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European Court of Human Rights
(Council of Europe)
67075 Strasbourg Cedex
France
Tel: 00 33 (0)3 88 41 20 18
Fax: 00 33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int

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M. Özel and Others v. Turkey - 14350/05, 15245/05 and 16051/05
Judgment 17.11.2015 [Section II]

Facts – The applicants' relatives were victims of an earthquake which, in 1999, caused the collapse of buildings in which they were living in the town of Çınarcık.

Before the European Court, the applicants complained of a breach of their relatives' right to life, as protected by Article 2. In particular, they accused the municipal authorities of having authorised developers to erect blocks of flats five or more storeys high in an area prone to seismic activity and of failing to carry out the necessary inspections to ensure the conformity of the buildings or to prevent their construction. They also complained about the conduct of the criminal proceedings and about their inability to secure the prosecution of the civil servants they considered responsible.

Law – Article 2

(a) *Substantive limb* – The State's obligation of prevention in relation to earthquake damage, under the substantive limb of Article 2, mainly consisted in taking measures to reduce its effects to limit the scale of the catastrophe as far as possible, particularly through land planning and control over urban development. The Court observed that the authorities had been aware of the risk of earthquakes in the devastated area. However, the earthquake in question had had catastrophic repercussions in terms of human life on account of the collapse of buildings which failed to comply with the safety and construction standards applicable to the zone concerned. In that connection it appeared established that the local authorities, whose role it was to monitor and inspect constructions, had failed in their duties in such matters. However, the Court found that this part of the complaint was out of time, the applications having been lodged more than six months after the national authorities' decisions concerning the complaint under the substantive limb of Article 2, and thus rejected it.

Conclusion: inadmissible (out of time).

(b) *Procedural limb* – Criminal proceedings had been brought against the developers of the buildings which collapsed and the individuals directly involved in their construction, and the applicants had joined the proceedings as third parties. While recognising that the case was a complex one on account of the number of victims, the Court noted that only five individuals had been prosecuted and that the experts' reports determining the defects and circumstances which caused the collapse of the buildings and the various responsibilities involved had been ready at an early stage. The importance of the investigation should have led the authorities to deal with it promptly in order to avoid any appearance of tolerance of illegal acts or of collusion in such acts. The length of the proceedings did not meet the requirement of a prompt examination of the case without undue delay. Only two of the defendants had actually been found responsible, while the proceedings were time-barred in the case of the three others. In addition, the attempts by some of the applicants to persuade the authorities to start a criminal investigation in respect of civil servants had remained unsuccessful on account of a lack of prior administrative authorisation. Lastly, the applicants who had brought civil proceedings for compensation had had to wait between eight and twelve years before the civil courts delivered their judgments and the sums awarded to them for non-pecuniary damage resulting from their relatives' deaths had been minimal. The Court thus took the view that the civil action for compensation was not, in the circumstances of the case, a remedy that could be regarded as effective.

Conclusion: violation (unanimously).

Article 41: EUR 30,000 awarded to each applicant or couple of applicants in respect of non-pecuniary damage; claims in respect of pecuniary damage dismissed.

(See also *Budayeva and Others v. Russia*, 11673/02 et al., 20 March 2008, Information Note 106, and *Murillo Saldias and Others v. Spain* (dec.), 76973/01, 28 November 2006, Information Note 92)

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Bamouhammad v. Belgium - 47687/13
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ARTICLE 6

Article 6 § 1 (criminal)

Fair hearing

Domestic courts' failure to address legitimate concerns about possible "planting" of evidence: *violation*

Sakit Zahidov v. Azerbaijan - 51164/07
Judgment 12.11.2015 [Section I]

Facts – The applicant was arrested and taken to local police premises where a search was conducted and drugs were found in one of his pockets. He was later convicted of illegal possession of drugs. Before the domestic courts, the applicant claimed that the drugs had been planted on him by the police officers. His complaints concerning the conditions in which the search was carried out and the admissibility of the evidence were not addressed by the domestic courts.

Law – Article 6: The applicant's conviction had been based solely on the physical evidence, namely narcotic substances found on his person during a search.

The Court noted a number of concerns regarding the circumstances in which the physical evidence had been obtained. Firstly, the search of the applicant was not carried out immediately following the arrest, but twenty minutes later, nowhere near the place of arrest. The time lapse between the arrest and search raised legitimate concerns about possible "planting" of evidence, because the applicant was completely under the police's control during that time. There was nothing to suggest that there were any special circumstances that had made it impossible to carry out a search immediately after the arrest. Secondly, the domestic courts had declined to examine a copy of the video-recording of the search and the Government had failed to provide a copy of the recording to the Court when specifically requested to do so. Thirdly, the applicant's arrest was not immediately documented by the police and the applicant was not represented by a lawyer during his arrest or the search. Overall, therefore, the quality of the physical evidence on which the domestic courts' guilty verdict was based was questionable because the manner in which it had been obtained cast doubt on its reliability.

The Court further found that the domestic courts had not properly considered the questions of the authenticity of the physical evidence and its use against the applicant. They had, in particular, failed to examine why his search had not been immediately conducted at the place of arrest and whether the proper procedure had been followed.

These two factors – the manner in which the physical evidence had been obtained and the domestic courts' failure to address the applicant's arguments regarding its authenticity and use against him – had thus rendered the proceedings as a whole unfair.

Conclusion: violation (unanimously).

Article 41: EUR 9,000 in respect of non-pecuniary damage.

(See also *Layijov v. Azerbaijan*, 22062/07, 10 April 2014)

Impartial tribunal

Alleged lack of impartiality on account of Constitutional Court's judge's previous party political affiliation: *inadmissible*

Otegi Mondragon and Others v. Spain - 4184/15 et al.
Decision 3.11.2015 [Section III]

Facts – In 2011 the applicants were convicted by the *Audencia Nacional* of belonging to a terrorist organisation (the ETA) and given a prison sentence. They unsuccessfully appealed to the Supreme Court and in 2012 lodged *amparo* appeals with the Constitutional Court. Some of the applicants complained that one of the judges of the Constitutional Court had previously been affiliated to the ruling political party (*Partido Popular*) and thus had an interest in the outcome of the proceedings and was not impartial. The Constitutional Court ruled against the applicants noting that the judge was no longer affiliated to the party.

Law – Article 6 § 1: There was no indication of subjective bias on the part of the judge concerned. As regards the objective test, the question was whether the fact of having previously belonged to a political party was enough to cast doubt on a judge's impartiality. The judge concerned had been a member of the ruling party from 2001 till 2011, while the *amparo* appeals had been introduced in 2012. That previous membership had not had any connection with the substance of the case before the Constitutional Court. Additionally, under the domestic legislation, membership of a political party was not *per se* incompatible with the post of judge at the Constitutional Court. The judge had been a mere member of a political party without any management functions and had not taken part in any party activity concerning the accusations formulated against the applicants, or the consequent proceedings. Thus the applicant's fear due to the mere fact of the judge's previous political affiliation was not objectively justified.

Conclusion: inadmissible (manifestly ill-founded).

The Court also declared inadmissible as manifestly ill-founded a further complaint concerning the alleged lack of impartiality of one of the Constitutional Court's judges and communicated a complaint concerning the alleged lack of impartiality of the *Audencia Nacional*.

Article 6 § 1 (administrative)

Criminal charge
Fair hearing

Lack of free legal assistance in administrative proceedings: *Article 6 applicable; violations*

Mikhaylova v. Russia - 46998/08
Judgment 19.11.2015 [Section I]

(See Article 6 § 3 (c) below, page 11)

Access to court

Limitation period commencing on date of incident rather than date applicants became aware of possible negligence by authorities: *violation*

Sefer Yılmaz and Meryem Yılmaz v. Turkey - 611/12
Judgment 17/11/2015 [Section II]

Facts – The applicants were the parents of a man who died in September 2008 while he was doing his military service. The military prosecutor's office was immediately informed and a criminal investigation was opened automatically.

