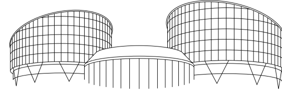


# Information Note on the Court's case-law

No. 145

October 2011

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/echr/NoteInformation/en>. A hard-copy subscription is available for 30 euros (EUR) or 45 United States dollars (USD) per year, including an index, by contacting the publications service via the on-line form at <www.echr.coe.int/echr/contact/en>.

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

ISSN 1996-1545

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# ARTICLE 3

## Inhuman or degrading treatment
## Extradition

### Extradition putting applicant at risk of lengthy, consecutive prison sentences: *inadmissible*

*Schuchter v. Italy* - 68476/10
Decision 11.10.2011 [Section II]

*Facts* – The applicant, a German national, was remanded in custody in 2009 after being arrested in Italy under an international arrest warrant issued by the US authorities, who suspected her of being involved in a number of fraud cases in the USA between 1996 and 1999. The offences in question being punishable by up to thirty years' imprisonment, the United States requested her extradition from Italy, which was approved by the Italian courts. In her application to the European Court of Human Rights, the applicant, who suffers from depression and serious eating disorders (anorexia), alleged that her extradition to the USA would have serious consequences for her life and health and would expose her to a risk of imprisonment for an excessive duration, in particular if a number of sentences were to be served consecutively and in conditions that would be fatal for her in view of her state of health. She further argued that the US penal system would not enable her to receive appropriate treatment and that she would be force fed, which constituted physical and mental torture.

*Law* – Articles 2 and 3

(a) *Length of potential sentence* – The offences for which the applicant was to be tried in the US were not punishable by life imprisonment but by prison sentences of thirty years maximum. The US courts, when convicting someone of a number of offences, could decide to impose consecutive sentences. In those circumstances it could not be ruled out, at least in theory, that the applicant might be sentenced to a very long prison term, equivalent in practice to life imprisonment. The Court thus had to determine whether, in such a case, the sentence could be described as irreducible. It observed in this connection that the US legislation did not deprive the applicant of all possibility of being released or of having her sentence commuted: she could, among other things, benefit from a reduction of sentence for extraordinary or compelling reasons, or seek measures of clemency, in particular a suspension on procedural grounds (reprieve) or a commutation. Whilst such measures were discretionary, the applicant nevertheless had the possibility, under US law, of benefiting from an adjustment of sentence leading ultimately to her release. It followed that her potential life sentence was not irreducible *de jure*. Moreover, there was nothing in the case file to suggest that she could never benefit *de facto* from an alleviation of her sentence. In conclusion, in the light of the criteria set out in its case-law, the Court found that it was not established that the applicant would be deprived of any hope of release if she were given a heavy prison sentence equivalent to life imprisonment.

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

(See also: *Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008, Information Note no. 105; *Iorgov v. Bulgaria (no. 2)*, no. 36295/02, 2 September 2010, Information Note no. 133; and *Vinter and Others v. the United Kingdom*, nos. 66069/09, 130/10 and 3896/10, communicated case, Information Note no. 138)

(b) *Consequences of a prison sentence* – Under the United States Code the court deciding on any preventive measures to be taken on the applicant's arrival in the United States would, in any event, take her state of health into account. It would most likely request a medical examination before deciding what measure to apply and would thus not necessarily remand the applicant in custody. Moreover, if she were ultimately to be given a prison sentence, the court would have to take account of her state of health not only at the time of sentencing but also throughout the term of imprisonment, and that consideration might lead it to rule out or limit any custodial measure. Lastly, in view of its findings concerning the alleged lack of appropriate medical treatment, the Court found that the applicant had not established that, if she were nevertheless imprisoned, her life would be at risk.

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

(c) *Alleged lack of medical treatment in US prisons* – The applicant had not substantiated by any objective evidence her claims that she would not benefit from medical treatment adapted to her anorexia and mental condition. In any event, her state of health would be taken into account throughout the proceedings, including at the time of sentencing and while the sentence was being served. It was thus not possible to find it foreseeable that the US authorities would ignore her state of health.

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

(d) *Alleged risk of treatment in breach of Article 3* – As regards the applicant's fears about the possibility of force-feeding, the Court reiterated that a therapeutic measure regarded as necessary according to recognised medical principles could not, in principle, be analysed as inhuman or degrading treatment. That was the case, in particular, of force-feeding for the purpose of saving the life of a prisoner who refused to eat. In the Court's opinion, there was no evidence to suggest that, if it proved necessary to feed the applicant against her will in order to save her life, the US authorities would act in a manner that was contrary to the principles established in its case-law regarding the existence of a medical necessity, the procedural guarantees accompanying such a decision and the conditions of implementation, which could not exceed the threshold of seriousness beyond which a course of treatment entailed a violation of Article 3 of the Convention. It was thus not possible to find it foreseeable that the applicant would be subjected to treatment contrary to Article 3. That finding also held true for the applicant's apparent fear of violence in US prisons.

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

## Degrading treatment

### Use of hood, handcuffs and leg shackles to restrain particularly dangerous suspect for two hours: *no violation*

*Portmann v. Switzerland* - 38455/06
Judgment 11.10.2011 [Section II]

*Facts* – Following his escape from prison in February 1999 and after committing various subsequent offences, the applicant was arrested at around 7.45 p.m. on 10 March 1999 by police officers. In accordance with the customary procedure for the arrest of potentially dangerous individuals, he was immobilised on the ground using handcuffs and leg shackles. When back on his feet he became very aggressive. To protect themselves and to prevent the applicant harming himself the officers covered his head with a hood. They explained to him the purpose of the measure, which he did not challenge, and made sure he was breathing normally. When he arrived at the nearest police station he was presented to the investigating judge. The officers subsequently removed the hood so that he could read and sign his statement. They instructed him not to look around. The applicant refused to sign and the hood was placed over his head again. He was taken to a cell and at 9.50 p.m. transferred to another police station. It was at that point that the hood, handcuffs and shackles were removed. In a judgment of March 2001 the court sentenced the applicant to ten years' imprisonment, reduced on appeal to nine years. In April 2006 the applicant filed a complaint with the investigating judge's office alleging that he had been subjected to inhuman or degrading treatment under Article 3 of the Convention at the time of his arrest, transfer and presentation before the investigating judge. The investigating judge's office ruled there was no case to answer. Subsequently, in 2006, the public prosecutor's office declared the applicant's complaint admissible, even though he had filed it more than seven years after the arrest in question, but considered it ill-founded. The applicant appealed against that decision but was unsuccessful.

*Law* – Article 3 (substantive aspect): The Court found it surprising that the applicant had filed his criminal complaint more than seven years after the events. Despite that delay, the domestic authorities had nevertheless examined it, but had dismissed it on the merits. That fact was not irrelevant when assessing the impact that the impugned treatment must have had on the applicant: if it had been significant, he would probably not have waited so long before complaining. Moreover, the applicant, who was forty at the material time, did not allege that he had had any particular health problems that would have made the measure harder to bear.

The treatment inflicted on the applicant during his arrest and transfer had been limited in time, lasting for about two hours. The applicant was a particularly dangerous individual against whom the police officers had to protect themselves adequately. They had thus considered it necessary to cover his head with a hood and to use handcuffs and shackles to stop him absconding or harming himself or others. The Court found the measures appropriate because they had been used both to reduce the applicant's freedom of action and to preserve the anonymity of the police officers involved, thus protecting them from possible reprisals. The hooding had been accompanied by the requisite safety measures. The applicant had not objected to wearing the hood and had confirmed, when asked by the officers, that he could breathe normally. Subsequently he had been watched almost continually by a police officer in accordance with the applicable rules. As regards his allegation that he had been subjected to a real interrogation by the investigating judge, for twenty or thirty minutes, after arriving at the police station and while still wearing the hood, the Court found that such conduct, if proven, could not be regarded as compatible with

Article 3. The Court observed, however, that in the present case the length of the confrontation between the applicant and the investigating judge was a matter of dispute between the parties. The disagreement was partly due to the fact that the arrest dated back to 1999 and the applicant's delay in filing his criminal complaint had made it more difficult to reconstitute the relevant events in detail. Thus, the wearing of the hood, even combined with the handcuffs and shackles, had been limited to about two hours, had been accompanied by appropriate safety measures and had not sought to humiliate or debase the applicant. It had not therefore attained the level of seriousness required to engage Article 3.

*Conclusion*: no violation (six votes to one).

The Court further found, by six votes to one, that there had been no violation of the procedural aspect of Article 3.

## Effective investigation

### Lack of effective investigation into raid of family home by masked police officers: *violation*

*Hristovi v. Bulgaria* - 42697/05
Judgment 11.10.2011 [Section IV]

*Facts* – The applicants, a married couple and their five-year-old daughter, alleged that in February 2004 masked police officers had burst into their flat, kicked and beaten up the father and threatened to kill the occupants. One of the officers had pointed a gun at the mother and daughter. The daughter was subsequently diagnosed as suffering from stress disorders. The mother lodged a criminal complaint against the police officers but the authorities refused to prosecute as they found that the officers were on a special operation to arrest members of a criminal gang and that there was no evidence that they had used unnecessary force or threatened the applicants. The mother's appeals were dismissed, *inter alia*, on the grounds that stress disorder could not be regarded as evidence of ill-treatment. The father was later given a six-year prison sentence for aiding and abetting forgery.

*Law* – Article 3 (procedural aspect): The applicants' allegation that masked police officers had intimidated and threatened them at gunpoint was detailed and coherent. The daughter, who was only five years old at the time, had been deeply affected by what she had experienced. The applicants' complaints of intimidation and death threats shouted at gunpoint by a masked police officer were therefore at least arguable thus placing the authorities under an obligation to effectively investigate this complaint.

It was therefore a matter of concern that, as in other cases against Bulgaria involving special units,[1] the impugned police officers had not been identified and questioned. In the Court's view, while legitimate security concerns might require confidentiality when special forces officers were involved, domestic law and practice which, as here, apparently did not allow their identification, at least to those conducting the investigation, and their questioning in an appropriate form, had to be seen as incompatible with the duty to investigate arguable claims of ill-treatment. Indeed, the Court had serious reservations about the use of masked and armed officers to conduct an arrest in a family setting where there was no risk of armed resistance. Where the circumstances were such that the authorities were obliged to deploy masked officers to effect an arrest, the officers should be required to visibly display some anonymous form of identification, such as a number or letter. The deficiency that had been noted in this and in other cases against Bulgaria could fairly be described as conferring virtual impunity on a certain category of police officers and an investigation suffering from such a defect could not be seen as effective. The investigation had suffered from other shortcomings too, including the fact that the decision not to prosecute had essentially been based on statements by a police officer and investigator who had not arrived at the scene until after the alleged incident, and the failure to question the applicants or any independent witnesses.

