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

Information Note on the Court's case-law

No. 196 May 2016

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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ISSN 1996-1545

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Positive obligations (substantive aspect)
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Patient allegedly deprived of access to appropriate emergency care as a result of a lack of coordination between departments of a public hospital: *case referred to the Grand Chamber*

Lopes de Sousa Fernandes v. Portugal - 56080/13
Judgment 15.12.2015 [Section IV]

Following an operation for the extraction of nasal polyps, the applicant's husband developed bacterial meningitis, which was not detected until two days after he had been discharged from hospital. He was re-admitted to hospital several times, suffering from acute abdominal pain and diarrhoea. He died three months after the operation from the consequences of septicaemia caused by peritonitis and hollow viscera perforation.

The Inspector General for Health ordered the opening of a disciplinary procedure against one of the doctors who had treated the applicant's husband. However, her complaint to the Medical Association was unsuccessful on the ground that no medical negligence had been found. She then filed a criminal complaint, but the court discontinued the proceedings. In other proceedings the Administrative Court dismissed her claim for damages on the grounds that it had not been proven that her husband had undergone treatment that was not suited to his clinical situation.

In a judgment of 15 December 2015 a Chamber of the Court held, by five votes to two, that there had been a violation of Article 2 (right to life) of the Convention, under its substantive head, and unanimously, a violation of Article 2 under its procedural head.

The Chamber found in particular that the mere fact that the patient had undergone a surgical operation presenting a risk of infectious meningitis should have warranted a medical intervention in conformity with the medical protocol on post-operative supervision. It also took the view that the lack of coordination between the ear, nose and throat department and the emergencies unit inside the hospital revealed a deficiency in the public hospital service, depriving the patient of the possibility of accessing appropriate emergency care.

As regards the investigation, the Chamber further found that the Portuguese legal system had not functioned effectively, since, firstly, the length of three sets of domestic proceedings did not meet the requirement of promptness and, secondly, none of the proceedings conducted, nor any of the experts' assessments presented, had addressed satisfactorily the question of the possible causal link between the various illnesses suffered by the patient two days after undergoing his operation. Lastly, before the operation the patient should have been clearly informed by the doctors of the risks involved.

On 2 May 2016 the case was referred to the Grand Chamber the Government's request.

ARTICLE 3

Inhuman or degrading treatment

Conditions of detention and of transfer of paraplegic remand prisoner: *violations*

Topekhin v. Russia - 78774/13
Judgment 10.5.2016 [Section III]

Facts – In his application to the European Court, the applicant, a remand prisoner suffering from serious back injuries, paraplegia and bladder and bowel dysfunction, complained, *inter alia*, of the conditions of his detention and of his transfer to a correctional colony.

Law – Article 3 (*substantive aspect*)

(a) *Conditions of detention* – The applicant had received no assistance from trained staff, but was forced to rely entirely on the help of his fellow inmates. The Court had found a violation of Article 3 in previous cases in which prison staff felt that they were relieved of their duty to provide security and care to more vulnerable detainees by making their cellmates responsible for providing them with daily assistance or first aid. The circumstances of the applicant's case were even more acute because his need for bedside assistance was exceptionally high and required special skills and knowledge. That fact was accentuated by the presence of bedsores that were noted by the independent medical expert as a sign of neglect on the part of the authorities, indicating that the applicant was not repositioned regularly, was forced to spend much time in bed in one position, and was not regularly bathed or kept clean. The situation was

further aggravated by bladder and bowel dysfunctions.

In addition, the applicant's inevitable dependence on his fellow inmates and the need to ask for their help with intimate hygiene procedures had put him in a very uncomfortable position and adversely affected his emotional well-being, impeding his communication with the cellmates who had to perform this burdensome work involuntarily. The conditions were further exacerbated by the failure to provide him with a hospital bed or other equipment, such as a special pressure-relieving mattress, affording a minimum of comfort.

The conditions of the applicant's detention in the remand prisons thus amounted to inhuman and degrading treatment.

Conclusion: violation (unanimously).

(b) *Conditions of transfer* – The applicant had been transported to the correctional colony in standard train carriages and prison vans with no special equipment installed to meet the needs of a bedridden person suffering from a serious back condition and bladder problems. The first part of the trip had taken nine hours, during which he was confined to a bunk in the train carriage. That trip had an evident detrimental effect on the applicant.

During the following part of the trip he spent at least two hours being driven in a prison van to and from a detention facility. The authorities failed to take any corrective measures to meet his needs during the transfer, treating his complaints of acute pain with indifference. The fact that he was placed directly on the floor of the van exposed him to vibrations from the road during the journey and resulted in additional pain. Given his fragile condition, such treatment could have had a negative impact on his back and legs.

The trip to the correctional colony was completed after a further five-hour journey by train and van in similar conditions.

In these circumstances, the cumulative effect of the material conditions of the applicant's transfer, and the duration of the trip, were serious enough to qualify as inhuman and degrading treatment.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 5 § 4 of the Convention for failure to conduct a speedy review of the orders for detention, but no violation of Article 3 on account of the quality of medical treatment provided to the applicant in detention and no violation of Article 5 § 3 of the Convention on account of an alleged failure of the domestic courts to provide sufficient reasons for his detention.

Article 41: EUR 19,500 in respect of non-pecuniary damage.

Inhuman or degrading treatment
Effective investigation

Excessive use of force to disperse demonstration and lack of effective investigation: *violation*

Süleyman Çelebi and Others v. Turkey - 37273/10 et al.
Judgment 24.5.2016 [Section II]

(See Article 46 below, page 27)

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Protracted detention pending deportation of alien who refused to take necessary steps to obtain travel documents required for his return: *violation*

J.N. v. the United Kingdom - 37289/12
Judgment 19.5.2016 [Section I]

Facts – The applicant arrived in the United Kingdom in 2003 from Iran and made an application for asylum, which was refused. After serving a term of imprisonment for indecent assault, he was detained on 31 March 2005 pending deportation. The Iranian Embassy initially refused to issue a travel document allowing the applicant's return but eventually agreed to do so provided he signed a disclaimer consenting to his return. In December 2007 the applicant was conditionally released from detention, but he returned to detention on 14 January 2008 after refusing to sign the disclaimer that would have allowed him to travel. Thereafter the United Kingdom authorities made various attempts to engage the applicant in a voluntary return, but he refused to cooperate. The applicant made three applications for bail all of which were refused. He was eventually released on bail in December 2009 after the Administrative Court ruled that his

detention after 14 September 2009 was unlawful owing to the authorities' failure to act with reasonable diligence and expedition.

In the Convention proceedings, the applicant complained under Article 5 § 1 of the Convention that the system of immigration detention in the United Kingdom fell short of the requirements of Article 5 § 1 (f) (in particular, on account of the absence of fixed time-limits and automatic judicial review) and that the length of his detention had exceeded that reasonably required for its purpose.

Law – Article 5 § 1: The Court rejected the applicant's submission that its recent case-law should be interpreted so as to read into Article 5 § 1 (f) a requirement that detention pending deportation be subject to a fixed maximum time-limit and/or automatic judicial review. While it was clear that the existence or absence of time-limits was one of a number of factors the Court might take into consideration in its overall assessment of whether domestic law was "sufficiently accessible, precise and foreseeable", in and of themselves they were neither necessary nor sufficient to ensure compliance with the requirements of Article 5 § 1 (f). Likewise, Article 5 § 1 (f) did not require automatic judicial review of immigration detention, although the Court could take the effectiveness of any existing remedy into consideration in its overall assessment of whether domestic law provided sufficient procedural safeguards against arbitrariness.

In the United Kingdom, a person in immigration detention could at any time bring an application for judicial review in order to challenge the "lawfulness" and Article 5 § 1 (f) compliance of his detention. In considering any such application, the domestic courts had to apply a series of principles of domestic law[1] that were almost identical to those applied by the European Court under Article 5 § 1 (f) of the Convention in determining whether or not detention had become "arbitrary".

In principle, therefore, the system in the United Kingdom should not give rise to any increased risk of arbitrariness as it permitted the detainee to challenge the lawfulness and Convention compliance of his ongoing detention at any time. Accordingly, it could not be said that in, the absence of fixed time-limits and automatic review of immigration detention, the domestic law was not sufficiently accessible, precise and foreseeable in its application or that there existed inadequate procedural safeguards against arbitrariness.

Turning to the facts of the applicant's case, the Court was prepared to accept that the applicant's previous offending, the risk of his further offending and the fear that he would abscond were all factors which had to weigh in the balance in deciding whether or not his continued detention was "reasonably required" for the purpose of effecting his deportation. Nevertheless, in the light of the fact that, with the exception of a period of just under one month, the applicant had been in immigration detention since March 2005[2], and having particular regard to the clear findings of the Administrative Court concerning the authorities' "woeful lack of energy and impetus" from mid-2008 onwards, the Court considered that from that point onwards it could not be said that his deportation was being pursued with "due diligence".

Conclusion: violation (unanimously).

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

Article 5 § 1 (d)

Minors

Placement of minor in closed boarding school owing to antisocial behaviour and risk she would engage in prostitution: *no violation*

D.L. v. Bulgaria - 7472/14
Judgment 19.5.2016 [Section V]

Facts – In August 2012, when she was 13 years old, the applicant was placed by social services in an open educational institution (while attending school outside) at the request of her mother, who was concerned that she was frequenting men registered on police files and considered herself unable to look after her daughter. The applicant,

1. The principles laid down in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] WLR 70 required that detention be for the purpose of exercising the power to deport; the period of detention must be reasonable in all the circumstances; a detainee must be released if it becomes apparent that deportation cannot be effected within a reasonable period; and the authorities must act with due diligence and expedition to effect removal.

2. The Court was only concerned with the period from 14 January 2008 to 14 September 2009, as the applicant's complaint in respect of a previous period of detention from 31 March 2005 to 17 December 2007 was declared inadmissible for failure to exhaust domestic remedies.

who was unaware of the seriousness of her situation, behaved aggressively towards the staff, ran away several times and allegedly started drifting towards prostitution. As her placement in that open institution had failed, a court placed her in a closed educational institution in 2013 pursuant to the Juveniles Antisocial Behaviour Act. The duration of the measure was not specified, but could legally extend to three years. The applicant subsequently made a number of attempts to commit suicide, sometimes in the company of other girls from the centre.

The application, examined under Article 5 of the Convention, concerned the alleged lack of educational aims of the system implemented and the lack of periodic reviews of the measure. The applicant also complained, under Article 8, of the regime applied to contact with the outside world in the centre: while she had admittedly been able to receive visits and to return home during the school holidays, written correspondence and telephone conversations had been subject to blanket authorisation and monitoring arrangements imposed by the staff.

