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

Information Note on the Court's case-law

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ARTICLE 2

Positive obligations
Life

Refusal to allow the use of an unauthorised experimental drug for medical treatment: *no violation*

Hristozov and Others v. Bulgaria - 47039/11 and 358/12
Judgment 13.11.2012 [Section IV]

(See Article 8 below, page 14)

Fatal shooting of a prosecution witness by accused in theft proceedings: *no violation*

Van Colle v. the United Kingdom - 7678/09
Judgment 13.11.2012 [Section IV]

Facts – The applicants' son was a witness for the prosecution in criminal proceedings against a former employee who was charged with theft. While the case was pending, he received threatening and/or aggressive telephone calls and his car was damaged by fire (although he did not report it to the police as he believed the fire to have been accidental). He was shot dead by the accused just before the trial. A police disciplinary panel later found that the officer in charge of the investigation had not performed his duties diligently. The High Court and Court of Appeal found a violation of Article 2. However, applying the *Osman*[1] test the House of Lords found that there had been no breach of the positive obligation to protect life.

Law – Article 2: The Court did not accept the applicants' submission that the *Osman* test should be adapted by lowering the threshold for State responsibility when the State created the relevant risk for the deceased such as by calling him as a witness in criminal proceedings. The fact that the deceased may have been in a category of person who may have been particularly vulnerable was but one of the relevant circumstances to be assessed, in the light of all the circumstances, in order to answer the first of the two questions making up the *Osman* test of responsibility. The House of Lord had identified the correct *Osman* test.

The first question to be addressed was then whether there had been any decisive stage in the sequence of events leading up to the fatal shooting when it could have been said the authorities had known or ought to have known of a real and immediate risk to the life of the applicants' son. In this connection, the Court noted that the prosecution had not been noteworthy: the accused was a petty offender charged with minor theft offences and the risk of a custodial sentence was low. The applicants' son was not the only or even the main witness in the proceedings. The accused's record did not indicate a propensity to serious violence against the person or any unpredictability in that respect. There had been nothing to suggest he had used weapons before and he had had no recorded history of mental illness or instability. This absence of violent antecedents had contributed to the unforeseeability of later acts of grave violence. Accordingly, the fact that the applicants' son had been a witness in the prosecution had not, of itself, given reason to fear for his life and this had been an important factor against which the additional risk factors had been examined. Moreover, facts that might have constituted an escalating situation of intimidation either had not been reported to the police officer concerned or had not amounted to a pattern of violence. Even if the question of whether the police "ought to have known" would have required the officer in charge of the investigation to make some further enquiries, this additional knowledge would not have led him to perceive the accused's activities as life-threatening. Accordingly, while his failure to enquire further than he had done had been criticised by the police disciplinary panel as lacking in diligence, it could not be impugned from the standpoint of Article 2. Finally, the risk factors in the present case could not be said to have been greater than those in *Osman* in which no violation of Article 2 had been found. Accordingly, while the officer in charge of the investigation ought to have been aware that there was an escalating situation of intimidation of a number of witnesses, including the applicants' son, it could not be said that there had been a decisive stage in the sequence of events leading up to the shooting when the officer had known or ought to have known of a real and immediate risk to the life of the applicants' son from the accused.

Conclusion: no violation (unanimously).

The Court also found no violation of Article 8 of the Convention.

1. *Osman v. the United Kingdom*, no. 23452/94, 28 October 1998.

Effective investigation

Lack of investigation into death of man during June 1990 demonstrations against Romanian regime: *violation*

Mocanu and Others v. Romania - 10865/09, 45886/07 and 32431/08
Judgment 13.11.2012 [Section III]

Facts – In June 1990 the Romanian Government decided to put an end to the occupation, of several weeks' duration, of University Square by demonstrators protesting against the regime then in place. On 13 June 1990 the police and gendarmerie intervened and arrested numerous demonstrators; in consequence, the demonstrations increased. The army having been sent into the most sensitive areas, shots were fired from inside the Ministry of the Interior, which was surrounded by demonstrators. Mr Velicu-Valentin Mocanu, the first applicant's husband, was shot in the head and subsequently died. The criminal investigation into the crackdown begin in 1990 with a very large number of individual files, which were subsequently joined, then transferred to the military prosecutor's office in 1997. The investigation conducted by that body was delayed and interrupted by several procedural developments, so that in July 2011 the proceedings concerning the death of the first applicant's husband had still not been completed.

Law – Article 2 (*procedural aspect*): An investigation had been opened automatically shortly after the events of June 1990. The Court's jurisdiction *ratione temporis* enabled it to take into consideration only the period after 20 June 1994, the date of the Convention's entry into force in respect of Romania. In 1994 the case had been pending before the military prosecutor's office. The investigation had been entrusted to military prosecutors, who, like some of the accused, were service personnel subject to the principle of hierarchical subordination. The shortcomings in the investigation had been acknowledged by the domestic authorities themselves. However, the subsequent investigation had failed to remedy all of these defects. With regard to the obligation to involve the victims' relatives in the proceedings, the first applicant had been informed of the progress of the investigation only in 2000, and had been heard by the prosecutor for the first time in 2007, that is, seventeen years after the events in question; nor had she been informed of progress following the High Court of Cassation and Justice's final decision of 17 December 2007 ordering that the case be sent back to the prosecutor's office. Thus, the first applicant's interest in participating in the investigation had not been sufficiently protected. In addition, the importance of what was at stake for Romanian society, namely the right of the numerous victims to know what had happened, implying the right to an effective judicial investigation and possible entitlement to compensation, ought to have incited the domestic authorities to deal with the case promptly and without unnecessary delay so as to prevent any appearance of impunity for certain actions. Further, on 6 July 2011 the first applicant's case was still pending before the prosecutor's office, that is, more than twenty years later, following two remittals ordered by the country's highest court for procedural shortcomings or flaws. The procedural obligations arising from Article 2 could hardly be considered to have been met where victims or their families were unable to obtain access to proceedings before an independent court tribunal called on to determine the facts. It followed that the domestic authorities had not acted with the required level of diligence in respect of the first applicant.

Conclusion: violation in respect of the first applicant (unanimously).

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

The Court also found no violation of Article 3 under its procedural aspect in respect of one of the applicants, and a violation of Article 6 § 1 in respect of the complaint by the applicant association.

(See also *Association "21 December 1989" and Others v. Romania*, nos. 33810/07 and 18817/08, 24 May 2011, Information Note no. 141)

ARTICLE 3

Positive obligations

Alleged failure by State to prevent sexual abuse of school pupil in National School in 1973: *relinquishment in favour of the Grand Chamber*

O'Keeffe v. Ireland - 35810/09 [Section V]

The applicant alleges that she was subjected to sexual abuse by a teacher in 1973 when she was a pupil in a state-funded National School owned and managed by the Catholic Church. National Schools were established in Ireland in the early nineteenth century as a form of primary school directly fi-

nanced by the State, but administered jointly by the State, a patron, and local representatives. Under this system the State provides most of the funding and lays down regulations on such matters as the curriculum and teachers' training and qualifications, but most of the schools are owned by clerics (the patron) who appoint a school manager (invariably a cleric). The patron and manager select, employ and dismiss the teachers.

The teacher in question in the applicant's case resigned from his post in September 1973 following complaints of abuse by other pupils. The applicant suppressed the abuse, however, and it was not until the late 1990s, after receiving counselling following a police investigation into a complaint by another former pupil, that she realised the connection between psychological problems she was experiencing and the abuse she had suffered. She then brought a civil action in damages alleging negligence, vicarious liability and constitutional responsibility on the part of various State authorities (for technical reasons, she did not sue the Church). The High Court rejected her claims in a judgment that was upheld by the Supreme Court on 19 December 2008, essentially on the grounds that the Irish Constitution specifically envisaged a ceding of the actual running of National Schools to interests represented by the patron and the manager, that the manager was the more appropriate defendant to the claim in negligence and that he had acted as agent of the Church, not the State.

Following relinquishment of jurisdiction by the Chamber, the Grand Chamber will consider the applicant's complaints that the system had failed to protect her from abuse and that she did not have a remedy against the State under Articles 3 (alone and in conjunction with Article 13) and 8 (alone and in conjunction with Article 14) of the Convention, and under Article 2 of Protocol No. 1 (alone and in conjunction with Article 14).

Refusal to allow the use of an unauthorised experimental drug for medical treatment: *no violation*

Hristozov and Others v. Bulgaria - 47039/11 and 358/12
Judgment 13.11.2012 [Section IV]

(See Article 8 below, page 14)

Inhuman treatment
Degrading treatment

Detention of a person suffering from multiple disabilities and unable to communicate: *violation*

Z.H. v. Hungary - 28973/11
Judgment 8.11.2012 [Section II]

Facts – The applicant is deaf and mute, illiterate and unable to use the official sign language. He also suffers from intellectual disability. He communicates using a peculiar sign-language-like method, only intelligible to his mother. On 10 April 2011 he was arrested on suspicion of mugging and interrogated at the police station in the sole presence of a sign-language interpreter he claimed he was unable to understand. He was detained on remand until 4 July 2011, when a district court ordered his release and placement under house arrest after noting that his detention had to be kept to a minimum in view of his difficulties in communicating. The applicant maintained that the conditions in which he was held were not fit for someone in his condition and that he had been molested by other inmates. In September 2011 he was placed under partial guardianship. At the date of the Court's judgment, the criminal proceedings against him were still pending.