At a more general level these grave deficiencies had also to be seen against the silence (apart from a reference to "threats") of Bulgarian criminal law on the issue of psychological suffering resulting from, for example, an aggressively conducted search, seizure and arrest operation. Unless complainants alleged physical injury at the hands of State agents, the authorities could not be required to open an investigation. Such a lacuna in the criminal law allowed those allegedly responsible for inflicting psychological trauma, in this case allegedly on a young child, to escape accountability.

The criminal investigation into the applicants' alleged psychological ordeal at the hands of the police had, therefore, not been effective.

*Conclusion*: violation (unanimously).

1. *Krastanov v. Bulgaria*, no. 50222/99, 30 September 2004; and *Rashid v. Bulgaria*, no. 47905/99, 18 January 2007.

As regards the substantive aspect of Article 3, the Court found that the father's allegations of ill-treatment had not been proved beyond reasonable doubt, so there had been no violation on that account.

Article 41: EUR 4,000 to each of the parents and EUR 6,500 to the daughter in respect of non-pecuniary damage.

(See also: *Kučera v. Slovakia*, no. 48666/99, 17 July 2007, Information Note no. 99; and *Rachwalski and Ferenc v. Poland*, no. 47709/99, 28 July 2009)

## Expulsion

**Order for applicant's expulsion on national-security grounds without adequate assessment of risk of proscribed treatment in receiving country:** *deportation would constitute violation*

*Auad v. Bulgaria* - 46390/10
Judgment 11.10.2011 [Section IV]

*Facts* – The applicant, a stateless person of Palestinian origin, claimed asylum shortly after arriving in Bulgaria in May 2009. In a decision of October 2009, the State Refugees Agency refused him refugee status, but granted him humanitarian protection on the grounds that there was "a real danger and risk of encroachments upon [the applicant's] life and person". However, the following month the head of the State Agency for National Security made an order for the applicant's expulsion on the grounds that he was a suspected terrorist and that his presence in Bulgaria represented a serious threat to national security. The applicant sought judicial review of the expulsion order but the Supreme Administrative Court refused after finding that the order was valid under the domestic law and that the applicant's fears for his safety if returned to Lebanon were "irrelevant" once a reasonable assumption that he presented a threat to national security in Bulgaria had been established. The applicant was held in detention pending his expulsion for the maximum period of eighteen months permitted by the domestic law before being released subject to reporting restrictions.

*Law* – Article 3: A planned expulsion would be in breach of the Convention if substantial grounds were shown for believing that there was a real risk that the person concerned would be subjected in the receiving country to treatment prohibited by Article 3, even where he or she was regarded as presenting a threat to national security. Thus, any national-security considerations in the applicant's case were irrelevant to the only salient issue: whether his expulsion would give rise to a real risk of proscribed treatment. The Supreme Administrative Court had not attempted to assess the question of risk, which it deemed "irrelevant", and had instead confined itself to the question of the lawfulness of the expulsion order. Such an approach could not be considered compatible with the need for independent and rigorous scrutiny of the substance of the applicant's fears, which were plainly arguable in the light of the opinion that had been delivered by the State Refugees Agency. On the basis of that opinion coupled with information on the situation of Palestinian refugees in Lebanon and the applicant's personal account, the Court found that there was at least prima facie evidence capable of showing substantial grounds for believing the applicant would be exposed to a real risk if expelled there. The burden had therefore been on the State to dispel any doubts, but the Government had not presented any evidence on that issue on the grounds that the question of risk would in any event be examined at the time of expulsion. In the Court's view, however, this could not be regarded as a binding assurance that the applicant would not be expelled to Lebanon. Indeed, it was unclear whether the Government in fact could bind the authorities responsible for executing the order.

More generally, the Court was not persuaded that effective guarantees existed in Bulgaria against the arbitrary deportation of people at risk of ill-treatment. Since the Aliens Act 1998 and regulations for its application were silent on the question of risk assessment and there were no reported cases on the subject, it was unclear which standards and what information the authorities would use in any determination of the risk faced by the applicant if removed to Lebanon. Nor was there any indication as to whether, in the event of their choosing to send the applicant to a third country, the authorities would properly examine the risk of his onward transmission to Lebanon. Accordingly, in view of the absence of a legal framework providing adequate safeguards there were substantial grounds for believing that the applicant risked a violation of his Article 3 rights.

*Conclusion*: deportation would constitute a violation (unanimously).

Article 13: The notion of an effective remedy in cases where the applicant had an arguable claim that he would be subjected to proscribed treatment if deported had two components: close, independent and rigorous scrutiny of the claim that

substantial grounds for fearing a real risk of proscribed treatment existed, without regard to what the person may have done to warrant expulsion or to any perceived threat to national security; and access to a remedy with automatic suspensive effect. As to the scrutiny requirement, the Supreme Administrative Court had expressly refused to deal with the question of risk on the grounds that it was irrelevant and the Court had already found under Article 3 that there were no adequate guarantees that the risk would be subjected to rigorous scrutiny prior to enforcement of the expulsion order. More importantly, the Government had not pointed to any procedure whereby the applicant would be able to challenge the authorities' assessment of his claims. As to the second component, the domestic courts did not appear to have any power to suspend the enforcement of expulsion orders issued on national-security grounds, even if an irreversible risk of death or ill treatment in the receiving State was claimed

*Conclusion*: violation (unanimously).

Article 5 § 1: Although the maximum period (eighteen months) allowed by the domestic law had not been exceeded, the grounds on which the applicant was detained, namely his pending deportation, had not remained valid for the whole period of his detention owing to the authorities' failure to conduct the proceedings with due diligence. All the authorities had done during this period was to write three times to the Lebanese Embassy with requests for a travel document. There was no indication that they had pursued the matter vigorously or attempted to negotiate an expedited delivery, or of any efforts to secure the applicant's admission to a third country. It was problematic too that domestic law did not require expulsion orders to specify the destination country as, where deprivation of liberty was concerned, legal certainty was required in respect of each and every element relevant to the justification of the detention and a lack of clarity over the destination country could hamper effective scrutiny of the authorities' actions. Lastly, the delays could not be explained by the need to wait for the Supreme Administrative Court's decision as not only did that court refuse to consider whether the applicant would be at risk if returned to Lebanon, the deportation order was in any event immediately enforceable.

*Conclusion*: violation (unanimously).

Article 46: In view of the grave and irreversible nature of the consequences of the removal of aliens to countries where they might face ill-treatment, and the apparent lack of sufficient safeguards in Bulgarian law in that respect, the Government was required to take measures, including amendments to the Aliens Act 1998 or other Bulgarian legislation and changes of administrative and judicial practice, to ensure that: (a) a mechanism existed requiring the competent authorities to consider rigorously, whenever there was an arguable claim, the risks an alien was likely to face as a result of expulsion on national-security grounds, by reason of the general situation in the destination country and his or her particular circumstances; (b) the destination country was always indicated in a legally binding act and a change of destination was amenable to legal challenge; (c) the mechanism allowed for consideration of the question whether, if sent to a third country, the alien might face a risk of being sent onwards to his or her country of origin without due consideration of the risk of ill treatment; (d) legal challenges had automatic suspensive effect pending the outcome of the examination of any arguable claim of a substantial risk of death or ill-treatment in the destination country; and (e) claims of a serious risk of death or ill-treatment in the destination country were examined rigorously by the courts.

Article 41: EUR 3,500 in respect of non-pecuniary damage.

### Extradition

**Alleged risk of ill-treatment if Hutu suspected of genocide and crimes against humanity was sent to stand trial in Rwanda:** *extradition would not constitute violation*

*Ahorugeze v. Sweden* - 37075/09
Judgment 27.10.2011 [Section V]

(See Article 6 § 1 below, page 12)

## ARTICLE 4

### Forced labour

**Obligation for lawyer to act as unpaid guardian to a mentally ill person:** *no violation*

*Graziani-Weiss v. Austria* - 31950/06
Judgment 18.10.2011 [Section II]

*Facts* – A district court held a list of possible legal guardians containing the names of all practising lawyers and public notaries in the district. Since

the local association of guardians did not have the capacity to appoint a legal guardian for a mentally ill person who had no close relatives, the court appointed the applicant, whose name had been the next on the list, as her guardian in matters of management of income and representation before the courts and other authorities. The applicant complained that his professional and free-time activities did not allow him to take on such a task and that listing only lawyers and public notaries and excluding other persons who possessed knowledge of law from the list of potential guardians had been discriminatory. His appeals were dismissed.

*Law* – Article 4: Given that Article 4 offered no definition of "forced or compulsory labour", the Court took as a starting point the definition from the International Labour Organization Convention No. 29 which defines this term as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". In the applicant's case it had not been disputed that the refusal to act as a guardian could give rise to disciplinary sanctions and that there existed the element of the "menace of a penalty". However, representation of a person before courts and other administrative authorities was not outside the ambit of the normal activities of a practising lawyer and the applicant must have been aware that he might in the future be called upon to act as somebody's guardian. There had therefore been an element of prior consent to such tasks. The applicant had not alleged that there were a significant number of cases in which he had to act as a guardian or that acting as the mentally ill person's guardian was particularly time-consuming or complex. The burden placed on the applicant had, therefore, not been disproportionate and the service the applicant had been required to perform did not constitute forced or compulsory labour.

*Conclusion*: no violation (unanimously).

Article 14 in conjunction with Article 4: The main activities of practising lawyers consisted of representing clients before the courts and various other authorities, for which they had received special training and passed appropriate examination. Other persons who had studied law, but who were not practising lawyers, were not allowed to represent parties before the courts in cases where representation was mandatory. It was also possible that they did not work in a law-related field. Even though there had undeniably been a difference in treatment between practising lawyers and notaries on the one hand, and other legally trained persons on the other, for the purposes of their appointment as a guardian in cases where legal representation was necessary, members of these two groups were not in relevantly similar situations.

*Conclusion*: no violation (unanimously).