Law

Article 5 § 1 (a) and (d): Placement in this type of centre for juveniles did indeed constitute deprivation of liberty, having regard in particular to the system of permanent monitoring and that of subjecting leave to prior authorisation, and the duration of the placement[1].

The first limb of Article 5 § 1 d) authorised the deprivation of a minor's liberty in his or her own interests, irrespective of the question whether he or she was suspected of having committed a criminal offence or was simply a child "at risk"[2]. As the applicant had not reached the age of majority, the only question of relevance here was the extent to which the purpose of the measure had indeed been her "educational supervision". The conclusion subsequently reached by the Court would dispense it from examining whether the detention could be justified under Article 5 § 1 a).

(a) *Lawfulness* – In the present case the decision to place the applicant had been made in accordance with the Juveniles Antisocial Behaviour Act. The domestic authorities had justified the need to place the applicant on grounds of the risk that she would be caught up in prostitution, and on account of her failure to cooperate, her aggressive behaviour and her attempts to run away.

Based, historically, on a "punitive" rather than a "protective" philosophy, the Juveniles Antisocial Behaviour Act appeared obsolete, and did not contain an exhaustive list of acts considered as "antisocial". However, according to established judicial practice, prostitution and running away were regarded as antisocial acts liable to justify educational measures, particularly placement in a specialised institution. The measure had therefore been foreseeable.

(b) *Educational purpose* – Regarding implementation of a pedagogical and educational system, the State had to be afforded a certain margin of appreciation.

In the present case the Court could not but observe that the applicant had been able to pursue her school studies, that individual efforts had been made to attempt to mitigate her schooling difficulties, that she had obtained a mark allowing her to go up a grade and that, lastly, she had been able to obtain a professional qualification allowing her to envisage her subsequent reintegration into society.

Those factors were sufficient to conclude that the State could not be accused of having failed to comply with its obligation to give the placement measure an educational objective.

(c) *Proportionality* – Where detention concerned a minor, an essential criterion of its proportionality was that it be decided as a measure of last resort, in the best interests of the child[3], and that it be intended to prevent serious risks for the child's development.

The Bulgarian legislation provided for a wide range of educational measures to deal with antisocial behavior of juveniles. The strictest of these – placement in an educational institution – could only be applied as a measure of last resort.

In the present case the applicant had already been the subject of educational measures in the past, including less stringent ones. The courts had heard all the parties involved – the applicant's mother, who had attended the hearing, not having requested leave to address the court – and had concluded that there was no longer any real alternative to placement in an educational institution. While the reasons might appear succinct, the courts' decisions had clearly reflected the statements of the two social workers who had had direct responsibility for the applicant in the open centre where she had

1. See *A. and Others v. Bulgaria*, 51776/08, 29 November 2011.
2. See the recent case of *Blokhin v. Russia* [GC], 47152/06, 23 March 2016, Information Note 194.
3. The Court referred here to the United Nations Convention on the Rights of the Child.

initially been placed. There was no basis on which their conclusion could be called into question.

In short, the placement measure in issue had not been punitive but part of a series of enduring efforts to place the applicant in a supervised educational environment enabling her to pursue her school studies. It should be pointed out here that protecting minors and, where applicable, removing them from a harmful environment, constituted positive obligations for the State.

Conclusion: no violation (six votes to one).

Article 5 § 4: Although there had been an initial review of the need for the measure, incorporated into the court decision ordering the placement, the measure had been ordered for an indefinite period which, under the applicable legislation, could extend to three years. Furthermore, having been ordered for educational purposes in order to correct the applicant's behaviour, which was deemed to be antisocial, the need for the measure could depend on how her behaviour evolved over time. She should therefore have had a regular court review of the placement decision, carried out automatically at reasonable intervals and at her request.

However, the applicable legislation did not authorise minors placed in a closed educational institution to apply to the courts for a review of their detention. Nor was there an appropriate regular and automatic review under domestic law.

With regard to the possibility of having the placement measure reviewed by the courts on a proposal of the local committee, the applicant could not be deemed to have had an "available" remedy for the purposes of Article 5 § 4. The committee in question had a discretionary power to assess the person's situation before deciding whether or not to seek a review by the courts; it was not therefore bound to grant such a request by the minor concerned.

Accordingly, the applicant had not had a proper opportunity to request a review of the measure in accordance with the development of her situation.

Conclusion: violation (unanimously).

Article 8: The margin of appreciation afforded the authorities regarding the monitoring of correspondence and telephone conversations of minors placed in a closed institution for educational purposes was narrower than in the area of monitoring prisoners who had committed a criminal offence: restrictions had to be as lenient as possible.

Everything had to be done to enable minors placed in an institution to have sufficient contact with the outside world as that was an integral part of their right to be treated with dignity and was absolutely essential in preparing their reintegration into society[1]. This applied as much to visits as to written correspondence or telephone conversations.

The internal rules of the educational institution in question allowed the authorities of that institution full discretion to monitor all correspondence of the residents, with no distinction drawn regarding the category of persons with whom they corresponded, the duration of the measure or the reasons justifying it. Even correspondence with a lawyer or with non-governmental organisations for the protection of children's rights was subject to the general monitoring measures.

Likewise, the monitoring regime imposed on residents wishing to converse by telephone with persons on the outside made no distinction between, for example, family members, representatives from organisations for the protection of children's rights or other categories of persons, and was not based on any individualised analysis of the risks involved.

In the Court's view, the automatic monitoring of correspondence and telephone conversations, which was a blanket measure drawing no distinction regarding the type of exchange, could not be regarded as necessary in a democratic society.

Conclusion: violation (unanimously).

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

Article 5 § 1 (f)

Expulsion

Protracted detention pending deportation of alien who refused to take necessary steps to obtain travel documents required for his return: *violation*

J.N. v. the United Kingdom - 37289/12
Judgment 19.5.2016 [Section I]

(See Article 5 § 1 above, page 8)

1. The Court referred here to the United Nations Rules for the Protection of Juveniles Deprived of their Liberty ("Havana Rules").

Article 5 § 4

Take proceedings
Review of lawfulness of detention

Lack of direct access to periodical judicial review of placement of endangered minor in closed boarding school: *violation*

D.L. v. Bulgaria - 7472/14
Judgment 19.5.2016 [Section V]

(See Article 5 § 1 (d) above, page 9)

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Supreme Court ruling that civil courts had no jurisdiction to hear pastor's claim for wrongful dismissal by church: *case referred to the Grand Chamber*

Károly Nagy v. Hungary - 56665/09
Judgment 1.12.2015 [Section II]

The applicant was a pastor in a Calvinist parish. In 2005 he was dismissed for a comment he had made in a local newspaper. He brought a compensation claim against his employer, the Hungarian Calvinist Church, in a labour court but the proceedings were discontinued for want of jurisdiction, since the applicant's relationship with his employer was regulated by ecclesiastical law. The applicant subsequently lodged a claim in the civil courts, but this too was ultimately discontinued after the Supreme Court ruled, following an analysis of the contractual relationship, that the civil courts had no jurisdiction either.

Before the European Court the applicant contended that the Supreme Court's ruling that the State courts had no jurisdiction had deprived him of access to a court, in breach of Article 6 § 1 of the Convention.

In a judgment of 1 December 2015 a Chamber of the Court held, by four votes to three, that there had not been a violation of Article 6 § 1. The Chamber found that, although the Supreme Court had held that the State courts had no jurisdiction to examine the applicant's claim, it had in fact examined the claim in the light of the relevant domestic legal principles of contract law. The applicant could not, therefore, argue that he had been deprived of the right to a determination of the merits of his claim (see Information Note 191).

On 2 May 2016 the case was referred to the Grand Chamber at the applicant's request.

Access to court
Fair hearing

Absence of proper procedural safeguards in proceedings to deprive applicant suffering from mental disorders of his legal capacity: *violation*

A.N. v. Lithuania - 17280/08
Judgment 31.5.2016 [Section IV]

Facts – The applicant had a history of mental illness. In 2006 his mother asked a prosecutor to initiate proceedings in the district court for him to be declared legally incapacitated. After visiting the applicant and consulting his medical records, a medical expert appointed by the court concluded that he was suffering from schizophrenia. The district court made unsuccessful attempts to summon the applicant to the hearing of the application for a declaration of incapacitation. At the hearing, which the applicant did not attend, it declared his incapacitation on the grounds that he was unable to understand or control his actions. His mother was later appointed as his guardian and the administrator of his property. On account of his condition, the applicant was compulsorily admitted to a psychiatric hospital for more than four months. In order to appeal against the district court's decisions he approached the Legal Aid Service, but it refused his request for legal aid as he had missed the deadline for appealing. The applicant's ensuing complaint to the prosecutor's office was unsuccessful.

Law

Article 6 § 1: The applicant had not participated in the hearing before the district court in any form. In a number of previous cases concerning compulsory confinement in a psychiatric hospital the Court had confirmed that a person of unsound mind must be allowed to be heard either in person or, where necessary, through some form of representation. The outcome of the proceedings in the

instant case was at least equally important for the applicant as his personal autonomy in almost all areas of his life was in issue.

Although the applicant had a history of psychiatric troubles, he appeared to have been relatively independent. His attendance at the hearing was necessary, not only to enable him to present his own case, but also to allow the judge to form a personal opinion about his mental capacity. Although the applicant's mother and the prosecutor had attended, their presence did not make the proceedings truly adversarial and there had been no one at the hearing able to rebut, on the applicant's behalf, their arguments or conclusions. That representative role should have been played by the social services, but they had no meaningful involvement in the case. The applicant's interests had thus not been represented.[1] The Court further noted that the district court had ruled exclusively on the basis of a psychiatric report (which was based on an account by the applicant's mother) without questioning its author and that no witnesses were summoned to the hearing. Lastly, the Legal Aid Service's decision to refuse the applicant legal aid to appeal against the ruling declaring him legally incapacitated was purely formalistic and limited to the question of time-limits the applicant had failed to observe through no fault of his own.

In sum, the regulatory framework for depriving people of their legal capacity had not provided the necessary safeguards. The applicant had been deprived of a clear, practical and effective opportunity to have access to court in connection with the incapacitation proceedings, in particular, in respect of his request to restore his legal capacity.

Conclusion: violation (unanimously).

Article 8: The interference with the applicant's right to respect for his private life was very serious, as it made him fully dependent on his mother as his guardian in almost all areas of his life.

Despite this, the district court had no opportunity to examine the applicant in person and relied in its decision essentially on the testimony of the mother and the psychiatric report. While the Court did not doubt the competence of the medical expert or the seriousness of the applicant's illness, it noted that the existence of a mental disorder, even a serious one, could not be the sole reason to justify full incapacitation. By analogy with the cases concerning deprivation of liberty, in order to justify full incapacitation the mental disorder had to be "of a kind or degree" that warranted such a measure. However, the questions put to the medical expert by the judge had not concerned "the kind and degree" of the applicant's mental illness. As a result, the report had not analysed the degree of his incapacity in sufficient detail.

