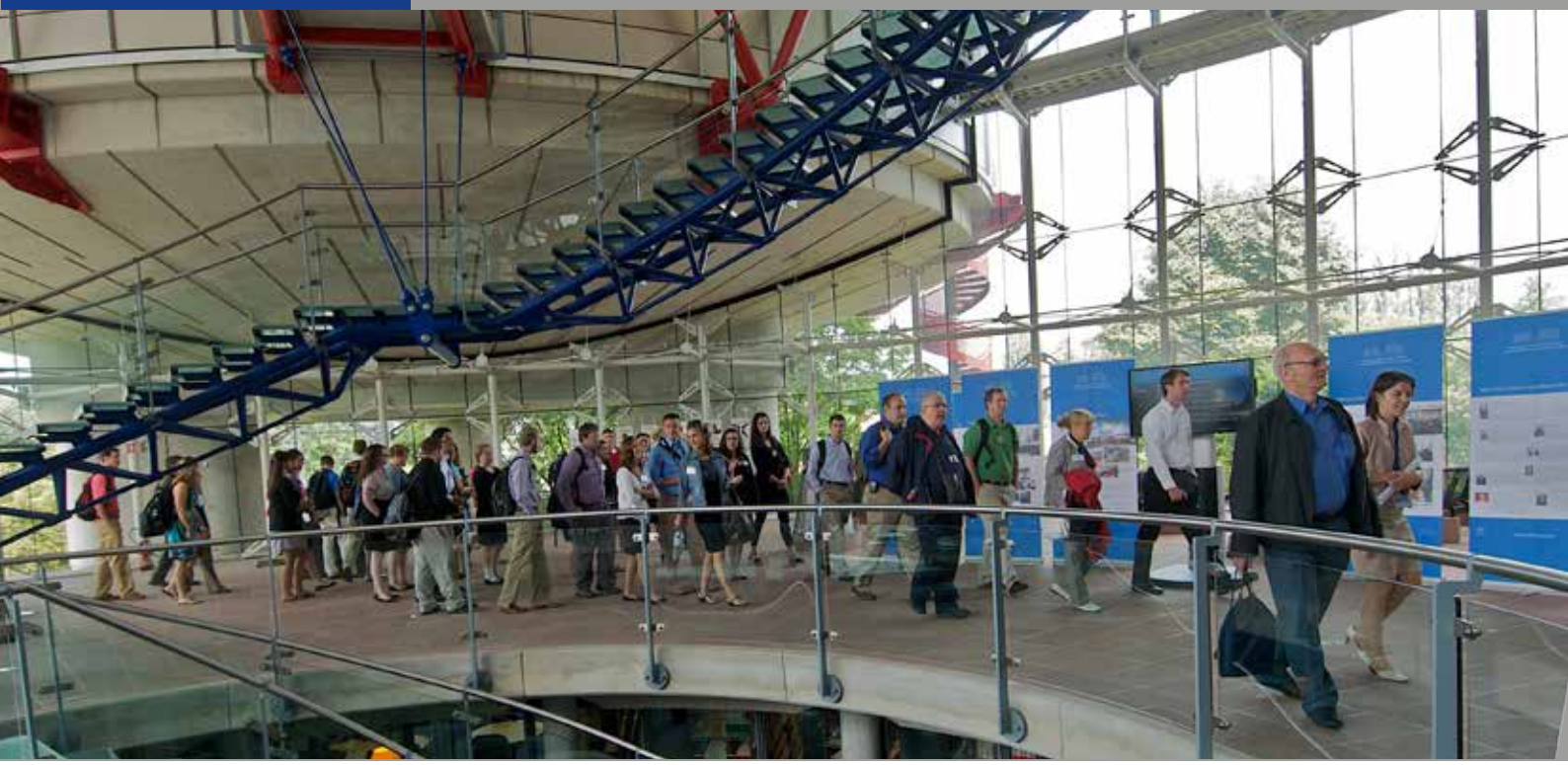
2017

MAY

INFORMATION NOTE 207

Case-law of the European Court of Human Rights



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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

English edition

ISSN 1996-1545

European Court of Human Rights
(Council of Europe)
67075 Strasbourg Cedex
France
Tel: + 33 (0)3 88 41 20 18
Fax: + 33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int
twitter.com/echrpublication

Layout: Publications Unit

Photograph: Council of Europe

Cover: interior of the Human Rights Building (Architects: Richard Rogers Partnership and Atelier Claude Bucher)

Table of contents

ARTICLE 2

Expulsion

Proposed deportation to Sudan of asylum-seekers who had carried on political activities in exile: *deportation would not constitute a violation; deportation would constitute a violation*

N.A. v. Switzerland, 50364/14, judgment 30.5.2017 [Section III]

A.I. v. Switzerland, 23378/15, judgment 30.5.2017 [Section III]

Facts – The applicants are both active members of the Justice and Equality Movement (the JEM), one of the largest rebel organisations militarily opposing the Sudanese regime. A.I. is also a member of an organisation working for peace and development in Dafur (the DFEZ).

They both applied for asylum in Switzerland, but the Federal Migration Office (now the State Secretariat for Migration – "the SEM") considered that they did not have refugee status and rejected their asylum applications and ordered them to be deported from Switzerland.

Law – Articles 2 and 3: Since the judgment in *A.A. v. Switzerland*, the Sudanese secret services could not be described as systematically monitoring the activities of political opponents abroad and, for the purposes of assessing whether individuals could be suspected of supporting organisations opposing the Sudanese regime and thus at risk of being subjected to ill-treatment and torture in the event of deportation to Sudan on account of their political activities in exile, a number of factors had to be taken into account.

With regard to the applicants' reasons for fleeing, the Court could not identify any factors that would justify calling into question the assessment by the SEM, which had found that their allegations lacked credibility. There was no evidence that the Sudanese authorities had taken any interest in the applicants when they had still been living in Sudan or abroad, prior to arriving in Switzerland.

The applicants' membership of the JEM and A.I.'s membership of the DFEZ were, however, factors giving rise to a risk of persecution. The JEM was one of the main rebel movements in Sudan and the danger it represented in the eyes of the Sudanese authorities had increased on account of the legitimacy it had acquired in connection with the conflict in Darfur.

a) *The case of N.A.* – N.A.'s political activities in Switzerland had not really intensified for over three years and he could not be described as having a very exposed political profile as an opponent of the Sudanese regime. Accordingly, his political activities in Switzerland, being confined to merely participating in the activities of opposition organisations in exile, were not liable to attract the attention of the Sudanese intelligence services.

He could not claim that he had personal or family ties with eminent members of the opposition in exile that might endanger him.

Having regard to the foregoing, N.A.'s political activities in exile, which had been limited to merely participating in the activities of opposition organisations in exile, were not reasonably capable of attracting the attention of the intelligence services. Accordingly, he was not at risk of being subjected to ill-treatment and torture on account of his activities in exile if he were to be deported to Sudan.

Lastly, the Court did not find that there was a risk of persecution on grounds of the applicant's ethnic background, as he had not alleged that he belonged to a non-Arab ethnic group in Darfur.

Conclusion: no violation in the event of deportation to Sudan (unanimously).

b) *The case of A.I.* – A.I., who had already been involved in political activities to a non-negligible degree, had become even further involved over time, as could be seen from his participation in international conferences on the human-rights situation in Sudan, his articles criticising the Sudanese regime and his appointment to the post of the JEM's media director. Whilst A.I. could not be described as having a very exposed political profile, particularly as he had never made a speech on behalf of an opposition organisation at those conferences, regard nonetheless had to be had to the specific situation of Sudan.

As a result of his involvement with the JEMA, A.I. had regularly frequented leaders of the Swiss branch of that movement without, however, claiming to have personal or family ties with eminent members of the opposition in exile that might endanger him.

However, both as an individual and through his political activities in exile, he had attracted the attention of the Sudanese intelligence services. He

could be suspected of being a member of an organisation opposing the Sudanese regime. Accordingly, there were reasonable grounds for believing that A.I. would run the risk of being detained, interrogated and tortured on his arrival at the airport in Sudan and that he would be unable to settle back down in the country.

Conclusion: violation in the event of deportation to Sudan (unanimously).

Article 41: no claim made.

(See also *A.A. v. Switzerland*, 58802/12, 7 January 2014, and *A.F. v. France*, 80086/13, 15 January 2015)

ARTICLE 3

Inhuman or degrading punishment

Whole-life sentences offering no genuine prospects of release: *violation*

Matiošaitis and Others v. Lithuania, 22662/13 et al., judgment 23.5.2017 [Section II]

Facts – The six applicants whose applications were declared admissible were all serving life sentences. In their applications to the European Court, they complained under Article 3 of the Convention that their sentences were not *de jure* or *de facto* reducible.

Law – Article 3: The question for the Court was whether the penalties imposed on the applicants should be classified as irreducible, or whether there was a prospect of release.

a) *Parole, commutation for terminal illness, amnesty and reclassification of sentence* – None of these measures afforded a genuine prospect of release. Under Lithuanian law only prisoners serving fixed-term sentences, not life prisoners, were eligible for release. For its part, and as the Court had consistently held, commutation of life imprisonment because of terminal illness could not be considered a "prospect of release". Likewise, amnesty under Lithuanian law could not be regarded as a measure giving life prisoners a prospect of mitigation of their sentence or release. All previous amnesties declared by the Seimas had not applied to prisoners convicted of the most serious crimes and three of the amnesties had explicitly excluded life prisoners from their scope. Moreover, as an act of general rather than individual application amnesties did not appear to take into account the rehabilitation aspect of each individual prisoner.[1] Lastly, although Article 3 of the new Criminal Code enabled life sentences to be reclassified and commuted to a fixed term, this was a one-off possibility and all the applicants who had been eligible had already applied under that provision without success.

b) *Presidential pardon* – Life prisoners became eligible to request a pardon within a period that was substantially less than the maximum of 25 years the Court had indicated as being acceptable in *Vinter and Others* and *Murray*, the procedure was transparent and accessible and involved a set of criteria that allowed the President, on the basis of advice from the Pardon Commission, to assess whether a life prisoner's continued imprisonment was justified on legitimate penological grounds.