In December 2009 the military prosecutor discontinued the proceedings. The applicants' appeal against that decision was rejected by the military tribunal in January 2011. In parallel, the applicants, relying on the Constitution and Law no. 1602 on the Military Administrative High Court, in August 2010, lodged a preliminary application with the Interior Minister for compensation.

As their application was implicitly rejected, when in November 2010 they had not received any reply after two months, the applicants lodged an appeal in the Military Administrative High Court, but on 12 January 2011 it was dismissed for failure to comply with the time-limit for such preliminary applications. A further application for rectification of that judgment was dismissed in May 2011.

Law – Article 6 § 1: As regards the determination of *the starting point of the one-year period on the expiry of which the* action in question was deemed statute-barred, it was apparent from the Court's case-law that, where a compensation claim was based on an alleged fault or negligence, it was from the time when the claimant became or should have become aware of the fact constituting that fault or negligence that he or she had grounds to act.

The applicants knew that their son had died on 9 September 2008. However, they had not been aware of the exact circumstances of his death until the discontinuance decision was notified to them. The details were, however, decisive for the lodging of an appeal with the Military Administrative High Court.

In addition, it was for the applicants to adduce not only evidence of the causal link between the damage sustained and the military service performed by their son, but also evidence of the fault or negligence of the authorities.

While the causal link had been established at the time when the incident occurred, the evidence of any fault or negligence of the authorities was lacking. Before the discontinuance had been notified, the applicants had been unaware that the military authorities had ordered their son to patrol at night with a hand grenade at his disposal. That detail would, however, have been essential for an action to establish responsibility in the Military Administrative High Court.

It was therefore on the date when the applicants had been notified of the discontinuance decision that they had properly gained access to the details of the investigation and had been informed of any possible fault or negligence on the part of the authorities for the purposes of bringing a claim.

Accordingly, by rejecting their action as out of time in those circumstances, on the ground that the administrative appeal had not been lodged within a time-limit calculated from the date of the incident rather than from the awareness of any negligence on the part of the authorities, the Military Administrative High Court had deprived the applicants of their right of access to a court.

Conclusion: violation (unanimously).

The Court also found unanimously that there had been no violation of Article 2 under its substantive and procedural limbs.

Article 41: EUR 6,000 awarded jointly to the applicants in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Independent and impartial tribunal

Presence of serving military officers on bench of Supreme Military Administrative Court: *violation*

Tanışma v. Turkey - 32219/05
Judgment 17.11.2015 [Section II]

Facts – The son and brother of the applicants committed suicide during his compulsory military service. Two days before his death he had been beaten and insulted by his chief warrant officer. After a criminal investigation the military prosecutor discontinued the proceedings, taking the view that the suicide was the result of financial and family problems. In parallel, criminal proceedings were brought against the chief warrant officer for inflicting injuries on the person of a subordinate. He was fined and the military tribunal decided to suspend his sentence. The applicants brought proceedings against the Ministry of Defence in the Military Administrative High Court, seeking damages, but they were unsuccessful.

Before the European Court, the applicants complained that the Military Administrative High Court lacked independence and impartiality because the bench included career army officers.

Law – Article 6 § 1: The Court noted that the votes of the two career army officers, who served under the same rules on salary, grade steps, benefits, duty allowance, promotion, age-limit and pension as their army colleagues, had carried decisive weight in the rejection of the applicants' claim. The Military Administrative High Court had rejected the damages claim, by three votes to two, based mainly on the military prosecutor's decision to discontinue the criminal proceedings, and the two army officers had voted in favour of that rejection.

As regards the applicants' complaint about the lack of legal training of the members of that court who were army officers, the participation of lay judges was not, in itself, incompatible with Article 6 of the Convention: the principles laid down by the case-law of the European Court as to independence and impartiality applied to both professional and non-professional judges.

Accordingly, the lack of legal training of career officers sitting in the Military Administrative High Court had not in itself undermined the independence or impartiality of that court. Nevertheless, even though they were subject to the same rules as the members of that court who were military judges, they were still serving in the army, which controlled all matters relating to their salary, benefits and promotion. Their appointment was proposed by their superiors and they did not benefit from the same constitutional safeguards as those applicable to the other three members of the bench, who were military judges. The court which had heard the applicants' case could not therefore be regarded as an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention.

Conclusion: violation (six votes to one).

The Court also found, unanimously, that there had been no violation of Article 2 of the Convention.

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

(See also *Ibrahim Gürkan v. Turkey,* 10987/10, 3 July 2012, Information Note 154)

Article 6 § 2

Presumption of innocence

Revocation of order suspending prison sentence owing to revoking court's "firm conviction" that defendant had committed further offence: *violation*

El Kaada v. Germany - 2130/10
Judgment 12.11.2015 [Section V]

Facts – Section 26 § 1 (1) of the Juvenile Courts Act provides that an order suspending a custodial sentence shall be revoked if a young offender commits a (further) criminal offence during the period of probation.

The applicant was a juvenile. In 2008 he was convicted of various offences and given a two-year prison sentence, which was suspended. While on release on licence in respect of those offences he was arrested in connection with a further offence of burglary. Under questioning and in the absence of a lawyer he initially admitted the offence. However, he retracted his confession a few days later. The order suspending his original two-year sentence was subsequently revoked by a district court under section 26 § 1 (1) of the Juvenile Courts Act on the grounds that he had committed a further offence, as attested by his confession to the burglary offence. The applicant appealed, arguing that he had retracted his confession, but his appeal was dismissed by a regional court.

In the Convention proceedings, the applicant complained that the revocation of the order suspending his prison sentence had violated his right to be presumed innocent, in breach of Article 6 § 2 of the Convention.

Law – Article 6 § 2: In upholding the district court's decision to revoke the order suspending the applicant's prison sentence, the regional court stated that the applicant had "committed another offence during the probation period" and that, in view of his confession to the burglary charge, it was of the "firm conviction" that he had again committed an offence. Those statements confirmed without any reservations or reference to a state of suspicion the district court's finding for the purposes of section 26 § 1 (1) of the Juvenile Courts Act that the applicant had committed a new offence. They therefore amounted to a clear declaration that the applicant was guilty of burglary before he had been proved guilty by the competent trial court in a final judgment in accordance with the law. The reasoning in the domestic courts' decisions revoking the suspension of the applicant's sentence had thus breached the applicant's right to be presumed innocent.

Conclusion: violation (unanimously).

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

(See also, for a case concerning similar legislation applicable to adult offenders, *Böhmer v. Germany*, 37568/97, 3 October 2002)

Article 6 § 3 (c)

Free legal assistance

Lack of free legal assistance in administrative proceedings: *violations*

Mikhaylova v. Russia - 46998/08
Judgment 19.11.2015 [Section I]

Facts – In 2007, after participating in a demonstration, the applicant was arrested on the grounds of having allegedly disobeyed a police order to disperse. Administrative proceedings were initiated against her, and her request for free legal assistance was dismissed. She was then found guilty of having breached Articles 19.3 and 20.2 of the Code of Administrative Offences (CAO) and sentenced to a fine. In her subsequent appeals, including to the Constitutional Court, her request for free legal assistance was again refused and her sentence upheld.

Law – Article 6 §§ 1 and 3 (c)

(a) *Applicability* – As to the charges under Article 20.2 of the CAO, the Court noted that certain procedural guarantees contained in the CAO were indicative of the "criminal" nature of the procedure. Moreover, the relevant penalty was not that actually imposed, but the penalty she in fact risked or was liable to have imposed, which was determined by reference to the maximum provided for the offence. The statutory maximum in the applicant's case was a fine equivalent to EUR 28. However, although the fine could not be converted into a custodial sentence in the event of non-payment, what mattered was that it was not intended as pecuniary compensation for damage but was punitive and deterrent in nature. Finally, noting the Government's admission that the applicant had been "arrested", the Court assumed that she had been subjected to the administrative arrest foreseen by the CAO in relation to both charges against her, a measure which had stronger criminal connotations than the escorting of an individual to the police station. As to the charges under Article 19.3 of the CAO, that provision provided for a fine equivalent to EUR 28 and/or 15 days' imprisonment as the maximum penalties. This gave rise to a strong presumption that the charges against the applicant were "criminal" in nature, a presumption which

could only exceptionally be rebutted, and only if the deprivation of liberty could not be considered "appreciably detrimental" given its nature, duration or manner of execution. However, in the present case the Court did not discern any such exceptional circumstances. It followed that both offences for which the applicant had been prosecuted under the CAO could be classified as "criminal" within the meaning of Article 6 of the Convention.

(b) *Merits*

(i) *Charge under Article 19.3 of the CAO* – Under domestic law administrative detention was to be applied only in "exceptional circumstances". However, since the applicant did not fall within the categories of people excluded from such detention, it had been a possible sanction. In the Court's view, the gravity of the penalty was sufficient to conclude that the applicant should have been provided with legal assistance free of charge since the "interests of justice" so required, regardless of whether she had legal skills enabling her to present a proper legal defence. The Russian Constitutional Court had come to similar conclusions.

Conclusion: violation (unanimously).

(ii) *Charge under Article 20.2 of the CAO* – Although the statutory penalty for this offence was relatively low (a fine of up to EUR 28) and the case concerned a single event whose relevant legal elements were relatively straightforward, the determination of the charge nevertheless required that the applicable rules and acts punishable be determined and assessed in the light of other legislation and, eventually, with reference to the defendant's rights to freedom of assembly and/or freedom of expression. Arguably, this task was capable of disclosing some degree of complexity as the applicant had no legal training or knowledge and it could therefore not be assumed that little was at stake for her. In order to comply with Article 6 of the Convention, it was preferable for the pertinent factual and legal elements (such as the means test and the question of "the interests of justice") to be first assessed at the domestic level when the issue of legal aid was decided, especially when, as in the present case, a fundamental right or freedom protected under the Convention was at stake. However, no such assessment was made in the present case.

Conclusion: violation (unanimously).

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

(See the Factsheet on Police arrest and assistance of a lawyer)

ARTICLE 9

Manifest religion or belief

Non-renewal by hospital of contract of employment on account of refusal to remove headscarf: *no violation*

Ebrahimian v. France - 64846/11
Judgment 26.11.2015 [Section V]

Facts – In 1999 the applicant was recruited on a fixed-term contract within the public hospital service as a social worker in the psychiatric department of a public hospital. In 2000 she was informed that her contract would not be renewed. That decision was based on her refusal to remove her veil and complaints made by a number of patients at the centre. It had been preceded by an interview during which the applicant had not been criticised for her religious affiliation but merely reminded of the rights and obligations of civil servants, namely, a prohibition on displaying one's religious affiliation. The non-renewal of the contract was based on an opinion of the *Conseil d'État* indicating that the principle of the secular nature of the State and that of the neutrality of public services applied to all public services. It observed that civil servants had to enjoy freedom of conscience but that this freedom had to be reconciled, in terms of its expression, with the principle of neutrality of the public service, which precluded the wearing of a symbol displaying one's religious affiliation. Furthermore, in the event of a breach of that obligation of neutrality, it stated that the consequences in terms of disciplinary proceedings had to be assessed on a case-by-case basis according to the particular circumstances. Appeals lodged by the applicant were dismissed.

In 2001 the applicant was enrolled by the establishment that had employed her in a competition to recruit social assistants. She did not sit the competition.

Law – Article 9: The non-renewal of the applicant's contract amounted to an interference with her right to manifest her religion. That interference had been prescribed by law and pursued the legitimate aim of protecting the rights and freedoms of others. The aim in the present case had been to maintain respect for all religious beliefs and spiritual orientations of the patients, who used the public service and benefited from the requirement of neutrality imposed on the applicant, by ensuring

strict equality among them. The objective had also been to ensure that users enjoyed equality of treatment without any distinction on religious grounds. Consequently, the restriction had pursued the aim of protecting the rights and freedoms of others and did not necessarily have to be motivated, further, by public-safety constraints or protection of public order.

With regard to the necessity of the measure in question, it should be noted that the authorities had informed the applicant of the reasons why this principle justified special application to a social worker in a psychiatric department of a hospital. The authorities had identified problems created by her attitude within the department in question and had attempted to persuade her to refrain from displaying her religious convictions. Furthermore, the lower courts had considered that the requirement of neutrality imposed on the applicant was even stricter in that she was in contact with patients in a fragile or dependent state. It could be seen from the file that it was the requirement of protecting the rights and freedoms of others, namely, respect for everyone's freedom of religion, and not her religious convictions, that had been the basis for the decision in question. From that point of view, the neutrality of the public hospital service could be regarded as bound up with the attitude of the staff and requiring that patients were left in no doubt as to their impartiality.

In France public servants enjoyed the right to respect for their freedom of conscience which prohibited, among other things, any discrimination based on religion in access to functions or career progression. They were, however, forbidden to manifest their religious beliefs in discharging their duties. The fact that the national courts had afforded greater weight to the principle of secularism-neutrality and to the State's interest than to the applicant's interest in not having the expression of her religious beliefs curtailed did not create a problem with regard to the Convention. This was a strict obligation which had its roots in the traditional relationship between the secular nature of the State and freedom of conscience, as stipulated in Article 1 of the Constitution. According to the French model, on which it was not the Court's task to rule as such, the neutrality of the State was binding on the officials representing it. It was, however, the administrative courts' task to ensure that the authorities did not disproportionately interfere with the freedom of conscience of civil servants where State neutrality was invoked.

The applicant, for whom it was important to manifest her religion by visibly wearing a headscarf on grounds of her religious convictions, had exposed herself to the serious consequence of disciplinary proceedings. However, there was no doubt that, following the opinion of 3 May 2000, she had been aware that she had to observe a neutral dress code in discharging her functions. It was owing to her refusal to comply with that obligation, and irrespective of her professional qualities, that disciplinary proceedings were instituted against her. She had then had the benefit of the safeguards relating to disciplinary proceedings and remedies before the administrative courts. Moreover, she had chosen not to sit the competition to recruit social assistants despite having been enrolled on the list of candidates that the establishment had drawn up in full knowledge of the facts. In those circumstances the national authorities had not exceeded their margin of appreciation in finding that there was no possibility of reconciling the applicant's religious convictions with the obligation to refrain from manifesting them, and in deciding to give precedence to the requirement of neutrality and impartiality of the State.

Furthermore, it could be seen from a report by the Observatory of Secularism that disputes arising from the manifestation of religious convictions of persons working within hospital services were assessed on a case-by-case basis with the competing interests being reconciled by the authorities in an effort to find friendly settlements. That willingness to reconcile competing interests was confirmed by the very low number of disputes of that kind that had been brought before the courts. Lastly, hospitals were a place where users, who despite their right to freedom to express their religious convictions, were also required to contribute to implementing the principle of secularism by refraining from any act of proselytism and complying with the organisation of the service and the requirements of health and hygiene in particular. In other words, the State regulations concerned gave precedence to the rights of others, the equality of treatment of patients and the functioning of the service over manifestations of religious beliefs.

Conclusion: no violation (six votes to one).

(See the Factsheet on Religious symbols and clothing)

ARTICLE 10

Freedom of expression

Prohibition, throughout period of applicant's release on licence, on disseminating works concerning terrorist offence of which he had been convicted: *no violation*

Bidart v. France - 52363/11
Judgment 12.11.2015 [Section V]

Facts – The applicant is the former leader of a Basque separatist organisation. He received a number of convictions, in particular for conspiracy in preparation of a terrorist attack, premeditated murder in connection with terrorist activity, armed robbery, murder in a terrorism context, and complicity in attempted murder and in murder and armed robbery. In 2007 he was granted release on licence. A few months later he participated in a peaceful demonstration in front of a prison in support of Basque prisoners being held there. This was reported on by the media.