Indeed, the legislative framework at the time had not left the judge with any other choice, as it distinguished only between full capacity and full incapacity, without providing for any "borderline" situation (other than for drug or alcohol addicts).[2] The Court considered that where a measure of protection is necessary it should be proportionate to the degree of capacity of the person concerned and tailored to his individual circumstances and needs.[3] However, the Lithuanian legislation at the time did not provide for a tailor-made response. The Court thus found that the guardianship regime had not been geared to the applicant's individual case but entailed restrictions automatically imposed on anyone declared incapable by a court.

Lastly, the applicant had been unable to himself request the court to lift his legal incapacity (at the time, his incapacitation could have been challenged only by his guardian, a care institution or a public prosecutor). The Court noted the trend at European level towards granting legally incapacitated individuals direct access to the courts to seek restoration of their capacity and suggested that it may also be appropriate in such cases for the domestic authorities to review after a certain period whether the measure continued to be justified, particularly when the person concerned so requested.

In sum, having examined the decision-making process and the reasoning behind the domestic decisions, the Court concluded that the interference with the applicant's right to respect for his private life was disproportionate to the legitimate aim pursued.

Conclusion: violation (unanimously).

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

1. New legislation which entered into force in 2016 now requires social workers to issue a very specific conclusion as to the person's capacity or incapacity to act in particular areas of life and provides for a special commission to monitor people with disabilities in order to protect their rights.

2. Partial incapacity was introduced into Lithuanian legislation only in 2016.

3. Principle 6 of Recommendation No. R(99)4 of the Committee of Ministers of the Council of Europe concerning the legal protection of incapable adults.

Fair hearing
Equality of arms

Enforcement in Latvia of judgment delivered in Cyprus in the debtor's absence: *no violation*

Avotiņš v. Latvia - 17502/07
Judgment 23.5.2016 [GC]

Facts – In May 1999 the applicant, a Latvian national, and a commercial company registered in Cyprus signed before a notary a formal acknowledgement of debt in which the applicant stated that he had borrowed a sum of money from the company and undertook to repay the sum in question, with interest, by 30 June of the same year. The document was governed by Cypriot law and the Cypriot courts had jurisdiction to rule on any dispute arising out of it.

In 2003 the company sued the applicant in a Cyprus court for failure to repay his debt. In May 2004, ruling in the applicant's absence, the court ordered him to pay the debt together with interest. According to the judgment, the applicant had been duly notified of the hearing but had not appeared.

In February 2006, at the company's request, a Latvian court ordered the recognition and enforcement of the Cypriot judgment and the recording of a charge against the applicant's property in the land register.

The applicant claimed that he had learnt by chance in June 2006 of the existence of both the Cypriot judgment and the Latvian court's enforcement order. He did not attempt to challenge the Cypriot judgment before the domestic courts but appealed against the Latvian enforcement order in the Latvian courts.

In a final judgment of January 2007 the Senate of the Latvian Supreme Court granted the company's request and ordered the recognition and enforcement of the Cypriot judgment and the recording of a charge against the applicant's immovable property in the land register. On the basis of that judgment a court issued a writ of execution and the applicant complied with the judgment. The charge against his property was lifted shortly afterwards.

In his application to the European Court the applicant complained that by enforcing the judgment of the Cypriot court, which, in his view, was clearly defective as it had been given in breach of his defence rights, the Latvian courts had failed to comply with Article 6 § 1 of the Convention. He had alleged before the Latvian courts that the summons to appear before the court in Cyprus and the company's request had not been duly served on him in good time, with the result that he had been unable to defend his case. Consequently, the Latvian courts should have refused to enforce the Cypriot judgment.

In a judgment of 25 February 2014 (see Information Note 177), a Chamber of the Court held unanimously that there had been no violation of Article 6 § 1. On 8 September 2014 the case was referred to the Grand Chamber at the applicant's request.

Law – Article 6 § 1

(a) *Applicability* – The Cypriot court judgment ordering the applicant to pay a contractual debt had concerned the substance of a "civil" obligation on the part of the applicant. Article 6 § 1 was therefore applicable.

(b) *Presumption of equivalent protection (*Bosphorus *presumption)* – The application of the presumption of equivalent protection in the legal system of the European Union was subject to two conditions, namely the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by European Union law.

With regard to the first condition, the provision to which the Senate of the Supreme Court had given effect was contained in a Regulation (Brussels I), which was directly applicable in the Member States in its entirety, and not in a Directive, which would have been binding on the State with regard to the result to be achieved but would have left it to the State to choose the means and manner of achieving it. The provision in question allowed the refusal of recognition or enforcement of a foreign judgment only within very precise limits and subject to certain preconditions. It was clear from the interpretation given by the Court of Justice of the European Union (CJUE) that this provision did not confer any discretion on the court from which the declaration of enforceability was sought. The Court therefore concluded that the Senate of the Latvian Supreme Court had not enjoyed any margin of manoeuvre in this case.

As to the second condition, namely the deployment of the full potential of the supervisory mechanism provided for by European Union law, the Senate of the Supreme Court had not requested a preliminary ruling from the CJEU regarding the interpretation and application of the relevant Article of the Regulation. However, this second condition

had to be applied without excessive formalism and taking into account the specific features of the supervisory mechanism in question.

The applicant had not advanced any specific argument concerning the interpretation of the relevant provision of the Regulation and its compatibility with fundamental rights such as to warrant a finding that a preliminary ruling should have been requested from the CJEU, nor had he submitted any request to that effect to the Senate of the Latvian Supreme Court. Hence, the fact that the matter had not been referred for a preliminary ruling was not a decisive factor in the present case. The second condition for application of the *Bosphorus* presumption should therefore be considered to be satisfied.

In view of the foregoing considerations, the presumption of equivalent protection was applicable in the present case, as the Senate of the Supreme Court had done no more than implement Latvia's legal obligations arising out of its membership of the European Union.

(c) *Allegation that the protection of the rights guaranteed by the Convention had been manifestly deficient* – The Court sought to ascertain whether the protection of fundamental rights afforded by the Senate of the Latvian Supreme Court had been manifestly deficient in the present case such that the presumption of equivalent protection was rebutted, with regard to both the provision of European Union law that had been applied and its implementation in the specific case of the applicant.

The requirement to exhaust remedies arising from the mechanism provided for by the relevant provision of the Regulation as interpreted by the CJEU was not in itself problematic in terms of the guarantees of Article 6 § 1 of the Convention.

In the proceedings before the Senate of the Supreme Court, the applicant had complained that he had not received any summons or been notified of the Cypriot judgment. In so doing he had relied on the grounds for non-recognition provided for by the relevant provision of the Regulation. That provision stated expressly that such grounds could be invoked only on condition that proceedings had previously been commenced to challenge the judgment in question, in so far as it was possible to do so. The fact that the applicant had relied on that provision without having challenged the judgment as required necessarily raised the question of the availability of that legal remedy in Cyprus in the circumstances of the present case. In such a situation the Senate had not been entitled simply to criticise the applicant, as it had done in its judgment of January 2007, for not appealing against the judgment concerned, and to remain silent on the issue of the burden of proof with regard to the existence and availability of a remedy in the State of origin; Article 6 § 1 of the Convention, like the relevant provision of the Regulation, had required it to verify that this condition had been satisfied, in the absence of which it could not refuse to examine the applicant's complaint. The determination of the burden of proof, which, as the European Commission had stressed, was not governed by European Union law, had therefore been decisive in the present case. Hence, that point should have been examined in adversarial proceedings leading to reasoned findings. However, the Supreme Court had tacitly presumed either that the burden of proof lay with the applicant or that such a remedy had in fact been available to him. This approach, which reflected a literal and automatic application of the relevant provision of the Regulation, could in theory lead to a finding that the protection afforded had been manifestly deficient such that the presumption of equivalent protection of the rights of the defence guaranteed by Article 6 § 1 was rebutted. Nevertheless, in the specific circumstances of the present application the Court did not consider this to be the case, although this shortcoming was regrettable.

Cypriot law had afforded the applicant, after he had learned of the existence of the judgment, a perfectly realistic opportunity of appealing despite the length of time that had elapsed since the judgment had been given. In accordance with Cypriot legislation and case-law, where a defendant against whom a judgment had been given in default applied to have that judgment set aside and alleged, on arguable grounds, that he or she had not been duly summoned before the court which gave judgment, the court hearing the application was required – and not merely empowered – to set aside the judgment given in default. In the period between June 2006 (when he had been given access to the entire case file at the premises of the first instance court and had been able to acquaint himself with the content of the Cypriot judgment) and January 2007 (when the hearing of the Senate of the Supreme Court had taken place), the applicant had had sufficient time to pursue a remedy in the Cypriot courts. However, for reasons known only to himself, he had made no attempt to do so.

The fact that the Cypriot judgment had made no reference to the available remedies did not affect the Court's findings. It was true that the Latvian Civil Procedure Law required the courts to indicate

in the text of their decisions the detailed arrangements and time-limits for appealing against them. However, while such a requirement was laudable in so far as it afforded an additional safeguard which facilitated the exercise of litigants' rights, its existence could not be inferred from Article 6 § 1 of the Convention. It had therefore been up to the applicant himself, if need be with appropriate advice, to enquire as to the remedies available in Cyprus after he had become aware of the judgment in question.

On this point the applicant, who was an investment consultant, should have been aware of the legal consequences of the acknowledgment of debt which he had signed. That document had been governed by Cypriot law, had concerned a sum of money borrowed by the applicant from a Cypriot company and had contained a clause conferring jurisdiction on the Cypriot courts. Accordingly, the applicant should have ensured that he was familiar with the manner in which possible proceedings would be conducted before the Cypriot courts. Having omitted to obtain information on the subject he had contributed to a large extent, as a result of his inaction and lack of diligence, to bringing about the situation of which he comlained before the Court and which he could have prevented so as to avoid incurring any damage.

Hence, in the specific circumstances of the case, the Court did not consider that the protection of fundamental rights had been manifestly deficient such that the presumption of equivalent protection was rebutted.

Lastly, with regard to the applicant's other complaints under Article 6 § 1, and in so far as it had jurisdiction to rule on them, the Court found no appearance of a violation of the rights secured under that provision.

Conclusion: no violation (sixteen votes to one).

(See *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], 45036/98, 30 June 2005, Information Note 76; *M.S.S. v. Belgium and Greece* [GC], 30696/09, 21 January 2011, Information Note 137; and *Michaud v. France*, 12323/11, 6 December 2012, Information Note 158).