However, the presidential pardon could not be regarded as making life sentences reducible *de facto*. Firstly, neither the Pardon Commission nor the President was bound to give reasons for refusing a request for a pardon. Secondly, the President's pardon decrees were not subject to judicial review and could not be challenged by the prisoners directly. Thirdly, the work of the Pardon Commission was not transparent and its recommendations were not legally binding on the President. In sum, the presidential power of pardon in Lithuania was a modern-day equivalent of the royal prerogative of mercy, based on the principle of humanity rather than a mechanism, with adequate procedural safeguards, for review of the prisoners' situation so that the adjustment of their life sentences could be obtained. In addition, prison conditions for life prisoners were not conducive to rehabilitation: although a number of social rehabilitation programmes had been set up in Lukiškės Prison, where life prisoners had to serve the first ten years of their sentence, the European Committee for the Prevention of Torture (CPT) had reported that prisoners were held for 22½ hours a day in their cells and were kept in small group isolation with little possibility to associate with prisoners from other cells.

***

In order to guarantee proper consideration of the changes and the progress towards rehabilita-

1. As the Court had indicated in earlier cases, a review of a whole-life sentence should permit the authorities to assess any changes in the life prisoner and any progress towards rehabilitation.

tion made by a life prisoner the review of a whole life sentence should entail either the executive giving reasons or judicial review, so that even the appearance of arbitrariness is avoided. Presidential pardons in Lithuania *de facto* did not allow life prisoners to know what they had do to be considered for release and under what conditions and there was no judicial review available. Accordingly, the applicants' life sentences could not be regarded as reducible for the purposes of Article 3 of the Convention.

Conclusion: violation (unanimously).

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

(See also *Kafkaris v. Cyprus* [GC], 21906/04, 12 February 2008, Information Note 105; *Vinter and Others v. the United Kingdom* [GC], 66069/09 et al., 9 July 2013, Information Note 165; *Harakchiev and Tolumov v. Bulgaria*, 15018/11 and 61199/12, 8 July 2014, Information Note 176; *Murray v. the Netherlands* [GC], 10511/10, 25 April 2016, Information Note 195; *Hutchinson v. the United Kingdom* [GC], 57592/08, 17 January 2017, Information Note 203; and, more generally, the Factsheet on Life imprisonment)

Positive obligations (procedural aspect)

Alleged failure to conduct effective and timely criminal investigation into responsibility for road-traffic accident: *relinquishment in favour of the Grand Chamber*

Nicolae Virgiliu Tănase v. Romania, 41720/13 [Section IV]

In 2004 the applicant was seriously injured in a road-traffic accident which he says left him with a serious physical disability. The authorities immediately opened a criminal investigation against the applicant and two other third parties involved, but the investigation, notably into the responsibility of one of the other drivers, was ultimately discontinued by the prosecutor in 2012 on the ground that not all the elements of an offence were present. The prosecutor's decision was upheld by a district court which dismissed the applicant's appeal under the statute of limitations.

In his application to the European Court, the applicant complains under Article 3 of the Convention that the domestic authorities failed to examine the merits of the case or to clarify the circumstances of the accident, and allowed the special status of limitation in respect of the driver allegedly responsible for the accident to take effect.

On 18 May 2017 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber.

Failure of authorities to take adequate measures to protect applicant from domestic violence: *violation*

Bălşan v. Romania, 49645/09, judgment 23.5.2017 [Section IV]

(See Article 14 below, page 18)

Expulsion

Proposed deportation to Sudan of asylum-seekers who had carried on political activities in exile: *deportation would not constitute a violation; deportation would constitute a violation*

N.A. v. Swtizerland, 50364/14, judgment 30.5.2017 [Section III]

A.I. v. Swtizerland, 23378/15, judgment 30.5.2017 [Section III]

(See Article 2 above, page 6)

ARTICLE 5

ARTICLE 5 § 1

Lawful arrest or detention

Failure of authorities to make reasonable attempts to inform applicant of criminal proceedings against her and necessity to appear before them: *violation*

Vasiliciuc v. the Republic of Moldova, 15944/11, judgment 2.5.2017 [Section II]

Facts – The applicant, a Moldovan national living in Greece, was stopped and questioned at Chisinau airport in relation to jewellery that she was carrying. Following her return to Greece, criminal proceedings were initiated against her for attempted smuggling of jewellery and she was subsequently summoned to appear via her Moldovan address. On 19 June 2009 a Moldovan district court ordered the applicant's detention on the basis that she had failed to appear before the investigating authorities

when summoned. The applicant became aware of the detention order and applied to have it revoked arguing that she had been unaware of the criminal proceedings against her. Her application was refused and her appeal dismissed. In 2011 the applicant was arrested in Greece, on the basis of an international arrest warrant, and held in detention pending extradition proceedings for a period of 23 days.

In the Convention proceedings, the applicant complained under Article 5 that the detention order issued against her by the Moldovan authorities had not been based on relevant and sufficient reasons.

Law – Article 5 § 1

(a) *Admissibility* – The applicant was under the control and authority of the Greek authorities in the period between her arrest in Greece and her release from detention. That deprivation of liberty had its origin in the measures taken by the Moldovan authorities, namely the international arrest warrant issued at Interpol at their request. In the context of an extradition procedure, a requested State should be able to presume the validity of the legal documents issued by the requesting State and on the basis of which a deprivation of liberty was requested. Furthermore, the country requesting the extradition had to ensure that the request for detention and extradition was lawful, not only under national law, but also under the Convention. Accordingly, the act complained of by the applicant, having been instigated by Moldova on the basis of its own domestic law and followed up by Greece in response to its international obligations had to be attributed to Moldova notwithstanding that the act was executed in Greece.

(b) *Merits* – The applicant's deprivation of liberty in Greece was a direct consequence of the detention order of 19 June 2009 and no deprivation of liberty in Greece would have been possible in the absence of that order. That fact was expressly noted by the Greek courts in their decisions concerning the applicant's extradition. The applicant's detention in Greece, although formally for the purpose of her extradition, was part of the mechanism used by the Moldovan authorities to implement the detention order outside Moldova's borders.

The reason for ordering the applicant's detention relied upon by the Moldovan courts was the fact that the applicant had failed to appear before the investigating authorities when summoned. However, the applicant had left the country lawfully at a time when no criminal proceedings were pending against her. It was after she had left the country that the authorities had initiated criminal proceedings. She had given the authorities her contact information in Greece but in spite of that the prosecutors had issued the summons to her Moldovan address. The prosecutors had made no attempt to follow up information that she was in Greece and had made no reasonable attempts to inform her of the criminal proceedings and the necessity to appear before them.

The authorities had chosen to take a very formalistic approach to the problem of summoning the applicant and when she had not shown up they had hastily concluded that she had absconded. The refusal of the domestic courts to check the applicant's submissions about improper summoning and to give her a chance to appear before the authorities persuaded the Court that the applicant's detention could not be considered necessary and devoid of arbitrariness.

Conclusion: violation (unanimously).

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

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Reasonable time

Unreasonable length of proceedings for compensation for terrorist acts: *violation*

Çevikel v. Turkey, 23121/15, judgment 23.5.2017 [Section II]

Facts – On 21 December 2006 the applicant brought proceedings against the national authorities to obtain compensation for damage she alleged to have sustained from acts of terrorism or counter-terrorism measures. After going before the commission set up under Law no. 5233 and the administrative courts, the applicant lodged an individual application with the Constitutional Court, which handed down its decision on 14 April 2015.

The applicant complained before the Court of the length of the proceedings before the compensation commission, the administrative courts and the Constitutional Court.

Law – Article 6 § 1

(a) *Applicability* – The dispute concerning compensation for the alleged damage resulting from acts of terrorism or counter-terrorism measures was pecuniary in nature and without any doubt concerned a civil right under Article 6 § 1 of the Convention.

Following the proceedings before the commission set up under Law no. 5233 and the administrative courts, the applicant had lodged an individual application with the Constitutional Court, alleging that her Constitutional and Convention rights had been breached as a result of those proceedings.

If the Constitutional Court had found one or more violations of the applicant's rights under the Constitution and the Convention or its protocols as a result of shortcomings in the proceedings before the commission and the administrative courts, it could have referred the case back to the administrative courts for the proceedings to be reopened; she would then have had a prospect of obtaining appropriate compensation for the alleged damage.

Therefore the Constitutional Court's decision was directly decisive of the applicant's civil right. Moreover, even though it had dismissed the applicant's appeal in a preliminary admissibility procedure, it had nevertheless addressed the applicant's substantive arguments in its reasoning and in particular had examined in detail whether the administrative courts, in dismissing the applicant's request for compensation under Law no. 5233, had breached her rights under the Constitution and the Convention or its protocols. Article 6 § 1 thus applied to those proceedings.

(b) *Merits* – The period to be taken into account had lasted for about eight years and four months, at four levels of jurisdiction.