Law – Article 3: The applicant, who suffered from multiple disabilities, had been detained in prison for almost three months. Given that he undoubtedly belonged to a particularly vulnerable group, it was incumbent on the Government to prove that the authorities had taken requisite measures to prevent situations arising that were likely to result in his being subjected to inhuman and degrading treatment. The Court was not convinced that the measures the Government said had been put in place to address his situation on 23 May 2011 – his incarceration with a relative in a cell close to the warden's office, the involvement of other inmates and the applicant's mother and the facilitation of his correspondence – had been sufficient to remove the applicant's treatment from the scope of Article 3. The Government had thus failed to discharge the burden of proof, especially in respect of the initial period of detention before 23 May 2011. Given the inevitable feelings of isolation and helplessness that flowed from his disabilities, and his lack of comprehension of his situation and of the prison order, the applicant must have suffered anguish and a sense of inferiority, especially as a result of being cut off from the only person (his mother)

with whom he could effectively communicate. Moreover, although the applicant's allegations of molestation by other inmates had not been supported by evidence, the Court noted that a person in his position would have faced significant difficulties in bringing any such incidents, had they occurred, to the wardens' attention, which could have resulted in fear and the feeling of being exposed to abuse. The district court had eventually released the applicant for quite similar considerations. Despite the authorities laudable but belated efforts to address his situation, the applicant's incarceration without requisite measures being taken within a reasonable time had thus resulted in a situation amounting to inhuman and degrading treatment.

Conclusion: violation (unanimously).

Article 5 § 2: Given the applicant's multiple disabilities, the Court was not persuaded that he could be considered to have obtained the information required to enable him to challenge his detention. The Court further found it regrettable that the authorities had not taken any truly "reasonable steps" – a notion quite akin to that of "reasonable accommodation" in Articles 2, 13 and 14 of the United Nations Convention on the Rights of Persons with Disabilities – to address his condition, in particular by procuring him assistance by a lawyer or another suitable person. For the Court, the police officers interrogating the applicant must have realised that no meaningful communication had been possible and should have sought assistance from the applicant's mother (who could have at least informed them of the magnitude of his communication problems) rather than simply making the applicant sign the interrogation record.

Conclusion: violation (unanimously).

Article 41: EUR 16,000 in respect of non-pecuniary damage.

ARTICLE 4

Servitude

Ineffective investigation into complaints of domestic servitude owing to absence of specific legislation criminalising such treatment: *violation*

C.N. v. the United Kingdom - 4239/08
Judgment 13.11.2012 [Section IV]

Facts – The applicant, a Ugandan national, left Uganda for the United Kingdom in September 2002 with the help of a cousin. In early 2003 she began work as a live-in carer for an elderly Iraqi couple. She alleged that she was permanently on-call day and night; that her salary was sent to the agent who had arranged her work with the family, who then passed a percentage of the money to her cousin on the apparent understanding that it would be paid to her. She did not, however, receive any significant payment for her labour. During that time, her passport was also retained. In August 2006 she collapsed in a bank and spent a month in hospital. She then made an application for asylum, which was refused. After her solicitor had written to the police in April 2007, the Metropolitan Police Human Trafficking Team commenced an investigation, but concluded in August 2009 that the circumstances of her case did not appear to constitute an offence of trafficking people for the purposes of exploitation contrary to the Asylum and Immigration Act 2004. On 6 April 2010 new legislation, without retrospective effect, came into force specifically criminalising slavery, servitude and forced or compulsory labour.[1]

Law – Article 4: The circumstances of the applicant's case were remarkably similar to the facts of *Siliadin v. France*, in which the Court had confirmed that Article 4 entailed a specific positive obligation on member States to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour. Her complaints had thus given rise to a credible suspicion that she had been held in conditions of domestic servitude, which in turn placed the domestic authorities under an obligation to investigate those complaints.[2] Although it was clear that the domestic authorities had investigated the complaints, the legislative provisions in force at the relevant time were inadequate to afford practical and effective protection against treatment falling within the scope of Article 4. Instead of enabling the authorities to investigate and penalise such treatment, the legislation restricted them to investigating and penalising offences which often, but not necessarily, accompanied the offences of slavery, servitude and forced or compulsory labour. Victims of such treatment who were not also victims of one of these related offences were thus left without any remedy.

1. Section 71 of the Coroners and Justice Act 2009.
2. See *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010, Information Note no. 121.

Although the Government had argued that the reason no prosecution was ultimately brought was not the absence of appropriate legislation but rather the lack of evidence to support the applicant's allegations, the Court considered that while the investigators had occasionally referred to slavery, forced labour and domestic servitude it was clear that at all times their focus had been on the offence of trafficking for exploitation enshrined in the legislation as it then stood. Domestic servitude was, however, a specific offence, distinct from trafficking and exploitation, with its own complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance. A thorough investigation into complaints of such conduct therefore required an understanding of the many subtle ways an individual could fall under the control of another. In the present case, owing to the absence of a specific offence of domestic servitude, the domestic authorities had been unable to give due weight to these factors. In particular, no attempt appeared to have been made to interview the applicant's cousin despite the gravity of the offence he was alleged to have committed. The lacuna in domestic law at the time may explain that omission, together with the fact that no apparent weight was attributed to the applicant's allegations that her passport had been taken from her, that her cousin had not kept her wages for her as agreed, and that she had been explicitly and implicitly threatened with denunciation to the immigration authorities, even though these factors were among those identified by the International Labour Organization as indicators of forced labour. Consequently, the investigation into the applicant's complaints of domestic servitude was ineffective due to the absence of specific legislation criminalising such treatment.

Conclusion: violation (unanimously).

Article 41: EUR 8,000 in respect of non-pecuniary damage.

(See *Siliadin v. France*, no. 73316/01, 26 July 2005, Information Note no. 77)

ARTICLE 5

Article 5 § 2

Information in language understood

Authorities' failure to procure adequate assistance to a person suffering from multiple disabilities and unable to communicate, in order to inform him of the reasons for his arrest: *violation*

Z.H. v. Hungary - 28973/11
Judgment 8.11.2012 [Section II]

(See Article 3 above, page 9)

ARTICLE 6

Article 6 § 1 (civil)

Civil rights and obligations

Undue length of proceedings for removal of conviction from criminal record: *Article 6 § 1 applicable*

Alexandre v. Portugal - 33197/09
Judgment 20.11.2012 [Section II]

Facts – On an unspecified date the applicant was fined for assault. In an application made in May 2004, he asked the court to order that this conviction not be entered in his criminal record. The request was dismissed and he lodged an appeal against that decision. The court of appeal granted his request in May 2008. In January 2009 the applicant asked the court to instruct the national criminal records department to remove the entry concerning his conviction from the criminal record. The court granted his request in October 2010.

Law – Article 6 § 1

(a) *Applicability* ratione materiae – The Court noted a development in its case-law with regard to the application of Article 6 to cases that did not at first sight appear to concern a civil right but which could have direct and important repercussions on an individual's private-law rights. In Portugal, a copy of one's criminal record was required for professional and other purposes, particularly when applying for certain licences. In addition, under the Law of 18 August 1998, copies of criminal records could not contain convictions for first offences resulting in sentences of less than six months' imprisonment or an equivalent penalty. It had accordingly been legitimate for the applicant to ensure that his conviction would not be included in a criminal record. It seemed clear that "a genuine and serious dispute" existed following the court's dismissal of the applicant's request. This dispute

had been finally determined when the court of appeal explicitly recognised the applicant's civil right not to have his conviction entered in his criminal record. Moreover, that decision was consistent with the domestic case-law in this area. In the light of the case-law arising from *Enea v. Italy* and having regard to the possible consequences at national level resulting from a criminal record, the repercussions for the applicant's private life were indisputable. Consequently, the complaint concerning the proceedings in respect of the applicant's criminal record was compatible *ratione materiae* with Article 6 under its civil head.

(b) *Merits* – The proceedings in question had lasted 6 years, 5 months and 24 days for two levels of jurisdiction. They had therefore been excessively long and had failed to meet the "reasonable time" requirement.

Conclusion: violation (unanimously).

Article 41: Claim made out of time.

