the "staged event" had involved burning his image. An act of this kind should be interpreted as the symbolic expression of dissatisfaction, as a protest. The "event" staged by the applicants had been a means of expressing an opinion in the framework of a debate on a matter of public interest, that is to say the monarchical institution.

No incitement to violence could be inferred from combined consideration of the elements used for staging the event and of the context in which it had taken place, nor could such incitement be established on the basis of the consequences of the act, which had not led to violent or public disorder.

The classification as hate speech of an act which, like that of which the applicants were accused in the present case, was the symbolic expression of political criticism and rejection of an institution, and its consequent exclusion from the protection guaranteed by freedom of expression, would have entailed an excessively broad interpretation of the exceptions allowed under the Court's case-law, and was liable to undermine the pluralism, tolerance and openness without which there was no "democratic society". The Government's preliminary objection under Article 17 of the Convention had therefore to be rejected.

As regards the criminal penalty imposed on the applicants, that is to say a prison sentence for an offence committed in the context of a political debate, which was the severest legal punishment for a criminal act, had amounted to an interference with the freedom of expression disproportionate to the legitimate aim pursued and unnecessary in a democratic society.

Conclusion: violation (unanimously).

Article 41: finding of a violation sufficient in itself in respect of non-pecuniary damage; EUR 2,700 to each applicant in respect of pecuniary damage.

(See also *Christian Democratic People's Party v. Moldova (no. 2)*, 25196/04, 2 February 2010; *Mamère v. France*, 12697/03, 7 November 2006, Information Note 91; and the Factsheet on Hate speech)

Freedom of expression

Conviction for defamation on account of journalistic statements presented in a question format and treated as statements of fact by domestic courts: *violation*

Falzon v. Malta, 45791/13, judgment 20.3.2018 [Section IV]

Facts – The deputy leader of the Malta Labour Party (MLP), M.F., delivered a speech in which he informed the public that he had received an anonymous email and threatening letters, in respect of which he had complained directly to the Commissioner of Police asking him to investigate the issue. The applicant published an opinion in the newspaper *Maltatoday*, commenting on this speech and querying the manner in which the two main political parties perceived the police force. The article contained a series of questions:

"Has not MLP Deputy Leader [M.F.] successfully used the Police Force to control the freedom of an innocent, law-abiding private citizen whom he suspected could be a political enemy? And has not somebody in the police force abused of his powers

by condescending to do this for the advantage of the faction led by [M.F.] in the MLP's internal squabbles? Why should the police force interfere in Labour's internal politics where, it is obvious, there are too many cooks spoiling the broth?"

"So what is the Government doing about this? Does the MLP Deputy Leader …, carry more weight and influence with the Commissioner of Police than the Deputy Prime Minister who is politically responsible for the Police Force?"

In response, the deputy leader instituted libel proceedings against the applicant. The domestic court found the applicant guilty of defamation and ordered him to pay damages (EUR 2,500). The applicant's appeals were dismissed.

In the constitutional redress proceedings, the applicant claimed that the domestic courts had imputed to him insinuations or allegations which he had neither made nor implied in his article, such as the statements to the effect that M.F. had "manipulated" the Commissioner of Police, that the latter had been subjected to pressure which had "impeded the exercise of his function" and that M.F. "was a *deus ex macchina* pulling the strings of the Police Force". As regards the series of questions in his article, the applicant argued that they were for the reader to answer.

The Constitutional Court considered the impugned questions as allegations of fact and endorsed the lower courts' conclusions that the applicant had failed to corroborate his factual allegation of an illegitimate and abusive pressure on the police by the MLP deputy leader.

Law – Article 10: The outcome of the libel proceedings constituted an interference with the applicant's right to freedom of expression. The interference was prescribed by law and pursued a legitimate aim, namely, the protection of the reputation or rights of others.

The statements set out in question format appeared to have been the main reason for the applicant's conviction. The domestic courts had attributed to them meanings which had not been explicitly set out and in consequence considered that they were untrue factual assertions. The Court disagreed with that conclusion of the domestic courts, recalling its broad and liberal interpretation of "value judgments" in relation to journalistic freedom on matters of public interest, particularly concerning politicians. By using a provocative style, it was plausible that the applicant was raising awareness as to the possibility of any abuse being perpetrated by the deputy leader of an opposition party, and was thus expressing his concerns on a matter of public interest. Thus the questions posed by the applicant were legitimate questions having a sufficient factual basis: M.F.'s own speech.

Furthermore, the Court was not convinced that the impugned statements could be considered as an attack reaching the requisite threshold of seriousness and capable of causing prejudice to M.F.'s personal enjoyment of private life. Therefore, the award of damages in his favour could have had a chilling effect.

In sum, the domestic courts had not appropriately performed a balancing exercise between the need to protect the plaintiff's reputation and the applicant's freedom of expression.

Conclusion: violation (unanimously).

Article 41: EUR 4,000 in respect of non-pecuniary damage; EUR 2,500 in respect of pecuniary damage.

Freedom of expression

Detention of journalists on anti-terrorism charges following attempted coup: *violations*

Mehmet Hasan Altan v. Turkey, 13237/17,
Şahin Alpay v. Turkey, 16538/17,
judgments 20.3.2018 [Section II]

(See Article 15 below, page 14)

Freedom of expression

Criminal conviction for publicly insulting the Prime Minister during a speech: *violation*

Uzan v. Turkey, 30569/09, judgment 20.3.2018 [Section II]

Facts – In September 2008 the applicant was sentenced by a criminal court to eight months' imprisonment and ordered to pay a fine of about EUR 400 for publicly insulting the Prime Minister and attacking the latter's honour and reputation; the court held that he had exceeded the limits of acceptable criticism in statements made during a speech in 2003 and in his repeated use of the terms "treacherous" "looter", "insolent", "godless one".

However, the criminal court decided to defer delivery of this judgment, subject to the condition that the applicant submit to judicial supervision for a

period of five years, one year of which was to be supervised by a counsellor who would ensure, firstly, that the applicant attended a three-month course on self-control and, secondly, that he read five books on personal development.

Nonetheless, as these obligations had not been fulfilled, the above-mentioned deferment was lifted and in February 2010 the applicant was sentenced to imprisonment and ordered to pay a fine; the duration and amount of these penalties were reduced by half for the execution phase. In December 2010 the Court of Cassation upheld that judgment.

