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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Jurisdiction of Moldovan and Russian Governments in relation to prison conditions within separatist region of the Republic of Moldova: *relinquishment in favour of the Grand Chamber*

Mozer v. the Republic of Moldova and Russia - 11138/10
[Section III]

In November 2008 the applicant was arrested by the authorities of the self-proclaimed "Moldavian Republic of Transdniestria" (the "MRT") on suspicion of defrauding the company he worked for. He was held in custody until his trial before the "Tiraspol People's Court", which in July 2010 convicted him and sentenced him to seven years' imprisonment, suspended for five years. It also ordered his release subject to an undertaking not to leave the city.

In his application to the European Court, the applicant, who was suffering from bronchial asthma, respiratory deficiency and other conditions, complained that he had been deprived of medical assistance and held in inhuman conditions of detention by the "MRT authorities" (Article 3 of the Convention). He further complained that he had been arrested unlawfully (Article 5 § 1) and deprived of the right to meet his parents and a pastor (Article 8). He submitted that both Moldova and Russia were responsible for these actions.

On May 2014 a Chamber of the Court decided to relinquish jurisdiction in the case in favour of the Grand Chamber.

ARTICLE 2

Effective investigation

Criminal proceedings in Germany against German doctor responsible for a patient's death in the United Kingdom: *no violation*

Gray v. Germany - 49278/09
Judgment 22.5.2014 [Section V]

Facts – The applicants' father died in his home in the United Kingdom as a result of medical malpractice by a German doctor who had been recruited by a private agency to work for the British National Health Service. Criminal proceedings were instituted against the doctor in the United Kingdom. Following a request by the British prosecution authorities for legal assistance, the German authorities also initiated criminal proceedings in Germany, which resulted in the doctor's conviction for having negligently caused the father's death. In view of the German proceedings, the German authorities did not execute the European Arrest Warrant issued against the doctor in the United Kingdom and refused to extradite him. Accordingly, the criminal proceedings brought against the doctor in the United Kingdom had to be discontinued.

Law – Article 2 (*procedural aspect*): The criminal proceedings conducted in Germany had enabled the investigative authorities to determine the cause of death and establish the doctor's responsibility therefor. In view of the available evidence taken as a whole, the prosecution authorities' decision to apply for the doctor's conviction in summary proceedings without a main hearing had been justified.

As to the applicants' allegations that they had not been sufficiently involved in the German proceedings, the Court noted that under the German rules of criminal procedure the prosecution authorities were not obliged to inform the applicants on their own initiative about the institution or progress of the proceedings. In the Court's view, in the instant case such an obligation did not follow from the procedural requirements inherent in Article 2 § 1 of the Convention either. Although in situations where the responsibility of State agents in connection with a death was at stake, Article 2 § 1 required that the next of kin be involved in the procedure to the extent necessary to safeguard his or her legitimate interests, in contrast the procedural obligation imposed by Article 2 in the sphere of medical negligence did not necessarily require the provision of a criminal-law remedy so that it may therefore be arguable whether and to what extent the applicants' involvement as next of kin was required where, as in the applicants' case, the prosecution authorities had recourse to such a remedy on their own initiative. In any event, the applicants had been involved in the criminal proceedings against the doctor. Since the circumstances of the case had been sufficiently established in the course of the investigative proceedings, their participation at any main hearing could not have further contributed to the trial court's assessment of the case. Indeed, even if a hearing had been scheduled the applicants would not have had the right to contest the trial court's judgment with the objective of a heavier penalty being imposed. There

was, therefore, nothing to establish that the legitimate interests of the deceased's next of kin were not respected in the domestic proceedings.

In reality, the applicants' complaint was that the doctor was convicted in Germany and not in the United Kingdom, where he may have faced a heavier penalty. The German authorities had, however, been obliged to institute criminal proceedings by operation of domestic law once they had learned of his involvement in the events surrounding the death and consequently had a basis under the relevant domestic and international law for their decision not to extradite him. The procedural guarantees enshrined in Article 2 do not entail a right or an obligation that a particular sentence be imposed on a prosecuted third party under the domestic law of a specific State.

In addition to the criminal proceedings, investigations regarding the doctor's fitness to practice had also been conducted by the German authorities and the applicants had been granted an opportunity to provide further information. As a consequence of the disciplinary proceedings, the doctor had been reprimanded and fined.

Accordingly, the German authorities had provided for effective remedies with a view to determining the cause of the father's death and the doctor's responsibility for it. There was nothing to establish that the criminal investigations and proceedings instituted on the initiative of the German authorities in relation to the death had fallen short of the procedural guarantees inherent in Article 2 § 1 of the Convention.

Conclusion: no violation (unanimously).

ARTICLE 3

Inhuman or degrading punishment

Life imprisonment de jure and de facto irreducible despite provision for presidential pardon: *violation*

László Magyar v. Hungary - 73593/10
Judgment 20.5.2014 [Section II]

Facts – The applicant was convicted of murder, robbery and other offences and was sentenced to life imprisonment without eligibility for parole. Although Article 9 of the Hungarian Fundamental Law provides for the possibility of a presidential pardon, since the introduction of whole life terms in 1999, there has been no decision to grant clemency to any prisoner serving such a sentence.

Law – Article 3: A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.

It was true that in *Törköly*[1] the Court had taken into account the fact that the applicant in that case might have been granted presidential clemency. However, in the present case where the applicant's eligibility for release on parole had been excluded, a stricter scrutiny of the regulation and practice of presidential clemency was required. Domestic legislation did not oblige the authorities or the President of the Republic to assess, whenever a prisoner requested a pardon, whether his or her continued imprisonment was justified on legitimate penological grounds. Although the authorities had a general duty to collect information about the prisoner and enclose it with the pardon request, the law did not provide any specific guidance as to what kind of criteria or conditions were to be taken into account in the gathering and organisation of such personal particulars and in the assessment of the request. Neither the Minister of Justice nor the President of the Republic was bound to give reasons for the decisions concerning such requests. Therefore, the Court was not persuaded that the institution of presidential clemency, taken alone (without being complemented by eligibility for release on parole) and as its regulation stood, allowed prisoners to know what they had to do to be considered for release and under what conditions. The regulation did not guarantee proper consideration of the changes and progress towards rehabilitation made by the prisoner, however significant they might be. Therefore, the applicant's life sentence could not be regarded as reducible for the purposes of Article 3 of the Convention.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 6 § 1 in respect of the length of the criminal proceedings against the applicant.