# ARTICLE 6

## Article 6 § 1 (criminal)

### Fair hearing
### Extradition

**Alleged risk of flagrant denial of justice if Hutu suspected of genocide and crimes against humanity was sent to stand trial in Rwanda:** *extradition would not constitute violation*

*Ahorugeze v. Sweden* - 37075/09
Judgment 27.10.2011 [Section V]

*Facts* – The applicant, a Rwandan national of Hutu origin, left his home country in 1994. Since 2001 he had resided in Denmark, where he was granted refugee status. In 2008 he was arrested in Sweden under an international arrest warrant. The Swedish authorities then received a request for his extradition to Rwanda to stand trial on charges including genocide and crimes against humanity. In their submissions, the Rwandan authorities relied on recent legislative changes in their country which they said guaranteed the applicant a fair trial. They also indicated that he would be detained in detention facilities that offered adequate accommodation and treatment. The applicant's case was referred to the Swedish Supreme Court, which, after careful examination, ruled that there was no legal impediment to the applicant's extradition. Subsequently, the European Court issued an interim measure under Rule 39 of its Rules, suspending the applicant's extradition pending its examination of the case. Meanwhile, in its *Uwinkindi* decision of 28 June 2011[1] the International Criminal Tribunal for Rwanda (ICTR) ruled for the first time that a suspect could be transferred to Rwanda in order to stand genocide charges. In so holding, it noted that Rwanda had made material changes to its laws such that the

1. *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor's request for referral to the Republic of Rwanda.

ICTR was confident that the case would be prosecuted consistently with internationally recognised fair-trial standards.

*Law* – Article 3: The applicant had submitted no medical certificates in support of his claim that he suffered from heart problems that would require bypass surgery within a few years. In addition, given the high threshold for a medical condition to raise an issue under Article 3, the applicant's alleged heart problems could not at present be regarded as sufficiently serious as to constitute compelling humanitarian reasons for not extraditing him to Rwanda. His allegations that he was at risk of persecution because he was a Hutu were not valid since no decision of the ICTR or of any national jurisdiction refusing transfer or extradition to Rwanda had ever been based on such grounds, nor was there any evidence of a general situation of persecution or ill-treatment of the Hutu population in Rwanda. Finally, the Rwandan authorities had provided assurances that the applicant would be detained and would serve any prison sentence imposed on him in certain named facilities, which the ICTR and some international delegations had found to meet international standards. Lastly, under Rwandan law, the sentence of life imprisonment in isolation could not be imposed on persons who had been transferred to Rwanda from other States. In the light of these considerations, the Court was satisfied that the applicant would not face a real risk of treatment proscribed by Article 3 if extradited to Rwanda.

*Conclusion*: extradition would not constitute a violation (unanimously).

Article 6: Under the principles first set out in the *Soering v. the United Kingdom* judgment,[1] a decision to extradite or expel could exceptionally give rise to an issue under Article 6 if the person concerned risked a flagrant denial of a fair trial in the requesting State. The test to be applied was a stringent one: a flagrant denial of justice went beyond mere procedural irregularities or lack of procedural safeguards which might have resulted in a breach of Article 6 had they occurred within one of the Contracting States. What was required was such a fundamental breach of the fair-trial guarantee as to amount to a destruction of the very essence of that right. Although, in decisions in 2008 and early 2009 the ICTR and various national jurisdictions had refused to transfer or extradite genocide suspects to Rwanda owing to concerns that they would not receive a fair trial, those decisions had mainly focused on difficulties for the defence in calling witnesses who feared reprisals. However, changes had since been made to the Rwandan legislation that afforded witnesses immunity from prosecution in respect of their statements or actions at trial and a new witness-protection programme had been launched. Witnesses residing outside Rwanda could give testimony via video-link. Accordingly, there was no reason to conclude that the applicant would be unable to call witnesses or to have their evidence examined by the Rwandan courts. As to the applicant's allegations of a lack of qualified defence lawyers in Rwanda, the ICTR had noted in the *Uwinkindi* case that many members of the Rwandan bar had more than five years' professional experience, that Rwandan lawyers were obliged to provide *pro bono* services to indigent defendants and that a legal framework and budgetary provision for legal aid had been set up. Defendants were also free to appoint foreign defence counsel. Further, in the light of the findings in the *Uwinkindi* case and the experience of international investigative teams, there were not sufficient grounds for calling into question the independence and impartiality of the Rwandan judiciary. Nor had the applicant substantiated allegations that he would be denied a fair trial because of testimony he had given in earlier ICTR cases or his former position in the Rwandan aviation authority.

The Court explained that, although the ICTR's decision in *Uwinkindi* was not yet final it had nevertheless attached considerable weight to its conclusions: this was the first transfer decision the ICTR had taken since the legislative changes in Rwanda and it had found that the issues that had led it to refuse transfers in 2008 had been addressed to such a degree in the intervening period that it was confident that the accused would be prosecuted in a manner consistent with internationally recognised fair-trial standards. The Court further noted that the ICTR's decision to transfer Uwinkindi for trial in Rwanda had been made pursuant to the ICTR Rules of Procedure and Evidence that required it to be satisfied that the accused would receive a fair trial in the Rwandan courts. The standard thus established clearly set a higher threshold for transfers than the test for extraditions under Article 6 of the Convention, as interpreted by the Court.

In the light of these considerations, the applicant would not face a real risk of a flagrant denial of justice if extradited to stand trial in Rwanda.

*Conclusion*: extradition would not constitute a violation (unanimously).

1. *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989.

## Article 6 § 1 (administrative)

### Fair hearing

**Divergences in case-law of separate, autonomous and hierarchically unconnected administrative and administrative-military courts:** *no violation*

*Nejdet Şahin and Perihan Şahin v. Turkey* - 13279/05
Judgment/Arrêt 20.10.2011 [GC]

*Facts* – The applicants' son, an army pilot, died in May 2001 when his plane crashed in Turkey while transporting troops. The parents applied for the monthly survivors' pension payable under the Anti-Terrorism Act, but to no avail. They applied to the ordinary administrative court, which declined jurisdiction, then their case was referred to the Supreme Military Administrative Court which the Jurisdiction Disputes Court adjudged to be competent. The applicants' complaint to the European Court concerned a divergence in the appraisal by the ordinary administrative courts and the military administrative courts of the circumstances of the plane crash. For the ordinary courts there was a causal link between the crash and the fight against terrorism – a *sine qua non* for entitlement to the pension in question – whereas the military court found no such link.

In a judgment of 27 May 2010 a Chamber of the Court found, by six votes to one, that there had been no violation of Article 6 § 1, considering that the applicants could not claim to have been denied justice because of the way in which the courts had examined their case and the finding they had reached in the circumstances.

*Law* – Article 6 § 1: It was clear from the case file that the difference the applicants complained of lay not in the factual situations examined by the different types of domestic court – the situations were comparable – but in the application of substantive law and the resulting judgments. However, the mere existence of conflicting decisions was not, in itself, sufficient grounds to find a violation of Article 6. The Court had to examine the effect of the divergence in relation to the principles of a fair trial and, in particular, of legal certainty.

In the present case a conflict of jurisdiction arose between the ordinary administrative courts and the Supreme Military Administrative Court, which were called upon to give judgment, in parallel, on the same legal issue. In spite of the intervention of the Jurisdiction Disputes Court, which found that the Supreme Military Administrative Court had jurisdiction in cases concerning military pensions, the ordinary administrative courts continued to accept cases similar to that of the applicants and to rule on the merits. The judgments of the Jurisdiction Disputes Court were not decisions of principle, and they had failed to impose themselves, by their sheer power of persuasion, on all the ordinary administrative courts. However, the role of the Jurisdiction Disputes Court was not to resolve conflicts of case-law, except where the judgments were so irreconcilable that their execution would result in a denial of justice for the party concerned, a situation which did not arise in the instant case.

In a domestic legal context characterised, as in the present case, by the existence of several supreme courts not subject to any common judicial hierarchy, the Court could not demand the implementation of a vertical review mechanism of the approach those courts chose to take. To make such a demand would go beyond the requirements of a fair trial enshrined in Article 6 § 1. In such a judicial system achieving consistency of the law could take time, and periods of conflicting case-law might therefore be tolerated without undermining legal certainty.

Two courts, each with its own area of jurisdiction, examining different cases could very well arrive at divergent but nevertheless rational and reasoned conclusions regarding the same legal issue raised by similar factual circumstances. The divergences of approach that might thus arise between courts were merely the inevitable outcome of this process of interpreting legal provisions and adapting them to the material situations they were intended to cover. These divergences might be tolerated when the domestic legal system was capable of accommodating them. In the instant case, the supreme courts in question – the Supreme Administrative Court and the Supreme Military Administrative Court – had the possibility of settling the divergences themselves, either by deciding to take the same approach, or by respecting the boundaries of their respective areas of jurisdiction and refraining from both intervening in the same area of the law. Just as it was not for the Court to act as a court of third or fourth instance and review the choices of the domestic courts concerning the interpretation of legal provisions and the inconsistencies that might result, nor was it its role to intervene simply because there had been conflicting court decisions. Its role in respect of Article 6 § 1 of the Convention was limited to cases where the impugned decision was manifestly arbitrary.

Therefore, even though the interpretation of the law made by the Supreme Military Administrative

Court was unfavourable to the applicants, that interpretation, however unjust it might appear to them compared with the solution adopted by the ordinary administrative courts, did not, in itself, constitute a violation of Article 6. Also, in the light of the Jurisdiction Disputes Court's finding that the Supreme Military Administrative Court was the body with jurisdiction to examine the type of dispute at issue, in the circumstances of the present case the decision of the administrative court that it did not have jurisdiction in the applicants' case was not at all arbitrary. Nor could the applicants claim to have been denied justice as a result of the examination of their dispute by the Supreme Military Administrative Court, or the conclusion it reached. The decision adopted by the Supreme Military Administrative Court in the applicants' case fell within the bounds of its jurisdiction and there was nothing in it that, in itself, warranted the intervention of the European Court. The judgments concerning the applicants had been duly reasoned in terms of the facts and the law, and the interpretation made by the Supreme Military Administrative Court of the facts submitted to it for examination could not be said to have been arbitrary, unreasonable or capable of affecting the fairness of the proceedings, but was simply a case of application of the domestic law.

In view of these considerations, the Court reiterated that it must avoid any unjustified interference in the exercise by the States of their judicial functions or in the organisation of their judicial systems. Responsibility for the consistency of their decisions lay primarily with the domestic courts and any intervention by the Court should remain exceptional. In the present case the circumstances required no such intervention and it was not the Court's role to seek a solution to the impugned conflict of case-law *vis-à-vis* Article 6 § 1 of the Convention. In any event, individual petition to the Court could not be used as a means of dealing with or eliminating conflicts of case-law that might arise in domestic law, or as a review mechanism for rectifying inconsistencies in the decisions of the different domestic courts.

*Conclusion*: no violation (ten votes to seven).