Law – Article 10: The criminal-law measures taken against the applicant amounted to an interference with the rights guaranteed by Article 10, were in accordance with the law and pursued the legitimate aim of protection of the reputation or rights of others.

Although the applicant had attempted to downplay the seriousness of his remarks by explaining to the domestic courts the terms used in the speech, some of them, such as "treacherous", "looter", insolent" and "godless one", remained open to criticism. As the applicant was the leader of an opposition party and the majority shareholder in two companies targeted by governmental measures, his statements, assessed in their entirety, could be considered as having been made in the context of a political speech on issues arising from the government's actions. Notwithstanding their negative and hostile connotation, in this context such exchanges between politicians could not be considered as lacking in moderation.

The domestic courts had made no distinction between "facts" and "value judgments", but had merely assessed whether or not the applicant's remarks had been insulting and whether the terms used were capable of denigrating the Prime Minister's personality and reputation. They had not ruled on either the context in which the impugned remarks were made, or on the merits of the criticism expressed by the applicant.

The Prime Minister had inevitably laid himself open to close scrutiny of his every word and deed, and also to criticism; he was required to display a particularly high degree of tolerance in this context, including with regard to the form taken by such criticism, especially since, in the present case, the impugned remarks had been made as part of a political speech.

Lastly, the Court attached considerable weight to the fact that, although in the first phase of the proceedings the criminal court had decided to defer delivery of the judgment convicting the applicant, provided that he submit to judicial supervision for five years and comply with the obligations imposed, this had nonetheless been a criminal-law penalty. In any event, the applicant had stood to benefit from deferment of the judgment only if, for five years from the date of that measure being granted, he did not commit any other intentional offence; otherwise, the applicant had been liable, at the very least, to be tried and sentenced to imprisonment and a fine.

Regard being had to the circumstances of the case and, in particular, the failure to examine the proportionality of the penalty, which was of a criminal-law nature, it had not been shown that the impugned measure was proportionate to the aim sought and that it was necessary in a democratic society for the protection of the reputation or rights of others.

Conclusion: violation (unanimously).

The Court also concluded, unanimously, that there had been a violation of Article 6 § 1 on account of the length of the proceedings before the domestic courts.

Article 41: no claim made in respect of damage.

(See also *Oberschlick v. Austria (no. 2)*, 20834/92, 1 July 1997; *Jerusalem v. Austria*, 26958/95, 27 February 2001, Information Note 27; and the Factsheet on Protection of reputation)

ARTICLE 14

Discrimination (Article 5)

Refusal, as a result of applicant's place of residence, to impose non-custodial sentence: *violation*

Aleksandr Aleksandrov v. Russia, 14431/06, judgment 27.3.2018 [Section III]

Facts – In 2005 a district Court in Moscow found the applicant guilty of kicking a police officer while intoxicated and sentenced him to one year's imprisonment. When deciding on the appropriate sentence, the court listed a number of mitigating circumstances which made the applicant *prima facie* eligible for a non-custodial sentence, such as probation or a fine. It held, however, that two elements extinguished the applicant's entitlement to a more lenient sentence, the first being "the

particular circumstances in which the offence had been committed", and the second being his lack of a permanent place of residence within the Moscow Region, which was not the region of the applicant's habitual residence but the region where the offence had been committed and the sentence had been pronounced. The applicant's appeal was dismissed.

Law – Article 14 taken in conjunction with Article 5: In so far as the applicant's place of residence had been explicitly mentioned as a factor in the sentencing decision, it had introduced a difference of treatment based on this ground between the applicant and other offenders convicted of similar offences and eligible for a sentence of probation or a fine. The difference in treatment did not seem to follow from domestic law. The Criminal Code provided for the possibility for a person serving a suspended sentence to change his place of residence under certain conditions.

In deciding whether or not a non-custodial sentence would be appropriate to attain the objectives of criminal justice, domestic courts could be called upon to consider the impact of the offender's personal circumstances on the manner of its enforcement. Nevertheless, reliance on any ground protected under Article 14 would require a justification that was capable of passing for an objective and reasonable one.

While acknowledging the existence of strong social links in the applicant's home town, the district court had not justified why the benefit of a non-custodial sentence should have been conditional on the applicant's ability to have a permanent residence outside his home region and near the place where he had been tried and sentenced. The appellate court had neither addressed the discrimination argument made by the applicant's lawyer nor offered any justification for the difference in treatment.

Accordingly, it had not been shown that the difference in treatment had pursued a legitimate aim or had an objective and reasonable justification.

Conclusion: violation (unanimously).

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

(See also *Paraskeva Todorova v. Bulgaria*, 37193/07, 25 March 2010, Information Note 128; and more generally: *Moldovan and Others v. Romania (no. 2)*, 41138/98 and 64320/01, 12 July 2005, Information Note 77; *Carson and Others v. the United Kingdom* [GC], 42184/05, 16 March 2010, Information Note 128; *Khamtokhu and Aksenchik v. Russia* [GC], 60367/08 and 961/11, 24 January 2017, Information Note 203; and *Carvalho Pinto de Sousa Morais v. Portugal*, 17484/15, 25 July 2017, Information Note 209)

ARTICLE 15

Derogation in time of emergency

Aborted military coup attempt: *derogation justified; proportionality of interferences to be examined with merits*

Mehmet Hasan Altan v. Turkey, 13237/17,
Şahin Alpay v. Turkey, 16538/17,
judgments 20.3.2018 [Section II]

Facts – On 21 July 2016 Turkey notified the Secretary General of the Council of Europe that it was availing itself of the right of derogation under Article 15 of the Convention, indicating that a state of emergency had been declared in order to tackle the "threat to the life of the nation" caused by the attempted military coup of 15 July 2016 and the terrorist violence affecting the country, without explicitly mentioning the Articles of the Convention to which the derogation related.

The applicants, journalists known as critics of the government, were arrested and tried in an assize court under provisions of the Criminal Code on attempting to overthrow the constitutional authorities and committing offences on behalf of a terrorist organisation without being a member of it. After failing to secure release from pre-trial detention, they both applied to the Constitutional Court, which took fourteen and sixteen months respectively to examine the applications of Mr Altan and Mr Alpay.

