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COUR EUROPÉENNE DES DROITS DE L'HOMME

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TABLE OF CONTENTS

ARTICLE 1

Responsibility of States

Serbia's responsibility for non-enforcement of decision given by a Kosovo court: *inadmissible*

Azemi v. Serbia (dec.) - 11209/09 7

ARTICLE 2

Life
Positive obligations
Use of force
Effective investigation

Bombing of civilian villages by military aircraft and subsequent failure to conduct an effective investigation: *violation*

Benzer and Others v. Turkey - 23502/06 7

Effective investigation

Effectiveness of investigation into death impaired on account of lack of independence of court upholding ruling that there was no case to answer: *case referred to the Grand Chamber*

Mustafa Tunç and Fecire Tunç v. Turkey - 24014/05 9

ARTICLE 3

Inhuman treatment

Anguish and distress as a result of bombing of civilian villages: *violation*

Benzer and Others v. Turkey - 23502/06 9

Degrading treatment

Bouyid v. Belgium - 23380/09 9

ARTICLE 5

Article 5 § 1

Deprivation of liberty

Thirty-day placement of minor in detention centre for young offenders to "correct his behaviour": *violation*

Blokhin v. Russia - 47152/06 10

Airport security-check lasting several hours: *inadmissible*

Gahramanov v. Azerbaijan (dec.) - 26291/06 12

Article 5 § 1 (d)

Educational supervision

Thirty-day placement of minor in detention centre for young offenders to "correct his behaviour": *violation*

Blokhin v. Russia - 47152/06 12

Article 5 § 1 (e)

Persons of unsound mind

Preventive detention of mental-health patient in prison wing: *violation*

Glien v. Germany - 7345/12 12

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Lack of right of appeal against sanctions imposed on applicants on basis of UN Security Council resolutions: *violation*

Al-Dulimi and Montana Management Inc. v. Switzerland - 5809/08.. 14

Article 6 § 1 (criminal)

Criminal charge

Proceedings leading to minor's placement in detention centre for young offenders to "correct his behaviour": *Article 6 applicable*

Blokhin v. Russia - 47152/06.. 16

Fair hearing
Equality of arms

Use of evidence obtained through incitement in context of an unlawful undercover operation: *violation*

Sepil v. Turkey - 17711/07.. 16

Article 6 § 3

Rights of defence

Lack of adequate procedural guarantees in proceedings leading to minor's placement in detention centre for young offenders to "correct his behaviour": *violation*

Blokhin v. Russia - 47152/06.. 16

ARTICLE 7

Article 7 § 1

Heavier penalty
Retroactivity

Retrospective extension of preventive detention from a maximum of ten years to an unlimited period of time: *violation*

Glien v. Germany - 7345/12.. 16

ARTICLE 8

Positive obligations
Respect for private life

Lack of clear statutory provisions criminalising act of covertly filming a naked child: *violation*

Söderman v. Sweden [GC] - 5786/08.. 17

Respect for private life

Alleged failure to secure the right to reputation of an applicant whose father was allegedly defamed: *no violation*

Putistin v. Ukraine - 16882/03.. 18

Respect for family life

Failure to conduct detailed examination of all relevant points when deciding whether to return a child pursuant to Hague Convention: *violation*

X v. Latvia [GC] - 27853/09.. 19

ARTICLE 10

Freedom of expression

Dismissal from the armed forces at retirement age, but allegedly on ground of personal opinions: *no violation*

Jokšas v. Lithuania - 25330/07 20

Freedom to receive information
Freedom to impart information

Refusal by regional authority to provide copy of its decisions to an association wishing to study the impact of property transfers on agricultural and forest land: *violation*

Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria - 39534/07 21

ARTICLE 11

Freedom of peaceful assembly

Criminal convictions for participating in non-violent demonstration: *violation*

Kudrevičius and Others v. Lithuania - 37553/05 22

ARTICLE 14

Discrimination (Article 8)

Exclusion of same-sex couples from "civil unions": *violation*

Vallianatos and Others v. Greece [GC] - 29381/09 and 32684/09 23

Refusal to amend criminal record despite Constitutional Court ruling that provision under which applicants had been convicted was unconstitutional: *violation*

E.B. and Others v. Austria - 31913/07 et al. 24

Excessively formalistic interpretation of domestic law as regards paid maternity leave for adoptive mother: *violation*

Topčić-Rosenberg v. Croatia - 19391/11 25

Discrimination (Article 1 of Protocol No. 1)

Termination of payment of retirement pension on the ground that beneficiary was permanently resident abroad: *violation*

Pichkur v. Ukraine - 10441/06 25

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies

No reasonable prospect of success of application to have deportation order set aside: *preliminary objection dismissed*

Z.M. v. France - 40042/11 26

Article 35 § 3

Competence *ratione materiae*

Refusal to reopen civil proceedings following finding of Article 6 violation: *relinquishment in favour of the Grand Chamber*

Bochan v. Ukraine (no. 2) - 22251/08 27

ARTICLE 38

Furnish all necessary facilities

Failure by respondent Government to provide essential piece of evidence: *violation*
Benzer and Others v. Turkey - 23502/06 28

ARTICLE 46

Execution of a judgment – General measures

Respondent State required to take further measures to provide genuine effective relief for violations of the right to a fair trial within a reasonable time
Vlad and Others v. Romania - 40756/06, 41508/07 and 50806/07 28

Execution of a judgment – Individual measures

Respondent Government required to conduct investigation to identify those responsible for bombing of civilian villages in 1994
Benzer and Others v. Turkey - 23502/06 29

ARTICLE 3 OF PROTOCOL No. 1

Free expression of opinion of people

Irrevocable nature of decision to renounce seat in parliament: *inadmissible*
Occhetto v. Italy (dec.) - 14507/07 29

REFERRAL TO THE GRAND CHAMBER 30

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER 30

COURT NEWS 31

Case-law translations programme

RECENT PUBLICATIONS 31

Case-law guides

Reports of Judgments and Decisions

ARTICLE 1

Responsibility of States

Serbia's responsibility for non-enforcement of decision given by a Kosovo court: *inadmissible*

Azemi v. Serbia - 11209/09
Decision 5.11.2013 [Section II]

Facts – In 1990 the applicant instituted proceedings in the Pristina District Court challenging his dismissal from work. In 2002 a municipal court in Kosovo ruled in his favour and ordered his reinstatement. Enforcement orders were issued in 2005 and 2006. In 2010 Kosovo's Constitutional Court found a violation of the applicant's right to a fair trial on account of the non-enforcement of the 2002 decision. Meanwhile, on 10 June 1999 the UN Security Council adopted Resolution 1244 deploying an international civil (UNMIK) and security (KFOR) presence in Kosovo. In February 2008 Kosovo declared its independence and has subsequently been recognised by eighty-nine countries.

Law – Article 1: The applicant's complaint against Serbia concerned the non-enforcement of the judgment adopted by a Kosovo court in 2002. In so far as it could be understood to relate to the period before 10 June 1999, that part of the complaint was incompatible *ratione temporis*, given that Serbia ratified the Convention only in 2004. As regards the subsequent period, the Court observed that by virtue of UNSC Resolution 1244 Kosovo was placed under international civil and military presence. UNMIK assumed all executive, legislative and judicial powers and regularly reported to the UN Secretary General, who submitted periodic reports on the situation in Kosovo to the UN Security Council. There was no evidence that Serbia exercised any control over UNMIK, Kosovo's judiciary or other institutions that had been established by virtue of UNMIK regulations. Neither could it be said that the Serbian authorities had militarily, economically, financially or politically supported Kosovo's institutions. Moreover, Kosovo's subsequent declaration of independence objectively prevented Serbia from securing the rights and freedoms in Kosovo, over which it had no effective control. That part of the complaint was therefore incompatible *ratione personae*. To the extent that the impugned non-enforcement might be attributed to the international civil administration acting under the UN, that part of the complaint was also incompatible *ratione personae*.

Conclusion: inadmissible (majority).

ARTICLE 2

Life
Positive obligations
Use of force
Effective investigation

Bombing of civilian villages by military aircraft and subsequent failure to conduct an effective investigation: *violation*

Benzer and Others v. Turkey - 23502/06
Judgment 12.11.2013 [Section II]

Facts – The applicants were Turkish nationals who lived and worked with their families in two villages in South-Eastern Turkey. The facts of the case were disputed between the parties. According to the applicants, in 1994 their villages were bombed by an aircraft belonging to the Turkish military. As a consequence, thirty-four of the applicants' close relatives died, some of the applicants themselves were injured, and most of their property and livestock was destroyed. After the incident, all surviving villagers abandoned their villages and moved to different parts of the country. At the time of the European Court's judgment, the villages were still uninhabited. In 1994, 1996 and 2006, local prosecutors concluded that the bombing of the villages had been carried out by members of the PKK. The Government upheld this view and maintained that there was no evidence of the State's involvement in the incident. In 2012 the applicants submitted to the Court a flight log drawn up by the Civil Aviation Directorate, which referred to two flying missions carried out by the national Air Force on the same day the applicants' villages were bombed.

Law – Preliminary objection (*six-month rule*): The respondent Government argued that the applicants had not complied with the six-month rule as they had lodged their application twelve years after the incident. Owing to the particular circumstances of the case, the Court accepted that the applicants had been unable to complain about the events to the national authorities for a long period after the attack on their villages. They had introduced official complaints with the national authorities as soon as they had had the possibility to do so, and had applied to the European Court shortly after they realised that the domestic remedies would not yield any results.

Conclusion: preliminary objection dismissed (unanimously).

Article 2

(a) *Substantive aspect* – The only argument the Government relied on to support their claim that the villages had been attacked by members of the PKK were statements taken from a number of villagers in 2008 and the decisions of some civilian and military prosecutors taken in 1994, 1996, and 2006. As for the witness statements, all but one of these had been given by people who were not resident in either of the applicants' two villages and were not present at the incident. That evidence was thus merely hearsay. Moreover, most of those witnesses had been questioned by members of the military and not by an independent judicial authority. The only witness who had allegedly been in one of the two villages on the day of the incident and who had claimed that PKK members, rather than planes, had carried out the bombing, could not be considered independent or impartial as he was employed by the State as a village guard. As for the ensuing investigations, the files of the investigations conducted in 1994 and 1996 by civilian prosecutors did not contain any evidence to substantiate the PKK's involvement in the attacks. Therefore, the conclusions reached by those prosecutors were baseless. As for the investigation carried out in 2006 by the military prosecutor, the Court found that it had been based on evidence that involved illogical reasoning and was subsequently proven incorrect. The Court could therefore not attach any importance to the conclusions reached by the prosecutors or consider that they supported the Government's submissions.