The proceedings before the administrative courts had lasted for about two years and two months, and the proceedings in the Constitutional Court about one year and four months, so they had not been particularly excessive in length.

However, while acknowledging the commission's heavy workload and the appropriateness of the measures adopted by the authorities to remedy this problem, those efforts had remained insufficient, since the commission had only started dealing with the applicant's request after about two years and ten months.

The length of the proceedings had been excessive and had not met the reasonable time requirement.

Conclusion: violation (unanimously).

Article 41: EUR 800 in respect of non-pecuniary damage.

(See also *Ruiz-Mateos v. Spain*, 12952/87, 23 June 1993)

ARTICLE 6 § 1 (CRIMINAL)

Fair hearing

Lack of access to lawyer during first three days of police custody not affecting overall fairness of the trial: *no violation*

Simeonovi v. Bulgaria, 21980/04, judgment 12.5.2017 [GC]

(See Article 6 § 3 (c) below, page 12)

Fair hearing, equality of arms

Non-disclosure to defence of identity and reports of undercover agents: *no violation*

Van Wesenbeeck v. Belgium, 67496/10 and 52936/12, judgment 23.5.2017 [Section II]

(See Article 6 § 3 (d) below, page 14)

ARTICLE 6 § 1 (DISCIPLINARY)

Access to court

Judge's inability to obtain judicial review of his suspension from office while disciplinary proceedings were pending: *violation*

Paluda v. Slovakia, 33392/12, judgment 23.5.2017 [Section III]

Facts – In September 2009 the Judicial Council of the Slovak Republic (the supreme governing body of the judiciary in Slovakia which was then presided over by the President of the Supreme Court) decided to suspend the applicant from his duties as a Supreme Court judge and to initiate disciplinary charges against him. The applicant was alleged, in particular, to have filed a criminal complaint accusing the President of the Supreme Court of abuse of authority and to have publicly stated that the President had sought to influence the outcome of proceedings. The suspension, which under the relevant legislation could last up to two years, entailed a 50% reduction in the applicant's salary. The applicant's attempts to challenge his suspension were unsuccessful. His appeal to the Judicial Council was

rejected on the grounds that it was a matter for the administrative courts. The administrative courts ruled that the decision to suspend the applicant was of a preliminary nature, had not amounted to a determination of his rights with final effect and as such had no bearing on his fundamental rights and freedoms. The applicant's complaints to the Constitutional Court were declared inadmissible.

In the Convention proceedings, the applicant complained under Article 6 § 1 that he had been denied access to court to challenge the order suspending him from office.

Law – Article 6 § 1: The applicant's suspension was imposed by the Judicial Council – a body that was not of a judicial character and did not provide the institutional and procedural guarantees inherent in Article 6 § 1 – within the context of disciplinary proceedings the Judicial Council had instituted. The applicant was not heard in respect of either the suspension or the underlying disciplinary charges.

The applicant had no access to proceedings before a tribunal within the meaning of Article 6 § 1 to challenge a suspension that had placed him for two years in the situation of being unable to exercise his judicial mandate and having one half of his salary withheld, while at the same time being unable to exercise any other gainful activity.

The Government had not invoked any conclusive reason for denying him judicial protection in respect of that measure. In that connection, it was important to draw a clear distinction between the arguably compelling reasons for suspending a judge facing a certain type of disciplinary charge and the reasons for not allowing him or her access to a tribunal in respect of the suspension. In the Court's view, the importance of this distinction was amplified by the fact that the body taking the measure and the procedure in the course of which it was taken fell short of the requirements of Article 6 § 1 and the fact that the measure was taken in a context as particular as that which had obtained in the applicant's case.

The applicant's lack of access to court could not, therefore, have been proportionate to any legitimate aim pursued. Accordingly, the very essence of his right had been impaired.

Conclusion: violation (unanimously).

Article 41: EUR 7,800 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

ARTICLE 6 § 2

Presumption of innocence

Conviction for money laundering following accused's failure to explain origin of unusually high payments into personal bank account: *inadmissible*

Zschüschen v. Belgium, 23572/07, decision 2.5.2017 [Section II]

Facts – The applicant was summoned to stand trial and convicted of money laundering as he had failed to give a convincing explanation about the origin of some significant payments into his bank account.

According to settled domestic case-law, the offence of money laundering was made out where any legal origin of the funds could be excluded, and without there being any need to prove the predicate offence(s).

Law – Article 6 §§ 1 and 2: The Court saw no reason to disagree with that domestic case-law, which seemed compatible with the Council of Europe's Convention on laundering. Under that Convention it was sufficient that the money-launderer suspected – or must have been aware – that the assets in question were proceeds of crime (Article 9 § 3); moreover, a money-laundering conviction was possible without having to prove the predicate offence (Article 9 § 6).

The case concerned inferences drawn from the applicant's silence by the trial court in its assessment of the evidence.

(i) *Degree of coercion* – The applicant merely made summary statements initially and had then been able to remain silent, as was his choice. No direct coercion was applied to make him answer questions. His refusal to reply had not constituted a criminal offence in itself.

(ii) *Role played by inferences in conviction* – The applicant's guilt had been based on a body of circumstantial evidence and his refusal to give explanations had merely corroborated that.

The fact that the applicant's refusal to prove his initial vague and unconvincing statements as to the origin of the money in question had been used, among other evidence, by the trial courts to find that any legal origin of the money could be excluded, did not constitute in itself a breach of his right to remain silent and not to incriminate himself.

Moreover, if the applicant's account about his financial transactions had corresponded to the truth, it would not have been difficult for him to prove the origin of the money.

Having regard to the evidence against him, the conclusions drawn from his refusal to give a convincing explanation about the origin of the money deposited in his bank account had been *dicta*ted by common sense and could not be regarded as unfair or unreasonable, or as shifting the burden of proof to the defence.

Conclusion: inadmissible (manifestly ill-founded).

Article 6 § 3 (a): Since the applicant had been charged with money-laundering, the fact that the summons merely described the transactions which served to establish the existence of this offence sufficed to enable the accused to exercise his defence rights. No obligation to additionally explain the unlawful activities from which the proceeds had subsequently been laundered could be derived from Article 6 § 3 (a) of the Convention, as those activities did not constitute the object of the accusation.

In a second decision of the same day, *Timmermans v. Belgium* (12162/07), the Court added, also under this head, the same reference to the Council of Europe's Convention on money-laundering as that mentioned above.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 6 § 3 (a)

Information on nature and cause of accusation, information in detail

Conviction for money laundering despite absence of decision regarding underlying substantive offence: *inadmissible*

Zschüschen v. Belgium, 23572/07, decision 2.5.2017 [Section II]

(See Article 6 § 2 above, page 11)

ARTICLE 6 § 3 (c)

Defence through legal assistance

Lack of access to lawyer during first three days of police custody not affecting overall fairness of the trial: *no violation*

Simeonovi v. Bulgaria, 21980/04, judgment 12.5.2017 [GC]

Facts – The applicant was arrested on 3 October 1999 on suspicion of involvement in a serious criminal offence. During his three days in police custody he was not assisted by a lawyer. On 6 October 1999, when he was charged in the presence of an officially assigned lawyer, he refused to answer any of the investigator's questions. On 12 October 1999, when he was questioned in the presence of two lawyers of his choosing, he remained silent. On 21 October 1999, while assisted by his two lawyers, he confessed to the offence as charged. A few months later he retracted his confession and presented a different version of events. He was sentenced to life imprisonment.

In its Chamber judgment of 20 October 2015 the Court unanimously found no violation of Article 6 § 3 (c) read in conjunction with Article 6 § 1 as regards the lack of access to a lawyer during the first three days of police custody.

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

Law – Article 6 §§ 1 and 3 (c): The Court reiterated that as a general rule, access to a lawyer must be granted as of the first police questioning of the suspect, unless it can be demonstrated that, in the light of the particular circumstances of the case, there are compelling reasons for restricting that right. Even if compelling reasons can exceptionally justify refusing access to a lawyer, such a restriction – for whatever reason – must not unduly diminish the defendant's rights under Article 6. The rights of the defence are, in principle, irremediably infringed where incriminating statements made under police questioning without any possibility of legal assistance are used as the basis for a conviction.

(a) *Starting point for the application of Article 6* – In the present case, the starting point for the right to legal assistance should be the date of the applicant's arrest. Indeed, that arrest had been based on criminal offences which he was suspected of having committed, and had had a major impact on his situation by enabling the authorities to conduct investigative measures with his participation.

(b) *Lack of waiver* – Even supposing the applicant submitted no explicit request for legal assistance during his police custody, he could not be deemed to have implicitly waived the right to such assis-

tance. The police had, in fact, failed to inform him of that right after his arrest.

(c) *Lack of "compelling reasons" to restrict access to a lawyer* – No "compelling reason" had been mentioned to justify restricting the applicant's access to a lawyer during his custody (imminent threat to the lives, physical integrity and/or safety of others). Furthermore, domestic legislation on access to a lawyer during police custody did not explicitly provide for exceptions to the application of that right.

(d) *Overall fairness of the proceedings* – The lack of "compelling reasons" in the instant case forced the Court to conduct a very strict assessment of the fairness of the proceedings. It was incumbent on the Government to convincingly demonstrate that the applicant had nevertheless benefited from a fair criminal trial.