Fair hearing

Failure by appellate courts to verify whether absent parties had received notification of hearing: *violation*

Gankin and Others v. Russia - 2430/06 et al.
Judgment 31.5.2016 [Section III]

Facts – All four applicants were parties to civil proceedings which went to appeal. In each case, the appellate court dismissed the applicants' claims in their absence, without examining whether they had in fact received notification of the hearing. In the Convention proceedings, the applicants complained under Article 6 § 1 of the Convention of a violation of their right to a fair hearing.

Law – Article 6 § 1: The rules of Russian civil procedure required the domestic courts to hold an oral hearing in all categories of cases. Whenever an oral hearing was to be held, the parties had the right to attend and make oral submissions, to choose another way of participating in the proceedings (for example by appointing a representative) or to ask for an adjournment. For the effective exercise of those rights, the parties had to be informed of the date and place of the hearing sufficiently in advance to have adequate time to make arrangements.

The Court stated that national courts were required to identify any defect in notification prior to embarking on the merits of the case. The analysis the Court expected to find in domestic decisions had to go beyond a reference to a dispatch of judicial summons and make the most of the available evidence in order to ascertain whether an absent party had in fact been informed of the hearing sufficiently in advance. A domestic court's failure to ascertain whether an absent party had received the summons in due time and, if he had not, whether the hearing should be adjourned, was in itself incompatible with genuine respect for the principle of a fair hearing and could lead the Court to finding a violation of Article 6 § 1.

The Russian Code of Civil Procedure, as worded at the material time, provided for oral hearings before appellate courts and that the scope of review by such courts was not limited to matters of law but also extended to factual issues. The appellate courts were empowered to carry out a full review of the case and to consider additional evidence and arguments which had not been examined at first instance. In these circumstances, by proceeding to consider the merits of the appeals without attempting to ascertain whether the applicants had or should have been aware of the date and time of the hearings, the domestic courts had deprived them of the opportunity to present their cases effectively.

Conclusion: violation (unanimously).

Article 41: EUR 1,500 each in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed. The Court noted that a finding of a violation was a ground for reopening civil proceedings under Article 392 §§ 2(2) and 4(4) of the Russian Code of Civil Procedure.

Article 6 § 1 (administrative)

Adversarial trial
Equality of arms

Lack of access to classified information constituting decisive evidence in judicial-review proceedings: *case referred to the Grand Chamber*

Regner v. the Czech Republic - 35289/11
Judgment 26.11.2015 [Section V]

In September 2006 the National Security Office ("the NSO") decided to revoke the security clearance which the applicant had been granted to perform his duties as deputy to a Vice-Minister of Defence, on the grounds that he was a risk to national security. However, the decision made no reference to the confidential information on which it was based; the information in question was classified as "restricted" and, in accordance with the law, could not be disclosed to him.

On an appeal by the applicant, the NSO confirmed the existence of the risk. An application by the applicant for judicial review was subsequently rejected by the City Court, to which the documents in question had been transmitted by the NSO. The applicant and his lawyer were not authorised to consult them. The Supreme Administrative Court rejected his subsequent appeal, holding that the disclosure of the information would result in exposure of the intelligence service's working methods, disclosure of sources of information or attempts by the applicant to influence potential witnesses. The applicant then lodged a complaint with the Constitutional Court, arguing that the proceedings had been unfair. The Constitutional Court dismissed his complaint, finding that it was not always possible to ensure all the procedural guarantees of fairness where confidential information relating to national security was at stake.

Relying on Article 6 § 1 of the Convention, the applicant complained that the administrative proceedings in his case had been unfair in that it had been impossible to have access to a decisive piece of evidence, classified as confidential, which had been made available to the courts by the defendant.

In a judgment of 26 November 2015, a Chamber of the Court concluded unanimously that there had been no violation of Article 6 § 1 of the Convention, holding that the decision-making process had complied as far as possible with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the applicant's interests.

On 2 May 2016 the case was referred to the Grand Chamber at the applicant's request.

ARTICLE 8

Respect for private life

Failure to take into account the kind or degree of applicant's mental disorder when depriving him of his legal capacity: *violation*

A.N. v. Lithuania - 17280/08
Judgment 31.5.2016 [Section IV]

(See Article 6 § 1 (civil) above, page 12)

Respect for family life

Permanent exclusion order against settled migrant resulting in separation from wife and children: *violation*

Kolonja v. Greece - 49441/12
Judgment 19.5.2016 [Section I]

Facts – The applicant was an Albanian national who had been living and working in Greece since 1989. He was married to a Greek national, with whom he had two children, also Greek nationals. His three brothers also lived in Greece. In 1999 the applicant was sentenced to seven years' imprisonment for purchasing drugs, and an order permanently excluding him from Greek territory was also issued. After being released on parole, he was deported to Albania. In 2007 he returned to Greece illegally. In 2011 he was arrested with a view to his deportation to Albania, pursuant to the order made in 1999. The applicant lodged several appeals from

2011 onwards. He was removed to Albania in 2012. His requests to be allowed to return to Greece were unsuccessful.

Law – Article 8: The permanent ban on the applicant's return to Greece amounted to an interference with his right to respect for his family life. It was in accordance with the law and pursued the legitimate aims of ensuring public safety and preventing disorder or crime.

The applicant was considered by the Court as a "settled migrant" in view of his origins, the special status granted by Greece to Albanian nationals of Greek origin and his long-term residence and life in Greece prior to committing the offence which led to his deportation.

In assessing the proportionality of the interference, the Court drew on the criteria set out in the Üner *v. the Netherlands* judgment.

Firstly, the indictments division of the criminal court which released the applicant on parole in 1999 had considered that he had not shown criminal potential and that his deportation, and thus the separation from his family, would cause him, and also his wife and daughter, very serious psychological and financial problems. Thus, this positive development in the applicant's situation could be taken into consideration when weighing up the interests at stake.

Secondly, on the date he was sent back to Albania in 2012, the applicant had been resident in Greece for a total period of about twenty years, which represented a considerable length of time and was equivalent to almost half his age. Greece had therefore been the centre of his private and family life for a very long time.

Thirdly, the domestic courts had emphasised the potential breach of the protected right if the impugned measure was enforced. In 2011 a decision by the indictments division noted that, throughout the duration of his stay in Greece after serving his sentence, the applicant had not infringed the criminal law or engaged in anti-social activities capable of endangering public order. The applicant's family lived in a stable and enduring manner in a house it owned, the applicant did not pose a danger to public order and was unlikely to abscond, and, if released, would be easy to find. Thus, the applicant's criminal past should not be a decisive factor in the present case.

Further, in 2012 the administrative court had found that the applicant's deportation would cause him damage that could not easily be repaired, namely destruction of the family ties that he had developed in Greece to date. Indeed, his wife and one of the children had taken Greek nationality, he lived in a house which was owned by his wife and two brothers, and his parents and his brothers were legally resident in Greek and had been issued with a special residence permit for Albanians of Greek origin. The administrative court had also considered that the impugned measure was not justified on compelling grounds in the public interest.

Fourthly, both the applicant's wife and his two children had Greek nationality. They had spent all their lives in Greece and had no close ties with Albania. The applicant's ties with Greece were thus particularly strong. The lifetime exclusion order was likely to result in his six-year-old son growing up without his father, although the child's best interests lay in being with both his parents.

In the light of the criteria developed in its case-law and of the above factors – especially the permanent nature of the ban on entering Greek territory, the family ties between the applicant and his wife and children, the fact that the applicant had committed only one serious offence in 1999 and that his subsequent conduct suggested, even in the opinion of the Greek courts, that he did not have a propensity to commit unlawful acts, the total length of the applicant's stay in Greece, the Greek nationality of members of his family, the age of the applicant's second child, and the latter's interests and well-being – a fair balance had not been struck in the present case.

Conclusion: violation (unanimously).

Article 41: EUR 3,500 in respect of non-pecuniary damage.

(see Üner *v. the Netherlands* [GC], no. 46410/99, 18 October 2006, Information Note no. 90)

Respect for correspondence

Blanket and indiscriminate surveillance of correspondence and telephone conversations for minors placed in closed boarding school: *violation*

D.L. v. Bulgaria - 7472/14
Judgment 19.5.2016 [Section V]

(See Article 5 § 1 (d) above, page 9)

ARTICLE 9

Freedom of religion

Planning restrictions making it impossible for small religious community to have a place of worship: *violation*

Association for Solidarity with Jehovah's Witnesses and Others v. Turkey - 36915/10 and 8606/13
Judgment 24.5.2016 [Section II]

Facts – In 2003 the Turkish Urban Planning Act, which had previously only been applicable to the building of mosques, was amended to allow the construction, with the prior permission of the authorities, of buildings for other religions. Plots of land had normally to be set aside for that purpose when drawing up urban development plans. However, places of worship still had to have a mandatory minimum surface area of 2,500 m^2.

After the 2003 reform two local Jehovah's Witness congregations linked to the applicants were denied authorisation to use as places of worship an apartment in a block of flats and the ground floor of another building, on the grounds that a place used for housing could not be used for other purposes and that a place of worship had to comply with the minimum size requirements set out in the relevant statutory provisions. The municipalities also informed them the local development plans included no further available locations that could be used as places of worship or any land suitable for the construction of a place of worship.

Law – Article 9: The present applications concerned the applicants' lack of access to appropriate venues for practising their religion. The fact is that a religious community's inability to obtain a place of worship nullifies its religious freedom. Consequently, the impugned decisions amounted to an interference with the right guaranteed by Article 9.

Given the complexity of such matters, Contracting States normally benefit from a broad margin of discretion in implementing their urban development policies. However, even if it is impossible to derive from the Convention any right on the part of a religious community to obtain a place of worship from the public authorities, the need to preserve genuine religious pluralism which is inherent in the concept of a democratic society requires close scrutiny from the Court.

The many cases reported to the Court by applicants and third parties showed that the administrative authorities tended to use the potential of their legislation to impose rigid, or even prohibitive, conditions on the activity of certain minority denominations, such as the Jehovah's Witnesses. In view of their small numbers, the Jehovah's Witnesses did not need any special type of building, merely an ordinary meeting room in which to worship, to gather as a community and to teach their beliefs. However, the criteria laid down in the impugned legislation did not mention the particular needs of small communities of believers; nor were those needs taken into account by the courts which dismissed the applicants' appeals.

The Court rejected the Government's argument that the applicants had repeatedly obtained authorisation to meet on the basis of on Meetings and Demonstrations, because the granting of such authorisation depended on the goodwill of the central or local government departments, so the applicants had to secure official authorisation for each religious service they organised.

In conclusion, the impugned denials of authorisation had such direct effects on the applicants' freedom of religious that they could not be regarded as proportionate to the legitimate aim of preventing public disorder.