As for the applicants' allegation that the attack had been carried out by a military aircraft, the Court noted that the applicants had consistently maintained this account over a number of years. Further investigations by the prosecuting authorities in 2004 and 2005, based on eyewitness testimony, concluded that the villages had been bombed by an aircraft and not the PKK. In addition, the flight log drawn up by the Civil Aviation Directorate established that missions had been flown to the location of the villages at the time the applicants claimed the attack had occurred. In the light of this evidence, the Court concluded that a military aircraft belonging to the Turkish Air Force had conducted an aerial attack killing thirty-three of the applicants' relatives and injuring three of the applicants themselves. In the Court's view, an indiscriminate aerial bombing of civilians and their villages could not be acceptable in a democratic society or reconcilable with any of the grounds regulating the use of force set out in Article 2 § 2 of the Convention, the customary rules of international humanitarian law or any of the international treaties regulating the use of force in armed conflicts.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – The investigation into the bombing was wholly inadequate and many important steps were omitted. For example, the prosecutors had not carried out any significant inquiry in the immediate aftermath of the bombing, and, once the incident had actually been looked into, the investigators were not independent, had formed baseless conclusions on extremely minimal investigations, and had attempted to withhold the investigation documents from the applicants. Most crucially, no investigation had been conducted into the flight log which constituted a key element in the possible identification and prosecution of those responsible. Having regard to the abundance of information and evidence showing that the applicants' villages had been bombed by the Air Force, the Court concluded that the inadequacy of the investigation had been the result of the national investigating authorities' unwillingness to officially establish the truth and punish those responsible.

Conclusion: violation (unanimously).

Article 3: It was not disputed that the applicants had witnessed the killings of their relatives and the destruction of their belongings, had had to deal with the consequence of the incident alone, and had been obliged to leave their place of residence. The bombing had been ordered and carried out without the slightest concern for human life by the pilots or by their superiors, who had then tried to cover it up by refusing to hand over the flight log. The national authorities had failed to offer even the minimum humanitarian assistance to the applicants in the aftermath of the bombing. In these circumstances, the Court considered that witnessing the killing of their close relatives, coupled with the authorities' wholly inadequate and inefficient response in the aftermath of the events had caused the applicants suffering that had attained the threshold of inhuman and degrading treatment. In addition, the bombing of their homes had deprived them and their families of shelter and support and obliged them to leave the place where they and their friends had been living. The anguish and distress caused by that destruction was sufficiently severe to constitute inhuman treatment within the meaning of Article 3.

Conclusion: violation (unanimously).

Article 38: Despite the fact that the Government had been expressly requested by the Court to

submit a copy of the entire investigation file in 2009, they had not submitted the relevant flight log or mentioned its existence in their observations. This piece of information had been supplied to the Court by the applicants in June 2012, after the Government had already submitted their observations on the case. The Government had not disputed the authenticity of the flight log, argued that they were unaware of its existence, or provided any explanation as to why it had not previously been supplied to the Court. Bearing in mind the importance of a respondent Government's co-operation in Convention proceedings, the failure to provide the flight log had amounted to a failure to comply with the obligation under Article 38 to provide all necessary facilities to assist the Court in its task of establishing the facts.

Conclusion: failure to comply with Article 38 (unanimously).

Article 46: Having regard to the fact that the investigation file was still open at the national level and to the documents in its possession, the Court considered that new investigatory steps should be taken by the national authorities under the supervision of the Committee of Ministers. These steps should include carrying out an effective criminal investigation, with the help of the flight log, with a view to identifying and punishing those responsible for the bombing of the applicants' villages.

Article 41: Sums ranging from EUR 15,000 to EUR 250,000 in respect of non-pecuniary damage; claims in respect of pecuniary damage dismissed.

(See also *Akdıvar and Others v. Turkey*, 21893/93, 16 September 1996; *Timurtaş v. Turkey*, 23531/94, 13 June 2000; and *Musayev and Others v. Russia*, 57941/00, 58699/00 and 60403/00, 26 July 2007, Information Note 99)

Effective investigation

Effectiveness of investigation into death impaired on account of lack of independence of court upholding ruling that there was no case to answer: *case referred to the Grand Chamber*

Mustafa Tunç and Fecire Tunç v. Turkey - 24014/05
Judgment 25.6.2013 [Section II]

In February 2004, while he was doing his military service, a sergeant was fatally injured by gunfire. A judicial investigation was opened as in accordance with the standard procedure in such cases. In June 2004 the prosecutor discontinued the proceedings, finding that no third party could be held responsible for the sergeant's death. In October 2004 a military tribunal of the air-force upheld an appeal by the applicants – the sergeant's parents – and ordered the prosecutor to carry out a further investigation. In December 2004 the prosecutor closed the inquiries and sent the file back to the military tribunal, together with a report on the further investigation requested, presenting the measures taken and addressing the shortcomings identified by the tribunal. The applicants alleged that the authorities had not conducted an effective investigation into the death of their relative.

By a judgment of 25 June 2013 (see Information Note 164), notwithstanding its findings concerning the prompt, appropriate and comprehensive nature of the investigative measures and the effective participation of the applicants in the proceedings, a Chamber of the Court concluded, by four votes to three, that there had been a violation of Article 2 under its procedural head, as the military tribunal did not have the requisite independence in its capacity as supervisory body, at last instance, in respect of the judicial investigation.

On 4 November 2013 the case was referred to the Grand Chamber at the Government's request.

ARTICLE 3

Inhuman treatment

Anguish and distress as a result of bombing of civilian villages: *violation*

Benzer and Others v. Turkey - 23502/06
Judgment 12.11.2013 [Section II]

(See Article 2 above, page 7)

Degrading treatment

Alleged administration of a slap by a police officer to an individual during police interview: *no violation*

Bouyid v. Belgium - 23380/09
Judgment 21.11.2013 [Section V]

Facts – The applicants, two brothers, one of whom was a minor at the time, were questioned separately by police officers about unrelated incidents. They both alleged that they had been slapped once on the face by the officers. They filed a criminal

complaint, with a request for civil-party status, but were unsuccessful.

Law – Article 3: Police officers who struck individuals during questioning at the very least committed a breach of ethics and showed a deplorable lack of professionalism. The Court endorsed the recommendation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) after its visit to Belgium in 2005: given the risk of ill-treatment against individuals deprived of liberty, the competent authorities had to be vigilant in this area, especially with regard to minors.[1] In the present case, however, even supposing that the slap had been given, it was on both occasions an isolated incident, inflicted unthinkingly by police officers who had lost their temper because of the applicants' disrespectful and provocative behaviour and not for the purpose of extracting confessions. It had, moreover, taken place in a very tense atmosphere involving members of the applicants' families and the local police. In those circumstances, even though one of the applicants was only 17 at the time, and whilst it was understandable that they felt strong resentment, assuming the events had taken place as alleged, each slap had been a one-off act in a situation of nervous tension and without any serious or long-term effect. Such acts, although they were unacceptable, could not be regarded as generating a degree of humiliation or debasement sufficient to characterise a breach of Article 3.

Conclusion: no violation (unanimously).

ARTICLE 5

Article 5 § 1

Deprivation of liberty

Thirty-day placement of minor in detention centre for young offenders to "correct his behaviour": *violation*

Blokhin v. Russia - 47152/06
Judgment 14.11.2013 [Section I]

Facts – The applicant, who at the material time was twelve years old and suffering from attention-deficit hyperactivity disorder and enuresis, was arrested and taken to a police station on suspicion of extorting money from a nine-year old. On the strength of the applicant's confession and the statements of the alleged victim and his mother, the authorities found it established that the applicant had committed offences punishable under the Criminal Code. Since the applicant was below the statutory age of criminal responsibility no criminal proceedings were opened against him. Instead he was brought before a court which ordered his placement in a temporary detention centre for minor offenders for a period of thirty days in order to "correct his behaviour" and to prevent his committing further acts of delinquency. The applicant alleged that his health deteriorated while in the centre as he did not receive the medical treatment his doctor had prescribed.

Law – Article 3: It was uncontested that the applicant was suffering from attention-deficit hyperactivity disorder and enuresis at the time of his detention. However, the paediatrician who supervised him in the detention centre had no expertise in the treatment of his mental disorder and there was no evidence before the Court that the applicant was examined by a neurologist or a psychiatrist, despite repeated recommendations that he should be, or that the medication he had been prescribed by a psychiatrist before his placement was ever administered. That lack of expert medical attention was unacceptable and it was a matter of concern that the applicant's condition had deteriorated during his detention to the point where he had to be taken to hospital with neurosis on the day after his release. The lack of adequate medical treatment amounted to inhuman and degrading treatment within the meaning of Article 3.

Conclusion: violation (unanimously).

Article 5: The Court reiterated that the starting-point for determining whether there has been a deprivation of liberty has to be the concrete situation of the individual concerned, with account being taken of a whole range of factors including the type, duration, effects and manner of implementation of the measure in question. The applicant had been placed for thirty days in a detention centre that was closed and guarded to exclude any possibility of leaving the premises without authorisation. There was an entry checkpoint and an alarm to prevent inmates from escaping. Inmates were under strict, almost constant, supervision. They were routinely searched on admission and all their personal belongings were confiscated. Discipline was maintained by duty squads and breaches were punishable by disciplinary

1. Document CPT/Inf (2006) 15, § 11.

sanctions. These elements were clearly indicative of a deprivation of liberty.

As regards the grounds for the deprivation of liberty, the Court could not accept the Government's submission that the detention had been intended for educational supervision within the meaning of Article 5 § 1 (d). While sub-paragraph (d) did not preclude an interim custody measure being used as a preliminary to a regime of supervised education, it had to be speedily followed by actual application of a regime of educational supervision in a setting designed and with sufficient resources for that purpose. The applicant had been placed in the temporary detention centre for the purpose of "behaviour correction" and the prevention of delinquent acts. His detention was not an interim custody measure preliminary to his placement in a closed educational institution, or to any other measure involving educational supervision. He had not received regular and systematic educational supervision, such education as he had been offered being purely incidental to the main purpose of preventing further delinquent acts. Accordingly, his detention did not come within sub-paragraph (d).

Nor did it come within sub-paragraphs (b) or (c) of Article 5 § 1 (detention to secure the fulfilment of an obligation prescribed by law or to prevent the commission of an offence). Although the domestic courts had identified the main purpose of the detention as being to prevent the commission of new delinquent acts, neither they nor the Government had identified any concrete and specific acts the applicant had to be prevented from committing. A general duty not to commit a criminal offence in the imminent future was not sufficient for this purpose. Further, as regards Article 5 § 1 (c), the applicant's detention did not meet the requirement that it should be "effected for the purpose of bringing him before the competent legal authority".

Lastly, since the applicant was not convicted of an offence because he had not reached the statutory age of criminal responsibility, his detention could not be regarded as "lawful detention after conviction by a competent court" within the meaning of Article 5 § 1 (a). Sub-paragraphs (e) and (f) of Article 5 § 1 were clearly not relevant.

The applicant's detention in the temporary detention centre for minor offenders therefore did not have any legitimate purpose under Article 5 § 1 and was accordingly arbitrary.

Conclusion: violation (unanimously).

Article 6 § 1 in conjunction with Article 6 § 3 (c) and (d)

(a) *Applicability* – Although the decision to place the applicant in the detention centre was taken in proceedings formally unrelated to the criminal inquiry, there was a close link between the two. Indeed the wording of both the applicable legal provisions and the decision clearly showed that his placement was a direct consequence of the prosecution authorities' finding that his actions had contained elements of the criminal offence of extortion. The applicant's thirty-day detention in a detention centre for minor offenders subject to a quasi-penitentiary regime after a finding that his actions contained elements of that offence contained punitive elements as well as elements of prevention and deterrence. Accordingly, the nature of the offence, together with the nature and severity of the penalty, were such that the proceedings against the applicant constituted criminal proceedings within the meaning of Article 6 of the Convention, which was therefore applicable.

(b) *Merits* – The applicant had not had an opportunity to contact his family or obtain legal assistance when questioned by the police. Given his young age, the circumstances surrounding the interview had been psychologically coercive and conducive to breaking down any resolve he might have had to remain silent. In addition, he had undoubtedly been affected by the restrictions on his access to a lawyer as his confession obtained without legal assistance had served as a basis for the finding that it was necessary to place him in the temporary detention centre. His defence rights had therefore been irretrievably prejudiced and the fairness of the proceedings had been undermined as a whole.

This was the first time the Court had had an opportunity to examine the special procedures applicable in Russia to minors who had committed a delinquent act before reaching the statutory age of criminal responsibility. Apart from the applicant's confession obtained without the benefit of legal advice and which was later repudiated, the statements by the neighbour and her son were the only, and thus the decisive, evidence against him. Yet no effort had been made to secure their appearance at court, and there had been no counterbalancing factors to compensate for the applicant's inability to cross-examine the witnesses.

Accordingly, and as a result of the special legal regime applicable to accused persons under the statutory age of criminal responsibility, the applicant's defence rights had been restricted to an extent incompatible with Article 6. In particular,

the Minors Act afforded legal assistance only from the time the case was transferred to a court, and failed to guarantee such important rights as the rights to cross-examine witnesses, not to incriminate oneself, or to the presumption of innocence. The applicant could not, therefore, be said to have received a fair trial.

Conclusion: violation (unanimously).

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

Airport security-check lasting several hours: *inadmissible*

Gahramanov v. Azerbaijan - 26291/06
Decision 15.10.2013 [Section I]

Facts – The applicant was stopped at Baku International airport during border control because his name appeared under the status "to be stopped" in the database of the State Border Service. He was taken to a separate room by the border-service officers and was ordered to wait there for further clarification of his situation. The applicant claimed that he spent some four hours in the room, whereas the Government claimed that it was only two hours. During that time the applicant was unable to leave or to contact anyone. After it turned out that his name had been flagged in the database owing to an administrative error (the failure to remove it following a presidential pardon for a criminal conviction) he was allowed to leave the airport. The cost of his missed flight ticket was reimbursed. Ultimately, the domestic courts dismissed his claims for compensation for unlawful deprivation of liberty.

Law – Article 5 § 1: Given the multitude of situations in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good, an air traveller must be seen as consenting to a series of security checks by choosing to travel by plane. Those measures might include identity checks, baggage searches or waiting for further inquiries to be made in order to establish whether he or she represents a security risk for the flight. Accordingly, where a passenger was stopped during airport border control in order to clarify his situation for no more than the time strictly necessary to accomplish the relevant formalities, no issue arose under Article 5 of the Convention.

The overall duration of the applicant's stay in the separate room could not have exceeded a few hours. When the border-service officers stopped him and asked him to wait in a separate room, they had reason to believe that further identity checks were necessary since his name was accompanied by a warning in their internal database. There was nothing to prove that the applicant's stay in the room had exceeded the time strictly necessary for searching his baggage and fulfilling the relevant administrative formalities for the clarification of his situation. Once it had been established that the warning in the database was the result of an administrative error, the applicant had been free to leave the airport immediately. His detention did therefore not amount to a deprivation of liberty within the meaning of Article 5.

Conclusion: inadmissible.

Article 5 § 1 (d)

Educational supervision

Thirty-day placement of minor in detention centre for young offenders to "correct his behaviour": *violation*

Blokhin v. Russia - 47152/06
Judgment 14.11.2013 [Section I]

(See Article 5 § 1 above, page 10)

Article 5 § 1 (e)

Persons of unsound mind

Preventive detention of mental-health patient in prison wing: *violation*

Glien v. Germany - 7345/12
Judgment 28.11.2013 [Section V]

Facts – Following the European Court's judgments in *M. v. Germany* and various follow-up cases, the German Federal Constitutional Court held in a judgment of 4 May 2011 that provisions on the retrospective prolongation of preventive detention were incompatible with the German Basic Law. It further ordered that all provisions declared incompatible with the Basic Law remained applicable until the entry into force of new legislation or 31 May 2013 at the latest. In relation to detainees whose preventive detention had been prolonged or ordered retrospectively, it required domestic

courts dealing with the execution of sentences to examine without delay whether, owing to specific circumstances relating to their person or conduct, the detainees were highly likely to commit the most serious crimes of violence or sexual offences and if, additionally, they suffered from a mental disorder within the meaning of the newly enacted Therapy Detention Act. Detainees in respect of whom these pre-conditions were not met had to be released by no later than 31 December 2011.

The applicant was convicted in 1997 of child sexual abuse and sentenced to four years' imprisonment. The trial court also made an order for his preventive detention because of the risk of his reoffending. The preventive detention began in 2001 and was renewed at regular intervals. At the end of the maximum ten-year period that had been applicable when the offences were committed and in reliance on the Constitutional Court's judgment of 4 May 2011 the applicant sought his immediate release. His application was refused in September 2011 on the grounds that he was suffering from dissocial personality disorder and paedophilia which, though not pathological, constituted a mental disorder for the purposes of the Therapy Detention Act and made it highly likely that he would reoffend. The conditions laid down by the Constitutional Court for his continued preventive detention were therefore satisfied.

Law – Article 5 § 1: The Court considered only the period relating to the extension of the applicant's preventive detention ordered in September 2011 which the Government had argued was justified under sub-paragraph (e) of Article 5 § 1 as being detention of a person "of unsound mind". The Court noted that while it had not established a precise definition of the term "persons of unsound mind" in its case-law, the permissible grounds for deprivation of liberty under Article 5 were to be interpreted narrowly. A mental condition had to be of a certain gravity in order to be considered a "true" mental disorder for the purposes of Article 5 § 1 (e). In addition, the detention of a person as a mental-health patient was covered by Article 5 only if it was effected in a hospital, clinic or other appropriate institution.

The Court considered that the notion of "persons of unsound mind" in Article 5 § 1 (e) of the Convention might be more restrictive than the notion of "mental disorder" referred to in the German Therapy Detention Act. However, it did not have to give a definitive answer to the question of the applicant's classification as a "person of unsound mind" in the present case since, in any event, he could not be said to have been held in a "hospital, clinic or other appropriate institution".

Although the Government had argued that the applicant's detention in a separate prison wing for persons in preventive detention had differed significantly from the execution of a normal prison sentence in that detainees had more freedom of movement and more possibilities for leisure activities than prisoners, the Court was not persuaded that he had been provided with a medical or therapeutic environment appropriate to a person detained as a mental-health patient. While, acknowledging the extensive measures Germany had recently initiated with a view to preventive detention becoming adapted in the future to constitutional and Convention requirements, notably through the provision of an environment significantly different from normal imprisonment, and while accepting that a transitional period might be necessary to implement these changes, the Court was not convinced that the domestic courts could not meanwhile have adapted the applicant's detention conditions to the needs of a person "of unsound mind", for example, by ordering his transfer to a psychiatric hospital or other appropriate institution. Indeed, the Therapy Detention Act expressly provided for just such a possibility. Prolonging the applicant's preventive detention in a prison wing had not been the only alternative to immediate release available to the authorities.

The applicant's preventive detention in the prison wing was therefore not justified under Article 5 § 1 (e). Further, his continued preventive detention beyond the former ten-year time-limit could no longer be justified under Article 5 § 1 (a) as it was no longer detention of a person "after conviction", nor could it be justified under any of the other sub-paragraphs of Article 5 § 1.

Conclusion: violation (unanimously).

Article 7 § 1: As in *M. v. Germany*, in which the Court had found a violation of Article 7, the applicant's preventive detention had been extended with retrospective effect beyond the maximum duration permitted at the time he committed the offences. The Court therefore had to determine whether his detention for that additional period amounted to a "penalty", a notion which for the purposes of Article 7 § 1 of the Convention was autonomous in scope. The starting-point and thus a very weighty factor in this assessment was that the preventive detention was imposed following his conviction of criminal offences. As regards the nature of the preventive detention, it entailed a

deprivation of liberty and the alterations to the detention regime were not such as to distinguish it from a prison sentence. As regards its purpose, although the respondent State had initiated extensive measures with a view to gearing preventive detention, through the provision of adequate treatment, towards reducing detainees' dangerousness and creating the conditions for their release, the applicant had not been provided with any such additional measures. The preventive detention had been ordered by the sentencing courts and its execution was determined by the courts responsible for the execution of sentences. Finally, as regards the severity of the measure, it still entailed detention with no maximum duration and no possibility of release unless a court found that it was not highly likely that the applicant would commit the most serious offences or that he was suffering from a mental disorder. Indeed, preventive detention remained among the most severe measures possible under the German Criminal Code and in the applicant's case had lasted approximately three times the length of his prison sentence.

The applicant's preventive detention in the period beyond the maximum permitted duration before the law was retrospectively changed therefore had to be classified as a "penalty" for the purposes of Article 7 § 1.

Conclusion: violation (unanimously).

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

(See *M. v. Germany*, 19359/04, 17 December 2009, Information Note 125. See also *Schmitz v. Germany* (30493/04) and *Mork v. Germany* (31047/04 and 43386/08), both judgments of 9 June 2011 summarised in Information Note 142; and *O.H. v. Germany*, 4646/08, 24 November 2011, Information Note 146)

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Lack of right of appeal against sanctions imposed on applicants on basis of UN Security Council resolutions: *violation*

Al-Dulimi and Montana Management Inc. v. Switzerland - 5809/08
Judgment 26.11.2013 [Section II]

Facts – The first applicant is an Iraqi national who lives in Jordan and manages a company incorporated under Panamanian law and based in Panama (the second applicant). After the invasion of Kuwait by Iraq in August 1990, the UN Security Council adopted several resolutions inviting member and non-member States to freeze all funds and other financial assets and economic resources that came from Iraq. In November 2003 a sanctions committee was tasked with drawing up a list of the leading members of the former Iraqi regime and their next of kin, and locating the assets belonging to them or to other persons acting on their behalf or under their control. The sanctions committee placed the applicants on its list. Then the Security Council adopted a resolution creating a de-listing procedure. In August 1990 the Swiss Federal Council adopted an order introducing measures to freeze the assets and economic resources of the former Iraqi government and senior government officials and any companies or businesses controlled or managed by them. The Federal Department of Economics was responsible for drawing up a list of the assets concerned using data supplied by the United Nations. The applicants had been on the list since May 2004. The Federal Council further adopted an order, valid until 30 June 2010, confiscating the Iraqi assets and economic resources that had been frozen and transferring them to the Development Fund for Iraq. According to the applicants, their assets in Switzerland had been frozen since August 1990 and proceedings to confiscate them had been under way since the entry into force of the confiscation order in May 2004. The applicants applied by letter in August 2004 to have their names taken off the list and the confiscation proceedings against their assets stayed. When that letter failed to produce the desired effect, the applicants requested by letter in September 2005 that the confiscation proceedings be conducted in Switzerland. In spite of the applicants' objections, the Federal Department of Economic Affairs ordered the confiscation of their assets and explained that the sums would be transferred to the bank account of the Development Fund for Iraq within ninety days of the decision becoming effective. In support of its decision, it noted that the applicants' names were on the lists of people and entities drawn up by the sanctions committee, that Switzerland was bound to implement Security Council resolutions, and that names could be removed from the appendix to the order concerning Iraq only by decision of the sanctions committee. The applicants applied to the Federal Court to have the decision set aside. By three almost identical judgments their appeals were dismissed on the

merits. The applicants submitted a de-listing request. The request was rejected on 6 January 2009.

Law – Article 6 § 1

(a) *Coexistence of the Convention safeguards and the obligations imposed on States by Security Council resolutions* – The Convention did not prevent Contracting Parties from transferring sovereign powers to an international organisation for the purposes of cooperation in certain fields of activity. State action taken in compliance with such legal obligations was justified as long as the relevant organisation was considered to protect fundamental rights in a manner which could be considered at least equivalent to that provided for under the Convention. States nevertheless remained responsible under the Convention for all acts falling outside their strict international legal obligations, particularly where they had exercised discretionary powers. Most cases coming before the Court relating to the equivalent protection criterion concerned the relationship between European Union law and the guarantees deriving from the Convention. Nevertheless, the Court had never excluded the application of this criterion to a situation concerning compatibility of acts originating from other international organisations with the Convention. The instant case could be considered in the light of the equivalent protection criterion, notably because the relevant Security Council resolutions did not confer discretionary powers on the States in question in implementing the consequent obligations. The system in place allowing the applicants to apply to a "focal point" for removal from the lists drawn up by the Security Council did not provide equivalent protection to that required by the Convention. It lacked a supervisory mechanism comparable to the Office of the Ombudsperson set up under the sanctions regime against the former Iraqi Government. Furthermore, the procedural defects of the sanctions regime could not be considered to have been offset by internal human rights protection mechanisms, given that the Federal Court had refused to review the merits of the impugned measures. The presumption of equivalent protection was therefore not applicable in this case. It was consequently for the Court to determine the merits of the complaint concerning the right of access to a court.

(b) *Examination of the complaint concerning access to a court* – The applicants, who had tried in vain to appeal to the Swiss courts against the confiscation of their assets, had been restricted in their right of access to a court. The restriction had pursued a legitimate aim, namely the maintenance of peace and international security. The refusal by the national courts, including the Federal Court, to examine the merits of the applicants' complaints concerning the confiscation of their assets had been motivated by their wish to ensure effective implementation, at domestic level, of the obligations arising from the Resolution in question. The Resolution, which provided for the freezing and confiscation of assets, had not been adopted in response to any imminent terrorist threat but had been geared to restoring the Iraqi Government's autonomy and sovereignty and securing to the Iraqi people the right freely to determine their political future and control their natural resources. Consequently, the impugned measures had been adopted in the wake of an armed conflict which had begun in 1990. Therefore, more differentiated, specifically targeted measures would probably be more conducive to the effective implementation of the Resolutions. Furthermore, the applicants' assets had been frozen in 1990 and their confiscation had been ordered on 16 November 2006. The applicants had therefore been deprived of access to their assets for a considerable period of time, even if the confiscation decision had not yet been implemented. The applicants were entitled under Article 6 § 1 of the Convention to have these measures reviewed by a national court. The Federal Court had ruled that it was incumbent on the lower court to grant the first applicant a brief final period within which to submit to the Sanctions Committee a fresh request for de-listing in accordance with the improved arrangements set out in Resolution 1730 (2006), including the setting up of a focal point for submission of de-listing requests. However, that request had been rejected on 6 January 2009.

Accordingly, in the absence of any effective and independent judicial review, at UN level, of the legitimacy of registering individuals and entities on their lists, it was vital that such individuals and entities should be authorised to request an examination by the national courts of any measure adopted in application of the sanctions regime. As no such examination had been available to the applicants, it followed that the very essence of their right of access to a court had been infringed.

Conclusion: violation (four votes to three).

Article 41: claim in respect of damage dismissed.

(See also *Nada v. Switzerland* [GC], 10593/08, 12 September 2012, Information Note 155; and *Al-Jedda v. the United Kingdom* [GC], 27021/08, 7 July 2011, Information Note 143)

Article 6 § 1 (criminal)

Criminal charge

Proceedings leading to minor's placement in detention centre for young offenders to "correct his behaviour": *Article 6 applicable*

Blokhin v. Russia - 47152/06
Judgment 14.11.2013 [Section I]

(See Article 5 § 1 above, page 10)

Fair hearing
Equality of arms

Use of evidence obtained through incitement in context of an unlawful undercover operation: *violation*

Sepil v. Turkey - 17711/07
Judgment 12.11.2013 [Section II]

Facts – The facts of the case were disputed between the parties. According to official records, in 2005 two undercover police officers contacted the applicant by telephone to buy heroin. After meeting at an agreed location, the officers purchased the heroin and arrested the applicant immediately afterwards. According to the applicant, he had not sold them the heroin, and the police officers had only found the drugs after searching him. In 2006 the domestic court found the applicant guilty of drug-trafficking and sentenced him to six years and three months' imprisonment. The Court of Cassation upheld that judgment.

Law – Article 6 § 1: The Court recalled that, while the use of undercover agents could be tolerated provided that it was subject to clear restrictions and safeguards, the public interest could not justify the use of evidence obtained as a result of police incitement, as it would expose the accused to the risk of being definitively deprived of a fair trial from the outset. In the applicant's case, the police had not confined themselves to investigating criminal activity in an essentially passive manner but had exerted such an influence on the applicant as to incite the commission of an offence that he would have otherwise not committed. Therefore, the police activity amounted to incitement to commit crime. Moreover, the police had performed the operation leading to the applicant's arrest of their own accord, and not on the basis of a decision of a judge or public prosecutor, contrary to the legal provision regulating the appointment of undercover agents, and without any judicial supervision. As for the criminal proceedings leading to the applicant's conviction, the trial court had ignored the applicant's repeated objections concerning the unlawfulness of the operation and the use of evidence obtained by police incitement. It had also failed to consider substantial evidence by refusing to examine records of the applicant's telephone conversations prior to his arrest, even though this could have proved that the police had not in fact tried to buy heroin from him. Moreover, the trial court had not tried to establish the reasons for the police operation or to determine whether the police officers had acted in compliance with domestic law. Its failure to analyse the relevant factual and legal elements, which would have helped it to establish whether there was incitement, in particular having regard to the fact that the police intervention had not complied with domestic law, had thus deprived the applicant's trial of the requisite fairness.

Conclusion: violation (unanimously).

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

(See also *Khudobin v. Russia*, 59696/00, 26 October 2006, Information Note 90)

Article 6 § 3

Rights of defence

Lack of adequate procedural guarantees in proceedings leading to minor's placement in detention centre for young offenders to "correct his behaviour": *violation*

Blokhin v. Russia - 47152/06
Judgment 14.11.2013 [Section I]

(See Article 5 § 1 above, page 10)

ARTICLE 7

Article 7 § 1

Heavier penalty
Retroactivity

Retrospective extension of preventive detention from a maximum of ten years to an unlimited period of time: *violation*

Glien v. Germany - 7345/12
Judgment 28.11.2013 [Section V]

(See Article 5 § 1 (e) above, page 12)

ARTICLE 8

Positive obligations
Respect for private life

Lack of clear statutory provisions criminalising act of covertly filming a naked child: *violation*

Söderman v. Sweden - 5786/08
Judgment 12.11.2013 [GC]

Facts – 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. However, his conviction was 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 153).

Law – Article 8: The Court endorsed the domestic court's finding that the stepfather's act had constituted a violation of the applicant's personal integrity. Even though the event in question had not involved any physical violence, abuse or contact, it had affected the applicant in highly intimate aspects of her private life. There was no evidence that the domestic authorities had failed to comply with their obligation to conduct an effective prosecution. The question before the Court was therefore whether, in the circumstances of the case, Sweden had had an adequate legal framework to protect the applicant against the actions of her stepfather, in compliance with its obligations under Article 8. The Grand Chamber chose a different approach from that followed by the Chamber, which had affirmed that "only significant flaws in legislation and practice, and their application, would amount to a breach of the State's positive obligations under Article 8". Such a significant-flaw test, while understandable in the context of investigations, had no meaningful role in an assessment as to whether the respondent State had had in place an adequate legal framework in compliance with its positive obligations since the issue before the Court concerned the question of whether the law had afforded an acceptable level of protection to the applicant in the circumstances.

As regards the possibility that the stepfather's act could have constituted attempted child pornography under the Penal Code, the Court was not convinced that the act had been covered by that offence. There was no information that the prosecutor had considered indicting the stepfather with that crime. Instead, the Government had enumerated a number of reasons why the prosecutor might have decided not to do so; in particular difficulties in providing sufficient evidence to show that there had been a "pornographic" picture. According to the applicant, even if the film – which had been destroyed – had still existed, the material would hardly have qualified as pornographic. The term "pornographic picture" was not defined in the Swedish Penal Code and the preparatory works on the provision on child pornography underlined that its intention was not to criminalise all pictures of naked children.

As regards the provision on the offence of sexual molestation under the Penal Code – which penalised in particular exposure in an offensive manner and indecent behaviour by word or deed – the appeal court had found that the stepfather could not be held criminally responsible for the isolated act of filming the applicant without her knowledge. Under the Swedish law in force at the time, it had been a requirement for the offence of sexual molestation to be made out that the offender intended the victim to find out about it or was indifferent to the risk of his or her doing so. However, that requirement had not been fulfilled in the applicant's case. It was not on account of a lack of evidence that the stepfather had been acquitted of sexual molestation, but rather because, at the time, his act could not have constituted sexual molestation. The provision on sexual molestation as worded at the material time could not legally have covered the act in question and thus had not protected the applicant against the lack of respect for her private life.

The gaps in protection of her rights had not been remedied by any other provision of criminal law at the time. Indeed, the absence of a provision covering the isolated act of covert or non-consensual filming or photographing had long been a matter of concern in Sweden. New legislation, designed to cover an act such as the one in the applicant's case, had recently been adopted and had entered into force in 2013.

In the instant case recourse to the criminal law was, in the Court's view, not necessarily the only way the respondent State could have fulfilled its obligations under Article 8. As regards civil-law remedies, when acquitting the stepfather, the appeal court had also dismissed the applicant's civil claim for damages. Under the Code of Judicial Procedure, when a civil claim was joined to a prosecution, the courts' finding on the question of criminal liability was binding for the decision on the civil claim. There were, moreover, no other grounds on which the applicant could have relied in support of her claim for damages. Finally, the Court was not persuaded that the Swedish courts could have awarded her compensation on the basis of finding a breach of the Convention alone.

In conclusion, the Court was not satisfied that the relevant Swedish law, as in force at the time, had ensured protection of the applicant's right to respect for her private life in a manner that complied with the State's obligations under Article 8. The act committed by her stepfather had violated her integrity and had been aggravated by the fact that she was a minor, that the incident had taken place in her home, and that the offender was a person whom she was entitled and expected to trust.

Conclusion: violation (sixteen votes to one).

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

Respect for private life

Alleged failure to secure the right to reputation of an applicant whose father was allegedly defamed: *no violation*

Putistin v. Ukraine - 16882/03
Judgment 21.11.2013 [Section V]

Facts – The applicant is the son of Mikhail Putistin, now deceased, a former Dynamo Kyiv football player who took part in a game known as the "Death Match" in 1942. The game was played between a team which included professional players from Dynamo Kyiv and a team of German pilots, soldiers and technicians. Against the odds and despite allegations that the match was refereed unfairly by an SS officer, the German team was defeated 5-3. Allegedly as a result of their victory, the Dynamo Kyiv team suffered reprisals. A number of Ukrainian players were sent to a local concentration camp, where four of them were executed. In 2002 the Kyiv authorities commemorated the 60th anniversary of the match, which received wide media coverage. In 2001 the newspaper *Komsomolska Pravda* published an article entitled "The Truth about the Death Match". It included an interview with a director and producer who discussed the possibility of making a film about the game, and a picture of the match poster from 1942. The poster contained the names of the players (including Mikhail Putistin), but these were not legible in the newspaper. The article included a quotation from the producer, who stated that there were only four players who had been executed, and that other players had "collaborated with the Gestapo". Another part of the article listed the names of the players who had been executed, which did not include Mikhail Putistin. The applicant sued the newspaper and the journalist, seeking rectification of the article. He claimed that it suggested that his father had collaborated with the Gestapo. He also provided evidence that the archives held no information indicating that his father had worked for the Nazis, and documents establishing that his father had been taken to a concentration camp. The domestic courts rejected his claim, finding that the applicant had not been directly affected by the publication: his father was not directly mentioned in the text, and it was not possible to read his name on the photograph of the match poster published with the article.

Law – Article 8: The Court could accept that the reputation of a deceased member of a person's family might, in certain circumstances, affect that person's private life and identity, and thus come within the scope of Article 8. However, like the national courts, it found that the applicant had not been directly affected by the publication. Though a quotation in the article had suggested that some members of the Ukrainian team had collaborated with the Gestapo, none of the pictures or words referred to the applicant's father. In order to interpret the article as claiming that the applicant's father had collaborated with the Gestapo, it would be necessary for a reader to know that the applicant's father's name had appeared on the original poster of the match. The names appearing under the photograph of the poster as reproduced by the

paper were illegible. The level of impact on the applicant had thus been quite remote. Moreover, the domestic courts had been obliged to have regard to the rights of the newspaper and the journalist and to balance those against the rights of the applicant. The article had informed the public of a proposed film on an historical subject. It had been neither provocative nor sensationalist. As the applicant's Article 8 rights had been affected only marginally and in an indirect manner, the domestic courts had struck an appropriate balance between the competing rights.

Conclusion: no violation (unanimously).

Respect for family life

Failure to conduct detailed examination of all relevant points when deciding whether to return a child pursuant to Hague Convention: *violation*

X v. Latvia - 27853/09
Judgment 26.11.2013 [GC]

Facts – The applicant lived in Australia and in 2005 gave birth to a daughter while living with her partner T. The child's birth certificate did not state the father's name and no paternity test was ever carried out. In 2008 the applicant left Australia with her daughter and returned to her native Latvia. T. then filed a claim with the Australian courts seeking to establish his parental rights in respect of the child, alleging that the applicant had taken the child without his consent when leaving Australia, contrary to the Hague Convention on the Civil Aspects of International Child Abduction. The Australian courts decided that T. and the applicant had joint custody of the child and that the case would be further reviewed once the child was returned to Australia. When the competent Latvian authorities received notification from the Australian authorities, they heard representations from the applicant, who contested the applicability of the Hague Convention on the ground that she had been the child's sole guardian. The Latvian courts granted T.'s request, concluding that it was not for them to challenge the conclusions reached by the Australian authorities concerning his parental responsibility. Consequently, the applicant was ordered to return the child to Australia within six weeks. In March 2009 T. met the applicant, took the child and returned with her to Australia. Ultimately, the Australian courts ruled that T. was the sole guardian and that the applicant was only allowed to visit the child under the supervision of social services and was not allowed to speak to her in Latvian.

In a judgment of 13 December 2011 (see Information Note 147), a Chamber of the Court concluded, by five votes to two, that there had been a violation of Article 8 of the Convention, considering that the failure to conduct an in-depth examination of all relevant factors when the Latvian courts decided that the applicant was to return her daughter in application of the Hague Convention had rendered that interference disproportionate.

Law – Article 8: The Court was called on to examine whether the interference with the applicant's rights under Article 8, resulting from the decisions of the national courts, had been "necessary in a democratic society". To that end, the Court reiterated that, in determining whether the decisions of the national courts had struck the fair balance that must exist between the competing interests at stake – those of the child, of the two parents, and of public order – within the margin of appreciation afforded to States in such matters, the best interests of the child had to be of primary consideration. In that connection, in order to achieve a harmonious interpretation of the European Convention and the Hague Convention, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the said Convention had, first of all, genuinely to be taken into account by the requested court, which had to issue a decision that was sufficiently reasoned on this point, and then to be evaluated in the light of Article 8 of the European Convention. It followed that Article 8 of the Convention imposed on the domestic authorities a procedural obligation, requiring that, when assessing an application for a child's return, the courts had to consider arguable allegations of a "grave risk" for the child in the event of return and make a ruling giving specific reasons. As to the exact nature of the "grave risk", the exception provided for in Article 13 (b) of the Hague Convention concerned only the situations which go beyond what a child could reasonably bear.

In the present case, the Court noted that, before the Latvian courts, the applicant had adduced several factors to establish that the child's return to Australia would entail a "grave risk" for her child; she had also submitted that T. had criminal convictions and referred to instances of ill-treatment by him. In particular, in her appeal pleadings, the applicant had submitted a psychologist's certificate concluding that there existed a risk of trauma for the child in the event of immediate separation from

her mother. Although it was for the national courts to verify the existence of a "grave risk" for the child, and the psychological report was directly linked to the best interests of the child, the regional court had refused to examine the conclusions of that report in the light of the provisions of Article 13 (b) of the Hague Convention. At the same time, the national courts had also failed to deal with the issue of whether it was possible for the mother to follow her daughter to Australia and to maintain contact with her. As the national courts had failed to carry out an effective examination of the applicant's allegations, the decision-making process under domestic law did not satisfy the procedural requirements inherent in Article 8 of the Convention, and the applicant had therefore suffered a disproportionate interference with her right to respect for her family life.

Conclusion: violation (nine votes to eight).

Article 41: no claim

for damages submitted.

(See also *Maumousseau and Washington v. France*, 39388/05, 6 December 2007, Information Note 103, and *Neulinger and Shuruk v. Switzerland* [GC], 41615/07, 6 July 2010, Information Note 132)

ARTICLE 10

Freedom of expression

Dismissal from the armed forces at retirement age, but allegedly on ground of personal opinions: *no violation*

Jokšas v. Lithuania - 25330/07
Judgment 12.11.2013 [Section II]

Facts – In 2002 the applicant was employed by the Lithuanian armed forces on a five-year contract which, under specific circumstances, could be rescinded even before the expiry date. In 2006 a Lithuanian newspaper published an article in which the applicant criticised new legislation for inadequately protecting the rights of servicemen in disciplinary proceedings. An internal investigation was initiated, but was eventually discontinued on the ground that the applicant had not violated military discipline. In 2006 the applicant's contract was terminated because he had reached retirement age, in accordance with the legal provisions in force. The applicant challenged this decision before the administrative courts, alleging that he had been discriminated against on grounds of his personal opinions, and asked the courts to obtain and analyse evidence of other soldiers in his battalion who should also have been dismissed on grounds of age. The applicant's complaints were dismissed in a decision that was ultimately upheld by the Supreme Administrative Court.

Law – Article 6 § 1

(a) *Applicability* – The Government argued that Article 6 was not applicable to the applicant's case, because the dispute at issue could not be regarded as "civil" within the meaning of that provision. The Court noted that the domestic law provided the applicant with the right of access to court, which the applicant had exercised, claiming the right, which was "civil" in nature, to continue his professional military service until the expiry of his existing contract. The dispute before the domestic courts had been genuine and serious and the result of the proceedings directly decisive for the right in question. Article 6 was thus applicable.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – The Court noted that an allegation of discrimination was at the heart of the applicant's complaint before the domestic courts. Therefore, a comparison between his situation and that of the other servicemen who had allegedly been allowed to continue serving after reaching their retirement age but before the expiry of their contracts was indispensable for the applicant to be able to present his grievance. The domestic courts' failure to assist the applicant in obtaining evidence in this regard and to give it consideration, or at least to provide reasons why this was not necessary, had denied the applicant an essential means to argue his case. In disputes concerning civil rights, such as the present one, such a limited assessment could not be considered an effective judicial review under Article 6 § 1. Therefore, the proceedings before the domestic courts, taken as a whole, did not satisfy the requirements of a fair and public hearing within the meaning of Article 6 § 1.

Conclusion: violation (unanimously).

Article 10, alone and in conjunction with Article 14: The Court recalled that Article 10 applied also to military personnel. While Contracting States could legitimately impose restrictions on freedom of expression where there was a real threat to military discipline, they could not rely on such rules for the purpose of frustrating the expression of opinions, even if these were directed against the army as an institution. The internal inquiry into the applicant's actions regarding his publication in

the newspaper was terminated on the ground that he had not violated any legal provisions, and no disciplinary sanction had been imposed on him. Therefore, as far as it concerned that inquiry in itself, the applicant could not claim to be a victim of a violation of the Convention. Furthermore, in the applicant's case, no new requirements for his post, which he did not meet, had been introduced after the impugned publication nor had any of the applicant's army superiors made public statements to the effect that he should be discharged from service due to his opinions. Moreover, the obligation to terminate contracts when the retirement age was reached was an established practice of the domestic courts, which had also previously been confirmed by the Supreme Administrative Court. As for the applicant's colleagues who had allegedly been treated differently from him although they were in a similar situation, the Court noted that they were entitled to serve until the expiry of their contracts, despite the fact that they had reached retirement age because, unlike the applicant, they all held military specialist codes. Therefore, the applicant had not been discriminated against.

Conclusion: no violation (unanimously).

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

(See also *Grigoriades v. Greece*, 24348/94, 25 November 1997; *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, 15153/89, 19 December 1994)

Freedom to receive information
Freedom to impart information

Refusal by regional authority to provide copy of its decisions to an association wishing to study the impact of property transfers on agricultural and forest land: *violation*

Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria - 39534/07
Judgment 28.11.2013 [Section I]

Facts – The applicant was a registered association whose aims were to research the impact of transfers of ownership of agricultural and forest land on society and to give opinions on relevant draft legislation. In that connection, in April 2005 it asked the Tyrol Real Property Transactions Commission, a regional authority whose approval was required for certain agricultural and forest land transactions, to provide it with copies of all decisions it had issued since the beginning of the year. It accepted that details of the parties and other sensitive information could be deleted and offered to reimburse the costs this entailed. The Commission refused citing a lack of time and personnel. Its decision was upheld by the domestic courts.

Law – Article 10: The refusal to afford the association, which was involved in the legitimate gathering of information of public interest, access to the Commission's decisions had amounted to interference with its right to receive and impart information under Article 10 of the Convention. The interference was prescribed by law and pursued the legitimate aim of protecting the rights of others.

The Court had noted in its *Társaság a Szabadságjogokért* judgment that it had advanced towards a broader interpretation of the notion of the "freedom to receive information" encompassing recognition of a right of access to information. It also drew a parallel to its case-law concerning freedom of the press, stating that the most careful scrutiny was called for when authorities enjoying an information monopoly interfered with the exercise of the function of a social watchdog.

Accordingly, although the Court did not accept the association's submission that a general obligation to publish all decisions in an electronic database or to provide anonymised paper copies upon request could be inferred from the Court's case-law under Article 10, it nevertheless had to examine whether the reasons given by the domestic authorities for refusing the association's request were "relevant and sufficient" in the specific circumstances of the case. It was true that, unlike the position in *Társaság a Szabadságjogokért*, the request for information in the instant case was not confined to a particular document, but concerned a series of decisions issued over a period of time. In addition, the need to anonymise the decisions and send copies to the association would have required substantial resources. Nevertheless, the association had accepted that personal data would have to be removed from the decisions and had offered to reimburse the cost of producing and mailing the requested copies. In addition, it was striking that none of the decisions of the Commission – a public authority responsible for deciding disputes over "civil rights" – were published, either electronically or otherwise. Consequently, much of the anticipated difficulty referred to by the Commission had

been of its own making and its choice not to publish any of its decisions.

In sum, the reasons relied on by the domestic authorities for refusing the association's request for access to the Commission's decisions were "relevant", but not "sufficient". While it was not for the Court to establish how the Commission should have granted the association access to its decisions, a complete refusal to give it access to any of its decisions was disproportionate and could not be regarded as having been necessary in a democratic society.

Conclusion: violation (six votes to one).

Article 41: No claim made in respect of damage.

The Court further held unanimously that there had been no violation of Article 13 of the Convention.

(See *Társaság a Szabadságjogokért v. Hungary*, 37374/05, 14 April 2009, Information Note 118)

ARTICLE 11

Freedom of peaceful assembly

Criminal convictions for participating in non-violent demonstration: *violation*

Kudrevičius and Others v. Lithuania - 37553/05
Judgment 26.11.2013 [Section II]

Facts – In May 2003 the Lithuanian authorities issued farmers with permits to hold peaceful assemblies in selected areas. The farmers held a peaceful demonstration, but after it dispersed it caused major traffic disruptions on three main roads. The five applicants, who had participated in the demonstration, were prosecuted and in September 2004 found guilty of having incited or participated in riots, an offence under Article 283 § 1 of the Criminal Code They were each given a sixty-day custodial sentence, suspended for one year, and ordered not to leave their places of residence for more than seven days during that period without the authorities' prior agreement. One of the applicants was also ordered to pay compensation in respect of pecuniary damage that had been sustained by a transport company. Another farmer was punished under administrative law for an identical violation.

Law – Article 11: Although they had not been involved in any violence, the applicants had incurred a sanction for actions which had been qualified by the authorities as having seriously violated public order. One of the applicants was also ordered to pay compensation. Accordingly, the applicants' conviction for participating in the gathering had amounted to an interference with their right to freedom of peaceful assembly. Even assuming that such interference was "prescribed by law" and in pursuit of the legitimate aims of preventing disorder and protecting the rights and freedoms of others, it was not proportionate.

Any demonstration in a public place inevitably caused a certain level of disruption to ordinary life, including disruption of traffic, and it was important for the public authorities to show a degree of tolerance towards peaceful gatherings if freedom of assembly, as guaranteed by Article 11 of the Convention, was not to be deprived of all substance. Whilst giving due regard to the Government's argument that pecuniary damage had been caused to transport companies, the Court nonetheless observed that only one company had sued the farmers for that reason. It was of particular importance that the demonstrating farmers had not only allowed passenger vehicles and vehicles carrying dangerous substances through, but that they had also allowed cars and vehicles carrying goods through ten at a time on each side of the road. Furthermore, good-faith negotiations between the farmers and the Government had been on-going during the demonstrations. The applicants had demonstrated their flexibility and readiness to cooperate with other road users and the element of violence had clearly been absent. On this point it was paramount to note that, in contrast with the position in *Barraco v. France*, the Lithuanian courts had considered the case in the context of the law on riots and that context had not allowed for proper consideration of the proportionality of the restriction on the right of assembly and thus had significantly restricted their analysis. Another farmer, who had taken others to block a highway and had obstructed traffic by pushing a cart in the middle of the road, had merely been charged with an administrative offence under the road-traffic rules. The actions of the five applicants and the other farmer appeared to have been similar in nature, thus representing a similar degree of danger. However, the other farmer had escaped with nothing but a modest administrative fine, whereas the five applicants had had to go through the ordeal of criminal proceedings and had been given a custodial sentence. Although the sentence had been suspended for one year, they had also been ordered for the duration of that period not to leave their places of residence for more than seven days with-

out the authorities' prior approval. In these circumstances, the applicants' conviction of the criminal offence had not been a necessary and proportionate measure in order to achieve the legitimate aims pursued.

Conclusion: violation (four votes to three).

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

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

ARTICLE 14

Discrimination (Article 8)

Exclusion of same-sex couples from "civil unions": *violation*

Vallianatos and Others v. Greece - 29381/09 and 32684/09
Judgment 7.11.2013 [GC]

Facts – The first application was lodged by two Greek nationals, and the second by six Greek nationals and an association whose aims include providing psychological and moral support to gays and lesbians. On 26 November 2008 Law no. 3719/2008, entitled "Reforms concerning the family, children and society", entered into force. It introduced an official form of partnership for unmarried couples called a "civil union", which was restricted to different-sex couples, thereby excluding same-sex couples from its scope.

Law – Article 14 in conjunction with Article 8

(a) *Applicability* – The applicants had formulated their complaint under Article 14 taken in conjunction with Article 8, and the Government did not dispute the applicability of those provisions. The Court found it appropriate to follow that approach. Furthermore, the applicants' relationships fell within the notion of "private life" and that of "family life", just as would the relationships of different-sex couples in the same situation. Article 14 taken in conjunction with Article 8 was therefore applicable.

(b) *Merits* – The applicants were in a comparable situation to different-sex couples with regard to their need for legal recognition and protection of their relationships. However, section 1 of Law no. 3719/2008 expressly reserved the possibility of entering into a civil union to two individuals of different sex. Accordingly, by tacitly excluding same-sex couples from its scope, the Law in question introduced a difference in treatment based on the sexual orientation of the persons concerned.

The Government relied on two sets of arguments to justify the legislature's choice not to include same-sex couples in the scope of the Law. Firstly, they contended that if the civil unions introduced by the Law were applied to the applicants, this would result for them in rights and obligations – in terms of their property status, the financial relations within each couple and their inheritance rights – for which they could already provide a legal framework under ordinary law, that is to say, on a contractual basis. Secondly, the Law in question was designed to achieve several objectives, including strengthening the legal status of children born outside marriage and making it easier for parents to raise their children without being obliged to marry. That aspect, they argued, distinguished different-sex couples from same-sex couples, since the latter could not have biological children together. The Court considered it legitimate from the standpoint of Article 8 of the Convention for the legislature to enact legislation to regulate the situation of children born outside marriage and indirectly strengthen the institution of marriage within Greek society, by promoting the notion that the decision to marry would be taken purely on the basis of a mutual commitment entered into by two individuals, independently of outside constraints or of the prospect of having children. The protection of the family in the traditional sense was, in principle, a weighty and legitimate reason which might justify a difference in treatment. It remained to be ascertained whether the principle of proportionality had been respected in the present case.

The legislation in question was designed first and foremost to afford legal recognition to a form of partnership other than marriage. In any event, even assuming that the legislature's intention had been to enhance the legal protection of children born outside marriage and indirectly to strengthen the institution of marriage, the fact remained that by enacting Law no. 3719/2008 it had introduced a form of civil partnership which excluded same-sex couples while allowing different-sex couples, whether or not they had children, to regulate numerous aspects of their relationship.

The Government's arguments focused on the situation of different-sex couples with children, without justifying the difference in treatment arising out of the legislation in question between same-sex and different-sex couples who were not

parents. The legislature could have included some provisions dealing specifically with children born outside marriage, while at the same time extending to same-sex couples the general possibility of entering into a civil union. Lastly, under Greek law, different-sex couples – unlike same-sex couples – could have their relationship legally recognised even before the enactment of Law no. 3719/2008, whether fully on the basis of the institution of marriage or in a more limited form under the provisions of the Civil Code dealing with *de facto* partnerships. Consequently, same-sex couples would have a particular interest in entering into a civil union since it would afford them, unlike different-sex couples, the sole basis in Greek law on which to have their relationship legally recognised.

Lastly, although there was no consensus among the legal systems of the Council of Europe member States, a trend was currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. Of the nineteen States which authorised some form of registered partnership other than marriage, Lithuania and Greece were the only ones to reserve it exclusively to different-sex couples. The fact that, at the end of a gradual evolution, a country found itself in an isolated position with regard to one aspect of its legislation did not necessarily imply that that aspect conflicted with the Convention. Nevertheless, in view of the foregoing considerations, the Court found that the Government had not offered convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of Law no. 3719/2008.

Conclusion: violation (sixteen votes to one).

Article 41: EUR 5,000 to each of the applicants, apart from the applicant association in application no. 32684/09, in respect of non-pecuniary damage.

Refusal to amend criminal record despite Constitutional Court ruling that provision under which applicants had been convicted was unconstitutional: *violation*

E.B. and Others v. Austria - 31913/07 et al.
Judgment 7.11.2013 [Section I]

Facts – Between 1983 and 2001 the applicants were convicted of offences under Article 209 of the Criminal Code, a provision that made homosexual relations between adults and consenting males aged between 14 and 18 illegal. Article 209 was subsequently abolished following a Constitutional Court ruling of 21 June 2002 that it led to arbitrary results and was not objectively justified. The provision was also found to be discriminatory by the European Court, as it applied only to homosexual relations between males, not females.[1] Following abolition of the offence the applicants applied to have their convictions deleted from their criminal records, but this was refused on the grounds that the Federal Ministry of the Interior had no power to delete a conviction that had been lawfully entered in the record.

Law – Article 14 in conjunction with Article 8: In view of its sensitive nature and the impact it could have on the person concerned, information contained in a criminal record was closely linked to private life, even though based on a court judgment delivered in public. Article 14 read in conjunction with Article 8 was therefore applicable.

It was within the normal course of events for provisions of the criminal law to be amended or repealed in order to adapt to changing circumstances within society. The mere fact that a criminal conviction that occurred in the past was based on a legal provision which had since lost force of law would normally have no bearing on whether the conviction should remain on a person's criminal record, as it concerned essentially a fact from the past. Abolishing an offence or substantially modifying its essential elements did not mean that the provision, at the time it was in force and applied, did not meet all the requirements under constitutional law.

The situation was different, however, in the applicants' case. Parliament had repealed and replaced Article 209 of the Criminal Code by a substantially different provision because the Constitutional Court had found that it was not objectively justified and was therefore unconstitutional. The European Court had found that convictions under that provision were discriminatory. The new provision of the Criminal Code had thus been introduced not as part of a general process of adapting the Criminal Code to the needs of a changing society, but to eliminate a provision that was in contradiction with the Constitution. That particular feature of the applicants' case had required a different response by the legislature. Since keeping an Article 209 conviction on criminal records could have particularly serious consequences for the persons concerned, when amending it in order

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1. See, for example, *L. and V. v. Austria*, 39392/98 and 39829/98, 9 January 2003, Information Note 49.

to bring it into conformity with modern standards of equality between men and women the legislature should have provided for appropriate measures such as introducing exceptions to the general rule of maintaining convictions on the record. The Government had not, however, provided any explanation for the failure to do so.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been a violation of the applicants' right under Article 13 of the Convention to an effective remedy.

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

Excessively formalistic interpretation of domestic law as regards paid maternity leave for adoptive mother: *violation*

Topčić-Rosenberg v. Croatia - 19391/11
Judgment 14.11.2013 [Section I]

Facts – The applicant, a self-employed entrepreneur, adopted a three-year old child. She requested paid maternity leave, but the local health-insurance fund refused on the grounds that under domestic law self-employed biological mothers were entitled to paid maternity leave only until the child's first birthday and adoptive mothers had to be treated in the same way. The applicant's appeals against that decision were dismissed. The relevant legislation changed in 2009, but was not applicable to the applicant's case.

Law – Article 14 in conjunction with Article 8: The purpose of parental or maternity leave for adoptive mothers was similar to that for biological mothers: to stay at home and look after the child. Moreover, States should refrain from actions which could prevent the development of ties between adoptive parents and their children or the children's integration into the adoptive family. If a State decided to create a parental- or maternity-leave scheme, it had to do so in a manner compatible with Article 14. The difference in treatment in the applicant's case was based on her status as an adoptive mother. Her request for paid maternity leave was refused because of an excessively formal and inflexible interpretation by the domestic authorities of the applicable legislation. In fact, the authorities had ignored the general principle recognised under the Labour Act that the position of the biological mother at the time of birth corresponded to that of an adoptive mother immediately after adoption. Instead, they interpreted the *lex specialis* applicable at the material time as granting to adoptive mothers the right to paid maternity leave only until the child's first birthday, irrespective of the child's age at the time of adoption. In such circumstances, the Court was unable to discern any objective and reasonable justification for the difference in treatment of the applicant. Even though the applicable law had subsequently changed and removed all doubt as to the necessity of treating adoptive mothers at the time of adoption equally to biological mothers at the time of birth, the administrative court and the Constitutional Court had ignored the relevant policies and principles of the domestic legal system when deciding the applicant's case.

Conclusion: violation (four votes to three).

Article 41: EUR 7,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Discrimination (Article 1 of Protocol No. 1)

Termination of payment of retirement pension on the ground that beneficiary was permanently resident abroad: *violation*

Pichkur v. Ukraine - 10441/06
Judgment 7.11.2013 [Section V]

Facts – In 1996 the applicant, who was then living in Ukraine, retired and began to receive a retirement pension. He emigrated to Germany in 2000. In 2005, after discovering that the applicant was now permanently resident abroad, the Ukrainian authorities decided to terminate his pension payments in accordance with the relevant provisions of the General State Pension (Obligatory Insurance) Act. The Constitutional Court of Ukraine declared those provisions unconstitutional on 7 October 2009. In 2011 a Ukrainian district court ordered the authorities to resume payment of the applicant's pension with effect from the date of the Constitutional Court's judgment. The district court's judgment was upheld on appeal.

Law – Article 14 of the Convention in conjunction with Article 1of Protocol No. 1: The applicant could no longer claim to be a victim of the alleged violation for the period after 7 October 2009. As to the preceding period, had he continued to reside in Ukraine or returned to live there, he would have continued to receive a pension. His interests thus fell within the scope of Article 1 of Protocol No. 1, which was sufficient to render Article 14 applicable.

The applicant had complained of a difference in treatment on the basis of his place of residence, which constituted an aspect of personal status for the purposes of Article 14. The instant case had to be distinguished from the *Carson and Others v. the United Kingdom* judgment, in which the difference in treatment had concerned the lack of indexation of existing pensions for persons residing in certain foreign States, while nobody had questioned the applicants' entitlement to the pension as such. In the instant case, however, the entitlement to the pension itself had been made dependent on the applicant's place of residence, resulting in a situation in which the applicant, having worked for many years in Ukraine and having contributed to the pension scheme, had been deprived of it altogether, on the sole ground that he no longer lived there. He had been in a relevantly similar situation to pensioners living in Ukraine. No justification for the difference in treatment had ever been advanced by the authorities. The Government had not relied on considerations of international cooperation in that context. The rise in population mobility, higher levels of international cooperation and integration, and developments in the banking-services and information-technology sectors no longer justified technically motivated restrictions in respect of beneficiaries of social-security payments living abroad. The difference in treatment at issue had therefore been in breach of Article 14 read in conjunction with Article 1 of Protocol No. 1.

Conclusion: violation (unanimously).

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

(See *Carson and Others v. the United Kingdom* [GC], 42184/05, 16 March 2010, Information Note 128)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies

No reasonable prospect of success of application to have deportation order set aside: *preliminary objection dismissed*

Z.M. v. France - 40042/11
Judgment 14.11.2013 [Section V]

Facts – The applicant, a Congolese national, officially joined the Congolese Liberation Movement (MLC) in 2005. He claimed to have been arrested on 4 July 2006 and imprisoned in the headquarters of the Intelligence and Special Services Directorate (DRGS). He was kept in detention for three weeks. Afterwards, he continued his political activities in a climate of repression. He left the Democratic Republic of Congo (DRC) on 21 April 2008. On 3 June 2008 he lodged his first application for asylum in France. The application was rejected by the French Office for the Protection of Refugees and Stateless Persons (OFPRA) on 9 December 2008, on the grounds that "his statement [did] not provide a basis for establishing the truth of his allegations or finding that his fears of persecution if he returned to his own country were well founded". That decision was upheld by the National Asylum Tribunal on 30 July 2010. The applicant lodged an application for review of his asylum application on 16 August 2010. On 24 September 2010 he was refused leave to remain in France and his case was made subject to the fast-track procedure. On 2 November 2010 he was served with an order to leave the country. He learned by that means that his asylum application had been rejected in a decision issued by OFPRA on 6 October 2010 which had not been served on him. The applicant appealed against that decision to the National Asylum Tribunal. On 9 June 2011 he was placed in an administrative detention centre. On 16 June 2011 he requested a review of his asylum application while still in the detention centre. The applicant requested the European Court to apply an interim measure under Rule 39 of its Rules of Court. On 30 June 2011 the President of the Chamber to which the case had been allocated decided to indicate to the French Government under Rule 39 that it was desirable to refrain from deporting the applicant to the DRC for the duration of the proceedings before it. On 4 July 2011 the prefect ordered the lifting of the administrative detention order in respect of the applicant and made him the subject of a compulsory residence order.

Law – Article 3

(a) *Admissibility* – The Government argued that the applicant had not exhausted domestic remedies. They observed that he had not challenged the expulsion order of 28 October 2010 although he could have applied to the administrative courts to have the order set aside within one month of being notified of it. They added that the remedy in question had suspensive effect, so that the deport-

ation order could not be enforced until the judge had given a ruling.

The Court had previously held that foreign nationals in the same situation as the applicant were not necessarily required, under Article 35 § 1 of the Convention, to apply to the administrative courts (*Y.P. and L.P. v. France*, 32476/06, 2 September 2010). The applicants in that case had given the authorities responsible for asylum matters the opportunity to determine whether there was a risk that they would be subjected to treatment contrary to Article 3 of the Convention if they were sent back to their country of origin, and possibly to prevent their deportation. Against that background, since an application to have the expulsion order against them set aside would have had no reasonable prospect of success, the Court had found that the applicants could not be criticised for not having applied to the administrative courts.

In the present case, the applicant's asylum applications had been refused. Moreover, only a few months had elapsed between the date of the last refusal and the date of adoption of the order requiring the applicant to leave French territory; during that time, the situation in the DRC had not changed with regard to the risks referred to by the applicant. In addition, the applicant had learned when that order was served on him that his request for review, registered under the fast-track procedure, had been rejected. Lastly, despite not having been notified of that last decision, he had nevertheless appealed against it, thus showing proof of diligence. Accordingly, the applicant had exhausted domestic remedies for the purposes of Article 35 § 1 of the Convention.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – In view of the applicant's background, and particularly his links with the opposition, his imprisonment, the existence of an explicit medical certificate corroborating his account, and the search warrant and summons issued against him in 2010 on account of his campaigning activities, which stated that he was being prosecuted for crimes punishable by life imprisonment, there were substantial grounds to believe that his case was of sufficient interest to the Congolese authorities to make it likely that they would detain and interrogate him on his return and that he would be subjected to treatment contrary to Article 3 of the Convention by the Congolese authorities if the deportation order were enforced.

Conclusion: deportation would constitute violation (unanimously).

Article 41: finding of a violation in the event of deportation sufficient in respect of non-pecuniary damage.

Article 35 § 3

Competence *ratione materiae*

Refusal to reopen civil proceedings following finding of Article 6 violation: *relinquishment in favour of the Grand Chamber*

Bochan v. Ukraine (no. 2) - 22251/08
[Section V]

Since 1997 the applicant has claimed, so far unsuccessfully, title to part of a house and to the land on which it stands. Her case was reconsidered on numerous occasions by the domestic courts. Eventually, following the reassignment of the case by the Supreme Court to courts with different territorial jurisdiction, her claim was dismissed.

In 2001 the applicant lodged an application with the European Court, complaining in particular of unfairness in the domestic proceedings. In May 2007 the Court delivered a judgment (see *Bochan v. Ukraine*, 7577/02, 3 May 2007) in which it found a violation of Article 6 § 1 of the Convention, having regard to the circumstances in which the applicant's case had been reassigned by the Supreme Court and the lack of sufficient reasoning in the domestic decisions. The applicant's complaints about the length of the proceedings and of a violation of Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention were dismissed as unsubstantiated. She was awarded EUR 2,000 in respect of non-pecuniary damage. The European Court also noted that the applicant was entitled under Ukrainian law to request a rehearing of her case. The Committee of Ministers has not yet concluded its supervision of the execution of the judgment under Article 46 § 2 of the Convention.

In June 2007, relying on the European Court's judgment, the applicant asked the Ukrainian Supreme Court to quash the decisions in her civil case and to adopt a new judgment allowing her claims in full. In March 2008 the Supreme Court rejected that application as unsubstantiated, while observing that "the European Court of Human Rights had concluded that the [domestic] courts' decisions were lawful and well-founded and de-

cided to award the applicant compensation in the amount of EUR 2,000 only for the violation of the 'reasonable-time' requirement by the Ukrainian courts." In April 2008 the applicant again applied to the Supreme Court arguing that its previous decision was based on an incorrect interpretation of the European Court's judgment. Her request was declared inadmissible.

In her new application to the European Court, the applicant complains under Article 6 § 1 that the proceedings before the Supreme Court were unfair as it had failed to take into account the European Court's findings in her previous case. She further complains under Article 1 of Protocol No. 1 that she has been unlawfully deprived of her property.