## Article 6 § 3 (c)

### Defence through legal assistance

#### Questioning, under international letter of request, of a "legally assisted witness" without a lawyer: *violation*

*Stojkovic v. France and Belgium* - 25303/08
Judgment 27.10.2011 [Section V]

*Facts* – On 31 January 2003 an armed robbery was committed in a jeweller's shop in Courchevel (France). The statements of a suspect, together with intercept evidence, led the investigating judge to believe that the applicant was involved in the case. The investigating judge issued an international letter of request. He requested that the applicant, who was being held in another case in Belgium, be questioned as a "legally assisted witness" (*témoin assisté*) by the Belgian judicial police, in the presence of his lawyer, the investigating judge himself, and two French police officers. Prior to questioning, when notified of his status as "legally assisted witness", the applicant immediately asked to be assisted by a lawyer "practising in the French courts". However, he was questioned without a lawyer. During the police interview, in March 2004, he admitted that he had taken part in an armed robbery in 2003 in a Courchevel jeweller's shop. He mentioned other armed robberies, recognising his involvement in some of them, in particular in Saint-Tropez and Biarritz. In 2005 he was surrendered by the Belgian authorities to the French authorities under a European Arrest Warrant and placed under judicial investigation (*mis en examen*), charged with armed robbery committed as part of a gang in Courchevel, Biarritz and Saint-Tropez. As regards the Courchevel robbery, the indictment indicated that the charges against the applicant had been confirmed, among other things, by his own "precise and detailed" statements given in Belgium during his police interview there. However, he had refused to comment on the charges when examined by the French investigating judge, because he alleged that his confessions had been taken unlawfully. In the proceedings before the Assize Court he accepted all the charges. He was sentenced to six years' imprisonment in 2008.

*Law* – Article 6 § 3 (c) in conjuction with Article 6 § 1

(a) *Admissibility of the application*

(i) *In respect of Belgium* – The applicant fell within Belgian jurisdiction within the meaning of Article 1 of the Convention. As requested State, Belgium was required[1] to execute the international letter of request issued in respect of the applicant according

1. Under Article 3 of the European Convention on Mutual Assistance in Criminal Matters (STE no. 30), adopted on 20 April 1959 and ratified by France on 23 May 1967 and by Belgium on 13 August 1975.

to that country's statutory formalities, which did not provide for legal assistance during the interview organised in that connection. In those circumstances the complaint of a violation of Article 6 § 3 stemmed from Belgian legislation. By contrast, in the absence of any subsequent criminal proceedings against the applicant in Belgium, and even of any action by him against the Belgian authorities to complain about his police interview and the failure to provide him with legal assistance, the alleged violation had to be regarded as resulting not from a continuing situation but from a single event that took place in March 2004. As that date was more than six months before the application was lodged with the Court (in 2008), it had to be rejected as out of time in so far as it was directed against Belgium.

*Conclusion*: inadmissible (out of time).

(ii) *In respect of France* – The presence at the applicant's interview by the Belgian police of the French judge in the case and a member of the public prosecutor's office from the same court, even though they had had no active role in the questioning, was significant. Whilst it was not *stricto sensu* for the French investigating judge to supervise the interview held pursuant to the letter of request he had issued, he should nevertheless have reminded the Belgian authorities responsible for the interview that he had stipulated that the applicant's lawyer should be present, especially as the applicant himself had requested a lawyer at the beginning of the interview, to no avail. It was also for the French authorities to assess *ex post facto* the validity of the acts undertaken pursuant to the letter of request for the purposes of the proceedings pending in France. The application was therefore compatible *ratione personae* with the provisions of the Convention in respect of France.

*Conclusion*: admissible (unanimously).

(b) *Merits*: The applicant's interview had been conducted in accordance with the procedural regime applicable in Belgium, which provided for the questioning of all persons without any difference in treatment, whether or not there were any suspicions against them. Moreover, the questioning of the applicant had taken place solely for the purposes of executing an international letter of request, in the context of a judicial investigation being conducted in France. The requesting investigating judge had indicated that he would be questioned as a "legally assisted witness". Even though this status could not have applied in reality to the interview in question, under international law as it then stood, the wording of the request showed that the applicant was strongly suspected of taking part in the offence in question, as required by French law in that connection. Moreover, the applicant had been made aware of those suspicions prior to his interview. As to the further statements by the applicant, whilst the offences in question did not fall within the initial remit of the investigating judge, it appeared that they had given rise to new judicial investigations, subsequently joined to the first, and had ultimately led to the applicant's committal to stand trial before the Assize Court. In those circumstances, as the applicant's situation had been substantially affected by the interview, there had already been a "criminal charge against him". The Court further took the view that the applicant's situation at the time of the interview had to be taken into consideration. Even though no restrictive or custodial measure had been imposed on him for the purposes of the proceedings at issue, he had been brought from prison to be questioned. He had been simultaneously notified of the provisions of Belgian law, which did not provide for legal assistance, and of his French status as a "legally assisted witness", which afforded him certain rights. The interview had taken place in the presence of the judge who had granted him that status. For the Court, the applicant must have been confused by such a situation. Consequently, whilst he was apparently willing to make certain disclosures to the investigators, even incriminating himself by his statements, this could not be regarded as a totally informed choice. The applicant had admittedly been informed of the statutory provisions to the effect that anything he said might be used in evidence in court. However, he had not expressly been notified of his right to remain silent and had given his statements without legal assistance. He had not unequivocally waived his right to remain silent or his right to a lawyer. The Court acknowledged that the French authorities bore no responsibility for the legal conditions in which the interview had taken place. They had to abide by the provisions of Belgian law as required by their international undertakings. However, under Article 1 of the Convention, it had been for the French criminal authorities to ensure that the acts carried out in Belgium had not been in breach of the rights of the defence and thus to verify the fairness of the proceedings under their supervision. Fairness had to be assessed, in principle, in the light of the proceedings as a whole. This had not been done in the present case. In spite of the fact that the applicant had subsequently exercised his right to remain silent before the French investigating judge, after being provided with legal assistance he had been placed under judicial investigation and then

sent for trial in the Assize Court based on his initial statements. The fact that he had later, before the trial court, accepted all the charges against him, could not therefore suffice to make good the breach initially committed, especially as by that time he was no longer in a position to challenge the validity of the interview in question.

*Conclusion*: violation in respect of France (unanimously).

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

# ARTICLE 8

## Private life

### Police records describing applicant's occupation as "prostitute", despite lack of any conviction for prostitution-related offences: *violation*

Khelili v. Switzerland - 16188/07
Judgment 18.10.2011 [Section II]

*Facts* – During a police check in Geneva in 1993, the police found the applicant to be carrying calling cards which read: "Nice, pretty woman, late thirties, would like to meet a man to have a drink together or go out from time to time. Tel. no. ...". The applicant alleged that, following that discovery, the Geneva police had entered her name in their records as a prostitute, an occupation in which she consistently denied having engaged. In 2003, and again in 2006, the applicant requested that the word "prostitute" be deleted after having learned that it still appeared on the police computer records. The police agreed to her request but refused to delete the word "prostitute" from the data concerning criminal complaints of threatening and insulting behaviour lodged against her in 2001 on the ground that such information had to be kept as a preventive measure. The applicant challenged that decision in the courts but was not successful.

*Law* – Article 8: The word "prostitute" describing the applicant's profession had been deleted from the police computer system and replaced with "dressmaker". However, court judgments revealed that the word at issue, cited in connection with various criminal proceedings, had not been deleted. The storage of data concerning the applicant's private life, including her profession, and the retention thereof, amounted to an interference within the meaning of Article 8, because it was personal data relating to an identified or identifiable individual. That interference had a legal basis in domestic law and was intended to prevent disorder and crime and to protect the rights of others.

The word at issue was liable to damage the applicant's reputation and, as she claimed, make her day-to-day life more problematic, given that the data contained in the police records could be transferred to the authorities. That was all the more significant these days because personal data were subject to automatic processing, thus considerably facilitating access to and the distribution of such data. The applicant therefore had a considerable interest in having the word "prostitute" deleted from the police records. While the Court acknowledged in principle that retaining an individual's personal data on the ground that that person might commit another offence might be in conformity with the principle of proportionality, it considered that the allegation of unlawful prostitution appeared too vague and general and was not supported by concrete facts. In particular, the link between the applicant's conviction for threatening and insulting behaviour and retention of the word "prostitute" was not sufficiently close. The Court did not in any way underestimate the importance of effective crime prevention. However, having regard to the foregoing, and in particular, having regard to the fundamental importance of the presumption of innocence in a democratic society, it was not satisfied that retention of the word "prostitute" to describe the profession of the applicant, who had never been convicted of unlawful prostitution within the meaning of the Swiss Criminal Code, could be considered to meet a "pressing social need" within the meaning of Article 8 of the Convention. Neither the domestic authorities nor the Government had claimed that it was difficult or impossible for technical reasons to remove the word at issue from the police files. Taking account of those uncertainties, the contradictory behaviour of the authorities, the principle that it was a matter for those same authorities to prove the accuracy of particular data, the narrow margin of appreciation enjoyed by the domestic authorities in that area and the seriousness of the interference with the applicant's rights under Article 8, retention of the word "prostitute" in the police files for years had not been necessary in a democratic society.

*Conclusion*: violation (unanimously).

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

## Family life

**Failure to revoke an order for alien's exclusion from national territory despite Court's finding a violation of right to respect for private and family life:** *violation*

*Emre v. Switzerland (no. 2)* - 5056/10
Judgment 11.10.2011 [Section II]

*Facts* – The applicant is a Turkish national who arrived in Switzerland with his parents in 1986. In 2003, following his conviction on several occasions for offences committed between 1994 and 2000, the Aliens Office ordered his administrative expulsion and his permanent exclusion from Swiss territory. The decision was upheld by the Federal Court. In 2004 the applicant lodged an application with the European Court which, in a judgment of 22 May 2008 (application no. 42034/04), held that his permanent exclusion from Swiss territory had been in breach of Article 8. The applicant subsequently applied to the Federal Court seeking a review of the administrative order concerning him. The Federal Court granted the application for review and limited the exclusion period to ten years. In September 2009 the applicant married a German national and obtained a German residence permit. He then applied unsuccessfully to have the expulsion order lifted so that he could settle in Switzerland.

*Law* – Article 8 in conjunction with Article 46: The prohibition on re-entering Switzerland for ten years amounted to interference with the applicant's right to respect for his family life. His expulsion had been in accordance with the law and had pursued a legitimate aim, namely the prevention of disorder and crime. However, it had to be ascertained whether the Federal Court judgment had complied with Switzerland's obligation to secure effective execution of the final judgments of the Court.

In response to the Court's judgment, it had reduced the period of the applicant's exclusion from Swiss territory to ten years, taking the view that his personal interest in remaining in Switzerland did not outweigh the public's interest in his expulsion. In reaching that conclusion, the Federal Court had reweighed the interests at stake, but had arrived at the opposite conclusion to that reached by the Court in its judgment of 22 May 2008. While the Federal Court had enjoyed a certain margin of appreciation in interpreting the Court's judgment, it had substituted its own interpretation in the instant case for that of the Court. Even assuming that this approach was acceptable and justified from the standpoint of the Convention, the Federal Court's re-assessment of the arguments advanced by the Court in its first judgment also had to be thorough and persuasive. The Court referred in that regard to its extremely detailed reasoning in its first judgment, in which, among other things, it had weighed up the specific interests at stake. This had entailed examining a series of factors including the nature of the offences committed by the applicant, the severity of the penalties imposed, the length of time for which he had been resident in Switzerland, the time that had elapsed between the commission of the offences and the impugned measure, the applicant's conduct during that period, the strength of his social, cultural and family ties in the host country and the destination country, the particular features of the case (the applicant's health problems) and, lastly, the final nature of the expulsion order. However, the Federal Court's examination had been confined to the last of these factors, whereas, in order to comply with the stringent requirements imposed on States under Article 46, it should have covered all of them.

As to the applicant's exclusion from Swiss territory for ten years, this was a considerable length of time which was out of proportion to the offences committed. With regard to events since the Court's judgment, these gave a clear indication that the applicant's offences could be seen as errors of youth which the applicant appeared to have acknowledged. The Court was prepared to accept that he had conducted himself since then in a responsible manner, carrying on a lawful occupation within his capabilities and establishing his own family unit. Hence, the most natural means of executing the Court's judgment, and the one corresponding most closely to *restitutio in integrum*, would have been simply to revoke the exclusion order with immediate effect. Even assuming that a different outcome might have been acceptable, the binding nature of the Court's judgments for the purposes of Article 46 § 1, and the importance of executing them effectively, in good faith and in accordance with the spirit and the letter of the judgment, meant that, in the particular circumstances of this case, a more thorough examination of the Court's findings in its first judgment had been called for. Accordingly, the applicant's exclusion from the country for ten years, which was a considerable portion of a person's life, could not be said to have been necessary in a democratic society.

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

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

(See also *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* [GC], no. 32772/02, 30 June 2009, Information Note no. 120)

## ARTICLE 10

### Freedom of expression

**Conviction of trade-union leaders for strident criticism of their mayor employer:** *violation*

*Vellutini and Michel v. France* - 32820/09
Judgment 6.10.2011 [Section V]

*Facts* – The applicants were the president and the general secretary of the municipal police officers' union. An officer who was a member of that union had a dispute with the mayor of the municipality where she worked. In January and February 2006 she was disciplined by the mayor for offensive and threatening behaviour towards colleagues. Assisted by one of the applicants, she challenged the two disciplinary decisions before the administrative court. In November 2006 she filed a complaint against a number of municipal employees for wilful assault, insults and threats, and false accusations. The mayor subsequently criticised her directly in two issues of the municipal newsletter. In February 2007 she filed a complaint against the mayor himself for public insults and procuring of false evidence. The applicants then published a leaflet, distributed to the residents of the town, containing remarks which, in the mayor's view, were clearly defamatory and were directed against him as an elected official in order to discredit him in the eyes of those residents. In March 2007 the mayor brought proceedings against the two applicants before the criminal court, which in July 2007 found them guilty of "public defamation against a citizen holding public office" and imposed fines, also awarding damages to the civil party, after ruling their evidence inadmissible. The applicants' appeals were unsuccessful.

*Law* – Article 10: The applicants had made their statements, calling into question the role of an elected official in his capacity as employer, in their capacity as union officials and in connection with the professional situation of one of the union's members. Their conviction had thus constituted an interference with the exercise of their right to freedom of expression; an interference that was prescribed by law and pursued the legitimate aim of protecting the reputation or rights of others.

The offending remarks had been of legitimate interest to the public in connection with the management of local authorities and the functioning of the services attached thereto. Accordingly, they had been made in the context of a debate of general interest, a situation in which the Convention did not generally allow for restrictions on freedom of expression. However, despite acting in their capacity as representatives of a trade union, the applicants had nevertheless been obliged to ensure that their remarks fell within the limits of that right. The mayor, who had been perfectly identifiable from the leaflet, had not however been mentioned by name. He had simply been criticised in connection with his duties, and no allegations of a private nature had been made against him. The limits of acceptable criticism were wider as regards a politician, criticised in that capacity, than as regards a private individual. Moreover, the applicants' remarks, whilst rather harsh, had been made in the context of a very lively local debate of general interest. In that context, as for any individual who took part in a public debate, a degree of exaggeration, or even provocation, with the use of somewhat immoderate language, was permitted. In addition, political invective often spilt over into the personal sphere; such were the hazards of politics and the free debate of ideas, which were the guarantees of a democratic society. Moreover, the impugned remarks had not been offensive or hurtful to a degree that went beyond the framework of trade-union discourse.

Such an attack might nevertheless prove excessive in the absence of any factual basis. In that connection, the applicants had offered to bring evidence before the domestic courts but the offer had been refused for procedural reasons. The domestic courts had not placed the applicants' remarks in the context of the strident debate between them and the mayor, even though the leaflet had been intended as a response to the mayor's public accusations in a municipal newsletter, without any right of reply being afforded to the person accused or her representatives. Consequently, the applicants could not have been required to refer with any greater precision to the procedures that they mentioned, bearing in mind that they were alluding to what the mayor himself had said. The applicants did not, in their capacity as trade-union officials, have the same duty of care as that required of journalists. In any event, whilst the applicants had not complied with the procedural rules governing offers to bring evidence, they had constantly pleaded good faith and had claimed with sufficient detail that they had serious enough

grounds on which to allege that their comments were true. Those comments were not therefore devoid of any factual basis. Moreover, the expressions used had not reflected any manifest personal animosity; on the contrary, they fell within the limits of admissible criticism afforded to trade-union representatives in a debate of general interest. Lastly, the applicants had been fined EUR 1,000 each and ordered to pay EUR 5,000 jointly in damages. In view of the charges, those orders had to be regarded as disproportionate. The interference with the applicants' right to freedom of expression, in their capacity as trade-union representatives, had not therefore been necessary in a democratic society.

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

Article 41: EUR 4,000 to each of the applicants in respect of pecuniary damage; finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

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**Criminal investigation for "denigrating Turkishness":** *violation*

*Altuğ Taner Akçam v. Turkey* - 27520/07
Judgment 25.10.2011 [Section II]

*Facts* – In October 2006 the applicant, a history professor involved in research and publication on the historical events of 1915 concerning the Armenian population in the Ottoman Empire, published an editorial opinion in a bilingual Turkish-Armenian newspaper criticising the prosecution of the late editor of that newspaper for the crime of "denigrating Turkishness" under Article 301 of the Criminal Code. Subsequently, a complaint was lodged against the applicant by a private individual in respect of the same offence. The public prosecutor took a statement from the applicant, but the charges were ultimately dropped.

*Law* – Article 10: The Court first had to establish whether a mere criminal investigation commenced against the applicant constituted an interference with his right to freedom of expression. While the investigation had been instigated by a criminal complaint lodged by a private individual, the applicant had been summoned to the prosecutor's office to give a statement. Although the charges against him had been dropped, that did not necessarily mean that he was safe from any future investigation. The applicant was clearly the target of an intimidation campaign which presented him as a "traitor" and a "spy" to the public on account of his research and publications. He had also received hate mail containing insults and even death threats. Such a situation had inevitably forced the applicant to modify his conduct by displaying self-restraint in his academic work in order not to risk prosecution under Article 301 of the Criminal Code. In so far as the Government relied on amendments to that provision which it was claimed would significantly reduce the number of prosecutions, the measures adopted did not provide sufficient safeguards as the Ministry of Justice still granted authorisation to prosecute in a large number of cases. The fact that Article 301 had not been applied in this particular type of case for a considerable time did not mean that it would not be applied in the future, for example, in the event of a change of political will or policy by a newly formed Government. The jurisprudence of the Court of Cassation also clearly established that any criticism of the official thesis on the Armenian issue was caught by Article 301. This combination of the criminal investigation commenced against him, the domestic courts' case-law on the Armenian issue and the public campaign sparked by the investigation confirmed that there was a real risk of the applicant being prosecuted in the future and constituted an interference with his right to freedom of expression.

Following several controversial cases against prominent writers and journalists, such as Orhan Pamuk and Hrant Dink, the respondent Government had amended Article 301 of the Criminal Code with a view to bringing it into line with the requirements of Article 10 of the Convention. The term "Turkishness" had been replaced by "Turkish nation", the maximum length of imprisonment reduced and any criminal investigation under this provision required the prior approval of the Ministry of Justice. However, despite the replacement of the term "Turkishness", there seemed to have been no change or major difference in the interpretation of this concept by the domestic courts. Even though the legislature's aim of preserving values and State institutions from public denigration could be accepted to an extent, the scope of the terms of Article 301 remained too wide and too vague and constituted a continuing threat to the exercise of the right to freedom of expression in that the wording did not enable individuals to regulate their conduct or to foresee the consequences of their acts. Article 301 of the Criminal Code did not, therefore, meet the "quality of law" requirement.

*Conclusion*: violation (unanimously).

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

(See also *Dink v. Turkey*, nos. 2668/07 et al., 14 September 2010, Information Note no. 133)

## ARTICLE 11

### Freedom of association

**Dissolution of squatters' association:** *violation*

*Association Rhino and Others v. Switzerland* - 48848/07
Judgment 11.10.2011 [Section II]

*Facts* – According to its articles of association, the aim of the applicant association was to provide its members – who were squatters – with affordable community-based housing. To this end it unlawfully occupied buildings. As part of its activities the association had, since 1988, occupied several empty buildings, including fourteen flats located in three blocks of flats, most of which had stood vacant for some time. The owners of the flats requested the Principal Public Prosecutor to order the squatters' eviction, and their request was granted. However, the eviction orders were never enforced owing to a local policy of tolerating the presence of squatters as long as the owners of the blocks of flats did not have a building or renovation permit. The occupied blocks of flats required renovation so that the owners could rent the flats out again. Starting in 1992 the owners, who had given up seeking the squatters' eviction, made various unsuccessful attempts to negotiate the sale of the buildings or the conclusion of a long-term lease with the association. In 2002 they applied for building permits in order to carry out the renovation work. After various sets of proceedings brought by the association and the squatters challenging the applications, final building permits were granted in September 2005. The Principal Public Prosecutor therefore ordered the occupied buildings to be vacated as work was scheduled to begin in November 2005. Following parallel proceedings, the court of first instance, at the owners' request, ordered the dissolution of the association in 2006 with immediate effect. On appeal, the Court of Justice upheld the dissolution order but gave it retrospective effect. This had significant financial implications for the members, since the association was deemed never to have existed. In 2007 the Federal Court rejected the appeals lodged by the association. The liquidator appointed by the court of first instance adopted several measures, including freezing the association's post office and bank accounts. In July 2007 the owners regained possession of the blocks of flats. The operation to evict the occupants with police assistance is the subject of another application pending before the European Court.

*Law* – Article 11: The impugned measure had consisted in the wholesale dissolution of the association. This was a severe measure that had significant financial implications for its members and could be tolerated only in very serious circumstances. With regard to the legitimate aim of protecting the rights of others, it was clear from the various sets of proceedings brought by the owners that they had sought the dissolution of the association after attempting unsuccessfully to secure the squatters' eviction. However, the dissolution of the association, which was essentially a legal act, had not by itself put an end to the occupation of the buildings, judged to be unlawful. Accordingly, it could not be claimed that the measure in question had been aimed in a practical and effective manner at protecting the owners' rights. Nor was the Court satisfied that the dissolution of the association had been necessary in order to prevent disorder, even assuming that the association or its activities had disturbed public order since its establishment in 1988. Consequently, regard being had to the fact that the occupation of the buildings had been tolerated for a long time by the authorities, and to the organisation's aims as set out in its articles of association, the respondent Government had not adequately demonstrated that its dissolution, which had impaired the very essence of the right to freedom of association, had been the only available means of achieving the authorities' aims. In the Court's view, other measures could have entailed a less serious infringement of the rights guaranteed by Article 11. Accordingly, the interference could not be said to have been proportionate to the aims pursued.

*Conclusion*: violation (unanimously).

Article 41: The transfer of the association's property to the authorities had clearly been a direct consequence of its dissolution. The Court did not share the Government's view that the applicants should make an application for review to the domestic courts in order to claim compensation for the pecuniary damage sustained. It awarded the applicants jointly the sum of EUR 65,651 (corresponding to the association's assets at the time of its dissolution) in respect of pecuniary damage.

# ARTICLE 14

## Discrimination (Article 4)

### Obligation for lawyer to act as unpaid guardian to a mentally ill person: *no violation*

*Graziani-Weiss v. Austria* - 31950/06
Judgment 18.10.2011 [Section II]

(See Article 4 above, page 11)

## Discrimination (Article 8)

### Denial of citizenship to a child born out of wedlock: *violation*

*Genovese v. Malta* - 53124/09
Judgment 11.10.2011 [Section IV]

*Facts* – The applicant was born out of wedlock of a British mother and a Maltese father. After the latter's paternity had been established judicially, the applicant's mother filed a request for her son to be granted Maltese citizenship. Her application was rejected on the basis that Maltese citizenship could not be granted to an illegitimate child whose mother was not Maltese.

*Law* – Article 14 in conjunction with Article 8

(a) *Applicability* – Denial of citizenship might raise an issue under Article 8 because of its impact on an individual's private life, which concept was wide enough to embrace aspects of a person's social identity. Even though the right to citizenship was not as such a Convention right and its denial in the applicant's case did not give a rise to a violation of Article 8, the Court considered that its impact on the applicant's social identity was such as to bring it within the general scope and ambit of that provision.[1]

(b) *Merits* – Recalling its jurisprudence in the cases of *Inze v. Austria*[2] and *Marckx v. Belgium*[3], as well as the 1975 European Convention on the Legal Status of Children Born out of Wedlock – to date not ratified by Malta – the Court reiterated that very weighty reasons would have had to be advanced to justify an arbitrary difference in treatment on the ground of birth.

The applicant was in an analogous situation to other children with a father of Maltese nationality and a mother of foreign nationality. The only distinguishing factor, which had rendered him ineligible to acquire citizenship, was the fact that he had been born out of wedlock. The Court was not convinced by the Government's argument that children born in wedlock had a link with their parents resulting from their parents' marriage, which did not exist in cases of children born out of wedlock. It was precisely a distinction in treatment based on such a link which Article 14 prohibited, unless it was otherwise objectively justified.

Furthermore, the Court could not accept the argument that, while the mother was always certain, a father was not. In the applicant's case, his father was known and was registered in his birth certificate, yet the distinction arising from the Citizenship Act had persisted.

Accordingly, no reasonable or objective grounds had been given to justify that difference in treatment.

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

Article 41: No claim made in respect of damage.

1. See also *Karassev v. Finland* (dec.), no. 31414/96, 12 January 1999, Information Note no. 2; and *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, 23 January 2002.
2. *Inze v. Austria*, no. 8695/79, 28 October 1987.
3. *Marckx v. Belgium*, no. 6833/74, 13 June 1979.

# ARTICLE 34

## Victim

### Applicant purporting to have acquired Convention claim under a deed of assignment: *absence of victim status*

*Nassau Verzekering Maatschappij N.V. v. the Netherlands* - 57602/09
Decision 4.10.2011 [Section III]

*Facts* – The applicant company insured a firm of brokers against professional-liability claims. The brokers were sued by a third party and ordered to pay damages. Their appeal against that order was dismissed as being out of time, allegedly as a result of an oversight by court bailiffs, and the applicant company was obliged to pay the damages under the terms of the insurance policy. The brokers then signed a deed assigning to the applicant company any claims they might have against the Netherlands State under Article 6 of the Convention as a result of their being denied access to the appeal court by the bailiffs' oversight. The European Court examined as a preliminary issue the question whether the applicant company had thereby acquired "victim" status.

*Law* – Article 34: Under the Court's established case-law, the concept of "victim" had to be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act. In addition, in order to claim "victim" status, applicants had to show a sufficiently direct link between them and the harm they considered they had sustained on account of the alleged violation. There were examples in the Court's case-law of applicants having been accorded standing despite not having themselves been victims of the alleged violation. These included the heirs and next-of-kin of deceased applicants, and company shareholders where it was impossible for the company to apply to the Convention institutions through its statutory organs.

The present case was, however, different. The applicant company was not itself a party to the impugned domestic proceedings and had not derived vicarious "victim" status from kinship, inheritance, or institutional links to the brokers, or from any other form of succession. Instead, it had sought to obtain by a deed of assignment – a contract under domestic civil law – the right to lodge an application under the Convention with the Court. The right of individual petition vouchsafed by Article 34 was not a proprietary right. Nor was it transferable as if it were. Whatever the transaction's validity in terms of domestic law, it would be out of keeping with the nature of the Convention as an instrument protecting basic human rights and the Court itself as its guardian to allow the status of applicant to be transferred at will.

*Conclusion*: inadmissible (incompatible *ratione personae*).

# ARTICLE 35

## Article 35 § 1

**Exhaustion of domestic remedies**
**Effective domestic remedy – Georgia**

**Provisions of new Prison Code affording improved protection of rights to health-care in prison:** *effective remedy*

*Goginashvili v. Georgia* - 47729/08
Judgment 4.10.2011 [Section III]

*Facts* – In his application to the European Court, the applicant, who was suffering from a number of serious chronic disorders, including renal failure and hepatitis, alleged that the prison authorities had not provided him with adequate medical care, in breach of Article 3 of the Convention. The Government raised a preliminary objection of failure to exhaust domestic remedies in that the applicant had not sued the authorities for monetary compensation under Article 207 of the General Administrative Code and Article 413 of the Civil Code or applied for a court order under Articles 24 and 33(1) of the Code of Administrative Procedure requiring the authorities to take additional measures to protect his health.

*Law* – Article 35 § 1: An important consideration when assessing the effectiveness of a domestic remedy for allegedly inadequate medical care for seriously ill prisoners was whether the remedy – which in principle could be both preventive and compensatory in nature – could bring direct and timely relief. Where the prisoner had resorted to the remedy he considered the most appropriate to his situation, he was not then required to pursue an alternative remedy.

As regards the Government's objection that the applicant had failed to sue for compensation, the Court noted that the prison authority had been well aware of the applicant's medical condition and of his persistent complaints of lack of adequate treatment. Furthermore, he had issued proceedings to have his prison sentence suspended on health grounds which had brought his medical grievances before the post-sentencing judges also. He had thus placed both the prison and judicial authorities sufficiently on alert with respect to his medical condition, demanding, at the moment when medical intervention was capable of stopping further evolution of the disease, preventative and thus more valuable, remedial action aimed at a direct alleviation of the sufferings caused by his serious renal dysfunction. It would thus be inappropriate to reproach him for not also requesting monetary compensation.

As to the second judicial remedy suggested by the Government, general provisions (such as those set out in Articles 24 and 33(1) of the Code of Administrative Procedure) entitling individuals to seek injunctive relief against State agencies with a view to protecting their rights or legitimate interests could only operate effectively in cases of inadequate medical care in prison if underpinned by prison rules specifically providing a right to health care and clarifying how and within what time-limits the prison and judicial authorities had to respond to claims. As the Court had found in previous cases, the rules in force when the applicant's

application was lodged[1] had lacked sufficient clarity and precision to constitute an effective domestic remedy. The new Prison Code, however, which had entered into force on 1 October 2010, now clearly provided for a detainee's right to health care in prison and contained precise rules on the procedure for submitting complaints combined with important procedural safeguards. Accordingly, with effect from 1 October 2010 Article 35 § 1 of the Convention should start to operate with deference to the formalities prescribed by that Code. Nevertheless, in the applicant's case, since the most fundamental values – health, well-being and life – were at stake, it would not be reasonable or compatible with the compelling humanitarian considerations applicable under Articles 2 and 3 of the Convention to declare his complaint inadmissible in its entirety owing to the introduction of a better domestic remedy after the date the application was lodged. On the contrary, the very nature of the complaint – which concerned the right to a swift and adequate medical response to prevent further deterioration of a prisoner's health – would not obviously permit any subsequently adopted rules of a preventative nature to extinguish the State's past omissions.

Accordingly, there had been no failure to exhaust domestic remedies for the period until 1 October 2010, but the applicant had not exhausted the remedies available under the new Prison Code, read in conjunction with Articles 24 and 33(1) of the Code of Administrative Procedure, in respect of the period after that date.

*Conclusion*: preliminary objection partially dismissed (unanimously).

On the merits, the Court found there had been no violation of Article 3 of the Convention as the prison authority had provided the applicant with prompt and systematic medical care.

(See also, for cases where an intervening domestic remedy was introduced in response to a pilot judgment by the Court: *Fakhretdinov and Others v. Russia* (dec.), nos. 26716/09 et al., and *Nagovitsyn and Nalgiyev v. Russia* (dec.), nos. 27451/09 and 60650/09, both 23 September 2010, Information Note no. 133)

### Effective domestic remedy – Turkey

**Request to Principal Public Prosecutor at Court of Cassation to lodge application to have Court of Cassation's decision set aside:** *ineffective remedy*

*Akçiçek v. Turkey* - 40965/10
Decision 18.10.2011 [Section II]

*Facts* – In April 2009 an assize court found the applicant guilty of complicity in attempted murder and sentenced him to imprisonment. On 1 December 2009 the judgment was upheld by the Court of Cassation. On 31 December 2009 the applicant requested the Principal Public Prosecutor at the Court of Cassation to lodge an application to have the Court of Cassation's decision set aside. His request was rejected.

*Law* – Article 35 § 1: The new Code of Criminal Procedure had provided for a new appeal procedure the conditions applicable to which were laid down in section 308 of law no. 5271, which entered into force on 1 June 2005. In the light of that provision, the Court noted that the said procedure, an application to have decisions of the Court of Cassation set aside, was an extraordinary remedy. In addition, the use of the procedure was left to the discretion of the Principal Public Prosecutor at the Court of Cassation and was not therefore a remedy directly accessible to individuals. The procedure was not subject to any specific time-limits when initiated on behalf of an accused. Accordingly, it could not be regarded as one of the domestic remedies to be exhausted within the meaning of Article 35 § 1 of the Convention.

The final domestic decision to be taken into account was the Court of Cassation's judgment of 1 December 2009. No information had been provided about the date on which it had been notified. The applicant had appealed against that judgment to the Principal Public Prosecutor at the Court of Cassation on 31 December 2009, so he must already have been aware of it on that date. The present application had been lodged on 5 July 2010, more than six months later.

*Conclusion*: inadmissible (out of time).

## Article 35 § 3 (a)

### Abuse of the right of application

**Lack of fair trial complaint concerning a token fine:** *inadmissible*

*Vasylenko v. Ukraine* - 25129/03
Decision 18.10.2011 [Section V]

*Facts* – The applicant was fined approximately EUR 3 for a speeding offence. The proceedings were conducted in his absence, despite the fact that he had been allegedly notified of the hearing date.

1. Imprisonment Act of 22 July 1999.

*Law* – Article 35 § 3: The no significant disadvantage criterion was inapplicable as it was not introduced until after the applicant's case had already been declared admissible. However, the Court had ruled in *Bock v. Germany*[1] that there could be an abuse of the right of application to an international tribunal where the amount at stake was small. Since under Article 35 § 4 of the Convention the Court could reject an application at any stage of the proceedings and the Government had raised the issue in their submissions, the Court was able to reconsider the admissibility of the applicant's case. In that connection, it noted that the impugned proceedings had borne no pecuniary or non-pecuniary importance for the applicant and that the issue of proper notification of court hearings had already been examined in a number of cases against Ukraine. Given the pettiness of the amount of the fine and the Court's overload with a large number of cases raising serious human-rights issues, it was appropriate to reject the applicant's complaint as an abuse of the right of application.

*Conclusion*: inadmissible (abuse of the right of individual application).

## Article 35 § 3 (b)

### No significant disadvantage

**Subject matter of domestic proceedings sufficiently significant:** *preliminary objection dismissed*

*Giusti v. Italy* - 13175/03
Judgment 18.10.2011 [Section II]

*Facts* – In 1985 the applicants were sued by private persons in connection with the performance of a contract of sale providing for the transfer of title to a flat in part exchange for a plot of land. The proceedings ended in 2000 with a judgment of a court of appeal dismissing the applicants' case. Before the European Court the applicants complained about the length of the proceedings. The Government raised a preliminary objection that the applicants had not suffered any significant disadvantage.

*Law* – Article 35 § 3 (b): The case-law, which remained limited in this area, only partly established the criteria on which to verify whether the violation of a right attained the "minimum threshold" of seriousness to justify its examination by an international court. The assessment of that threshold was thus, by its very nature, relative and depended on the circumstances of the case. In order to verify whether the violation of a right attained that minimum threshold, it was necessary to take into account *inter alia*: the nature of the right allegedly breached, the seriousness of the impact of the alleged violation on the exercise of the right and/or the potential consequences of the violation on the applicant's personal situation. In assessing those consequences, the Court would examine, in particular, the importance or outcome of the domestic proceedings. In the present case the applicants had complained about the length of civil proceedings concerning the performance of a contract that had lasted for fifteen years and about six months for two levels of jurisdiction. Such a duration was clearly incompatible with the "reasonable-time" requirement under Article 6 § 1 of the Convention. In the Court's view, in order to assess the seriousness of the consequences of that type of allegation, the importance of the case before the domestic courts could be decisive only if the amount involved was low or derisory. That was not so in the present case because the performance of the contract in question represented a significant value.

*Conclusion*: preliminary objection dismissed (unanimously).

The Court found that there had been a violation of Article 6 § 1 in respect of the length of the proceedings.

Article 41: EUR 6,300 to each of the applicant in respect of non-pecuniary damage.

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**Complaint concerning failure to execute a court order that had become devoid of purpose:** *inadmissible*

*Savu v. Romania* - 29218/05
Decision 11.10.2011 [Section III]

*Facts* – In their application to the European Court, the applicants complained of a failure by the authorities to execute a court order of 3 February 2003 requiring a local mayor to issue a certificate concerning the ownership of land between 1959 and 1963 which they had needed as evidence in

1. *Bock v. Germany* (dec.), no. 22051/07, 19 January 2010, Information Note no. 126.

separate proceedings for restitution of the land. The first applicant's rights to the land were in fact upheld in a decision of 27 August 2003 in the restitution proceedings, partly on the basis of a certificate issued by the municipality, although it was unclear whether this was the same certificate as that stipulated in the order of 3 February.

In the proceedings before it, the European Court decided of its own motion to examine the issue of admissibility in the light of the criteria set out in Article 35 § 3 (b) of the Convention.

*Law* – Article 35 § 3 (b): Although the main obligation requiring enforcement – the issue of a certificate concerning land-ownership rights – could not be quantified financially, the Court was ready to accept that it concerned a civil right within the meaning of Article 6 § 1 that was of importance to the applicants. There was no need to determine whether the certificate relied on in the final decision of 27 August 2003 was the same as that which had been contemplated in the proceedings against the mayor as, once the applicants' ownership rights over the land had been recognised in a final judicial decision, the purpose for which the applicants had sought to obtain the certificate had been attained. They could not, therefore, be deemed to have suffered a significant disadvantage as a result of the alleged non-execution of the final decision of 3 February 2003. Nor had the failure to enforce the obligation to pay penalties in default of production of the certificate caused a significant disadvantage as that obligation was subsidiary and only served as a mechanism for securing compliance with the main obligation. Lastly, the delay of almost seven months before the decision of 27 August 2003 was not excessive and so had not caused a significant disadvantage either. As to the two remaining criteria under Article 35 § 3 (b), respect for human rights did not require an examination of the application on the merits, as the problem of non-enforcement in Romania had already been addressed on numerous occasions by the Court, and the applicants' complaints against the mayor had been duly considered – at two levels of jurisdiction – by a domestic tribunal.

*Conclusion*: inadmissible (no significant disadvantage).

# ARTICLE 46

## Execution of a judgment

**Failure to revoke order for alien's exclusion from national territory despite Court finding a violation of right to respect for private and family life:** *violation*

*Emre v. Switzerland (no. 2)* - 5056/10
Judgment 11.10.2011 [Section II]

(See Article 8 above, page 18)

## Measures of a general character

**Respondent State required to take measures to ensure adequate safeguards in cases concerning the deportation of aliens at risk of ill-treatment in the country of destination**

*Auad v. Bulgaria* - 46390/10
Judgment 11.10.2011 [Section IV]

(See Article 3 above, page 10)

## Individual measures

**Respondent State required to refrain from demanding repayment of compensation awarded for expropriation**

*Zafranas v. Greece* - 4056/08
Judgment 4.10.2011 [Section I]

*Facts* – The applicants possessed three plots of land that were expropriated in 1988 for the purpose of building a railway line. They applied to a court of first instance for recognition of their entitlement to compensation for the expropriation. They based their claim on the contracts under which the first applicant and his mother had acquired the plots of land in 1947 from a private individual who, in turn, had acquired them under a contract concluded with the Office for the Management of Church Property in 1936 and had subsequently been granted permission to sell them by the Minister for Agriculture. In 1998 the court of first instance allowed the applicants' claim and its judgment was upheld on appeal. Following an appeal on points of law by the Greek State, the Court of Cassation quashed the judgment and remitted the case to a court of appeal. In 2003 the court of appeal dismissed the applicants' claim, holding that they had not succeeded in establishing that their predecessors had occupied the land in question for a continuous period starting thirty years before 1915, and concluding that the Greek State was the official owner of the land. That judgment was upheld by the Court of Cassation.

*Law* – Article 1 of Protocol No. 1: The applicants had been able to provide the domestic courts with a sound legal basis in support of their ownership of the land, namely the contract of sale and the decision of the Minister for Agriculture regarding the legal status of the land in question before they had acquired it. It was beyond doubt that the Minister for Agriculture would not have allowed the applicants' predecessor in title to sell the land to others if he had considered that it was State property. Admittedly, when examining the case for the second time the court of appeal had not taken into account the decision of the Minister for Agriculture, having accepted that the applicants' predecessor in title had taken advantage of the "confusion and disputes among the State authorities as to the existence or the scope of the State's right of property over the land in question and had succeeded in obtaining the adoption of the decision by the Minister for Agriculture forming the basis for its sale". However, the Court considered that the domestic authorities could not legitimately rely on an alleged lack of coordination within their internal organisation in seeking to avoid implementing lawful administrative decisions. Furthermore, with regard to the position adopted by the domestic court, its determination of the case amounted to drawing adverse inferences to the litigants' detriment on account of a situation not attributable to them concerning the State authorities' operating standards. Such an approach contravened the principle of legal certainty, which litigants inevitably relied on when carrying out property transactions. The proceedings before the domestic courts had therefore upset the "fair balance" between the demands of the public interest and the requirements of the protection of the applicants' right to the peaceful enjoyment of their possessions.

*Conclusion*: violation (unanimously).

Article 46: The applicants currently faced the risk of having to repay to the authorities the compensation awarded for the expropriation. Consequently, regard being had to the particular circumstances of the case, if the domestic authorities refrained from claiming back the compensation awarded to the applicants for the expropriation, this would constitute an appropriate form of redress by which to put an effective end to the violation of Article 1 of Protocol No. 1.

Article 41: EUR 10,000 to each of the applicants in respect of non-pecuniary damage.

# ARTICLE 1 OF PROTOCOL No. 1

## Peaceful enjoyment of possessions

### Capping of retirement pensions: *no violation*

*Valkov and Others v. Bulgaria* - 2033/04 et al.
Judgment 25.10.2011 [Section IV]

*Facts* – The Social Security Code 1999, which came into force on 1 January 2000, made significant changes to the Bulgarian retirement pension model, introducing a three-tier pension system. The first-tier, or basic, pension scheme is mandatory, public and financed mainly by social-security contributions and subsidies from the State budget. First-tier pensions are exempt from taxation but a cap is imposed on the maximum amount of pension payable (caps also existed in various forms under previous pension schemes[1]). In addition to retirement pensions, contributions to the first-tier fund are used to pay out survivors' and disability pensions, and certain health related benefits. The second-tier scheme, for individuals born on or after 1 January 1960, is mandatory and tax exempt. The third-tier scheme is voluntary with contributions freely decided by participants in the scheme, which is open to all. Contributions to both second- and third-tier pensions are directly linked to the expected benefit returns.

The applicants were pensioners who had retired on various dates between 1979 and 2002. In their application to the European Court, they complained under Article 1 of Protocol No. 1 of the statutory cap on their retirement pensions which operated whenever the nominal monthly amount of their pensions exceeded the maximum amount specified in the legislation. They also complained under Article 14 of the Convention, in conjunction with Article 1 of Protocol No. 1, of discrimination both in relation to pensioners whose pensions fell below the cap and in relation to certain high ranking officials whose pensions were exempted from the cap.

*Law* – Article 1 of Protocol No. 1: While Article 1 of Protocol No. 1 did not guarantee, as such, any right to a pension of a particular amount, where a Contracting State had in force legislation providing for the payment as of right of a pension – whether or not conditional on the prior payment of contributions – that legislation had to be regarded as generating a proprietary interest for persons satisfying its requirements and the reduction or

1. Under the Pensions Act 1957, as amended from time to time.

discontinuance of a pension could therefore constitute interference with the right to the peaceful enjoyment of possessions. In the applicants' case it was not in dispute that the interference was lawful under both domestic and Convention law.

The interference pursued a legitimate aim in the public interest. In upholding the validity of the cap the Constitutional Court had taken the view that it was based on the "requirements of social justice". For its part, the Court did not consider that it was illegitimate for the Bulgarian legislature to have had regard to social considerations, or that its judgement in that respect was manifestly without reasonable foundation. The pension systems of different countries varied in the relative emphasis they placed on redistributive *vis-à-vis* insurance elements. Comparative studies by the World Bank and the OECD showed that, while some Contracting States attached more importance to providing the same or very similar pension replacement rates to all workers, with a strong link between pensions and pre-retirement earnings, in others the accent was on pension adequacy, with little or no connection between pensions and pre-retirement earnings. That was primarily a matter for the national authorities, which had direct democratic legitimation and were better placed than an international court to evaluate local needs and conditions.

As regards proportionality, imposing a cap on the maximum amount of pension under the first tier was not in itself disproportionate, but instead fell within the State's margin of appreciation in regulating its social-security policy. In coming to that conclusion, the Court took into account the following considerations: Firstly, unlike the second- and third-tier schemes, where contributions were directly linked to the expected benefit returns, the first-tier contributions the applicants had been paying did not have an exclusive link to their retirement pensions and so could not be regarded as a sufficient ground for entitlement to matching pension benefits. Indeed, in the case of some of the applicants, the bulk of the contributions had been paid under a different economic regime when the pension fund had been an inseparable part of the general State budget and the general framework of the economy very different. Secondly, the pensions cap had been put in place and maintained at a time when the Bulgarian pension system was undergoing a comprehensive reform as part of the country's transition from a wholly State-owned and centrally planned economy to private property and a market economy. Maintaining the cap could be seen as a transitional measure accompanying the overall transformation of the pension system towards a global levelling of the amount of benefits provided and States had a wide discretion when passing laws in the context of a change of political or economic regime. Thirdly, the applicants had been obliged to endure a reasonable and commensurate reduction rather than a total loss of their pension entitlements. They had not suffered an actual decrease in the monthly payments they received or been totally divested of their only means of subsistence. As the top earners among Bulgarian pensioners, they could, therefore, hardly be regarded as having been made to bear an excessive and disproportionate burden, or as having suffered an impairment of the essence of their pension rights. Fourthly, public-pension schemes were based on the principle of solidarity between contributors and beneficiaries. Like other social-security schemes, they were an expression of a society's solidarity with its vulnerable members and thus could not be likened to private-insurance schemes. Finally, the amount of the cap had gradually increased over the years, with the result that, as a general trend, considerably fewer pensioners were affected by it.

*Conclusion*: no violation (six votes to one).

Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: As regards the applicants' allegation that they had been treated differently to pensioners whose pensions fell below the cap and were thus not affected by it, the Court saw no reason to depart from its finding under Article 1 of Protocol No. 1 that, having regard to its margin of appreciation, the Bulgarian legislature had not transgressed the principle of proportionality. As to the allegation of alleged discrimination *vis-à-vis* retirees from high office, who were exempt from the cap, the Court noted that the holding, or otherwise, of high office could be regarded as "other status" for the purposes of Article 14. However, the applicants were not able to demonstrate that, for pension purposes, they were in a relevantly similar situation to retirees from high office. They had argued that it was impossible to draw a valid distinction, for pension purposes, between the character of the respective employments of the two groups. However, the Court was not prepared to draw conclusions based on the nature of the respective tasks. These were policy judgements that in principle were reserved for the national authorities, which had direct democratic legitimation and were better placed than an international court to evaluate local needs and conditions.

*Conclusion*: no violation (unanimously).

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

*Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"* - 60642/08
Decision 17.10.2011 [Section IV]

*Facts* – The applicants deposited their foreign-currency savings with two banks in what is now Bosnia and Herzegovina: the Ljubljanska banka Sarajevo and the Tuzla branch of the Investbanka. Following the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY), they have been unable to recover their deposits. This is one of a large number of applications concerning matters of "old" foreign-currency savings following the dissolution of the former SFRY.

*Law* – Article 1 of Protocol No. 1, alone and in conjunction with Articles 13 and 14 of the Convention: The Slovenian and Serbian Governments firstly argued that the applicants had no "possessions" within the meaning of Article 1 of Protocol No. 1. However, the Court held that the applicants' claims subsisted since they had not been extinguished by the legislation of the respective successor States. Moreover, the States had accepted that the "old" foreign-currency savings formed part of the financial liabilities of the former SFRY which they should divide, as they had done with its other liabilities and assets. Finally, the States had clearly demonstrated their unequivocal commitment to ensuring that persons in the situation of the applicants obtained payment of their "old" foreign-currency savings in one way or another. The Court therefore dismissed the Governments' objections concerning incompatibility *ratione materiae*. The case was further declared admissible *ratione personae*, *loci* and *temporis*, whereas the issue of exhaustion of domestic remedies was joined to the merits.

*Conclusion*: admissible (majority).

## Deprivation of property

**Calculation of compensation for expropriation based on specific characteristics of expropriated property, not on strict market value:** *inadmissible*

*Helly and Others v. France* - 28216/09
Decision 11.10.2011 [Section V]

*Facts* – The fourteen applicants have interests, either as owners, life tenants or heirs, in plots of land within the boundary of a listed site. In December 1994 three potholers discovered a cave underneath the land in question, decorated with drawings, paintings and engravings dating back some 30,000 years. Now known as the "Chauvet Cave", it is one of the finest examples of prehistoric artwork. Stringent protection measures were taken immediately at the site. In January 1995, by virtue of prefectoral orders, access to the cave was prohibited and the State was authorised to occupy the land for five years. In the absence of a friendly settlement, the State initiated expropriation proceedings in the public interest. In May 2007, after ten years of proceedings, a court of appeal determined, in a decision that was final, the amount of compensation payable.

*Law* – Article 1 of Protocol No. 1: The Court noted, firstly, that the expropriation of the applicants' property had had a basis in law and had been in the public interest, given the absolute necessity to guarantee the protection of the Chauvet Cave.[1] It went on to determine whether a "fair balance" had been struck between the general interest of the community and the requirements of the protection of the individual's fundamental rights.

In this connection, the Court noted that the applicants had been awarded approximately EUR 770,000 in compensation in proceedings before the expropriations judge. That sum included the principal compensation award, corresponding to the market value of the expropriated land plus the increase in value brought about by the cave, and also a reinvestment allowance, representing the amount of costs and fees the persons concerned would have to incur in reconstituting their assets in kind. In determining this increase in value, the expropriations judge had based his assessment, by way of comparison, on the updated value of the Lascaux Cave as assessed at the time of its donation to the State in 1972, and had taken into account the award paid to the three potholers who had made the discovery. Accordingly, the expropriations judge had not simply determined the compensation on the basis of the market value of the land alone, but had taken into consideration the increase in value resulting from the presence of the cave and, in so doing, the specific features of the expropriated property. The applicants had complained that the amount they had been repaid did not correspond

1. With regard to this point, the Court had already had occasion to find that protection of a country's historical and cultural heritage was a legitimate aim capable of justifying expropriation (see, in particular, *Kozacıoğlu v. Turkey* [GC], no. 2334/03, 19 February 2009, Information Note no. 116).

to the market value of their property since the compensation had not been assessed in relation to market prices for major works of art. However, that criticism was unfounded. It was not for the Court to substitute its own view for that of the domestic authorities in determining the basis on which compensation should be assessed. Furthermore, while the compensation awarded for expropriation should normally be determined on the basis of the property's market value, it had to be borne in mind that the Chauvet Cave did not lend itself to strict commercial evaluation in view of the inherent necessity of protecting it owing to its exceptional features, and the legal constraints to which it was thus subject. Lastly, the compensation had been determined following a procedure that had ensured an overall assessment of the consequences of the expropriation, in which the individuals concerned had been given due opportunity to defend their rights, and the expropriations judge had, to that end, applied criteria which did not appear arbitrary. Accordingly, the respondent State had not overstepped its margin of appreciation and the applicants had obtained a sum that was reasonably related to the value of the property of which they had been dispossessed. The "fair balance" between the demands of the general interest of the community and the protection of the right to peaceful enjoyment of possessions had therefore not been upset.

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

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### *2. Practical Guide on Admissibility Criteria in German*

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