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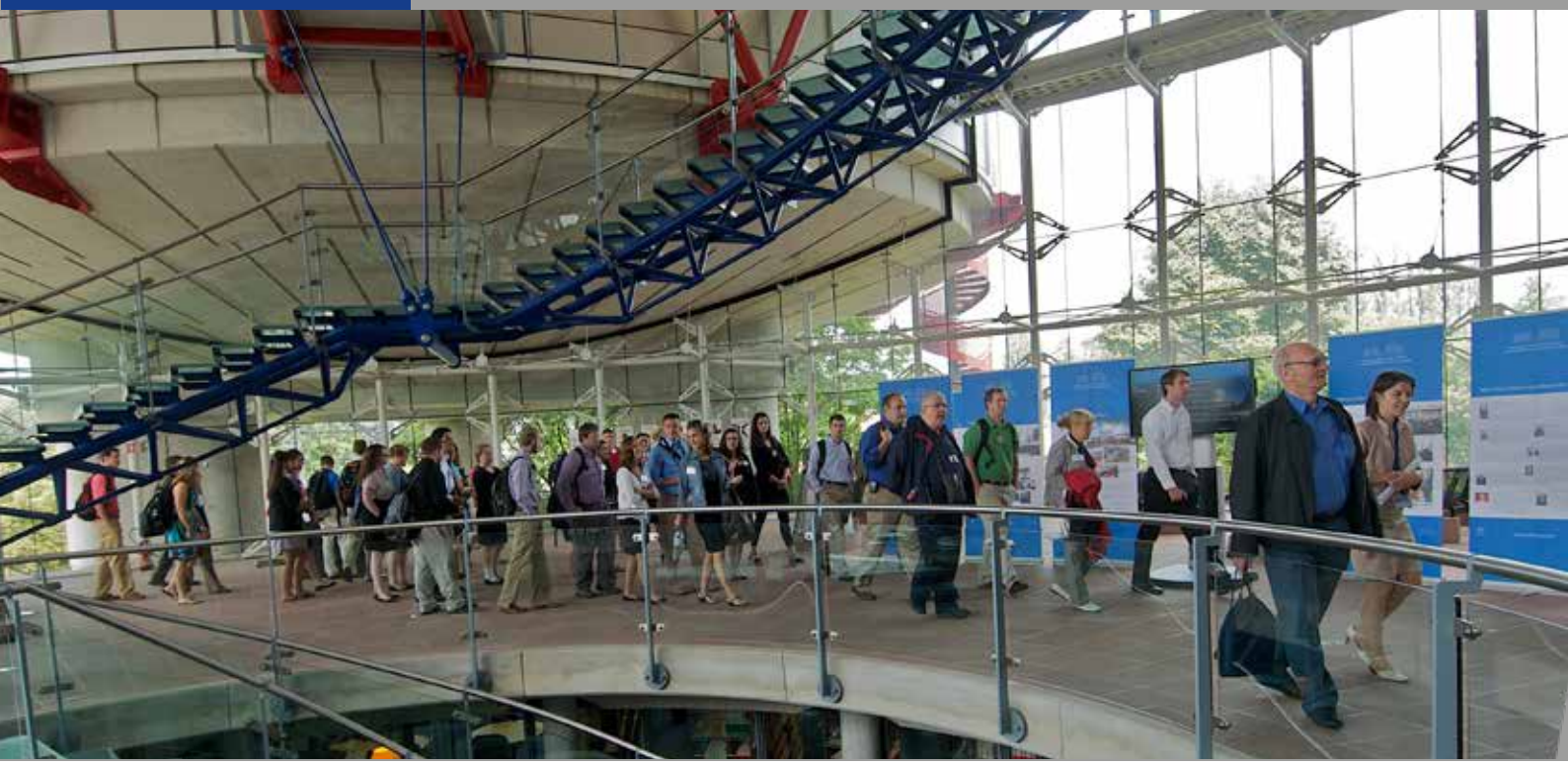

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Table of contents

COURT NEWS

RECENT PUBLICATIONS

ARTICLE 2

Use of force

Death of mentally ill man following during arrest by police officers: *no violation*

Boukrourou and Others v. France, 30059/15, judgment 16.11.2017 [Section V]

Facts – A man suffering from a psychiatric illness died during his arrest by police in a pharmacy. The police officers had been called in by the pharmacist, who had reported the presence in his establishment of an agitated person suffering from psychiatric disorders. The investigating judges dropped the case against the police officers. The applicants' appeals were dismissed.

Law

Article 2: The force used by the officers in attempting to control the man may have caused the fatal outcome. The police officers were only aware that he was undergoing psychiatric treatment and could not have known of the danger arising from the combined effect of his heart complaint and the stress he was undergoing. Therefore, although there was some form of causal link between the force used by the police officers and the man's death, that particular outcome had not been foreseeable under the circumstances of the case.

The police could not have been unaware of the man's vulnerability, having been informed by telephone of his psychiatric illness when they were called out. The officers should have verified his state of health, as he had been placed under their responsibility by the force of circumstances. However, the swift request for assistance issued by the police officers and the rapid intervention of the emergency services on site ruled out any failure on the part of the authorities to meet their obligation to protect the man's life.

Conclusion: no violation (unanimously).

Article 3: The injuries the medical experts found on the body were caused by the arresting officers and corresponded to the acts described and acknowledged by the police officers.

Although the man had shown signs of agitation in the pharmacy, he had subsequently sat down on a chair and had calmed down somewhat by the time the police arrived. The police officers invited him several times to leave the premises. However, when he refused they decided to remove him by force even though he was not a person who posed a threat to other people's lives and physical integrity or to his own welfare and therefore needed controlling. Owing to the difficulties they were having in removing him from the premises and handcuffing him the police officers punched him twice in the solar plexus. Such treatment of a vulnerable man was neither justified nor strictly necessary and only served to increase his agitation and resistance, so reinforcing his feeling of exasperation and, at the very least, of confusion at the course events had taken.

Inside the police van, although the man was vulnerable owing to both his psychiatric illness and the fact that he was in police custody, he was kept face down, handcuffed to a fixed point with three police officers standing over him applying their full weight to different parts of his body. The officers were plainly unable to cope with the situation, over which they seemed to have lost control.

There was nothing to suggest that the violence inflicted on the man was the result of any intention on the part of the police to humiliate him or make him suffer. Instead, it may have been due to a lack of preparedness, experience, appropriate training or equipment. Even though the case file showed that they had been informed of his psychiatric problems, the police officers did not appear to have considered how they should broach the man or respond to a possible negative or aggressive reaction on his part. The violent, repeated and ineffective acts inflicted on a vulnerable person constituted an infringement of human dignity and reached a threshold of severity incompatible with Article 3 of the Convention.

Conclusion: violation (unanimously).

Article 41: EUR 30,000 in respect of non-pecuniary damage, breaking down as follows: EUR 6,000 for the victim's wife, EUR 6,000 each for his parents, and EUR 4,000 each for his two brothers and his sister.

(See also *Scavuzzo-Hager and Others v. Switzerland*, 41773/98, 7 February 2006, Information Note 83; and *Tekın and Arslan v. Belgium*, 37795/13, 5 September 2017, Information Note 210)

Effective investigation

Death of detainee during hunger strike: *no violation*

Ceesay v. Austria, 72126/14, judgment 16.11.2017 [Section V]

Facts – The applicant's brother, Y.C., died in detention while on hunger strike. On the day of his death,

he had been taken to hospital for examination and his fitness for detention had been confirmed. On his return at around 11 a.m. he was placed alone in a security cell, which did not contain a water outlet. A police officer checked on him every fifteen to thirty minutes. At 1.20 p.m. he was declared dead by an emergency doctor. The autopsy concluded that Y.C. had died of dehydration, combined with the fact that he had been a carrier of sickle cell trait,[1] a fact of which he had been unaware.

The applicant alleged that there had been no effective or comprehensive investigation into his brother's death. He further complained that the treatment of his brother during his hunger strike had not been in accordance with the law and that he had been subjected to inhuman and degrading treatment. In particular, he alleged that the doctor at the detention centre had inaccurately calculated his brother's critical weight.

Law

Article 2 (*procedural aspect*): There was no indication of shortcomings in the public prosecutor's investigation, which had been closed as no sufficient evidence had been found to indicate misconduct on the part of the persons in charge. The public prosecutor had relied on the comprehensive autopsy report and expert medical report, which had clearly stated that death through the use of force could be excluded, and that Y.C. had died of dehydration, combined with the fact that he had been a carrier of sickle cell trait.

The applicant had instituted administrative proceedings before the Independent Administrative Panel ("IAP"), in the course of which several witnesses and experts were questioned. The IAP examined the evidence and delivered three decisions, two of which were quashed by the Administrative Court. While the IAP found that the authorities should have known that Y.C. came from a country whose inhabitants bore a high likelihood of being a carrier of sickle cell disease and therefore should have informed Y.C. of this potential risk after he had started his hunger strike, the Administrative Court held that the mere fact that a person came from a country with a high rate of such disease did not mean that the State had a duty to test every person from a certain area for that genetic predisposition. After obtaining a second expert report, the IAP dismissed the applicant's complaints, in accordance with the legal opinion of the Administrative Court. The IAP also considered an expert report submitted by the applicant, focusing on the calculation of Y.C.'s critical weight and mistakes allegedly made in that respect, but preferred the evidence of other experts who had concluded that the calculation of the critical weight had had no bearing on Y.C.'s death.

Conclusion: no violation (unanimously).

Article 3 (*substantive aspect*): As regards the steps to be taken in the event of a hunger strike, clear instructions had been issued by the Ministry of the Interior to the authorities, which had been prepared after consultations with its medical service and various NGOs. There was no indication that those instructions were in themselves insufficient or unclear, or that overall in the instant case they were not sufficiently followed. Furthermore there had been no indications that Y.C. suffered from sickle cell disease and he had not been aware of it himself. At the time, even hospitals did not conduct standardised tests for that blood anomaly. The authorities could not be blamed for not having given appropriate instructions at the outset to conduct such a test for the applicant's late brother.

On the morning of his death, Y.C.'s external appearance had been that of a physically fit man who was aggressive because he did not want to be examined. While his behaviour might, with hindsight, be considered a sign of already advanced dehydration and a consequent disintegration of his blood cells owing to sickle cell disease that was not foreseeable at the time of the events. The doctor who drew up the autopsy report, found no signs of classic dehydration in Y.C.´s body and, moreover, no malnutrition and no long-term abstinence from food.

As regards the calculation and registration of Y.C.'s weight, the Court considered the possible mistake in recording particularly regrettable as the correct recording of a detainee's weight could be critical for determining when and what medical care was made available during detention in the course of a hunger strike. Given the protocol in place in Austria for the treatment of detainees on hunger strike, it fell to the competent authorities to follow the instructions it contained with due diligence. However, on the basis of the experts' reports, which were examined in detail by the domestic investigative authorities, the Court

1. Sickle cell disease describes a group of inherited red blood cell disorders. Sickle cell trait is a usually asymptomatic condition that occurs when a person inherits from only one parent the abnormal hemoglobin gene characteristic of sickle cell disease.

could not discern any causal link between the possible mistake in recording Y.C.'s weight and his death.

In the light of those facts and the witness and expert statements there was no reason to question the domestic courts' conclusion that the authorities could not have been aware that Y.C. was in a life-threatening situation requiring urgent medical attention. It was not foreseeable that, if his health declined, the rate of decline would be precipitous due to the undetected sickle cell disease.

Further, the Court observed that while it was true that Y.C. could have requested a water bottle at any time, it would clearly have been advisable given the situation to provide him with direct access to water in the cell and to advise him to take in fluids. However, as it was not possible either for the hospital or the authorities at the detention centre to detect the critical state of the applicant's health and the fact that he might go into rapid decline due to the sickle cell disease, the failure to take such measures could not, under the circumstances, be considered as inhuman or degrading.

Conclusion: no violation (unanimously).

ARTICLE 3

Inhuman or degrading treatment

Death of mentally ill man following during arrest by police officers: *violation*

Boukrourou and Others v. France, 30059/15, judgment 16.11.2017 [Section V]

(See Article 2 above, page 7)

Treatment of detainee during hunger strike: *no violation*

Ceesay v. Austria, 72126/14, judgment 16.11.2017 [Section V]

(See Article 2 above, page 7)

Inhuman treatment

Conditions of detention of convicted prisoner with terminal cancer: *violation*

Dorneanu v. Romania, 55089/13, judgment 28.11.2017 [Section IV]

Facts – Having been the subject of criminal proceedings since 2002, the applicant was convicted in a final judgment in February 2013 and sentenced to three years and four months' imprisonment.

Although he had been diagnosed with advanced prostate cancer in November 2012, he was admitted to prison in March 2013 to begin his sentence. He applied immediately and on several further occasions for the suspension of his sentence. In June 2013 the court granted his application for a three-month period, but in August 2013 the court of appeal held that the necessary medical treatment could be provided in prison. To receive his treatment, the applicant was repeatedly transferred between different hospitals and prisons, sometimes a very long distance apart. His chemotherapy was replaced by palliative care, and he died in hospital in December 2013.

Law – Article 3 (*substantive aspect*)

(a) *General conditions of detention*: The conditions in which the applicant had been held had subjected him to hardship going beyond the unavoidable level of suffering inherent in detention. Although the duration of his detention with less than 3 sq. m of personal space had been brief, the ordinary cells (between 3 and 4 sq. m) had not been suitably equipped to accommodate his severe disability, as towards the end of his life he had become blind and deaf and suffered from bone pain.