Article 41: Finding of a violation constituted sufficient just satisfaction in respect of any non-

1. *Törköly v. Hungary* (dec), 4413/06, 5 April 2011.

pecuniary damage concerning the applicant's complaint under Article 3; EUR 2,000 in respect of non-pecuniary damage concerning the complaint under Article 6 § 1.

Article 46: For the proper execution of the present judgment the respondent State was required to put in place a reform, preferably by means of legislation, of the system of review of whole life sentences. The mechanism of such a review should guarantee the examination in every particular case of whether continued detention was justified on legitimate penological grounds and should enable whole life prisoners to foresee, with some degree of precision, what they must do to be considered for release and under what conditions.

(See also *Vinter and Others v. the United Kingdom* [GC], 66069/09, 130/10 and 3896/10, 7 July 2013, Information Note 165)

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Inability of Supreme Court President to contest premature termination of his mandate: *violation*

Baka v. Hungary - 20261/12
Judgment 27.5.2014 [Section II]

Facts – The applicant, a former judge of the European Court of Human Rights, was elected President of the Supreme Court of Hungary for a six-year term ending in 2015. In his capacity as President of that court and of the National Council of Justice, the applicant expressed his views on various legislative reforms affecting the judiciary. The transitional provisions of the new Constitution (Fundamental Law of Hungary of 2011) provided that the legal successor to the Supreme Court would be the *Kúria* and that the mandate of the President of the Supreme Court would end following the entry into force of the new Constitution. As a consequence, the applicant's mandate as President of the Supreme Court ended on 1 January 2012. According to the criteria for the election of the President of the new *Kúria*, candidates were required to have at least five years' experience as a judge in Hungary. Time served as a judge in an international court was not counted. This led to the applicant's ineligibility for the post of President of the new *Kúria*.

Law – Article 6 § 1: According to the test set out in *Vilho Eskelinen*, an applicant's status as a civil servant acting as the depositary of public authority could justify excluding the protection embodied in Article 6 subject to two conditions: firstly, the State must have expressly excluded in its national law access to a court for the post or category of staff in question and, secondly, the exclusion must be justified on objective grounds in the State's interest. In order for the exclusion to be justified, it was not enough for the State to establish that the civil servant in question participated in the exercise of public power, it also had to be demonstrated that the subject matter of the dispute was related to the exercise of State power. Under Hungarian law judges of the Supreme Court, including their president, were not expressly excluded from the right of access to court. In fact, domestic law expressly provided for the right to a court in the event of dismissal of a court executive. Rather than by express exclusion, the applicant's access to a court had been impeded by the fact that the impugned measure – the premature termination of his mandate as President of the Supreme Court – had been written into the new Constitution itself and had therefore not been subject to any form of judicial review, including by the Constitutional Court. In view of the above, the Government had not demonstrated that the legal policy choice of enacting the premature termination of the applicant's mandate into the new Constitution had involved an express identification of an "[area] of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way". Therefore, it could not be concluded that the national law had "expressly excluded access to court" for the applicant's claim. The first condition of the *Eskelinen* test had not been met and Article 6 applied under its civil head.

Furthermore, even assuming that the national legislative framework had specifically denied the applicant the right of access to a court, the applicant's exclusion from that right had not been justified. The Government maintained that his post as President of the Supreme Court had by its very nature involved the exercise of powers conferred on him by public law and duties designed to safeguard the general interests of the State. However, the mere fact that the applicant was in a sector or department which participated in the exercise of power conferred by public law was not in itself decisive. In order for the exclusion to be justified,

it was for the State to show that the subject matter of the dispute at issue was related to the exercise of State power or that it had called into question the special bond of trust and loyalty between the civil servant and the State. In the applicant's case, the Government had not adduced any arguments to show that the subject matter of the dispute had been linked to the exercise of State power in such a way that the exclusion of the Article 6 guarantees had been objectively justified. In this regard, the Court considered it significant that, unlike the applicant, the former Vice-President of the Supreme Court had been able to challenge the premature termination of his mandate before the Constitutional Court.

Conclusion: violation (unanimously).

Article 10: The facts of the case and the sequence of events showed that the early termination of the applicant's mandate as President of the Supreme Court was not the result of restructuring of the supreme judicial authority, as the Government had contended, but a consequence of views and criticisms he had publicly expressed in his professional capacity. The proposals to terminate his mandate and the new eligibility criterion for the post of President of the *Kúria* had all been submitted to Parliament after the applicant had publicly expressed his views on the legislative reforms at issue, and had been adopted within an extremely short time. The fact that the functions of the President of the National Council of Justice had been separated from those of the President of the new *Kúria* was not in itself sufficient to conclude that the functions for which the applicant had been elected had ceased to exist after the entry into force of the new Constitution. Furthermore, neither the applicant's ability to exercise his functions as president of the highest court in the country, nor his professional behaviour had been called into question. The early termination of his mandate thus constituted an interference with the exercise of his right to freedom of expression.

The applicant's impugned opinion concerned four legislative reforms affecting the judiciary. Issues concerning the functioning of the justice system constituted questions of public interest, the debate of which enjoyed the protection of Article 10 of the Convention. Even if an issue under debate had political implications, this was not in itself sufficient to prevent a judge from making a statement on the matter. It had not only been the applicant's right but also his duty as President of the National Council of Justice to express his opinion on legislative reforms affecting the judiciary. The applicant had used his prerogative to challenge some of the legislation concerned before the Constitutional Court and to express his opinion directly before Parliament. There was no evidence to conclude that the views he had expressed went beyond mere criticism from a strictly professional perspective, or that they had contained gratuitous personal attacks or insults. As regards the proportionality of the interference, the applicant's term of office as President of the Supreme Court had been terminated three and a half years before the end of the fixed term applicable under the legislation in force at the time of his election. Furthermore, although the applicant had remained in office as a judge of the new *Kúria*, the premature termination of his mandate had had pecuniary consequences.