Conclusion: violation (unanimously).

Article 41: EUR 1,000 to the applicant association and EUR 1,000 jointly to the other applicants in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

ARTICLE 10

Freedom of expression

Fine imposed on opposition MPs for showing billboards and using a megaphone during parliamentary votes: *violation*

Karácsony and Others v. Hungary - 42461/13 and 44357/13
Judgment 17.5.2016 [GC]

Facts – At the material time, the seven applicants were members of the opposition in the Hungarian Parliament. On a motion introduced by the Speaker, they were fined amounts ranging from EUR 170 to EUR 600 for having gravely disrupted parliamentary proceedings after they displayed billboards and used a megaphone accusing the government of corruption. The fines were imposed by the Parliament in plenary session without a debate.

In two judgments of 16 September 2014, concerning the cases *Karácsony and Others* (42461/13, Information Note 177) and *Szél and Others* (44357/13) respectively, a Chamber of the Court held unanimously that there had been a violation of the applicants' freedom of expression guaranteed under Article 10 of the Convention.

On 16 February 2015 the cases were referred to the Grand Chamber at the Government's request.

Law – Article 10: The fines imposed on the applicants amounted to an interference with their right to freedom of expression. The expression consisted mainly of non-verbal means of communication through the display of a placard and banners. The impugned measures were imposed on the basis of a provision (section 49(4) of the Parliament Act) which, in common with similar legislation in many European countries, included an element of vagueness and was subject to interpretation through parliamentary practice. However, on account of their professional status, the applicants must have been able to foresee, to a reasonable degree, the consequences their conduct could entail, even in the absence of any previous application of the impugned provision. The provision therefore met the required level of precision for the interference to be prescribed by law. The interference pursued two legitimate aims: the prevention of disorder and the protection of the rights of others.

As to whether the interference was necessary in a democratic society, the Court was called upon for the first time to examine the compliance with Article 10 of the Convention of internal disciplinary measures imposed on MPs for the manner in which they expressed themselves in Parliament. The Grand Chamber recalled the general principles, developed in its case-law, governing freedom of expression both in general and in Parliament, which had to be balanced in the present case.

(a) *Freedom of expression* – The general principles concerning the question whether an interference with freedom of expression is "necessary in a democratic society" are well established and were summarised in *Animal Defenders International v. the United Kingdom* [GC] (48876/08, 22 April 2013, Information Note 162) and *Delfi AS v. Estonia* [GC] (64569/09, 16 June 2015, Information Note 186).

(b) *Procedural guarantees* – The fairness of the proceedings and the procedural guarantees afforded are factors which in some circumstances may have to be taken into account when assessing the proportionality of an interference with freedom of expression (see *Association Ekin v. France*, 39288/98, 17 July 2001; *Lombardi Vallauri v. Italy*, 39128/05, 20 October 2009, Information Note 123; *Cumhuriyet Vakfı and Others v. Turkey*, 28255/07, 8 October 2013, Information Note 167).

(c) *Freedom of expression of members of parliament* – The Court has consistently underlined the importance of freedom of expression for members of parliament, this being political speech *par excellence*. Accordingly, interference with the freedom of expression of an opposition member of parliament calls for the closest scrutiny on the part of the Court (see *Castells v. Spain*, 11798/85, 23 April 1992).

(d) *Freedom of expression in Parliament* – Speech in Parliament enjoys an elevated level of protection which is reflected by the rule of parliamentary immunity. The guarantees offered by both types of parliamentary immunity (non-liability and inviolability) serve to ensure the independence of Parliament in the performance of its tasks. The protection afforded to free speech in Parliament serves to protect the interests of Parliament as a whole and should not be understood as protection afforded solely to individual MPs. However, freedom of parliamentary debate is not absolute and States may make it subject to certain restrictions or penalties, whose compatibility with freedom of expression will then be assessed by the Court. In this context, it is important to distinguish between the substance of a parliamentary speech and the time, place and manner in which such speech is conveyed. While States and Parliaments should, in principle, independently regulate the time, place and manner of speech in Parliament, with limited scrutiny on the Court's part, they have very limited latitude in regulating the content of parliamentary speech. However, some regulation may be considered necessary in order to prevent forms of expression such as direct or indirect calls for violence. In verifying that freedom of expression remains secured, the Court's scrutiny in this context should be stricter. The Convention establishes a close nexus between an effective political democracy and the effective operation of Parliament. In this regard, the domestic court's task is to find the right balance between the rights of individual MPs and the guaranteeing of effective parliamentary activity, bearing in mind that the rights of the parliamentary minority should also be taken into account.

(e) *Autonomy of Parliament* – The rules concerning the internal operation of Parliament stem from the constitutional principle of the autonomy of Parlia-

ment, according to which Parliament is entitled to regulate its own internal affairs. The autonomy of Parliament extends to its power to enforce rules aimed at ensuring the orderly conduct of parliamentary business. In principle, the rules concerning the internal functioning of national parliaments fall within the margin of appreciation of the Contracting States, the breadth of which depends on a number of factors. In particular, it is defined by the type of expression in issue. Bearing this in mind, there is an overriding public interest in ensuring that Parliament, while respecting the demands of free debate, is able to function effectively and pursue its mission in a democratic society. Therefore, the margin of appreciation to be afforded in this area should be a wide one. However, the national discretion, albeit very important, is not unfettered and should be compatible with the concepts of effective political democracy and the rule of law. In particular, a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids abuse of a dominant position. Accordingly, parliamentary autonomy should not be abused for the purpose of suppressing the freedom of expression of MPs. It would be incompatible with the purpose and object of the Convention if the Contracting States, by adopting a particular system of parliamentary autonomy, were thereby absolved from their responsibility under the Convention in relation to the exercise of free speech in Parliament. Similarly, the rules concerning the internal operation of Parliament should not serve as a basis for the majority abusing its dominant position *vis-à-vis* the opposition. The Court attaches importance to protection of the parliamentary minority from abuse by the majority. It will therefore examine with particular care any measure which appears to operate solely, or principally, to the disadvantage of the opposition.

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Turning to the present case, the Court accepted that, by displaying a placard and using a megaphone, the applicants had disrupted order in Parliament so making it necessary to react to their conduct. Moreover, they were not sanctioned for expressing their views on issues debated in Parliament, but rather for the time, place and manner in which they had done so.

As to whether the restriction on the applicants' right to freedom of expression was accompanied by effective and adequate safeguards against abuse, the Court distinguished two different situations. The first would obtain in the event of Parliament acting clearly in excess of its powers, arbitrarily, or indeed *mala fide* by imposing a sanction not prescribed in the rules or that was blatantly disproportionate to the alleged disciplinary breach. In such event, Parliament could not rely on its own autonomy to justify the sanction, which would therefore be subjected to the Court's full scrutiny. The second situation – relevant in the present case – would obtain when a sanctioned MP did not dispose of basic procedural safeguards under parliamentary procedure to contest the disciplinary measures imposed. The Court acknowledged the difference between immediate sanctions which instantaneously prevented MPs from expressing their opinion, and *ex post facto* sanctions such as the fine in the instant case. The procedural safeguards available in such circumstances had to include, as a minimum, the right for the MP concerned to be heard in a parliamentary procedure before a sanction was imposed. This right increasingly appeared as a basic procedural rule in democratic States, over and beyond judicial procedures, as demonstrated, *inter alia*, by Article 41 § 2 (a) of the Charter of Fundamental Rights of the European Union. The manner and mode of implementation of this right had to be adapted to the parliamentary context, bearing in mind that a balance had to be achieved to ensure the fair and proper treatment of the parliamentary minority and preclude abuse of a dominant position by the majority. In addition, while an MP who was disciplinarily sanctioned could not be considered entitled to a remedy to contest his sanction outside Parliament, the argument for procedural safeguards in this context was nonetheless particularly compelling given the lapse of time between the conduct in issue and the actual imposition of the sanction. Furthermore, any *ex post facto* decision imposing a disciplinary sanction had to state basic reasons to enable the MP concerned to understand the justification for the measure and permit some form of public scrutiny of it.

At the material time, the domestic legislation did not provide any possibility for the MPs concerned to be involved in the relevant procedure, notably by being heard. Nor did the decisions to fine the applicants contain any relevant reasons. Moreover, none of the remedies suggested by the Government to challenge the impugned measures, namely, addressing the plenary Parliament, the House Committee or the Committee responsible for the interpretation of the Rules of Parliament, offered the applicants an effective means of challenging the Speaker's proposal. Although in 2014 the possibility for a fined MP to seek a remedy and to

make representations before a parliamentary committee was introduced, this amendment had not affected the applicants' situation. It followed that the impugned interference with their right to freedom of expression was not proportionate to the legitimate aims pursued because it was not accompanied by adequate procedural safeguards. Therefore, the interference with the applicants' right to freedom of expression had not been necessary in a democratic society.

Conclusion: violation (unanimously).

Article 41: Awards ranging from EUR 170 to EUR 600 in respect of pecuniary damage; finding of a violation constituted sufficient just satisfaction in respect of non-pecuniary damage.

Journalists fined for purchasing a firearm to illustrate an article they were writing on the local black market in weapons: *inadmissible*

Salihu and Others v. Sweden - 33628/15
Decision 10.5.2016 [Section III]

Facts – In 2010 several shootings took place in Malmö, allegedly due to the easy access to firearms in the city. With a view to investigating how easy it was to get hold of a weapon the three applicants, who were journalists, purchased a firearm on the black market, which they then surrendered to the police before publishing an article in the press the next day. They were subsequently convicted of illegally possessing a firearm and sentenced to pay fines.

In their application to the European Court they complained, *inter alia*, that their convictions were in breach of their right to freedom of expression under Article 10 of the Convention.

Law – Article 10: It was clear that the applicants' convictions constituted an interference with their rights which was in accordance with law and had the legitimate aims of protecting public safety and preventing disorder and crime.

As to whether the impugned measures were necessary, the Court stressed that they did not concern the prohibition of the published article or sanctions in respect of publication, and were not based on restrictions specific to the press. The applicants were convicted solely because of their failure to comply with the relevant legislation, which applied to everyone. They must have known that their actions infringed the ordinary criminal law. Furthermore, although the article concerned a topic of public interest in view of the many shootings that had occurred in the area, it could have nevertheless been illustrated in other ways.

As to the nature and severity of the penalty, all the applicants had had their sentences reduced to mere fines because of the journalistic purpose and the special circumstances of the case. The amount of the fines could was not excessive or liable to have a deterrent effect on the exercise of freedom of expression by the applicants or other journalists.

Most importantly, the question of the applicants' rights under Article 10 had been tried and argued on its merits before all three domestic instances, including the Supreme Court. All the domestic courts had stressed the importance of journalists' role in society and made a balanced evaluation of all the interests at stake.