The Court noted that: (i) the applicant had actively participated in all stages of the criminal proceedings; he had retracted his initial statements, presenting a different version of events, and his lawyers had secured the gathering of exonerating evidence and contested the evidence against him; (ii) the applicant's conviction had been based not solely on his confession but also on a whole body of consistent evidence; (iii) the courts had duly taken into account the evidence gathered, had ascertained that the applicant's procedural rights had been respected and had provided adequate reasons for their decisions in both factual and legal terms.

There was nothing to suggest that the applicant had been formally or informally questioned while in police custody. No evidence against the applicant had been obtained and included in the file during his custody. It did not transpire from any case document that during the approximately three days of custody the applicant had participated in any other investigative measures (such as an identification parade or DNA sampling). Furthermore, it would have been impossible under domestic law to use evidence against him obtained in the absence of a lawyer. Moreover, the applicant had changed his version of events; even his submissions before the European Court had been very vague on that point, and he had not provided any specific details until he lodged his memorial with the Grand Chamber.

The voluntary nature of the applicant's confession could be deduced from the following facts: (i) he had remained silent during two previous interrogations; (ii) during the questioning and his confession he had benefited from legal assistance and been informed of his procedural rights, in particular his privilege against self-incrimination; (iii) his refusal to make any statement would not have had any impact on the subsequent stages of the criminal proceedings.

No causal link had ever been mentioned, before the domestic courts or before the Court, between the lack of legal assistance during the applicant's police custody and his confession two weeks later, in the presence of a lawyer of his choosing. Consequently, the absence of a lawyer during that custody had in no way infringed the applicant's privilege against self-incrimination. Accordingly, it had not irremediably infringed the fairness of the criminal proceedings as a whole.

Conclusion: no violation (twelve votes to five).

The Court also unanimously found a violation of Article 3 of the Convention on account of the applicant's conditions of detention, read in conjunction with the duration of his imprisonment and the strict prison regime imposed on him, and awarded him EUR 8,000 in respect of non-pecuniary damage.

(See also *Ibrahim and Others v. the United Kingdom* [GC], 50541/08 et al., 13 September 2016, Information Note 199)

ARTICLE 6 § 3 (d)

Examination of witnesses

Order, based on statements by absent witnesses, to pay tax fine and surcharges: *violation*

Chap Ltd v. Armenia, 15485/09, judgment 4.5.2017 [Section I]

Facts – The applicant company was a licensed television broadcaster. In 2007 the tax authorities produced a report in which they found that the applicant company had underreported its tax liability by hiding advertising revenues. The tax authorities relied, *inter alia*, on documents they had requested from the head of the National Television and Radio Commission (NTRC) and statements from witnesses who claimed that they had not been given a receipt for payments they had made after placing advertisements with the television station. The applicant company was subsequently ordered by the Administrative Court to pay unpaid tax, a 60% fine and surcharges for late payment. In the Convention proceedings, it complained under

Article 6 §§ 1 and 3 (d) that the Administrative Court had not given it the opportunity to examine the head of the NTRC or the other witnesses at the trial.

Law – Article 6 § 1 in conjunction with Article 6 § 3 (d): Substantial penalties – fines and surcharges amounting to more than 60% of the amounts of tax due – had been imposed on the applicant company. Article 6 was thus applicable under its criminal head. Although the way in which the guarantees of Article 6 applied in the context of tax-surcharge proceedings could in certain cases be different from that applied in the hard core criminal law, in the instant case, the applicant company disputed the factual findings of the tax authorities which were based on the witness statements not supported by relevant documentation.

Without considering whether there were good reasons for their not appearing, the Administrative Court had refused to grant the applicant company's application to summon the witnesses as it considered that their evidence was not relevant. However, the documents provided by one of the witnesses (the head of the NTRC)[1] and the statements made by the other witnesses were admitted in evidence against the applicant company and, while not the only evidence against the applicant company, could be considered decisive for the determination of its tax surcharges. There were no procedural safeguards to compensate for the handicaps caused to the applicant company as a result of its being unable to examine the witnesses in question. Accordingly, the applicant company had been unreasonably restricted in its right to examine the witnesses in the proceedings against it.

Conclusion: violation (unanimously).

Article 41: EUR 2,400 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Refusal by trial court to allow examination of undercover agents: *no violation*

Van Wesenbeeck v. Belgium, 67496/10 and 52936/12, judgment 23.5.2017 [Section II]

Facts – In 2011 the applicant was given a prison sentence for his involvement in an international criminal organisation. The main case file (to which the defence had access) comprised the results of a "proactive" investigation involving undercover officers. The applicant complained unsuccessfully about a breach of his defence rights, on the ground that he had been unable to examine or have examined the undercover officers and had not been given access to a separate confidential file containing the full results of their intervention.

Belgian law allows the prosecution, under certain conditions, to keep a separate confidential file containing authorisations and reports about the implementation of special investigation methods. In the present case the public prosecutor had authorised the use of infiltration and observation in 2006. This "proactive" investigation had been followed up in 2008 by a judicial investigation stage involving the use of more conventional methods (phone tapping and house searches). In 2010 the Indictments Division ruled that the judicial investigation had been lawful and that the main case file was complete.

Law

Article 6 § 1: *Lack of access to confidential file* – Under Belgian law, the confidential file was necessary to protect the anonymity and therefore the safety of the undercover officers and to ensure that the methods used were kept secret. That justification was consonant with the Court's case-law.

In addition, the legislature had limited the evidence in the confidential file to documents that were likely to undermine those aims. Any other information (especially the nature of the methods used, the reasons for their use and the stages of their implementation) had to be contained in the main file, to which the adversarial principle by contrast applied.

Under Belgian law, review of the lawful use of certain investigation methods was carried out by the Indictments Division. That independent and

1. The Court found that the head of the NTRC was a "witness" in respect of whom the guarantees of Article 6 §§ 1 and 3 (d) of the Convention applied despite the fact that he had not made any oral or written statements in relation to the applicant company and had provided the relevant documents in his official capacity. For the Court, the fact that he had not made any statements against the applicant company was of no relevance. What mattered was that the information contained in the documents he had provided constituted evidence for the tax authorities and the courts.

impartial court also verified whether the main case file was complete and thus indirectly whether it was necessary to exclude certain information. In the present case that court had found that there was a balanced relationship between the confidential file and the main file, which contained the implementation report and non-confidential information from the proactive investigation.

There was nothing to support the applicant's allegation that he had been the victim of entrapment. Moreover, the courts had verified from the main case file that this was not substantiated. In particular, the Indictments Division had found that the launching of a proactive investigation was justified by sufficient circumstantial evidence; the relevant inferences had been mentioned in reports added to the main criminal case file and referred to in the public prosecutor's written submissions, to which the applicant also had access.

Thus the restriction of defence rights had been justified and the review carried out upstream by the Indictments Division had constituted a sufficient safeguard.

Conclusion: no violation (unanimously).

Article 6 §§ 1 and 3 (d): *Inability to have the undercover officers examined* – As the undercover officers could be regarded as witnesses for the prosecution, the Court examined the complaint using the three criteria set out below (see *Schatschaschwili v. Germany* [GC], 9154/10, 15 December 2015, Information Note 191).

(a) *The reasons for denying the examination of the undercover officers* – It was in principle for the national judge to assess the necessity or appropriateness of summoning a witness to give evidence. In the present case the domestic courts had taken the view that (i) the officers' safety and the importance of anonymity, as they were to be redeployed in such operations, precluded their appearance, and (ii) the defence had not indicated any questions to which the answer had not already been available in the main case file. The refusal by the Belgian courts to examine the undercover officers had thus been based on serious grounds.

(b) *Weight attached to impugned statements in the conviction* – Even though they had not been the sole and decisive basis of the applicant's conviction, the Court acknowledged that the statements of the undercover officers could have caused difficulties for the defence.

(c) *Whether there were sufficient counterbalancing safeguards* – A significant safeguard of fairness had been provided by the upstream review carried out by the Indictments Division. This independent and impartial tribunal had been able to verify the identity of the undercover officers and their reliability, by reviewing the lawfulness of their actions. That review had enabled the applicant to challenge the investigation methods used, including to allege that he had been the victim of entrapment. Before the trial courts, the refusal in question had been accompanied by detailed reasoning.

Admittedly, it did not appear from the file that the courts had shown particular prudence *vis-à-vis* the statements of the undercover officers in view of their non-appearance. However, the Court found that there had been procedural safeguards to counterbalance any resulting difficulties for the defence: the defence had been able to call witnesses, some of whom had been examined as to the allegations about the undercover officers; and it had been possible to compare the reports drawn up by the two officers in question and their results with the evidence gathered during the searches and phone tapping.

The applicant had thus been in a position to challenge the evidence gathered through the intervention of the undercover officers. His inability to secure their examination had not therefore undermined the fairness of the proceedings as a whole.

Conclusion: no violation (four votes to three).

ARTICLE 7

Heavier penalty, retroactivity

Retrospective preventive detention of convicted murderer on basis of psychiatric assessments that he continued to pose a danger: *case referred to the Grand Chamber*

Ilnseher v. Germany, 10211/12 and 27505/14, judgment 2.2.2017 [Section V]

The applicant has been in preventive detention since completing a ten-year prison sentence for a sexually motivated murder committed at the age of 19. His detention was retrospectively extended by subsequent court orders, based upon psychiatric assessments which revealed a high risk that he might commit similar serious crimes of a sexual and violent nature if released. Since 20 June 2013

the applicant has been detained in a newly built preventive detention centre offering an intensive treatment programme for sex offenders.