The Court reiterated that the fear of sanction had a "chilling effect" on the exercise of freedom of expression and in particular risked discouraging judges from making critical remarks about public institutions or policies, for fear of losing their judicial office. In addition, the impugned measure had not been subject to effective judicial review by the domestic courts.

Having regard to the foregoing considerations, the interference with the applicant's right to freedom of expression had not been necessary in a democratic society.

Conclusion: violation (unanimously).

Article 41: question reserved.

(See also, as regards the issues arising under Article 6 § 1, *Vilho Eskelinen and Others v. Finland* [GC], 63235/00, 19 April 2007, Information Note 96; and *Harabin v. Slovakia*, 58688/11, 20 November 2012, Information Note 157)

ARTICLE 10

Freedom of expression

One year's detention pending trial and three year suspended sentence prison for involvement in protest against President: *violation*

Taranenko v. Russia - 19554/05
Judgment 15.5.2014 [Section I]

Facts – In December 2004 the applicant was arrested at the scene of a protest action against Presidential policies. She was part of a group of about 40 people who had forced their way through

identity and security checks into the reception area of the President's administration building and had locked themselves in one of the offices, where they had started to wave placards and to distribute leaflets out of the windows. She was charged with participation in mass disorder and remanded in custody for a year, at the end of which time she was convicted as charged and sentenced to three years' imprisonment, suspended for three years.

Law – Article 10 of the Convention read in the light of Article 11: The arrest, detention and conviction of the applicant constituted an interference with her right to freedom of expression, which interference was prescribed by law and pursued the legitimate aims of preventing disorder and protecting the rights of others.

The applicant and the other participants in the protest action had wished to draw the attention of their fellow citizens and public officials to their disapproval of the President's policies and their demand for his resignation. This was a topic of public interest and contributed to the debate about the exercise of presidential powers. The protest action had taken place in the President's administration building. It was significant that the administration's mission was to receive citizens and examine their complaints and that its premises were therefore open to the public, subject to identity and security checks. The protesters, however, had failed to comply with the established admission procedure. Instead, they had stormed into the building, pushed one of the guards aside, and jumped over furniture before locking themselves in a vacant office. Such behaviour, intensified by the number of protesters, could have frightened those present and caused disruption. In such circumstances, the actions of the police in arresting the protesters and removing them from the premises may have been justified by the demands of protection of public order.

It remained to be ascertained whether the length of the applicant's detention pending trial and the penalty imposed on her were proportionate to the legitimate aim pursued. The applicant's conviction was at least in part founded on the domestic courts' condemnation of the political message conveyed by the protesters. Indeed, she was accused of "throwing anti-[Putin] leaflets" and "issuing an unlawful ultimatum by calling for the President's resignation". At the same time, it was significant that she was not convicted solely for the expression of an opinion, but rather for such expression mixed with particular conduct. The participants in the protest action had come to the building to meet officials, hand over a petition criticising the President's policies, distribute leaflets and talk to journalists. They were not armed and did not resort to the use of violence or force, except for pushing aside the guard who had attempted to stop them. The disturbance that had followed was not part of their initial plan but a reaction to the guards' attempts to stop them from entering the building. Although that reaction may have appeared misplaced and exaggerated, it was significant that the protesters had not caused any bodily injuries to those present. Indeed, the charges against them did not mention any use or threat of violence or any infliction of bodily harm. Although, they were found guilty of damaging property the domestic courts had not established whether the applicant had personally participated in causing such damage or had committed any other reprehensible act. It was also significant that before the end of the trial the defendants had paid for all the pecuniary damage caused by their action.

The Court considered that the circumstances of the applicant's case presented no justification for her being remanded in custody for a year or being given a three year suspended prison sentence. The unusually severe sanction imposed in the present case must have had a chilling effect on the applicant and others taking part in protest actions. Thus, the interference in question had not been necessary in a democratic society.

Conclusion: violation (unanimously).

The Court also found a violation of Article 5 § 3 as the authorities had extended the applicant's detention on grounds which, though relevant, could not be regarded as sufficient.

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

(See also *Barraco v. France*, 31684/05, 5 March 2009, Information Note 117)

Premature termination of Supreme Court President's mandate as a result of views expressed publicly in his professional capacity: *violation*

Baka v. Hungary - 20261/12
Judgment 27.5.2014 [Section II]

(See Article 6 § 1 above, page 9)

Award of damages for defamation on account of publication of article criticising Constitutional Court decision ordering dissolution of a political party: *violation*

Mustafa Erdoğan and Others v. Turkey - 346/04 and 39779/04
Judgment 27.5.2014 [Section II]

Facts – The applicants were ordered by the civil courts to pay damages for defamation on account of the publication of an article written by the first applicant, a constitutional law professor, criticising a decision of the Constitutional Court to dissolve a political party and questioning the professional competence and impartiality of the majority of judges who heard the case.

Law – Article 10: The final judgments given in respect of the defamation actions brought by the three members of the Constitutional Court had interfered with the applicants' right to freedom of expression. The interference in question was prescribed by law and pursued the legitimate aim of protecting the reputation or rights of others.

The subject matter of the article in question, written by an academic, concerned an important and topical issue in a democratic society – the functioning of the system of justice – which the public had a legitimate interest in being informed of. It therefore contributed to a debate of general interest.

The claimants in the three sets of proceedings were members of the Constitutional Court who had voted in favour of the dissolution of the political party. Whilst it could not be said that they knowingly laid themselves open to close scrutiny of their every word and deed to the same extent as politicians, members of the judiciary acting in an official capacity could nevertheless be subject to wider limits of acceptable criticism than ordinary citizens. At the same time, however, the Court had on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect that confidence against destructive attacks which are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.