Having regard to all the foregoing factors, and taking into account the margin of appreciation afforded to the State in this area, the Court found that the domestic courts had struck a fair balance between the competing interests at stake.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Pentikäinen v. Finland* [GC], 11882/10, 20 December 2015, Information Note 189; and *Erdtmann v. Germany* (dec.), 56328/10, 5 January 2016, Information Note 192)

ARTICLE 11

Freedom of peaceful assembly

Insufficient judicial scrutiny of use of force by police to disperse peaceful demonstrations: *violation*

Süleyman Çelebi and Others v. Turkey - 37273/10 et al.
Judgment 24.5.2016 [Section II]

(See Article 46 below, page 27)

Freedom of association

Alleged inability of trade union to engage in collective bargaining owing to abolition of the relevant wages council: *inadmissible*

Unite the Union v. United Kingdom - 65397/13
Decision 3.5.2016 [Section I]

Facts – The Agricultural Wages Board of England and Wales ("AWB") was composed of employers',

workers' and ministry representatives and had the power to make orders in respect of agricultural workers concerning minimum rates of wages, holiday entitlement and other terms of employment. It was abolished by section 72(1) of the Enterprise and Regulatory Reform Act 2013 following an extensive consultation process by the Government.

The applicant was the only significant trade union in the agricultural sector in the United Kingdom, representing around 18,000 members. In the Convention proceedings it complained that as a result of the AWB's abolition, it had been denied the effective right to collective bargaining in the agricultural sector as, in the absence of that body, there was no effective legal mechanism for promoting or requiring collective bargaining in the sector.

Law – Article 11: The case concerned the extent of the respondent State's positive obligation under Article 11, in particular, whether it was obliged to have in place a mandatory, statutory forum for collective bargaining in the agricultural sector. In this sphere and in the absence of an established consensus among the member States of the Council of Europe, the respondent State enjoyed a wide margin of appreciation in determining whether a fair balance was struck between the protection of the public interest in the abolition of the AWB and the applicant's competing rights under Article 11.

The abolition of the AWB was preceded by research into pay and conditions in the agricultural sector and a public consultation. The consultation paper put forward a number of reasons tending to support the AWB's abolition, all of which were relevant to the decision where the balance between the competing interests lay. In particular, it was noted that the AWB was the only outstanding wage council and that there were indications that a number of agricultural workers were already negotiating their own agreements. The financial implications of abolition on workers and farmers and the net savings in terms of the AWB's operating costs were assessed. The human-rights implications of the proposal had also been considered.

Significantly, the applicant had not been prevented from engaging in collective bargaining. The conditions for collective agreements to be deemed to be legally enforceable in the United Kingdom – the existence of intent to be bound by the collective agreement and of an agreement in writing – did not appear unreasonable or unduly restrictive. Even accepting the applicant's submission that voluntary collective bargaining in the agricultural sector was virtually non-existent and impractical, this was not sufficient to lead to the conclusion that a mandatory mechanism should be recognised as a positive obligation. The applicant remained free to take steps to protect the operational interests of its members by collective action, including collective bargaining, and by engaging in negotiations to seek to persuade employers and employees to reach collective agreements and it had the right to be heard. The relevant European and international instruments, as they currently stood, did not support the view that a State's positive obligations under Article 11 extended to providing for a mandatory statutory mechanism for collective bargaining in the agricultural sector.

Bearing in mind the wide margin of appreciation in this area, the Court was not satisfied that, in deciding to abolish the AWB, the respondent Government had failed to observe their positive obligations incumbent under Article 11. It could not be said that the United Kingdom Parliament had lacked relevant and sufficient reasons for enacting the contested legislation or that the abolition of the AWB had failed to strike a fair balance between the competing interests at stake.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Demir and Baykara v. Turkey* [GC], 34503/97, 12 November 2008, Information Note 113; and *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 31045/10, 8 April 2014, Information Note 173; and the Factsheet on Trade union rights)

ARTICLE 14

Discrimination (Article 8)

More favourable conditions for family reunion applying to persons who had held Danish citizenship for at least 28 years: *violation*

Biao v. Denmark - 38590/10
Judgment 24.5.2016 [GC]

Facts – The applicants are husband and wife. The first applicant is a naturalised Danish citizen of Togolese origin who lived in Ghana from the age of 6 to 21, entered Denmark in 1993 aged 22 and acquired Danish citizenship in 2002. He married the second applicant in 2003 in Ghana. She is a Ghanaian national who was born and raised in Ghana and who at the time of the marriage had

never visited Denmark and did not speak Danish. After the marriage, the second applicant requested a residence permit for Denmark, which was refused by the Aliens Authority on the grounds that the applicants did not comply with the requirement under the Aliens Act (known as the "attachment requirement") that a couple applying for family reunification must not have stronger ties with another country – Ghana in the applicants' case – than with Denmark. The "attachment requirement" was lifted for persons who had held Danish citizenship for at least 28 years, as well as for non-Danish nationals who were born in Denmark and had lawfully resided there for at least 28 years (the so-called 28-year rule under the Aliens Act). The applicants unsuccessfully challenged the refusal to grant them family reunification before the Danish courts. They submitted that the 28-year rule resulted in a difference in treatment between two groups of Danish nationals, namely those who were born Danish nationals and those who acquired Danish nationality later in life. Under that rule, the first applicant could not be exempted from the attachment requirement until 2030 when he would reach the age of 59.

In the meantime, the second applicant entered Denmark on a tourist visa. Some months later, the couple moved to Sweden where they had a son, born in 2004. Their son has Danish nationality through his father.

In a judgment of 25 March 2014 (see Information Note 172) a Chamber of the Court held unanimously that there had been no violation of the applicants' rights under Article 8. By four votes to three it held that there had been no violation of Article 14 taken in conjunction with Article 8 of the Convention on account of a difference in treatment between persons who had been Danish nationals for more than 28 years and those who had been nationals for a shorter period of time. The case was referred to the Grand Chamber at the applicants' request.

Law – Article 14 taken together with Article 8: In order to determine whether the present case revealed any "indirect discrimination" based on race or ethnic origin, it was necessary to examine whether the application of the 28-year rule had in practice given rise to a disproportionate prejudicial effect on persons who, like the first applicant, had acquired Danish nationality after birth and were not of Danish ethnic origin.

The possibility that persons who had obtained Danish nationality after birth might not have to wait for 28 years thereafter but only, as the Government claimed, three years or more, before benefiting from family reunification, did not negate the fact that the 28-year rule had a prejudicial effect on Danish citizens in the same situation as the first applicant.

Moreover, the Court found that it could reasonably be assumed that at least the vast majority of Danish expatriates and Danish nationals born and resident in Denmark (who could benefit from the 28-year rule) would usually be of Danish ethnic origin, whereas persons acquiring Danish citizenship at a later point in life, like the first applicant (who would not benefit from the 28-year rule at the same age), would generally be of foreign ethnic origin.

The possibility that persons of foreign ethnic origin who were born in Denmark or arrived there at an early age could also benefit from the 28-year rule did not alter the fact that the rule had the indirect effect of favouring Danish nationals of Danish ethnic origin, and placing at a disadvantage, or having a disproportionately prejudicial effect on, persons of foreign ethnic origin who, like the first applicant, acquired Danish nationality later in life.

In those circumstances, the burden of proof shifted to the Government to show that the difference in the impact of the legislation pursued a legitimate aim and was the result of objective factors unrelated to ethnic origin.

One of the aims of introducing the 28-year rule was that the previous amendment of the Aliens Act, extending the attachment requirement to apply also to Danish nationals, had been found to have unintended consequences for persons such as Danish nationals who had opted to live abroad for a lengthy period and who had started a family while away from Denmark and subsequently had difficulties fulfilling the attachment requirement upon return.

The justification advanced by the Government for introducing the 28-year rule was, to a large extent, based on rather speculative arguments. In the Court's view, the answer to the question as to when it could be said that a Danish national had created such strong ties with Denmark that family reunification with a foreign spouse had a prospect of being successful from an integration point of view could not depend solely on length of nationality, whether it was 28 years or less. In order to obtain Danish nationality Mr Biao had already been required, among other things, to have spent 9 years in Denmark and to demonstrate his knowledge of Danish language and culture; in addition, he had previously been married to a Danish citizen for

about four years, had participated in various courses and worked in Denmark for more than six years, and had a son who was a Danish national by virtue of his father's nationality. None of these elements had been, or even could have been, taken into account in the application of the 28-year rule to Mr Biao, although they were indeed relevant when assessing whether his wife had any prospect of successful integration.

The preparatory work relating to the legislation which amended the Act in question reflected negatively on the lifestyle of Danish nationals of non-Danish ethnic origin, for example describing their "marriage pattern", consisting of "marry[ing] a person from one's own country of origin", as contributing to problems of isolation and to "hampering the integration of aliens newly arrived in Denmark". The Court, referring to its case-law to the effect that general biased assumptions or prevailing social prejudice in a particular country did not provide sufficient justification for a difference in treatment on the ground of sex[1], found that similar reasoning should apply to discrimination against naturalised nationals.

The Danish Supreme Court, taking the view that the factual circumstances of the present case were identical to those of Mrs Balkandali[2], found that the criterion of 28 years of Danish nationality "had the same aim as the requirement of birth in the United Kingdom, which was accepted by the Court in the 1985 judgment as not being contrary to the Convention: to distinguish a group of nationals who, seen from a general perspective, had lasting and strong ties with the country". The Supreme Court considered that the alleged discrimination was based solely on the length of citizenship, a matter falling within the ambit of "other status" within the meaning of Article 14 of the Convention. Accordingly, the proportionality test applied by the Supreme Court was different from the test to be applied by the European Court of Human Rights, which required compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule.

In the field of indirect discrimination between a State's own nationals based on ethnic origin, it was very difficult to reconcile the grant of special treatment with current international standards and developments:

(a) Article 5 § 2 of the European Convention on Nationality, aimed at eliminating the discriminatory application of rules in matters of nationality between nationals from birth and other nationals, including naturalised persons, suggested a certain trend towards a European standard which had to be seen as a relevant consideration in the present case.

(b) Neither in the 29 Council of Europe members studied by the Court, nor in EU law, was any distinction made between different groups of nationals when it came to determining the conditions for granting family reunification.

(c) Various independent bodies had expressed concern about the 28-year rule: the Committee on the Elimination of Racial Discrimination (CERD), the European Commission against Racism and Intolerance (ECRI) and the Council of Europe's Commissioner for Human Rights.

In conclusion, having regard to the respondent State's very narrow margin of appreciation in the present case, the Government had failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule.

Conclusion: violation (twelve votes to five).