The Constitutional Court held that in the absence of any specific grounds other than their articles or television appearances, the applicants' initial pre-trial detention and its continuation were unconstitutional from the standpoint of the rights protected under both Article 5 and Article 10 of the Convention. However, the assize courts refused to release them, finding that the Constitutional Court had acted outside its jurisdiction by conducting an assessment of the evidence.

Law

Article 15 (*general aspect*): The Court was prepared to accept: (i) that the formal requirement in Article

15 § 3 to keep the Secretary General of the Council of Europe fully informed of the measures taken by way of derogation from the Convention and the reasons for them had been satisfied; and (ii) that, as the Constitutional Court in particular had found, the attempted military coup had disclosed the existence of a "public emergency threatening the life of the nation" within the meaning of the Convention.

As to whether the measures taken had been strictly required by the exigencies of the situation and consistent with the other obligations under international law, this question would be examined together with the merits of the complaints.

Article 5 § 1: Firstly, although the legal basis on which the ordinary courts reviewed pre-trial detention differed from that employed in the context of a constitutional application, it could not be maintained that the Constitutional Court could have examined the lawfulness of pre-trial detention without considering the evidence in the file.

Secondly, the binding nature of the Constitutional Court's judgments was precisely one of the reasons that had prompted the conclusion that that court offered an effective remedy to be used in cases concerning pre-trial detention (see *Uzun v. Turkey* (dec.), 10755/13, 30 April 2013, Information Note 163; and *Koçintar v. Turkey* (dec.), 77429/12, 1 July 2014, Information Note 176).

Accordingly, if the Constitutional Court ruled that an individual's pre-trial detention was in breach of the Constitution, the competent courts should react in such a way as to ensure the individual's release, unless new reasons or evidence justified not doing so.

However, in the present cases, the assize courts had refused to release the applicants despite the Constitutional Court's judgment by interpreting and applying domestic law in a manner departing from the approach indicated to the European Court by the Government, who had argued that an application to the Constitutional Court was an effective remedy. The reasons given by the assize courts could not be accepted. For another court to call into question the powers conferred on a constitutional court to give "final and binding" judgments ran counter to the fundamental principles of the rule of law and legal certainty.

In the absence of any evidence indicating that there had been any change in the basis for the detention, the applicants' continued pre-trial detention, after the Constitutional Court's clear and unambiguous judgments, could not be regarded as "in accordance with a procedure prescribed by law".

With regard to the context of Turkey's derogation from the Convention, a measure of pre-trial detention that was unlawful on account of the lack of reasonable suspicion was not strictly required by the exigencies of the situation that had justified the application of Article 15.

The Court noted that it reserved the right to reconsider the effectiveness of an application to the Constitutional Court for the protection of the rights enshrined in Article 5 and would, to that end, take account of the domestic courts' practice regarding the authority of Constitutional Court judgments.

Conclusion: violation (six votes to one).

Article 5 § 4: In the present cases, the applicants had on several occasions been able to secure a "speedy" review by the appropriate court of the reasons for their detention. In a system of that kind, the Court could tolerate longer periods of review by the Constitutional Court.

Although a period of fourteen to sixteen months could nevertheless have been regarded as incompatible with the "speediness" requirement in a normal context, such a finding did not apply in the particular circumstances of the two cases: firstly, the applicants' applications to the Constitutional Court raised new and complex issues linked to the state of emergency following the attempted military coup; and secondly, the Constitutional Court's caseload after the declaration of a state of emergency had created an exceptional situation.

That did not mean, however, that the Constitutional Court had carte blanche in this regard: in accordance with Article 19 of the Convention, the Court retained its ultimate supervisory jurisdiction for complaints submitted by other applicants about the length of time taken to examine their application to the Constitutional Court concerning the lawfulness of their detention.

Conclusion: no violation (unanimously).

Article 10: Although serious doubts could arise as to whether the interference had been foreseeable, the following conclusions made it unnecessary for the Court to settle this question.

The Court was prepared to take into account the difficulties facing Turkey in the aftermath of the

attempted military coup. However, the existence of a "public emergency threatening the life of the nation" must not serve as a pretext for limiting freedom of political debate, which was at the very core of the concept of a democratic society. Even in a state of emergency – a legal regime designed to return the situation to normal by guaranteeing fundamental rights (as the Constitutional Court had noted) – any measures taken should seek to protect the democratic order from the threats to it, and the authorities had to make every effort to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness.

Criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda. And even where such charges were brought, pre-trial detention should only be used as a last resort.

The pre-trial detention of anyone expressing critical views had a chilling effect on freedom of expression for society as a whole, and such an effect could persist even where the detainee was subsequently acquitted.

Lastly, with regard to the derogation by Turkey, the conclusions set out in relation to Article 5 were also valid in the context of Article 10.

Conclusion: violation (six votes to one).

Article 46: The respondent State was to take all necessary measures to put an end to Mr Alpay's pre-trial detention breaching Article 5 § 1. However, there was no basis for indicating a similar measure in the case of Mr Altan, since he had in the meantime been convicted and his detention was thus no longer covered by Article 5 § 1 (c) but by Article 5 § 1 (a).

Article 41: EUR 21,500 to each applicant in respect of non-pecuniary damage.

ARTICLE 35

ARTICLE 35 § 1

Six-month period

Later addition by applicants of a period of more than 50 years to facts of complaint based on adverse possession: *inadmissible*

Radomilja and Others v. Croatia, 37685/10 and 22768/12, judgment 20.3.2018 [GC]

Facts – On 6 April 1941 the legislation of the former Yugoslavia prohibited the acquisition of ownership of socially owned property by adverse possession. That provision was repealed by the Croatian Parliament in 1991 and section 388(4) of the 1996 Property Act provided that the period from 6 April 1941 to 8 October 1991 was to be included in calculating the period for acquiring ownership by adverse possession of socially owned immovable property. However, in 1999 the Constitutional Court invalidated section 388(4) of the 1996 Property Act on the grounds that its retrospective effect and the adverse consequences it produced on the rights of third parties were unconstitutional.

The domestic courts refused to make a declaration that the applicants had, through adverse possession, acquired title to land registered in the name of local authorities. The 1996 Property Act had fixed the period for acquisition of ownership by adverse possession at 40 years for socially owned property. The running of the statutory 40-year period had been interrupted in April 1941 and had only started to run again after 8 October 1991. The applicants and their predecessors-in-title had only been in possession of the land (continuously and in good faith) since 1912, and therefore they fell short of the requisite period as of 6 April 1941.