(b) *Repeated transfers*: Although the majority of the transfers had been justified on medical grounds, the fact remained that the institutions concerned were a long distance apart, and in some cases several hundred kilometres away. In view of the applicant's deteriorating health, these repeated changes were likely to instil and exacerbate feelings of anxiety in him as to the suitability of the different detention facilities, the implementation of the medical protocol for his treatment and his continued contact with his family. The intensity of such hardship likewise exceeded the unavoidable level of suffering inherent in detention.

(c) *Quality of care and assistance: At the time of his admission to prison, the applicant had already been suffering from a disease with a fatal short-term prognosis. Although he had been treated in accordance with doctors' instructions, the domestic authorities did not at any time appear to have envisaged the possibility of providing the treatment in the same place* – which would have spared the applicant a number of transfers – or at least limiting the number of transfers and their harmful effects on the patient's

well-being. Moreover, in the final stages of the disease, when there was no longer any hope of remission, the stress inherent in prison life could have repercussions on the prisoner's life expectancy and state of health.

A stage had been reached where the applicant had become so physically and psychologically weakened and diminished that he was no longer able to perform basic everyday tasks unaided and a fellow prisoner had been designated to assist him. There was no evidence that the prisoner who had agreed to help the applicant was qualified to assist a terminally ill person or that the applicant had received proper moral or social support or appropriate psychological counselling, even though he had been found to be suffering from depression.

(d) *Continued imprisonment in inadequate conditions of detention*: The applicant had been imprisoned despite being terminally ill and suffering the effects of heavy medication in difficult prison conditions. In such a context, any lack of diligence on the authorities' part placed the person concerned in an even more vulnerable position, making it impossible for him to retain his dignity as his illness ran its inevitably fatal course.

As the applicant's disease had progressed, it had become impossible for him to endure it in a prison environment. It had thus been the responsibility of the national authorities to take special measures on the basis of humanitarian considerations.

As to whether the applicant's continued detention had been appropriate, the Court could not substitute its own view for that of the domestic courts, but it nevertheless noted that the court of appeal had not put forward any reasons linked to the threat that the applicant's release might have posed in terms of protecting the community, with due regard for his condition. This had been the applicant's first ever conviction and he had already served one-third of a relatively mild sentence; his behaviour during the trial had been good; he had been granted the most favourable prison regime; and on account of his state of health, the risk of his reoffending could only have been minimal.

The authorities had not examined whether in practice the applicant was fit to remain in prison in the conditions complained of. The court of appeal had held that the treatment prescribed could be provided in detention but had not considered the conditions and practical arrangements for administering such heavy medication in the applicant's specific situation, the conditions for his transfer to the different prisons and hospitals, the distances between these facilities, the number of hospitals to which he had been admitted to receive his treatment or the impact of this combination of factors on his already highly vulnerable state. In view of the exceptional nature of the circumstances of the case, these factors should have been examined, even on humanitarian grounds alone, in order to assess whether the applicant's state of health was compatible with the conditions of his detention.

No arguments had been put forward to the effect that it had been impossible for the national authorities to address these exceptional circumstances with due regard for the pressing humanitarian considerations they entailed. On the contrary, the procedures followed had prioritised formalities, thus preventing the dying applicant from spending his final days in dignity. In addition, the length of the proceedings for having the sentence suspended on health grounds had been excessive for a terminally ill patient, and the replies by the prison authorities to the applicant's requests for assistance in securing his release had been characterised by a lack of consideration for his situation.

In conclusion, the conditions of detention which the applicant had had to endure while terminally ill had amounted to inhuman treatment.

Conclusion: violation (unanimously).

Article 41: EUR 9,000 to the applicant's son in respect of non-pecuniary damage; claim for pecuniary damage rejected.

(See also *Gülay Çetin v. Turkey*, 44084/10, 5 March 2013, Information Note 161; see also the Factsheet on Prisoners' health-related rights)

ARTICLE 5

ARTICLE 5 § 1 (e)

Persons of unsound mind

Extension of compulsory admission to psychiatric hospital without sufficient assessment of level of danger presented by patient: *violation*

N. v. Romania, 59152/08, judgment 28.11.2017 [Section IV]

(See Article 46 below, page 30)

ARTICLE 5 § 4

Review of lawfulness of detention, speediness of review

Lack of regular reviews of grounds for compulsory admission to psychiatric hospital and of effective legal assistance: *violation*

N. v. Romania, 59152/08, judgment 28.11.2017 [Section IV]

(See Article 46 below, page 30)

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Access to court

Uncertainty regarding starting point of time-limit for appeals in absence of system identifying date when impugned decision was available: *violation*

Cherednichenko and Others v. Russia, 35082/13 et al., judgment 7.11.2017 [Section III]

Facts – The five applicants wished to appeal against a decision by a district court. With one exception, they all filed their notice and/or grounds of appeal, which were declared out of time. However, the starting point for lodging an appeal was interpreted in different ways at national level: it was either the date on which a short form of the decision was read out at the hearing, or the date on which the full text of the decision was finalised by the judge, or the date on which the finalised decision was filed with the court's registry, or the date on which a copy of the decision was received through the post.

The applicants complained of a breach of their right of access to a court, on the grounds that, as a result of allegedly incorrect application of the procedural rules, their appeals had been declared inadmissible as being out of time.

Law – Article 6 § 1: The problem in question was the result of a systemic shortcoming arising from the absence, at domestic level, of a uniform system that would make it possible to establish in an objective manner the date from which the full text of the decision was available to the parties to the dispute, given that that date triggered the time-limit within which an appeal could be lodged. The national authorities could remedy the situation by correcting this defect in the procedural law. Nonetheless, in the absence of such a system, the Court accepted as the starting point of the time-limit for lodging an appeal the dates indicated by the applicants, unless the Government could prove the contrary.

It followed that three of the applicants had exercised their right of appeal within the time-limit allowed, from the date on which they had effectively received a full copy of the judicial decisions. By rejecting their appeals as out of time, the domestic courts had given an excessively formalistic interpretation of the domestic law, with the result that the applicants had had imposed on them an obligation that they were unable to meet, even with particular diligence. Given the seriousness of the penalty imposed on the applicants for failure to comply with the time-limits calculated in this way, the contested measure had not been proportionate to the aim of ensuring judicial certainty and the proper administration of justice.

With regard to another applicant, the failure to notify the text of the decision had deprived him of his right of access to the appeal court.

Conclusion: violation (unanimously).

Article 41: EUR 2,500 each in respect of non-pecuniary damage.

(See also *Ivanova and Ivashova v. Russia*, 797/14 and 67755/14, 26 January 2017, Information Note 203)

Dismissal of appeals by appellants who had asked for the appeals to be heard in their absence: *violation*

Sukhanov and Others v. Russia, 56251/12 et al., judgment 7.11.2017 [Section III]

Facts – The courts declined to examine the three applicants' actions on the merits, on the grounds that the applicants had withdrawn them. The Government maintained that the applicants had not appeared in court or requested that their cases be heard in their absence. In their view, this amounted to tacit withdrawal, resulting in the termination of the proceedings under Article 222 § 8 of the Code of Civil Procedure[2].

2. Under Article 222 § 8 of the Code of Civil Procedure the proceedings are terminated if a claimant fails to appear at two hearings and has not requested that the case be heard in his or her absence, and if the defendant has not insisted that the case be examined on the merits.

The applicants alleged that their applications to the courts had not been examined on the merits, in breach of their right of access to a court.

Law – Article 6 § 1: Appearing before the court was a right rather than an obligation for claimants in civil cases. The court was entitled to consider a repeated failure by a claimant to appear as a tacit withdrawal and to terminate the proceedings accordingly. This was possible provided two conditions had been met: the claimant had been duly informed of the date of the hearing and he or she had not requested that the case be heard in his or her absence.

The two applicants whose applications were declared admissible (Mr Sukhanov and Mr Mazunin) had requested that their cases be heard in their absence. It was thus clear that they had not withdrawn their actions, either expressly or implicitly. Hence, the application by the courts of Article 222 § 8 of the Code of Civil Procedure appeared manifestly arbitrary as it made no connection between the established facts, the applicable law and the outcome of the proceedings.

It was therefore unnecessary for the Court to ascertain in the abstract whether the termination of the proceedings, as provided for by the legislature in Article 222 § 8 of the Code of Civil Procedure, had pursued a legitimate aim in so far as its application, which had been manifestly arbitrary, had distorted the purpose of that provision. For the same reason the Court found it unnecessary to examine the proportionality of the impugned measure, with particular reference to the question whether it had been open to the above-mentioned applicants, as suggested by the Government, to resubmit their claims in order to assert their right to a court.

The court rulings concerning the two applicants had been arbitrary and therefore amounted to a "denial of justice".

Conclusion: violation (unanimously).

Article 41: EUR 2,000 to Mr Mazunin in respect of non-pecuniary damage; no claim submitted by Mr Sukhanov.

(See also *Anđelković v. Serbia*, 1401/08, 9 April 2013, Information Note 162)

ARTICLE 6 § 1 (CRIMINAL)

Fair hearing

Conviction for currency counterfeiting following an operation by undercover police agents: *violation*

Grba v. Croatia, 47074/12, judgment 23.11.2017 [Section I]

Facts – The applicant had been convicted of currency counterfeiting in connection with four occasions on which he had sold counterfeit euros to undercover police agents. He challenged the first-instance judgment arguing, in particular, that the circumstances of his entrapment had not been properly examined. His appeals were dismissed.

Before the European Court the applicant complained of, *inter alia*, entrapment and the use of evidence thereby obtained in the criminal proceedings against him.

Law – Article 6 § 1: Recourse to an operational technique involving the arrangement of multiple illicit transactions with a suspect by the State authorities was a recognised and permissible means of investigating a crime when the criminal activity was not a one-off, isolated criminal incident but a continuing illegal enterprise. In practice such an operational technique might be aimed at gaining the trust of an individual with the aim of establishing the scope of his or her criminal activity or working up to a larger source of criminal enterprise, namely to disclose a larger crime circle.

However, in keeping with the general prohibition of entrapment, the actions of undercover agents had to seek to investigate on-going criminal activity in an essentially passive manner and not exert an influence such as to incite the commission of a greater offence than the one the individual had already been planning to commit without such incitement. It followed that in cases concerning recourse to such an operational technique, any extension of the investigation had to be based on valid reasons, such as the need to ensure sufficient evidence to obtain a conviction, to obtain a greater understanding of the nature and scope of the suspect's criminal activity, or to uncover a larger criminal circle. Absent such reasons, the State authorities might be found to be engaging in activities which had improperly enlarged the scope or scale of the crime and might unfairly subject the defendant to increased penalties either within the prescribed range of penalties or for an aggravated offence. Although normally the issues concerning appropriate sentencing fell outside the scope of the Convention, as a matter of fairness, the sentence imposed should reflect the offence which the defendant had actually been planning to commit. In these situations although it would not be unfair to convict the

person, it would be unfair for him or her to be punished for that part of the criminal activity which was the result of improper conduct on the part of the State authorities.

It was undisputed between the parties that the applicant had been involved in four encounters during which he had succeeded in uttering a significant quantity of counterfeit euros by selling them to the undercover police agents. The first illicit transaction had been the result of the applicant's own deliberate conduct and there was nothing suggesting that he would not have uttered the counterfeit currency on that occasion had an "ordinary" customer approached him instead of the police.

However, there was no conclusive evidence as to who had taken the initiative in arranging the further meetings between the applicant and the undercover agents. There was no indication that, during the period concerned, the applicant was selling counterfeit currency to anybody other than the undercover agents. During the domestic proceedings, the undercover agents had been unable to explain why the applicant had not been arrested after the first illicit transfer of euros or the reasons for the decision to engage in multiple illicit transactions with him in the first place. It was therefore unclear under what form of practical guidance, if any, they were acting. There was no indication that any further activities had been undertaken by the authorities to secure the evidence that would have been necessary to prosecute an illegal business enterprise engaged in counterfeiting currency, and which might have warranted recourse to an operational technique involving the arrangement of multiple illicit transactions with the applicant.

Since it was impossible to establish with a sufficient degree of certainty whether or not the applicant had been the victim of entrapment contrary to Article 6 it was essential to examine the procedure whereby the plea of entrapment had been assessed in his case, to ensure that the rights of the defence had been adequately protected.

The applicant had raised an arguable plea of entrapment. The competent criminal courts should have investigated why the police had decided to launch the operation, what evidentiary material they had had in their possession, and the manner in which they had interacted with the applicant. That was particularly important in view of the lack of proper scrutiny by the investigating judge when authorising the undercover operation in question and the inconclusive statements of the undercover agents concerning the decision-making process as regards the conduct of the undercover operation. When scrutinising the conduct of the undercover agents, the domestic courts had mostly limited their inquiry to ascertaining whether the undercover agents had been acting on the basis of an order from an investigating judge. The Supreme Court had reiterated and endorsed the reasoning of the lower courts and had failed to thoroughly analyse and to provide the relevant reasoning for accepting or refusing the applicant's contention that he had been prompted to engage in one of the subsequent illicit transfers.

In the light of the above considerations, the domestic courts had failed to comply with their obligation to examine effectively the applicant's plea of entrapment, as required under the procedural test of incitement under Article 6 § 1. Accordingly, the decision-making procedure leading to the applicant's more serious sentencing for multiple uttering of counterfeit currency had failed to comply with the requirements of fairness. That did not imply that he had been wrongly convicted for uttering counterfeit currency but rather that the domestic courts had failed to establish whether, by his participation in the subsequent illicit transactions, the scope of his criminal activity had been extended as a result of improper conduct on the part of the authorities.