The Court also found, by fourteen votes to three, that it did not need to examine the application separately under Article 8.

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

Discrimination (Article 1 of Protocol No. 1)

Difference in treatment between publicly and privately employed retirees and between various categories of civil servants as regards payment of old-age pension: *case referred to the Grand Chamber*

Fábián v. Hungary - 78117/13
Judgment 15.12.2015 [Section IV]

In 2012 the applicant, who was already in receipt of an old-age pension, took up employment as a civil servant. In 2013 an amendment to the Pension Act 1997 entered into force suspending the payment of old-age pensions to persons simultaneously employed in certain categories of the public sector. As a consequence, the payment of

1. *Konstantin Markin v. Russia* [GC], 30078/06, 22 May 2012, Information Note 150.
2. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 9214/80 et al., 28 May 1985.

the applicant's pension was suspended. His administrative appeal against that decision was unsuccessful. The restriction did not apply to pensioners working in the private sector. In the Convention proceedings, the applicant complained of an unjustified and discriminatory interference with his property rights, in breach of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1.

In a judgment of 15 December 2015 (see Information Note 191) a Chamber of the Court held, unanimously, that there had been a violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1. The Chamber found that the Government's arguments to justify the difference in treatment between publicly and privately employed retirees on the one hand, and between various categories of civil servants on the other, were unpersuasive and thus not based on any objective and reasonable justification.

On 2 May 2016 the case was referred to the Grand Chamber at the Government's request.

ARTICLE 35

Article 35 § 1

Effective domestic remedy – Russia
Six-month period

New cassation appeal procedure in criminal proceedings introduced by Federal Law no. 433-FZ did not constitute an effective remedy requiring exhaustion: *inadmissible*

Kashlan v. Russia - 60189/15
Decision 19.4.2016 [Section III]

Facts – Federal Law no. 433-FZ, which entered into force on 1 January 2013, amended the Code of Criminal Procedure by introducing a new cassation procedure. It prescribed a list of persons entitled to lodge cassation appeals against final judicial acts. An initial one-year time-limit for lodging cassation appeals was subsequently removed.

The applicant's conviction for hooliganism was upheld by a regional court more than six months before he lodged his application (complaining of a breach of his right to a fair trial) in the Convention proceedings. Following the regional court's judgment the applicant lodged successive cassation appeals, both of which were ruled inadmissible less than six months before his application to the Court.

Law – Article 35 § 1: The Court considered whether the applicant had complied with the six-month time-limit established by Article 35 § 1. Under its previous case-law a decision taken by a second-instance criminal court at the regional level under the former cassation procedure in Russia was considered a final decision for the purposes of Article 35 § 1 and thus the starting-point for calculation of the six-month time-limit (see *Berdzenishvili v. Russia* (dec.), 31697/03, 29 January 2004, Information Note 60).

The applicant's cassation appeals had been lodged under the new legislation (Federal Law no. 433-FZ), which had converted the first two levels of supervisory review under the former system into two levels of cassation proceedings. The Court thus had to assess whether the new cassation procedure constituted a remedy under Article 35 § 1 and was therefore relevant for the calculation of the six-month time-limit.

In contrast with the 2012 amendments to civil proceedings, which, in the Court's view, now constituted an ordinary remedy to be exhausted (see *Abramyan and Yakubovskiye v. Russia* (dec.), 38951/13 and 59611/13, 12 May 2015, Information Note 186), the amendments introduced in 2014 made it impossible to reconcile the length of the new time-limits in the criminal cassation system with the Convention requirements for an effective remedy. By abolishing the time-limit for lodging cassation appeals, final and binding judicial acts would in practice be amenable to appeal indefinitely, thus putting the new system in the same situation as the previous supervisory-review system, which was found to generate unacceptable uncertainty regarding the application of the six-month rule. Accordingly, the new cassation-review procedure did not constitute an ordinary remedy requiring exhaustion within the meaning of Article 35 § 1. The final domestic decision for the purposes of the six-month rule had therefore been the regional court's appeal judgment upholding his conviction and the application had been lodged out of time.

Conclusion: inadmissible (out of time).

ARTICLE 46

Execution of judgment – General measures

Respondent State reminded that senior officials should not be excluded from scope of judicial scrutiny of use of force by security forces

Süleyman Çelebi and Others v. Turkey - 37273/10 et al.
Judgment 24.5.2016 [Section II]

Facts – The applicants were a number of individuals and a trade union who took part in a demonstration on 1 May 2008 in Istanbul that was dispersed by the police using violence. In the preceding weeks the Governor had stated on television that the planned march towards Taksim Square was unlawful and would be prevented. A gathering was nevertheless held and was dispersed by force. Large quantities of tear gas were deployed, including in the garden of a hospital where some demonstrators had taken refuge. The applicants lodged criminal complaints alleging illtreatment, stating that they had been struck and had suffered respiratory problems. Their complaints were directed not only against the police officers who had intervened at the scene, but also against the Governor of Istanbul and the Head of the Istanbul Security Directorate. The Minister of the Interior, who was the subject of a separate complaint, refused to institute any investigation concerning the last two of these, despite a request to that effect from the public prosecutor at the Court of Cassation and the setting-aside by the Supreme Administrative Court of an initial decision not to prosecute. Meanwhile, some of the applicants were prosecuted for participation in an unlawful demonstration and acts of rebellion, but were acquitted.

Law

Article 3 (*substantive and procedural aspects*): The injuries observed by doctors to two of the applicants, who had not engaged in violence, were to be considered attributable to the aggressive police operation to break up the demonstration. As such treatment was not justified simply in order to disperse a demonstration, it constituted inhuman and degrading treatment.

In view of the arguable nature of the allegations made, an effective investigation had been required. That requirement had not been satisfied.

Firstly, the police officers involved had not been prosecuted. The prosecuting authorities had discontinued the proceedings, thereby disregarding their new powers in that sphere, and the Minister had not instituted a disciplinary investigation.

Secondly, the persons who had issued the orders had not been the subject of a judicial investigation. In the present case the Governor and then the Head of the Security Directorate had given the order to disperse the crowd, in their capacity as hierarchical superiors. The Minister of the Interior had opposed any proceedings against them on the grounds that they had not been present at the scene and that there was no evidence of their involvement by virtue of the orders they had given.

The Court considered that, in view of the remarks made by the Governor in the media and the scale of the means employed – extending to the use of tear-gas grenades in the grounds of a hospital – it was difficult to imagine that the police officers had not been following very specific instructions. Only a criminal investigation concerning the police officers and also the Governor and Head of the Security Directorate, who had given the orders, would have been able to shed light on the content and scope of the orders received by the police officers.

Conclusion: violation in the case of the third and fifth applicants (unanimously).

Article 11: The authorities had stopped the gathering before the planned march to Taksim Square had even begun. It was true that the Istanbul Governor's office had informed the public of the locations authorised for the demonstrations. However, the chosen venue had had a certain symbolic significance. The need for authorisation should not act as a disguised obstacle to freedom of peaceful assembly.

With regard to the use of tear gas, the Court criticised the use of indiscriminate force that made no distinction between the demonstrators and individuals who happened to be in the garden of a hospital.

The Court agreed with the reasoning of the judicial decisions given in the applicants' favour by the first-instance courts – which had also made reference to Articles 10 and 11 of the Convention – in particular regarding the fact that the demonstrators had not engaged in violence prior to the police intervention. The criminal investigations instituted against the applicants for breaches of the Demonstrations Act had thus ended in their being acquitted. However, their complaints seeking to

establish the responsibility of the authorities at various levels of the hierarchy, which had highlighted the interference with their right to demonstrate as protected both by the Constitution and by Article 11 of the Convention, had all been dismissed at last instance without any examination, either with regard to the necessity of the intervention in question or to the proportionality of the force used.

There had been no pressing social need capable of justifying the complete lack of tolerance which the authorities had shown towards the demonstrators by interfering – in violent fashion – with the exercise of their freedom of peaceful assembly[1]. In view of the brutality of the police intervention in the present case, particularly regarding the use of tear gas, the lack of any judicial scrutiny of its proportionality and necessity was apt to dissuade trade-union members and other members of the public from taking part in lawful demonstrations.

Conclusion: violation (unanimously).

Article 41: EUR 10,000 to the third and fifth applicants and EUR 7,500 each to the remaining applicants (including the trade union) in respect of non-pecuniary damage.

Article 46: The persistent use of excessive force to disperse peaceful demonstrations and the systematic use of tear-gas grenades, which were potentially lethal weapons, was liable to make members of the public fearful of participating in demonstrations and thus discourage them from exercising their rights under Article 11. In the face of an increase in similar applications[2] the Court reiterated the need for effective judicial scrutiny of the security forces' actions in dealing with demonstrations. In order to be viewed as effective, such scrutiny must be capable of leading, as applicable, to proceedings being brought against the persons (such as senior officials) who had issued the orders.

ARTICLE 1 OF PROTOCOL No. 1

Control of the use of property

Order for provisional seizure of assets in criminal proceedings without an assessment of the proportionality of the measure: *violation*

Džinić v. Croatia - 38359/13
Judgment 17.5.2016 [Section II]

Facts – The applicant, a company director, was placed under investigation on suspicion of economic crimes. During the course of the proceedings the County Court granted a request by the State Attorney's Office for the seizure of several of the applicant's properties in order to secure the enforcement of a probable confiscation order covering the pecuniary gain he was alleged to have made. The seizure order was upheld by the Supreme Court. An application by the applicant for it to be lifted or reassessed on the grounds that the value of the properties seized far exceeded the amount of the alleged pecuniary gain was likewise dismissed.

Law – Article 1 of Protocol No. 1: The sole issue before the Court was whether the seizure of the applicant's properties was proportionate, in other words, whether it had struck a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

The applicant was suspected of having made a pecuniary gain of approximately EUR 1,060,000 through the commission of the offences. Accordingly, the action taken by the State Attorney's Office to secure the enforcement of a possible confiscation order was not in itself open to criticism. However, in view of the risk of an excessive burden being imposed on the applicant, that did not absolve the domestic courts from ascertaining whether the conditions for seizure of his properties were met and whether the nature and scope of the seizure were proportionate. Despite having no evidence before it regarding the value of the properties, the County Court had accepted the request for seizure of all the properties without making any assessment of the proportionality between their value and the amount of the alleged gain. The Supreme Court had failed to rectify that omission by making its own proportionality assessment and had later dismissed the applicant's claims in the criminal proceedings that the properties were in fact worth almost EUR 10,000,000 as speculative without giving reasons. The Court considered it important to note that the properties were not alleged to be a result of crime or traceable to crime. They had nonetheless remained subject to the seizure order for more than two and a half years.