Relying on Article 1 of Protocol No. 1, the applicants complained that, in dismissing their claims, the domestic courts had misapplied the relevant domestic law, as the statutory period for acquiring ownership by adverse possession had been 20, not 40, years. They pointed out that according to the interpretation of the Federal Supreme Court of Yugoslavia in April 1960, a *bone fide* possessor of immovable property was entitled to acquire it by adverse possession after 20 years.

In its judgments of 28 June 2016 (*Radomilja and Others v. Croatia*, 37685/10, and *Jakeljić v. Croatia*, 22768/12), a Chamber of the Court held by six votes to one in both cases that there had been a violation of Article 1 of Protocol No. 1. Following the approach adopted in *Trgo v. Croatia* (35298/04, 11 June 2009) the Chamber took account of the period from 6 April 1941 to 8 October 1991 and found that the applicants' claim to ownership of the plots of land had a sufficient basis in national law (section 388(4) of the 1996 Property Act) to qualify as an "asset" protected by Article 1 of Protocol No. 1.

On the merits, the Court found that – in the absence of any prejudice to the rights of others – it was not justified to exclude the 1941-1991 period from the calculation of the period for acquiring ownership by adverse possession of socially owned property.

On 28 November 2016 the cases were referred to the Grand Chamber at the Government's request (see Information Note 201).

Law – As the two applications were based on similar facts and complaints and raised the same questions under the Convention, the Court decided to join them.

(a) *Scope of the case* – The scope of a case "referred to" the Court through the exercise of the right of individual petition was circumscribed by the applicant's complaint, comprising factual allegations and legal arguments. By virtue of the *jura novit curia* principle the Court was not bound by the legal grounds adduced by the applicant and had the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles or provisions of the Convention that were different from those relied upon by the applicant. It could not, however, base its decision on facts that were not covered by the complaint. To do so would be tantamount to deciding beyond the scope of a case; in other words, to deciding on matters that had not been "referred to" it, within the meaning of Article 32 of the Convention.

The applicants' initial complaints before the Court, as formulated in their application forms, were rather open-ended. Subsequently, in their observations before the Chamber, they did not include the period between 6 April 1941 and 8 October 1991 in the factual and legal basis of their complaints. This they confirmed subsequently in their reply to the Government's observations before the Chamber where they expressly excluded that period.

The Chamber had decided to examine the applicants' complaints – and in particular the issue whether they had had a possession protected under Article 1 of Protocol No. 1 – in the light of the Court's *Trgo v. Croatia* judgment, resulting in the finding that the applicants' claims to become owners of the land in question had a sufficient basis in national law, namely, in the 1996 version of section 388(4) of the 1996 Property Act. That finding necessarily entailed taking into account the period between 6 April 1941 and 8 October 1991. By doing so, the Chamber had based its judgment on facts that were substantially different from those that had been relied on by the applicants and had thus decided beyond the scope of the case as delimited by the applicants' complaints under Article 1 of Protocol No. 1.

In their observations before the Grand Chamber, the applicants had argued that it had never been their intention to exclude from the factual basis of their complaints the said period between 6 April 1941 and 8 October 1991, whereas their submissions before the Chamber evidently suggested otherwise.

The Grand Chamber took the view that the belated addition of the period of more than 50 years to the factual basis of their complaint about adverse possession, a means of property acquisition for which the time factor was crucial, had to be seen as changing the substance of that complaint. Thus it amounted, in effect, to raising before the Grand Chamber new and distinct complaints. While nothing prevented an applicant from raising a new complaint in the course of the proceedings before the Court, such a complaint had, like any other, to comply with the admissibility requirements.

(b) *Admissibility* – The domestic proceedings in the applicants' cases ended on 30 September 2009 and 4 October 2011, respectively. The new and extended complaints (including the period from 6 April 1941 to 8 October 1991) were made as late as in their observations before the Grand Chamber of 13 February 2017, more than six months later.

Conclusion: inadmissible (out of time).

(c) *Merits* – Article 1 of Protocol No. 1: As regards the alleged misapplication by the domestic courts of the relevant domestic law in the case, the Court reiterated the principle that an applicant could not be regarded as enjoying a sufficiently established claim, constituting an "asset" for the purposes of Article 1 of Protocol No. 1, where there was a dispute as to the correct interpretation and application of domestic law and where the question whether or not he or she complied with the statutory requirements was to be determined in judicial proceedings.

As to the factual questions, there was no reason for the Court to contradict the findings of the domestic courts.

Accordingly, the applicants' claims to be declared the owners of the land in question (excluding the

period from 6 April 1941 to 8 October 1991) did not have a sufficient basis in the national law to qualify as "possessions" within the meaning of Article 1 of Protocol No. 1. The guarantees of that provision therefore did not apply to the present case.

Conclusion: no violation (fourteen votes to three).

ARTICLE 46

Execution of judgment – General and individual measures

Committee of Ministers to identify measures required by Russia regarding ban on foreign travel

Berkovich and Others v. Russia, 5871/07 et al., judgment 27.3.2018 [Section III]

Facts – The applicants were prevented from travelling abroad for several years, owing to the absolute restriction on the right to leave Russia for persons having had access to "State secrets".

Law – Article 2 of Protocol No. 4: The Court had already found the impugned prohibition to lack justification, given that the confidential information which the applicants possessed could be transmitted in a variety of ways which had not required their presence abroad or even direct physical contact with anyone (see *Bartik v. Russia*, 55565/00 and 55565/00, 21 December 2006, Information Note 92; and *Soltysyak v. Russia*, 4663/05 and 4663/05, 10 February 2011, Information Note 138).

Conclusion: violation (unanimously).

Article 46 of the Convention: At the date of this judgement, the relevant provisions of domestic law had not been amended or repealed.

The Russian authorities' prolonged failure to implement their accession commitment and to execute two of the Court's judgments was at variance with their obligations under Article 46. It was incumbent on the Committee of Ministers to address the issue of what might be required of the respondent Government by way of compliance, through both individual and general measures

Article 41: sums ranging from EUR 3,500 to EUR 5,000 to each applicant in respect of non-pecuniary damage; claims in respect of pecuniary damage dismissed.