Conclusion: violation (unanimously).

The Court also found a violation of Article 8 as regards covert surveillance of the applicant.

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

(See also *Matanović v. Croatia*, 2742/12, 4 April 2017, Information Note 206; and *Milinienė v. Lithuania*, 74355/01, 24 June 2008, Information Note 109)

Fair hearing, independent and impartial tribunal

Alleged unfairness of proceedings to impeach the prime minister: *no violation*

Haarde v. Iceland, 66847/12, judgment 23.11.2017 [Section I]

Facts – The applicant was prime minister of Iceland between 2006 and 2009. In December 2008 the Icelandic Parliament set up a Special Investigation Commission (*SIC*) to investigate and analyse the collapse

of the Icelandic banking system in October 2008. It also formed an *ad hoc* parliamentary review committee (PRC) to examine the *SIC*'s report and decide whether there were grounds for impeachment proceedings. The *SIC*'s report blamed the applicant and two other former ministers for failing to respond appropriately to the economic danger caused by the banks' deteriorating situation. The PRC subsequently submitted a proposal for impeachment proceedings on the basis of which Parliament passed a resolution for the applicant's impeachment for negligent conduct. It also appointed a prosecutor, who was one of the persons the PRC had heard evidence from when deciding whether sufficient grounds for prosecution existed.

The applicant was tried by a Court of Impeachment and convicted of one count of gross negligence under Article 17 of the Constitution in conjunction with section 8(c) of the Ministerial Accountability Act for failing to hold ministerial meetings on "important government matters" ahead of the crisis. He was not sentenced to any punishment and the State was ordered to bear all the legal costs.

In the Convention proceedings the applicant complained under Articles 6 and 7, *inter alia*, that the pre-trial investigation had been deficient, that the court which had tried him had not been impartial and that the provisions under which he had been found guilty of criminal conduct were not clear and foreseeable.

Law

Article 6: In view of the number and nature of the violations alleged by the applicant, the Court dealt with the Article 6 complaints together following, so far as possible, the chronology of the domestic proceedings.

(a) *Pre-trial stage* – The Court reiterated that the manner in which Article 6 was to be applied during the investigation stage depended on the special features of the proceedings involved and on the circumstances of the case. In the instant case, none of the measures taken or events occurring during the handling of the case by the PRC, Parliament and the prosecutor had affected the applicant's position in a manner that could render the subsequent stages of the proceedings unfair. Nor could the pre-trial proceedings be considered to have had such an effect when examined as a whole.

In reaching that conclusion, the Court found that (i) the pre-trial collection of the evidence could not be said to have been deficient to the applicant's detriment; (ii) the applicant had had ample opportunity to acquaint himself with the case materials and prepare his defence and there was no indication that he and his counsel were given insufficient information to understand the charges; (iii) there was nothing to indicate that the rules of procedure were applied in a manner that prejudiced the fairness of the applicant's trial; and (iv) the prosecutor's involvement during the examination of the case by the PRC had not breached the principle of the presumption of innocence as her role had been to establish whether there were sufficient grounds for prosecution and she had not given any statements to the public or taken any judicial decisions in the case.

As to the applicant's allegation that the process of deciding whether to bring charges had been arbitrary and political, the Court noted that the Contracting States had adopted varied approaches to the important and sensitive questions concerning the criminal liability of members of government for acts or omissions that have taken place in the exercise of their official duties. It was not for the Court to seek to impose any particular model. Its task was to conduct a review of the concrete circumstances of the case on the basis of the complaints brought before it.

The Court was mindful of the fact that while the purpose of the relevant constitutional, legislative and procedural frameworks on this subject should be to seek a balance between political accountability and criminal liability, and to avoid both the risk of impunity and the risk of ill-founded recourse to criminal proceedings, there may be risks of abuse or dysfunctionalities, which had to be avoided. The Court was aware of the importance of ensuring that criminal proceedings were not misused for the purpose of harming political opponents or as instruments in political conflict. It therefore had to bear in mind the need to ensure that the necessary standards of fairness were upheld regardless of the special features of the proceedings.

The impeachment proceedings in the applicant's case were based on a decision of Parliament. From a comparative perspective, parliamentary involvement was not uncommon in the context of decisions as to whether criminal proceedings should be brought against a member of government for acts undertaken in the exercise of ministerial functions and was not in itself sufficient to raise an issue

under Article 6, bearing in mind that the charges brought by Parliament were examined and adjudicated upon by a court of law. Furthermore, the negligence imputed to the applicant concerned an objective legal obligation and there was no indication that Parliament's decision to bring charges was based on insufficient information.

Thus, while party preferences may have played a role in the parliamentary vote, the process leading to the applicant's indictment had not been arbitrary or political to such an extent that the fairness of his trial was prejudiced.

(b) *Independence and impartiality of the Court of Impeachment* – The applicant had complained that the eight lay judges who had sat with the seven professional judges on the Court of Impeachment had been appointed by Parliament, which was also the prosecuting authority in his case. He also complained that Parliament had interfered with the composition of the court during the proceedings by prolonging the terms of the lay judges.

Although political sympathies could play a part in the process of appointment of lay judges to the Court of Impeachment, the Court did not consider that that alone raised legitimate doubts as to their independence and impartiality. In that connection, it noted that, prior to taking seat on the court for the first time, judges were required to sign an oath that they would act conscientiously and impartially. It had not been shown that the lay judges sitting in the applicant's case had declared any political affiliations concerning the subject-matter in issue or that there existed other links between them and Parliament which could give rise to misgivings as to their independence and impartiality.

The fact that the lay judges made up a majority had had no impact either as the applicant was convicted by nine votes to six, where five out of the nine judges giving a guilty verdict were professional judges.

Likewise, the decision of Parliament to extend the term of the sitting lay judges was, in the circumstances, fully justified. The only alternative would have been to appoint new lay judges. As, effectively, they would have been appointed specifically for the case at hand, their participation could have given rise to justifiable doubts with regard to independence and impartiality. Conversely, the lay judges already sitting on the Court of Impeachment had been appointed years before the relevant events of the case took place and before the proceedings against the applicant started. Furthermore, there had been parliamentary elections in the meantime and the sitting lay judges had thus not been appointed by the same Parliament that had decided to prosecute the applicant.

Accordingly, having regard to the particular circumstances of the case and the special character of the Court of Impeachment, there was nothing to show that it had failed to meet the requirements of independence and impartiality under Article 6 § 1.

(c) *Trial and judgment* – The applicant had asserted that uncertainty concerning the details of the charges against him and the arguments on which the prosecution intended to base them had persisted until the end of the proceedings and had given the Court of Impeachment an excessive margin of appreciation as to the grounds on which it would base its verdict.

The Court disagreed. The offence of which the applicant was found guilty was sufficiently described in the indictment and was furthermore covered by the prosecution's pleadings before the Court of Impeachment; the applicant had been fully able to respond to the indictment, the pleadings and the evidence presented, and the Court of Impeachment had set out the factual and legal reasoning for the conviction at length without straying beyond the prosecution case or a reasonable reading of the legal provisions applied. Accordingly, neither the trial before the Court of Impeachment nor the reasoning given in its judgment had breached the guarantees set out in Article 6.

Conclusion: no violation (unanimously).

Article 7: Article 17 of the Icelandic Constitution was a provision of central importance in the constitutional order, in that it set out important principles on how the Government were expected to function, as a collegial organ for important matters of State governance and policy-making. The applicant as Prime Minister and Head of Government was responsible for ensuring that the requirements of Article 17 were complied with. The Court agreed with the Court of Impeachment that that provision could not be regarded as lacking in sufficient clarity, even though the notion of "important government matters" the former prime minister had been found guilty of neglecting could necessarily be a matter of interpretation. The conclusions drawn by the Court of Impeachment as regards the meaning to

be given to the relevant provisions and their application to the conduct of the applicant had to be considered to have been well within its remit to interpret and apply national law and the offence for which the applicant was convicted was sufficiently defined in law. Accordingly, the applicant could reasonably have foreseen that his conduct would render him criminally liable under the Constitution and the Ministerial Accountability Act.

Conclusion: no violation (six votes to one).

ARTICLE 7

Nullum crimen sine lege

Alleged lack of clarity of legal provisions governing impeachment: *no violation*

Haarde v. Iceland, 66847/12, judgment 23.11.2017 [Section I]

(See Article 6 § 1 (criminal) above, page 13)

ARTICLE 8

Respect for private life, respect for correspondence

Covert surveillance without adequate legal safeguards: *violations*

Dudchenko v. Russia, 37717/05, judgment 7.11.2017 [Section III]

Facts – The applicant complained, *inter alia*, about being subjected to covert surveillance, in particular, the interception of telephone communications with an accomplice in criminal proceedings and his counsel. He alleged a violation of his right to respect for his private life and correspondence.

Law – Article 8

(a) *Telephone conversations with accomplice* – The interception of the applicant's telephone communications amounted to an interference with the exercise of his rights as set out in Article 8 of the Convention.

As to whether the interference was "in accordance with the law", the Court had found in *Roman Zakharov* that the judicial authorisation procedures provided for by Russian law were not capable of ensuring that covert surveillance measures were not ordered haphazardly, irregularly or without due and proper consideration. One of the issues identified in that case was that in their everyday practice the Russian courts did not verify whether there was a "reasonable suspicion" against the person concerned and did not apply the "necessity" and "proportionality" tests.

The Government had not produced any evidence to demonstrate that the Russian courts had acted differently in the applicant's case. There was no evidence that any information or documents confirming the suspicion against the applicant had actually been submitted to the judge. The only reason advanced by the court to justify the surveillance measures was that it "seem[ed] impossible to obtain the information necessary to expose [the applicant's] unlawful activities by overt investigation", without explaining how it had come to that conclusion. Such a vague and unsubstantiated statement was insufficient to justify the decision to authorise a lengthy (180 days) covert surveillance operation, which entailed a serious interference with the right to respect for the applicant's private life and correspondence.

Conclusion: violation (six votes to one).

(b) *Telephone conversations with counsel* – In order to avoid abuses of power in cases where legally privileged material had been acquired through measures of secret surveillance, the following minimum safeguards needed to be set out in law. Firstly, the law had to clearly define the scope of the legal professional privilege and state how, under what conditions and by whom the distinction was to be drawn between privileged and non-privileged material. Given that the confidential relations between a lawyer and his clients belonged to an especially sensitive area which directly concerned the rights of the defence, it was unacceptable that that task should be assigned to a member of the executive, without supervision by an independent judge. Secondly, the legal provisions concerning the examination, use and storage of the material obtained; the precautions to be taken when communicating the material to other parties; and the circumstances in which recordings may or must be erased or the material destroyed had to provide sufficient safeguards for the protection of the legally privileged material obtained by covert surveillance. In particular, the national law should set out with sufficient clarity and detail: procedures for report-

ing to an independent supervisory authority for review of cases where material subject to legal professional privilege had been acquired as a result of secret surveillance; procedures for secure destruction of such material; conditions under which it may be retained and used in criminal proceedings and law-enforcement investigations; and, in that case, procedures for safe storage, dissemination of such material and its subsequent destruction as soon as it was no longer required for any of the authorised purposes.

Russian law proclaimed protection of legal professional privilege, which was understood as covering any information relating to legal representation of a client by an advocate. It did not, however, contain any specific safeguards applicable to interception of lawyers' communications; lawyers were subject to the same legal provisions on interception of communications as anyone else. The Court had already found in *Roman Zakharov* that those legal provisions did not provide for adequate and effective guarantees against arbitrariness and the risk of abuse and were therefore incapable of keeping the "interference" to what is "necessary in a democratic society". Most importantly for the case at hand, the domestic law did not provide for any safeguards to be applied or any procedures to be followed in cases where, while tapping a suspect's telephone, the authorities accidentally intercepted the suspect's conversations with his or her counsel.

Conclusion: violation (six votes to one).

The Court also found, unanimously, violations of Article 3 on account of the conditions of the applicant's detention pending trial and the conditions in which the applicant was transported between detention facilities and, by six votes to one, a violation of Article 5 § 3, finding that his detention had not been based on sufficient reasons. Finally, the Court found, unanimously, that there had been no violation of Article 6 §§ 1 and 3 (c) on the basis that the removal of the applicant's chosen counsel had not irretrievably prejudiced the applicant's defence rights or undermined the fairness of the proceedings as a whole.

Article 41: EUR 14,000 in respect of non-pecuniary damage.

(See *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015, Information Note 191; see also the Factsheet on Mass surveillance)

Covert surveillance without adequate legal safeguards: *violation*

Zubkov and Others v. Russia, 29431/05 et al., judgment 7.11.2017 [Section III]
Akhlyustin v. Russia, 21200/05, judgment 7.11.2017 [Section III]
Moskalev v. Russia, 44045/05, judgment 7.11.2017 [Section III]
Konstantin Moskalev v. Russia, 59589/10, judgment 7.11.2017 [Section III]

Facts – The applicants complained, *inter alia*, about being subjected to covert surveillance, in particular, the interception of their telephone communications. One of the applicants complained about the covert filming of meetings with acquaintances in a rented flat and another about the audio-visual surveillance of his office. They alleged violations of their right to respect for their private life, home and correspondence.

Law – Article 8

(a) *Admissibility*

(i) *Exhaustion of domestic remedies* – The Government submitted that the applicants in the cases of *Zubkov and Others*, *Aklyustin* and *Moskalev* had not exhausted domestic remedies as they had not complained to a court under section 5 of the Operational-Search Activities Act (OSAA).