In sum, although in principle legitimate and justified, the seizure had been imposed and kept in force without an assessment of whether the value of the seized properties corresponded to the pos-

1. The Court previously found a violation of Article 11 in relation to the same demonstration in its judgment in *Disk and Kesk v. Turkey*, 38676/08, 27 November 2012.
2. See also the decision of the Committee of Ministers of the Council of Europe of 12 March 2015 (Cases no. 20 – Oya Ataman group against Turkey).

sible confiscation claim. The manner in which the measure had been applied was thus not adequate to demonstrate that the "fair balance" requirement had been satisfied.

Conclusion: violation (unanimously).

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

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

Lopes de Sousa Fernandes v. Portugal - 56080/13
Judgment 15.12.2015 [Section IV]

(See Article 2 above, page 7)

Károly Nagy v. Hungary - 56665/09
Judgment 1.12.2015 [Section II]

(See Article 6 § 1 (civil) above, page 12)

Regner v. the Czech Republic -35289/11
Judgment 26.11.2015 [Section V]

(See Article 6 § 1 (administrative) above, page 17)

Fábián v. Hungary - 78117/13
Judgment 15.12.2015 [Section IV]

(See Article 14 above, page 25)

DECISIONS OF OTHER INTERNATIONAL JURISDICTIONS

Inter-American Court of Human Rights

Duty to protect with strict due diligence in cases of violence against women

Case of Velásquez Paiz et al. v. Guatemala -
Series C No. 307
Judgment 19.11.2015[1]

Facts – The facts of this case occurred in a context of increased violence against women and gender-based homicides in Guatemala. It was shown that the State became aware of this situation by at least December 2001. In 2004 and 2005 the numbers of such homicides had increased and had remained high since, and were accompanied by high levels of impunity.

Claudina Isabel Velásquez Paiz was a 19-year-old law student who informed her family that she was at a party on the night of 12 August 2005. Around 11.45 p.m., and after several mobile phone calls, her parents held a last call with her and subsequently lost communication. At approximately 2 a.m. on 13 August 2005, Claudina's parents were informed that she might be in danger and thus began searching for her. Around 2.50 or 2.55 a.m. they called the National Civil Police and, in response, at approximately 3 a.m. a patrol arrived at the Panorama Neighbourhood, where the police officers were informed by Claudina's parents that they were searching for her and that she could be in danger. The officers escorted her parents from the Panorama Neighbourhood to the entrance of the Pinares Neighbourhood, where they told them there was nothing else they could do, that they had to wait at least 24 hours to report their daughter as missing, and that meanwhile they would keep patrolling. Between 3 a.m. and 5 a.m., the parents continued their search with the help of family and friends. Around 5 a.m. they went to the police station to report her disappearance but were again told to wait 24 hours. Finally, at 8.30 a.m. their claim was received in writing at Police Sub-Station San Cristobal 1651.

Around 5 a.m. the Volunteer Fire Department of Guatemala received an anonymous call regarding the discovery of a corpse in the Roosevelt Neighbourhood and rushed to the scene. Later two police officers, the assistant prosecutor, and other investigative authorities arrived. The victim's body, which was found on the asphalt covered with a white sheet, was identified as "XX." She had sustained injuries and had been shot in the forehead, her clothes were covered in blood, and there were signs to indicate probable sexual violence.

Claudina Velásquez's parents received a call from a friend telling them that an unidentified body that looked like their daughter was in the morgue of the Forensic Medical Service. Around noon, they identified their daughter and her body was released to them by the forensic doctor. Later, the assistant prosecutor and technicians in Criminal Investigations arrived at Claudina's wake and collected her fingerprints, after threatening her family that

1. This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. A more detailed, official abstract (in Spanish only) is available on that Court's website (<www.corteidh.or.cr>).

they would be accused of obstructing justice if they refused to permit them to carry out the procedure.

Criminal proceedings were initiated in 2005 before the Tribunals of First Instance in Criminal Matters, Narcotics, and Crimes against the Environment. Nine persons were linked to the investigations, but no one was ever charged. In 2006 the Human Rights Ombudsman also initiated an investigation and issued a resolution declaring violations to Claudina Velásquez's rights to life, personal security, and justice within a reasonable time, as well as to her and her family´s right to judicial protection. The resolution also declared several State authorities liable for the violations. Additionally, disciplinary proceedings were initiated that resulted in a verbal admonishment against two investigators and a 20-day suspension for a forensic doctor.

Law

(a) *Preliminary objections* – The State submitted two preliminary objections: (i) lack of jurisdiction *ratione materiae* in respect of Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention), and (ii) non-exhaustion of domestic remedies. The Inter-American Court rejected the first objection, considering that Article 12 of that Convention granted it jurisdiction by not exempting from its application any of the rules and procedures established for individual communications. The second preliminary objection was also rejected because the State had implicitly admitted that at the moment the petition was filed, the domestic remedies had been subject to unjustified delays or lacked effectiveness. In addition, the State had not mentioned which remedies were available, or whether they were adequate, appropriate, and effective.

(b) *Articles 4(1) and 5(1) (rights to life and personal integrity) of the American Convention on Human Rights (ACHR), in relation to Articles 1(1) (obligation to respect and ensure rights) and 2 (domestic legal effects) thereof and Article 7 of the Belém do Pará Convention* – The Inter-American Court reiterated its consistent jurisprudence that a State cannot be responsible for every violation of human rights committed between individuals within its jurisdiction. Thus, in order to establish a breach of the duty to prevent violations of the rights to life and personal integrity, it must be verified that the State authorities (i) knew, or should have known, of the existence of a real and immediate risk to the life and/or personal integrity of an individual or group of individuals, and (ii) failed to take the necessary measures within the scope of their powers which, judged reasonably, might have been expected to prevent or avoid that risk.

The Court recalled that in a context of increased violence against women of which the State is aware, there arises a duty of strict due diligence when State authorities are alerted to the fact that a woman's life or personal integrity is in danger. This duty requires an exhaustive search during the first few hours and days, following adequate procedures.

The Court found Guatemala internationally responsible because: (i) in the time before Claudina's disappearance, despite the known context of violence against women, the State had not implemented the measures necessary so that the authorities responsible for receiving complaints regarding missing persons would have the capacity and sensitivity to understand the seriousness of such claims, and the willingness and training to act immediately and effectively; (ii) once alerted that Claudina Velásquez was in danger, the authorities had not acted with the due diligence required to adequately prevent her injuries and death, as they had not acted as would be reasonably expected given the context of the case and the allegations before them. For instance, they had initially refused to take the complaint, indicating that the parents had to wait 24 hours to report her as missing; they had not collected data and descriptions that would permit her identification; they had not undertaken a systematic, strategic, exhaustive, and coordinated search with other State authorities, covering areas where she was likely to be; and they had not interviewed persons who might logically have information on her whereabouts.

Conclusion: violation (unanimously).

(c) *Articles 8(1) (right to a fair trial), 25 (right to judicial protection) and 24 (right to equal protection) of the ACHR, in conjunction with Articles 1(1) and 2 thereof and Article 7 of the Belém do Pará Convention* – The Inter-American Court found that the criminal investigation should have initiated with the claims that Claudina was missing; however, it had initiated only with the discovery of her body. Additionally, the Court held that the State had not investigated with due diligence, as there were a number of irregularities in the collection of evidence at the crime scene and during the later stages of the investigation. Also, it found that over 10 years, investigative actions had been tardy and repetitive, without a clear objective, violating the family's right to access to justice within a reasonable time.

Furthermore, given all the signs that Claudina had suffered sexual violence, the Court concluded that the State had violated its obligation to investigate her death as a possible manifestation of violence against women and with a gender perspective. Additionally, it found that the State authorities had not investigated diligently and rigorously owing to gender stereotypes and prejudices regarding her attire and the place where she was found that allowed the victim to be viewed as a person whose death did not deserve to be investigated or as someone who could be blamed for the attacks committed against her. Also, the characterisation of the crime as a possible "crime of passion" was based on a stereotype that justified the conduct of the aggressor. All of this constituted violence against women and a form of gender discrimination in access to justice.

Conclusion: violation (unanimously).

(d) *Articles 5(1) (right to personal integrity) and 11 (right to honour and dignity), in relation to Article 1(1) of the ACHR* – The Inter-American Court determined that the way the investigation of the case was conducted, in particular, the way in which the prosecutors had intruded upon the victim's wake in order to obtain her fingerprints, the way she was labelled as a person whose death did not deserve to be investigated, and the irregularities and deficiencies that had occurred throughout the investigation, in which Claudina's father was particularly active, had violated the family's right to personal integrity. Also, the Court indicated that when the prosecutors arrived at the wake to take Claudina's fingerprints and threatened her parents with charges of obstruction of justice if they refused, they had intruded upon an intimate and painful moment in order to manipulate Claudina's remains once again, even though this procedure should have been carried out before the body was delivered to her family. They had thus affected the family's right to honour and dignity.

Conclusion: violation (unanimously).

(e) *Article 11 (right to privacy) of the ACHR* – Given that it had already ruled on the State's duty to investigate the signs that Claudina Velásquez had possibly been subjected to sexual violence, the Court found it unnecessary to analyse the alleged violation of her right to privacy.

Conclusion: unnecessary to rule (unanimously).

(f) *Articles 13 (freedom of thought and expression) and 22 (freedom of movement and residence) of the ACHR* – The Court held that the alleged violations of these rights had already been duly considered in the chapter of the judgment on access to justice; thus, it was unnecessary to rule thereon.

Conclusion: unnecessary to rule (six votes to one).

(g) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered, among other measures, that the State: (i) open, conduct, and conclude, as appropriate and with due diligence, criminal investigations and proceedings in order to identify, prosecute, and, if applicable, punish those responsible for Claudina's injuries and death, as well as evaluate the conduct of the public servants involved in the investigation of the case in accordance with pertinent disciplinary norms; (ii) provide free medical and psychological or psychiatric treatment to the victims that required it; (iii) publish the judgment and its official summary; (iv) perform an act of public apology; (v) incorporate a continuing education programme on the need to eradicate gender discrimination, gender stereotypes and violence against women in Guatemala into the curriculum of the National Education System; (vi) develop a timetabled plan to strengthen the National Institute of Forensic Sciences; (vii) implement the full functioning of "specialised courts" and specialised prosecution throughout the Republic of Guatemala; (viii) implement permanent programmes and courses for the judiciary, prosecutors, and National Civil Police on the investigation into killings of women and on standards on the prevention, punishment, and eradication of killings of women, as well as train them on the proper implementation of international law and the jurisprudence of the Inter-American Court on the matter; (ix) adopt a strategy, system, mechanism, or national programme, through legislative or other measures, in order to ensure effective and immediate searches for missing women; and (x) pay pecuniary and non-pecuniary damages, as well as costs and expenses.

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