ARTICLE 1 OF PROTOCOL No. 1

Possessions

Claims to ownership of socially owned property through adverse possession: *no violation*

Radomilja and Others v. Croatia, 37685/10 and 22768/12, judgment 20.3.2018 [GC]

(See Article 35 § 1 above, page 16)

ARTICLE 2 OF PROTOCOL No. 4

ARTICLE 2 § 2

Freedom to leave a country

Long-term absolute prohibition for persons having had access to "State secrets" to travel abroad: *violation*

Berkovich and Others v. Russia, 5871/07 et al., judgment 27.3.2018 [Section III]

(See Article 46 above)

ARTICLE 4 OF PROTOCOL No. 7

Right not to be tried or punished twice

Decision to withdraw administrative fine and replace it with criminal prosecution: *relinquishment in favour of the Grand Chamber*

Mihalache v. Romania, 54012/10 [Section IV]

In August 2008 the prosecution, on the grounds that the acts committed were not sufficiently serious to constitute an offence, closed the criminal proceedings against the applicant, imposing an administrative fine. The applicant did not contest that decision within the twenty-day time-limit laid down in domestic law and paid the fine.

A few months later, considering that, in view of the degree of danger to society and the acts of which the applicant was accused (refusal to undergo biological testing to determine his blood alcohol level), the administrative fine had been inappropriate, the higher-ranking prosecutor's office set aside the decision to discontinue proceedings and the administrative fine. The applicant was committed for trial and sentenced to a suspended term of one year's imprisonment: the court ruled that *non bis in idem* was an invalid plea in this case.

Before the European Court the parties disagree on the questions whether the case concerns a straightforward continuation or a full-scale reopening of the criminal proceedings and, in the latter situation, whether such reopening was justified.

On 27 March 2018 a Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber.

RULE 80 OF THE RULES OF COURT

Request for revision of a judgment

Alleged new fact of no decisive influence on findings in the original judgment: *request for revision dismissed*

Ireland v. the United Kingdom, 5310/71, judgment (revision) 20.3.2018 [Section III]

Facts – In its judgment *Ireland v. the United Kingdom* (5310/71, 18 January 1978) the Court held, in the context of the crisis in Northern Ireland marked by terrorism and civil disorder, that the authorities' use of the five techniques of interrogation in 1971 constituted a practice of inhuman and degrading treatment, in breach of Article 3, and that the said use of the five techniques did not constitute a practice of torture within the meaning of this Article.

On 4 June 2014 the Irish television network broadcast a programme entitled "The torture files" which discussed the original proceedings before the Commission and the Court and highlighted a number of documents which had recently become available from the United Kingdom archives.

On 4 December 2014 the applicant Government informed the Court that documents had come to their knowledge, which were not known by the Court at the time of the judgment and which might have had a decisive influence on the Court's judgment on the specific question of whether or not the use of the five techniques amounted to torture. They accordingly requested revision of the judgment within the meaning of Rule 80 of the Rules of Court on the following two grounds:

– firstly, that a psychiatric expert called by the respondent Government in the original proceedings misled the Commission about the severe and long-term effects of the five techniques, and,

– secondly, that the then respondent Government withheld important information in respect of these techniques.

Law – Rule 80 of the Rules of Court: The possibility of revision introduced by the Rules of Court was an exceptional procedure. Requests for revision of judgments were therefore to be subjected to strict scrutiny.

(a) *Whether the six-month time-limit laid down in Rule 80 § 1 of the Rules of Court has been complied with* – The respondent Government had submitted that the applicant Government had received certain important documents even before June 2014. They argued, firstly, that the six-month time-limit for a revision request started running from the date on which the applicant Government could reasonably have known the new facts and, secondly, that facts ascertainable from publicly accessible sources were to be treated as known.

As regards a separate requirement of Rule 80 § 1, namely whether the new fact "could not reasonably have been known" to the party seeking revision, it related to situations in which the new fact forming the basis for the revision request could already have been known to the party before the delivery of the original judgment, not, as in the present case, long after the conclusion of the original proceedings. However, having regard to the exceptional nature of the revision procedure, which called the final character of judgments of the Court into question, it could be argued that once aware of possible grounds for revision a party had a certain duty of diligence and thus had to take reasonable steps to ascertain whether such grounds actually existed, in order to put the Court in a position to rule on the matter without delay (see *Grossi and Others v. Italy* (revision), 18791/03, 30 October 2012).

The present request for revision was of a complex nature: the circumstances transpired from a significant number of documents which, analysed together, led the applicant Government to the conclusion that there was a basis for seeking revision. The applicant Government had not remained passive when they received documents potentially disclosing new facts before June 2014. Those documents had been submitted for review by counsel who had advised that they were not by themselves sufficient to merit a request for revision. As to whether they were under a duty to do more, it should be noted that the relevant documents were not readily available. The applicant Government would have had to carry out extensive research among a broad range of potentially relevant documents in the United Kingdom's national archives.

In sum, the applicant Government had not "acquired knowledge" of any new facts before June 2014. The Court also doubted whether the applicant Government could reasonably have "acquired knowledge" of the documents containing the facts relied on in their revision request before June 2014. Therefore, the request for revision had been submitted within the six month time-limit laid down in Rule 80 § 1 of the Rules of Court.

(b) *Whether there were facts "which by [their] nature might have a decisive influence" on the judgment of 18 January 1978*

(i) *The scope of the revision request* – Though the applicant Government were not seeking to modify the Court's finding of a violation of Article 3, but the reasons on which that finding was based, the revision sought related to an important finding in the original judgment set out in two separate points of its operative part and constituted matters which could be the subject of a revision request.

(ii) *Whether the documents submitted by the applicant Government demonstrate new facts* – Where documents were submitted in support of a revision request it had to be assessed whether they provided sufficient *prima facie* evidence in support of the party's version of the events. In order to make that assessment the Court had regard to the conduct of the original proceedings and in particular to the manner in which the facts of the case were established.

Concerning the documents submitted in support of the first ground for revision, the Court doubted whether the documents contained sufficient *prima facie* evidence of the alleged new fact that the psychiatric expert had misled the Commission as to the serious and long-term effects of the five techniques. As to the second ground of revision, while a number of documents submitted in support demonstrated that the then Government of the United Kingdom wanted to avoid any detailed inquiry into the use of the five techniques, the relevant facts as such were not "unknown" to the Court at the time of the original proceedings. In the original judgment, the Court had regretted the attitude of the respondent Government which had not always afforded it the assistance desirable.

(iii) *Whether the alleged new facts were of "decisive influence"* – In order for revision to be granted, it had to be shown that there was an error of fact and a causal link between the erroneously established fact and a conclusion which the Court had drawn. It had to be clear from the reasoning contained in the original judgment that the Court would not have come to a specific conclusion had it been aware of the true state of facts. In contrast, where doubts remained as to whether or not a new fact actually did have a decisive influence on the original judgment, legal certainty had to prevail and the final judgment had to stand.

Having regard both to the wording of Rule 80 and to the purpose of revision proceedings, a request for revision was not meant to allow a party to seek a review in the light of the Court's subsequent case-law. Consequently, the Court made its assessment in the light of the case-law on Article 3 as it stood at the time.

In the original proceedings the Commission had highlighted there were other experts who considered that the after-effects of the application of the five techniques were rather minor and did not produce long-term effects. Nonetheless, the uncertainty in that respect had not prevented it from concluding that the use of the five techniques amounted to torture within the meaning of Article 3.

Turning to the original judgment, the issue of possible long-term effects of the use of the five techniques had not been mentioned in the legal assessment. It was considered difficult to argue that the original judgment had attached any particular importance to the uncertainty as to their long-term effects, let alone considered this to be a decisive element for coming to another conclusion than the Commission. As followed from the reasoning of the original judgment, the difference between the notions of "torture" and "inhuman and degrading treatment" was a question of degree depending on the intensity of the suffering inflicted. Necessarily, the assessment of that difference in degree depended on a number of elements.

Without an indication in the original judgment that, had it been shown that the five techniques could have severe long-term psychiatric effects, that one element would have led the Court to the conclusion that the use of the five techniques had occasioned such "very serious and cruel suffering" that they had to be qualified as a practice of torture, the Court could not conclude that the alleged new facts might have had a decisive influence on the original judgment.

Conclusion: request for revision dismissed (six votes to one).

GRAND CHAMBER (PENDING)

Relinquishments

Mihalache v. Romania, 54012/10 [Section IV]

(See Article 4 of Protocol No. 7 above, page 18)

OTHER JURISDICTIONS

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

Ne bis in idem* principle: *proportionality of addition of administrative and criminal penalties; res judicata of acquittal by criminal court

Luca Menci, C-524/15,
Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e la Borsa (Consob), C-537/16,
Enzo Di Puma v. Consob and Consob v. Antonio Zecca, C-596/16 and C-597/16,
judgments 20.3.2018 (CJEU, Grand Chamber)

In these cases various Italian courts asked the CJEU to interpret the principle *ne bis in idem* guaranteed by Article 50 of the Charter of Fundamental Rights of the European Union in the context of the application of Directive 2006/112/EC on VAT and Directive 2003/6/EC concerning financial markets.[1]

In the case of *Menci*, Mr Menci had been given an administrative penalty and then prosecuted in criminal proceedings for the same offence. In *Garlsson Real Estate SA and Others*, an administrative penalty had been imposed on a person who had already been finally convicted of the same offence and sentenced to a criminal penalty, extinguished as a result of a pardon.

The third judgment (*Di Puma and Zecca*) concerned more specifically the *res judicata* effect of an acquittal ruling: in that case the criminal court had found that insider dealing had not been established, and the *res judicata* effect of that final acquittal ruling prohibited, according to national procedural law, the act of bringing parallel administrative proceedings. The referring courts sought a ruling as to whether the obligation on member States to provide in national law for appropriate administrative sanctions for infringements of the prohibition on insider dealing should result in disregarding the *res judicata* effect of the criminal judgment.

The considerations and replies of the CJEU can be summarised as follows.

As a preliminary point, firstly, whilst the fundamental rights recognised by the European Convention on Human Rights constituted general principles of EU law and, under Article 52 of the Charter of Fundamental Rights, had the same meaning and scope as those laid down by the European Convention on Human Rights, the latter did not constitute, as long as the European Union had not acceded to it, a legal instrument which had been formally incorporated into EU law.

Secondly, the fact that an "administrative" penalty also sought to deter or to repair damage did not mean that it could not be characterised as an essentially "criminal" penalty.

Thirdly, the relevant criterion for the purposes of assessing the existence of the "same offence" was identity of the material facts, understood as the existence of a set of concrete circumstances which were inextricably linked together and which had resulted in the final acquittal or conviction of the person concerned. The legal classification, under national law, of the facts and the legal interest protected were not relevant; the scope of the *ne bis in idem* principle could not vary from one member State to another. Moreover, the fact that for a criminal offence to be made out a subjective element was required did not preclude the conclusion that a possible duplication of administrative and criminal proceedings related to the same offence.

In order to comply with Article 50 of the Charter of Fundamental Rights, domestic law authorising a duplication of criminal proceedings and penalties must (*Menci* judgment):

(i) pursue an objective of general interest which was such as to justify a duplication of criminal proceedings and administrative penalties, it being necessary for those proceedings and penalties to pursue complementary objectives;

1. Directive 2006/112/EC of the Council of 28 November 2006 on the common system of value added tax; Directive 2003/6/CE of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).

(ii) ensure that proceedings were coordinated in order to limit to what was strictly necessary the additional disadvantage which resulted, for the persons concerned, from a duplication of proceedings; and

(iii) ensure that the severity of all of the penalties imposed was limited to what was strictly necessary in relation to the seriousness of the offence concerned.

The level of protection of the *ne bis in idem* principle thus proposed did not infringe that guaranteed by the case-law of the European Court of Human Rights, which had held that duplication of tax and criminal proceedings did not infringe Article 4 of Protocol No. 7 to the European Convention on Human Rights where the respective proceedings at issue had a sufficiently close connection in substance and time (see the ECHR judgment in *A and B v. Norway* [GC], 24130/11 and 29758/11, 15 November 2016, Information Note 201).

It was for the national court to determine whether those conditions were satisfied under the relevant legislation and to ensure that the disadvantages actually resulting from such a duplication for the person concerned were not excessive in relation to the seriousness of the offence committed.

In the present case the existence of an objective of general interest was established for both areas at issue (VAT and financial markets). It appeared legitimate for a member State to seek to deter and punish by imposing administrative penalties (fixed, where appropriate, on a flat-rate basis) any violation of the relevant rules, whether intentional or not, and by more severe criminal penalties deter and punish more serious violations which were particularly damaging for society.

The condition of proportionality of national legislation could not be called into question by the mere fact that it provided for the possibility of duplication of administrative and criminal penalties, as otherwise that member State would be deprived of its freedom of choice where, in the absence of harmonisation, EU law gave the member States freedom to choose the applicable penalties in the form of administrative penalties, criminal penalties or a combination of both.

However, authorising administrative proceedings of a criminal nature to be brought with respect to the same acts which had already been subject to a criminal conviction – the Italian legislation penalising market manipulation (*Garlsson Real Estate SA and Others* judgment) – did not appear to respect the principle of proportionality. Given the harm caused to society by the offence committed, that conviction was such as to itself punish the offence in an effective, proportionate and dissuasive manner.

That conclusion was not called into question by the fact that the final sentence pronounced could subsequently be extinguished as a result of a pardon. Moreover, the CJEU observed that, whilst it did indeed limit the duplication of fines, the Italian legislation on market manipulation did not appear to contain any provisions in the event of duplication of an administrative fine and a prison sentence.

With regard to the *res judicata* effect of an acquittal ruling, in light of the importance of the principle of *res judicata* both in the legal order of the EU and in national legal orders, the Court had previously held that EU law did not preclude the application of national procedural rules conferring *res judicata* effects on a judicial decision.

No particular circumstances justified a different approach here (*Di Puma and Zecca* judgment). Under Italian law the *res judicata* effect was limited to findings of fact in a criminal judgment delivered after adversarial proceedings. The Italian Companies and Stock Exchange Commission (*Commissione Nazionale per le Società e la Borsa* – Consob) – the authority bringing the administrative proceedings – was free to participate in criminal proceedings, in particular as a civil party, and was moreover required to send to the judicial authorities the documents collected during the exercise of its supervision.

In the CJEU's view, the obligation to provide for appropriate administrative penalties could not result in disregarding the force of *res judicata* which a final criminal judgment of acquittal had, in accordance with the national law, in relation to proceedings for an administrative penalty relating to the same facts as those which had been held by the judgment not to be established. Such an assessment was without prejudice to the possibility of reopening criminal proceedings where there was evidence of new or newly discovered facts, or if there had been a fundamental defect in the previous proceedings, which could affect the outcome of the criminal judgment.

(As regards the ECHR case-law, see the Guide on Article 4 of Protocol No. 7)

Inter-American Court of Human Rights (IACtHR)

State obligations to ensure equality and non-discrimination with regard to same-sex couples

Advisory Opinion OC-24/17, Series A No. 24, opinion (second part) 24.11.2017

[This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. It relates only to the second part of the Opinion, specifically concerning State obligations to ensure equality and non-discrimination with regard to same-sex couples. A more detailed, official abstract (in Spanish only) is available on that Court's website: www.corteidh.or.cr.]

The request – The Republic of Costa Rica presented a request for an advisory opinion from the Inter-American Court of Human Rights (hereafter, "the Court") to rule on "the protection afforded by Articles 11(2) and 24 in relation to Article 1 of the American Convention on Human Rights (ACHR) to the recognition of the patrimonial rights derived from a relationship between persons of the same sex." Costa Rica submitted the following specific questions for the Court´s interpretation:

1. Taking into account that non-discrimination based on sexual orientation is a category protected by Articles 1 and 24 of the ACHR, in addition to the provision of Article 11(2) thereof, should the State recognise all the patrimonial rights derived from a relationship between persons of the same sex?

2. If the answer to the preceding question is affirmative, must there be a legal institution that regulates relationships between persons of the same sex for the State to recognise all the patrimonial rights that derive from that relationship?

Law – Concerning the treaty-based protection of the relationship between same-sex couples, the Court interpreted that: (i) the questions submitted refer to the patrimonial rights derived from the relationship which results from the emotional ties between same-sex couples; (ii) in general, the rights resulting from emotional ties between couples are protected by the ACHR through the family and family life institutions. The ACHR contains two provisions that provide complementary protection to both family and family life (Articles 11(2) and 17(1)); (iii) the ACHR does not refer to a rigorous and exhaustive definition of what should be understood by "family" and does not protect a specific model of family. Its conceptualisation has varied and evolved over time, and is not restricted to family ties derived from marriage; (iv) Article 17(2) of the ACHR, when referring to the "right of men and women of marriageable age to marry and to raise a family," is merely establishing, expressly, the treaty-based protection of a specific model of marriage. This wording neither proposes a restrictive definition of how marriage and family should be understood nor means that this is the only form of family protected by the ACHR; (v) all family models require protection by society and the State. A restrictive interpretation of the definition of "family" that excludes the emotional ties between same-sex couples from the Inter-American protection would defeat the object and purpose of the ACHR; (vi) there is no reason to ignore family relationships formed by same-sex couples seeking to undertake a joint life project and it is not the Court's role to give preference to or distinguish one type of family tie over another; (vii) under the ACHR, it is the obligation of States to recognise those family ties and to protect them, taking into consideration the principle of non-discrimination and the "equal protection of the law" clause with regard to all their domestic laws and their enforcement; (viii) all the patrimonial rights derived from a family relationship between same-sex couples must be protected, pursuant to the right to equality and non-discrimination; (ix) however, such protection is not restricted to patrimonial rights issues, but permeates other rights protected internationally, as well as those established in domestic law for family relationships of heterosexual couples.

The Court established that States may resort to diverse mechanisms and measures to protect the rights of same-sex couples. If a State decides that it is not necessary to create new legal institutions to ensure such rights and, consequently, chooses to extend existing institutions to same-sex couples – including marriage – based on the *pro persona* principle, such extension would also be protected by Articles 11(2) and 17 of the ACHR. The Court considered that this would be the most simple and effective way to ensure the rights derived from the relationship between same-sex couples.

The Court stated that the establishment of a differentiated treatment between heterosexual and same-sex couples regarding the way they can form a family – either by a *de facto* marital union or a civil marriage – does not pass the strict test of equality because there is no purpose acceptable under the ACHR for which this distinction could be considered necessary or proportionate. The Court noted

that, in order to deny the right to marry, it is typically asserted that its purpose is procreation and that the union of same-sex couples cannot meet this purpose. This assertion was found to be incompatible with the purpose of Article 17, which is the protection of family as a social reality. Moreover, the Court considered that procreation is not a characteristic that defines conjugal relationships. Affirming the contrary would be demeaning for couples – whether married or not – who, for any reason, are unable or unwilling to procreate.

Moreover, in the Court's opinion, there would be no point in creating an institution that produces equal effects and gives rise to the same rights as marriage, but is not called marriage, except to draw attention to same-sex couples by the use of a label that indicates a stigmatising difference or that, at the very least, belittles them. On that basis, marriage would be reserved for those who, according to the stereotype of heteronormativity, were considered "normal," while another institution with identical effects but under a different name would exist for those who do not fit this stereotype. Consequently, the Court deemed inadmissible the existence of two types of formal unions that create a distinction based on an individual's sexual orientation. This would be discriminatory and, therefore, incompatible with the ACHR.

Based on the above, the Court interpreted that States must ensure access to all legal institutions that exist in their domestic law to guarantee the protection of all rights of families composed of same-sex couples, without discrimination. To this end, States may need to amend existing institutions to extend such mechanisms to same-sex couples. The Court noted that States may encounter institutional difficulties to adapt the existing provisions. However, on a transitional basis, and while promoting such reforms in good faith, States remain obliged to ensure equality and parity of rights for same-sex couples with respect to heterosexual couples, without any discrimination.

United Nations Committee on the Rights of the Child

Deportation proceedings against child facing risk of being forcefully subjected to female genital mutilation

I.A.M. v. Denmark, 3/2016, views 25.1.2018

The author of the communication is a Somali national acting on behalf of her daughter. She entered Denmark without valid travel documents and made an application for asylum which was rejected by the Danish Immigration Service. After the birth of her daughter the author appealed against the decision to the Refugee Appeals Board, arguing a fear of being killed by her family because of her secret marriage against their will, and the risk that her daughter would be subjected to female genital mutilation (FGM) if returned to the Puntland State of Somalia.

The Appeals Board rejected the appeal and ordered the author's deportation to Somalia. With regard to the risk that the daughter would be forcefully subjected to FGM, the Board relied on an Immigration Service report that stated that FGM was prohibited by law throughout the country and that mothers could prevent their daughters from being subjected to FGM, particularly in Puntland.

Before the Committee on the Rights of the Child the author claimed, *inter alia*, that her daughter's rights under Articles 3 and 19 of the Convention on the Rights of the Child would be violated if she was returned to Somalia because of the risk of FGM.

Law – The Committee recalled that in respect of its General Comment No. 6[2] States should not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, and that such *non-refoulement* obligations applied irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensi

2. UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6.

tive manner. General Comment No. 18[3] was also invoked emphasising that FGM may have various immediate and/or long-term health consequences; that the legislation and policies relating to immigration and asylum should recognise the risk of being subjected to harmful practices or being persecuted as a result of such practices as a ground for granting asylum; and that consideration should also be given to providing protection to a relative who may be accompanying the girl or woman.

The Committee noted that, although the prevalence of FGM had declined in the Puntland State of Somalia according to reports submitted by the parties, its practice was still deeply engrained in its society. It was emphasised that the best interests of the child should be a primary consideration in decisions concerning the return of a child, and that such decisions should ensure – within a procedure with proper safeguards – that the child, upon return, will be safe and provided with proper care and enjoyment of rights.

Turning to the facts, firstly, the Committee observed that the Appeals Board had limited its assessment to a report on central and southern Somalia, without assessing the specific and personal context in which the author and her daughter would be deported and without taking the best interests of the child into account, in particular in light of the high prevalence of FGM in Puntland and that the author would be returned as a single mother, without a male supporting network.

Secondly, the rights of the child under Article 19 of the Convention on the Rights of the Child could not be made dependent on the mother's ability to resist family and social pressure, and State parties should take measures to protect the child from all forms of physical or mental violence, injury or abuse in all circumstances, even where the parent or guardian is unable to resist social pressure.

Finally, the evaluation of a risk for a child to be submitted to an irreversible harmful practice such as FGM in the country to which he or she is being returned should be adopted following the principle of precaution, and where reasonable doubts exist that the receiving State cannot protect the child against such practices, State parties should refrain from returning the child.

The Committee concluded that the State party had failed to consider the best interests of the child when assessing the risk of the author's daughter being subjected to FGM if returned to Puntland, and to take proper safeguards to ensure the child's wellbeing upon return.

Conclusion: violation of Articles 3 and 19 of the Convention on the Rights of the Child.

Individual recommendations: Denmark to refrain from returning the author and her daughter to the Puntland State of Somalia.

General recommendations: Denmark to prevent similar violations in the future, in accordance with the presented views.

COURT NEWS

Conference on "Comparative human rights"

On 8 and 9 March 2018 a conference on "Comparative human rights" was held at the Court. The event was organised by the Court in cooperation with the Centre des études internationales et européennes, the International Academy of Comparative Law and the Fondation René Cassin.

Videos of the conference are available on the Court's Internet site (www.echr.coe.int – The Court – Events).

3. Joint general recommendation No. 31 of the UN Committee on the Elimination of Discrimination against Women/general comment No. 18 of the UN Committee on the Rights of the Child on harmful practices, 14 November 2014, CEDAW/C/GC/31-CRC/C/GC/18.

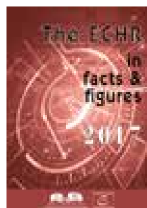
RECENT PUBLICATIONS

Case-Law Guides: updates

Several Guides in English and French have been updated on 31 December 2017. All Case-Law Guides can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law).

The Court in facts and figures 2017

This document contains statistics on cases dealt with by the Court in 2017, 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 2017 (eng)

Overview 1959-2017

This document, which gives an overview of the Court's activities since it was established, has been updated until 2017. It can be downloaded from the Court's Internet site (www.echr.coe.int – The Court).

Overview 1959-2017 (eng)

Commissioner for Human Rights

The quarterly activity report 2018 of the Council of Europe's Commissioner for Human Rights Nils Muižnieks is available on the Commissioner's Internet site (www.coe.int – Commissioner for Human Rights – Activity reports).