(See *Enea v. Italy* [GC], no. 74912/01, 19 September 2009, Information Note no. 122)

Civil rights and obligations
Impartial tribunal

Alleged bias in disciplinary proceedings against Supreme Court President: *Article 6 § 1 applicable; violation*

Harabin v. Slovakia - 58688/11
Judgment 20.11.2012 [Section III]

Facts – The applicant, the President of the Slovakian Supreme Court, was the subject of disciplinary proceedings before the Constitutional Court (plenary session) after he refused to allow an audit by Ministry of Finance staff which he considered should have been conducted by the Supreme Audit Office. The applicant challenged four of the judges due to hear his case, including two who had earlier been excluded from other sets of proceedings in which he had been involved, on the grounds that his past dealings with certain of the judges in question meant that there was a risk of bias. His opponent in the proceedings, the Minister of Justice, challenged a further three judges on like grounds. The Constitutional Court rejected all the challenges. It subsequently found the applicant guilty of a serious disciplinary offence and reduced his annual salary by 70%. In his application to the European Court, the applicant complained, *inter alia*, of a violation of his right to a fair hearing by an impartial tribunal.

Law – Article 6 § 1

(a) *Applicability* – In order for a respondent State to be able to rely on an applicant's status as a civil servant to exclude the application of Article 6, two conditions had to be fulfilled: (i) the State in its national law must have expressly excluded access to a court for the post or category of staff in question, and (ii) the exclusion must be justified on objective grounds in the State's interest.[1] In the instant case, national law had not excluded judicial examination of the relevant points and the applicant had had access to the Constitutional Court. The case concerned a dispute over the applicant's "civil rights" (as he was at risk of becoming ineligible to continue in office if found guilty of a further serious disciplinary offence,[2] and as a result of the Constitutional Court's finding his annual salary had been reduced by 70%). Article 6 § 1 was thus applicable under its civil head. It was not necessary to examine whether it was also applicable under its criminal head.

Conclusion: Article 6 § 1 applicable (unanimously).

(b) *Merits* – Compliance with the guarantees of Article 6 were of particular relevance to disciplinary proceedings against a judge in his or her capacity as President of a Supreme Court as what was ultimately at stake in such proceedings was the confidence of the public in the functioning of the judiciary at the highest national level.

In the applicant's case seven of the thirteen judges making up the Constitutional Court plenary session had been challenged for bias. Of the four challenged by the applicant, two had been excluded for bias in earlier proceedings involving the applicant before a chamber of the Constitutional Court. The Constitutional Court had not, however, attached decisive weight to that fact (or to the fact that two other constitutional judges challenged by the Minister of Justice had also been excluded for bias in the past) and had decided not to exclude any of the judges on the grounds that the disciplinary proceedings were within the exclusive jurisdiction of its plenary session and that excessive formalism and overlooking the statements of the individual judges posed the risk of rendering the proceedings ineffective. In so doing, it failed to answer the arguments for which the judges' exclusion had been requested. In the European Court's

1. See *Olujić v. Croatia*, no. 22330/05, 5 February 2009, Information Note no. 116; and *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19 April 2007, Information Note no. 96.
2. Section 116(3)(b) in conjunction with section 117(7) of the Judges and Assessors Act 2000.

view, it was only once the parties' arguments had been answered and a decision taken on the merits of the challenges that the question whether there was any need and justification for not excluding any of the judges could arise. The reasons invoked by the Constitutional Court could not therefore justify the participation of two judges who had been excluded for lack of impartiality in earlier cases involving the applicant and in respect of whom objective doubts had not been convincingly dissipated. Accordingly, the applicant's right to a hearing by an impartial tribunal had not been respected.

Conclusion: violation (unanimously).

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

Article 6 § 1 (criminal)

Access to court

Appeal on points of law declared inadmissible on grounds that level of fine was below statutory minimum for appeal: *violation*

Bayar and Gürbüz v. Turkey - 37569/06
Judgment 27.11.2012 [Section II]

Facts – The applicants, who were the proprietor and editor-in-chief of a daily newspaper, were fined because their newspaper had published two articles that the domestic courts described as conveying statements by an illegal armed organisation. The Assize Court left open the possibility of an appeal on points of law. However, the applicants' appeal was declared inadmissible on the ground that the fine had not attained the minimum amount for such an appeal.

Law – Article 6 § 1: The inadmissibility of the applicants' appeal on points of law stemmed from Article 305 of the former Code of Criminal Procedure and pursued the legitimate aim of avoiding the overloading of the Court of Cassation's list by cases of lesser importance. However, the applicants' case had been examined at only one level of jurisdiction. Moreover, in the Turkish court system, apart from reviewing compliance with the law, the Court of Cassation also had the role of ensuring that the findings by the trial court were consistent with the facts of the case. In addition, the Turkish Constitutional Court had invalidated paragraph 2 of Article 305 of the Code of Criminal Procedure, finding in particular that, except in the case of petty offences, "in the event of imposition of a fine of less than a given amount, the fact of restricting the defendant's right to appeal on points of law, without taking account of the characteristics of the sentence or any harmful consequences that it may have, cannot be regarded as compatible with Articles 2 and 36 of the Constitution". The Court shared this view, especially as the offence in the present case certainly did not fall into the category of petty offences, since it concerned the printing or publication "of statements or leaflets of terrorist organisations", acts that were punishable by a prison sentence of between one and three years. The applicants had been fined in their capacities as proprietor and editor-in-chief of a newspaper. Moreover, the amount of the fine applicable to that type of offence varied depending on the newspaper's circulation. Lastly, the defendants, who had been unable to appeal on points of law, were at a disadvantage in relation to the public prosecutor, who was by contrast able to take the case to the higher court to challenge the characterisation of the facts. Thus, the restriction imposed on the applicants in the present case, on account of the amount of the fine imposed on them, could not be regarded as compatible with the principle of the equality of arms. The applicants had thus suffered a disproportionate restriction to their right of access to a court, and that right had been impaired in its very essence.

Conclusion: violation (unanimously).

The Court also found a violation of Article 10 of the Convention.

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

(See also *Gözel and Özer v. Turkey*, nos. 43453/04 and 31098/05, 6 July 2010, Information Note no. 132)

Impartial tribunal

Impartiality of judge who had previously participated in criminal proceedings in which applicant had been granted amnesty: *no violation*

Marguš v. Croatia - 4455/10
Judgment 13.11.2012 [Section I]

(See Article 4 of Protocol No. 7 below, page 25)

ARTICLE 8

Positive obligations
Respect for private life

Lack of clear statutory provisions criminalising act of covertly filming a naked child: *case referred to the Grand Chamber*

E.S. v. Sweden - 5786/08
Judgment 21.6.2012 [Section V]

In 2002, when the applicant was fourteen years old, she discovered that her stepfather had hidden a video camera in the laundry basket in the bathroom. The camera was directed at the spot where the applicant had undressed before taking a shower. She took it to her mother who burned the film without anyone seeing it. The incident was reported in 2004 when the mother heard that the applicant's cousin had also experienced incidents with the stepfather. The stepfather was prosecuted and in 2006 convicted by a district court of sexual molestation under Chapter 6, section 7 of the Penal Code, as worded at the material time. His conviction was, however, overturned on appeal after the court of appeal found that his act did not come within the definition of the offence of sexual molestation. The court of appeal went on to point out that the conduct might have constituted the separate offence of attempted child pornography, but did not consider the issue further in the absence of any charge. The Supreme Court refused leave to appeal.

In a judgment of 21 June 2012 a Chamber of the Court found, by four votes to three, that there had been no violation of Article 8 of the Convention (see Information Note no. 153).

On 19 November 2012 the case was referred to the Grand Chamber at the applicant's request.

Refusal to allow the use of an unauthorised experimental drug for medical treatment: *no violation*

Hristozov and Others v. Bulgaria - 47039/11 and 358/12
Judgment 13.11.2012 [Section IV]

Facts – The ten applicants were cancer sufferers who complained that they had been denied access to an unauthorised experimental drug. Having exhausted a number of conventional treatments for cancer, the applicants were advised by a private clinic about an experimental drug in development in Canada, the provision of which was offered free of charge. Permission was sought from the Government to use the drug. Domestic law stated that such permission could only be given where the drug in question had been authorised in another country. While the drug was permitted for "compassionate use" in a number of countries, nowhere had it been officially authorised. Accordingly, permission was refused.

Law – Article 8: It is under Article 8 that the extent to which States may use their power to protect people from the consequences of their own conduct is examined, as it concerns issues of personal autonomy and quality of life, even when that conduct poses a danger to health or is of a life-threatening nature. The salient issue was to determine whether a fair balance had been struck between the competing interests of the individual and of the community as a whole, with due regard to the State's margin of appreciation.

The applicants' interest was described as "the freedom to opt, as a measure of last resort, for an untested treatment which may carry risks but which the applicants and their medical doctors consider appropriate to their circumstances, in an attempt to save their life". The countervailing public interest was threefold: first, to protect patients from the risks of unauthorised treatment; second, to ensure the statutory framework governing the provision of unauthorised medicine was not circumvented; third, to ensure that the development of medicinal products would not be compromised by, for instance, diminished patient participation in clinical trials.