(See also *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], 32772/02, 30 June 2009, Information Note 120; *Steck-Risch and Others v. Liechtenstein* (dec.), 29061/08, 11 May 2010, Information Note 130; *Öcalan v. Turkey* (dec.), 5980/07, 6 July 2010, Information Note 132; and *Schelling v. Austria (no. 2)* (dec.), 46128/07, 16 September 2010)

ARTICLE 38

Furnish all necessary facilities

Failure by respondent Government to provide essential piece of evidence: *violation*

Benzer and Others v. Turkey - 23502/06
Judgment 12.11.2013 [Section II]

(See Article 2 above, page 7)

ARTICLE 46

Execution of a judgment – General measures

Respondent State required to take further measures to provide genuine effective relief for violations of the right to a fair trial within a reasonable time

Vlad and Others v. Romania - 40756/06, 41508/07 and 50806/07
Judgment 26.11.2013 [Section III]

Facts – In their applications to the European Court, the three applicants complained of the length of civil and criminal proceedings in which they had been involved before the domestic courts and of the lack of an effective domestic remedy in respect of those delays. The applications were lodged in 2006 and 2007 and the Government argued that legislation had since been introduced to provide remedies in such cases: Law no. 202/2010, which amended the 1993 Code of Civil Procedure and the 1997 Code of Criminal Procedure pending the entry into force and implementation of new codes of procedure, and Articles 522 to 526 of the new Code of Civil Procedure, which provided a complaints procedure for delays (but applied only to proceedings instituted after 15 February 2013). The Government also submitted that a number of recent cases based on the direct applicability of the Convention in Romania demonstrated that litigants now had access to compensation in length-of-proceedings cases.

Law – Article 6 § 1: In each of the applicants' cases the length of the proceedings had been excessive and failed to meet the "reasonable-time" requirement of Article 6.

Conclusion: violation (unanimously).

Article 13: The second and third applicants complained that they had not had effective remedies in respect of the length of the proceedings in which they were involved. Although the Government had argued that the changes to the national legal system and the direct applicability of the Convention meant that litigants now had an effective remedy, they had failed to produce examples of domestic cases in which litigants had been able to access an effective remedy in length-of-proceedings cases. Furthermore, both the change to the law and the new Code of Civil Procedure had come into force only after the domestic courts had already dealt with the majority of the proceedings brought by the two applicants concerned.

Conclusion: violation (unanimously).

Article 46: Since its first judgment concerning the length of civil proceedings in Romania[1], the Court had adopted decisions and judgments in some 200 Romanian cases dealing with allegations of breaches of the "reasonable-time" requirement laid down in Article 6 § 1 in relation to civil and criminal proceedings. A further 500 cases were currently pending. Those figures indicated the existence of a systemic problem, which the Parliamentary Assembly of the Council of Europe had noted in 2011 was of grave concern and required

1. *Pantea v. Romania*, 33343/96, 3 June 2003, Information Note 54.

tackling as a matter of priority.[1] Although new legislation had been introduced, the Government had not submitted any information in reply to questions that had been raised by the Committee of Ministers regarding, in particular, the procedural rules applicable to length-of-proceedings complaints under the new Code of Civil Procedure, the remedies available in criminal proceedings or the possibility of introducing a specific compensatory remedy.[2] In any event, the measures aimed at ensuring the speedy examination of civil cases applied only to proceedings instituted after 15 February 2013 and could not remedy the problem of delays accrued before that date.

Accordingly, in view of the extent of the recurrent problem and of the weaknesses and shortcomings of the current remedies, Romania was encouraged to either amend the existing range of legal remedies or add new remedies, such as a specific and clearly regulated compensatory remedy, in order to provide genuine effective relief for violations of the right to a fair trial within a reasonable time.

Article 41: Sums ranging from EUR 2,340 to EUR 7,800 to each applicant in respect of non-pecuniary damage; claims in respect of pecuniary damage dismissed.

Execution of a judgment – Individual measures

Respondent Government required to conduct investigation to identify those responsible for bombing of civilian villages in 1994

Benzer and Others v. Turkey - 23502/06
Judgment 12.11.2013 [Section II]

(See Article 2 above, page 7)

ARTICLE 3 OF PROTOCOL No. 1

Free expression of opinion of people

Irrevocable nature of decision to renounce seat in parliament: *inadmissible*

Occhetto v. Italy - 14507/07
Decision 12.11.2013 [Section II]

Facts – The applicant stood for election to the European Parliament in June 2004 in two constituencies where he came first among the unelected candidates. On 6 July 2004 he signed a document renouncing his parliamentary seat, as a result of an agreement with the co-founder of the political movement to which he belonged, Mr Di Pietro. On 7 July 2004 the latter deposited one of the four counterparts of the signed renouncement with the Italian electoral board. On 27 April 2006 the applicant declared that he wished to withdraw his renouncement, expressing his wish to sit in the European Parliament. On 28 April 2006 Mr Di Pietro renounced his entitlement to take his seat as a member of the European Parliament. On 8 May 2006 the electoral board declared the applicant elected to the European Parliament for the “Southern Italy” constituency. Mr Donnici, who had come second in that constituency, just after the applicant, lodged an application with the Regional Administrative Court for the annulment of the electoral board’s decision. On 21 July 2006 the Regional Administrative Court dismissed the application. Mr Donnici appealed. On 6 December 2006 the *Consiglio di Stato* annulled the decision appealed against. On 29 March 2007 the electoral board took note of the judgment of the *Consiglio di Stato* and proclaimed Mr Donnici elected to the European Parliament, thus revoking the applicant’s election. The applicant lodged an objection. On 24 May 2007 the European Parliament declared Mr Donnici’s election invalid and confirmed the validity of the applicant’s election. The Government appealed against the European Parliament’s decision on the verification of Mr Donnici’s powers before the Court of Justice of the European Communities (CJEC), whilst Mr Donnici himself challenged the same decision before the Court of First Instance (CFI). On 15 November 2007 the urgent proceedings judge of the CFI ordered a stay of execution of that decision. Consequently, the applicant stopped sitting in the European Parliament. Later, on 13 December 2007, the CFI relinquished the case to the CJEC. On 30 April 2009 the latter annulled the European Parliament’s decision in question.

Law – Article 3 of Protocol No. 1: The applicant, who had stood for election to the European Parliament, had voluntarily signed a document renouncing his entitlement to a seat. This was the result of an agreement with the co-founder of the political movement to which he belonged and, *de facto*, it deprived the votes he had received of any useful effect. It followed that the applicant could be considered, to a great extent, to have contributed

1. Parliamentary Assembly’s Resolution 1787 (2011) of 26 January 2011.
2. Committee of Ministers in its decision of 6 December 2011 (CM/Del/Dec(2011)1128/17).

to creating the situation of which he complained before the European Court of Human Rights, namely the annulment of the proclamation of his election to the European Parliament. Moreover, he had stated that the Italian authorities should have declared his agreement with Mr Di Pietro unlawful and that in substance he relied on the right to annul his own acts. The Court took the view, however, that it did not need to address the question whether the applicant could claim to be a "victim", within the meaning of Article 34 of the Convention, of the events that he denounced; nor the question whether there had been a "significant disadvantage" for the applicant, within the meaning of Article 35 § 3 (b) of the Convention.

The European Parliament was sufficiently associated with the legislative process, and with the supervision of the general democratic supervision of the European Union's activities for it to be considered part of the "legislature" of its member States for the purposes of Article 3 of Protocol No. 1, which provision was therefore applicable.

The applicant had criticised the *Consiglio di Stato* mainly for its finding that his renouncement of his parliamentary seat was irrevocable. The Court did not, however, find any appearance of arbitrariness. There were many acts by which an individual could freely exercise his rights that might involve permanent consequences, without impairing the principles guaranteed by the Convention. The refusal to accept the withdrawal of the applicant's renouncement had pursued the legitimate aims of guaranteeing legal certainty in the electoral process and the protection of the rights of others, in particular those of the person who had been proclaimed elected to the seat that could have been taken by the applicant. If a candidate were able to renounce a parliamentary seat and then to withdraw that decision at any time, there would be uncertainty as to the composition of the legislature. Moreover, the applicant had not sustained any arbitrary consequences. Having signed the renouncement of his own free will, he knew or must have known that this decision would mean that he could not sit in the European Parliament, even if Mr Di Pietro were to renounce his seat. As to the question whether there had been a breach of the free expression of the opinion of the people, the possible disappointment felt by voters who had voted for the applicant could not be directly attributed to the Italian authorities, but rather to the applicant and to Mr Di Pietro on account of the agreement between them for the purpose of depriving those votes of any useful effect. Moreover, as a result of elections being held, a candidate might obtain the right to sit in a legislature but would be under no obligation to do so. Any candidate was entitled to renounce, for political or personal reasons, the seat to which he was elected, and the decision to act upon such a renouncement could not be considered incompatible with the principle of universal suffrage. In the present case, the applicant's wish had been expressed in writing and in unequivocal terms, and, in a communication of 12 November 2004 to the European Parliament, the applicant had stated that his renouncement was final. Lastly, in its judgment of 30 April 2009 the CJEC had found that it was for the domestic legal system of each member State to designate the competent courts and to regulate the procedural arrangements for appeals seeking to guarantee rights that were available under Community law. In the present case, the competent courts were the Regional Administrative Court and the *Consiglio di Stato*, according to the Italian legal system. The proceedings concerning the effects and nature of the applicant's renouncement had taken place before those judicial organs, which had power to deal with all aspects of the case, and the applicant had been able to submit the arguments that he deemed useful for his defence in the context of those proceedings.

Having regard to the foregoing, and in particular to the broad margin of appreciation afforded to States in respect of the "passive" aspect of the rights guaranteed by Article 3 of Protocol No. 1, there was no appearance of a violation of that provision.

Conclusion: inadmissible (manifestly ill-founded).

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

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

Mustafa Tunç and Fecire Tunç v. Turkey - 24014/05
Judgment 25.6.2013 [Section II]

(See Article 2 above, page 9)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Bochan v. Ukraine (no. 2) - 22251/08
[Section V]

(See Article 35 § 3 above, page 27)

COURT NEWS

Case-law translations programme

More than 10,000 texts in twenty-seven languages other than English and French have now been made available in the Court's database HUDOC which is increasingly serving as a one-stop-shop (*guichet unique*) for translations of the Court's case-law[1]. The new language-specific filter in the HUDOC allows for rapid searching of these translations, including in free text. These texts now amount to almost ten per cent of all content published in HUDOC.

In 2012 the Registry commissioned an important number of translations into Russian and in 2013 it outsourced translations into Bulgarian, Greek, Hungarian and Spanish.

Governments, judicial training centres, associations of legal professionals, NGOs and other interested parties are invited to offer, for inclusion in HUDOC, any ECHR case-law translations or case summaries to which they have rights.

The Registry is also referencing, on the Court's Internet site, third-party sites hosting additional translations of its case-law. It would welcome any suggestions for further sites of this kind. More information can be found online (<www.echr.coe.int> – Case-law/Translations of the Court's case-law/Existing translations/External online collections of translations –scroll down to see the list of sites).

RECENT PUBLICATIONS

Case-law guides

The Court has just published a guide on Article 6 of the Convention (Right to a fair trial – civil limb) as part the new series on the case-law relating to particular Convention Articles.

Guides on Articles 4 (Prohibition of slavery and forced labour) and 5 (Right to liberty and security) are already available in English and French, but also in Chinese (Article 4) and in Russian, Turkish and Ukrainian (Article 5). The case-law guides can be downloaded from the Court's Internet site (<www.echr.coe.int> – Case-law).

1. All translations into languages other than English and French are published with a disclaimer.

Reports of Judgments and Decisions

All six volumes for 2009 and volumes ECHR 2012-III and -IV have recently been published.

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