Subsequently, he was ordered by the Sentence Execution Judge to "refrain from disseminating any work or audiovisual production authored or co-authored by him concerning, in whole or in part, the offence of which he had been convicted, and from speaking publicly about that offence". The judge noted that the applicant had previously been described by a court as a "calm and respectful person, who spent most of his time writing his *mémoire*". He inferred therefrom that "even though it was not known what was meant by the term *mémoire*, it was not to be excluded that [the applicant] might be tempted to publish his memoirs and to make statements about the acts for which he was convicted". The judgment contained no other reasoning on that point.

Law – Article 10: The new obligation imposed on the applicant, in the context of his release on licence, had clearly constituted a restriction of his freedom of expression. It was prescribed by law. The release of the applicant, the former leader of a Basque separatist organisation, who had been sentenced to life imprisonment, in particular for three murders in a terrorism context, had aroused ill-feeling among the victims' relatives and more generally within the local population. In addition, the obligation in question had been imposed a few months after his release on licence, when he had taken part in a peaceful demonstration to support Basque prisoners. In that context the judicial authorities had been entitled to fear that the applicant was putting himself in a situation that might lead to his reoffending. Having regard to the situation in the Basque country, the impugned restriction could thus fulfil such legitimate aims as the prevention of disorder or crime.

The basic principles as to the necessity in a democratic society of an interference with freedom of expression also applied to measures taken by national authorities to combat terrorism. The Court was thus concerned by the fact that, when he imposed that restriction, the Sentence Execution Judge had based his decision on hypothetical rather than actual remarks or writings. It also found it regrettable that the domestic judge had not weighed up the interests at stake and had not fully established the existence of the risk to public order. That being said, the decision to impose that type of restriction was a judicial decision, not an administrative one, because it was taken by the Sentence Execution Judge, and the convicted person thus had the right to appeal against it, including on points of law. The applicant had availed himself of that possibility as he had appealed against the judgment imposing the impugned obligation to the Court of Appeal. That court had, in particular, emphasised that the obligation merely consisted in refraining from making any comments on or justifying the offences committed, that it was not disproportionate to the necessary protection of public order and that he was not prohibited from expressing his political opinions. He had subsequently appealed on points of law. The applicant had therefore been able to have the measure reviewed by the courts and had enjoyed genuine guarantees against abuse – a point to which the Court attached considerable weight.

In addition, the measures available to the judge in that context were limited in three respects. They were limited in respect of the individuals on whom they could be imposed, as they concerned only persons convicted of certain specific major offences (intentional homicide, sexual assault or abuse). The measures were also limited in time (until the end of the period of release on licence) and in terms of subject matter (only affecting freedom to talk about the offences committed). The applicant had thus still been able to express his views on the Basque question, as long as he did not mention the offences of which he had been convicted. Lastly, the Court could not ignore the context in which the restriction on the applicant's freedom of expression had been imposed, namely the early release of an important and well-known figure of a terrorist organisation, who in particular had been

sentenced to life imprisonment for murders committed in a terrorist context, and that his early release had caused much ill-feeling among the victims' relatives and within the local population. Therefore, in imposing the impugned measure on the applicant the domestic courts had not overstepped their margin of appreciation.

Conclusion: no violation (unanimously).

Criminal conviction of comedian for expression of negationist and anti-Semitic views during show: *inadmissible*

M'Bala M'Bala v. France - 25239/13
Decision 20.10.2015 [Section V]

Facts – In December 2008 the applicant, who is a comedian using the pseudonym "Dieudonné" and who has engaged in political activities, put on a performance in which he invited an academic who had received a number of convictions in France for his negationist and revisionist opinions, mainly his denial of the existence of gas chambers in concentration camps, to join him on stage at the end of the show. The applicant called up an actor wearing what was described as a "garment of light" – a pair of striped pyjamas reminiscent of the clothing worn by Jewish deportees, with a stitched-on yellow star bearing the word "Jew" – to award the academic a "prize for unfrequentability and insolence". The prize took the form of a three-branched candlestick (the seven-branch candlestick being an emblem of the Jewish religion), with an apple crowning each branch.

The incident was recorded by the police. In October 2009 the *tribunal de grande instance* found the applicant guilty of public insults directed at a person or group of persons on account of their origin or of their belonging, or not belonging, to a given ethnic community, nation, race or religion, specifically in this case persons of Jewish origin or faith. The court sentenced him to a fine of EUR 10,000, awarding a token euro in damages to each civil party. The Court of Appeal upheld the judgment and the Court of Cassation dismissed the applicant's appeal on points of law.

Law – Articles 10 and 17: Like the domestic courts, the Court had no doubt about the highly anti-Semitic content of the offending part of the applicant's show, as he had paid tribute to an individual who was well known in France for his negationist views, for which he had been convicted, leading the audience to applaud him "heartily" and awarding him a "prize".

The applicant, far from distancing himself from his guest's views, had merely argued that the academic had not expressed any revisionist remarks during the scene in question. The Court took the view, by contrast, that the fact of describing as "affirmationists" those who had described the academic of being a negationist was a clear indication on the part of the academic that he was putting "well-established historical facts" on the same plane as a position which was prohibited under French law and which was removed from the protection of Article 10 by the effect of Article 17. An invitation to the audience to give a different spelling to the word "*affirmationnistes*" had revealed the aim, through a word play, of inciting the audience to regard the proponents of the historical truth as being driven by "Zionist" ("*sioniste*" in French) motives. Moreover, the applicant himself had made anti-Zionism one of his main political causes. He had indicated, during the ensuing investigation, that different remarks by the academic had been agreed upon. However, among other things, the portrayal of a deportee's costume as a "garment of light" at least reflected a certain contempt on the part of the applicant for the victims of the Holocaust, thereby adding to the offensive dimension of the scene as a whole.

The applicant was a comedian who had displayed his strong political commitment by standing for election a number of times. At the material time he had already been convicted for racial insult. There was thus no evidence, in the light both of the background and of the remarks actually made on stage, to suggest that the comedian had had any intention of denigrating the views of his guest or of denouncing anti-Semitism. On the contrary, the actor playing the role of a deportee had himself stated that he was not surprised by the decision to call the academic onto the stage, in view of the positions taken by the applicant in public over the previous two years, particularly his support for the then president of the Front National party. The audience's reaction had indeed shown that the anti-Semitic nature of the scene had been perceived as such by them (or at least some of them), this also being the perception of the domestic courts.

Lastly, and above all, the applicant had not explained why he had wished to "do better" than in one of his previous performances which had allegedly been described by an observer as "the biggest anti-Semitic rally since the Second World War". That statement had necessarily guided the

audience's perception of what they were going to see. The applicant had sought to use the defence of provocation to justify the racist insult for which he had been charged.

The Court thus took the view that, during the offending scene, the performance had no longer constituted entertainment but had taken on the appearance of a political meeting. The applicant could not claim, in the particular circumstances and in the light of the whole context of the case, that he had acted in his capacity as an artist with the right to express himself using satire, humour and provocation. In the guise of a comic sketch he had called upon one of the best known French negationists, who had been convicted a year earlier for calling into question crimes against humanity, in order to pay tribute to him and give him a platform. Thus, in the context of a preposterous and grotesque *mise en scène*, he had brought onto the stage an actor, dressed as a Jewish deportee in a concentration camp, who awarded a prize to the academic. In this promotion of negationism, through the key position given to the guest's appearance and the degrading portrayal of Jewish deportation victims faced with a man who had denied their extermination, the Court saw a demonstration of hatred and anti-Semitism and support for Holocaust denial. In the Court's view, the expression of an ideology which ran counter to the basic values of the Convention, as stated in its Preamble, namely justice and peace, could not be considered a performance which, even if satirical or provocative, fell within the protection of Article 10 of the Convention.

The Court further observed that while Article 17 of the Convention had in principle been applied in previous cases to explicit and direct remarks which did not require any interpretation, it was convinced that a blatant display of hatred and anti-Semitism disguised as an artistic production was as dangerous as a fully-fledged and immediate attack. It did not therefore deserve protection under Article 10 of the Convention.

Accordingly, since the acts at issue were unmistakeably negationist and anti-Semitic in nature, both in their content and in their general tone, and thus in their aim, the Court found that the applicant had sought to deflect Article 10 from its real purpose by using his right to freedom of expression for ends which were incompatible with the letter and spirit of the Convention and which, if admitted, would contribute to the destruction of Convention rights and freedoms.

Consequently, pursuant to Article 17 of the Convention, the applicant was not entitled to the protection of Article 10.

Conclusion: inadmissible (incompatible *ratione materiae*).

Freedom of expression
Freedom to impart information

Court order restraining distribution of leaflets equating abortion to the Holocaust and publishing on-line the contact details of doctors performing abortions: *violations*

Annen v. Germany - 3690/10
Judgment 26.11.2015 [Section V]

Facts – In 2005 the applicant, an anti-abortion campaigner, distributed leaflets in the vicinity of a clinic ran by Doctors M. and R. where abortions were performed. The leaflet contained the following text in bold letters: "In the day clinic Dr M./ Dr R. [full names and address] unlawful abortions are performed". This was followed by an explanation in smaller letters that abortions were, however, allowed by the German legislature and were not subject to criminal liability. On the back of the leaflet it was stated that "The murder of human beings in Auschwitz was unlawful, but the morally degraded [Nazi]-State allowed the murder of innocent people and did not make it subject to criminal liability." Below this sentence the leaflet referred to a website operated by the applicant which contained an address list of so-called "abortion doctors", including the clinic and the full names of Doctors M. and R. Following a complaint by the two doctors, the domestic courts ordered the applicant to desist from further disseminating the leaflets at issue and from mentioning the doctors' names and address in his website. The applicant's subsequent appeal was dismissed. In the Convention proceedings, the applicant complained of a breach of his right to freedom of expression.

Law – Article 10

(a) *Order to desist from disseminating leaflets in the immediate vicinity of the clinic* – The domestic courts had acknowledged that the leaflet addressed questions of public interest and that the applicant was allowed to pursue his political aims even by the use of exaggerated and polemic criticism. They however found that the applicant had created the erroneous impression that abortions had been performed unlawfully, because the whole layout of the leaflet was intended to draw the reader's attention to the first sentence set in bold letters, while the

further explanation was set in smaller letters with the intent of dissimulating its content. Furthermore, they held that the applicant had created a massive "pillory effect" by singling out the two doctors, an effect that was further aggravated by the Holocaust reference.

In the Court's view, however, the applicant's statement that "unlawful abortions" had been performed was correct from a judicial point of view, because the domestic law merely distinguished between abortions which were considered "unlawful", but were exempt from criminal liability, and abortions which were considered justified and thus "lawful". The wording of that statement was also sufficiently clear and immediately accessible to the reader, even from a layperson's perspective. Therefore, the facts of the present case had to be distinguished from those underlying the applicant's prior applications to the Court, which had concerned leaflets and a poster which used the expression "unlawful abortions" without providing any further legal explanation.[1] Furthermore, the applicant's choice of disseminating leaflets in the immediate vicinity of the clinic had enhanced the effectiveness of his campaign, which contributed to a highly controversial debate of public interest. Moreover, although it appeared that the doctors, as a consequence of negative public attention, had closed the day clinic and had built up another professional practice, it was not clear whether the applicant's activities had actually caused this development. As to the reference to the Holocaust, the Court could not agree with the domestic courts' interpretation that the applicant had compared the doctors and their professional activities to the Nazi regime. In fact, his statement that the killing of human beings in Auschwitz had been unlawful, but allowed, and had not been subject to criminal liability under the Nazi regime, could also be understood as a way of creating awareness of the more general fact that law may diverge from morality. Although the Court was aware of the implicit meaning of the applicant's statement, which was further intensified by the reference to his webpage called <www.babycaust.de>, it observed that the applicant had not explicitly equated abortion with the Holocaust. Thus, the Court was not convinced that the prohibition of disseminating the leaflets was justified by a violation of the doctors' personality rights due to the Holocaust reference alone.

Conclusion: violation (five votes to two).

1. See the decisions in the case of *Annen v. Germany* of 30 March 2010 (2373/07 and 2396/07) and of 12 February 2013 (55558/10).

(b) *Order not to mention the doctors' contact details in the on-line list of "abortion doctors"* – The domestic courts had found that the applicant's leaflet and website equated the doctors' actions with the Holocaust and with mass murder, which was not covered by his freedom of expression. However, they limited themselves to finding that the same principles which had been elaborated with regard to the leaflet should also apply to the website, without further examination of the individual and contextual circumstances. In particular, they did not distinguish between the applicant's statement in the leaflet, which had a geographically limited impact, and his statements on the Internet, which could be disseminated worldwide. Additionally, they did not analyse, for example, the exact content, overall context or specific layout of the applicant's webpage listing the doctors' names, the need to protect sensitive data, the doctors' previous behaviour, the impact of the applicant's statement on third parties and whether or not it was likely to incite aggression or violence against the doctors.

It followed that the domestic courts had not applied standards in conformity with the procedural principles embodied in Article 10 of the Convention and had not based themselves on an acceptable assessment of the relevant facts.

Conclusion: violation (five votes to two).

Article 41: claim in respect of non-pecuniary damage dismissed.

(See also *A, B and C v. Ireland* [GC], 25579/05, 16 December 2010, Information Note 136; *Delfi AS v. Estonia* [GC], 64569/09, 16 June 2015, Information Note 186; *Hoffer and Annen v. Germany*, 397/07 and 2322/07, 13 January 2011; *PETA Deutschland v. Germany*, 43481/09, 8 November 2012, Information Note 157)

Freedom to impart information

Finding of liability against publishers of article and photographs revealing existence of monarch's secret child: *violation*

Couderc and Hachette Filipacchi Associés v. France - 40454/07
Judgment 10.11.2015 [GC]

Facts – On 3 May 2005 the British newspaper the Daily Mail published an article containing disclosures by Ms C. with regard to her son, claiming that his father was the reigning prince of Monaco. The article referred to a forthcoming publication

in Paris Match and set out its core elements, including photographs, one of which showed the Prince with the child in his arms. The interview with Ms C. and the photographs in question were also published in the German weekly magazine *Bunte* dated 4 May 2005.

The applicants are, respectively, the publication director of the weekly magazine *Paris Match* and the company which publishes the magazine. On 6 May 2005 *Paris Match* published an article in which Ms C. gave details about how she had met the Prince, their meetings, their intimate relationship and feelings, the way in which the Prince had reacted to the news of Ms C.'s pregnancy and his attitude on meeting the child. The Prince brought proceedings against the applicants, seeking compensation for invasion of privacy and infringement of his right to protection of his own image. The French courts granted his request, awarding him EUR 50,000 in damages and ordering that details of the judgment be published across one third of the magazine's front cover.

In a judgment of 12 June 2014 (see Information Note 175), a Chamber of the Court concluded, by four votes to three, that there had been a violation of Article 10. On 13 October 2014 the case was referred to the Grand Chamber at the Government's request.

Law – Article 10: The judgment against the applicants amounted to interference with their right to freedom of expression. That interference had been prescribed by law and had pursued a legitimate aim, namely the protection of the reputation and rights of others. It remained to be determined whether it was necessary in a democratic society.

(a) *Contribution to a debate on a matter of general interest* – The public interest could not be reduced to the public's thirst for information about the private life of others, or to the reader's wish for sensationalism or even, sometimes, voyeurism. Yet the interview with Ms C. contained numerous details about the Prince's private life and his real or supposed feelings which were not directly related to a debate of public interest. However, it was necessary at the outset to point out that although a birth was an event of an intimate nature, it did not come solely within the private sphere of the persons concerned by it, but also fell within the public sphere, since it was in principle accompanied by a public statement (the civil-status document) and the establishment of a legal parent-child relationship. Thus, the purely family and private interest represented by a person's descent was supplemented by a public aspect, related to the social and legal structure of kinship. A news report about a birth could not therefore be considered, in itself, as a disclosure concerning exclusively the details of the private life of others, intended merely to satisfy the public's curiosity. In addition, at the material time this child's birth had not been without possible dynastic and financial implications: the question of legitimation by marriage could be raised, even if such an outcome was improbable. Indeed, the consequences of the birth on the succession had been mentioned in the article. The impugned information had not therefore been without political import, and could have aroused the interest of the public with regard to the rules of succession in force in the Principality (which prevented children born outside marriage from succeeding to the throne). Likewise, the attitude of the Prince, who had wished to keep his paternity a secret and refused to acknowledge it publicly, could, in a hereditary monarchy whose future was intrinsically linked to the existence of descendants, also be of concern to the public. This was equally true with regard to his behaviour in respect of the child's mother and the child himself: this information could have provided insights into the Prince's personality, particularly with regard to the way in which he approached and assumed his responsibilities. In this context, it was important to reiterate the symbolic role of a hereditary monarchy, in which the person of the Prince and his direct line were also representative of the continuity of the State. Furthermore, the press's contribution to a debate of public interest could not be limited merely to current events or pre-existing debates. Admittedly, the press was a vector for disseminating debates on matters of public interest, but it also had the role of revealing and bringing to the public's attention information capable of eliciting such interest and of giving rise to such a debate within society. Accordingly, the national courts ought to have assessed the publication as a whole in order to determine its subject-matter accurately, rather than examining the remarks concerning the Prince's private life out of their context. However, they had refused to take into consideration the interest that the article's central message could have had for the public, and instead concentrated on the details about the couple's intimate relationship. In so doing, they had deprived the public-interest justification relied upon by the applicants of any effectiveness.

(b) *How well known was the person concerned and what was the subject of the report?* – The domestic courts ought to have taken into account the potential impact of the Prince's status as Head of

State, and to have attempted, in that context, to determine what belonged to the strictly private domain and what fell within the public sphere. Yet, although they reiterated that an exception could be made to the principle of protection of private life whenever the facts disclosed could give rise to a debate on account of their impact given the status or function of the person concerned, they had drawn no conclusion from that consideration.

In addition, the Prince's private life was not the sole subject of the article, but it also concerned the private life of Ms C. and her son. Ms C. had certainly not been bound to silence and had been free to communicate in respect of elements relating to her private life. In this regard, it could not be ignored that the disputed article was a means of expression for the interviewee and her son. Thus, the interview also concerned competing private interests. Admittedly, Ms C.'s right to freedom of expression for herself and her son was not directly in issue in the present case; nonetheless, the combination of elements relating to Ms C.'s private life and to that of the Prince had to be taken into account in assessing the protection due to him.

(c) *Prior conduct of the person concerned* – The material in the case file was not in itself sufficient to enable the Court to examine the Prince's previous conduct with regard to the media.

(d) *Means by which the information was obtained and its veracity* – In a decision which appeared to have been personal, deliberate and informed, Ms C. herself had contacted *Paris Match*. The veracity of the statements with regard to the Prince's paternity had not been contested by him, and he himself had publicly acknowledged it shortly after publication of the impugned article. As to the photographs which illustrated the interview, they had been handed over voluntarily and without charge to *Paris Match*. They had not been taken without his knowledge or in circumstances showing him in an unfavourable light.

(e) *Content, form and consequences of the impugned article* – The duties and responsibilities of journalists implied that they were required to take into account the impact of the information that they intended to publish. In particular, certain events enjoyed particularly attentive protection under Article 8 of the Convention and ought therefore to lead journalists to show prudence and caution in covering them. The tone of the interview with Ms C. appeared to be measured and non-sensationalist. Her remarks were recognisable as quotations and her motives were also clearly set out for the readers. Equally, readers could easily distinguish between what was factual material and what concerned the interviewee's perception of the events, her opinions or her personal feelings. Admittedly, the interview had been placed in a narrative setting accompanied by graphic effects and headlines which were intended to attract the reader's attention and provoke a reaction. However, this narrative presentation did not distort the content of the information and did not deform it, but had to be considered as its transposition or illustration. The magazine could not be criticised for enhancing the article and striving to present it attractively, provided that this did not distort or deform the information published and was not such as to mislead the reader.

Moreover, while there was no doubt in the present case that these photographs fell within the realm of the Prince's private life and that he had not consented to their publication, their link with the impugned article was not tenuous, artificial or arbitrary. Their publication could be justified by the fact that they added credibility to the account of events. Indeed, Ms C. had at her disposal no other evidence which would have enabled her to substantiate her account. In consequence, although publication of these photographs had had the effect of exposing the Prince's private life to the public, they had supported the account given in the article.

Lastly, with regard to the consequences of the disputed article, shortly after the article was published the Prince had publicly acknowledged his paternity. These consequences had to be put into perspective, in the light of the articles which had previously appeared in foreign newspapers. However, in the present case the domestic courts did not appear to have evaluated the consequences in the wider context of the international media coverage already given to the events described in the article. Thus, they had attached no weight to the fact that the secrecy surrounding the Prince's paternity had already been undermined by the previous articles in other media.

(f) *The severity of the penalty* – The penalties inflicted on the applicant company, namely EUR 50,000 in damages and an order to publish a statement detailing the judgment, could not be considered insignificant.

In the light of all of these considerations, the arguments advanced with regard to the protection of the Prince's private life and of his right to control his own image, although relevant, could not be regarded as sufficient to justify the interference in issue.

Conclusion: violation (unanimously).

Article 41: claim in respect of pecuniary damage dismissed.

(See also *Von Hannover v. Germany (no. 2)* [GC], 40660/08 and 60641/08, and *Axel Springer AG v. Germany* [GC], 39954/08, judgments of 7 February 2012, summarised in Information Note 149.)

ARTICLE 13

Effective remedy

Lack of effective remedy in respect of repeated transfers and prison security measures: *violation*

Bamouhammad v. Belgium - 47687/13
Judgment 17.11.2015 [Section II]

(See Article 46 below)

ARTICLE 17

Prohibition of abuse of rights

Criminal conviction of comedian for expression of negationist and anti-Semitic views during show: *inadmissible*

M'Bala M'Bala v. France - 25239/13
Decision 20.10.2015 [Section V]

(See Article 10 above, page 15)

ARTICLE 46

Execution of judgment – General measures

Respondent State required to provide effective remedy in respect of repeated transfers and prison security measures

Bamouhammad v. Belgium - 47687/13
Judgment 17.11.2015 [Section II]

Facts – From 1984 onwards, the applicant received a number of long-term prison sentences for, among other offences, premeditated murder and attempted murder, robbery, aggravated robbery, hostage-taking, destruction of public buildings and illegal possession of weapons. In 2007 he was diagnosed as having a combination of symptoms corresponding to Ganser syndrome and derived from sensorial deprivations. In addition, in 2012 the psychiatrist treating him found that his mental condition could also be explained by a "disorder of the appearance of autism associated with Asperger's syndrome". From 2006 to 2013 the applicant was transferred 43 times from one prison to another. In addition, owing to disciplinary incidents related to his violent behaviour, special security and coercive measures were imposed on him on a number of occasions. None of his appeals against those measures was successful.

Before the European Court, the applicant complained about all the security measures ordered against him during his imprisonment, claiming that they had caused a deterioration in his mental health: continual transfers from one prison to another, extreme measures of coercion (systematic handcuffing, American-style grille door, body searches, deprivation of contact, including with a psychologist, and of leisure activities), measures of solitary confinement and harassment.

Law

Article 3 (*substantive limb*): The applicant was suffering from serious mental disorders. There were a number of factors explaining these disorders, which stemmed both from his personal history and from the duration and context of his imprisonment.

The arrangements for the applicant's detention, involving repeated transfers between prisons and prolonged special measures, together with the administration's delay in providing him with therapy, and the authorities' refusal to envisage the slightest adaptation of his sentence in spite of the decline in his health, had subjected him to distress of an intensity exceeding the inevitable level of suffering inherent in detention and had thus constituted degrading treatment.

Conclusion: violation (unanimously).

Article 13 taken together with Article 3: In addition to the compensatory remedy by which the State and prosecution could be held accountable for their actions, the applicant had also, on two occasions, used a "preventive" remedy, which consisted of an urgent application to the civil court to put an end to the transfers and to the special measures.

The Court noted that it had considered, *obiter*, in the case of *Vasilescu*, which concerned prison

overcrowding, that the preventive remedy seemed, in theory, to be sufficient to rectify with immediate effect situations that were in breach of detainees' rights. The urgent proceedings judge could order an individual measure to put an end to a situation in breach of the detainee's rights, concerning, for example, relations with other prisoners or security measures.

That being said, the applicant's complaints did not concern isolated measures of detention but rather the continuous policy of transfers and the regime applied in a given prison, and the effects of those measures on the applicant's health. On account of the repeated prison transfers, the protection available from the urgent applications judge had not proved effective. During the first set of proceedings the applicant had continued to be transferred between prisons, rendering without object his request to discontinue the individual measures, and preventing him from proving the urgency of the matter such as to justify the jurisdiction of the urgent applications judge. Moreover, the proceedings on the merits as regards the transfer policy had not ultimately been successful.

Consequently, the circumstances voluntarily created by the authorities had not enabled the applicant to have any realistic possibility of using the urgent applications procedure. He had not had an effective remedy by which to submit his complaints under Article 3.

Conclusion: violation (unanimously).

Article 46: A law (*loi de principes*) of 2005 had introduced into Belgian law a specific right of prisoners to complain to a complaints board attached to the supervisory committees in each prison. The relevant provisions had not yet entered into force, however, in the absence of a royal implementing decree.

With that in mind, and as had already been the case in *Vasilescu*, the Court recommended that the State should introduce a remedy adapted to the situation of prisoners who were subjected to transfers and to special measures such as those imposed on the applicant.

Article 41: EUR 12,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See *Vasilescu v. Romania*, 27053/95, 25 November 2014, Information Note 179)

DECISIONS OF OTHER INTERNATIONAL JURISDICTIONS

Inter-American Court of Human Rights

Indirect restriction of freedom of expression through closure of a television station

Case of Granier et al. (Radio Caracas Televisión) v. Venezuela - Series C No. 293
Judgment 22.6.2015[1]

Facts – The facts of this case occurred in the aftermath of a military coup in April 2002. The Inter-American Court considered that the events in question combined with the reaction of the media had contributed to a climate of political tension leading to the radicalisation of certain sectors of the population. It further found statements by high-level State officials directed against the independent media and aimed at discrediting journalists had created an intimidating atmosphere for the media.

Radio Caracas Televisión (RCTV) had operated as a free-to-air television station with national coverage since 1953, when it was granted a broadcasting concession. It broadcast entertainment and news shows, and shows on political opinion. Its editorial policy was based on a critical attitude to the government of President Chávez. Before going off air, RCTV had enjoyed the highest ratings in all sectors of the Venezuelan population. In 1987 Venezuela renewed RCTV's concession allowing it to operate as a free-to-air television station and to use the broadcast spectrum for the next twenty years, that is, until 27 May 2007.

On a number of occasions after 2002, Venezuelan government officials, including President Chávez, made statements to the effect that certain concessions issued to the private media would not be renewed. In December 2006 an official decision not to renew RCTV's concession was announced.

On 5 June 2002 in accordance with the schedule established by the National Telecommunications Commission (CONATEL), RCTV had requested the transformation of its title of concession to a new legal regime that had been introduced by the *Ley Orgánica de Telecomunicaciones* (LOTEL) in 2000. However, CONATEL did not examine the

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

request within the two-year statutory time-limit and only issued a response in March 2007. On 24 January 2007 RCTV representatives requested CONATEL to issue documents corroborating renewal of the concession.

On 28 March 2007 the Ministry of People's Power for Telecommunications and Informatics (MPPTI), which was also in charge of CONATEL, decided not to renew RCTV´s concession.

On 25 May 2007 the Constitutional Chamber of the Supreme Court of Justice ordered provisional measures which resulted in the transfer of RCTV´s property to CONATEL with a view to providing the Venezuelan Social Television Foundation (TVes) with the necessary infrastructure for broadcasting its programmes nationwide.

RCTV´s broadcasting station´s signal was interrupted at 00:00 a.m. on 28 May 2007. In its place, TVes started broadcasting its programmes on Channel 2 of the free-to-air television network.

Subsequently RCTV had recourse to various domestic remedies, including administrative and criminal proceedings challenging the application of provisional measures. It also made an application for *amparo* writs. Some of those proceedings were still pending at the date of the Inter-American Court's judgment.

Law

(a) *Preliminary objections* – The Venezuelan Government argued that the Inter-American Court had no jurisdiction with respect to legal persons and that the applicants had failed to exhaust domestic remedies. The Court rejected the first preliminary objection, considering that no legal person was presented as an alleged victim in the present case and that the alleged interference with the rights under the American Convention on Human Rights (ACHR) in this case concerned natural persons, such as shareholders and employees. The Court also rejected the second preliminary objection since the plea of non-exhaustion of domestic remedies was raised after the admissibility report was issued and was therefore time-barred.

(b) *Article 13 (freedom of thought and expression) in relation to Article 1(1) (respect and ensure rights) of the ACHR* – The Court acknowledged the need to regulate the broadcasting activity and the State's authority in this respect. The latter extends not only to defining the modalities of granting, renewal or revocation of concessions, but also to the planning and implementation of public policies applicable to such activity insofar as they comply with the standards of freedom of expression. The Court emphasised that the pluralism of ideas in the media is measured having regard to the diversity of ideas and information transmitted, which should be taken into account for the purposes of granting or renewing concessions or broadcasting licences. It also stressed that it was necessary for the States to regulate in a clear and precise manner the processes related to the granting or renewal of concessions or broadcasting licences on the basis of objective criteria that prevent arbitrariness.

The Court noted that the domestic law did not provide a right to automatic renewal of a broadcasting concession. The applicants had, however, applied on two occasions for the transformation of their broadcasting rights to a new legal regime, which would have entailed renewal of the concession, but those proceedings had not been conducted. The question was, therefore, whether this could be considered an indirect restriction of freedom of expression in breach of Article 13(3) of the ACHR.

The Court took into account public statements made by State officials after 2002 to the effect that television channels which had failed to modify their editorial policies would not have their concessions renewed. After 2006, and before the decision of 28 March 2007, it was stated on numerous occasions that the decision not to renew RCTV´s concession had already been adopted. Such statements appeared not only in the media but also in official publications. Having regard to the foregoing, the Court concluded that the decision not to renew RCTV´s concession had been taken before the term of the concession had expired in accordance with instructions given to CONATEL and MPPTI by the executive branch.

As regards the reasons for the above decision, the statements of the various members of the Venezuelan Government related to two aspects: (i) RCTV´s failure to modify its editorial policy after the military coup of 2002 and (ii) alleged irregularities as a result of which RCTV found itself subject to sanctions. As regards the first aspect, the Court emphasised that the restriction of freedom of expression on the ground of political differences between an editorial policy and the Government´s stance was inacceptable. As to the second aspect, the Court dismissed it as untenable having regard to the fact that the decision of 28 March 2007 had expressly indicated that no such irregularities constituted the grounds for the refusal to renew RCTV´s concession.

On the basis of the foregoing, the Court concluded that the facts of this case disclosed an abuse of

power by the State, insofar as it had sought by legal means to force RCTV to bring its editorial policy in line with the government's position. In this respect the Court referred, in particular, to the fact that the decision not to renew RCTV´s concession was taken ahead of time and was motivated by the government´s discontent with its editorial policy. Furthermore, this had taken place in a climate that was unpropitious for freedom of expression which the Court found to exist at the relevant time. The Court also stated that the abuse of power not only had an impact on the exercise of the right to freedom of expression by the employees and managers of RCTV, but also affected the social dimension of that right having deprived Venezuelan society of access to the editorial policy represented by RCTV. The real purpose was thus to silence criticism of the government. Along with pluralism, tolerance and open-mindedness, such criticism was indispensable for a democratic debate protected by the right to freedom of expression.

Accordingly, the Court found there had been an indirect restriction of the exercise of the right of freedom of expression through the use of means aimed at impeding communication and the circulation of ideas and opinions. In other words, the State had withheld a part of the broadcast spectrum thereby preventing the media who had expressed critical opinions of the government from participating in the administrative proceedings for the allocation of broadcasting rights and the renewal of concessions. There had thus been a violation of Article 13(1) and (3) in relation to Article 1(1) of the ACHR.

The Court further noted that there had existed other television stations comparable with RCTV whose concessions were about to expire on 27 May 2007. However, with the exception of RCTV, they had all had their broadcasting concessions renewed. For this reason the Court decided to examine whether the decision to allocate that part of the broadcast spectrum initially allocated to RCTV to a different television station might have constituted discriminatory treatment based on political opinion.

The Court considered that a television station´s editorial policy may be considered as a reflection of the political opinions of its managers and employees insofar as they determine the content of the information transmitted. Thus, the critical attitude of a channel constituted a reflection of the critical attitude of its managers and employees involved in deciding what type of information would be transmitted.

The Court noted that, in order to justify the differential treatment in this case, the government had not relied on any specific technical features peculiar to RCTV that would distinguish it from other television channels. The ground for the differential treatment was RCTV´s editorial policy. This sent an intimidating message to other media as to the possible consequences should their editorial policies be similar to that of RCTV, and therefore had a chilling effect on freedom of expression.

Accordingly, the Court concluded that the State's decision to withhold the part of the broadcast spectrum assigned to RCTV had constituted discriminatory treatment with respect to the exercise of the right to freedom of expression, in violation of Article 13 in conjunction with Article 1(1) of the ACHR.

Conclusion: violation (six votes to one).

(c) *Articles 8(1) and 25(1) (fair trial and judicial protection) in relation to Articles 1(1) and 2 (domestic legal effects) of the ACHR* – The Court found that the State had violated Article 8(1) in conjunction with Article 1(1) of the ACHR in respect of the proceedings for the renewal of RCTV´s concession and transformation of its broadcasting rights to a new legal regime, as well as on account of the length of proceedings in respect of the administrative proceedings and the proceedings for challenging the application of provisional measures. It found no violation of Article 8 of the ACHR with respect to the criminal proceedings and no violation of Article 25(1) in conjunction with Article 1(1) of the ACHR in respect of the proceedings concerning the *amparo* writs.

Conclusion: violation and no violation (unanimously).

(d) *Article 21 (property) in relation to Article 1(1) of the ACHR* – The Inter-American Court concluded that it was not proven that the State had violated the right to property for the following reasons. Firstly, it noted that the broadcast spectrum constituted public goods in full possession of the State and thus its ownership could not be claimed by individuals. Consequently, the economic benefits that shareholders might have received as a result of the renewal of the concession could not be considered as goods or acquired rights and hence were not protected by Article 21 of the ACHR. Secondly, the Court reiterated that it was not competent to examine alleged violations of the ACHR with respect to legal persons and therefore could not examine the consequences that the order to seize RCTV´s property might have produced

for the company. Thirdly, it did not have sufficient proof of the alleged damage caused to the value of the shares owned by the applicants.

Conclusion: insufficient evidence to determine a violation (five votes to two).

(e) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation. In addition, it ordered the State: (i) to restore the concession of the frequency of the broadcast spectrum corresponding to television Channel 2 and to return the assets subject to the provisional measures; (ii) once the concession was restored, to institute, within a reasonable time, open, independent and transparent proceedings for the allocation of the frequency of the broadcast spectrum corresponding to television Channel 2 in accordance with the procedure established in the applicable domestic rules; (iii) to publish the judgment and its official summary; (iv) to adopt the necessary measures to ensure that all future proceedings for the allocation and renewal of broadcasting concessions are conducted in an open, independent and transparent manner, and (v) to pay the amounts awarded by the Court for pecuniary and non-pecuniary damage and the reimbursement of costs and expenses.

See also the following cases from the ECHR case-law: *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*, 14134/02, 11 October 2007, Information Note 101; *Meltex Ltd and Movsesyan v. Armenia*, 32283/04, 17 June 2008, Information Note 109; and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], 38433/09, 7 June 2012, Information Note 153.

COURT NEWS

65th anniversary of the European Convention on Human Rights

The Convention was signed in Rome (Italy) on 4 November 1950 by 12 member States of the Council of Europe and entered into force on 3 September 1953. In the last 65 years it has rid Europe of the death penalty, prohibited torture and enshrined fundamental human rights in the legal systems of the 47 Council of Europe's member States.

It was the first instrument to give effect and binding force to certain of the rights stated in the Universal Declaration of Human Rights. It was also the first treaty to establish a supranational organ – the European Court of Human Rights – to ensure that the States Parties fulfilled their undertakings.

Declaration by France indicating possible derogation under Article 15 of the Convention in light of terrorist threat

In a declaration of 24 November 2015 the Permanent Representation of France informed the Secretary General of the Council of Europe of its decision following the large-scale terrorist attacks in the Paris region on 13 November 2015 to apply Law No. 55-385 of 3 April 1955 on the state of emergency, as amended by Law No. 2015-1501 of 20 November 2015, for a period of three months. The Permanent Representation has advised that some of the measures may involve a derogation from France's obligations under the Convention.

IAP report on 2014 Odessa events[1]

The International Advisory Panel (IAP) was constituted by the Council of Europe in April 2014, initially to oversee the Maidan violence investigations. In September 2014, the Panel's mandate was extended to examine whether the Odessa investigations met all the requirements of the European Convention on Human Rights and the case-law of the Court.

The Panel's report on its review of the investigations into the tragic events in Odesa of May 2014 has just been published. The Panel has found that the investigations have failed to satisfy the requirements of the European Convention of Human Rights.

More information on the Council of Europe's Internet site (<www.coe.int> – Explore – Files).

RECENT PUBLICATIONS

Admissibility Guide: translation into Estonian

With the help of the Government of Estonia, a translation into Estonian of the third edition of the Practical Guide on Admissibility Criteria has now been published on the Court's Internet site (<www.echr.coe.int> – Case-law).

Vastuvõetavuse kriteeriumite praktiline käsiraamat (est)

1. The clashes in the centre of Odessa and the fire in the Trade Union Building on 2 May 2014 resulted in 48 deaths and injuries to several hundreds of persons.

Handbook on European law relating to the rights of the child

On 20 November 2015 the Court, the Council of Europe and the European Union Agency for Fundamental Rights (FRA) jointly launched a point-of-reference publication on both Council of Europe and European Union law related to the protection and promotion of children's rights.

This new handbook is available in English and French on the Internet site of the Court (<www.echr.coe.int> – Publications). Translations into other languages are pending.

Handbook on European law relating to the rights of the child (eng)

Quarterly activity report of the Commissioner for Human Rights

The third quarterly activity report 2015 of the Council of Europe's Commissioner for Human rights is available on the Commissioner's Internet site (<www.coe.int> – Commissioner for Human Rights – activity reports).

3rd quarterly activity report 2015 (eng)