In the Convention proceedings, the applicant complained of violations of Articles 5 § 1 and 7 § 1 of the Convention in respect of his retrospectively imposed preventive detention. He also complained of a breach of Article 5 § 4 on account of the length of the review proceedings and of a violation of Article 6 § 1 owing to the alleged lack of impartiality of a judge sitting on the bench of the Regional Court that made one of the orders for his preventive detention.

The Government made a unilateral declaration in respect of the applicant's complaints under Articles 5 § 1 and 7 § 1 regarding a period of preventive detention from 6 May 2011 till 20 June 2013 when the applicant was detained in prison.

In a judgment of 2 February 2017, a Chamber of the Court unanimously struck out the part of the application in respect of which the Government had made a unilateral declaration and found no violation of Article 5 § 1 or Article 7 § 1 in respect of the applicant's retrospective preventive detention from 20 June 2013 onwards. It found in particular that the German courts had been justified in finding that the applicant's mental disorder was such as to warrant his detention as a person of unsound mind and that, because his preventive detention had been ordered because of and with a view to addressing his mental condition, it could not be considered a "penalty". Lastly, he had been held in a suitable therapeutic environment during the period in question (see also *Bergmann v. Germany*, 23279/14, 7 January 2016, Information Note 192).

The Chamber also held unanimously that there had been no violation of Article 5 § 4 on account of the length of the proceedings for review of the applicant's provisional preventive detention and no violation of Article 6 § 1 on account of the alleged lack of impartiality of the Regional Court judge. The judge had allegedly warned the applicant's female counsel to be careful if the applicant was released, but the European Court found that the alleged warning had been given immediately after the order for preventive detention was made and so amounted in substance to a confirmation of the Regional Court's finding.

On 29 May 2017 the case was referred to the Grand Chamber at the applicant's request.

ARTICLE 8

Positive obligations

Alleged ineffectiveness of proceedings for medical negligence in Croatia: *no violation*

Jurica v. Croatia, 30376/13, judgment 2.5.2017 [Section II]

Facts – The applicant brought a civil action for damages alleging medical negligence, but her claim was dismissed after the domestic courts found on the basis of expert reports that the deterioration in her health was the result of complications in her treatment and not of medical malpractice.

In the Convention proceedings, the applicant complained, *inter alia*, that the concept of medical negligence was not properly defined in the domestic legal system making it impossible to obtain a judicial determination of the responsibility for medical malpractice. She further complained that it was impossible to secure an independent and impartial expert report on the issue of medical negligence in Croatia since the competent experts all worked and collaborated with those suspected of medical negligence.

Law – Article 8: It was well established in the Court's case-law that the States have a positive obligation under Article 8 of the Convention to provide victims of medical negligence with access to proceedings in which they can, where appropriate, obtain compensation. However, in view of the broad margin of appreciation enjoyed by the States in laying down their health-care policies, and in choosing how to comply with their positive obligations and organise their judicial systems, there was no basis on which to hold that the Convention requires a special mechanism which facilitates the bringing of medical malpractice claims at domestic level.

Seeking compensation for medical malpractice in Croatia by way of a claim for damages was not a possibility that existed only in theory. There had been awards of damages at the domestic level with responsibility arising either on the principle of fault or, in particular circumstances, on the principle of objective liability.

As to the objectivity of the expert evidence, the fact that an expert was employed in a public medical institution specially designated to provide expert reports on a particular issue and financed by the State did not in itself justify a fear of a lack of

neutrality or impartiality. Croatian law laid down several procedural safeguards designed to ensure the reliability of expert evidence: for example, court experts were required by law to provide their opinions objectively, impartially and to the best of their knowledge and the provisions on the disqualification of judges applied also to experts. There was no evidence that those safeguards had not been properly applied in the applicant's case or that the experts whose opinions formed the basis for the courts' rulings in the case had lacked the requisite objectivity. In addition, the domestic courts had not simply admitted the written reports in evidence, but had also heard evidence from them in open court in the presence of the parties who were able to put questions. Supplementary reports and fresh reports by new experts were also ordered to cast further light on points which remained unclear or were contested.

It could not therefore be said that the authorities had failed to provide the applicant with an effective procedure enabling her to obtain compensation for the medical malpractice to which she alleged she had fallen victim.

Conclusion: no violation (unanimously).

The Court also held unanimously that there had been a violation of Article 6 § 1 of the Convention on account of the length of the proceedings and made an award of EUR 3,500 in respect of non-pecuniary damage under that head.

(See also *Vasileva v. Bulgaria*, 23796/10, 17 March 2016)

ARTICLE 10

Freedom of expression

Vagueness of grounds relied on by prison authorities for seizing prisoner's novel: *violation*

Sarıgül v. Turkey, 28691/05, judgment 23.5.2017 [Section II]

Facts – In 2004, while he was in prison, the applicant deposited a handwritten draft of a novel, to be sent outside the prison with a view to publication, with the prison administration. The prison authority examined the draft (about 200 pages) in the context of its supervision of inmates' correspondence, treating it as an ordinary letter. The administration, taking the view that the text supported an illegal separatist organisation, insulted the police and used abusive and inappropriate language, including expressions that were directed against women, public morals and beliefs, decided to seize it. In 2006, after the public prosecutor had decided not to prosecute the applicant, the draft was returned to him.

Law – Article 10: The Court took the view that the case had to be examined in terms of freedom of expression (Article 10) rather than respect for correspondence (Article 8) even though notice of the application had been given under the latter provision.

The disciplinary board had not expressly relied on any statutory basis in ordering the seizure of the applicant's manuscript, explaining only that the text in question contained inappropriate words and expressions according to the administration's pre-established correspondence checklist.

Reiterating that rules governing scrutiny of prisoners' correspondence which provide no precision as to its scope and do not define what is meant by "inappropriate" cannot meet the requirement of foreseeability (see *Tan v. Turkey*, 9460/03, 3 July 2007, Information Note 99), the Court reached a similar conclusion in the present case. The interference had not therefore been "prescribed by law".

Conclusion: violation (unanimously).

Article 41: EUR 1,500 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

ARTICLE 11

Freedom of peaceful assembly

Repeated arrest and prosecution for administrative offences of political activist: *case referred to the Grand Chamber*

Navalnyy v. Russia, 29580/12 et al., judgment 2.2.2017 [Section III]

The applicant – a Russian opposition leader and anti-corruption campaigner – was arrested on seven occasions at different public gatherings and prosecuted for administrative offences. In his application to the European Court, he complained that the measures had been politically motivated and had violated his rights under Articles 5 (right to liberty and security), 6 (right to a fair hearing) and 11 (freedom of assembly and association) of

the Convention. He also complained of breaches of Articles 14 (prohibition of discrimination) and 18 (limitation on use of restrictions on rights).

In a judgment of 2 February 2017, a Chamber of the Court, following its previous case-law in similar cases against Russia,[1] held unanimously that:

(i) the arrests, which appeared to be part of a practice whereby police would interrupt unnotified but peaceful gatherings and arrest the participants as a matter of routine, had been disproportionate reactions in breach of the applicant's right to freedom of assembly under Article 11;

(ii) the seven occasions when the applicant was arrested and the two occasions he was also held in pre-trial detention had all been arbitrary deprivations of his liberty in breach of Article 5 § 1 in the absence of reasons explaining why they were necessary in the circumstances; and

(iii) six of the seven sets of proceedings for administrative offences had been conducted in violation of the applicant's right to a fair hearing under Article 6 § 1 of the Convention.

In view of its findings of a violation of Articles 5 and 11, the Court also held that it was not necessary to examine whether there had been a violation of Article 18 of the Convention in conjunction with Articles 5 or 11 (by four votes to three), or of Article 14 of the Convention (unanimously).

On 29 May 2017 the case was referred to the Grand Chamber at the request of both the applicant and the Government.

ARTICLE 14

Discrimination (Article 3)

Failure of authorities to take appropriate action to address domestic violence against women: *violation*

Bălşan v. Romania, 49645/09, judgment 23.5.2017 [Section IV]

Facts – The applicant reported that her ex-husband had been violent towards her throughout their marriage. During their divorce proceedings his assaults against her had intensified and she made various complaints to the police. Before the European Court the applicant complained that she had been subjected to violence by her husband and that the State authorities had done little to stop it or to prevent it from happening again.

Law – Article 3: The physical violence suffered by the applicant had been documented in forensic medical and police reports. It was concerning that at the investigation level and before the courts the national authorities had considered the acts of domestic violence as being provoked and thus not serious enough to fall within the scope of the criminal law. The question of impunity for acts of domestic violence was at the heart of the case. The applicant had made full use of the remedy provided by criminal procedure but the national authorities, although aware of her situation, had failed to take appropriate measures to punish the offender and prevent further assaults.

Conclusion: violation (unanimously).

Article 14 read in conjunction with Article 3: The failure by a State to protect women against domestic violence breached their right to equal protection under the law. Official statistics showed that domestic violence was tolerated and even perceived as normal by a majority of people in Romania and that a rather small number of reported incidents were followed by criminal investigations. The number of victims of domestic violence had increased every year, the vast majority of victims being women. Those considerations were in line with previous findings by the United Nations Committee on Elimination of Discrimination against Women.[2]

The national authorities had been well aware that the applicant's husband had repeatedly subjected her to violence. They had deprived the national legal framework of its purpose by finding that she had provoked the domestic violence, that the violence had not presented a danger to society and

1. See, for example, *Kasparov and Others v. Russia*, 21613/07, 3 October 2013, Information Note 167; *Navalnyy and Yashin v. Russia*, 76204/11, 4 December 2014, Information Note 180; *Frumkin v. Russia*, 74568/12, 5 January 2016, Information Note 192; and *Novikova and Others v. Russia*, 25501/07 et al., 26 April 2016, Information Note 195.

2. Thirty-fifth session of the United Nations Committee on the Elimination against Women, concluding comments in respect of Romania, CEDAW/C/ROM/CO/6, 15 May to 2 June 2006.

was not therefore severe enough to require criminal sanctions. In doing so, they had acted in a way that was clearly inconsistent with international standards on violence against women and domestic violence in particular.[1] The authorities' passivity in the case was also apparent from their failure to consider any protective measures for the applicant, despite her repeated requests to the police, the prosecutor and the courts. Bearing in mind the particular vulnerability of victims of domestic violence, the authorities ought to have looked into the applicant's situation more thoroughly.

The violence suffered by the applicant could be regarded as gender-based violence, which was a form of discrimination against women. Despite the adoption by the Government of a law and national strategy on preventing and combatting domestic violence, the overall unresponsiveness of the judicial system and the impunity enjoyed by aggressors, as found in the case, indicated that there was an insufficient commitment to take appropriate action to address domestic violence. The criminal-law system, as operated in the case, did not have an adequate deterrent effect capable of ensuring the effective prevention of unlawful acts by the applicant's husband against the personal integrity of the applicant.

Conclusion: violation (unanimously).

Article 41: EUR 9,800 in respect of non-pecuniary damage.

(See also *Opuz v. Turkey*, 33401/02, 9 June 2009, Information Note 120; *T.M. and C.M. v. the Republic of Moldova*, 26608/11, 28 January 2014; *Talpis v. Italy*, 41237/14, 2 March 2017; and, more generally, the Factsheet on Violence against Women)

ARTICLE 18

Restriction for unauthorised purposes

Repeated arrest and prosecution for administrative offences of political activist: *case referred to the Grand Chamber*

Navalnyy v. Russia, 29580/12 et al., judgment 2.2.2017 [Section III]

(See Article 11 above, page 17)

ARTICLE 34

Victim

Chamber of Economy established by law and carrying out public functions: *absence of victim status*

Croatian Chamber of Economy v. Serbia, 819/08, decision 25.4.2017 [Section III]

Facts – The applicant, the Croatian Chamber of Economy (CCE), was a legal entity regulated by the Croatian Chamber of Economy Act.[2] In the Convention proceedings, it complained under Article 6 § 1 that it had been denied access to the Serbian courts in respect of civil claims it had lodged. A preliminary issue arose over whether the applicant could, for the purposes of enjoying victim status, be considered a "non-governmental organisation" within the meaning of Article 34 of the Convention.

Law – Article 34: When determining whether any given legal entity falls within the category of non-governmental organisations, the Court has regard to the entity's legal status, the nature and context of its activity, and the degree of its independence from the political authorities.

(a) *Legal status* – The applicant was established by a law and consisted of 21 county chambers set up in accordance with the official division of Croatia into counties; it belonged to a public-law system of chambers (see the Court's decision in *Smits, Kleyn, MettlerToledo B.V. et al., Raymakers, Vereniging Landelijk Overleg Betuweroute and Van Helden v. the Netherlands* ((dec.), 39032/97 et al., 3 May 2001)); all entities carrying out economic activities in Croatia were required by law to join a chamber; the applicant defined itself as a public institution which paid special attention to the execution of public power entrusted to it; and judgments of the Court

1. See the Council of Europe Convention on preventing and combatting violence against women and domestic violence ("the Istanbul Convention").

2. The Croatian Chamber of Economy Act (*Zakon o Hrvatskoj gospodarskoj komori*, published in the Official Gazette of the Republic of Croatia 66/91 et al.).

of Honour of the CCE could be subject of examination by the Administrative Court of the Republic of Croatia.

(b) *Nature of its activities* – The applicant carried out a number of lawfully delegated public functions and documents it issued in the execution of its public functions had the character and significance of official documents which were eligible for judicial scrutiny (contrast *Chamber of Commerce, Industry and Agriculture of Timişoara v. Romania (no. 2)* (23520/05 et al., 16 July 2009), where the Court found that the national chamber and departmental chamber did not exercise public authority and were not placed under the State control).

(c) *Independence from political authorities* – The applicant's work was mainly funded from compulsory membership fees and revenue from the exercise of the public functions.

In these circumstances, the applicant did not enjoy a sufficient degree of autonomy from the Croatian Government for it to be considered a non-governmental organisation within the meaning of Article 34 of the Convention.

Conclusion: inadmissible (incompatible *ratione personae*).

ARTICLE 1 OF PROTOCOL No. 1

Possessions

Dismissal of compensation award following reopening of domestic proceedings as a result of the institution of Convention proceedings: *inadmissible*

Haupt v. Austria, 55537/10, decision 2.5.2017 [Section V]

Facts – At the material time the applicant was Deputy Federal Chancellor and chairperson of the Austrian Freedom Party. After being compared to a "hippopotamus" in a television show he instituted criminal proceedings under the Media Act against the television company for proffering insults and was awarded compensation in a judgment that became final. The television company subsequently lodged an application with the European Court complaining of a breach of its rights under Article 10 of the Convention. Following the communication of that application to the Government, the Austrian Supreme Court granted a request by the Procurator General for an extraordinary re-opening of the domestic proceedings and remitted the case to the regional court, which dismissed the applicant's claim for compensation.

In his application to the European Court, the applicant complained, *inter alia*, of a breach of his right to private life under Article 8 of the Convention and of a breach of Article 1 of Protocol No. 1 as a result of the dismissal of his compensation claim in the re-opened proceedings.

Law – The regional court's judgment had struck a fair balance between the competing interests – the right to private life and to freedom of expression – at stake. The applicant's Article 8 complaint was therefore declared inadmissible as being manifestly ill-founded.

Article 1 of Protocol No. 1: The central question was whether the applicant had had an undisputed claim, constituting "possessions", to the compensation he had been awarded by the regional criminal court.

In finding that he had not, the Court noted that under Article 363a of the Austrian Code of Criminal Proceedings any person claiming a violation of his or her rights under the Convention could request the renewal of criminal proceedings and, under the established domestic case-law of the Supreme Court, the finding of a violation by the European Court was not a necessary precondition for such a renewal. The applicant should thus have been aware of the situation under Austrian law whereby the television company's application to the European Court could set in motion proceedings by which the domestic compensation award would have to be reconsidered with regard to the company´s rights under the Convention. The compensation award was not merely accessory to the company's criminal conviction, but constituted the sanction for the offence. It would therefore have been clear to the applicant that the setting aside of the judgment would automatically affect his compensation award.

The applicant had, therefore, not shown that he had a claim that was sufficiently established to constitute "possessions" within the meaning of Article 1 of Protocol No. 1. The Court went on to add that even if the dismissal of the compensation claim had constituted "possessions", in the light of its findings under Article 8, there had been a legal basis and sufficient reasons for the reopening of the proceed-

ings and there was no indication that the dismissal of the claim had been disproportionate.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 3 OF PROTOCOL No. 1

Free expression of the opinion of the people

Failure by domestic authorities to adequately investigate complaints of serious electoral irregularities: *violation*

Davydov and Others v. Russia, 75947/11, judgment 30.5.2017 [Section III]

Facts – The case concerned city and federal level elections on 4 December 2011 to the Legislative Assembly of St Petersburg and the State Duma of the Russian Federation (the lower chamber of the Russian parliament). The applicants participated in the elections in different capacities: all were registered voters, some stood as candidates for the Legislative Assembly and others were members of electoral commissions or observers. In the Convention proceedings, the applicants complained of breaches of their right to free elections during the elections and of a failure by the domestic authorities to ensure an effective review of their allegations. They alleged that the electoral commissions had falsified the results of the elections by ordering recounts in which the ruling *Yedinaya Rossiya* party and its candidates were systematically assigned more votes, while the opposition parties and candidates were stripped of votes. Some of the applicants had complained to the St Petersburg City Electoral Commission, while others had lodged criminal complaints and sued the respective electoral commissions in the domestic courts. However, their claims had been rejected.

Law – Article 3 of Protocol No. 1

(a) *Applicability* – It was clear that the elections to the State Duma qualified as the elections of a "legislature" within the meaning of Article 3 of Protocol No. 1.

The St Petersburg Legislative Assembly was a democratic government body of one of the subjects of the Russian Federation, vested with a wide range of powers in the constituent territory, based on the constitutional separation of powers between the regions and the Federation. As such, it too fell under the definition of "legislature" within the meaning of Article 3 of Protocol No. 1.

(b) *Merits* – The detailed recommendations made in the Explanatory Report to the Venice Commission's Code of Good Practice in Electoral Matters[1] reflected the importance of technical details which could be crucial in ensuring an open and transparent procedure of ascertaining the voters' will through the counting of ballot papers and the accurate recording of election results throughout the system, from the local polling station to the Central Electoral Commission. They confirmed that the post-voting stages covering the counting, recording and transfer of the election results form an indispensable part of the election process. As such, they should be achieved with clear procedural guarantees, be open and transparent, and allow observation by all members across the political spectrum, including the opposition.

However, Article 3 of Protocol No. 1 was not conceived as a code on electoral matters designed to regulate all aspects of the electoral process. Accordingly, the level of the Court's scrutiny would depend on which aspect of the right to free elections was in issue. Tighter scrutiny should be reserved for any departures from the principle of universal suffrage while the States could be afforded a broader margin of appreciation where measures prevented candidates from standing for elections. Still less stringent scrutiny would apply to the more technical stage of vote counting and tabulation: a mere mistake or irregularity at this stage would not, *per se*, signify unfairness of the elections if the general principles of equality, transparency, impartiality and independence of the electoral administration were complied with. The concept of free elections would be put at risk only if (i) there was evidence of procedural breaches capable of thwarting the free expression of the opinion of the

1. Code of Good Practice in Electoral Matters (Guidelines and Explanatory Report) (CDL-AD (2002) 23 rev), adopted by the European Commission for Democracy through Law ("the Venice Commission").

people, for instance through gross distortion of the voters' intent, and (ii) such complaints had received no effective examination at the domestic level (although the Court confirmed in this connection that an individual voter's right to appeal could be subject to reasonable limitations such as a requirement for a quorum of voters).

(i) *Seriousness of the procedural breaches* – The following elements of the applicants' complaints of unfairness in the elections were undisputed: (i) the results in almost half the initially challenged precincts in the elections to the St Petersburg Legislative Assembly (and three of the four challenged in the State Duma elections) were declared void by the territorial electoral commissions (TECs) and recounts were ordered; (ii) the TECs' decisions were summarily and similarly worded, making it difficult to assess whether they were justified; (iii) the composition of the TECs which decided to hold recounts excluded the members from both opposition parties in a majority of cases; (iv) some of the members of the precinct electoral commissions (PECs) concerned were not notified of the decisions taken and so did not take part in the recounting; (v) the recounts were carried out in such a short time as to raise questions over their ability to comply with the procedural requirements of the national legislation; (vi) the members of the opposition parties were systematically absent from the recount process both at the territorial and precinct levels; and (vii) as a result of the recounts the Government party had overwhelmingly gained and the opposition parties had lost.

In addition, the applicants' allegations were indirectly supported by the Organization for Security and Co-operation in Europe (OSCE), an independent and credible international observer mission, which identified the counting and tabulation of the results as the most problematic stages of the elections in question.

The applicants had thus presented, to both the domestic authorities and the Court, an arguable claim that the fairness of the elections had been seriously compromised by the recounting procedure. Such an irregularity was capable of leading to gross distortion of the voters' intent in each of the precincts concerned. It was therefore necessary to determine whether the applicants had obtained an effective examination of these complaints at the domestic level.

(ii) *Effectiveness of the examination of the applicants' complaints at the domestic level* – Between them, the applicants had tested all the remedies available under the domestic legislation and seen by the Government as being effective and accessible. However, the City Electoral Commission had not considered the applicants' complaints in substance, but had forwarded them to the prosecutor's offices. For their part, the prosecutor's office and the investigating committee had seen no reason to take any procedural steps aimed at verifying the allegations of fraud in the precincts concerned, and had not opened a criminal investigation, being of the view that the matter fell into the domain of the competent courts. In turn, though competent under both federal and regional legislation to perform independent and effective evaluations of allegations of breaches of the right to fair and free elections, the courts had generally refrained from going into the substance of the allegations, limiting their analysis to trivial questions of formalities and ignoring evidence pointing to serious and widespread breaches of procedure and transparency requirements. In essence, they had endorsed the electoral commissions' decisions, without engaging in any real examination of the reasons for the challenges.

There had accordingly been a violation of Article 3 of Protocol No. 1 in so far as the applicants had been denied effective examination of their complaints about serious irregularities in the procedure in which the votes had been recounted.

Conclusion: violation (unanimously).

Article 41: EUR 7,500 to each of the applicants who made a claim in respect of non-pecuniary damage.

(See also *Namat Aliyev v. Azerbaijan*, 18705/06, 8 April 2010, Information Note 129; *Kerimova v. Azerbaijan*, 20799/06, 30 September 2010, Information Note 133; and *Riza and Others v. Bulgaria*, 48555/10 and 48377/10, 13 October 2015, Information Note 189)

ARTICLE 4 OF PROTOCOL No. 7

Right not to be tried or punished twice

Parallel administrative and criminal proceedings in respect of the same conduct: *violation*

Jóhannesson and Others v. Iceland, 22007/11, judgment 18.5.2017 [Section I]

Facts – The first and second applicants had tax surcharges imposed on them in administrative proceedings for failing to declare certain income on their tax returns. In subsequent criminal proceedings they were ultimately convicted of criminal offences in respect of the same omissions and were given suspended prison sentences and a fine. The tax surcharges were taken into account in fixing the level of the fine. In the Convention proceedings, the applicants complained under Article 4 of Protocol No. 7 that they had been prosecuted and punished twice in respect of the same offence.

Law – Article 4 of Protocol No. 7: The Court was satisfied that the criminal offences for which the applicants were prosecuted and convicted were based on the same set of facts as those for which the tax surcharges had been imposed. It went on to examine whether there had been a duplication of the trial and punishment. In that connection, it reiterated that dual proceedings concerning, as in the applicant's case, both criminal and administrative law were not proscribed by Article 4 of Protocol No. 7 if the respondent State was able to demonstrate convincingly that the two sets of proceedings were "sufficiently closely connected in substance and in time" (see *A and B v. Norway* [GC], 24130/11 and 29758/11, 15 November 2016, Information Note 201).

That test was not satisfied in the instant case.

Firstly, as regards the connection in substance, the Court accepted that the two sets of proceedings pursued complementary purposes, the consequences of the applicants' conduct had been foreseeable and, since the tax surcharges had been offset against the fines, the sanctions already imposed in the tax proceedings had been sufficiently taken into account in sentencing in the criminal proceedings. However, as regards the collection of the evidence, which was an important factor in the evaluation of a connection in substance, despite having access to the tax investigators' reports and the documents collected during the tax audit, the police in charge of the criminal investigation had conducted their own independent investigation and that had resulted in the applicants' conviction by the Supreme Court. The applicants' conduct and their liability under the different provisions of tax and criminal law had thus been examined by different authorities and courts in proceedings that were largely independent of each other.

Secondly, as regards the connection in time, it had to be sufficiently close to protect the individual from being subjected to uncertainty and delay and from proceedings becoming protracted. In the applicants' cases, the overall length of the two sets of proceedings was about nine years and three months, with the proceedings being conducted in parallel for just over a year. The applicants were not indicted until some 15 to 16 months after the decisions of the tax authorities in the administrative proceedings and were not convicted until some four years after those decisions. The Supreme Court´s judgment (upholding the applicants' convictions and adding further convictions in respect of the first applicant) was delivered more than a year later still. The Government had failed to explain the delays.

Accordingly, in view in particular of the limited overlap in time and the largely independent collection and assessment of evidence, there had not been a sufficiently close connection in substance and in time between the tax proceedings and the criminal proceedings for them to be considered compatible with the *bis* criterion in Article 4 of Protocol No. 7.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 to the first applicant and EUR 10,000 to the second applicant in respect of non-pecuniary damage; finding of a violation constituted sufficient just satisfaction in respect of any pecuniary damage.

PENDING GRAND CHAMBER

Referrals

Ilnseher v. Germany, 10211/12 and 27505/14, judgment 2.2.2017 [Section V]

(See Article 7 above, page 15)

Navalnyy v. Russia, 29580/12 et al., judgment 2.2.2017 [Section III]

(See Article 11 above, page 17)

Relinquishments

Nicolae Virgiliu Tănase v. Romania, 41720/13 [Section IV]

(See Article 3 above, page 8)

OTHER JURISDICTIONS

Court of Justice of the European Union (CJEU)

Equality of arms in proceedings for judicial review of tax information request by another EU Member State

Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes, C-682/15, judgment 16.5.2017 (Grand Chamber)

In the context of a dispute concerning a sanction imposed by the Luxembourg tax authority on a company for refusing to respond to a request for information from another member State, the CJEU received preliminary questions from the Administrative Court (Luxembourg) concerning the interpretation of Directive 2011/16/EU on administrative cooperation in the field of taxation ("the Directive") and Article 47 of the EU Charter of Fundamental Rights ("the Charter").

Facts – The French tax administration, investigating an exemption from taxation at source applied to the payment of dividends by a French company to its Luxembourg parent company (Berlioz), sent the Luxembourg tax administration a request for information concerning the latter. The Luxembourg administration directed Berlioz to communicate certain information. Berlioz refused to respond on certain points that it did not consider relevant to the investigation. An administrative fine of EUR 250,000 was thus imposed on Berlioz. On an appeal against that sanction, the Administrative Court (Luxembourg) took the view that the disputed relevance of the requested information fell outside its review. Berlioz appealed to the referring court arguing that Article 47 of the Charter (corresponding to Articles 6 and 13 ECHR) required a broader scope of judicial review.

Law – The questions referred gave rise in substance to the following answers.

(a) *Undermining of an individual right?* – Judicial protection, within the meaning of Article 47 of the Charter, could be invoked by a relevant person in respect of a measure adversely affecting him, such as the information order and the penalty at issue in the main proceedings. In order for there to be an effective remedy, it was necessary for the court to have jurisdiction to examine all the relevant questions.

(b) *Whether the lack of relevance of a request can be invoked in support of an appeal* – Articles 1 and 5 of the Directive had to be interpreted as meaning that the obligation to cooperate did not extend to the communication of information that would be devoid of "foreseeable relevance" (a concept reflecting that used in the OECD model tax convention). Member States were not at liberty to engage in "fishing expeditions" or to request information that was unlikely to be relevant to the tax affairs of a given taxpayer.