The Court noted that the scope of a judicial review complaint under section 5 of the OSAA – irrespective of whether it was lodged in proceedings under Article 125 of the Code of Criminal Procedure (where the criminal investigation was still pending) or under the Judicial Review Act and Chapter 25 of the Code of Civil Procedure – was limited to reviewing whether or not State officials performing surveillance activities had carried out the surveillance in a manner compatible with the applicable legal requirements and whether they had abided by the terms of the judicial authorisation. The review did not touch upon the legal and factual grounds for the underlying judicial authorisation, that is, whether there were relevant and sufficient reasons for authorising covert surveillance.

The courts were not required by law to examine the issues of "necessity in a democratic society", in particular whether the contested actions answered a pressing social need and were proportionate to any legitimate aims pursued, principles which lay at the

heart of the Court's analysis of complaints under Article 8 of the Convention.

In the context of Article 8, a judicial review remedy incapable of examining whether the contested interference answered a pressing social need and was proportionate to the aims pursued could not be considered an effective remedy. In view of the above considerations, a judicial review complaint under section 5 of the OSAA was not an effective remedy to be exhausted.

Conclusion: preliminary objection dismissed.

(ii) *Compliance with the six-month time-limit* – All but one of the applicants had introduced their applications within six months of the final judgment in the criminal proceedings against them. It was significant that they had learned about the covert surveillance during those criminal proceedings.

Setting out the position in the *Zubkov and Others* case, the Court observed that this was the first time it had undertaken an examination of remedies existing in the Russian legal system for complaints about covert surveillance of which the surveillance subjects had learned in the course of the criminal proceedings against them. Given the uncertainty as to the effectiveness of those remedies – and in particular given that at the material time it could not have been presumed that raising the issue of covert surveillance in the criminal proceedings was a clearly ineffective remedy – it was not unreasonable for the applicants to have attempted to use an available remedy in order to give the domestic courts an opportunity to put matters right through the national legal system, thereby respecting the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.

The applicants had only learned about the covert surveillance during the criminal proceedings, when the prosecution used the intercepted material as evidence to substantiate the cases against them. It was reasonable, in such circumstances, for them to try to bring their grievances to the attention of the domestic courts through the remedies provided by the criminal procedural law. There was nothing in the parties' submissions to suggest that the applicants were aware, or should have become aware, of the futility of such a course of action. Moreover, given the secret nature of surveillance, the defendants may have difficulties in obtaining access to documents relating to it. This in turn could prevent them from having a detailed understanding of the circumstances in which the surveillance was carried out and, most importantly, the grounds on which it was ordered. It was therefore not unreasonable for applicants to wait until they had received documents establishing the facts essential for an application to the Court before introducing such an application.

The applicants had thus complied with the six-month rule.

Conclusion: admissible (unanimously).

(b) *Merits* – The measures aimed at the interception of the applicants' telephone communications amounted to an interference with the exercise of their rights set out in Article 8 of the Convention.

As to whether the interference was "in accordance with the law", the Court had found in *Roman Zakharov* that the judicial authorisation procedures provided for by Russian law were not capable of ensuring that covert surveillance measures were not ordered haphazardly, irregularly or without due and proper consideration. One of the issues identified in that case was that in their everyday practice the Russian courts did not verify whether there was a "reasonable suspicion" against the person concerned and did not apply the "necessity" and "proportionality" tests. The Government had not produced any evidence to demonstrate that the Russian courts had acted differently in the applicants' cases. In particular, they had failed to submit copies of the surveillance authorisations in respect of the applicants and thereby made it impossible for the Court to verify whether the authorisations were based on a reasonable suspicion or whether "relevant" and "sufficient" reasons had been adduced to justify the surveillance measures.

It was also significant that the applicants had been refused access to the surveillance authorisations. While there might be good reasons to keep all or part of a covert surveillance authorisation secret from its subject even after he or she becomes aware of its existence (for example, to avoid revealing working methods, fields of operation and the identity of agents), at the same time, the information contained in the authorisation decision might be critical for legal proceedings challenging the legal and factual grounds for the surveillance. Accordingly, when dealing with a request for the disclosure of a covert surveillance authorisation, the

domestic courts were required to ensure a proper balance between the subject's interests and the public interest and the surveillance subject should be granted access to the documents in question unless there are compelling concerns to prevent such a decision.

In the cases of *Zubkov and Others*, *Konstantin Moskalev* and *Moskalev* the Court found that it had not been demonstrated that the domestic courts which had authorised the covert surveillance against the applicants had verified whether there was a "reasonable suspicion" against them and had applied the "necessity in a democratic society" and "proportionality" tests.

In *Zubkov and Others* the domestic authorities had relied solely on the confidentiality of the authorisations for refusing access and had not carried out any balancing exercise between the applicants' interests and the public interest. Moreover, they had failed to specify why disclosure of the authorisations, after the surveillance had stopped and the recordings had been disclosed, would have jeopardised the effective administration of justice or any other legitimate public interests. That refusal, without any valid reason, to disclose the authorisations had deprived the applicants of any possibility to have the lawfulness of and necessity for the measure reviewed by an independent tribunal in the light of the relevant principles of Article 8.

In *Konstantin Moskalev* the Court noted that in *Roman Zakharov* it had found that the "urgent procedure" under section 8(3) of the OSAA did not provide sufficient safeguards to ensure that it was used sparingly and only in duly justified cases. In particular, although Russian law required that a judge be immediately informed of each instance of urgent interception, the judge had no power to assess whether the use of the urgent procedure was justified. Those defects were also present in Mr Konstantin Moskalev's case. The judge notified about the urgent interception of the telephone communications did not carry out any judicial review of the police's decision to tap his telephone and no independent authority had assessed whether the use of the urgent procedure had been justified and was based on reasonable suspicion.

In *Moskalev* there was no evidence that any information or documents confirming the suspicion against the applicant had been submitted to the judge. Furthermore, there was no indication that the court had assessed the proportionality of the surveillance measures or performed a balancing exercise weighing the right to respect for private life and correspondence against the need for surveillance. The only reason advanced by the court to justify the surveillance was that the applicant was suspected of a serious criminal offence. Although that reason was undoubtedly relevant it was not in itself sufficient to justify the lengthy and extensive covert surveillance.

Conclusion: violations (unanimously).

The Court also found a breach of the "quality of law" requirement in the *Akhlyustin* case, which concerned the audio-visual surveillance of the applicant's office.

As in the *Bykov v. Russia* case, which concerned the interception of the applicant's conversation through a hidden radio transmitter, Mr Akhlyustin had enjoyed very few, if any, safeguards in the procedure by which the surveillance measures against him were ordered and implemented. In particular, the legal discretion of the authorities to order the "surveillance" was not subject to any conditions, and its scope and the manner in which it was exercised were not defined; no other specific safeguards were provided for. Given the absence of specific regulations providing safeguards, the Court was not satisfied that the possibility provided by Russian law for the applicant to bring court proceedings for an order declaring the surveillance unlawful or to request the exclusion of its results as unlawfully obtained evidence met the "quality of law" requirements.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 13 in conjunction with Article 8 in the *Konstantin Moskalev* case as the applicant did not have at his disposal an effective remedy which would allow the assessment of whether the surveillance measures against him had been in "accordance with the law" and "necessary in a democratic society" and a violation of Article 5 § 4 in respect of one of the applicants in the *Zubkov and Others* case, finding that his appeal against his detention order had not been examined speedily.

(See *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015, Information Note 191; and *Bykov v. Russia* [GC], 4378/02, 10 March 2009, Information Note 117; see also the Factsheet on Mass surveillance)

Respect for private life, positive obligations

Dismissal of defamation proceedings brought by a public figure accused of being a "rapist": *violation*

Egill Einarsson v. Iceland, 24703/15, judgment 7.11.2017 [Section II]

Facts – The applicant was a well-known figure in Iceland who had published articles, blogs and books and appeared in films, on television and other media. Following rape and sexual assault accusations against the applicant by two women a police investigation was opened, but both cases were later discontinued by the public prosecutor for lack of evidence. Shortly after the second case was dropped the applicant gave an interview about the accusations to a magazine. On the day the interview was published, a third party (X) published an altered version of the applicant's magazine picture with the caption "Fuck you rapist bastard" on his account on Instagram, an online picture-sharing application. The applicant brought defamation proceedings against X but the case was dismissed at first instance after the Supreme Court found that the Instagram caption constituted invective and was therefore a value judgment, not a factual statement that the applicant was in fact guilty of rape.

In the Convention proceedings, the applicant alleged a violation of his right to respect for his private life in breach of Article 8.

Law – Article 8: The Court had to determine whether a fair balance had been struck between the applicant's right to the protection of his private life under Article 8 of the Convention and X's right to freedom of expression as guaranteed by Article 10.

The domestic courts had found that the applicant was a well-known figure whose views, including his attitudes towards women and their sexual freedom, had attracted attention and controversy. The complaints against him of sexual violence had led to public discussions in which he had participated. In these circumstances the Court accepted that the limits to acceptable criticism had to be wider in his case than in the case of an individual who was not well-known.

The Court also agreed with the domestic courts that, in the light of the fact that the applicant was well-known and the impugned publication was a part of a debate concerning accusations of a serious criminal act, the caption concerned an issue of general interest.

The crux of the matter before the domestic courts was whether or not the caption "Fuck you rapist bastard" was a statement of fact or a value judgment. The Supreme Court had taken took the view that this was a case of invective in a ruthless public debate which the applicant had instigated, and was therefore a value judgment. The Court disagreed with that assessment. The term "rapist" was objective and factual in nature, referring directly to a person who has committed the act of rape, which was a criminal offence under Icelandic law. The veracity of an allegation of rape could therefore be proven. Although the Court did not exclude the possibility that an objective statement of fact, such as the one impugned in the applicant's case, could contextually be classified as a value judgment the contextual elements justifying such a conclusion had to be convincing.

The factual context in which the caption alleging the applicant was a "rapist" was published was the criminal proceedings in which the applicant had been accused of the very same criminal act to which the caption referred. Those proceedings had been discontinued a short time before. The Supreme Court had, however, failed to take adequate account of that important chronological link. Given the discontinuance of the criminal proceedings against the applicant just prior to the publication of the applicant's newspaper interview, the Supreme Court had failed to explain sufficiently the factual basis that could have justified assessing the use of the term "rapist" as a value judgment.

Article 8 of the Convention had to be interpreted to mean that persons, even disputed public figures that have instigated a heated debate due to their behaviour and public comments, do not have to tolerate being publicly accused of violent criminal acts without such statements being supported by facts.

In sum, the domestic courts had failed to strike a fair balance between the applicant's right to respect for private life under Article 8 of the Convention and X's right to freedom of expression under Article 10.

Conclusion: violation (five votes to two).

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

Domestic courts' failure to balance freedom of expression against right to protection of reputation: *violation*

Tarman v. Turkey, 63903/10, judgment 21.11.2017 [Section II]

Facts – The applicant was the subject of two press articles describing her as a suicide bomber who was preparing an attack, and including her name and photograph. Her subsequent claims for damages against the two newspapers were dismissed on the grounds that the content of the impugned articles "corresponded to appearances on the date of their publication".

Law – Article 8: The applicant did not complain about an action on the part of the State, but about a failure by the State to protect her private life against interference by a third party.

In the context of the State's positive obligations under Article 8, the national authorities had been required to carry out an appropriate balancing exercise, in conformity with the criteria established by the Court's case-law, between the applicant's right to respect for her private life and the right of the opposing party to freedom of expression.

However, there had not been a proper balancing exercise in the instant case:

(i) the courts had simply referred to appearances, basing their findings on documents from the file of an ongoing criminal investigation concerning the applicant at the time of publication, without giving a specific classification (statement as a fact or value judgment) to the content of the impugned articles;

(ii) the judgments did not provide a satisfactory response to the question of whether freedom of the press could, in the present case, justify the interference with the applicant's right to the protection of her reputation that had arisen through the content and form of the impugned articles, in which the applicant's identity had been divulged, her photograph had been published and she had been described as a dangerous terrorist, although the suspicions against her in the criminal investigation file had been of a different nature.

Conclusion: violation (unanimously).

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

Respect for private life

Unlawful video surveillance of university amphitheatres: *Article 8 applicable; violation*

Antović and Mirković v. Montenegro, 70838/13, judgment 28.11.2017 [Section II]

Facts – The applicants were university lecturers. Following a decision by the dean to introduce video surveillance in a number of the university amphitheatres, they lodged a complaint with Personal Data Protection Agency. The Agency upheld their complaint and ordered the removal of the cameras, notably on the grounds that the reasons for the introduction of video surveillance provided for by section 36 of the Personal Data Protection Act had not been met, as there was no evidence that there was any danger to the safety of people and property and the university-s further stated aim of surveillance of teaching was not among the legitimate grounds for video surveillance. That decision was overturned by the domestic courts on the grounds that the university was a public institution performing activities of public interest, including teaching. Amphitheatres were a working area, just like a courtroom or parliament, where professors were never alone, and therefore they could not invoke any right to privacy that could be violated. Nor could the data that had been collected be considered personal data.