The Court noted that generally matters of health-care policy fall within the Contracting States' margin of appreciation. In addition, while the clear trend among the Contracting States is towards allowing the use of unauthorised medicinal products, there is no consensus on the precise manner in which this is regulated, nor is there a settled principle of law on the matter.

With regard to the above, the Court concluded that the balance struck by the domestic law, irrespective of whether there might have been a fairer balance, did not exceed the wide margin of appreciation afforded to the State.

Conclusion: no violation (four votes to three).

Article 2 § 1: The Court took note of the fact that Bulgaria has regulations governing access to unauthorised medicinal products in cases where con-

ventional forms of medical treatment appear insufficient. It was held that there is no positive obligation under Article 2 to frame those regulations in a particular way.

Conclusion: no violation (five votes to two).

Article 3: Suffering which flows from an illness may be covered by Article 3 where it is exacerbated by treatment for which the authorities can be held responsible. However the threshold in such situations is high because the alleged harm emanates not from the authorities but the illness. In this case, the complaint arose not from inadequate treatment, but from the denial of potentially life-saving treatment the safety and efficacy of which were still in doubt. The Court could not accept that such denial could be characterised as inhuman or degrading treatment. While the refusal may have caused the applicants mental suffering, it was not of a sufficient level of severity to fall within the scope of Article 3.

Conclusion: no violation (five votes to two).

Respect for private life

Retention of caution on criminal record for life: *violation*

M.M. v. the United Kingdom - 24029/07
Judgment 13.11.2012 [Section IV]

Facts – In 2000 the applicant, who lived in Northern Ireland, was arrested by the police after disappearing with her baby grandson for a day in an attempt to prevent his departure to Australia following the break up of her son's marriage. In view of the circumstances in which the incident had occurred, the authorities decided not to prosecute and the applicant was instead cautioned for child abduction. The caution was initially intended to remain on her record for five years, but owing to a change of policy in cases where the injured party was a child, that period was later extended to life. In 2006 the applicant was offered employment as a health worker subject to vetting, but the offer was withdrawn following a criminal-record check by the prospective employer after she disclosed the caution. In her application to the European Court, the applicant complained that the change in policy regarding retention of caution data had adversely affected her employment prospects, in breach of her right to respect for her private life.

Law – Article 8: The Court reiterated that both the storing of information relating to an individual's private life and the release of such information come within the scope of Article 8 § 1. Although data contained in the criminal record were, in one sense, public information, their systematic storing in central records meant that they were available for disclosure long after the event when everyone other than the person concerned was likely to have forgotten about it, especially where, as in the applicant's case, the caution had occurred in private. Thus, as the conviction or caution itself receded into the past, it became a part of the person's private life which had to be respected. In the present case, the administration of the caution had occurred almost twelve years earlier. The fact that disclosure had followed upon a request by the applicant or with her consent did not deprive her of the protection afforded Article 8, as individuals had no real choice if the prospective employer insisted, and was entitled to insist, on disclosure. Article 8 was thus applicable to the retention and disclosure of the caution which retention and disclosure amounted to interference with the applicant's right to respect for her private life.

The scope and application of the system for retention and disclosure in Northern Ireland was extensive: the recording system included non-conviction disposals such as cautions, warnings and reprimands and there was a general presumption in favour of the retention of data in central records until the data subject's hundredth birthday. While there might be a need for a comprehensive record, the indiscriminate and open-ended collection of criminal record data was unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable and setting out the rules governing, *inter alia*, the circumstances in which data can be collected, the duration of their storage, the use to which they can be put and the circumstances in which they may be destroyed.

In the instant case, however, there was, no statutory law in respect of Northern Ireland governing the collection and storage of data on cautions. Under the applicable guidelines the recording and initial retention of such data were intended in practice to be automatic. The criteria for review appeared to be very restrictive and to focus on whether the data were adequate and up to date. Deletion requests would be granted only in exceptional circumstances and not where the data subject had admitted the offence and the data were accurate. It was also a matter of concern that policy had changed regarding the length of time the caution was to remain on the applicant's record with significant effects on her employment prospects. As to the legislation requiring disclosure in the context

of a standard or enhanced criminal-record check it made no distinction based on the seriousness or circumstances of the offence, the time which had elapsed since its commission and whether the caution was spent. The legislation did not allow for any assessment at any stage in the disclosure process of the relevance of conviction or caution data to the employment sought, or of the extent to which the data subject could be perceived as continuing to pose a risk.

As a result of the cumulative effect of these shortcomings, the Court was not satisfied that there were sufficient safeguards in the system for retention and disclosure of criminal record data to ensure that data relating to the applicant's private life would not be disclosed in violation of her right to respect for her private life. The retention and disclosure of the applicant's caution data accordingly could not be regarded as having been in accordance with the law.

Conclusion: violation (unanimously).

Article 41: No claim made in respect of damage.

ARTICLE 10

Freedom of expression

Injunction against animal rights association's poster campaign featuring photos of concentration camp inmates alongside pictures of animals kept in mass stocks: *no violation*

PETA Deutschland v. Germany - 43481/09
Judgment 8.11.2012 [Section V]

Facts – The applicant association is the German branch of the animal rights organisation PETA (People for the Ethical Treatment of Animals). In 2004 the applicant planned to launch an advertising campaign entitled "The Holocaust on your plate", which had been carried out in a similar way in the United States. It intended to publish a number of posters each bearing a photograph of concentration camp inmates along with a picture of animals kept in mass stocks, accompanied by a short text. For example, one poster showed photographs of piled up human bodies and of a pile of slaughtered pigs under the heading "final humiliation" and another photographs of rows of inmates lying on bunk beds and of rows of chickens in laying batteries under the heading "if animals are concerned, everybody becomes a Nazi". The president and the two vice-presidents of the Central Jewish Council in Germany sought an injunction ordering PETA to refrain from publishing seven specific posters on the Internet or displaying them in public. They had survived the Holocaust as children and one of them had lost her family through the Holocaust. The regional court granted the injunction after finding, that although there was no indication that PETA's primary aim was to debase Holocaust victims and that criticism of the conditions in which animals were kept was a matter of public interest that would generally enjoy a higher degree of protection, the comparison that had been made between concentration camp inmates and Holocaust victims appeared arbitrary in the light of the central role of human dignity in the German Basic Law. That decision was upheld on appeal. In 2009 the Federal Constitutional Court rejected the applicant's constitutional complaint on the grounds that the lower courts had based their decisions on the assumption that the Basic Law drew a clear distinction between human life and dignity on the one hand and the interests of animal protection on the other, and that the campaign had banalised the fate of the victims of the Holocaust.

Law – Article 10: The interference with the applicant's right to freedom of expression had had a legal basis and pursued the legitimate aim of protecting the plaintiffs' personality rights and thus "the reputation or rights of others". As regards proportionality, the intended poster campaign related to animal and environmental protection and so had undeniably been in the public interest. Accordingly, only weighty reasons could justify the interference. The domestic courts had carefully examined whether the requested injunction would violate the applicant's right to freedom of expression. They had also considered that the campaign had confronted the plaintiffs with their suffering and persecution in the interest of animal protection and that this "instrumentalisation" of their suffering had violated their personality rights in their capacity as Jews living in Germany and as survivors of the Holocaust. The facts of the case could not be detached from the historical and social context in which the expression of opinion had taken place. A reference to the Holocaust had to be seen in the specific context of the German past. The Court accepted the respondent Government's view that they considered themselves under a special obligation towards Jews living in Germany. In these circumstances, the domestic courts had given relevant and sufficient reasons for granting the injunction. That finding was not called into question by the fact that courts in other

jurisdictions might address similar issues in a different way. Furthermore, as regards the severity of the sanction, the proceedings had not concerned any criminal sanctions, but only a civil injunction preventing the applicant from publishing seven posters. Finally, the applicant had not established that it did not have other means at its disposal to draw public attention to the issue of animal protection. The injunction had therefore been a proportionate means to protect the plaintiffs' personality rights.

Conclusion: no violation (unanimously).

Freedom to receive information
Freedom to impart information

Surveillance of journalists and order for them to surrender documents capable of identifying their sources: *violations*

Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands - 39315/06
Judgment 22.11.2012 [Section III]

Facts – The applicant company owned a newspaper which in January 2006 published articles by the second and third applicants alleging that information on pending investigations by the Netherlands secret services (AIVD) into drugs and arms dealings had fallen into criminal hands. The applicant company was then ordered by the National Police Internal Investigation Department to surrender the documents in its possession, but objected on the grounds that its source might be identifiable from fingerprints on the documents. The Regional Court rejected that argument after finding that the interference was justified to protect State secrets and that the applicant company's rights had not been violated as it had not been required actively to cooperate in the identification of the source. That decision was upheld by the Supreme Court.

In June 2006 the applicants brought civil proceedings against the State claiming that the second and third applicants had been subject to telephone tapping and observation, presumably by AIVD agents. They alleged that the measures were unlawful as they had in fact targeted the journalists' sources. However, the Supreme Court ultimately held that the protection of journalistic sources was not absolute and reached its limits where the protection of national security and confidential information were concerned.

Law – Article 8 in conjunction with Article 10

(a) *Use of special powers* – Although questions raised by surveillance measures were usually considered under Article 8 alone, they were so intertwined with the Article 10 issue in this case that the Court considered the matter under both Articles concurrently. It was undisputed that that there had been "interference" with the second and third applicants' rights under those provisions and the Court was satisfied that the special powers had been used to circumvent the protection of a journalistic source, even if identifying the person or persons who had supplied the secret documents to the applicants had been subordinate to the AIVD's main aim of discovering and closing the leak of secret information from within its own ranks.

There was a statutory basis for the interference[1] and the law was accessible and its effects foreseeable in the sense that the applicants could not reasonably have been unaware that publishing authentic classified information unlawfully taken from the AIVD would be likely to provoke action aimed at discovering its provenance. However, the law in question also had to protect against arbitrary interference by public authorities, especially where, as here, the risks of arbitrariness were evident because a power of the executive was exercised in secret.

Although it had not been alleged that the general supervisory and monitoring procedures in place were in themselves insufficient, the question arose as to whether the second and third applicants' status as journalists had required special safeguards to ensure adequate protection of their sources. Unlike the position in *Weber and Saravia v. Germany* in which the surveillance measures had been directed at identifying and averting danger while keeping the disclosure of journalistic sources to an unavoidable minimum, the applicants' case was characterised precisely by the targeted surveillance of journalists to determine the origin of their information. The Court reiterated that in a field where abuse was potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, supervisory control should be entrusted to a judge or an adequate independent authority. In the applicant's case, however, the use of special powers had been authorised without prior review by an independent body with the power to prevent or terminate it. Review after the event was insufficient as, once

1. Section 6(2)(A) of the 2002 Intelligence and Security Services Act.

destroyed, the confidentiality of journalistic sources could not be restored. The law had thus not provided appropriate safeguards in respect of the powers of surveillance used against the second and third applicants with a view to discovering their journalistic sources.

Conclusion: violation in respect of the second and third applicants (unanimously).

(b) *Order to surrender documents* – The surrender order had constituted "interference" with the applicant company's freedom to receive and impart information. That interference had a statutory basis and procedural safeguards had been in place to protect the identity of the source until the domestic courts had decided the applicant company's objection to surrender.[1] The interference was thus prescribed by law and pursued the legitimate aims of "national security" and "the prevention of crime".

As to whether the interference had been necessary in a democratic society, the Court observed that without protection of journalistic sources, the vital public watchdog role of the press could be undermined and the ability of the media to provide accurate and reliable information could be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure could have on the exercise of that freedom, such a measure was not compatible with Article 10 unless it was justified by an overriding requirement in the public interest.

The surrender order could not be justified solely by the need to identify the AIVD official(s) who had supplied the secret documents to the applicants since, as the public prosecutor had admitted, that goal could have been achieved simply by studying the contents of the documents and identifying the officials who had had access to them. Further, while the Court accepted that it had been legitimate for the AIVD to check whether all documents taken had been withdrawn from circulation, it had not been sufficient to justify the disclosure of the applicant's journalistic source. In any event, such withdrawal could no longer prevent the information the documents contained from falling into the wrong hands as it was highly likely that it long been known to persons described by the parties as criminals. Finally, the actual handover of the documents taken had not been necessary: visual inspection to verify that they were complete, followed by their destruction, would have sufficed. The Government had thus not given "relevant and sufficient" reasons for the surrender order.

Conclusion: violation in respect of the applicant company (five votes to two).

Article 41: No claim made in respect of damage.

(See *Weber and Saravia v. Germany* (dec.), no. 54934/00, 29 June 2006, Information Note no. 88)

1. The documents had been placed in a sealed container by a notary and handed over to the investigating judge to be kept in a safe.

ARTICLE 11

Positive obligations
Freedom of association

Positive obligation to protect employees from discrimination based on political belief or affiliation: *violation*

Redfearn v. the United Kingdom - 47335/06
Judgment 6.11.2012 [Section IV]

Facts – The applicant was a private-sector bus driver responsible for transporting people with disabilities, the majority of whom were Asian in origin. Remaining in this position, he was also elected to the position of local councillor with the British National Party. At the time, the party's membership only extended to white nationals. Consequently, the applicant was summarily dismissed from his job out of concern for the anxiety it would cause among passengers. Under domestic law at the time, as the applicant had been employed for under a year, a claim for unfair dismissal could only be brought where the dismissal had been based on grounds of pregnancy, race, sex or religion. Unable to argue discrimination based on political affiliation, the applicant brought an unsuccessful claim of racial discrimination in the domestic courts.

Law – Article 11 read in light of Article 10: The Court reasserted that, in some instances, there is a positive obligation on national authorities to intervene in the relationships between private individuals to secure effective enjoyment of the right to freedom of association. Taking into account that no complaints had previously been made against the applicant and that, at the age of 56, he would find further employment difficult to obtain, the Court accepted that his dismissal was capable of striking at the very substance of his Article 11

rights. Had there not been a one-year qualifying period for unfair dismissal claims, the applicant could have pursued an appropriate remedy. The principal question before the Court was therefore whether the qualifying period was reasonable and appropriate in protecting the applicant's Article 11 rights.

The Court accepted that the economic grounds put forward for justifying the qualifying period – bolstering the domestic labour market by preventing new employees from bringing unfair dismissal claims – were, in principle, reasonable and appropriate. However, considering the importance of political parties for the proper functioning of democracy, the Court concluded that, in the absence of judicial safeguards, a legal system which allows dismissal from employment solely on account of the employee's membership of a political party carries with it the potential for abuse. The State was therefore under a positive obligation to provide the applicant the opportunity to challenge his dismissal. This is not to say that dismissal based on party membership is never justified, but that such dismissal should always be capable of being challenged, irrespective of the duration of employment.

Conclusion: violation (four votes to three).

Article 41: No claim made in respect of damage.

ARTICLE 12

Right to marry

Remarriage delayed by length of divorce proceedings: *violation*

V.K. v. Croatia - 38380/08
Judgment 27.11.2012 [Section I]

Facts – The applicant married in 2002. His wife gave birth a year later. In 2004 the applicant petitioned for divorce. The parties agreed that the marriage should be dissolved, but not on the arrangements for child maintenance and contact. In 2005 the applicant brought a separate action contesting his paternity. He lodged several requests for expedition of the divorce proceedings and for a partial judgment dissolving the marriage. In 2008 the county court found a violation of the applicant's right to a hearing within a reasonable time. The applicant also alerted the domestic courts on several occasions of his intention to remarry. In January 2010 the parties reached an agreement on child maintenance and contact between the applicant and the child, and the marriage was dissolved the same day. The applicant remarried in September 2010. In his application to the European Court, he complained, *inter alia*, that the length of the divorce proceedings had impaired his right to remarry.

Law – Article 6: The period to be taken into account had amounted to five years and eight months at one level of jurisdiction. Therefore, the length of the proceedings had failed to satisfy the reasonable-time requirement.

Conclusion: violation (unanimously).

Article 12: A failure by the domestic authorities to conduct divorce proceedings within a reasonable time could, in certain circumstances, raise an issue under Article 12 of the Convention. It was noteworthy that the domestic legal system required divorce proceedings to be treated as urgent and did not allow individuals who were already married to conclude another marriage. Therefore, a failure on the part of the domestic authorities to conduct divorce proceedings with the required degree of urgency might impair the right to marry of an individual who had sought to have his previous marriage dissolved in order to marry again, or who had acquired a serious and genuine opportunity to remarry after instituting divorce proceedings. In the instant case, the parties had agreed that their marriage should be dissolved. The applicant had asked the domestic courts on more than one occasion to pronounce the divorce in a partial judgment and to decide the other issues relating to the proceedings separately, as the domestic system permitted. However, for more than five years the domestic courts had either ignored or dismissed his requests without giving any reasons. The Court further noted that on at least two occasions, when complaining about the length of the proceedings, the applicant had informed the domestic courts that he was planning to remarry, and that the lengthy divorce proceedings had been preventing him from doing so. These arguments had been substantiated by the fact that he had indeed remarried shortly after his first marriage had been dissolved. Accordingly, attaching importance to the failure of the domestic authorities to conduct the divorce proceedings efficiently and to take into account the specific circumstances of those proceedings, such as the agreement of the parties to divorce, a possibility of rendering a partial decision and the urgent nature of these proceedings under domestic law, the Court considered that the applicant had been left in a state of prolonged

uncertainty which had amounted to an unreasonable restriction on his right to marry.

Conclusion: violation (six votes to one).

The Court also found a violation of Article 13.

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

ARTICLE 14

Discrimination (Article 8)

Inability of immigrants with limited leave to remain as refugees to be joined by post-flight spouses: *violation*

Hode and Abdi v. the United Kingdom - 22341/09
Judgment 6.11.2012 [Section IV]

Facts – The first applicant was granted asylum status in the United Kingdom in 2006 and thus an initial limited period of leave to remain in the country. In 2007 he married the second applicant in Djibouti and she applied for a visa to join him in the United Kingdom. However, under the Immigration Rules only spouses who formed part of the refugee's family unit before he or she left the country of permanent residence qualified for "family reunion". The second applicant was later denied leave to enter the country on the ground that her husband, having only been granted five years' leave to remain, was not a person present and settled in the United Kingdom. In April 2011 the Immigration Rules were amended to permit refugees to be joined in the United Kingdom by post-flight spouses during their initial period of leave to remain. The second applicant gave birth to two children in 2008 and 2011.

Law – Article 14 in conjunction with Article 8: The Immigration Rules had obviously affected the home and family life of the applicants and their children as it had impacted upon their ability to set up home together and enjoy family life while living together in a family unit. The facts of this case therefore fell within the ambit of Article 8. The applicants, as a refugee who had married after leaving his country of permanent residence and the spouse of such a refugee, had enjoyed "other status" for the purpose of Article 14 of the Convention. Refugees who had married before leaving their country of permanent residence and students and workers, whose spouses had been entitled to join them, had been in an analogous position to the applicants for the purpose of Article 14 as they had also been granted a limited period of leave to remain. Offering incentives to certain groups of immigrants might amount to a legitimate aim for the purposes of Article 14. However, in a previous case the Upper Tribunal (Asylum and Immigration) had found no justification for the particularly disadvantageous position that refugees had found themselves in when compared to students and workers, whose spouses had been entitled to join them. In fact, the Tribunal had gone so far as to call on the Secretary of State for the Home Department to give urgent attention to amending the Immigration Rules so as to extend them to the spouses of those with limited leave to remain as refugees. The Immigration Rules had subsequently been amended in the manner suggested by the Tribunal. The Court therefore did not consider that the difference in treatment between the applicants, on the one hand, and students and workers, on the other, had been objectively and reasonably justified. Furthermore, there was no justification for treating refugees who had married post-flight differently from those who had married pre-flight. The Court accepted that in permitting refugees to be joined by pre-flight spouses, the United Kingdom had been honouring its international obligations. However, where a measure resulted in the different treatment of persons in analogous positions, the fact that it had fulfilled the State's international obligation did not in itself justify the difference in treatment.

Conclusion: violation (unanimously).

Article 41: EUR 6,000 jointly in respect of non-pecuniary damage; EUR 1,000 jointly in respect of pecuniary damage.

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies
Effective domestic remedy – Turkey

Claims in respect of expropriated land for compensation under Article 1007 of Civil Code or for restitution under Law of 18 April 2012: *effective remedies*

Arıoğlu and Others v. Turkey - 11166/05
Decision 6.11.2012 [Section II]

Facts – In 1990 a plot of land that had formerly been part of the public forest estate was entered in the land register under the applicants' names. In 2001 the Treasury brought proceedings seeking to have the applicants' title to the land annulled. In 2002 the courts allowed the Treasury's claim, in accordance with section 2(B) of the Forestry Act, finding that new studies had shown that when it ceased to be classified as forest land the land should have been transferred to the Treasury and not to the applicants. Before the European Court, the applicants alleged that the loss of their property rights without payment of compensation had breached their right to the peaceful enjoyment of their possessions under Article 1 of Protocol No. 1. The Government contended that the complaint was inadmissible as the applicants had not exhausted the available domestic remedies.

Law – Article 35 § 1: The fact that almost forty judgments had been delivered on this subject and that hundreds of cases were still pending before the Court demonstrated that the annulment of duly established title to property without compensation constituted a structural problem. Following the Court's judgments, the Turkish Court of Cassation, in late 2009, had reversed its case-law regarding the application of Article 1007 of the Civil Code, thereby providing for compensation for individuals who had been deprived of property forming part of the forest estate on the basis of that provision. The Court of Cassation had confirmed this approach in several subsequent judgments. Furthermore, following a separate development in the case-law, persons who had lost the title to their property on the grounds that it formed part of the forest estate could now lodge a claim for compensation equal to the actual value of the property, within ten years starting from the date on which the judgment depriving them of the property became final. The National Assembly had also enacted legislation on 18 April 2012 providing for the restitution of land to former owners whose title had been annulled under section 2(B) of the Forestry Act. As to the effectiveness of the remedies in question, the remedy relating to Article 1007 of the Civil Code was now in regular use and the domestic courts frequently applied the above-mentioned provision while referring to Article 1 of Protocol No. 1 to the Convention and the Court's case-law. Hence, this line of case-law could henceforth be said to be well established. Furthermore, under the legislation of 18 April 2012, there was no obstacle preventing the applicants from requesting the restitution of their land within two years from its entry into force. The Law in question also made provision in certain exceptional situations for compensation equivalent to the market value, or a plot of land of equivalent value, to be offered in exchange for the land transferred to the Treasury.

Thus, as matters stood, a claim for compensation under Article 1007 of the Civil Code, which had given rise to the reversal in the case-law by the Court of Cassation in late 2009, and the possibility of restitution under the Law of 18 April 2012, had acquired a degree of legal certainty such that they could and should be exercised for the purposes of Article 35 § 1 of the Convention. In the light of the foregoing, the applicants should have made use of at least one of the remedies now available, in accordance with the new legislation and the new case-law of the Court of Cassation referred to above. No exceptional circumstances existed capable of dispensing the applicants from their obligation to exhaust those remedies.

Conclusion: inadmissible (failure to exhaust domestic remedies).

ARTICLE 46

Pilot judgment – General measures

Slovenia and Serbia required to take measures to enable applicants and all others in their position to recover "old" foreign-currency savings

Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia" - 60642/08
Judgment 6.11.2012 [Section IV]

(See Article 1 of Protocol No. 1 below)

ARTICLE 1 OF PROTOCOL No. 1

Control of the use of property

Inability to recover "old" foreign-currency savings following dissolution of former SFRY: *violation*

Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia" - 60642/08
Judgment 6.11.2012 [Section IV]

Facts – The applicants are citizens of Bosnia and Herzegovina. Until 1989-90, the former Socialist

Federal Republic of Yugoslavia (SFRY) made it attractive for its citizens to deposit foreign currency with its banks by high interest rates and a State guarantee in the event of bankruptcy or "manifest insolvency". Depositors were also entitled to withdraw their savings with accrued interest at any time. Ms Ališić and Mr Sadžak deposited foreign currency at what was then the Ljubljanska Banka Sarajevo and Mr Šahdanović at the Tuzla branch of Investbanka. Following reforms in 1989-90, Ljubljanska Banka Sarajevo became a branch of Ljubljanska Banka Ljubljana, which took over the former's rights, assets and liabilities. Investbanka became an independent bank with headquarters in Serbia and branches, including the Tuzla branch, in Bosnia and Herzegovina. During this period, the convertibility of the dinar and very favourable exchange rates led to massive withdrawals of foreign currency from commercial banks which prompted the SFRY to take emergency measures to restrict such withdrawals. After the break-up of the SFRY in 1991-92, the "old" foreign-currency deposits remained frozen in the successor States, who however agreed to repay them to domestic banks. In Bosnia and Herzegovina, the Constitutional Court examined numerous individual complaints concerning failures to repay "old" foreign-currency savings at the domestic branches of Ljubljanska Banka Ljubljana and Investbanka. The Constitutional Court found no liability on the part of Bosnia and Herzegovina or its Entities and instead ordered the State to help the clients of those branches to recover their savings from Slovenia and Serbia respectively. In the framework of the negotiations for the Agreement on Succession Issues, negotiations regarding the distribution of the SFRY's guarantees of "old" foreign-currency savings were held in 2001 and 2002. As the successor States could not reach an agreement, however, in 2002 the Bank for International Settlements ("the BIS") informed them that it would have no further involvement in the matter. The applicants complained that they had been unable to withdraw their foreign-currency savings.

Law – Article 1 of Protocol No. 1: As regards the period before the dissolution of the SFRY, the State guarantee for the "old" foreign-currency could only be activated at the request of a bank and liability had not therefore shifted from the banks to the SFRY. Consequently, Ljubljanska Banka Ljubljana, based in Slovenia, and Investbanka, based in Serbia, had remained liable for "old" foreign-currency savings in their branches, irrespective of their location, until the dissolution of the SFRY.

As regards the period after dissolution, the Slovenian Government had nationalised Ljubljanska Banka Ljubljana and transferred most of its assets to a new bank, while at the same time confirming that the old Ljubljanska Banka remained liable for "old" foreign-currency savings in its branches in the other successor States. Indeed Slovenia had become the sole shareholder of the old Ljubljanska Banka, which was administered by a Government agency. In addition, Slovenia was to a large extent responsible for the bank's inability to service its debts (as it had transferred most of its assets to another bank) and most of the funds of the Sarajevo branch of Ljubljanska Banka Ljubljana had in all probability ended up in Slovenia.

As to Investbanka, it had remained liable for "old" foreign-currency savings at its branches in the other successor States until January 2002, when a Serbian court had made a bankruptcy order against that bank and the State guarantee of "old" foreign-currency savings in the bank and its branches had been activated. Moreover, Investbanka was either entirely or to a large extent socially owned. The Court had held in comparable cases against Serbia that the State was liable for debts of socially-owned companies as they were closely controlled by a Government agency. Furthermore, most of the funds of Investbanka's Tuzla branch had in all likelihood ended up in Serbia.

Therefore, as regards the period after the dissolution of the SFRY, there had been sufficient grounds to deem Slovenia liable for the bank's debts to Ms Ališić and Mr Sadžak, and Serbia liable for the bank's debt to Mr Šahdanović as it was clear that Slovenia and Serbia respectively controlled those banks.

As to the applicants' inability to freely dispose of their "old" foreign-currency savings since 1991-92, the explanation of the Serbian and Slovenian Governments for the delay essentially concerned their duty to negotiate that question in good faith with other the successor States, as required by international law. Any unilateral solution would, in their view, have been contrary to that duty. However, the duty to negotiate did not prevent the successor States from adopting interim measures to protect the savers' interests. The Croatian Government had repaid a large part of its citizens' "old" foreign-currency savings in Ljubljanska Banka Ljubljana's Zagreb branch and the Macedonian Government had repaid the total amount of "old" foreign currency savings in the Skopje branch of that bank. At the same time, those two Governments had never abandoned their position that

the Slovenian Government should eventually be held liable and continued to claim compensation at the inter-State level (notably, within the context of the succession negotiations). Although certain delays could be justified in exceptional circumstances, the applicants' continued inability to freely dispose of their savings despite the collapse of the BIS negotiations in 2002 and the lack of any meaningful negotiations concerning that issue thereafter had been contrary to Article 1 of Protocol No. 1.

Conclusion: violation by Slovenia with regard to Ms Ališić and Mr Sadžak (six votes to one); violation by Serbia with regard to Mr Šahdanović (unanimously); no violation as regards the other respondent States (unanimously).

Article 13: Concerning the Sarajevo branch of the old Ljubljanska banka, none of the remedies available to the applicants in Slovenia could have provided sufficient redress or offered reasonable prospects of success. The provision limiting the State's liability to "old" foreign currency savings in the old Ljubljanska banka was not subject to review by the Constitutional Court. As to the possibility of a civil action in the Croatian courts, the Slovenian Government had not given any example of a successful outcome for a Sarajevo branch saver there. Turning to the Tuzla branch of Investbanka, the Court observed that although hundreds of clients of Bosnian-Herzegovinian branches of Investbanka had lodged claims with the competent bankruptcy court in Serbia, none of them had so far been successful. Moreover, the Serbian Government had failed to show that any of the judgments obtained in the Serbian courts ordering the banks to pay their "old" foreign-currency savings had in fact been enforced. The applicants had thus had no effective remedy at their disposal in Slovenia or Serbia for their complaint under Article 1 of Protocol No. 1.

Conclusion: violation by Slovenia with regard to Ms Ališić and Mr Sadžak (six votes to one); violation by Serbia with regard to Mr Šahdanović (unanimously); no violation as regards the other respondent States (unanimously).

Article 46: The Court considered it appropriate to apply the pilot-judgment procedure, as there were more than 1,650 similar applications, concerning over 8,000 applicants, pending before it. Considering the systemic situation identified, general measures were necessary at the national level: notably, Slovenia and Serbia were required to take all necessary measures within six months from the date the Court's judgment became final to enable the applicants and all others in their position to be paid back their "old" foreign-currency savings under the same conditions as depositors with such savings in domestic branches of Slovenian and Serbian banks. Although it was not necessary to order that adequate redress be awarded to all persons affected by past delays, if either Serbia or Slovenia failed to apply the general measures indicated by the Court, it could reconsider that issue in an appropriate future case against the State in question. Serbia and Slovenia could only exclude from their repayment schemes persons who had been paid their entire "old" foreign currency savings by other successor States on humanitarian or other grounds. The Court adjourned the examination of all similar cases for six months from the date on which its judgment became final without prejudice to its power at any moment to declare inadmissible any such case or to strike it out of its list.

Article 41: Serbia was to pay Mr Šahdanović EUR 4,000 and Slovenia the same amount to Ms Ališić and Mr Sadžak in respect of non-pecuniary damage.

(See also: *Kovačić and Others v. Slovenia* [GC], nos. 44574/98, 45133/98 and 48316/99, 3 October 2008, Information Note no. 112; *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, 3 November 2009, Information Note no. 124)

ARTICLE 3 OF PROTOCOL No. 1

Stand for election

Introduction of new conditions for participation in parliamentary elections one month before deadline for registering candidates: *violation*

Ekoglasnost v. Bulgaria - 30386/05
Judgment 6.11.2012 [Section IV]

Facts – The applicant, the "political club" Ekoglasnost, is a Bulgarian political party which presented candidates in all parliamentary elections from 1990 to 2001. In May 2005 the Central Electoral Commission refused to register it as a participant in the forthcoming parliamentary elections of 25 June, on the ground that it had not satisfied three new conditions introduced into the electoral law in April 2005: the submission of a document certifying the payment of an electoral deposit of 20,000 Bulgarian levs (BGN), a certificate from the Court of Audit showing that the

party had submitted to it its annual financial reports for the past three years, and the signatures of at least 5,000 voters supporting the party's participation in the elections.

Law – Article 3 of Protocol No. 1: None of the three conditions in question seemed to raise an issue under Article 3 of Protocol No. 1. They had been provided for by domestic law with the aim of ensuring the participation in parliamentary elections of viable political formations that were sufficiently representative in society and that complied with rules on the transparency of political financing, as also of limiting the expenses incurred in the organisation of elections. In addition, the obligation to obtain a certificate from the Court of Audit as to the validity of annual reports had been foreseeable. The leaders of Ekoglasnost could have anticipated its introduction well before April 2005 and could have taken the necessary measures to ensure that the party's situation was validated by the Court of Audit, but they had not done so. However, as regards the other two conditions, the relevant parliamentary debates had considerably amended the proposals, such that the leaders of Ekoglasnost could not have been aware of the exact content of the two new conditions until the date of their final enactment by Parliament in April 2005. As parties had been required to nominate their candidates no later than 46 days before the date of the elections, Ekoglasnost had had barely one month to obtain the 5,000 signatures and pay the requisite election deposit. The Venice Commission had established at least three categories of fundamental electoral rules: the voting system, the composition of electoral commissions and the fixing of constituency boundaries. The Court took the view that the conditions of participation in elections imposed on political parties were also among the fundamental electoral rules. Those conditions should therefore have had the same stability in time as the other fundamental elements of the electoral system. Admittedly, that short period of time had not prevented twelve other small political formations from taking part in the elections. However, ten other parties and coalitions, including Ekoglasnost, had not been allowed to take part because they did not fulfil one or more of the new conditions. Moreover, by introducing those conditions the Bulgarian legislature had sought to resolve the serious problem raised by the participation in elections of numerous formations that did not have any real political or electoral legitimacy. It was nevertheless to be noted that this trend had existed in Bulgarian political life well before the parliamentary elections of 2005. The bill providing for the new measures in question could have been tabled earlier. That would have made it possible to put in place, with sufficient notice, a solution adapted to the problem of "ghost parties", whilst observing the principle of the stability of the fundamental rules of electoral law. Consequently, by introducing at such a late stage into domestic law the system of election deposits and the requirement of 5,000 signatures in support of a party's participation in the elections, the Bulgarian authorities had failed to strike a fair balance between the legitimate interests of society as a whole and the right of the applicant party to be represented in the parliamentary elections.

Conclusion: violation (six votes to one).

Article 41: Claim made out of time

ARTICLE 2 OF PROTOCOL No. 4

Article 2 § 2

Freedom to leave a country

Ban on travelling abroad following breach of immigration rules of a third-party State: *violation*

Stamose v. Bulgaria - 29713/05
Judgment 27.11.2012 [Section IV]

Facts – In 2003 the applicant was deported from the United States of America to his home country of Bulgaria after taking up paid employment in breach of the conditions attached to his student visa. On his arrival home, the Bulgarian authorities imposed a two-year travel ban on the applicant and confiscated his passport after receiving a letter from the US Embassy. An application by the applicant for judicial review of the Bulgarian authorities' decisions was dismissed.

Law – Article 2 of Protocol No. 4: This was the first case in which the Court had examined a travel ban designed to prevent breaches of domestic or foreign immigration laws. The prohibition on leaving Bulgaria and the attendant seizure of his passport amounted to interference with the applicant's right to leave any country of his choice. The interference was "in accordance with the law". However, it was not necessary to determine whether it pursued the legitimate aims of maintenance of *ordre public* or the protection of the

rights of others as, in any event, it was not necessary in a democratic society.

Such a blanket and indiscriminate measure as automatically prohibiting the applicant from travelling to any and every foreign country on account of a breach of the immigration laws of one particular country could not be considered proportionate. The normal consequences of a serious breach of a country's immigration laws would be for the person concerned to be removed from that country and prohibited (by the laws of that country) from re-entering for a certain period. The applicant had been deported from the United States. It therefore appeared draconian for the Bulgarian State – which could not be regarded as directly affected by the applicant's infringement of the US immigration rules – to have in addition prevented him from travelling to any other foreign country for a period of two years. Moreover, the authorities had not given any reasons for their order and had apparently not considered it necessary to examine the applicant's individual circumstances, such as the gravity of his breach of the US immigration rules, the risk he might breach other States' rules, his family, financial and personal situation, and his antecedents. The domestic courts had ruled that they had no power to review the exercise of the authorities' discretion in this matter. Although the Court might be prepared to accept that a prohibition to leave one's own country imposed in relation to breaches of the immigration laws of another State may in certain compelling situations be regarded as justified, it did not consider that the automatic imposition of such a measure without any regard to the individual circumstances of the person concerned could be characterised as necessary in a democratic society.

Conclusion: violation (unanimously).

Article 13: The domestic courts had been concerned solely with the ban's formal validity and had specifically held that they could not scrutinise the authorities' discretionary assessment of the need for the ban, which was in fact the main point raised by the applicant and a key part of the balancing exercise required under Article 2 § 3 of Protocol No. 4. By reason of its limited scope of review, such a procedure did not afford a possibility to deal with the substance of an arguable Convention complaint and so could not satisfy the requirements of Article 13.

Conclusion: violation (unanimously).

Article 41: No claim made.

ARTICLE 4 OF PROTOCOL No. 7

Right not to be tried or punished twice

Conviction for war crimes of a soldier who had previously been granted amnesty: *no violation*

Marguš v. Croatia - 4455/10
Judgment 13.11.2012 [Section I]

Facts – A first set of criminal proceedings was brought against the applicant in 1993 in connection with a number of serious offences against civilians, including murder, he had allegedly committed in 1991 as a member of the Croatian army. Those proceedings were terminated in 1997 under the General Amnesty Act, which had entered into force in 1996 and applied to criminal offences committed during the war in Croatia between 1990 and 1996 with the exception of acts amounting to grave breaches of humanitarian law or to war crimes. In 2007 the Supreme Court, on a request for the protection of legality lodged by the State Attorney, found the decision to terminate the proceedings to be in violation of the Amnesty Act. It noted in particular that the applicant had committed the alleged offences as a member of the reserve forces after his tour of duty had terminated, so that there was no significant link between the alleged offences and the war, as required by the Act.

In parallel, the applicant was tried in a second set of criminal proceedings. The proceedings before the county court were conducted by a three-judge panel, which included one judge, M.K., who had also presided over the panel that had terminated the earlier proceedings. During the closing arguments, the applicant was removed from the courtroom, after twice being warned for interrupting the Deputy State Attorney. His lawyer remained in the courtroom. In 2007 the county court convicted him of war crimes against the civilian population and sentenced him to 14 years' imprisonment. On appeal, the Supreme Court upheld the conviction and increased the sentence to 15 years' imprisonment. A constitutional com

plaint by the applicant was dismissed. The domestic courts found that he had killed and tortured Serbian civilians, treated them in an inhuman manner, unlawfully arrested them, ordered the killing of a civilian and robbed the civilian population. Those acts had violated international law, in particular

the Geneva Convention relative to the Protection of Civilian Persons in Time of War.

Law – Article 6 §§ 1 and 3 (c)

(a) *Impartiality*: Although the Court was not convinced that there was sufficient evidence to establish that Judge M.K. had shown any personal bias, he had participated in both sets of criminal proceedings. The charges against the applicant in those two sets of proceedings had overlapped to a certain extent. However, in the first set, which was terminated under the Amnesty Act, the facts of the case had not been assessed, nor had the question of the applicant's guilt been examined. The judge had therefore not expressed an opinion on the merits of the case. Under those circumstances there had been no ascertainable facts to justify doubts as to the judge's impartiality.

Conclusion: no violation (unanimously).

(b) *The applicant's removal from the courtroom*: The closing arguments were an important stage of the trial. However, where the accused disturbed order in the courtroom, the trial court could not be expected to remain passive and to allow such behaviour. The applicant had been removed from the courtroom only after twice being warned not to interrupt the Deputy State Attorney's closing submissions. His defence lawyer had remained in the courtroom and had presented the applicant's closing arguments. The applicant had therefore not been prevented from having the final view of the case given by his defence and had been legally represented throughout the proceedings. Against this background, and viewing the proceedings as a whole, his removal from the courtroom had not prejudiced his defence rights to a degree incompatible with Article 6 §§ 1 and 3 (c).

Conclusion: no violation (unanimously).

Article 4 of Protocol No. 7: The offences set out in the applicant's indictment in 1993 corresponded to those described in the county court's judgment in 2007. The charges had therefore been the same in both sets of proceedings. It was questionable whether the 1997 decision terminating the first set of proceedings under the General Amnesty Act could be understood as a final acquittal, since that decision had not presupposed any investigation into the charges and did not amount to an assessment of the applicant's guilt. However, the Court decided to leave that question open.

In the second set of proceedings, the domestic courts found that the applicant had committed war crimes against the civilian population and thereby violated international law. The Supreme Court had established that the General Amnesty Act had been erroneously applied in respect of those offences and interpreted in a way which called its very purpose into question. The European Court had previously held that that an amnesty was generally incompatible with the States' duty to investigate acts such as torture and that the obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that might be considered contrary to international law. The same approach applied to war crimes. Granting an amnesty in respect of crimes against humanity, war crimes and genocide was increasingly considered to be prohibited by international law. In that light, the Court accepted the Government's view that the grant of an amnesty to the applicant in respect of acts which had been characterised as war crimes against the civilian population had amounted to a fundamental defect in the proceedings within the meaning of the second paragraph of Article 4 of Protocol No. 7, which had justified the reopening of the proceedings.

Conclusion: no violation (unanimously).

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

The following cases have been referred to the Grand Chamber in accordance with Article 43 § 2 of the Convention:

E.S. v. Sweden - 5786/08
Judgment 21.6.2012 [Section V]

(See Article 8 above, page 14)

COURT PUBLICATIONS

Guide on case-law

The Court has recently launched a new series of studies on its case-law relating to particular Articles of the Convention. The first publication in the series deals with Article 5; it will be followed shortly by studies on other Articles.

Guide on Article 5: Right to liberty and security

Translation of the Court's case-law

With a view to making the Convention standards more accessible in Council of Europe member

States, the Court has launched a case-law translation project with the support of the Human Rights Trust Fund. In the context of this project, hundreds of Court judgments, decisions and legal summaries will be translated into the official languages of twelve member States (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Republic of Moldova, Montenegro, Serbia, "the former Yugoslav Republic of Macedonia", Turkey and Ukraine).

More information

Research report

A new research report has been published on the Court's Internet site (<www.echr.coe.int> – Jurisprudence). It provides a compilation of the relevant case-law of the Court on young people aged between 18 and 35. It is available only in English.

Case-law of the Court on Young People

Thematic factsheets on the Court's case-law

Thanks to the Polish Ministry of Justice, some of the thematic factsheets on the Court's case-law are now also available in Polish.

In addition, new factsheets on the Court's case-law concerning social welfare, work-related rights and the European Union have recently been issued, bringing the total number to 45. Almost all the factsheets are also available in Russian and German. They can be downloaded from the Court's Internet site (<www.echr.coe.int> – Press – Information sheets – Factsheets).

Translation of the Court's information materials into over 40 languages

The Court is publishing its information documents in various languages in order to raise awareness of the Convention system throughout Europe, particularly among potential applicants. A number of publications, including the booklets "Questions & Answers" and "The ECHR in 50 Questions", together with the leaflet "The Court in brief", have been translated into the official languages of Council of Europe member States. In total, 139 new documents, in 39 languages, have already been published on the Court's website in the context of this ongoing project. (See the documents)

In addition, the Court is continuing to develop its multimedia materials to make them available as widely as possible. 10 new language versions of the video-clip on the Convention are being released today. Aimed at the general public, this video presents the main rights in the Convention.

The video-clip on admissibility conditions, aimed at informing potential applicants of the main conditions to be fulfilled in order to apply to the Court, has also been produced in 10 new languages.

Other language versions of these publications and videos will be released in the coming weeks, including translations into non-European languages such as Chinese, Japanese and Arabic.

The Court wishes to encourage any initiatives to include the dissemination of its multimedia resources in human rights awareness programmes or civic education courses. (See the Court's videos)