The domestic courts considered that certain expressions used in the article were defamatory of the claimants and that the author had overstepped the boundaries of acceptable criticism. The Court accepted that some of the language and expressions used were harsh and could be perceived as offensive. That said, tshey were mostly value judgments, coloured by the author's own political and legal opinions and perceptions. In this connection, they were based on the manner in which the Constitutional Court had ruled on certain issues and the rulings concerned, including the decision to dissolve the political party, were already subject to virulent public debate, as the applicant had sought to demonstrate in the domestic proceedings. They could therefore be considered to have had a sufficient factual basis. The domestic courts had not attempted to distinguish the statements of fact in the impugned article from value judgments, and did not appear to have examined whether the "duties and responsibilities" incumbent on the applicants within the meaning of Article 10 § 2 of the Convention were observed or to have assessed whether the article was published in good faith. In particular, they had omitted to place the impugned remarks within the context in which they were expressed. In that connection, the Court reiterated that style constitutes part of the communication as the form of expression and, as such, is protected together with the content of the expression. When account was taken of the content of the article as a whole and of the context, the impugned remarks could not be construed as a gratuitous personal attack against the claimants. Moreover, the article was published in a quasi-academic quarterly as opposed to a popular newspaper.

In the light of the above, and notwithstanding their margin of appreciation, the national authorities had not adduced sufficient reasons to show that the interference with the applicants' freedom of expression had been necessary in a democratic society to protect the reputation and rights of others. This finding made it unnecessary for the Court to determine whether the amount of damages the applicants were ordered to pay was proportionate to the aim pursued.

Conclusion: violation (unanimously).

Article 41: reimbursement of damages paid by the first applicant in domestic proceedings and EUR 7,500 to the first applicant in respect of non-pecuniary damage.

ARTICLE 11

Freedom of peaceful assembly

One year's detention pending trial and three year suspended sentence prison for involvement in protest against President: *violation*

Taranenko v. Russia - 19554/05
Judgment 15.5.2014 [Section I]

(See Article 10 above, page 10)

ARTICLE 18

Restriction for unauthorised purposes

Restriction of applicant's liberty for purposes other than bringing him before competent legal authority on reasonable suspicion of having committed an offence: *violation*

Ilgar Mammadov v. Azerbaijan - 15172/13
Judgment 22.5.2014 [Section I]

Facts – The applicant, an opposition politician with a history of criticising the Government, maintained a personal internet blog on which he commented on various political issues. On 24 January 2013 he travelled to Ismayilli, a town where rioting had broken out the day before. He described his impressions in blog posts in which he suggested that at least part of the official Government version of the events may have been untrue and was an attempt at a cover-up. On the following day the Prosecutor General's Office and the Ministry of Internal Affairs said in a joint press statement that the applicant had committed illegal actions which were calculated to inflame the situation in the country and would be fully and thoroughly investigated and receive legal assessment. The applicant was invited for questioning on three occasions before being charged with criminal offences and remanded in custody. His appeals against that measure were rejected.

Law

Article 5 § 1 (c): The Government had not submitted any specific arguments to rebut the applicant's assertion that there had existed no information or evidence giving rise to a "reasonable" suspicion that he had committed any of the criminal offences with which he was charged. In particular, the prosecution's official documents did not mention any witness statements or other specific information that might have given them reason to suspect the applicant, nor had any such evidence been presented to the courts which ordered the applicant's remand in custody. The vague and general references by both the prosecution and the courts in their respective decisions to unspecified "case material", in the absence of any precise statement, information or concrete complaint could not be regarded as sufficient to justify the "reasonableness" of the suspicion on which the applicant's arrest and detention had been based.

Conclusion: violation (unanimously).

Article 6 § 2: The Court had consistently emphasised the importance of the choice of words by public officials in their statements before a person had been tried and found guilty of a particular criminal offence. In the applicant's case, the impugned remarks had not been made in the framework of criminal proceedings but as part of a joint press statement by the Prosecutor General's Office and the Ministry of Internal Affairs. The Government claimed that the purpose of that statement had been to inform the public about the steps taken by the authorities in connection with the Ismayilli events, and in particular their intention to investigate the applicant's involvement in those events. However, the statement, assessed as a whole, had not been made with necessary discretion and circumspection. By stating that the applicant's actions were "illegal" and that "it has been established that [the applicant] made appeals to local residents ..., such as calls to resist the police, not to obey officials and to block roads", the authorities had essentially prejudged the assessment of the facts by the courts. As such, the impugned statement must have encouraged the public to believe the applicant guilty before he had been proved guilty according to law.

Conclusion: violation (unanimously).

Article 18: The applicant's arrest had been linked to his specific blog entries, in particular, his post of 28 January 2013 which included sourced information shedding light on the "true causes" of the Ismayilli protests, which the Government had reportedly attempted to withhold from the public and which had immediately been picked up by the press. Even though the prosecution had not made any express references to the applicant's blog entries, the accusations against him had first been made in the official press statement issued a day after the post, and he had first been invited to the

Prosecutor General's Office for questioning on the same day. There was nothing in the case file to show that the prosecution had any objective information giving rise to a bona fide suspicion against the applicant at that time, and it had not been shown that they were in possession of any such information or witness statements at any point prior to his arrest. The above circumstances indicated that the actual purpose of the impugned measures had been to silence or punish the applicant for criticising the Government and attempting to disseminate what he believed to be true information the Government were trying to hide. Accordingly, the restriction of the applicant's liberty had been applied for purposes other than bringing him before a competent legal authority on reasonable suspicion of having committed an offence.

Conclusion: violation (unanimously).

The Court also held unanimously that there had been a violation of Article 5 § 4 of the Convention.

Article 41: EUR 20,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Lutsenko v. Ukraine*, 6492/11, 3 July 2012, Information Note 154; and *Tymoshenko v. Ukraine*, 49872/11, 30 April 2013, Information Note 162)

ARTICLE 41

Just satisfaction

Award to State applicant party in respect of its missing and enclaved citizens in northern Cyprus

Cyprus v. Turkey - 25781/94
Judgment (just satisfaction) 12.5.2014 [GC]

Facts – In its Grand Chamber judgment delivered on 10 May 2001 ("the principal judgment") the Court found numerous violations of the Convention by Turkey, arising out of the military operations it had conducted in northern Cyprus in July and August 1974, the continuing division of the territory of Cyprus and the activities of the "Turkish Republic of Northern Cyprus". Regarding the issue of just satisfaction, the Court held unanimously that it was not ready for decision and adjourned its consideration. The procedure for execution of the principal judgment was, at the date of the instant judgment on just satfisaction, still pending before the Committee of Ministers.

Law – Article 41

(a) *Admissibility*

(i) *Whether the claims are out of time* – Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law. General international law, in principle, recognises the obligation of the applicant Government in an inter-State dispute to act without undue delay in order to uphold legal certainty and not to cause disproportionate harm to the legitimate interests of the respondent State.[1]

The present application was introduced in 1994, before the former European Commission of Human Rights, under the system previous to the entry into force of Protocol No. 11. Under the Rules of Procedure of the Commission then in force, neither an applicant Government in an inter-State case nor an individual applicant had to make a general indication of their just satisfaction claims in their application form. In a letter of 29 November 1999 sent to both Governments the Court had expressly instructed the applicant Government not to submit any claim for just satisfaction at the merits stage. In its judgment of 10 May 2001 the Court adjourned consideration of the possible application of Article 41 and no time-limits were fixed for the parties to submit their just satisfaction claims.

The impugned delay had occurred between the judgment of the Court on the merits and the continued supervision of the enforcement of that judgment by the Committee of Ministers. During this phase of the case both Governments were entitled to believe that the issue relating to a possible award of just satisfaction was in abeyance pending further developments. Moreover, the just satisfaction issue was repeatedly mentioned in the course of the proceedings on the merits.

In the principal judgment the issue of a possible award of just satisfaction was adjourned, which clearly and unambiguously meant that the Court did not exclude the possibility of resuming the examination of this issue at some appropriate point in the future. Neither of the parties could therefore reasonably have expected that this matter would be left unaddressed, or would be extinguished or nullified by the passage of time. Lastly, as the

1. *Certain Phosphate Lands in Nauru* (Nauru v. Australia), Preliminary Objections, Judgment, 1992 ICJ Rep.

Cypriot Government had rightly pointed out, they had never expressly or impliedly renounced or waived their right to claim just satisfaction; on the contrary, their letter of 31 August 2007 should have been seen as a clear and unequivocal re-assertion of that right. In these circumstances, the respondent Government were not justified in claiming that the resumption of the examination of the applicant Government's claims was prejudicial to their legitimate interests. In the light of the *Nauru* judgment,[1] the Court considered that in this context, the "prejudice" element was first and foremost related to the respondent Government's procedural interests, and that it was for the respondent Government to prove convincingly the imminence or likelihood of such a prejudice. However, the Court had seen no such proof in the present case.

In so far as the respondent Government referred to the supervisory proceedings before the Committee of Ministers, the Court reiterated that findings of a violation in its judgments are essentially declaratory, and that, by Article 46 of the Convention, the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. In this respect, it was important not to confuse, on the one hand, proceedings before the Court, which is competent to find violations of the Convention in final judgments which are binding on the States Parties (Article 19, in conjunction with Article 46 § 1) and to afford just satisfaction (Article 41) where relevant, and, on the other, the mechanism for supervising the execution of judgments under the Committee of Ministers' responsibility (Article 46 § 2). Further, although the developments between 2001 and 2010 in the course of or in connection with the supervisory proceedings before the Committee of Ministers were undoubtedly relevant when assessing the substance of the applicant Government's just satisfaction claim, they did not preclude the Court from examining it.

In the light of the foregoing, the Court saw no valid reason to consider the Cypriot Government's claims for just satisfaction belated and to declare them inadmissible.

Conclusion: preliminary objection dismissed (unanimously).

1. In the Nauru case examined by the International Court of Justice (ICJ), the impugned delay occurred before the filing of the inter-State application.

(ii) *Applicability* – Bearing in mind its specific nature as *lex specialis* in relation to the general rules and principles of international law, Article 41 of the Convention does, as such, apply to inter-State cases. However, the question whether granting just satisfaction to an applicant State is justified has to be assessed and decided by the Court on a case-by-case basis, taking into account, *inter alia*, the type of complaint made by the applicant Government, whether the victims of violations can be identified, and also the main purpose of bringing the proceedings in so far as this can be discerned from the initial application to the Court. Where an application brought before the Court under Article 33 contains different types of complaints pursuing different goals, each complaint has to be addressed separately in order to determine whether awarding just satisfaction in respect of it would be justified.

Where an applicant Contracting Party complains about general issues in another Contracting Party, its primary goal is that of vindicating the public order of Europe within the framework of collective responsibility under the Convention. In such circumstances, it may not be appropriate to make an award of just satisfaction even if such a claim is made. However, where an applicant State denounces violations by another Contracting Party of the basic human rights of its nationals (or other victims), its claims are substantially similar not only to those made in an individual application under Article 34 of the Convention, but also to claims filed in the context of diplomatic protection. If the Court upholds this type of complaint and finds a violation of the Convention, an award of just satisfaction may therefore be appropriate having regard to the particular circumstances of the case and the criteria set out above. Nevertheless, it must always be kept in mind that, according to the very nature of the Convention, it is the individual, not the State, who is directly or indirectly harmed and primarily "injured" by a violation of one or several Convention rights. Therefore, if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims.

In the present case the Cypriot Government submitted just satisfaction claims in respect of violations of the Convention rights of two sufficiently precise and objectively identifiable groups of people: 1,456 missing persons and the enclaved Greek Cypriot residents of the Karpas peninsula. In other terms, just satisfaction was not sought with a view to compensating the State for a violation of its rights but for the benefit of individual victims. In

these circumstances, a claim under Article 41 was justified.

Conclusions: Article 41 applicable in respect of missing persons (sixteen votes to one); Article 41 applicable in respect of enclaved citizens (fifteen votes to two).

(b) *Non-pecuniary damage* – There was no doubt about the protracted feelings of helplessness, distress and anxiety of the Karpas residents whose rights under Articles 3, 8, 9, 10 and 13 of the Convention and of Article 2 of Protocol No. 1 had been violated as found in the principal judgment.

The surviving relatives of the missing persons were thus awarded EUR 30,000,000 and the enclaved residents of the Karpas peninsula EUR 60,000,000 in respect of non-pecuniary damage. The aforementioned sums were to be distributed by the applicant Government to the individual victims of the violations found in the principal judgment under these two heads.

Conclusion: EUR 90,000,000 in respect of non-pecuniary damage (fifteen votes to two).

(See also *Ireland v. the United Kingdom*, 5310/71, 18 January 1978)

ARTICLE 46

Execution of a judgment – General measures

Respondent State required to introduce sytem of review of whole life sentences

László Magyar v. Hungary - 73593/10
Judgment 20.5.2014 [Section II]

(See Article 3 above, page 8)

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Narrow scope of review for order confiscating wages from employment obtained using a false passport: *violation*

Paulet v. the United Kingdom - 6219/08
Judgment 13.5.2014 [Section IV]

Facts – The applicant, an Ivoirian national living illegally in the United Kingdom, obtained employment using a false French passport. From 2003 to 2007 he accumulated over GBP 20,000 in savings. When he applied for a driving licence with the same passport, the falsity of the document was discovered and criminal proceedings were brought against him. At his trial the applicant pleaded guilty. The trial judge sentenced him to prison, recommended him for deportation, and imposed a confiscation order in respect of all of his savings under section 6 of the Proceeds of Crime Act 2002. The applicant appealed against the confiscation order on the ground that it was an abuse of process and oppressive, noting that Parliament had intended the Proceeds of Crime Act to be compatible with Article 1 of Protocol No. 1 to the Convention. The Court of Appeal dismissed his appeal.

Law – Article 1 of Protocol No. 1

(a) *Admissibility* – The Government contended that the application should be rejected for non-exhaustion of domestic remedies because the applicant's complaints in the domestic proceedings had been framed by reference to domestic law ("oppression" and "abuse of process"), not by reference to the Convention ("disproportionate"). However, the Court held that the applicant, in arguing that the confiscation order was an abuse of process and oppressive because it was disproportionate in light of Article 1 of Protocol No. 1, had taken sufficient steps towards advancing his Convention complaint at the domestic level. Moreover, at the time the applicant brought his complaint before the domestic courts, it had been appropriate for him to argue his case in terms of "oppression" and "abuse of process" because it was only in a later case (*R v. Waya* [2012] UKSC 51) that the Supreme Court had indicated that it would be preferable to analyse confiscation cases in terms of proportionality under Article 1 of Protocol No. 1.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – The applicant complained that the confiscation order was a disproportionate interference with his right to peaceful enjoyment of his possessions under Article 1 of Protocol No. 1. The Government argued that the order was proportionate because it only confiscated assets with a value equivalent to the applicant's benefit from his criminal conduct. However, rather than ruling on whether the order met the proportionality requirement, the Court ruled on procedural grounds. The Court observed that the scope of review carried out by the Court of Appeal was too narrow, as it had only asked whether the order was in the public interest, and not whether it maintained a fair

balance between property rights and the public interest. On the contrary, the Court of Appeal had only asserted that the abuse of process jurisdiction had to be exercised "sparingly". Given that fair balance was not within the Court of Appeal's scope of review, the Court concluded that there had been a violation of Article 1 of Protocol No. 1 of the Convention.

Conclusion: violation (six votes to one).

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

ARTICLE 2 OF PROTOCOL No. 1

Right to education

Refusal to enrol remand prisoner in prison school: *violation*

Velyo Velev v. Bulgaria - 16032/07
Judgment 27.5.2014 [Section IV]

Facts – In 2005 the applicant, a remand prisoner, asked to be enrolled in the prison school. His request was refused first by the prison authorities and ultimately by the Supreme Administrative Court. The Prison Governor reasoned that, if convicted, the applicant, who had a previous conviction, would be a recidivist and should thus be kept separately from the non-recidivist prisoners. The Supreme Administrative Court rejected his request on different grounds, holding that the right to education applied only to convicted prisoners, not remand prisoners.

Law – Article 2 of Protocol No. 1: The Court recalled that lawfully detained prisoners continued to enjoy all fundamental rights and freedoms guaranteed under the Convention, save for the right to liberty. Consequently, the applicant still had the right to education under Article 2 of Protocol No. 1. The right to education imposed a duty on Bulgaria to afford effective access to existing educational establishments, including prison schools. Consequently, the Government had the burden of showing that its exclusion of the applicant was foreseeable, pursued a legitimate aim and was proportionate to that aim. The Court found it open to doubt whether the exclusion was sufficiently foreseeable, as the relevant legislative framework provided that convicted prisoners had the right to be included in educational programmes and that provisions regarding convicted prisoners were equally applicable to remand prisoners. The lack of clarity in the statutory framework was reflected in the fact that the reasons given by the national authorities for his exclusion were different: the Prison Governor and the Ministry of Justice emphasised the applicant's potential recidivism, while the Supreme Administrative Court focused on the applicant's remand status.

The Government had relied on three different grounds to justify the applicant's exclusion from the school. As to their first argument that it was inappropriate for the applicant to attend school with convicted prisoners, the Court observed that the the applicant did not have any objections and there was no evidence to show that remand prisoners would be harmed by attending school with convicted prisoners. Moreover, the Court did not consider the uncertainty of the length of the pretrial detention to be a valid justification for exclusion from educational facilities. Finally, as regards the Government's third argument that the applicant risked being sentenced as a recidivist, so it would not be in the interests of the non-recidivist prisoners to attend school with him, the Court recalled that the applicant was entitled to the presumption of innocence and thus could not be classified as a recidivist. In the light of these considerations, and recognising the applicant's undoubted interest in completing his secondary education, the Court found that the refusal to enrol him in prison school had not been sufficiently foreseeable, had not pursued a legitimate aim or was proportionate to that aim.

Conclusion: violation (unanimously).

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

ARTICLE 4 OF PROTOCOL No. 7

Right not to be tried or punished twice

Conviction for war crimes of a soldier who had previously been granted an amnesty: *Article 4 of Protocol No. 7 not applicable*

Marguš v. Croatia - 4455/10
Judgment 27.5.2014 [GC]

Facts – The applicant, a member of the Croatian army, was indicted for murder and other serious offences committed in 1991 during the war in Croatia. Some of the charges were subsequently dropped. In 1997 the trial court, presided by Judge

M.K., terminated the proceedings in respect of the remaining charges pursuant to the General Amnesty Act, which granted amnesty for all criminal offences committed in connection with the war in Croatia between 1990 and 1996, except for acts amounting to the gravest breaches of humanitarian law or war crimes. In 2007 the Supreme Court, on a request for the protection of legality lodged by the State Attorney, found the decision to terminate the proceedings against the applicant to be in violation of the General Amnesty Act. It noted in particular that the applicant had committed the alleged offences as a member of the reserve forces after his tour of duty had terminated, so that there was no significant link between the alleged offences and the war, as required by the Act.

In parallel, the applicant was indicted on charges of war crimes in a second set of criminal proceedings. These proceedings were conducted by a three-judge panel, which included Judge M.K. During the closing arguments, the applicant was removed from the courtroom after being warned twice for having interrupted the Deputy State Attorney. His lawyer remained in the courtroom and delivered the applicant's closing argument. The trial court convicted the applicant of war crimes and sentenced him to 14 years' imprisonment. On appeal, the Supreme Court upheld the conviction on three grounds: firstly, the two sets of proceedings were not the same case, so it was permissible for Judge M.K. to have participated in both; secondly, the applicant's removal from the courtroom had been justified; and thirdly, the matter had not been *res judicata* because the factual background to the offences in the second set of proceedings was significantly wider in scope than that in the first set, as the applicant had been charged with a violation of international law, in particular the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War. The applicant filed a constitutional complaint, which was ultimately dismissed.

Law

Article 6 § 1: The applicant complained that the same judge had participated in the two sets of proceedings against him, in violation of the impartiality requirement. However, the mere fact that the judge had participated in both sets of proceedings was not incompatible with that requirement. In the first set of proceedings he had not adopted a judgment finding the applicant guilty or innocent and no evidence relevant for the determination of his guilt was ever assessed.

Conclusion: no violation (unanimously).

Article 6 §§ 1 and 3 (c): As to the applicant's complaint that, in violation of his rights of defence, he had been deprived of the right to make closing submissions, the Court noted that where the accused disturbed order in the courtroom, the trial court could not be expected to remain passive and to allow such behaviour. Given that the applicant had been removed from the courtroom after two warnings not to interrupt the Deputy State Attorney's closing arguments, and that the applicant's defence lawyer had remained in the courtroom and had presented the applicant's closing arguments, there had been no violation of Article 6 §§ 1 and 3 (c).

Conclusion: no violation (unanimously).

Article 4 of Protocol No. 7: The applicant complained of a violation of his right not to be tried twice. The Court acknowledged that in both sets of proceedings the applicant had been prosecuted for the same offences. There were, however, two distinct situations as regards the charges brought in the first set of proceedings: the prosecutor had withdrawn the charges concerning two alleged killings, whereas the proceedings in respect of two further alleged killings and a charge of serious wounding had been terminated by a County Court ruling adopted on the basis of the General Amnesty Act.

(a) *Dropped charges* – In respect of the charges that had been withdrawn by the public prosecutor in the first set of proceedings, the Court reiterated that the discontinuance of criminal proceedings by a public prosecutor did not amount to either a conviction or an acquittal, such that Article 4 of Protocol No. 7 was not applicable.

Conclusion: inadmissible (unanimously).

(b) *Termination of proceedings under General Amnesty Act* – As regards the termination of the first set of proceedings on the basis of the General Amnesty Act, the Court observed that the applicant had been improperly granted an amnesty for acts that amounted to grave breaches of fundamental human rights protected under Articles 2 and 3 of the Convention. The States were under an obligation to prosecute acts such as torture and intentional killings. Moreover, there was a growing tendency in international law to see the granting of amnesties in respect of grave breaches of human rights as unacceptable. In support of this observation, the Court relied on several international bodies, courts and conventions, including the United Nations Human Rights Committee, the International Criminal Tribunal for the former

Yugoslavia and the Inter-American Court on Human Rights. Further, even if it were to be accepted that amnesties are possible where there are particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there was nothing to indicate that any such circumstances obtained in his case. The fresh indictment against the applicant for war crimes in the second set of proceedings was thus in compliance with the requirements of Articles 2 and 3 of the Convention, such that Article 4 of Protocol No. 7 was not applicable.

Conclusion: Article 4 of Protocol No. 7 not applicable (sixteen votes to one).

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Mozer v. the Republic of Moldova and Russia - 11138/10
[Section III]

(See Article 1 above, page 7)

DECISIONS OF OTHER INTERNATIONAL JURISDICTIONS

Court of Justice of the European Union

Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González - C-131/12
CJEU (Grand Chamber) 13.5.2014

The Court of Justice of the European Union (CJEU) has delivered a landmark judgment on data protection, the Internet and the so-called "right to be forgotten". The judgment followed a request by the Spanish courts for a preliminary ruling on the interpretation of the EU Data Protection Directive[1] and of Article 8 of the Charter of Fundamental Rights of the European Union.

1. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281).

The facts were as follows: In 1998 a Spanish newspaper published notice of the sale by auction of land belonging to Mr Costeja González in proceedings for the recovery of debts. Mr Costeja González paid the debts thus bringing the proceedings to a close without the property being auctioned. However in 2010, after discovering that internet searches against his name using the Google search engine continued to display links to the newspaper announcement, he lodged a complaint with the Spanish Data Protection Agency (AEPD) against the newspaper, Google Spain and Google Inc. requesting that they be required to conceal or remove the links. The AEPD rejected the complaint against the newspaper, on the grounds that it had lawfully published the information, but upheld the complaint against Google Spain and Google Inc. Google challenged that decision in proceedings before the *Audiencia Nacional*, which requested the preliminary ruling from the CJEU.

The CJEU's judgment is important in a number of ways: firstly, it held that for the purposes of the Data Protection Directive an Internet search operator is a data "controller" engaged in "processing" data whenever Internet searches against an individual's name results in the presentation of information about the individual with links to third party websites. This is so despite the fact that the data have already been published on the Internet and are not altered in any way by the search engine. Secondly, the search engine operator does not necessarily need to be based in an EU Member State for the Directive to apply: territorial scope is also established where the processing of the personal data was carried out "in the context of the activities" of an EU based "establishment". So even though Google Spain did not actually do any processing itself, because its advertising activities were inextricably linked to those of the search engine which it helped make economically profitable, the Directive was nevertheless applicable.

Turning to the substantive issues, the CJEU found that even initially lawful processing of accurate data could, in the course of time, become incompatible with the Directive. A data subject could thus request the removal of links to websites from search results where the data were inadequate, irrelevant or excessive, were not kept up to date or were kept for longer than necessary. This was so even when the data had been lawfully published by third parties and contained true information. Thus, Google could be required to remove the links and information in the search results, despite the fact that the newspaper announcement itself continued to be lawfully available on the Internet. In this

context, the CJEU noted that the interference with the rights of the person whose name was searched against was heightened by the important role played by the internet and search engines in modern society, which rendered the information contained in the lists of results ubiquitous. In the light of its potential seriousness, such interference could not be justified merely by the economic interest which the operator of the search engine had in the data processing. Indeed, the rights of the data subject under Articles 7 and 8 of the Charter to privacy and to the protection of personal data would normally override the economic interest of the search engine operator and the interest of the general public in having access to the information through a search, although an exception could arise where the interest in access was preponderant, for example, because of the role played by the data subject in public life.

In a case such as Mr Costejas Gonzales's, where the newspaper announcement contained sensitive information about private life and had been published 16 years earlier, it would be appropriate to hold that the data subject had established a right for the information no longer to be linked to his name by means of a list of search results, unless – and this was a matter for the national courts to decide – there was a preponderant interest of the public in having access to that information.

Links to the CJEU judgment and to CJEU press release (<http://curia.europa.eu>)

For an overview of the legal frameworks of both the European Union and the Council of Europe and of the key jurisprudence of the CJEU and European Court of Human Rights on data protection, see below the recently published Handbook on European data protection law.

Further information on the Convention case-law can be found in this Factsheet on the protection of personal data (<www.echr.coe.int> – Press).

COURT NEWS

Court's Internet site: information to the applicants

In order to inform potential applicants and/or their representatives of the conditions for lodging an application, the Court has decided to gradually expand its range of information materials designed to assist applicants with the procedure in all the languages of the States Parties to the Convention.

To this end, the main page for applicants on the Court's website can now be accessed in 27 non-official languages (<www.echr.coe.int> – Applicants/Other languages). Nine new language versions (Bosnian, Croatian, Danish, Dutch, Hungarian, Macedonian, Slovenian, Swedish and Turkish) have been added to the 18 previously available.

Bosanski – Dansk – Hrvatski – Magyar – Македонски – Nederlands – Slovenščina – Svenska – Türkçe

RECENT PUBLICATIONS

Reports of Judgments and Decisions

All six volumes and Index for 2010 have now been been published.

The print edition is available from Wolf Legal Publishers (the Netherlands) at <www.wolfpublishers.nl>; <sales@wolfpublishers.nl>. All published volumes and indexes from the *Reports* series may also be downloaded from the Court's Internet site (<www.echr.coe.int> – Case-law).

Handbook on European data protection law

Published jointly by the Court and the European Union Agency for Fundamental Rights (FRA), this third handbook is a comprehensive guide to European data protection law. It provides an overview of the EU's and the Council of Europe's applicable legal frameworks and explains key jurisprudence of both the Strasbourg Court and the EU Court.

Completed in April 2014, this handbook is now available in English, French, German, Greek and

Italian. It can be downloaded from the Court's Internet site (<www.echr.coe.int> – Publications). Translations into Bulgarian, Croatian, Danish, Dutch, Estonian, Finnish, Hungarian, Latvian, Lithuanian, Polish, Portuguese, Romanian, Slovak, Slovenian and Spanish will be available by the end of the year.

Handbook on European data protection law (eng)

Manuel de droit européen en matière de protection des données (fra)

Handbuch zum europäischen Datenschutzrecht (deu)

Εγχειρίδιο σχετικά με την ευρωπαϊκή νομοθεσία για την προστασία των προσωπικών δεδομένων (ell)

Manuale sul diritto europeo in materia di protezione dei dati (ita)

Factsheets

The Court has launched 6 new factsheets on its case-law concerning the following themes: elderly people, persons with disabilities, political parties and associations, hunger strikes in detention, migrants in detention, and domestic violence.

All factsheets can be downloaded from the Court's Internet site (<www.echr.coe.int>– Press).

Translations into Macedonian

The Guide on Article 5 (Right to liberty and security) and the Research Report on Article 10 have been translated into Macedonian thanks to IRZ-Stiftung. These translations can be downloaded from the Court's Internet site (<www.echr.coe.int>– Case-law):

Водич за членот 5 (право на слобода и на безбедност) (mac)

Извештај од истражувањето – Позитивни обврски за земјите-членки според членот 10 за заштита на новинарите и за спречување на неказнивоста (mac)

Proceedings of the conference on the long-term future of the Court

What are the future challenges to the enjoyment of the rights and freedoms guaranteed by the Convention? How can the Court best fulfil its twin role of acting as a safeguard for individuals and authoritatively interpreting the Convention? The Oslo Conference 7 and 8 April 2014, arranged by the MultiRights project and the PluriCourts Centre of Excellence at Oslo University, under the auspices of the Council of Europe, sought to inspire and facilitate this task, through a dialogue between scholars, judges and governmental experts.

The conference proceedings are now available on the Council of Europe's Internet site (<www.coe.int/cddh> – Steering Committee for Human Rights).