Law – Article 8

(a) *Applicability* – University amphitheatres were the workplaces of teachers. It was where they not only taught students, but also interacted with them, thus developing mutual relations and constructing their social identity. The Court had already held that covert video surveillance of employees at their workplace must be considered, as such, as a considerable intrusion into their private life, entailing the recorded and reproducible documentation of conduct at the workplace which the employees, who were contractually bound to work in that place, could not evade. There was no reason for the Court to depart from that finding even in cases of non-covert video surveillance of employees at their workplace. Furthermore, the Court had also held that even where the employer's regulations in respect of the employees' private social life in the workplace were restrictive they could not reduce it to zero. Respect for private life continued to exist, even if it might be restricted in so far as necessary.

The data collected by the impugned video surveillance related to the applicants' "private life", and Article 8 was thus applicable.

(b) *Merits* – The relevant legislation (section 36 of the Personal Data Protection Act) explicitly provided for certain conditions to be met before camera surveillance was resorted to. However, in the instant case, those conditions had not been met as the Personal Data Protection Agency had indeed found. In this regard (in the absence of any examination of that question by the domestic courts), the Court could not but conclude that the interference with the applicants' private life constituted by the video surveillance of their workplace was not "in accordance with the law" for the purposes of Article 8.

Conclusion: violation (four votes to three).

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

(See also the Factsheet on Surveillance at workplace)

Respect for family life

Decision by domestic authorities to allow adoption of psychologically vulnerable child by foster parents: *no violation*

Strand Lobben and Others v. Norway, 37283/13, judgment 30.11.2017 [Section V]

Facts – In 2008 the first applicant, who was single and had been identified by the child welfare authorities as being in need of guidance on motherhood, gave birth to a baby boy (the second applicant). After the birth she moved into a family centre with her son so that her ability to give him adequate care could be monitored. Three weeks later she withdrew her consent to stay in the centre. Concerned about her parenting skills, the child welfare authorities obtained an emergency care order and the child was placed with foster parents. The authorities later obtained a full care order. In 2011 they successfully sought an order by the County Social Welfare Board for the first applicant to be deprived of her parental responsibility and for the child's foster parents to be allowed to adopt him. That order was upheld by the City Court, which found that particularly weighty reasons existed for consenting to the proposed adoption. Although the first applicant's general situation had improved (she had married and had a baby daughter for whom she appeared to be able to care), the situation was different with her son, whom several experts had described as a vulnerable child who was easily stressed and needed a lot of quiet, security and support. In the City Court's view, the first applicant would not be sufficiently able to see or understand his special care needs which, if not met, would give rise to a considerable risk of abnormal development. The child's fundamental attachment was to his foster parents, with whom he had been living almost since birth, and adoption would give him a sense of belonging and security for longer than the period a foster-home relationship would last. The first applicant was refused leave to appeal against the City Court's decision.

Law – Article 8: The Court reiterated that measures replacing a foster-home arrangement with a more far-reaching measure, such as deprivation of parental responsibilities and authorisation of adoption, with the consequence that the applicants' legal ties with the child are broken, should only be applied in exceptional circumstances and can only be justified if they are motivated by an overriding requirement pertaining to the child's best interests.

The City Court had been faced with the difficult and sensitive task of striking a fair balance between the relevant competing interests in a complex case. It had clearly been guided by the interests of the child, notably his particular need for security in his foster-home environment, given his psychological vulnerability. Taking also into account the City Court's conclusion that there had been no positive development in the mother's competence in contact situations throughout the three years in which she had had rights of access, that the decision-making process was fair, and having regard to the fact that the domestic authorities had the benefit of direct contact with all the persons concerned, the Court was satisfied that there were such exceptional circumstances in the present case as could justify the measures in question and that they were motivated by an overriding requirement pertaining to the child's best interests.

Conclusion: no violation (four votes to three).

(See also the Factsheet on Children's rights)

ARTICLE 11

Freedom of peaceful assembly

Unforeseeable conviction for membership of an illegal organisation: *violation*

Işıkırık v. Turkey, 41226/09, judgment 14.11.2017 [Section II]

Facts – In 2007 the applicant was convicted of "membership" of an illegal armed organisation (the PKK) and sentenced to more than six years' imprisonment on the basis of Article 220 § 6 of the Criminal Code on the grounds that he had attended the funeral of four PKK militants, had walked in front of one of the coffins during the funeral and made a "V" sign, and that he had applauded while other demonstrators chanted slogans in support of Abdullah Öcalan during a gathering at his university.

The courts considered that since both the funeral and the demonstration had been held following calls and instructions issued by the PKK, the applicant, who had participated in those events, had to be considered as having acted "on behalf" of that organisation.

According to Article 220 § 6 of the Turkish Criminal Code, anyone who commits a crime "on behalf" of an illegal organisation will be punished as a "member" of that organisation under Article 314 § 2, without the prosecution having to prove the material elements of actual membership.

Law – Article 11: The applicant's conviction for membership of an illegal organisation under Articles 220 § 6 and 314 § 2 of the Criminal Code, based on his participation in a funeral and a demonstration, could be considered as an interference with his right to freedom of assembly.

The wording of Article 220 § 6 of the Criminal Code did not itself define the meaning of the expression "on behalf of an illegal organisation".

The domestic courts had interpreted the notion of "membership" of an illegal organisation under Article 220 § 6 in extensive terms. The mere fact of being present at a demonstration, called for by an illegal organisation, and openly acting in a manner expressing a positive opinion towards the organisation in question, was found sufficient to be considered acting "on behalf of" the organisation and thus liable to punishment as an actual member.

In contrast, when Article 314 of the Criminal Code was applied alone as regards "membership" of an illegal organisation, the courts had to have regard to the "continuity, diversity and intensity" of the accused's acts. Similarly, they would also assess whether the accused had committed offences within the "hierarchical structure" of the organisation, whereas when the same article was applied with reference to Article 220 § 6, the question of acting within a hierarchy became irrelevant.

In sum, the array of acts that potentially constituted a basis for the application of a severe criminal sanction in the form of imprisonment, under Article 220 § 6, was so vast that the wording of the provision, including its extensive interpretation by the domestic courts, did not afford a sufficient measure of protection against arbitrary interference by the public authorities.

Furthermore, and importantly, on account of his conviction for acts which fell within the scope of Article 11 of the Convention, there remained no distinction between the applicant, a peaceful demonstrator, and an individual who had committed offences within the structure of the PKK.

Such extensive interpretation of a legal norm could not be justified when it had the effect of equating the mere exercise of fundamental freedoms with membership of an illegal organisation in the absence of any concrete evidence of such membership.

Article 220 § 6 of the Criminal Code was thus not "foreseeable" in its application since it did not afford the applicant legal protection against arbitrary interference with his right under Article 11 of the Convention. Hence, the interference was not prescribed by law.

Moreover, when demonstrators faced the charge of membership of an illegal armed organisation, they risked an additional sentence of between five and ten years in prison, a sanction which was strikingly severe and grossly disproportionate to their conduct.

Therefore, Article 220 § 6 of the Criminal Code, as applied in the instant case, would inevitably have a particularly chilling effect on the exercise of the rights to freedom of expression and assembly.

Moreover, the application of the provision at issue was not only likely to deter those who were found criminally liable from reexercising their rights under Arti-

cles 10 and 11 of the Convention, but also had a great deal of potential to deter other members of the public from attending demonstrations and, more generally, from participating in open political debate.

Therefore, the very essence of the right to freedom of peaceful assembly and, thereby, the foundations of a democratic society, was undermined when the applicant was held criminally liable under Articles 220 § 6 and 314 of the Criminal Code for the mere fact of attending a public meeting and expressing his views thereat.

Conclusion: violation (unanimously).

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

Freedom of association

Refusal to register association as a religious entity: *violation*

"Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy)" v. the former Yugoslav Republic of Macedonia, 3532/07, judgment 16.11.2017 [Section I]

Facts – The applicant association's applications for registration as a religious group had been refused and their appeals dismissed. Before the European Court it alleged, *inter alia*, that the refusal of the respondent State to register it violated its rights to freedom of religion and association.

Law – Article 11 interpreted in the light of Article 9: It was accepted that there had been an interference with the applicant association's rights under Article 11, interpreted in the light of Article 9. The interference in question had been "prescribed by law" and pursued a "legitimate aim", namely that of the protection of the rights and freedoms of others. The central issue was whether the non-recognition by the respondent State of the applicant association as a religious entity had been "necessary in a democratic society".

(a) *Alleged formal deficiencies* – The domestic authorities had referred to several formal deficiencies in justification of the refusal to register the applicant association. Those included: that the application for registration had been submitted by an unauthorised person outside the statutory time-limit; that the property-related provisions of the applicant's Charter had been contrary to the relevant legislation; that the applicant association had not specified whether it would operate as a church, community or a group and that it had not described itself as a voluntary association of physical persons. The decisions of the national courts had been focused on purely formalistic aspects, not on the substance of the application and, moreover, did not make clear what their exact import was for allowing the applicant's registration. The reasons adduced regarding the formal deficiencies for registration were not "relevant and sufficient".

(b) *The applicant association's "foreign origin"* – The Court had not been presented with any evidence in support of the Government's assertion that the applicant association had been set up by a foreign church or State. Despite the fact that the applicant's leader had been appointed by the Serbian Orthodox Church, the founders were nationals of the respondent State. In any event, it did not appear that the relevant legislation precluded registration of a religious organisation founded by a foreign church or State.

(c) *The applicant association's intended name* – The applicant initially sought registration as "Orthodox Ohrid Archdiocese" and later as "Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy". Under domestic law the relevant authorities were required to examine the application in the light of the statutory requirement precluding registration of a religious entity whose name did not (substantially) differ from the name of an already registered organisation. In the context of the freedom of association this was a relevant component since the name was among the most important elements identifying an association, be it religious or otherwise, and distinguished it from other such organisations. However, in the present case the name chosen for the applicant was sufficiently specific as to distinguish it from the Macedonian Orthodox Church-Ohrid Archdiocese. Furthermore, there was nothing to suggest that the applicant association intended to identify itself with the Macedonian Orthodox Church. On the contrary, during the impugned proceedings it had continuously and expressly refused to be confused or associated with it. Despite the domestic finding that only the Macedonian Orthodox Church had the "historical, religious, moral and substantive right" to use the name "Ohrid Archdiocese", there was no suggestion that the use of that name by the

applicant association would violate the rights and freedoms, in particular the religious ones, of others.

(d) *The applicant association's alleged intention to become a parallel religious entity to the Macedonian Orthodox Church* – The State's duty of neutrality and impartiality, as defined in the Court's case-law, was incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs were expressed. While it was apparent that the autocephaly and unity of the Macedonian Orthodox Church was a matter of utmost importance for adherents and believers of that Church, and for society in general, that could not justify, in a democratic society, the use of measures which, as in the present case, went so far as to prevent the applicant association comprehensively and unconditionally from even commencing any activity.

The role of the authorities in a situation of conflict between or within religious groups was not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerated each other. Furthermore, there could be no justification for measures of a preventive nature to suppress freedom of assembly and expression, other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used might appear to the authorities, and however illegitimate the demands made might be. At no stage in the registration proceedings or in the proceedings before the Court was it alleged that the applicant association advocated the use of violence or any anti-democratic means in pursuing its aims.

(e) *Conclusion* – In view of the foregoing, it could not be said that the reasons provided by the national authorities, taken as a whole, were "relevant and sufficient" to justify the interference and the manner in which the domestic authorities refused the recognition of the applicant association as a religious organisation could not be accepted as necessary in a democratic society.

Conclusion: violation (unanimously).

Article 41: EUR 4,500 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

ARTICLE 18

Restriction for unauthorised purposes

Extension of leader of opposition's pre-trial detention with primary purpose of obtaining information on matters unrelated to suspected offence: *violation*

Merabishvili v. Georgia, 72508/13, judgment 28.11.2017 [GC]

Facts – At the relevant time the applicant, a former Prime Minister, was the leader of the main opposition party (the UNM). Between 2012 and 2013, shortly after the "Georgian Dream" movement had been elected into power in October 2012, criminal proceedings were brought against the applicant for abuse of power and other offences. The applicant, who had been held in detention pending his trial, complained that he had thus been removed from the political scene. He also alleged that one night in December 2013 he had been covertly removed from his cell to be questioned by the Chief Prosecutor about the death of a former Prime Minister in 2005 and about the financial activities of the former President. In 2014 he was found guilty of the majority of the charges brought against him.

In a judgment of 14 June 2016 a Chamber of the Court held in particular that there had been a violation of Article 18 taken in conjunction with Article 5 § 1, on the ground that the pre-trial detention had been used not only for the purpose of bringing the applicant before the competent legal authority on grounds of reasonable suspicion that he had committed offences, but also to exert pressure on him in relation to an investigation that was unconnected with the offences with which he had been charged (see Information Note 197).

Law – The Grand Chamber held unanimously that there had been no violation of Article 5 § 1 regarding the applicant's arrest and pre-trial detention, or of Article 5 § 3 with regard to the first judicial decisions ordering his placement in pre-trial detention, but that there had been a violation of Article 5 § 3 because there had subsequently been insufficient grounds to justify keeping him in detention.

Article 18, taken together with Article 5 § 1: The Court considered it necessary to clarify its case-law as follows.

(a) *Preliminary points – the relation between Article 18 and the other clauses of the Convention* – Consistency justified aligning the use of the terms "independent" and "autonomous" in relation to Article 18 with the practice followed in relation to Article 14.

Like Article 14, Article 18 of the Convention did not have an independent existence; it could only be applied in conjunction with an Article of the Convention or the Protocols thereto which set out or qualified the rights and freedoms guaranteed by it.