It was for the requesting authority, which was in charge of the investigation from which the request for information arose, to assess the foreseeable relevance of the requested information. Although the requesting authority had a discretion in that regard, it could not request information that was of no relevance to the investigation concerned. As regards the relevant person subject to an information order, he was entitled to rely in court on the lack of relevance of the request from the other Member State.

(c) *Scope of jurisdiction of requested authority and court of requested State?* – The requested authority would not generally have extensive knowledge of the factual and legal framework prevailing in the requesting State. To ensure efficient and fast cooperation, the requested authority must, in principle, trust the requesting authority. In any event, the requested authority could not substitute its own assessment of the possible usefulness of the information sought for that of the requesting authority. That being said, it nevertheless had to verify whether the information sought was not devoid of any foreseeable relevance to the investigation being carried out by the requesting authority.

As was apparent from the Directive, matters that were relevant for the purposes of the review included (1) the identity of the person under examination or investigation and the tax purpose for which the information is sought; (2) the contact details of any person believed to be in possession of the requested information; and (3) anything that may facilitate the collection of information by the requested authority.

The requesting authority had to provide an adequate statement of reasons explaining the purpose of the information sought in the context of the tax procedure underway in respect of the taxpayer identified in the request for information. If required, the requested authority could ask the requesting authority for additional information that might be

necessary in order to rule out the possibility that the information sought manifestly had no foreseeable relevance.

Moreover, if the judicial review guaranteed by Article 47 of the Charter was to be effective, the reasons given by the requesting authority must put the national court in a position in which it might carry out the review of the legality of the request for information.

(d) *Whether the relevant person should have access to the request to ensure that the judicial review is effective* – If the court of the requested Member State was to be able to conduct its judicial review, it was important that that court should have access to the request for information sent by the requesting Member State to the requested Member State. That court could, if necessary, ask the requested authority for the additional information which it might have obtained from the requesting authority. As to whether the relevant person had a right of access to the request for information, it was necessary to take into account the secrecy attached to that document, in accordance with the Directive, so as not to undermine the effectiveness of the investigation.

In the context of judicial proceedings, respect for the principle of equality of arms must be assessed according to the specific circumstances of each case. It was necessary, but sufficient, for the relevant person to demonstrate that all or part of the requested information manifestly had no foreseeable relevance in the light of the investigation being carried out, given the identity of the taxpayer concerned and the tax purpose for which the information was sought. It was therefore sufficient for the person to have access to this minimum information.

However, if the court of the requested Member State asked the requested authority for additional information, that court was obliged to provide that additional information to the relevant person, while taking due account of the possible confidentiality of some of that information.

In conclusion:

(a) A relevant person on whom a pecuniary penalty had been imposed for failure to comply with an administrative decision directing that person to provide information in the context of an exchange between national tax administrations was entitled to challenge the legality of that decision.

(b) The "foreseeable relevance" of the information requested by one Member State from another Member State was a condition which the request for information must satisfy in order for the requested Member State to be required to comply with that request, and thus a condition of the legality of the information order addressed by that Member State to a relevant person and of the penalty imposed on that person for failure to comply with that information order.

(c) Verification by the requested authority to which a request for information had been submitted by the requesting authority was not limited to the procedural regularity of that request but must enable the requested authority to satisfy itself that the information sought was not devoid of any foreseeable relevance having regard to the identity of the taxpayer concerned and that of any third party asked to provide the information, and to the requirements of the tax investigation concerned.

In the context of an action brought by a relevant person against a penalty imposed on that person by the requested authority for non-compliance with an information order, the national court had jurisdiction not only to vary the penalty imposed but also to review the legality of that information order. The courts' review was limited to verification that the requested information manifestly had no such relevance.

(d) In the context of a judicial review by a court of the requested Member State, that court must have access to the request for information addressed to the requested Member State by the requesting Member State.

The relevant person did not, however, have a right of access to the whole of that request for information, which was to remain a secret document. In order for that person to be given a full hearing of his case in relation to the lack of any foreseeable relevance of the requested information, it was sufficient, in principle, that he be aware of the identity of the taxpayer and the tax purpose for which the information was sought.

Inter-American Court of Human Rights

Forced disappearance during an international armed conflict

Case of Vásquez Durand et al. v. Ecuador, Series C No. 332, judgment 15.2.2017

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

Facts – An international armed conflict between Ecuador and Peru, known as the *Cenepa War* or the conflict of *Alto Cenepa*, began in January 1995. Mr Jorge Vásquez Durand, a Peruvian citizen who worked selling traditional crafts between both countries, went missing on 30 January 1995 after informing his wife by telephone that he was going to re-enter Ecuador to move his merchandise from that country to Peru. This was the last time anyone heard from Mr Vásquez Durand.

Immigration records showed that Mr Vásquez Durand left Ecuador to enter Peru on 30 January 1995 and there is no record of him re-entering Ecuador on that same day. However, according to information received by his wife, he re-entered Ecuador and was detained by state officials from the Ecuadorian Intelligence Agency. Moreover, another Peruvian citizen, who was also detained by state officials during the armed conflict, testified that he saw Mr Vásquez Durand in a "very deteriorated" condition at the Teniente Ortiz military prison at least up until June 1995. Despite the efforts made by Mr Vásquez Durand's family to locate him, his whereabouts remained unknown.

In May 2007 Ecuador established a Truth Commission to investigate human-rights violations committed from 1984 onwards. The case of Mr Vásquez Durand was included in the Commission's Final Report released in June 2010, which concluded that he had been subjected to torture, forced disappearance and arbitrary deprivation of liberty. A criminal investigation launched by Ecuador in 2010 remained at an initial stage at the date of the Inter-American Court's judgment.

Law

(a) *Articles 7 (Right to Personal Liberty), 5(1) and 5(2) (Right to Humane Treatment), 4(1) (Right to Life) and 3 (Right to Juridical Personality) of the American Convention on Human Rights (ACHR) in conjunction with Article 1(1) thereof and Article I(a) of the Inter-American Convention on Forced Disappearance of Persons* – Owing to the fact that Mr Vásquez Durand disappeared during an international armed conflict, the Inter-American Court considered it useful to interpret the scope of the obligations under the ACHR taking into account the relevant provisions of international humanitarian law. In particular, the Court highlighted that international humanitarian law obliged Ecuador to protect civilians from the other party to the conflict located anywhere on its territory.

According to the Inter-American Court's consistent jurisprudence, a forced disappearance is a complex and multiple violation of different human rights composed of three concurring elements: (a) a deprivation of liberty; (b) the direct intervention or acquiescence of State agents; and (c) a refusal to acknowledge the detention and to reveal the fate or whereabouts of the person concerned. The Court noted that although the Geneva Conventions and Additional Protocol I do not include an express prohibition on forced disappearance such a prohibition is considered a rule of customary international humanitarian law.

The Inter-American Court reiterated that any detention, regardless of its duration or purpose, must be duly recorded in order to protect against any illegal or arbitrary interference with physical liberty. In addition, in international armed conflicts, States have an obligation to establish "an official Information Bureau responsible for receiving and transmitting information in respect of the protected persons in [their] power".

In order to determine whether these three elements were met in the present case, the Inter-American Court resorted to circumstantial evidence and relied on the conclusions of Ecuador's own Truth Commission. The Court established that Mr Vásquez Durand had re-entered Ecuador on 30 January 1995, where he was detained by Ecuadorian security officials. It considered that the lack of detention and immigration records did not preclude that finding, which was consistent with testimonies and information gathered by his family. The failure to register Mr Vásquez Durand's detention, despite clear obligations in this regard, showed an intention to conceal it. In addition, as a Peruvian national and a civilian held by the other party to the conflict, Mr Vásquez Durand was deemed by international humanitarian law to be a protected person. In conclusion, the Inter-American Court ruled that Mr Vásquez Durand was – and remained – forcibly disappeared since 30 January 1995. Ecuador was therefore responsible for the violation of his rights to personal liberty, humane treatment, life and recognition of juridical personality.

Conclusion: violation (unanimously).

(b) *Articles 8(1) (Right to a Fair Trial) and 25(1) (Right to Judicial Protection) of the ACHR, in conjunction with Article 1(1) thereof and Article I(b) of the Inter-American Convention on Forced Disappearance of Persons* – The Inter-American Court determined that Ecuador had breached its duty to start an investigation *ex officio* regarding the forced disappearance of Mr Vásquez Durand since it had only started its criminal investigation in 2010, despite the fact that numerous competent authorities had received notice of the victim's forced disappearance in 1995. The Court also found that the criminal investigation that was eventually started in 2010 had not been carried out within a reasonable time since seven years later it was still in its very early stages. Finally, the Court concluded that the State had not carried out a serious search for Mr Vásquez Durand or his remains, since the mere verification of formal registries or written documents was insufficient.

Conclusion: violation (unanimously).

(c) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered the State to: (i) continue and carry out proper investigations into the forced disappearance of Mr Vásquez Durand in a timely and diligent manner; (ii) conduct a rigorous and systematic search to determine the victim's whereabouts; (iii) publish the judgment and its official summary; (iv) pay an amount to cover psychological or psychiatric treatment for the relatives, and (v) pay compensation in respect of pecuniary and non-pecuniary damage, as well as costs and expenses.

RECENT PUBLICATIONS

Commissioner for Human Rights

The first quarterly activity report 2017 of the Council of Europe's Commissioner for Human Rights is available on the Commissioner's Internet site (www.coe.int – Commissioner for Human Rights – Activity reports).

1st quarterly activity report 2017 (eng)

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

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

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

ENG

www.echr.coe.int

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

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE