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COUR EUROPÉENNE DES DROITS DE L'HOMME

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# ARTICLE 1

## Jurisdiction of States

### Territorial jurisdiction in relation to alleged killing of Iraqi national by Netherlands serviceman, member of Stabilisation Force in Iraq

*Jaloud v. the Netherlands* - 47708/08
Judgment 20.11.2014 [GC]

*Facts* – From July 2003 until March 2005 Netherlands troops participated in the Stabilisation Force in Iraq (SFIR) in battalion strength. They were stationed in south-eastern Iraq as part of Multinational Division South-East (MND-SE), which was under the command of an officer of the armed forces of the United Kingdom. The participation of Netherlands forces in MND-SE was governed by a Memorandum of Understanding between the United Kingdom and the Kingdom of the Netherlands to which Rules of Engagement were appended. Both documents were classified confidential.

The applicant is the father of an Iraqi national who died in April 2004 from bullet wounds received when the car in which he was travelling as a passenger was shot at after passing a vehicle checkpoint at speed. The checkpoint was manned at the time by members of the Iraqi Civil Defence Corps (ICDC) who had been joined by a patrol of Netherlands soldiers who had arrived after the checkpoint had come under fire from another vehicle a few minutes before the incident in which the applicant's son was killed. One of the Netherlands servicemen admitted to having fired several rounds at the car in which the applicant's son was travelling, but claimed to have done so in self-defence, believing himself to have been under fire from the vehicle. Following an investigation by the Royal Military Constabulary (a branch of the Netherlands armed forces), the military public prosecutor concluded that the applicant's son had presumably been hit by an Iraqi bullet and that the Netherlands serviceman had been acting in self-defence. He therefore closed the investigation. That decision was upheld by the Military Chamber of the Court of Appeal, which found that the serviceman had reacted to friendly fire, mistaking it for fire from inside the car. In the circumstances, he had therefore acted within the confines of his instructions and the decision not to prosecute him could stand.

In his application to the European Court, the applicant complained under Article 2 of the Convention that the investigation was not sufficiently independent or effective. On 9 July 2013 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber.

*Law* – Article 1 (*jurisdiction*): The Government raised a preliminary objection that the complaints did not come within the territorial jurisdiction of the Netherlands since authority lay elsewhere: either with the United States and the United Kingdom as the designated "occupying powers" under United Nations Security Council Resolution 1483, or with the United Kingdom alone as the "lead nation" in south-eastern Iraq, holding command over the Netherlands contingent of SFIR.

Rejecting that argument, the Court observed that the fact of executing a decision or an order given by an authority of a foreign State was not in itself sufficient to relieve a Contracting State of its obligations under the Convention. The Netherlands were not divested of "jurisdiction" solely by dint of having accepted the operational control of a United Kingdom commanding officer. Although the forces of nations other than the "lead nations" took their day-to-day orders from foreign commanders, the formulation of essential policy – including, within the limits agreed in the form of Rules of Engagement appended to the relevant Memoranda of Understanding, the drawing up of distinct rules on the use of force – remained the reserved domain of the individual States who had supplied forces. The Netherlands assumed responsibility for providing security in the area where their troops were stationed, to the exclusion of other participating States, and retained full command over its contingent there. Nor was it relevant that the checkpoint where the shooting happened was nominally manned by ICDC personnel, as the ICDC was supervised by and subordinate to officers from the coalition forces. The Netherlands troops had thus not been at the disposal of any foreign power or under the exclusive direction or control of any other State.

The fatal shooting had taken place at a checkpoint manned by personnel under the command and direct supervision of a Netherlands army officer which had been set up in the execution of SFIR's mission under United Nations Security Council Resolution 1483. It had thus occurred within the "jurisdiction" of the Netherlands.

*Conclusion*: preliminary objection dismissed (unanimously).

Article 2 (*procedural aspect*): The Court did not accept the applicant's allegation that the investigation had not been sufficiently independent. There was no evidence to show that the fact that the Royal Military Constabulary unit which had undertaken the initial investigation had shared their living quarters with the army personnel allegedly responsible for the death had in itself affected its independence to the point of impairing the quality of its investigations. Nor did the fact that the public prosecutor had relied to a large extent on the reports by the Royal Military Constabulary raise an issue, as public prosecutors inevitably relied on the police for information and support. As to the inclusion of a serving military officer as a judge of the Military Chamber of the Court of Appeal which upheld the decision not to prosecute the Netherlands army officer who had fired at the car, the chamber had been composed of two civilian members of the Court of Appeal and one military member. The military member was a senior officer qualified for judicial office who was not subject to military authority and discipline and whose functional independence and impartiality were the same as those of civilian judges. The Military Chamber had thus offered sufficient guarantees of independence for the purposes of Article 2.

However, as regards the effectiveness of the investigation, the Court found that it had been characterised by a number of shortcomings. Notably, the Military Chamber of the Court of Appeal had confined itself to establishing that the officer who had fired the shots had acted in self-defence, mistakenly reacting to friendly fire from across the road, without addressing certain aspects relevant to the question of the proportionality of the force used, in particular, whether more shots had been fired than necessary and whether the firing had ceased as soon as the situation had allowed. Documents containing information potentially relevant to those questions had not been made available to the Military Chamber at the time. In particular, an official record of statements from the ICDC personnel who had been guarding the checkpoint at the time of the shooting and a list of the names of ICDC personnel who had fired their weapons had not been added to the case file.

In addition, there had been a delay of more than six hours after the incident before the officer who had fired the shots was questioned. While there was no suggestion of foul play, the fact that no appropriate steps had been taken to reduce the risk of him colluding with other witnesses was another shortcoming. As regards the autopsy, it had been carried out without any qualified Netherlands official being present. The pathologist's report was extremely brief, lacked detail and did not include any pictures. Finally, fragments of metal identified as bullet fragments taken from the body – potentially important material evidence – were not stored or examined in proper conditions and had subsequently gone missing in unknown circumstances.

In sum, the investigation into the circumstances surrounding the death had failed to meet the standards required by Article 2 in that documents containing important information were not made available to the judicial authorities and the applicant; no precautions were taken to prevent the officer who fired the shots from colluding, before he was questioned, with other witnesses; no attempt was made to carry out the autopsy under conditions befitting an investigation into the possible criminal responsibility of an agent of the State, and the resulting report was inadequate; and important material evidence was mislaid in unknown circumstances. It could not be said that these failings had been inevitable, even in the particularly difficult conditions that had prevailed in Iraq at the relevant time.

*Conclusion*: violation (unanimously).

Article 41: EUR 25,000 in respect of non-pecuniary damage.

(See also: *Al-Skeini and Others v. the United Kingdom* [GC], 55721/07, 7 July 2011, Information Note 143; *Hassan v. the United Kingdom* [GC], 29750/09, 16 September 2014, Information Note 177; and the Factsheet on Extra-territorial jurisdiction of States Parties to the Convention)

## ARTICLE 2

### Life

**Decision to discontinue nutrition and hydration allowing patient in state of total dependence to be kept alive artificially:**
*relinquishment in favour of the Grand Chamber*

*Lambert and Others v. France* - 46043/14
[Section V]

The applicants are the parents, a half-brother and a sister of Vincent Lambert, who sustained head injuries in a road-traffic accident in 2008 as a result of which he is tetraplegic and totally dependent.

He receives artificial nutrition and hydration administered through a stomach tube. Following the consultation procedure provided for by the "Leonetti" Act on patients' rights and end-of-life issues, the doctor in charge of Vincent Lambert decided, on 11 January 2014, to discontinue the patient's nutrition and hydration from 13 January. After proceedings in which the implementation of the doctor's decision was suspended, the *Conseil d'État*, relying on a medical expert report in particular, declared lawful the decision taken on 11 January 2014 by the doctor in charge of Vincent Lambert to discontinue his artificial nutrition and hydration.

After receiving a request under Rule 39 of the Rules of Court, the Court ruled that the authorities should stay execution of the judgment given by the *Conseil d'État* for the duration of the proceedings before it. The Chamber stipulated that as a result of this interim measure Mr Lambert should not be moved for the purpose of discontinuing his nutrition or hydration.

The applicants contend, in particular, that the withdrawal of Vincent Lambert's artificial nutrition and hydration would be in breach of the State's obligations under Articles 2 and 3 of the Convention. From the standpoint of the procedural aspect of Article 2, they complain of a lack of clarity and precision in the legislation and challenge the process which led to the decision of 11 January 2014.

The case was communicated under Articles 2, 3 and 8 of the Convention (see Information Note 176). On 4 November 2014 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber.

(See also the Factsheet on Euthanasia and assisted suicide).

### Effective investigation
### Positive obligations (procedural aspect)

**Failure to hold effective investigation into alleged fatal shooting by Netherlands forces at vehicle checkpoint in southern Iraq:** *violation*

*Jaloud v. the Netherlands* - 47708/08
Judgment 20.11.2014 [GC]

(See Article 1 above, page 7)

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# ARTICLE 3

### Inhuman or degrading treatment

**Protective sexological treatment allegedly administered without patient's informed consent:** *no violation*

*Dvořáček v. the Czech Republic* - 12927/13
Judgment 6.11.2014 [Section V]

*Facts* – The applicant suffers from Wilson's disease, a genetic disorder whose symptoms include personality changes. At the time of the diagnosis the applicant had begun to suffer from hebephilia (a sexual preference for adolescents), considered as a form of paedophilia; according to the experts, this disorder led to a personality change in the applicant which was due to the illness itself, not to any primary sexual deviance. The applicant had been prosecuted on several occasions. In 2007 the court had ordered protective sexological treatment in an institution, observing that this measure was also in the applicant's interests and that it was up to him how long he would stay in the hospital. The applicant was hospitalised from November 2007 to September 2008. The day after his arrival the senior medical officer had noted that since the applicant refused surgical castration and anti-androgen treatment, he would probably have to remain in hospital. According to a note drawn up in December 2007, however, the applicant had agreed to undergo anti-androgen treatment, which was subsequently administered by intravenous injection once a fortnight. The treatment method was then adjusted after the applicant had voiced dissatisfaction, and no further injections were administered from July 2008 onwards.

The applicant complained to the European Court that the hospital had not provided him with the necessary treatment, particularly appropriate psychotherapy, and that he had been subjected to forcible medicinal treatment and psychological pressure to consent to surgical castration.

*Law* – Article 3 (*substantive head*): As regards whether the applicant's complaint of alleged forcible or inappropriate medical treatment should be assessed from the angle of Article 8 the Court considered that in view of the opposition expressly voiced by the applicant, who was duly represented, it should confine itself to considering the present case under Article 3.

The main issue in the instant case is whether or not the applicant consented to treatment by anti-androgen medication.

The legislation in force at the material time had been fragmentary and unclear in this respect, so that many medical professionals, and even the courts, considered that the consent of patients subject to protective treatment ordered by a court was unnecessary. However, because this case was being assessed from the angle of Article 3, it was not incumbent on the Court to assess the quality of the legal basis but to review the circumstances and modalities of its application to the applicant.

The applicant argued in the domestic courts that he had consented to the aforementioned treatment solely for fear of remaining in hospital indefinitely, or indeed of undergoing surgical castration. He told the Court that there could be no question of free, informed consent in a situation where the only available choice was between a medical operation and indefinite hospitalisation. Firstly, it had not been established that the applicant had been pressurised into surgical castration. Furthermore, at the time surgical castration had been strictly regulated and subject to free, informed consent. On the latter point, there was no indication in the case-file that the hospital had taken action to force the applicant to undergo anti-androgen treatment. Nevertheless, the fact that the applicant was in a position to choose between taking anti-androgen drugs, which would significantly reduce the danger posed by patients and thus raise the prospect of earlier discharge, and treatment solely involving psychotherapy and sociotherapy, which required more time to eliminate that danger, could be considered as amounting to some form of pressure. Even if this was a statement of fact, choosing between the two options presented the applicant with a difficult dilemma. On the other hand, it emerges from the different expert opinions that the treatment at issue was justified on medical grounds and was particularly recommended in the present case because it was more effective than psychotherapy, which would not have prevented him from reoffending. Moreover, whenever the applicant expressed reservations about the anti-androgen treatment an alternative solution had been found, which solution had not been demonstrably imposed on him. Furthermore, the drug treatment had been backed up with occupational therapy and psychotherapy. Therefore, the medical staff of the psychiatric hospital could not be said to have failed in their duty to protect the applicant's health. That being the case, even though the difficult choice facing the applicant might have amounted to some form of pressure, the treatment at issue corresponded, in the instant case, to a therapeutic necessity.

Nevertheless, since alternatives had in fact been proposed to that treatment, it remained to be seen whether it had been a case of informed consent. In this regard, the domestic courts drew on the hospital's assertions that the applicant was aware of the side-effects of the anti-androgen treatment because he had previously undergone such treatment and had also been informed about it by the attending physician. While there was nothing to suggest that these assertions had been unreliable, the situation would have been clearer if the applicant's consent had been recorded in writing in a specific form setting out all the requisite information on the benefits and side-effects of the treatment in question and informing the applicant of his right to withdraw his initial consent at any time. Such a procedure would certainly have reinforced legal certainty for all concerned. However, the omission in question was rather procedural in nature, which was insufficient to infringe the safeguards set out in Article 3 of the Convention.

Accordingly, even though it helped clarify the applicant's alleged feelings of distress and frustration, consideration of the facts of the present case did not disclose evidence enabling one to establish beyond any reasonable doubt that the applicant had been subjected to forcible medicinal treatment.

*Conclusion*: no violation (unanimously).

The Court also unanimously concluded that there had been no violation of Article 3 under its substantive head concerning the applicant's conditions of detention in the psychiatric hospital, and no violation of Article 3 under its procedural head.

(See also the Factsheet on Health)

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**Conditions of detention amounting to degrading and inhuman treatment:** *violation*

*Vasilescu v. Belgium* - 64682/12
Judgment 25.11.2014 [Section II]

(See Article 46 below, page 20)

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**Lack of adequate medical care of seriously ill detainee:** *violation*

*Amirov v. Russia* - 51857/13
Judgment 27.11.2014 [Section I]

(See Article 34 below, page 18)

## Inhuman or degrading punishment

### Life imprisonment with possibility of review after 30 years' imprisonment: *no violation*

*Bodein v. France* - 40014/10
Judgment 13.11.2014 [Section V]

*Facts* – On 2 October 2008 the applicant was sentenced to life imprisonment for three murders, including two committed against minors under the age of fifteen, preceded or accompanied by rape. As the applicant was a recidivist, having a previous conviction in 1996, the Assize Court decided that no sentence adjustment measures could be granted.

*Law* – Article 3 (*substantive head*): In accordance with the principles established by the Grand Chamber in *Vinter and Others v. the United Kingdom*, it was appropriate to examine the prospects for review of sentence provided by French law. Article 7204 of the Code of Criminal Procedure stated that after a thirty-year prison term a convicted person can benefit from a sentence adjustment measure.

The review of the applicant's situation after thirty years' imprisonment was geared to reaching a decision on his dangerousness and taking account of how he has changed while serving his sentence. The provision in question provided for a judicial review of the whole-life term, which could be requested by the prosecutor's office or the prisoner, with a view to verifying whether there were legitimate grounds for continued imprisonment. If the Assize Court's special decision not to grant any form of sentence adjustment was rescinded, the applicant would become eligible for such measures, including release on parole. The Court could not speculate on the outcome of such a mechanism since it had not yet been used in practice; it noted, however, that it left no uncertainty as to the existence of a "prospect of release" from the time of imposition of the sentence. Furthermore, the Constitutional Council had validated the impugned provisions of the Law of 1 February 1994 establishing an irreducible sentence on the grounds that the post-sentencing judge could rescind the special decision "in the light of the conduct of the convicted prisoner and changes in his personality".

As regards the possible timing of the judicial review, even though the thirty-year deadline went beyond the clear international trend towards scheduling a review twenty-five years at the latest after the imposition of the life sentence, the wording of the provision of the Code of Criminal Procedure stipulating a period of at least thirty years implied that the whole period of deprivation of liberty undergone from the time of the detention order should be included in calculating the total period of imprisonment, that is to say the starting point for the whole-life term. It is a case of applying, *mutatis mutandis*, the principle set out in Article 7164 of the Code of Criminal Procedure to the effect that any detention on remand effected during proceedings should be deducted from the prison sentence imposed. In 2034, therefore, twenty-six years after the imposition of the life sentence on 2 October 2008, the applicant would be able to apply to the post-sentencing judge for rescission of the special decision of the Assize Court not to grant him any form of sentence adjustment and to be granted release on parole, if appropriate. In view of the margin of appreciation available to States in matters of criminal justice and sentencing, the possibility of obtaining a review of life sentences was sufficient to conclude that the sentence imposed on the applicant was reducible for the purposes of Article 3 of the Convention.

*Conclusion*: no violation (unanimously).

The Court also unanimously concluded that there had been no violation of Article 6 § 1, considering that the applicant had had sufficient safeguards enabling him to understand why he had been found guilty.

(See *Vinter and Others v. the United Kingdom* [GC], 66069/09, 130/10 and 3896/10, 9 July 2013, Information Note 165)

## Expulsion

### Proposed removal of Afghan asylum-seeker family to Italy under Dublin II Regulation: *expulsion would constitute a violation*

*Tarakhel v. Switzerland* - 29217/12
Judgment 4.11.2014 [GC]

*Facts* – The applicants, a married couple and their six minor children, are Afghan nationals who live in Switzerland. The couple and their five oldest children landed on the Italian coast in July 2011 and were immediately subjected to the EURODAC identification procedure (taking of photographs and fingerprints). The applicants subsequently travelled to Austria and, later, to Switzerland, where they applied for asylum. However, their application was refused on the grounds that, under the European Union Dublin II Regulation, it should be dealt with by the Italian authorities. The Swiss authorities therefore ordered the applicants'

removal to Italy. The appeals lodged by the applicants against that measure were dismissed. In their application to the European Court, the applicants contended that their deportation from Switzerland to Italy would be in breach of their rights under Article 3 of the Convention.

*Law* – Article 3: In the present case the Court had to ascertain whether, in view of the overall situation with regard to the reception arrangements for asylum seekers in Italy and the applicants' specific situation, substantial grounds had been shown for believing that the applicants would be at risk of treatment contrary to Article 3 if they were returned to Italy. The Court considered it necessary to follow an approach similar to that which it had adopted in its judgment in *M.S.S. v. Belgium and Greece*, in which it had examined the applicant's individual situation in the light of the overall situation prevailing in Greece at the relevant time.

(a) *Overall situation with regard to the reception arrangements for asylum seekers in Italy* – In its decision in the case of *Mohammed Hussein and Others v. the Netherlands and Italy*, the Court had observed that the Recommendations of the Office of the United Nations High Commissioner for Refugees (UNHCR) and the report of the Commissioner for Human Rights, both published in 2012, referred to a number of failings relating, in particular, to the slowness of the identification procedure, the inadequate capacity of the reception facilities and the living conditions in the available facilities.

(b) *Capacity of the reception facilities for asylum seekers* – The number of places reportedly fell far short of what was needed. Hence, without entering into the debate as to the accuracy of the available figures, the Court noted the glaring discrepancy between the number of asylum applications made in the first six months of 2013 (14,184) and the number of places available in the refugee reception facilities belonging to the SPRAR network (9,630 places).

(c) *Living conditions in the available facilities* – While it had observed a degree of deterioration in reception conditions, and a problem of overcrowding in the reception centres for asylum seekers (CARAs), UNHCR had not referred to situations of widespread violence or insalubrious conditions, and had even welcomed the efforts undertaken by the Italian authorities to improve reception conditions for asylum seekers. The Human Rights Commissioner, in his 2012 report, had also noted the existence of problems in "some of the reception facilities". Lastly, at the hearing of 12 February 2014 the Italian Government had confirmed that violent incidents had occurred in the CARA shortly before the applicants' arrival but had denied that the families of asylum seekers were systematically separated, stating that this occurred only in a few cases and for very short periods, notably during the identification procedures.

Hence, the current situation in Italy could in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment, cited above, where the Court had noted in particular that there were fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers and that the conditions of the most extreme poverty described by the applicant existed on a large scale.

While the structure and overall situation of the reception arrangements in Italy could not therefore in themselves act as a bar to all removals of asylum seekers to that country, the data and information set out above nevertheless raised serious doubts as to the current capacities of the system. Accordingly, the possibility that a significant number of asylum seekers might be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, could not be dismissed as unfounded.

(d) *The applicants' individual situation* – Just as the overall situation of asylum seekers in Italy was not comparable to that of asylum seekers in Greece as analysed in the *M.S.S.* judgment, the specific situation of the applicants in the present case was different from that of the applicant in *M.S.S.* Whereas the former had been taken charge of immediately by the Italian authorities, the latter had first been placed in detention and then left to fend for himself, without any means of subsistence.

In the present case, in view of the current situation regarding the reception system in Italy, the possibility that a significant number of asylum seekers removed to that country might be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, was not unfounded. It was therefore incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants would be received in facilities and in conditions adapted to the age of the children, and that the family would be kept together.

According to the Italian Government, families with children were regarded as a particularly vulnerable category and were normally taken charge of within

the SPRAR network. This system apparently guaranteed them accommodation, food, health care, Italian classes, referral to social services, legal advice, vocational training, apprenticeships and help in finding their own accommodation. However, in their written and oral observations the Italian Government had not provided any further details on the specific conditions in which the authorities would take charge of the applicants.

It was true that at the hearing of 12 February 2014 the Swiss Government had stated that the Federal Migration Office (FMO) had been informed by the Italian authorities that, if the applicants were returned to Italy, they would be accommodated in one of the facilities funded by the European Refugee Fund (ERF). Nevertheless, in the absence of detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation of the family unit, the Swiss authorities did not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children.

It followed that, were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention.

*Conclusion*: the applicants' removal would constitute a violation (fourteen votes to three).

Article 41: Finding that the applicants' removal would constitute a violation was sufficient just satisfaction in respect of any non-pecuniary damage.

(See *M.S.S. v. Belgium and Greece* [GC], 30696/09, 21 January 2011, Information Note 137; and *Mohammed Hussein and Others v. the Netherlands and Italy* (dec.), 27725/10, 2 April 2013, Information Note 162; see also the Factsheet on "Dublin" cases)

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**Homosexual man required to return to Libya in order to apply for family reunion:** *case referred to the Grand Chamber*

*M.E. v. Sweden* - 71398/12
Judgment 26.6.2014 [Section V]

The applicant, a Libyan national who had been living in Sweden since 2010, applied for asylum there initially on the grounds that he feared persecution because he was homosexual and had married a man. The Migration Board and the Migration Court rejected his request on the grounds that his story lacked credibility.

In a judgment of 26 June 2014 (see Information Note 175), a Chamber of the Court held, by six votes to one, that there would be no violation of Article 3 in respect of the applicant's return to Libya. In the Court's view, the applicant had failed to give a coherent and credible account on which to base the examination of his claims and there were insufficient elements to conclude that the Libyan authorities actively persecuted homosexuals. Moreover, the applicant was not being permanently expelled from Sweden as he could apply for family reunification from Libya. Even though he would need to be discreet about his private life during the waiting period, that would not require him to conceal or suppress an important part of his identity permanently or for a longer period of time. While it was true that he would have to travel to Egypt, Tunisia or Algeria for interview, since there was no Swedish Embassy in Libya, that could be done in a few days and did not put the applicant at risk of ill-treatment in those countries. In sum, there were no substantial grounds for believing the applicant would be subjected to ill-treatment on account of his sexual orientation if he was returned to Libya in order to apply for family reunion from there.

On 17 November 2014 the case was referred to the Grand Chamber at the applicant's request.

## ARTICLE 5

### Article 5 § 3

**Length of pre-trial detention**

**Period of over five years in pre-trial detention owing to difficulties in obtaining evidence from abroad:** *no violation*

*Ereren v. Germany* - 67522/09
Judgment 6.11.2014 [Section V]

*Facts* – The applicant was arrested in Germany in April 2007 in possession of forged identity papers. He remained in custody and, following further inquiries, was detained in connection with suspected terrorist offences committed in Turkey. His

detention was repeatedly extended on the grounds that there was a risk of collusion and of his absconding, as he had no fixed residence in Germany. In September 2011, a court of appeal convicted him of two counts of murder and sentenced him to life imprisonment, but his conviction was subsequently quashed and the case was remitted for a fresh trial by another chamber of the same court. The proceedings were still pending at the date of the European Court's judgment.

In total the applicant spent five years and eight months in detention over two separate periods before eventually being released by order of the court of appeal in February 2014, on the grounds that, even though the criminal proceedings were still pending, his continued detention would be disproportionate. In his application to the European Court, the applicant complained of the length of his pre-trial detention

*Law* – Article 5 § 3: The Court accepted that the persistence of reasonable suspicion that the applicant had committed serious offences and was liable to abscond constituted relevant and sufficient grounds for his continued detention. However, it also had to ascertain whether the judicial authorities had displayed "special diligence" in the conduct of the proceedings.

It was common ground that the delays had primarily been caused by the difficulties of gathering evidence by way of letters rogatory from Turkey. In that connection, the Court noted that while some delays in criminal procedures within the framework of international anti-terror laws were unavoidable due to difficulties in collecting evidence in different countries, a pro-active approach was nevertheless necessary to speed up the procedure as far as possible. In the applicant's case, the court of appeal had travelled four times to Turkey in order to follow up the requests by letters rogatory and so could not be said to have failed to exercise special diligence. Furthermore, the applicant had contributed to the length of the proceedings by requesting the court of appeal to re-open the taking of evidence. While he was entitled to make use of his procedural rights, any consequential lengthening of the proceedings could not be held against the State.

The applicant's continued detention had been subject to repeated reviews in which the grounds for detention had been carefully examined in the light of all the available evidence. Indeed, the court of appeal had decided in February 2014 to release the applicant on the grounds that it felt unable to expedite the proceedings as was necessary in view of the overall duration of the applicant's detention. It had thereby expressly referred to the principle of proportionality. The present application thus fell to be distinguished from other cases in which the Court had found that the length of the detention on remand was not justified by the complexity of the proceedings or that the domestic courts had failed to process the proceedings with special diligence or in which the applicants were not released before the criminal proceedings had ended.

In the light of these factors and, in particular, of the thorough examination of the grounds for detention by the domestic courts, the length of the applicant's detention, though considerable, could still be regarded as reasonable.

*Conclusion*: no violation (unanimously).

## ARTICLE 6

### Article 6 § 1 (criminal)

**Fair hearing**

**Alleged unfairness of proceedings leading to imposition of special supervision measure:** *relinquishment in favour of the Grand Chamber*

*De Tommaso v. Italy* - 43395/09
[Section II]

(See Article 2 of Protocol No. 4 below, page 23)

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**Lack of effective legal assistance during questioning:** *violation*

*Aras v. Turkey (no. 2)* - 15065/07
Judgment 18.11.2014 [Section II]

(See Article 6 § 3 (c) below)

### Article 6 § 3 (c)

**Defence through legal assistance**

**Lack of effective legal assistance during questioning:** *violation*

*Aras v. Turkey (no. 2)* - 15065/07
Judgment 18.11.2014 [Section II]

*Facts* – The applicant was arrested on suspicion of qualified fraud. While he was being questioned by

the investigating judge, his lawyer was allowed to enter the hearing room but not to take the floor or advise his client. The applicant was then placed in detention and eventually convicted of involvement in offshore banking activities.

*Law* – Article 6 § 3 (c) in conjunction with Article 6 § 1: The applicant's access to a lawyer had been restricted pursuant to the relevant law in force at that time. The presence of the applicant's lawyer in the hearing room during the questioning had been merely passive as he had not had any possibility to intervene in order to ensure respect for his client's rights. In fact, the applicant had not been given an opportunity to consult his lawyer, who in turn had not been allowed to take the floor and defend him. Furthermore, the restriction imposed on his access to a lawyer had been systematic and applied to anyone held in police custody in connection with an offence falling under the jurisdiction of the State Security Courts. The Court recalled the importance of the investigation stage for the preparation of criminal proceedings and stressed that Article 6 § 1 required access to a lawyer from the start of questioning of a suspect by the police, unless it was demonstrated in the particular circumstances of the case that there were compelling reasons to restrict that right. Accordingly, the mere presence of the applicant's lawyer in the hearing room could not be considered to have been sufficient by Convention standards.

*Conclusion*: violation (five votes to two).

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

(See also *Salduz v. Turkey* [GC], 36391/02, 27 November 2008, Information Note 113; and, generally, the Factsheet on Police arrest and assistance of a lawyer)

## ARTICLE 8

### Respect for private and family life
### Respect for home

**Confiscation of a house funded through drug trafficking:** *inadmissible*

*Aboufadda v. France* - 28457/10
Decision 4.11.2014 [Section V]

(See Article 1 of Protocol No. 1 below, page 22)

## ARTICLE 9

### Freedom of religion
### Manifest religion or belief

**Refusal to provide public religious services to members of Alevi faith:** *relinquishment in favour of the Grand Chamber*

*Doğan and Others v. Turkey* - 62649/10
[Section II]

In June 2005 the applicants, who are members of the Alevi faith, each presented a petition to the Prime Minister requesting that Alevi religious services constitute a public service, that Alevi places of worship be afforded the status of places of worship, that Alevi dignitaries of their religious community be recruited as civil servants, and that special provision be made in the budget for worship of the Alevi faith. In August 2005 the public-relations department attached to the Prime Minister's Office wrote to them saying that their requests could not be granted. Following receipt of that letter 1,919 persons, including the applicants, applied to the Administrative Court for judicial review of the decision. In July 2007 the Administrative Court dismissed the application on the grounds that the refusal by the respondent authority was in conformity with the legislation in force. It observed in that connection that the requests by the applicant party could only be satisfied by the enactment of new laws. The applicants appealed against that judgment but on 2 February 2010 the Supreme Administrative Court dismissed their appeal.

In their application to the European Court the applicants submitted that by refusing their requests for provision of a public religious service to members of the Alevi faith the State had failed to comply with its negative and positive obligations under Article 9 of the Convention. They also claimed that they were discriminated against on the basis of their religion on the grounds that they were treated less favourably than citizens adhering to the Sunni branch of Islam in a comparable situation. They relied on Article 14 of the Convention taken in conjunction with Article 9.

On 25 November 2014 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber.

# ARTICLE 10

## Freedom of expression

### Conviction of a journalist for the publication of materials covered by the secrecy of a pending investigation: *case referred to the Grand Chamber*

*A.B. (Bedat) v. Switzerland* - 56925/08
Judgment 1.7.2014 [Section II]

On 15 October 2003 the applicant, a journalist, published an article in a weekly magazine relating to a set of criminal proceedings against a driver who had been remanded in custody for crashing into a group of pedestrians, killing three and injuring a further eight, before jumping off the Lausanne Bridge. The article drew a portrait of the accused, presented a summary of the questions put by the police and the investigating judge and the accused's replies, and was accompanied by several photographs of the letters which he had sent to the investigating judge. The article also comprised a brief summary of statements from the accused's wife and attending physician. The journalist was prosecuted for publishing secret documents. In June 2004 the investigating judge sentenced him to a one-month suspended prison term. The Police Court later replaced the sentence with a fine of 4,000 Swiss francs (approximately EUR 2,667). The applicant's appeals against his conviction were dismissed.

By a judgment of 1 July 2014 (see Information Note 176), a Chamber of the Court concluded by four votes to three that there had been a violation of Article 10 because the applicant's sentence to a fine for using and reproducing excerpts from the investigation file in his article did not meet "a pressing social need". Although the grounds of conviction had been "relevant", they were not "sufficient" to justify such an interference in the applicant's right to freedom of expression.

On 17 November 2014 the case was referred to the Grand Chamber at the Government's request.

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### Historian fined for damaging a well-known professor's reputation as domestic law required non-journalists to prove veracity of their allegations: *violation*

*Braun v. Poland* - 30162/10
Judgment 4.11.2014 [Section IV]

*Facts* – The applicant, a film director, historian and author of press articles, referred to a well-known professor as a secret collaborator with the communist regime during a radio debate in 2007. In 2008 a regional court ordered the applicant to pay a fine and to publish an apology for having damaged the professor's reputation. The applicant's appeal was ultimately dismissed by the Supreme Court.

*Law* – Article 10: When balancing the applicant's right to freedom of expression and the professor's right to respect for his reputation, the domestic courts had distinguished between the standards applicable to journalists and those applicable to other participants in the public debate without examining whether such a distinction was compatible with Article 10 of the Convention. In fact, under the Supreme Court's case-law the standard of due diligence and good faith was applied only to journalists, while others, such as the applicant, were required to prove the veracity of their allegations. As the veracity of the applicant's statements could not be proven the domestic courts had considered them untrue and therefore illegal.

However, the issue of whether or not the applicant was a journalist under the domestic law was not of particular relevance for examining the complaint under Article 10, as the Convention offered protection to all participants in debates on matters of legitimate public concern. What mattered in the present case was that the applicant had clearly been involved in a public debate on an important issue. The Court was therefore unable to accept the approach which had required the applicant to fulfil a higher standard of proof than that of due diligence only on the ground that under the national law he was not considered a journalist. The reasons on which the Polish courts had relied could thus not be considered relevant and sufficient under the Convention.

*Conclusion*: violation (unanimously).

Article 41: EUR 3,000 in respect of non-pecuniary damage; EUR 8,000 in respect of pecuniary damage.

(See also *Vides Aizsardzības Klubs v. Latvia*, 57829/00, 27 May 2004, Information Note 64)

# ARTICLE 11

## Freedom of association

### Trade union prevented from holding a strike for almost four years: *violation*

*Hrvatski liječnički sindikat v. Croatia* - 36701/09
Judgment 27.11.2014 [Section I]

*Facts* – The applicant was a trade union of medical practitioners. In 2004 it and other trade unions concluded a collective agreement for the healthcare sector with the Government. On the same day, the applicant union and the Government also concluded another collective agreement, which formed an annex to the previous one, for the medical and dentistry sector. In 2005 Croatian doctors approved the Annex through a referendum, the validity of which was, however, not recognised by the authorities. The applicant then announced a strike aimed at enforcing the Annex, having the results of the referendum recognised, and concluding a new collective agreement for the medical and dentistry sector. However, the County Court banned the applicant from holding the strike on the ground that the Annex was invalid. The applicant's appeal to the Supreme Court was dismissed, as was its complaint to the Constitutional Court. In parallel civil proceedings brought by other trade unions the Annex was declared null and void in 2008 because it had not been entered into by all the trade unions that had concluded the main agreement.

*Law* – Article 11: The ban on holding the strike constituted an interference with the applicant union's freedom of association, which interference was prescribed by law and pursued the aim of protecting the rights of other trade unions to parity in the collective-bargaining process.

As regards proportionality, the Court noted that the domestic courts had considered that they were not required to examine whether a strike could be called to demand the conclusion of a new collective agreement, as the applicant union's representative had stated that this was a "subsidiary" argument to be considered in the event of the Annex being declared invalid. Yet it had been of particular importance to address that ground for the strike because the domestic law actually allowed industrial action in the absence of a collective agreement. As a consequence of the domestic courts' decision, the applicant union had been prevented from holding a strike between April 2005 and December 2008. In the absence of any exceptional circumstances, the Court found it difficult to accept that upholding the principle of parity in collective bargaining was a legitimate aim capable of justifying the deprivation of a trade union for three years and eight months of the most powerful instrument it had to protect the occupational interests of its members. That was especially so in the present case as the applicant union had not been allowed to strike to put pressure on the Government to grant doctors and dentists the same rights already agreed on in the Annex, which was invalidated on formal grounds only. Therefore, the interference in question could not be regarded as proportionate to the legitimate aim it had sought to achieve.

*Conclusion*: violation (unanimously).

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

(See also the Factsheet on Trade union rights)

# ARTICLE 33

## Inter-State application

### Alleged widespread human-rights violations in Crimea and Eastern Ukraine: *communicated*

*Ukraine v. Russia* - 20958/14 and 43800/14
[Section III]

On 25 November 2014 the Court invited the Russian Government to submit their observations on the admissibility of two inter-State applications lodged by the Government of Ukraine under Article 33 of the Convention.

(a) Application no. 20958/14 relates to events leading up to and following the assumption of control by the Russian Federation over the Crimean peninsula and subsequent developments in Eastern Ukraine. The Government of Ukraine maintain that, by exercising effective control over the Autonomous Republic of Crimea and over armed groups operating in Eastern Ukraine, Russia has from 27 February 2014 onwards exercised jurisdiction over a situation which has resulted in numerous violations of the Convention. In particular, the Ukrainian Government allege that between March and September 2014 Ukrainian military servicemen, officers of law-enforcement bodies and civilians were killed as a result of the illegal annexation of Crimea and Russian support of separatist armed

groups in Eastern Ukraine and that the killings amount to a widespread and systematic practice. They also refer to cases of torture or other forms of ill-treatment of civilians and of arbitrary deprivation of liberty. A number of Crimean Tatars were subjected to ill-treatment on account of their ethnic origin or their attempts to protect Ukrainian national symbols. Ukrainian nationals living in Crimea and Sevastopol were automatically recognised as Russian nationals and pressure was exerted on those who expressed the wish to remain Ukrainian nationals. They further allege that journalists have been the victims of attacks, abductions, ill-treatment and harassment while doing their work. Property belonging to Ukrainian legal entities has been subjected to the unlawful control of the self-proclaimed authorities of the Crimean Republic, in action that was later validated by Russian legislation. Lastly, entry to Crimea by Ukrainian nationals has been unlawfully restricted.

*Communicated* under Articles 2, 3, 5, 6, 8, 9, 10, 11, 13 and 14 of the Convention, Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4. The interim measure issued by the Court under Rule 39 of its Rules calling upon both Russia and Ukraine to refrain from taking any measures, in particular military action, which might bring about violations of the Convention rights of the civilian population, remains in force (see Information Note 172).

(b) Application no. 43800/14 concerns the alleged abduction of groups of Ukrainian children in care and the adults accompanying them by separatist forces in Eastern Ukraine in June, July and August 2014 and their subsequent transportation to Russia. In each case, following diplomatic efforts by the Ukrainian authorities in coordination with the Russian authorities, the children and adults were returned to the territory of Ukraine within a few days of their abduction.

*Communicated* under Articles 2, 3, 5, and 8 of the Convention and under Article 2 of Protocol No. 4. The interim measure requiring the Russian Government to ensure respect for the Convention rights of the people abducted and ensure their immediate return to Ukraine was lifted after the group's return to Ukraine.

In addition to the two inter-State applications, some 160 individual applications against Ukraine, Russia or both are currently pending before the Court in connection with the aforementioned events. More than 20 relate to events in Crimea and the remainder to developments in Eastern Ukraine.

# ARTICLE 34

## Hinder the exercise of the right of application

### Failure to comply with interim measure indicated by the Court: *violation*

*Amirov v. Russia* - 51857/13
Judgment 27.11.2014 [Section I]

*Facts* – The applicant was a former deputy Prime Minister of the Dagestan Republic and Mayor of the Republic's capital city. In 1993 he became paralysed following an assassination attempt. He also suffered from other serious health problems. In 2013 he was charged with a number of serious offences. He was subsequently arrested and placed in detention. Under Rule 39 of the Rules of Court, on 16 August 2013 the European Court indicated to the Government that the applicant should be immediately examined by independent medical experts to determine whether the medical treatment he was receiving in the detention facility was adequate and whether his condition was compatible with detention or required his admission to hospital. The domestic authorities did not, however, comply with the measure. In 2014 the applicant was found guilty of conspiring to organise a terrorist attack and sentenced to ten years' imprisonment. The criminal proceedings on the remaining charges against him were still pending at the time of the Court's judgment.

*Law*

Article 34: In reply to the interim measure indicated by the Court, the Government had submitted two reports by civilian doctors, but these had not provided any answers to the Court's questions. Instead, the Government had answered the questions themselves and had refused to allow the applicant's defence team to organise an examination by a medical expert. By replacing expert medical opinion with their own assessment of the applicant's situation, the Government had frustrated the purpose of the interim measure, which had sought to enable the Court, on the basis of relevant independent medical opinion, to effectively respond to and prevent the possible continuous exposure of the applicant to physical and mental suffering in violation of Article 3 of the Convention.

*Conclusion*: violation (unanimously).

Article 3: The applicant was a paraplegic wheelchair-bound inmate suffering from a long list of illnesses.

The parties disagreed as to the seriousness and gravity of his condition and its compatibility with detention. It was true that the expert evidence produced by the applicant had been drawn up by experts who had not examined him in person. However, this argument could not be considered valid as the Government had failed to organise an expert medical examination in disregard of the interim measure indicated by the Court and the authorities had denied the applicant access to medical experts of his choice. The Government had failed to demonstrate that the applicant had been receiving effective medical treatment for his illnesses while in detention. As a result of the lack of comprehensive and adequate medical treatment, the applicant had been exposed to prolonged mental and physical suffering diminishing his human dignity. The authorities' failure to provide him with the medical care he needed had thus amounted to inhuman and degrading treatment within the meaning of Article 3.

*Conclusion*: violation (unanimously).

Article 5 § 3: The applicant had been kept in detention on remand for more than a year. The Court accepted the existence of a reasonable suspicion that he had committed the offences with which he was charged, as well as the particularly serious nature of those offences. As regards the danger of the applicant's absconding, the domestic courts had taken into consideration the sentence the applicant would face if found guilty as charged, his personality, his connections and his powers stemming from his position as mayor and his political and social stance, as well as the likelihood that he would influence witnesses. Considering these factors cumulatively, the domestic courts could have validly presumed that a risk existed that, if released, the applicant might abscond, reoffend or interfere with the proceedings. Moreover, the risk of absconding or perverting the course of justice had persisted throughout the entire period of the applicant's detention. Although his state of health considerably reduced the risk of his absconding, it nevertheless could not entirely mitigate that risk. Considering also the considerable complexity of the proceedings, the Court found that the national authorities had put forward relevant and sufficient reasons to justify the applicant's detention and had not displayed a lack of special diligence in handling his case.

*Conclusion*: no violation (unanimously).

Article 46: The authorities were required to admit the applicant to a specialised medical facility where he would remain under constant medical supervision and be provided with adequate medical services. They were also required to regularly re-examine the applicant's situation, including with the assistance of independent medical experts.

Article 41: EUR 15,000 in respect of non-pecuniary damage.

(See also *Mamedova v. Russia*, 7064/05, 1 June 2006, Information Note 87; *Khudobin v. Russia*, 59696/00, 26 October 2006, Information Note 90; *Belevitskiy v. Russia*, 72967/01, 1 March 2007; *Gurenko v. Russia*, 41828/10, and *Bubnov v. Russia*, 76317/11, both 5 February 2013; *Budanov v. Russia*, 66583/11, and *Gorelov v. Russia*, 49072/11, both 9 January 2014; and see, more generally, the Factsheet on Prisoners' health-related rights)

# ARTICLE 35

## Article 35 § 1

### Exhaustion of domestic remedies
### Effective domestic remedy – Sweden

**Retroactive redress in respect of alleged violations of Article 4 of Protocol No. 7 following Supreme Court decision of 11 June 2013:** *effective remedy; inadmissible*

*Shibendra Dev v. Sweden* - 7362/10
Decision 21.10.2014 [Section V]

*Facts* – In a plenary decision of 11 June 2013 the Swedish Supreme Court, departing from its previous case-law, held that there was sufficient support to conclude that the Swedish system that enabled persons guilty of tax offences to be both prosecuted and subjected to tax surcharges was incompatible with Article 4 of Protocol No. 7 to the Convention. In a series of further decisions, both it and the Supreme Administrative Court ruled that persons convicted or on whom surcharges were imposed in a manner incompatible with Article 4 of Protocol No. 7 could, in certain situations, have their cases re-opened. This applied with retrospective effect from 10 February 2009, the date of the European Court's judgment in the case of *Sergey Zolotukhin v. Russia* [GC].[1]

1. *Sergey Zolotukhin v. Russia* [GC], 14939/03, 10 February 2009, Information Note 116. The case also concerns double jeopardy and duplication of proceedings

The applicant in the instant case was ordered to pay tax surcharges before being convicted of, *inter alia*, a tax offence. He lodged an application with the European Court complaining of a violation of Article 4 of Protocol No. 7 to the Convention on 21 January 2010. The question arose whether he was required first to exhaust the domestic remedies that had become available as a result of the Supreme Court's decision.

*Law* – Article 35 § 1: In view of the new legal position following the Supreme Court's decision of 11 June 2013, there was now an accessible and effective remedy in Sweden that was capable of affording redress in respect of alleged violations of Article 4 of Protocol No. 7, provided that the conditions specified in that and later decisions were met. Thus, to the extent that a case involved tax surcharges and tax offences based on the same information supplied in a tax return and had been tried or adjudicated in the second set of proceedings on or after 10 February 2009, a potential applicant could be expected to take domestic action to secure a re-opening of the proceedings, a quashing or reduction of sanctions or an award of compensation for alleged damage.

There were several factors that justified departing from the general principle that the assessment whether domestic remedies had been exhausted was normally carried out by reference to the date the application was lodged. First, by examining the issues in question in plenary, the Supreme Court and Supreme Administrative Court had intended to address a general question of compatibility of the Swedish legal system with the Convention by delivering leading decisions for the guidance of the future handling of cases concerning double proceedings and punishments in tax matters. Second, the new legal position regarding *ne bis in idem* and Article 4 of Protocol No. 7 had not come about through gradual changes or been defined in general terms but had been laid down specifically for one type of case and situation. The Supreme Court's decision of 11 June 2013 and the subsequent decisions taken by the two supreme courts were sufficiently detailed and precise to enable applicants to assess whether their case might meet the conditions stipulated. Third, the remedy afforded litigants a genuine opportunity to obtain redress for their grievances at national level. The Supreme Court had not stopped at a literal reading of Article 4 of Protocol No. 7 but, in reliance on Swedish legal tradition, had decided to extend the prohibition against double proceedings and punishments to situations of *lis pendens*, thus affording protection that went beyond that offered by Article 4 of Protocol No. 7. Lastly, the remedy allowed criminal punishment and tax surcharges to be quashed or reduced and the new legal position had led to many individuals being released from prison or from having to serve their sentences whereas the compensation afforded by the Convention system was normally limited to an award of monetary damages.

*Conclusion*: inadmissible (failure to exhaust domestic remedies).

(See also *Lucky Dev v. Sweden*, 7356/10, 27 November 2014, summarised under Article 4 of Protocol No. 7 below, page 23)

## ARTICLE 46

### Execution of judgment – General measures

#### Respondent State required to take general measures to improve conditions of detention and to afford appropriate remedies

*Vasilescu v. Belgium* - 64682/12
Judgment 25.11.2014 [Section II]

*Facts* – The applicant complained before the European Court of the conditions in which he had been detained in various prisons in Belgium.

*Law* – Article 3: The applicant had been detained in overcrowded prison conditions and sometimes in cells with no toilet facilities or access to running water. He had also had to sleep on a mattress on the floor for several weeks and had been exposed to passive smoking. Accordingly, the applicant's material conditions of detention in Antwerp and Merksplas prisons, taken as a whole, had reached the minimum threshold of seriousness required by Article 3 of the Convention and amounted to inhuman and degrading treatment.

*Conclusion*: violation (unanimously).

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

Article 46: The problems arising from prison overcrowding in Belgium, and the problems of unhygienic and dilapidated prisons, were structural in nature and did not concern the applicant's personal situation alone. The conditions of detention about which the applicant had complained had been criticised by national and international observers for many years without any improvement apparently having been made in the prisons in which he had been detained. On the contrary, the

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) had observed in 2012 that the problem of prison overcrowding had continued to worsen in Belgium during recent years. Furthermore, none of the remedies referred to by the Government could at the present time be regarded as an effective remedy that had to be exhausted.

Accordingly, the Court recommended that the respondent State envisage adopting general measures in order to guarantee prisoners conditions of detention compatible with Article 3 of the Convention and also to provide them with a remedy capable of putting a stop to an alleged violation or permitting them to obtain an improvement in their conditions of detention.

(See also the Factsheet on Detention conditions and treatment of prisoners)

### Execution of judgment – Individual measures

**Respondent State required to transfer disabled applicant to specialised medical facility and provide him with adequate medical care**

*Amirov v. Russia* - 51857/13
Judgment 27.11.2014 [Section I]

(See Article 34 above, page 18)

## ARTICLE 1 OF PROTOCOL No. 1

### Peaceful enjoyment of possessions

**Re-registration in bishopric's favour of title to church belonging to applicant company:** *violation*

*Sociedad Anónima del Ucieza v. Spain* - 38963/08
Judgment 4.11.2014 [Section III]

*Facts* – The applicant company was a Spanish limited company. In 1978 it purchased land. The purchase was entered in the land register. In addition to the plot of land and its overall area, the entry in the register mentioned that "a church, a house, a number of *norias*, a poultry yard and a mill" formed an enclave within the plot. In 1994 the Diocese of Palencia ("the Diocese") had the church owned by the applicant company registered in the name of the Diocese. The entry was made on the basis of a certificate by the Diocese on 16 December 1994. The certificate was signed by the General Secretary of the Diocese with the agreement of the Vicar General. Even though its name appeared in the register as the owner of the land in question, the applicant company was neither informed of this new entry in the register nor given any opportunity to object. All the applicant company's appeals were dismissed, owing in particular to the ambiguity of the terms of the previous registration of the church in question.

*Law* – Article 1 of Protocol No. 1: The new registration of the church in the Diocese's name by the General Secretary of the Diocese had deprived the applicant company of its rights under the previous registration of the building in its name and therefore constituted interference in its right to respect for its property. That situation was different from a *de facto* expropriation or a measure to control the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 and therefore had to be seen as falling within the ambit of the first sentence of Article 1 of Protocol No. 1. The interference met the requirements of the general interest, in this case ensuring the security of trade in real estate by entering the property in the land register.

The registration by the Diocese was based solely on the December 1994 certificate. However, the rule governing that procedure could only come into play in the absence of a previous entry in the register. Indeed the registration in the name of the Diocese should have been refused by the registry official, because there could not be two concurrent and apparently contradictory entries in respect of the same property. The registration had nevertheless been effected without the applicant company being given any opportunity to object. No argument had been heard on the applicable domestic provisions in the national courts which had examined the applicant company's case. Consequently, the registration of the church in the Diocese's name had been arbitrary and barely foreseeable, and had failed to provide the applicant company with the basic procedural safeguards for defending its interests. The applicant company had found itself unable to defend itself against the effect of the registration at issue, which made this latter measure in itself disproportionate.

Moreover, it was surprising that a certificate issued by the General Secretary of the Diocese should have the same value as a certificate issued by State officials exercising public authority and that the domestic norm governing this procedure referred only to diocesan bishops of the Roman Catholic Church, to the exclusion of representatives of other denominations. It was also noteworthy that there was no time limit on such registration which could

therefore be effected, as in the present case, at any time, without any prior publicity requirement, and in breach of the principle of legal certainty. Lastly, as the domestic courts had considered the church as having always belonged to the Diocese owing to its status as a parish church, the applicant company had been unable to secure any kind of compensation.

In the particular circumstances of the case – the exceptional nature of the procedure at issue, the fact that the Diocese held no title deeds, the lack of adversarial proceedings or equality of arms, combined with interference with the full enjoyment of the right of property and the lack of compensation – the applicant company had had to bear an unusual and excessive burden.

*Conclusion*: violation (six votes to one).

The Court also unanimously held that there had been a violation of Article 6 § 1 of the Convention owing to the particularly strict interpretation of a procedural rule which had deprived the applicant company of the right of access to the court with jurisdiction to examine its appeal on points of law.

Article 41: question reserved.

## Control of the use of property

### Confiscation of a house funded through drug trafficking: *inadmissible*

*Aboufadda v. France* - 28457/10
Decision 4.11.2014 [Section V]

*Facts* – In 2005 the applicants purchased a house, which they paid for through a deposit and by taking out a bank loan. A few months later a judicial investigation revealed a major drug-trafficking operation organised by the applicants' son. Financial checks were carried out into his assets and those of his entourage, in order to establish whether the offences of failure to justify resources and money laundering had been committed. In 2008 the applicants' son was sentenced, among other measures, to seven years' imprisonment and the applicants to three years' imprisonment, two years of which were suspended. In the applicants' case the court also ordered that the house purchased in 2005 be confiscated. The court noted, in particular, that the applicants' son was responsible for managing the work being carried out on the house and was contributing to the costs, that he was making the mortgage payments and that tapping of the applicants' telephone line showed that they had been aware of their son's illegal activities. The applicants were authorised to remain in the house until May 2011, in exchange for a monthly rent of EUR 900, to enable them to find alternative accommodation. The State took possession of the building on 1 June 2011.

*Law* – Article 1 of Protocol No. 1: The confiscation in question had been provided for by law and pursued the public-interest aim of combatting drug-trafficking by discouraging concealment of unlawfully obtained assets and money laundering. With regard to persons who were in regular contact with a person engaged in committing crimes or offences punishable by up to five years' imprisonment and who were unable to show that they had resources corresponding to their lifestyles or to demonstrate the lawful origin of the assets held by them, the legislative framework laid down a presumption: the persons concerned were presumed to have benefited from the fraudulently obtained resources or assets in full knowledge of the facts. In such a case, all or part of the assets in respect of which they were unable to explain the financial provenance were likely to be confiscated as an additional penalty. The presumption was a rebuttable one, and the applicants could have avoided being convicted had they demonstrated the lawful origin of their resources and assets. Indeed, after having noted that their lifestyle was disproportionate to the income declared by them, the domestic courts had duly assessed the evidence submitted in support of their claim. It also took account of the applicants' conduct, noting in particular that they could not have been unaware of the provenance of the money made available to them by their son. More generally, there was nothing to suggest that the applicants, whose case had been heard before two levels of jurisdiction, who had submitted an appeal on points of law and who did not claim to be victims of a violation of their right to a fair trial, had not been afforded a reasonable opportunity of putting their case to the authorities.

The Court accepted that it seemed that part of the funding for the purchase of the applicants' house had a source other than the income from the drug-trafficking in which their son was involved. Indeed, their resources subsequent to 2006 were not in issue. Thus, the mortgage payments due after 2006 amounted to

a means of funding the purchase which had not originated in the drug-trafficking for which they had been convicted. However, there was nothing excessive in the conclusion that "most" of these assets had been obtained from the proceeds of the drug-trafficking in which their son was engaged. Moreover, the domestic courts' decision to

confiscate the house in its entirety as a penalty had demonstrated a legitimate wish to punish severely the offences committed by the applicants, which were akin to the concealment of illegally obtained assets and which, in addition, had occurred in the context of large-scale drug-trafficking at local level. Given the ravages caused by drugs, it was understandable that the authorities of Contracting States should show great firmness towards those who contributed to the propagation of this scourge.

It followed that the interference in the applicants' right to the peaceful enjoyment of their possessions had not been disproportionate to the general-interest aim pursued.

*Conclusion*: inadmissible (manifestly ill-founded).

Article 8: The confiscated house was the applicants' family home. The measure had thus interfered with the exercise of their right to respect for their private and family life and their home. The interference was in accordance with the law, was intended to combat drug-trafficking and to prevent it by discouraging the concealment of illegally obtained assets and money laundering, and was aimed at "the prevention of disorder or crime". The scope of the States' margin of appreciation was narrower when applying Article 8 of the Convention than when applying the second paragraph of Article 1 of Protocol No. 1. However, the authorities had taken due account of the applicants' situation by permitting them to remain in their home until such time as they were able to move to other premises.

*Conclusion*: inadmissible (manifestly ill-founded).

## ARTICLE 2 OF PROTOCOL No. 4

### Article 2 § 1

**Freedom of movement**

**Imposition of special supervision measure on account of alleged dangerousness:** ***relinquishment in favour of the Grand Chamber***

*De Tommaso v. Italy* - 43395/09
[Section II]

In April 2008 the applicant was placed under special supervision for a duration of two years. The court had found that, in view of his previous convictions for drug trafficking, escaping detention and unlawful possession of weapons, and the fact that he associated with criminals, the applicant was indisputably dangerous.

The special supervision order required the applicant to report once a week to the police authority responsible for his supervision, to seek employment within one month, to continue living in the same town, to lead an honest and law-abiding life, not to give cause for suspicion, not to associate with persons who had a criminal record and were subject to preventive or security measures, not to return home later than 10 p.m. or to leave home before 7 a.m., except in case of necessity and only after giving notice to the authorities in due time, not to keep or carry any weapons, not to frequent bars or nightclubs, and not to take part in public meetings.

In January 2009 the court of appeal observed that the offence of which the applicant had been convicted dated back to 2004 and was not especially serious, and that he had not committed any subsequent offences. The fact that he had associated with people with criminal records was not sufficient evidence of his dangerousness. The court of appeal held that the lower court had omitted to assess the impact of the rehabilitation purpose of the sentence on the applicant's personality.

The applicant submits that the preventive measure imposed on him was arbitrary and applicable for an excessive length of time, seeing that the court of appeal's ruling had been given six months after he had lodged his appeal. He also complains that the proceedings before the benches of the lower court and the court of appeal specialising in the application of preventive measures were not held in public and that the proceedings resulting in the application of preventive measures were unfair.

The case was communicated under Article 2 of Protocol No. 4 and Article 6 of the Convention. On 25 November 2014 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber.

## ARTICLE 4 OF PROTOCOL No. 7

**Right not to be tried or punished twice**

**Continuation of tax-surcharge proceedings after taxpayer's acquittal of tax offence arising out of same facts:** *violation*

*Lucky Dev v. Sweden* - 7356/10
Judgment 27.11.2014 [Section V]

*Facts* – In June 2004 the Swedish tax authorities instituted proceedings against the applicant in respect of her income tax and VAT returns for 2002 and ordered her to pay additional tax and surcharges. The applicant challenged that order in the

courts. She was also prosecuted for bookkeeping and tax offences arising out of the same set of tax returns. Although she was convicted of the book-keeping offence, she was acquitted of the tax offence (for want of the requisite intent). The tax proceedings continued for a further nine and a half months after the date her acquittal became final. In her application to the European Court, the applicant complained that as a result of being prosecuted and ordered to pay tax surcharges in respect of the same events, she had been tried and punished twice, in breach of Article 4 of Protocol No. 7.

*Law* – Article 4 of Protocol No. 7

(a) *Admissibility* – In three recent decisions, including *Shibendra Dev v. Sweden* (7362/10, 21 October 2014, summarised under Article 35 § 1 above, page 19), the Court had ruled that new remedies that had become available in the domestic law as a result of recent rulings of the Swedish Supreme Court concerning liability to both prosecution and tax surcharges could now be considered effective and had to be exhausted in any case in which the set of proceedings which commenced later in time ended on or after 10 February 2009. Since the second set of proceedings (the criminal proceedings in the applicant's case) had ended before that date, the applicant had not been required to use that remedy.

(b) *Merits* – The Court reiterated that proceedings involving tax surcharges were to be considered "criminal" not only for the purposes of Article 6 of the Convention but also for the purposes of Article 4 of Protocol No. 7. Thus, both the tax and the criminal proceedings in the applicant's case came under the ambit of the latter provision.

Article 4 of Protocol No. 7 prohibited the prosecution or trial of a second "offence" in so far as it arose from identical facts or facts which were substantially the same. The elements of the book-keeping offence were sufficiently separate from the facts that had given rise to the tax surcharges as to enable the Court to conclude that the applicant's conviction of that offence had not amounted to double punishment. The position regarding his prosecution for the tax offence was, however, different: the applicant's indictment and the imposition of tax surcharges were based on the same failure to declare business proceeds and VAT while the tax proceedings and the criminal proceedings concerned the same period of time and essentially the same amount of evaded taxes. Accordingly, the facts were at least substantially the same.

The requirement of a "final" decision had been met in as much as no appeal had been lodged against the decision acquitting the applicant of the tax charge, which had thus acquired legal force.

As to whether there had been duplication of the proceedings, the Court reiterated that Article 4 of Protocol No. 7 was not confined to the right not to be punished twice but extended to the right not to be tried twice for the same offence. It thus applied even where the individual was prosecuted in proceedings that did not result in a conviction. However, the protection only operated once a decision concerning the same offence was final: Article 4 of Protocol No. 7 did not preclude several concurrent sets of proceedings being conducted before that final decision was issued. A violation would occur, however, if one set of proceedings continued after the date on which the other set was concluded with a final decision. The tax proceedings in the applicant's case were not terminated and the tax surcharges were not quashed after the criminal proceedings became final but instead had continued for a further nine and a half months. There had not been a sufficiently close connection, in substance and in time, between the two sets of proceedings for them to be viewed as part of the same set of sanctions (contrast the position in cases such as *R.T. v. Switzerland* and *Nilsson v. Sweden*, in which the Court found that decisions on withdrawal of a driving licence were directly based on an expected or final conviction for a traffic offence and thus did not contain a separate examination of the offence or conduct at issue).

In sum, the applicant had thus been tried "again" for an offence of which she had already been finally acquitted.

*Conclusion*: violation (unanimously).

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

(See *R.T. v. Switzerland* (dec.), 31982/96, 30 May 2000, Information Note 18; and *Nilsson v. Sweden* (dec.), 73661/01, 13 December 2005, Information Note 81)

## REFERRAL TO THE GRAND CHAMBER

### Article 43 § 2

*M.E. – Sweden* - 71398/12
Judgment 26.6.2014 [Section V]

(See Article 3 above, page 13)

*A.B. (Bedat) – Switzerland* - 56925/08
Judgment 1.7.2014 [Section II]

(See Article 10 above, page 16)

## RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

### Article 30

*Lambert and Others v. France* - 46043/14
[Section V]

(See Article 2 above, page 8)

*Doğan and Others v. Turkey* - 62649/10
[Section II]

(See Article 9 above, page 15)

*De Tommaso v. Italy* - 43395/09
[Section II]

(See Article 2 of Protocol No. 4 above, page 23)

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