That rule derived both from the wording of Article 18, which complemented that of clauses such as, for example, the second sentence of Article 5 § 1 and the second paragraphs of Articles 8 to 11, and from its place in the Convention, at the end of Section I, which contained the Articles that defined and qualified those rights and freedoms.

Article 18 did not, however, serve merely to clarify the scope of those restriction clauses. It also expressly prohibited the High Contracting Parties from restricting the rights and freedoms enshrined in the Convention for purposes not prescribed by the Convention itself, and to this extent it was autonomous. Therefore, as was also the position in regard to Article 14, there could be a breach of Article 18 even if there was no breach of the Article in conjunction with which it applied.

It further followed from the terms of Article 18 that a breach could only arise if the right or freedom at issue was subject to restrictions permitted under the Convention. However, the mere fact that a restriction of a Convention right or freedom did not meet all the requirements of the clause that permitted it did not necessarily raise an issue under Article 18. Separate examination of a complaint under that Article was only warranted if the claim that a restriction had been applied for a purpose not prescribed by the Convention appeared to be a fundamental aspect of the case.

(b) *Where there was a plurality of purposes* – Where a restriction pursued a number of purposes, it could be compatible with the substantive Convention provision which authorised it because it pursued an aim permissible under that provision, but still infringe Article 18 because it was chiefly meant for another purpose that was not prescribed by the Convention – in other words, if that other purpose was predominant. Conversely, if the prescribed purpose was the main one, the restriction did not run counter to Article 18 even if it also pursued another purpose.

That interpretation was consistent with the case-law of the Contracting States' national courts and of the Court of Justice of the European Union, which the Court could take into account when construing the Convention, especially appropriate in this case since the preparatory works to the Convention clearly indicated that Article 18 was meant to be the Convention version of the administrative-law notion of "misuse of power".

Which purpose was predominant in a given case depended on all the circumstances, notably the nature and degree of reprehensibility of the alleged ulterior purpose. In continuing situations, it could not be excluded that the assessment of which purpose had been predominant might vary over time. It also had to be borne in mind that the Convention had been designed to maintain and promote the ideals and values of a democratic society governed by the rule of law.

(c) *Questions of proof* – In order to establish whether or not there had been an ulterior purpose and whether it had been the predominant one the Court could and should adhere to its usual approach to proof rather than follow any special rules: (i) as a general rule, the burden of proof was not borne by one or the other party and the Court could take account of evidentiary difficulties faced by the applicants and, conversely, draw conclusions where the respondent Government refrained or refused to disclose information without offering a satisfactory explanation; (ii) the standard of proof was "beyond reasonable doubt"; and (iii) the Court was free to assess not only the admissibility and relevance but also the probative value of each item of evidence before it. There was therefore no reason for the Court to restrict itself to direct proof in relation to complaints under Article 18 of the Convention or to apply a special standard of proof.

According to the applicant, the authorities had in the present case used pre-trial detention for two ulterior purposes. The Court examined each one in turn to determine whether one of the two purposes had been predominant.

(i) *Aim of removing the applicant from the political scene* – There was no right as such under the Convention not to be criminally prosecuted. The Court was thus chiefly concerned with the purpose

underlying the pre-trial detention. The Court did not consider sufficient proof in that respect:

– the fact that criminal prosecutions had been instituted against a number of former ministers and other high officials from UNM (members under a previous government could not be held to account while in power; more importantly, there was no evidence that the courts which had ruled on the pre-trial detention had lacked independence);

– the place of the proceedings, which was not redolent of forum shopping (moreover, its conformity with domestic law had not been disputed);

– shortcomings in the decisions from the point of view of Article 5 § 3;

– the fact that courts of other member States had turned down requests for the extradition of other former officials from MNU on grounds that the criminal prosecutions against them had been politically motivated (firstly, the facts of the cases had not been identical; secondly, those courts had been assessing a future risk, whereas the Court was concerned with past facts, which coloured their respective assessment of inconclusive contextual evidence). The same considerations applied to the decisions of Interpol in relation to the former President.

(ii) *The aim of exerting pressure on the applicant for the purposes of obtaining information unconnected with the grounds for detention*

(α) *Proof of that aim*: The Court was sensitive to its subsidiary role and recognised that it must be cautious in taking on the role of a primary finder of fact; yet it could take into account the quality of domestic investigations and any possible flaws in the decision-making process.

Certain parts of the applicant's account – which was detailed, specific, remained consistent throughout, and was corroborated by certain indirect evidence – had lent themselves to verification of his allegations by objective means (identity parade, checking telephone records and cell tower data, video recordings) or taking witness statements from third parties. Those leads had not been explored however.

The evidence put forward by the Government was not sufficiently persuasive:

– generally speaking, the findings obtained following the two inquiries that had been carried out had to be approached with caution: the first one had been conducted by officials from the Ministry of Prisons against a backdrop of firm denials by their Minister; the second one had only been opened following the Chamber judgment in this case;

– following a concrete examination, several elements cast doubt on the assertion that footage from the surveillance cameras had been automatically deleted after twenty-four hours; the exact method used to examine other footage (which had not been made available to the applicant's lawyer); the various statements produced in evidence (emanating either from subordinates of the alleged perpetrators or from persons whose own conduct might have been called into question); the probative value of the data taken from the prosecuting authorities' document-management system during the night of the incident;

– the absence of entries in the prison logs attesting to the applicant's removal from his cell was in keeping with the covert nature of the alleged operation.

Drawing inferences from that material and the authorities' conduct, the Court was satisfied that the applicant had been covertly removed from his prison cell.

(β) *Predominance of that purpose*: If the restriction of the applicant's right to liberty was thus seen as a whole, it was hard to conclude that obtaining information about the former Prime Minister's death or the former President's bank accounts had been the chief purpose of the measure. There was no evidence that the applicant's pre-trial detention had been used with that purpose in mind for the first seven months.

In the present case, however, the restriction in question constituted a continuing situation. The following factors led the Court to the conclusion that the initial purpose had been supplanted by another one: while in the beginning it had been the investigation of offences based on a reasonable suspicion, later on it had become to obtain information about a former Prime Minister's death and about the President's bank accounts.

Some of those factors related to the time of the incident: the reasons for keeping the applicant in pre-trial detention appeared to have receded; the former President, who had become the target of several criminal investigations, had just left Georgia following the end of his term of office; the investigation into the former Prime Minister's death had apparently not made significant progress.

Other factors showed the considerable importance of the questions regarding those two men for the

authorities. Thus, the Government had stated at the hearing before the Grand Chamber that there was still a "huge question" for the applicant to answer on this point. The prosecuting authorities had had the power to drop all charges against the applicant at any point without judicial control and had promised to do so if he provided the requested information, so the courts would have had to discontinue the criminal proceedings against him. The applicant had been taken in a covert and apparently irregular manner, in a clandestine operation carried out in the middle of the night, to meet with an individual who had been appointed to his post three weeks previously. The authorities' initial reaction in that respect had been to issue firm denials, and the ensuing inquiry and investigation had been marred by a series of omissions from which it could be inferred that the authorities had been eager that the matter should not come to light: the main protagonists had not been interviewed during the initial inquiry but only nearly three years after the events, and the crucial evidence in the case – the footage from the prison surveillance cameras – had not been recovered.

Conclusion: violation (nine votes to eight).

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

(See also *Lutsenko v. Ukraine*, 6492/11, 3 July 2012, Information Note 154; *Tymoshenko v. Ukraine*, 49872/11, 30 April 2013, Information Note 162; *Khodorkovskiy and Lebedev v. Russia*, 11082/06 and 13772/05, 25 July 2013, Information Note 165; *Ilgar Mammadov v. Azerbaijan*, 15172/13, 22 May 2014, Information Note 174; *Rasul Jafarov v. Azerbaijan*, 69981/14, 17 March 2016, Information Note 194)

ARTICLE 35

ARTICLE 35 § 1

Exhaustion of domestic remedies, effective domestic remedy – Hungary

Application lodged while domestic proceedings were pending under new legislation introduced to deal with prison overcrowding following *Varga and Others* pilot judgment: *inadmissible*

Domján v. Hungary, 5433/17, decision 14.11.2017 [Section IV]

Facts – In its pilot judgment regarding conditions of detention in Hungary (*Varga and Others v. Hungary*, 14097/12 et al., 10 March 2015, Information Note 183), the Court found violations of Articles 3 and 13 of the Convention originating in a widespread problem resulting from a malfunctioning of the Hungarian penitentiary system and, under Article 46 of the Convention, required Hungary to put in practice preventive and compensatory remedies. On 25 October 2016 the Hungarian Parliament adopted Act No. CX of 2016 which enabled complaints concerning conditions of detention to be presented to the prison governor, who could take action to improve the conditions or counterbalance the injury suffered (for instance through relocation, increasing the time allowed for visits or the time spent in the open air, and improvement of the sanitary facilities).

In the instant case, the applicant complained under Articles 3 and 13 of the Convention that he had been kept in overcrowded cells in various prisons between December 2010 and July 2016 and did not have an effective domestic remedy.

Law – Article 35 § 1: The Court was satisfied that the 2016 Act provided a combination of remedies, both preventive and compensatory in nature, guaranteeing in principle genuine redress for Convention violations originating in prison overcrowding and other unsuitable conditions of detention in Hungary.

As to the preventive remedy, complaints by prison inmates or their representatives about conditions of detention allegedly in violation of fundamental rights were to be submitted to the governor of a penal institution. If the latter found the complaint to be well-founded he or she was to decide, within 15 days, about necessary actions such as relocation within the institution or transfer to another institution. A further judicial review of the prison governor's decision was explicitly provided for by the 2016 Act. In the Court's view nothing proved that the new complaint mechanism would not offer realistic perspectives of improving unsuitable conditions of detention. As to the compensatory remedy, the award offered – between EUR 4 and EUR 5.30 per day of unsuitable conditions of detention – was not unreasonable, having regard to economic realities.

In view of its finding that the 2016 Act met, in principle, the standards set out by the pilot judgment, the Court considered that the applicant and all others in his position had to use the remedies introduced by the Act. In the instant case, the applicant had made

use of the remedies but the proceedings were still pending. His complaint was thus premature.

The Court went on to point out that it was ready to change its approach as to the potential effectiveness of the remedies should the practice of the domestic authorities show, in the long run, that detainees were being refused relocation and/or compensation on formalistic grounds, that the domestic proceedings were excessively long or that the domestic case-law was not in compliance with the requirements of the Convention. Any such future review would involve determining whether the national authorities had applied the 2016 Act in a manner that was in conformity with the pilot judgment and the Convention standards in general.

Conclusion: inadmissible (application premature).

Exhaustion of domestic remedies, six-month period

Use by applicants of domestic remedies that were not clearly ineffective: *admissible*

Zubkov and Others v. Russia, 29431/05 et al., judgment 7.11.2017 [Section III]
Akhlyustin v. Russia, 21200/05, judgment 7.11.2017 [Section III]
Moskalev v. Russia, 44045/05, judgment 7.11.2017 [Section III]
Konstantin Moskalev v. Russia, 59589/10, judgment 7.11.2017 [Section III]

(See Article 8 above, page 17)

ARTICLE 46

Execution of judgment – General and individual measures

Respondent State required to take measures to resolve problems relating to prolonged non-enforcement of final judgments

Kunić and Others v. Bosnia and Herzegovina, 68955/12 et al., judgment 14.11.2017 [Section IV]
Spahić and Others v. Bosnia and Herzegovina, 20514/15 et al., judgment 14.11.2017 [Section IV]

Facts – The applicants were awarded different sums in respect of unpaid work-related benefits. The Constitutional Court subsequently found a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 on account of the prolonged non-enforcement of the final judgments in the applicants' favour. However, the final judgments remained unenforced on account of public debt.

Law – Article 6 § 1 of the Convention and Article 1 of Protocol No. 1: It was not open to authorities to cite a lack of funds as an excuse for not honouring a judgment debt. In its decisions the Constitutional Court had held, in particular, that the relevant cantonal governments should identify the exact number of unenforced judgments and the amount of aggregate debt, and set up a centralised, chronological and transparent database which should include the enforcement time-frame and help avoid abuses of the enforcement procedure. While it appeared that some of the general measures ordered by the Constitutional Court had been implemented, the applicants' situation remained unchanged. By failing for a considerable period of time to take the necessary measures to comply with the final judgments in the instant case, the authorities had deprived the provisions of Article 6 § 1 of all useful effect and had also prevented the applicants from receiving the money to which they were entitled. That failure further amounted to a disproportionate interference with their peaceful enjoyment of their possessions.

Conclusion: violations (unanimously).

Article 46: By virtue of Article 46 the High Contracting Parties had undertaken to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers of the Council of Europe. It followed that a judgment in which the Court had found a breach, imposed on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures. The State was obliged to take such measures also in respect of other persons in the applicants' position, notably by implementing the general measures indicated by the Constitutional Court in their decisions.

There were already more than 400 similar applications pending before the Court. Subject to their notification to the Government under Rule 54 § 2 (b) of the Rules of the Court, the respondent State was obliged to grant adequate and sufficient redress to all such applicants. Such redress might be

achieved through *ad hoc* solutions such as friendly settlements or unilateral remedial offers in line with the Convention requirements.

Article 41: In respect of pecuniary damage, the applicants sought the payment of the outstanding judgment debts. The most appropriate form of redress in non-enforcement cases was indeed to ensure full enforcement of the domestic judgments in question. That principle equally applied to the present case. The applicants had suffered distress, anxiety and frustration as a result of the respondent State's failure to enforce final domestic judgments in their favour. EUR 1,000 in respect of non-pecuniary damage.

Respondent State to provide procedural guarantees against arbitrariness in respect of compulsory admission to psychiatric hospital

N. v. Romania, 59152/08, judgment 28.11.2017 [Section IV]

Facts – In January 2001, criminal proceedings were instituted against N. on suspicion of incest and corruption of his two minor daughters (the proceedings were discontinued in 2002). He was admitted to a psychiatric hospital, a measure upheld by a court in April 2002 in the applicant's absence. Following legislative amendments designed to consolidate the rights of people with disabilities, the lawfulness of the applicant's continued detention was periodically reviewed from September 2007 onwards. However, he remained in the psychiatric hospital as medical experts found that he was suffering from paranoid schizophrenia. In August 2016 the County Court held that in principle the applicant should be released from the hospital, but that he would continue to be detained on a provisional basis until a place in a suitable facility became available. In February 2017 the first-instance court ordered that the applicant's detention was to be replaced by compulsory treatment until his recovery, but efforts to secure his release were still to no avail.

Law – Article 5 § 1: The applicant's deprivation of liberty fell within the scope of sub-paragraph (e), since his mental disorders had been confirmed by a series of forensic medical assessments.

(a) *Continued detention after 2007* – In accordance with domestic legislation, a psychiatric detainee's mental illness had to constitute a danger to society. Furthermore, Article 5 § 1 (e) implied that where no medical treatment was envisaged, the detention of a person with mental disorders required special justification on account of the seriousness of the disorders and the need to protect the person concerned or others.

In the present case, in its first review of the applicant's detention, the first-instance court had based its decision on a simple reference to two main aspects: the criminal charges initially brought against the applicant (incest and corruption of minors); and his paranoid schizophrenia (according to the expert medical report issued in July 2007).

Regarding the charges, the court had relied entirely on the file produced by the prosecution. However, the public prosecutor had dismissed the charge of incest for lack of evidence. The charge of corruption of minors had later given rise to a finding that there was no case to answer on account of the applicant's lack of insight. That finding had never been reviewed by a court. The charges themselves had, moreover, not been examined by a court in adversarial proceedings. Accordingly, the reference to them was not sufficient to establish the applicant's dangerousness.

With regard to the applicant's mental disorders, instead of assessing the danger he posed, the court had quite simply referred to the conclusions of the forensic medical report (which had recommended continuing his detention), an approach that had already been criticised by the Court. In addition, neither the court nor the medical authorities had reported any acts of violence by the applicant during his detention. On the contrary, according to his assessment in July 2007, the applicant had behaved calmly, had not objected to his treatment, had not caused any conflicts with other patients and had only displayed a low level of hostility while receiving his treatment.

The subsequent reviews had not clarified whether the applicant posed a potential danger, as the same formalistic and superficial approach had been pursued; and neither the applicant's appeals against the first-instance court's decisions nor the proceedings he had instituted separately had shed any further light on this issue.

Furthermore, neither the medical authorities nor the court itself had examined whether alternative measures could have been applied.

Accordingly, in the absence of an assessment of the danger posed by the applicant, his detention had had no legal basis and had not been justified under sub-paragraph (e) of Article 5 § 1. It had also

been questionable in the light of Article 14 § 1 (b) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which specified that the existence of a disability in itself should on no account justify deprivation of liberty.

Although there had eventually been a review of whether the applicant posed a danger, the national authorities had not disclosed the factual information that had prompted the change in the medical experts' assessment.

(b) *Whether it was necessary to continue the applicant's detention after the judicial decision ordering his release* – In its judgment of August 2016, while emphasising the need to end the applicant's detention, the County Court had kept the measure in place without indicating the relevant legal basis.

Furthermore, after the adoption of the final judgment of February 2017 ordering the applicant's release, neither the national authorities nor the Government had indicated any procedure applicable to the applicant's situation that could have allowed him first to have his needs assessed before being released or transferred to another centre meeting those needs. The possibility of gradual or conditional release had not been mentioned either.

Although the applicant had agreed to remain in detention until such time as the social services found an appropriate solution to his situation, he should have been afforded adequate protective safeguards ensuring that he could be released without undue delay.

Admittedly, the decisions referred to above drew on practices increasingly adopted in recent years at international level encouraging the treatment and care of disabled people within the community where possible (see Article 19 of the CRPD, the guidelines issued by the Committee on the Rights of Persons with Disabilities, or the Council of Europe Disability Strategy 2017-2023).

However, their implementation raised additional issues under Article 5 § 1. In practice, the applicant had not actually been released. In any event, there had yet to be any rigorous assessment of his specific needs and the appropriate measures in terms of social protection. Furthermore, the efforts by the national authorities had proved to no avail on account of the lack of facilities that could accommodate him.

This state of affairs was a reflection of current realities in Romania, as previously described by other international bodies (such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) or the Council of Europe Commissioner for Human Rights).

The applicant's continued detention after the judgment of 29 August 2016 had therefore been arbitrary.

Conclusion: violation (unanimously).

Article 5 § 4: The implementation of the relevant Romanian legislation, which had come into force in September 2006, had been inadequate to safeguard the applicant's rights.

(a) *Periodic nature of reviews: The reviews by the courts of the necessity of the applicant's detention had been separated by periods of fifteen months (February 2015* – May 2016), sixteen months (October 2008 – February 2010) and even three years and eight months (April 2010 – December 2013). No exceptional reasons had been put forward to justify such delays. Moreover, these periods had significantly exceeded the time-limits provided for by domestic law (six months, and subsequently twelve months from 2014).

The Court also noted with concern the practice of retrospective assessment of the need for continued detention on the basis of medical information obtained a long time in advance (for example, more than one, two or three years previously) which did not necessarily reflect the detained person's condition at the time of the decision. Such a delay between the forensic medical examination and the subsequent decision could in itself run counter to the principle underlying Article 5 of the Convention, namely the protection of individuals against arbitrariness.

Lastly, in so far as the above-mentioned delays could be explained by the need to obtain the requisite forensic medical reports, the court did not appear to have enquired about the progress of the experts' work, or to have made use of its power to fine experts who failed to comply with the obligation to submit a report.

Accordingly, the requirement of a "speedy" review had not been satisfied.

(b) *Legal assistance*: The applicant, who suffered from mental disorders that prevented him from conducting court proceedings satisfactorily, had admittedly had the assistance of officially assigned

counsel. However, he had been represented by a different lawyer in each set of proceedings without being able to confer with them, having been unable to meet the various lawyers prior to the court hearings. In the vast majority of cases, his lawyers had either argued in favour of his continued detention or had left the matter to the courts' discretion.

While not *dicta*ting how lawyers should deal with cases in which they were representing a person with mental disorders, the Court found that there had been a lack of effective assistance.

Conclusion: violation (unanimously).

Article 46

Individual measures: In order to redress the effects of the violation of the rights secured to the applicant under Article 5, the authorities should implement without delay the County Court's final judgment ordering his release in conditions meeting his needs.

General measures: As the deficiencies identified in the present case were likely to give rise to other well-founded applications in the future, the Court recommended that the respondent State envisage general measures to ensure: that the detention of individuals in psychiatric hospitals was lawful, justified and not arbitrary; and that any individuals were able to take proceedings affording adequate safeguards with a view to securing a speedy court decision on the lawfulness of their detention.

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

ARTICLE 2 OF PROTOCOL No. 4

ARTICLE 2 § 1

Freedom to choose residence

Policy imposing length-of-residence and type of income conditions on persons wishing to settle in inner-city area of Rotterdam: *no violation*

Garib v. the Netherlands, 43494/09, judgment 6.11.2017 [GC]

Facts – The Inner City Problems (Special Measures) Act, which entered into force on 1 January 2006, empowered a number of named municipalities, including Rotterdam, to take measures in certain designated areas including the granting of partial tax exemptions to small business owners and the selecting of new residents based on their sources of income. In 2005 the applicant moved to the city of Rotterdam and took up residence in a rented property in the Tarwewijk district. Following the entry into force of the Inner City Problems (Special Measures) Act, Tarwewijk became a designated area under a Rotterdam by-law. After being asked by her landlord to move to another property he was letting in the same district, the applicant applied for a housing permit as required by the new legislation. However, her application was rejected on the grounds that she had not been resident in the Rotterdam Metropolitan Region for the requisite period and did not meet the income requirement. Her subsequent appeals were unsuccessful. In 2010 the applicant moved to the municipality of Vlaardingen, which was also part of the Rotterdam Metropolitan Region.

In a judgment of 23 February 2016 (see Information Note 193), a Chamber of the Court found, by five votes to two, that there had been no breach of Article 2 of Protocol No. 4. In particular, the Chamber held that, in principle, the State had been entitled to adopt the impugned legislation and policy and in the circumstances the domestic authorities had been under no obligation to accommodate the applicant's preferences.

On 12 September 2016 the case was referred to the Grand Chamber at the applicant's request.

Law – Article 2 of Protocol No. 4: In an area as complex and difficult as that of the development of large cities, the State enjoyed a wide margin of appreciation in order to implement their town-planning policy. The margin extended, in principle, to both the decision to intervene in the subject area and, having intervened, to the detailed rules laid down in order to achieve a balance between the competing interests of the State and those directly affected by the legislative choices.

(a) *Legislative and policy framework* – The domestic authorities had found themselves called upon to address increasing social problems in inner-city areas of Rotterdam resulting from impoverishment caused by unemployment and a tendency for gainful economic activity to be transferred elsewhere. They sought to reverse those trends by favouring new residents whose income was related to gainful economic activity of their own. The intention was to foster diversity and counter the stigmatisation of particular inner-city areas as fit only for the most deprived social groups. The Inner City

Problems (Special Measures) Act did not deprive a person of housing or force any person to leave their dwelling. The measures only affected relatively new settlers: residents of the Rotterdam Metropolitan Region of at least six years' standing were eligible for a housing permit whatever their source of income. In the circumstances, that waiting time did not appear to be excessive.

The legislative history of the Act showed that the legislative proposals had been scrutinised by the Council of State, whose concerns had been addressed by the Government, and that Parliament itself had been concerned to limit any detrimental effects. The entitlement of individuals unable to find suitable housing had been recognised. The restriction in issue remained subject to temporal as well as geographical limitation. The competent Minister was required by the Act to report to Parliament every five years on the effectiveness of the Act and its effects in practice. The individual hardship clause allowed derogation from the length-of-residence requirement in cases where strict application of it would be excessively harsh. Procedural safeguards comprised of the availability of administrative objection proceedings and of judicial review before two levels of jurisdiction, both before tribunals invested with full competence to review the facts and the law and which met the requirements of Article 6 of the Convention.

(b) *The applicant's individual case* – It was undisputed that the applicant was of good behaviour and constituted no threat to public order. Nonetheless, her personal conduct could not be decisive on its own when weighed in the balance against the public interest which was served by the consistent application of legitimate public policy. The system of the Inner City Problems (Special Measures) Act was not called into question by the mere fact that it did not make an exception in respect of persons already residing in a designated area, such as the applicant. The applicant had been resident in a dwelling in Vlaardingen let to her by a Government-funded social housing body since 27 September 2010. She had not explained her reasons for choosing to move to Vlaardingen instead of remaining in the dwelling in Tarwewijk for the final eight months needed to complete six years' residence in the Rotterdam Metropolitan Region. Nor had she suggested that her dwelling in Vlaardingen was inadequate for her needs or in any way less congenial or convenient than the one she had hoped to occupy in Tarwewijk. In addition, it had not been stated that the applicant had expressed the wish to move back to Tarwewijk. The information submitted did not allow the Court to find that the consequences for the applicant of the refusal of a housing permit amounted to such disproportionate hardship that her interest should outweigh the general interest served by the consistent application of the measure in issue. An unspecified personal preference for which no justification was offered could not override public decision-making.

Conclusion: no violation (twelve votes to five).

OTHER JURISDICTIONS

Inter-American Court of Human Rights (IACtHR)

State obligations with respect to the investigation of violence against women

Case of Gutiérrez Hernández et al. v. Guatemala, Series C No. 339, judgment 24.8.2017

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

Facts – Mayra Angelina Gutiérrez Hernández was a university professor. On 7 April 2000 she did not undertake her usual Friday work trip to another city. Two days later, a colleague and her brother reported her missing to the National Civil Police and her brother indicated that a man with whom she had had a relationship might be responsible. The public prosecutor´s office began an investigation which remained open as of the date of the Inter-American Court´s judgment. In April and May 2000 the victim´s representative submitted two *habeas corpus* petitions to a court, which granted the petitions and ordered an investigation by the public prosecutor. The public prosecutor submitted a third *habeas corpus* petition but this was refused as the investigation was already under way. Finally, in December 2000 the Supreme Court ordered the Human Rights Ombudsperson to carry out a special investigation, granting him the same powers and duties as the public prosecutor. The Ombudsperson´s mandate ended in 2013. All of the investigations focused their efforts on establishing the possible responsibility of the victim´s former partner, leaving aside other possible hypotheses

as to her disappearance, in particular, those that might implicate the participation or acquiescence of State agents.

Law

(a) *Articles 3 (right to juridical personality), 4 (right to life), 5 (right to personal integrity) and 7 (right to personal liberty) of the American Convention on Human Rights (ACHR), in relation to Articles I and II of the Inter-American Convention on Forced Disappearance of Persons* – The Inter-American Court analysed the reasons given by the representatives in support of their hypothesis that Ms Gutiérrez had been the victim of an enforced disappearance: (i) in 1982 and 1985, during the Guatemalan internal armed conflict, two members of her family had been forcibly disappeared; (ii) her name had appeared in a military log that had been declassified in the year 2000; and (iii) she had participated in an investigation relating to child trafficking in Guatemala that had been used in a report by the UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography. The Inter-American Court found that, on their own, those elements were insufficient to establish that Ms Gutiérrez had been deprived of her freedom by State agents or with their acquiescence. Therefore, it did not declare the State responsible for the alleged enforced disappearance and found no violation therefor.

Furthermore, the Court found no violation of the State´s duty to prevent violations of Ms Gutiérrez´s rights to life and personal integrity, given that: (i) it was not proven that at the time of her disappearance the State was aware or should have been aware of rising rates of violence against women and femicide in Guatemala; thus, there was no obligation of strict due diligence in her search on the part of the State; and (ii) State agents had not been notified of prior threats, risks, or requests for protection in favour of Ms Gutiérrez; thus, at the time of her disappearance, there were insufficient elements to establish that she was in real and imminent risk of harm. Therefore, the Court found no violation of Articles 4 and 5 of the ACHR and held that the authorities' response to her disappearance would be analysed in relation to the effectiveness of the investigations.

Conclusion: no violation (unanimously).

(b) *Articles 8(1) (right to a fair trial) and 25(1) (right to judicial protection), in relation to Articles 1(1) (obligation to respect and ensure rights and non-discrimination) and 24 (equality before the law) of the ACHR, as well as Article 7(b) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women ("Belém do Pará Convention"), to the detriment of Ms Gutiérrez Hernández and her family* – First, the Inter-American Court concluded that from the initial phases of the investigation there had been a lack of due diligence on the part of the authorities in following up on the information gathered. Additionally, the authorities had used stereotyped language when referring to Ms Gutiérrez and these stereotypes and prejudices had affected their objectivity, as they had centred their investigation on her personal relationships and lifestyle, setting aside other lines of investigation. In particular, the authorities had focused on the possibility that this was a "crime of passion," a term that shifted the blame for the disappearance from the aggressor to the victim. The lack of a rigorous and exhaustive investigation had allowed for impunity for the unreasonable period of time over seventeen years. Additionally, this was not an isolated case in Guatemala, as other cases had shown a tendency on the part of the authorities to discredit victims and blame their fates on their lifestyle, mode of dress, personal relationships or sexuality. Thus, the State had violated Articles 24 and 1(1), as well as Articles 8(1) and 25 of the ACHR, in relation to Article 1(1) thereof and to Article 7(b) of the Belém do Pará Convention.

Second, the Court found that despite the fact that three *habeas corpus* petitions had been filed on behalf of Ms Gutiérrez, the public prosecutor had been put on notice of her disappearance, and a special investigation had been undertaken by the Human Rights Ombudsperson, the State had not had a diligent strategy of investigation that took into account the complexities of the case. Therefore, the State had violated Articles 8(1) and 25 of the ACHR, in relation to Article 1(1) thereof.

Conclusion: violation (unanimously).

(c) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered that the State: (i) effectively conduct the investigation within a reasonable time, free from gender stereotypes, and continue and/or open the appropriate criminal proceedings in order to identify, prosecute, and if applicable, sanction those responsible for Ms Gutiérrez's disappearance, as well as determine her whereabouts; (ii) publish the judgment and its official summary; and

(iii) pay compensation in respect of non-pecuniary damage, as well as costs and expenses.

United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families United Nations Committee on the Rights of the Child

Joint general comments on the human rights of children in the context of international migration

Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration (CMW/C/GC/3-CRC/C/GC/22), 16.11.2017

Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (CMW/C/GC/4-CRC/C/GC/23), 16.11.2017

The objective of the joint general comments was to provide authoritative guidance on legislative, policy and other appropriate measures that should be taken to ensure full compliance with the obligations under the Conventions to fully protect the rights of children in the context of international migration.[3] The obligations of the State parties applied to each child within their jurisdictions, including the jurisdiction arising from a State exercising effective control outside its borders. Those obligations could not be arbitrarily and unilaterally curtailed either by excluding zones or areas from the territory of a State or by defining particular zones or areas as not or only partly under the jurisdiction of the State. Comprehensive child protection systems at the national and local levels should mainstream into their programmes the situation of all children in the context of migration, including in countries of origin, transit, destination and return. Children's personal data, in particular biometric data, should only be used for child protection purposes, with strict enforcement of appropriate rules on collection, use and retention of, and access to, data.

In all actions concerning children, States should be guided by the overarching principles of the Conventions and the legal obligations of State parties to protect the rights of children in the context of international migration in their territory which included:

(a) *Non-discrimination (Articles 1 and 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW); Article 2 of the Convention on the Rights of the Child (CRC))* – The principle of non-discrimination should be at the centre of all migration policies and procedures, including border control measures, and regardless of the migration status of children of their parents. State parties should ensure that migrant children and their families were integrated into receiving societies through effective realisation of their human rights and access to services in an equal manner with nationals. State parties should strengthen efforts to combat xenophobia, racism and discrimination and adopt measures to prevent, diminish and eliminate the conditions and attitudes that caused or perpetuated *de facto* discrimination against them.

(b) *Best interests of the child (Article 3 CRC)* – State parties should ensure that the best interests of the child were taken fully into consideration in immigration law, planning, implementation and assessment of migration policies and decision-making on individual cases and were obliged to ensure that any decision to return a child to his or her country of origin was based on evidentiary considerations on a case-by-case basis and pursuant to procedure with appropriate due process safeguards.

(c) *Right to be heard, express his or her views and participation (Article 12 CRC)* – Article 12 underscored the importance of children's participation, providing for children to express their views freely and to have those views taken into account with due weight, according to their age, maturity and the evolving capacity of the child. States should adopt measures aimed at empowering children affected

3. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990; and the Convention on the Rights of the Child, 20 November 1989.

by international migration to participate on different levels.

(d) *Right to life, survival and development (Article 9 ICRMW; Article 6 CRC)* – The lack of regular and safe channels for children and families to migrate contributed to children taking life-threatening and extremely dangerous migration journeys. States, especially those of transit and destination should devote special attention to the protection of undocumented children and to the protection of asylum-seeing children, stateless children and child victims of transnational organised crime, including trafficking, sale of children, commercial sexual exploitation of children and child marriage.

(e) *Non-refoulement, prohibition of collective expulsion (Articles 9, 10 and 22 ICRMW; Articles 6, 22 and 37 CRC)* – State parties should respect *non-refoulement* obligations deriving from international human rights, humanitarian, refugee and customary international law.

(f) *Right to liberty (Articles 16 and 17 ICRMW; Article 37 CRC)* – Every child, at all times, had a fundamental right to liberty and freedom from immigration detention. Children should never be detained for reasons related to their or their parents' migration status. Children should not be criminalised or subject to punitive measures, such as detention, because of their or their parents' migration status nor be deprived of their liberty solely on the basis of being unaccompanied or separated. A child may be deprived of liberty only as a last resort and for the shortest appropriate period of time.

(g) *Due process guarantees and access to justice (Articles 16, 17 and 18 ICRMW; Articles 12 and 40 CRC)* – All children should be treated as individual rights holders, their child-specific needs considered equally and individually and their views appropriately heard. Children should be able to bring complaints before the courts, administrative tribunals or other bodies at lower levels that were easily accessible to them.

(h) *Right to a name, identity, and a nationality (Article 29 ICRMW; Articles 7 and 8 CRC)* – State parties should take all necessary measures to ensure that all children were immediately registered at birth and issued birth certificates. While States were not obliged to grant their nationality to every child born in their territory, they were required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child had a nationality when he or she was born.

(i) *Family life (Articles 14, 17 and 44 ICRMW; Articles 9, 10, 11, 16, 18, 19, 20 and 27(4) CRC)* – States should comply with their international legal obligations in terms of maintaining family unity. The rupture of a family unit by the expulsion of one of both parents based on a breach of immigration law was disproportionate, as the sacrifice inherent in the restriction of family life and the impact on the life and development of the child was not outweighed by the advantages obtained by forcing the parent to leave the territory because of an immigration-related offence. Financial and material poverty should never be the sole justification for removing a child from parental care. States should provide appropriate assistance, including by providing social benefits and child allowances regardless of the migration status of the parents or the child. Applications for family reunification should be dealt with in a positive, humane and expeditious manner, including facilitating the reunification of children with their parents.

(j) *Protection from all forms of violence and abuse, including exploitation, child labour and abduction, and sale of traffic in children (Articles 11 and 27 ICRMW; Articles 19, 26, 32, 34, 35 and 36 CRC)* – States should establish early identification measures to detect victims and carry out mandatory training for social workers, border police, lawyers, medical professionals and all other staff who come into contact with children and take effective measures to protect migrant children from all forms of violence and abuse, regardless of their migration status. States should ensure comprehensive protection, support services and access to effective redress mechanisms.

(k) *Right to protection from economic exploitation (Articles 11 and 27 ICRMW; Articles 19, 26, 32, 34, 35 and 36 CRC)* – States should take all appropriate legislative and administrative measures to regulate and protect the employment of migrant children with respect to the minimum age of employment and hazardous work. In cases of necessity, States should provide emergency social assistance to migrant children and their families regardless of their migration status, without any discrimination.

(l) *Right to an adequate standard of living (Article 45 ICRMW; Article 27 CRC)* – States should ensure that children in the context of international migration have an adequate standard of living adequate for their physical, mental, spiritual and moral development. States should develop guidelines on stand-

ards of reception facilities, assuring adequate space and privacy for children and their families.

(m) *Right to health (Articles 28 and 45 ICRMW; Articles 23, 24 and 39 CRC)* – Migrant and refugee children may experience severe emotional distress and may have particular and often urgent mental health needs. Children should therefore have access to specific care and psychological support. Every migrant child should have access to health care equal to that of nationals regardless of their migration status.

(n) *Right to education and professional training (Articles 30, 43 and 45 ICRMW; Articles 28, 29 and 30 CRC)* – States should ensure equal access to quality and inclusive education for all migrant children. Migrant children should have access to alternative learning programmes where necessary and participate fully in examinations and receive certification of their studies.

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The Committees reaffirmed the need to address international migration through international, regional or bilateral cooperation and dialogue, and through a comprehensive and balanced approach, recognising the responsibilities of countries of origin, transit, destination and return in promoting and protecting the human rights of children in the context of international migration, so as to ensure safe, orderly and regular migration, with full respect for human rights and avoiding approaches that might aggravate their vulnerability. In particular, cross-border case management procedures should be established in an expeditious manner and in conformity with the relevant Convention. All practices should be fully in line with international human rights and refugee law obligations.

COURT NEWS

Spanish version of the HUDOC database and agreement to increase case-law translations in Spanish

On 23 November 2017 a ceremony was organised in Spain for the launch of a Spanish version of the Court's case-law database HUDOC which can be found at: http://hudoc.echr.coe.int/spa. The Spanish user interface joins the existing English, French, Russian and Turkish versions, with Georgian, Bulgarian and Ukrainian interfaces to follow.

At the ceremony an agreement was signed between the Court, the Spanish Government and the *Universidad Nacional de Educación a Distancia (UNED)* aimed at increasing the number of Spanish translations of the Court's case-law and publications in cooperation with the said university.

As a reminder the HUDOC database is increasingly serving as a one-stop-shop for translations of the Court's case-law in languages other than its official ones (English and French). It now contains 23,500 case-law translations in 31 languages other than English and French. Some 1,150 texts are in Spanish, number which will soon be increasing thanks to the agreement.

Press release (eng)

Comunicado de prensa (esp)

Film on the ECHR: new versions

The film presenting the Court is now also available in Bulgarian, Dutch, Finnish, Greek and Slovak. It explains how the Court works, describes the challenges faced by it and shows the scope of its activity through examples from the case-law.

This film is currently available in 22 languages of the Council of Europe member States. The videos accessible via the Court's Internet site (www.echr.coe.int – The Court) and its YouTube channel (https://www.youtube.com/user/EuropeanCourt).

RECENT PUBLICATIONS

Case-Law Guides: new translations

The Court has recently published on its Internet site (www.echr.coe.int – Case-law):

– Albanian translations of the Guide on Article 7 of the Convention (no punishment without law) and of the Guide on Article 15 of the Convention (derogation in time of emergency);

Udhëzues rreth nenit 7 të Konventës – Nuk ka dënim pa ligj (alb)

Udhëzues rreth nenit 15 të Konventës – Derogimi në rastet e gjendjes së jashtëzakonshme (alb)

– Armenian translations of the Guide on Article 5 of the Convention (right to liberty and security) and of the Guide on Article 6 (civil limb) of the Convention (right to a fair trial);

Ուղեցույց 5-րդ հոդվածի վերաբերյալ- ազատության եվ անձնական անձեռնմխելիության իրավունք (arm)

Ուղեցույց Կոնվենցիայի 6-րդ հոդվածի վերաբերյալ. Արդար դատաքննության իրավունք (քաղաքացիահիրավական հայեցակետ) (arm)

– Spanish translations of the Guides on the civil limb and on the criminal limb of Article 6 of the Convention (right to a fair trial);

Guía del artículo 6 del Convenio – Derecho a un proceso equitativo (parte civil) (esp)

Guía del artículo 6 del Convenio – Derecho a un proceso equitativo (parte penal) (esp)

– A Serbian translation of the Guide on Article 9 of the Convention (freedom of thought, conscience and religion).

Sloboda mišljenja, savesti i veroispovesti član 9 Konvencije (srb)

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

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

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

ENG

www.echr.coe.int

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

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE