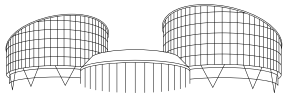

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law

No. 156 October 2012

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Jurisdiction of States

Jurisdiction of Moldovan and Russian Governments in relation to educational policy within separatist region of the Republic of Moldova

Catan and Others v. the Republic of Moldova and Russia - 43370/04, 8252/05 and 18454/06
Judgment 19.10.2012 [GC]

Facts – The applicants were children and parents from the Moldovan community in Transdniestria, a region in the eastern part of the territory of the Republic of Moldova over which the Moldovan Government do not exercise control. This area is governed by the "Moldavian Republic of Transdniestria" (the "MRT"), a separatist movement. The "MRT" has not been recognised by the international community. The applicants complained about the effects on their and their children's education and family lives brought about by the language policy of the separatist authorities. The core of their complaints relate to measures taken by the "MRT" authorities in 2002 and 2004 which forbade the use of the Latin alphabet in schools and required all schools to register and start using an "MRT"-approved curriculum and the Cyrillic script. These actions involved the forcible eviction of pupils and teachers from their schools, and the subsequent closure and relocation of the schools to distant and poorly equipped premises. The applicants further contended that they were subjected to a systematic campaign of harassment and intimidation by representatives of the "MRT" regime and private individuals. They claimed that children were verbally abused on their way to school and stopped and searched by the "MRT" police and border guards, who confiscated Latin script books when they found them and that in addition the two schools located in "MRT"-controlled territory were the target of repeated acts of vandalism. The applicants alleged that the events in question fell within the jurisdiction of both of the respondent States.

Law – Article 1: A State's jurisdictional competence under Article 1 is primarily territorial. However, in exceptional cases, acts of the Contracting States performed or producing effects outside their territories can constitute an exercise of jurisdiction. A State can exercise jurisdiction extra-territorially through the assertion of authority and control by its agents over an individual or individuals; or when as a consequence of lawful or unlawful military action it exercises effective control of an area outside its national territory.

(a) *Jurisdiction of the Republic of Moldova* – All three schools were at all times situated within Moldovan territory. Though it was not disputed that Moldova had no authority over the area in question, and did not control the acts of the "MRT", in the *Ilaşcu* judgment the Court held that individuals detained in Transdniestria fell within Moldova's jurisdiction because Moldova was the territorial State, even though it did not have effective control over the Transdniestrian region. The Court held in that case that Moldova therefore had an obligation under Article 1 of the Convention to take the measures within its power to secure the Convention rights and freedoms. The Court saw no ground here on which to distinguish the present case. The fact that the region was recognised under public international law as part of Moldova's territory gave rise to an obligation to use all legal and diplomatic means available to it to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention to those living there.

Conclusion: within the jurisdiction (unanimously).

(b) *Jurisdiction of the Russian Federation* – As the key events in this case fell within the period of time considered by the Court in the *Ilaşcu* judgment, and given that in that case the Court concluded that the applicants came within the "jurisdiction" of the Russian Federation for the purposes of Article 1 of the Convention, in the present case the burden lay on the Russian Government to establish that Russia did not exercise jurisdiction in relation to the events complained of. The Court accepted that there was no evidence of any direct involvement of Russian agents in the action taken against the applicants' schools, and went on to consider whether Russia had effective control over the "MRT". Having regard to the Russian military presence in the area, the Court accepted that the number of Russian forces stationed there had decreased significantly and was small in relation to the size of the territory. Nevertheless, as the Court had found in *Ilaşcu*, in view of the size of the Russian army's arsenal in the region its influence persisted. The historical background also had a significant bearing – the separatists had managed to secure power in 1992 only with the help of the Russian military. Further, the Court had found in *Ilaşcu* that the "MRT" had only survived during the period in question by virtue of Russia's economic support, and it was noted that the Russian Government continued to spend large sums every

year providing humanitarian aid to the population of Transdniestria.

No evidence to discredit the findings in *Ilaşcu* had been adduced, and the ongoing Russian military presence sent a strong signal of continued support for the "MRT" regime. Therefore, the Russian Government had not persuaded the Court that the conclusions it reached in *Ilaşcu* were inaccurate, and the applicants in the present case fell within Russia's jurisdiction.

Conclusion: within the jurisdiction (sixteen votes to one).

Article 2 of Protocol No. 1: It was difficult to establish in detail the facts relating to the applicants' experiences following the reopening of the schools, but the Court noted that the use of the Latin alphabet constituted an offence in the "MRT"; that it was clear that the schools had had to move to new buildings which were often at significant distances; and that the number of pupils attending the schools affected had significantly decreased. These uncontested facts corroborated the general thrust of the applicant's allegations. The measures taken and the harassment that the applicants suffered constituted interferences with the applicant pupils' rights of access to educational institutions and to be educated in their national language. In addition, the Court considered that the measures amounted to an interference with the applicant parents' rights to ensure their children's education and teaching in accordance with their philosophical convictions, and the Court noted that Article 2 of Protocol No. 1 must be read in the light of Article 8 of the Convention. In considering whether the interference with the applicants' rights could be considered to be justified, it was observed that there was no evidence to suggest that the measures taken by the "MRT" authorities in respect of these schools pursued a legitimate aim. Indeed, it appeared that the "MRT"'s language policy, as applied to these schools, was intended to enforce the Russification of the language and culture of the Moldovan community. The Court then considered the responsibility of the respondent States as regards this interference.

(a) *Obligations of the Republic of Moldova* – In contrast to the position in *Ilaşcu*, in which the Court found that Moldova had not taken all available measures to end the Convention violation in that case, in the instant case it considered that the Moldovan Government had made considerable efforts to support the applicants. In particular, following the requisitioning of the schools' former buildings by the "MRT", they had paid for the rent and refurbishment of new premises as well as equipment, staff salaries and transport costs. They had thus fulfilled their positive obligations in respect of the applicants.

Conclusion: no violation (unanimously).

(b) *Obligations of the Russian Federation* – There was no evidence of any direct participation by Russian agents in the measures taken against the applicants. Nor was there any evidence of Russian involvement in or approbation for the "MRT"'s language policy in general. However, Russia had exercised effective control over the "MRT" during the period in question. It was not necessary to determine whether or not Russia had exercised detailed control over the policies and actions of the subordinate local administration. By virtue of its continued military, economic and political support for the "MRT", which could not otherwise survive, it had responsibility under the Convention for the violation of the applicants' rights to education.

Conclusion: violation (sixteen votes to one).

Article 41: EUR 6,000 in respect of non-pecuniary damage to each applicant named in the Schedule to the case.

(See also *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, 8 July 2004, Information Note no. 66; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 7 July 2011, Information Note no. 143; *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, 15 November 2011, Information Note no. 146)

Jurisdiction in relation to detention in the United Nations Detention Unit (The Hague) of a Congolese remand prisoner who was transferred to the custody of the International Criminal Court: *inadmissible*

Djokaba Lambi Longa v. the Netherlands - 33917/12
Decision 9.10.2012 [Section III]

Facts – In 2005 the applicant, a Congolese national, was arrested in Kinshasa and charged with participation or complicity in murder. His detention on remand was extended several times. In March 2011 the applicant was transferred from detention in the Democratic Republic of the Congo to the custody of the International Criminal Court (ICC) in The Hague to give evidence as a defence witness, which he did in March and April 2011. In June 2011 he lodged an asylum request with the Netherlands authorities and asked the ICC to order a stay of

his removal to the Democratic Republic of the Congo. In July 2011 Trial Chamber I of the ICC decided that the ICC had to provide a proper opportunity for the Netherlands authorities to consider the applicant's asylum request and for the applicant to make his case. In September 2011 the Immigration and Naturalisation Service of the Netherlands informed the applicant that since he was not within the jurisdiction of the Netherlands it was not possible for him to request asylum and that his request would be treated as a request for protection, to be considered in the light of the prohibition of *refoulement* flowing from the 1951 Convention Relating to the Status of Refugees and Article 3 of the European Convention. Subsequently, the applicant challenged the lawfulness of his detention before the Dutch courts, which held that although the Netherlands were prepared to give consideration to the applicant's request for protection and had asked the ICC to continue the applicant's detention, the detention of the applicant had not for that reason been brought under the authority or control of the Netherlands authorities. Before the European Court the applicant complained under Article 5 § 1 of the Convention that his continued detention in the United Nations Detention Unit was unlawful. The Congolese title for his detention, such as it was, had expired in July 2007 and had not been renewed. The ICC had no legal ground to keep him detained after he had given evidence. The Netherlands authorities had never even claimed that there was a title for the applicant's detention in Netherlands domestic law. He also alleged a violation of Article 13 of the Convention in that he had not had any effective recourse in the domestic legal system to challenge the legality of his detention. In September 2012 the applicant withdrew his asylum request. He is currently detained in the United Nations Detention Unit within Scheveningen Prison, The Hague.

Law – Article 37 § 1: Although the applicant had withdrawn his request for asylum, which unambiguously entailed the relinquishment of his efforts to seek an order from the Netherlands authorities for his release from custody, he had not so informed the Court himself (Rule 47 § 6), nor had he withdrawn his application. The Court was thus left in uncertainty as to whether the applicant wished the Court nonetheless to address the merits of his case. However, the application raised important questions with regard to the application of Article 1 of the Convention. In particular, it touched on essential aspects of the functioning of international criminal tribunals having their seat within the territory of a Contracting State and invested with the power to keep individuals in custody. Moreover, an answer to the questions posed by the present application was urgently required given the uncertainty that had arisen from a recent judgment of the domestic courts in a similar case. The Court therefore decided not to strike the application out of its list.

Article 1: In so far as the applicant invoked the territorial principle, it would in the Court's view be unthinkable for any criminal tribunal, domestic or international, not to be vested with powers to secure the attendance of witnesses. The power to keep them in custody, either because they were unwilling to testify or because they were detained in a different connection, was a necessary corollary. This power was implied in the case of the NATO Status of Forces Agreement, Article VII of which granted the sending State extraterritorial powers to try and to police; explicit provision for such a power was made for the International Criminal Tribunal for the Former Yugoslavia in Rule 90 *bis* of its Rules of Procedure and Evidence. The applicant had been brought to the Netherlands as a defence witness in a criminal trial pending before the ICC. He had already been detained in his country of origin and remained in the custody of the ICC. The fact that the applicant was deprived of his liberty on Netherlands soil did not of itself suffice to bring questions touching on the lawfulness of his detention within the "jurisdiction" of the Netherlands as that expression was to be understood for the purposes of Article 1. As long as the applicant was neither returned to the Democratic Republic of the Congo nor handed over to the Netherlands authorities, the legal ground of his detention remained the arrangement entered into by the ICC and the authorities of the Democratic Republic of the Congo under Article 93 § 7 of the Statute of the International Criminal Court. In sum, the applicant's detention had a basis in the provisions of international law governing the functioning of the ICC and binding also on the Netherlands.

As regards the alleged insufficiency of human rights guarantees offered by the ICC, it had powers under Rules 87 and 88 of its Rules of Procedure and Evidence to order protective measures, or other special measures, to ensure that the fundamental rights of witnesses were not violated. It could not be decisive that the orders given by the Trial Chamber in the use of its said powers would not necessarily result in the applicant's release from detention by the authorities of the Democratic Republic of the Congo, as the applicant appeared to suggest. The Convention did not impose on a

State that had agreed to host an international criminal tribunal on its territory the burden of reviewing the lawfulness of deprivation of liberty under arrangements lawfully entered into between that tribunal and States not party to it.

The applicant's final argument was that since the Netherlands had agreed to examine his asylum request, it necessarily followed that the Netherlands had taken it upon itself to review the lawfulness of his detention on the premises of the ICC – and to order his release, presumably onto its territory, if it found his detention unlawful. The Court, for its part, failed to see any such connection in view of its well-established case-law, according to which the right to political asylum was not contained in either the Convention or its Protocols; the Convention did not guarantee, as such, any right to enter, reside or remain in a State of which one was not a national; and, finally, States were, in principle, under no obligation to allow foreign nationals to await the outcome of immigration proceedings on their territory.

Conclusion: inadmissible (incompatible *ratione personae*).

(See also *Galić v. the Netherlands* (dec.), no. 22617/07, and *Blagojević v. the Netherlands* (dec.), no. 49032/07, decisions of 9 June 2009, Information Note no. 120)

ARTICLE 2

Life
Effective investigation

Murder of two villagers by soldiers, followed by a preliminary investigation started over thirteen years ago and still pending: *violations*

Nihayet Arıcı and Others v. Turkey - 24604/04 and 16855/05
Judgment 23.10.2012 [Section II]

Facts – The applicants are respectively the wife and children of the late Mehmet Arıcı and the parents of the late Muhsin Güngör. In September 1999 the two men's bodies were found buried under a rock behind a village close to the Iraqi border which was under military control at the time. The administrative and criminal proceedings failed to produce results. The investigation is ongoing.

Law – Article 2

(a) *Substantive aspect*: It was clear from the pu–blic prosecutor's decision of November 1999 declining jurisdiction *ratione materiae* that military units had been stationed near the village and had subjected the applicants' relatives to checks. The accounts given to the national authorities by the various witnesses had been consistent and the statements made by the members of the armed forces confirmed that an operation had been conducted in the vicinity of the village. Lastly, a report had been drawn up on the search of Mehmet Arıcı's home by military personnel. The witness statements had also been corroborated by the autopsy report and the evidence gathered, such as the spent cartridges which were found in the area where the bodies had been discovered and which matched the type of ammunition used in armed forces personnel weapons. Neither the applicants' relatives nor the other persons arrested by the soldiers had been armed, nor had they been dressed in a way that would suggest that they were members of an illegal armed organisation. According to the autopsy report, they had been killed by bullets to the head and the thorax. Lastly, the additional criminal investigation had established that the armed forces had been stationed in the village itself at the time of the events. The national authorities had not furnished any explanation as to what had happened after the applicants' relatives had been arrested, nor had they given any reasons capable of justifying the use of lethal force by their agents. Consequently, the applicants' relatives had been killed by members of the armed forces in the circumstances described in the decision of November 1999.

Conclusion: violation (unanimously).

(b) *Procedural aspect*: The criminal investigation was still pending, with no timetable set for its completion. In all, two criminal investigations and one administrative investigation had been conducted, none of which had succeeded in establishing the circumstances of the men's deaths or identifying those responsible. The villagers had informed the public prosecutor that seven bodies had been discovered, including that of Mehmet Arıcı. However, the prosecutor had not taken the trouble, for security reasons, to go to the scene in order to record in detail the evidence found there, but had instead requested the *muhtar* to bring back the bodies himself for the purposes of the autopsy. Furthermore, although the villagers had found spent cartridges and a live round of ammunition at the scene of the incident, the prosecutor had not ordered any ballistics tests. Despite instituting a criminal investigation into the persons allegedly responsible, the prosecutor had not taken possession of the search report drawn up by the soldiers who searched the house of Mehmet Arıcı, which

had been signed by the dead man's daughter, and had not questioned the latter. He had taken evidence from a number of soldiers without managing to establish which of them had taken part in the operation at issue. The prosecutor had also been sent a list of soldiers by the military authorities but had drawn no conclusions from it with regard to the men's deaths. In his statement, the *muhtar* said that he had gone with a professional soldier to the headquarters of the commando units located in the area, where he had been informed that an operation had been conducted in the village and that five people, including Mehmet Arıcı, had been arrested and handed over to the gendarmes. However, neither the soldier in question nor the commanding officer of the commando unit had been questioned by the public prosecutor. In the case file sent by the Government, some statements from armed forces personnel were missing, while others were illegible; meanwhile, other members of the armed forces had still not been questioned. Hence, the domestic authorities had not conducted a thorough and effective investigation into the circumstances surrounding the deaths of the applicants' relatives.

Conclusion: violation (unanimously).

Article 46: The Court had found a violation of the Convention on account of the fact that the applicants' relatives had been killed by soldiers in the circumstances described in the public prosecutor's decision of November 1999 declining jurisdiction *ratione materiae*, and the fact that the domestic authorities had not conducted a thorough and effective investigation into the circumstances surrounding the deaths. The applicants had not submitted any claim for pecuniary or non-pecuniary damage under Article 41. However, the thrust of their allegations was that their relatives had been killed by members of the armed forces and that they had had no remedy in domestic law by which to claim compensation. Consequently, in view of the particular circumstances of the applications and the fact that the criminal investigation was still pending before the domestic authorities, the Court considered that the respondent State must take all necessary measures, subject to supervision by the Committee of Ministers, to ensure that the preliminary investigation, which was still ongoing after more than thirteen years, was concluded without delay in order to shed light on the circumstances in which the applicants' relatives had been killed, and must take the appropriate action regarding the compensation to be awarded to the applicants.

ARTICLE 3

Torture

No plausible explanation offered for injuries suffered while in detention: *violation*

Virabyan v. Armenia - 40094/05
Judgment 2.10.2012 [Section III]

(See below, page 16)

Inhuman treatment
Degrading treatment
Effective investigation

Ill-treatment by police of journalist attempting to report on a matter of public interest and inadequate investigation: *violations*

Najafli v. Azerbaijan - 2594/07
Judgment 2.10.2012 [Section I]

(See Article 10 below, page 33)

Inhuman treatment
Degrading treatment
Expulsion

Secret transfer of person at risk of ill-treatment in Uzbekistan to third-party State where he was beyond the protection of the Convention: *violation*

Abdulkhakov v. Russia - 14743/11
Judgment 2.10.2012 [Section I]

Facts – The applicant left his native Uzbekistan in August 2009 after being fined for participating in unlawful religious activities. He travelled to Moscow where the Russian authorities arrested and detained him on the grounds that he was wanted in Uzbekistan for involvement in extremist activities. He applied for refugee status in Russia but this was refused and an order was made for his extradition to Uzbekistan. His appeal against that order was rejected by the Supreme Court on 14 March 2011, on the grounds that diplomatic assurances given by the Uzbek authorities to the effect that he would not be subjected to torture or ill-treatment were sufficient to assure his protection. The extradition order was not enforced, however, because of an interim measure issued by the European Court requiring the Russian Government not

to extradite him to Uzbekistan till further notice and in June 2011 he was released as the maximum period allowed for his detention under Russian law had expired. On 23 August 2011 the applicant was abducted by a group of men in plain clothes in the centre of Moscow. He says that he was then taken to the airport and flown to Tajikistan, where he was handed over to the Tajik police and detained with a view to his extradition to Uzbekistan. He was released in November 2011 and went into hiding in Tajikistan.

Law – As regards the facts, the Court found it established that the applicant had been kidnapped and transferred against his will into the custody of the Tajik authorities, with the knowledge and either passive or active involvement of the Russian authorities. The Government had not advanced any convincing explanation for his presence in Tajikistan. In particular, they had not explained how he could have crossed the border without his passport, which had been retained by the Russian migration authorities.

Article 3

(a) *Extradition to Uzbekistan* – The Court had found in a number of previous cases that ill-treatment of detainees was widespread in Uzbekistan and that the practice of torture against those in police custody was "systematic" and "indiscriminate". People such as the applicant who were accused of criminal offences in relation to their involvement with prohibited religious organisations in Uzbekistan were at increased risk. Although the applicant's situation had been brought to their attention in the refugee status proceedings, the Russian authorities had refused to examine the relevant international reports and had instead attached great importance to the diplomatic assurances provided by the Uzbek authorities. However, the Court had previously warned against reliance on diplomatic assurances against torture from States where torture was endemic or persistent and, in any event, the assurances provided by the Uzbek authorities had been phrased in general stereotyped terms and had not provided for any monitoring mechanism. The applicant faced a serious risk of being subjected to torture or inhuman or degrading treatment in Uzbekistan and his extradition there, in the event of his return to Russia, would give rise to a violation of Article 3.

Conclusion: extradition would constitute a violation (unanimously).

(b) *Removal to Tajikistan* – The applicant's transfer to Tajikistan, which was not a party to the Convention, had removed him from the protection guaranteed by the Convention. In such circumstances, the Russian authorities should have reviewed Tajikistan's legislation and practice relating to the evaluation of the risks of ill-treatment faced by asylum seekers with particular scrutiny. However, there was no evidence that, before removing him to Tajikistan, the Russian authorities had made any assessment of whether there existed legal guarantees against the removal of people facing a risk of ill-treatment and how the Tajik authorities applied them in practice. It was particularly striking that the applicant's transfer to Tajikistan had been carried out in secret and outside any legal framework capable of providing safeguards against his removal to Uzbekistan without an evaluation of the risks of his ill-treatment there. Any extra-judicial transfer or extraordinary rendition, by its deliberate circumvention of due process, was contrary to the rule of law and the values protected by the Convention.

Conclusion: violation (unanimously).

Article 34: The applicant had been transferred to Tajikistan five months after the Court had indicated to the Russian Government, under Rule 39 of the Rules of Court, that he should not be extradited to Uzbekistan until further notice. Although he had not been transferred to Uzbekistan, his removal to a State which was not a party to the Convention had prevented the Court from securing the applicant the benefit of the Convention rights on which he relied and the purpose of the interim measure – to maintain the status quo pending the Court's examination of the application and to allow its final judgment to be effectively enforced – had been frustrated.

Conclusion: failure to comply with Article 34 (unanimously).

The Court further found a violation of Article 5 § 1 in respect of the applicant's detention in Russia during an initial period before a valid court order was made, but no violation of that provision in respect of his further detention pending extradition until his release in June 2011. It also found two violations of Article 5 § 4 on account of the length of the proceedings concerning the applicant's appeals against two of the detention orders and on account of his inability to obtain a review of his detention.

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

Inhuman treatment
Degrading treatment

Holding of homosexual prisoner in total isolation for more than eight months to protect him from fellow prisoners: *violation*

X v. Turkey - 24626/09
Judgment 9.10.2012 [Section II]

Facts – The applicant was sentenced to prison for almost ten years for various offences. In 2008 he was remanded in pre-trial detention. A homosexual, he was initially placed in a shared cell with heterosexual prisoners. He asked the prison administration to transfer him, for his own safety, to a shared cell with homosexual inmates. He explained that he had been intimidated and bullied by his cell-mates. He was immediately placed in an individual cell, which was small and dirty. He was deprived of any contact with other inmates or of social activity. After a number of unsuccessful requests to the public prosecutor's office and the post-sentencing judge, in which he complained about these conditions, the applicant was ultimately transferred to a psychiatric hospital where he was diagnosed with depression and remained for about a month in hospital before returning to prison. Another homosexual inmate was placed in the same cell as the applicant for about three months. During that period they filed a complaint against a warder for homophobic conduct, insults and blows. The applicant was subsequently deprived again of any contact with other inmates and he withdrew his complaint. This situation ended in February 2010 when the applicant was transferred to another remand prison and placed with three other inmates in a standard cell where he enjoyed the rights usually granted to convicted prisoners.

Law – Article 3: At the material time the applicant had been awaiting trial for non-violent offences. The cell where he was placed for over eight months measured 7 square metres with living space not exceeding half of that area. The cell was fitted with a bed and toilets, but no washbasin. It was very poorly lit, very dirty and visited by rats. It was a cell intended for inmates who were placed in solitary confinement as a disciplinary measure or those accused of paedophilia or rape. While in that cell the applicant had been deprived of any contact with other inmates or social activity. He had had no access to outdoor exercise and had been allowed out only to see his lawyer or to attend hearings, which took place periodically, about once a month. The relative social isolation was harsher in some aspects than the regime applied to prisoners serving life sentences. Whilst the latter could take daily walks in a courtyard next to their cell and were allowed limited contact with prisoners in the same unit, the applicant had been deprived of those possibilities. The total exclusion from fresh air, combined with the lack of contact with other prisoners, illustrated the extraordinary nature of the applicant's detention conditions.

The length of the isolation period called for close examination. The placing and maintaining of the applicant in isolation was based on the prison rules, which allowed the administration to take measures other than those provided for in the rules where there was a risk of "serious danger". For the administration, the applicant risked being harmed. It could not be said that those fears had been groundless, especially as the applicant himself had complained of intimidation and bullying when he had been in a cell with others. However, even if such safety measures had been necessary to protect him, they were not sufficient in themselves to justify total exclusion from the shared areas of the prison. Moreover, the applicant's attempts to have the measure reviewed by a post-sentencing judge and by the Assize Court had not been very successful, since his complaints had been rejected without any examination on the merits. The applicant's detention conditions in solitary confinement had been such as to cause him both mental and physical suffering and a strong feeling of being stripped of his dignity. Those conditions, aggravated by the lack of an effective remedy, thus constituted inhuman and degrading treatment.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 3: As a result of the inappropriateness of the applicant's total isolation from prison life, the Court had found a violation of Article 3. The concerns of the prison administration to the effect that the applicant risked suffering harm if he remained in a standard cell with other inmates were not totally unfounded but they were not sufficient to justify a measure of total isolation from other prisoners. Moreover, the applicant had not been placed in solitary confinement at his own request. The prison administration had been asked to transfer him to another cell with homosexuals or appropriate accommodation. The applicant had constantly challenged his solitary confinement, emphasising among other things that the detention conditions had been imposed on the basis solely of his sexual orientation, supposedly to protect him from bodily harm. He had expressly requested to be treated on an equal footing with

the other inmates, benefiting from the possibility of outdoor exercise and social activities with others, whilst being protected from physical harm. He had, moreover, explained that he was a homosexual and not a transvestite or transsexual. However, those arguments had not been taken into account by the post-sentencing judge, for whom the applicant's total isolation from prison life was the best adapted measure. In the Court's view, the prison authorities had not performed a sufficient assessment of the risk for the applicant's safety. Because of his sexual orientation they had simply taken the view that he risked serious bodily harm. The applicant's total exclusion from prison life could not be regarded as justified. Thus the Court was not convinced that the need to take safety measures to protect the applicant's physical well-being was the primary reason for his total exclusion from prison life. The main reason for the measure was his homosexuality. As a result it was established that he had sustained discrimination on grounds of sexual orientation.

Conclusion: violation (six votes to one).

Article 41: EUR 18,000 in respect of non-pecuniary damage.

Harassment of minor by anti-abortion activists as a result of authorities' actions after she had sought an abortion following rape: *violation*

P. and S. v. Poland - 57375/08
Judgment 30.10.2012 [Section IV]

(See Article 8 below, page 29)

Effective investigation

Serious allegations of ill-treatment not followed by adequate investigation: *violation*

Virabyan v. Armenia - 40094/05
Judgment 2.10.2012 [Section III]

Facts – At the material time the applicant was a member of one of the main opposition parties in Armenia. The events in question occurred in a time of heightened political sensitivity, during which the applicant participated in several anti-government demonstrations. While demonstrating, the applicant was brought into custody after the police allegedly received an anonymous telephone call stating that he was in possession of a firearm. According to the police record, the applicant subsequently used foul language and was abrasive, so an administrative case was prepared. The applicant was later charged with assaulting the police officer who informed him of the administrative case. The applicant contested this version of events, and alleged that he had cooperated with the police, but that at a certain point he had been given a brutal beating, having been handcuffed, kicked and hit with metal objects in the scrotum until he lost consciousness. Subsequent to the events in question the applicant was found to be badly injured, and later had to undergo a procedure to remove his left testicle. The prosecutor ultimately decided to discontinue the criminal proceedings against the applicant under former Article 37 § 2(2) of the Armenian Code of Criminal Procedure on the grounds that the applicant had "atoned for his guilt" through the injury he had suffered during the commission of the offence.[1]

In his application to the European Court, the applicant complained that the alleged treatment amounted to torture on account of his political opinions, and that no effective investigation was carried out. He also alleged that the prosecutor's decision to discontinue the proceedings on the basis of former Article 37 § 2(2) of the Armenian Code of Criminal Procedure had violated his right to be presumed innocent.

Law – Article 3

(a) *Substantive aspect*: Where, as here, an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. However in the present case the Government did no more than refer to the findings of the official domestic investigation in support of their position. That investigation was fundamentally flawed (see below). Therefore the Court could not consider the Government's explanation of how the applicant had received his injuries – that he fell while in custody – satisfactory and concluded that they were attributable to ill-treatment for which the authorities were responsible. The applicant had been subjected to a particularly cruel form of treatment that had caused severe physical and mental suffering. Having regard to the nature, degree, and purpose of the ill-treatment, the Court found that it could be characterised as acts of torture.

1. Former Article 37 § 2(2) of the Armenian Code of Criminal Procedure laid down that a prosecutor could decide not to proceed if he considered it not to be expedient on the ground that the suspect had redeemed the committed act through suffering, limitation of rights and other privations which he had suffered in connection with the committed act.

Conclusion: violation (unanimously).

(b) *Procedural aspect*: The investigation of serious allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened. However, there were numerous deficiencies in the investigation in the present case. Among other things, it was based entirely on the statements of the police officers and the medical reports were entirely inadequate. Conversely, at all stages of the investigation the applicant had presented a consistent and detailed description of who had ill-treated him and how, and his allegations were compatible with the description of his injuries contained in various medical records. Therefore the Court concluded that the sole purpose of the investigation was to prosecute the applicant and to collect evidence in support of that prosecution, and so it lacked the requisite objectivity and independence.

Conclusion: violation (unanimously).

Article 6 § 2: The prosecutor's decision to discontinue the criminal proceedings against the applicant was couched in terms which left no doubt as to the prosecutor's view that the applicant had committed an offence. The facts had been set out in a manner that suggested it had been established that the police officer had acted in self-defence against an assault by the applicant and, in deciding not to prosecute, the prosecutor had specifically stated that by suffering privations the applicant had "atoned for his guilt". Both the Court of Appeal and the Court of Cassation had upheld that decision. Indeed, the ground for discontinuing criminal proceedings envisaged by former Article 37 § 2(2) of the Code of Criminal Procedure in itself presupposed that the commission of an imputed act was an undisputed fact. It followed that the reasons given by the prosecutor and upheld by the courts for discontinuing the proceedings in reliance on that provision had violated the presumption of innocence.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 3

(a) *Substantive aspect*: The Court's task under this heading was to establish whether or not political motives were a causal factor in the applicant's ill-treatment. Pertinent to this consideration was the prevailing climate of political sensitivity in Armenia, and the general administrative practice of deterring or preventing opposition activists from participating in demonstrations. The Court further noted that the applicant was an active member of the opposition and that the initial reason for his arrest was indirectly linked to his participation in a political demonstration based on an allegation from an anonymous phone call of which there was no record. Further, the suspicion of possession of a firearm and the administrative case against the applicant were not subsequently pursued, and the arresting police officers had made conflicting statements as to the reasons for his detention.

However despite these factors there was no objective way to verify the applicant's allegations. In certain cases of alleged discrimination the Court may require the respondent Government to disprove an arguable allegation of discrimination and, if they fail to do so, find a violation of Article 14 on that basis. However, here such an approach would amount to requiring the Government to prove the absence of a particular subjective attitude. It was true that the circumstances of the applicant's politically motivated arrest raised serious concerns. However, this in itself was not sufficient to conclude that the ill-treatment was similarly inflicted for political motives. In the circumstances of the case, it could not be ruled out that the applicant had been subjected to ill-treatment as revenge for injuries he had inflicted on a police officer while in custody, or for other motivating factors. Therefore the Court could not conclude beyond reasonable doubt that the applicant's ill-treatment was motivated by his political opinions.

Conclusion: no violation (unanimously).

(b) *Procedural aspect*: When investigating violent incidents, State authorities must take all reasonable steps to unmask any political motive and establish whether or not intolerance towards a dissenting political opinion may have played a role in the events. This is an aspect of their procedural obligations under Article 3 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 to secure the fundamental values enshrined in Article 3 without discrimination. Failing to conduct such an investigation and treating politically induced violence and brutality on an equal footing with cases that have no political overtones may constitute unjustified treatment.

The applicant had alleged on numerous occasions before the investigating authorities that his ill-treatment had been linked to his participation in the opposition demonstrations and had been politically motivated. Indeed, the basis for his arrest had been questioned by the Armenian Ombudsman. The investigating authorities had thus had before them sufficient information to alert them to the need to carry out an initial verification and,

depending on the outcome, an investigation into possible political motives for the applicant's ill-treatment. However, almost nothing had been done to verify the information. Only two police officers were apparently asked if they were aware of the applicant's political affiliation, while the officers alleged to have made politically intolerant statements both before and during the applicant's ill-treatment were not even questioned on that point. In sum, no attempts had been made to investigate the circumstances of the applicant's arrest, including the numerous inconsistencies and other elements pointing at possible political motives behind it, and no conclusions had been drawn from the materials available. The authorities had thus failed in their duty to take all possible steps to investigate whether or not discrimination may have played a role in the applicant's ill-treatment.

Conclusion: violation (unanimously).

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

Failure in criminal proceedings to take measures necessary to assess credibility of an alleged act of domestic violence that was supported by forensic evidence: *violation*

E.M. v. Romania - 43994/05
Judgment 30.10.2012 [Section III]

Facts – The applicant alleged that at about 5 p.m. on 4 March 2004, while in the matrimonial home with her daughter, she received a telephone call from her husband asking her to leave and threatening to kill her. Her husband later returned to the flat and threatened to beat her until she required hospital treatment and to kill her if she did not move out. He threw several objects to the ground and struck her, all in the presence of her daughter. On 5 March 2004 the applicant took her daughter for a medical examination, at which it was concluded that the child was psychologically traumatised. On 6 March 2004 the applicant went to hospital; the medical certificate stated that she presented traumatic injuries necessitating eight to nine days treatment that could have been sustained on 4 March 2004 and have resulted from repeated blows with a hard object. The couple divorced in October 2004.

On 6 March 2004 the applicant lodged a criminal complaint against her husband with the police. On 3 May 2004 she brought criminal proceedings accusing him of threats, insults, assault and other acts of violence. In a judgment of 14 March 2005, the court of first instance upheld her complaint in part and ordered her husband to pay a fine. He appealed. In a judgment of 9 June 2005, the county court upheld his appeal, quashed the judgment delivered at first instance and directed the husband's acquittal of the charges of assault and other acts of violence.

Law – Article 3 (*procedural aspect*): The applicant had complained to the national courts of domestic violence by her husband on 4 March 2004. She had joined to her complaint two copies of medical certificates confirming she had been assaulted. A statutory framework had been in place to enable her to complain about the assault and to seek protection from the authorities. Although she had complained only of one incident, the authorities were nonetheless under a duty to act with diligence and to take the matter seriously where the alleged existence of an act of domestic violence, supported by forensic evidence, was brought to their attention. By a judgment of 14 March 2005, the first-instance court, which had carried out the judicial investigation into the case and examined the evidence directly, had ordered the husband to pay a fine in respect of assault and other acts of violence. On appeal, however, the county court had overturned that judgment and, reinterpreting the evidence, ordered his acquittal. While the domestic authorities had had a difficult task in assessing the evidence, as they had been confronted with two conflicting versions of the events and had no "direct" evidence, the investigators nevertheless had a duty to take the necessary measures to evaluate the credibility of the different accounts and elucidate the facts. In addition, the county court had justified its decision on the grounds that there was no evidence that the husband had carried out the assault. In reaching that decision, it had rejected a witness statement on the grounds that it was not credible and found that the applicant's statement was not sufficiently detailed with regard to the offences charged. Without calling into question the outcome of the investigation, the county court had reached its decision on the basis of the same evidence as that which the first-instance court had found sufficient to find the husband criminally liable. It had thus had sufficient plausible information before it to make it aware of the need to conduct a thorough verification of the entire case. Yet, while noting failings in the investigation which might be considered to undermine the first-instance judgment, the county court had closed the proceedings without taking steps to remedy them.

Had it played an active role and used its powers under domestic law, especially where, as here, the possibility of domestic violence had been raised, it could have ordered that new evidence be sought in order to elucidate the facts. Instead, despite having sufficient elements to enable it to order further investigations, the county court had closed the case, so making the applicant bear the responsibility for the lack of evidence. Accordingly, the criminal-law system, as applied in the applicant's case, had proved incapable of leading to the identification and punishment of the person responsible for the assault, leaving possible avenues for investigation unexplored. Finally, when making the first of her complaints the applicant had requested assistance and protection from the authorities for herself and her daughter against her husband's aggressive conduct. Despite the fact that the statutory framework provided for cooperation between the various authorities and for non-judicial measures to identify and ensure action was taken in respect of domestic violence, and although the medical certificate provided prima facie evidence of the applicant's allegations, it did not appear from the case file that any steps had been taken to that end. This indicated a lack of cooperation between the authorities responsible for intervening in a sensitive area of public interest, which had impeded clarification of the facts. Such cooperation had been all the more desirable in the instant case, in that the alleged assault had occurred in the presence of a minor. Thus, the manner in which the investigation had been conducted had not afforded the applicant the effective protection required by Article 3.

Conclusion: violation (unanimously).

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

ARTICLE 4

Positive obligations
Servitude
Forced labour

Failure to put in place legislative and administrative framework to combat servitude and forced labour effectively: *violation*

C.N. and V. v. France - 67724/09
Judgment 11.10.2012 [Section V]

Facts – The applicants were two French sisters born in Burundi. They arrived in France with their three younger sisters in the 1990s through the intermediary of their aunt, who had been appointed their guardian. The three younger sisters were taken in by host families. From the date of their arrival, the applicants were obliged to carry out household and domestic chores for their aunt, her husband and their seven children, and to look after the house. Only the second applicant attended school. The first applicant was occupied all day with housework and looking after her disabled cousin. She reached her majority without making any application to the authorities regarding her status, and apparently in the belief that her residence in France was illegal. Her aunt threatened to send her back to Burundi. She was hospitalised on several occasions under her cousin's name. In 1999, after being alerted by an association, the authorities opened a preliminary investigation. The diplomatic immunity of the applicants' uncle, a Unesco employee, was lifted and he was charged with infringing personal dignity, an offence under Articles 225-14 and 225-15 of the Criminal Code. Psychiatric reports were obtained which attested to the applicants' mental suffering accompanied, in the case of the first applicant, by fear and a sense of abandonment, as she equated being sent back to Burundi with a mortal danger and the abandonment of her younger sisters. In 2009 a court of appeal acquitted the aunt and uncle of subjecting vulnerable persons, including at least one minor, to working and living conditions that were incompatible with human dignity and dismissed the applicants' claims for compensation for the damage arising from that offence. That judgment was upheld following an appeal on points of law.

Law – Article 4

(a) *Applicability*

(i) *Existence of "forced or compulsory labour"*: Forced or compulsory labour within the meaning of Article 4 § 2 meant work required under the menace of a penalty and against the will of the person concerned, that is, work for which he or she had not offered themselves voluntarily. However, it was necessary to take into account, among other things, the nature and amount of work. Those circumstances made it possible to distinguish "forced labour" from work which could reasonably be required in respect of mutual family assistance or cohabitation. In the present case, the first applicant had been obliged to perform so much work that, without her help, the couple who used her services would have been required to have recourse to a professional – and thus paid – employee. Further, although the "penalty" could go as far as

violence or physical coercion, it could also take a more subtle psychological form, such as denunciation to the police or immigration services of workers without correct papers. The first applicant viewed a return to Burundi as a penalty, and the threat of such a return as the "menace" of execution of that "penalty". The first applicant had therefore been subjected to "forced or compulsory labour". In contrast, the situation of the second applicant, who had attended school, was less isolated and had less work to perform, did not correspond to "forced or compulsory labour".

(ii) *Existence of "servitude"*: In servitude, what was prohibited was a particularly serious form of denial of freedom. It meant an obligation to provide one's services that was imposed by the use of coercion such as the obligation for the 'serf' to live on another person's property and the impossibility of altering his or her condition. Servitude was thus a specific form of forced or compulsory labour, or, in other words, "aggravated" forced or compulsory labour. In the instant case, the essential element distinguishing servitude from forced or compulsory labour within the meaning of Article 4 was the victims' feeling that their condition could not be altered and that there was no potential for change. In this respect, it was enough that that feeling was based on objective elements created or maintained by those responsible. In the instant case, the first applicant had believed that she could not escape from the host couple's guardianship without the risk of becoming an illegal immigrant, a feeling reinforced by events such as her hospitalisation under a false name. In addition, she had not attended school and had received no vocational training that would have enabled her to hope one day to find paid employment outside the couple's home. Without any days off or a leisure activities, she had had no opportunities to make external contacts, which would have enabled her to request help. Thus, she had the feeling that her condition could not evolve and was unalterable, especially as it had lasted four years. That situation had begun when she was a minor and had continued into adulthood. The first applicant had thus been kept in a state of servitude.

(b) *Merits* – Articles 225-13 and 225-14 of the Criminal Code as worded at the material time were open to interpretations that could vary widely from one court to another. In addition, since the public prosecutor had not appealed against the court of appeal's judgment acquitting the perpetrators of the impugned acts, the appeal to the Court of Cassation had concerned only the civil aspect of the case. The first applicant had therefore not been afforded tangible and effective protection. The legislative amendments introduced in 2003 did not invalidate that finding. The State had thus failed to comply with its positive obligation to put in place a legislative and administrative framework to combat servitude and forced labour effectively.

Conclusion: violation in respect of the first applicant (unanimously).

The Court also held that there had been no violation of Article 4 in respect of the first applicant with regard to the State's procedural obligation to conduct an effective investigation into cases of servitude and forced labour, and that there had been no violation of Article 4 in respect of the second applicant.

Article 41: EUR 30,000 to the first applicant in respect of pecuniary and non-pecuniary damage.

(See also *Siliadin v. France*, no. 73316/01, 26 July 2005, Information Note no. 77; and *Van der Mussele v. Belgium*, no. 8919/80, 23 November 1983)

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Placement of pregnant minor in juvenile shelter to prevent her from seeking abortion following rape: *violation*

P. and S. v. Poland - 57375/08
Judgment 30.10.2012 [Section IV]

(See Article 8 below, page 29)

Article 5 § 1 (e)

Persons of unsound mind

Seven-year detention in prison psychiatric wings despite authorities' insistence on need for placement in structure adapted to applicant's pathology: *violation*

L.B. v. Belgium - 22831/08
Judgment 2.10.2012 [Section II]

Facts – The applicant was convicted in 1986 and 1995 of theft and possession of weapons. In 1997

he was convicted of raping his daughter and sentenced to five years' imprisonment; after completing his sentence he was kept in prison on the basis, in particular, of medical reports establishing that he represented a danger to society and because he had breached the conditions of his release on licence. In 2004, further to a decision of the Social Protection Commission (*Commission de défense sociale* – "CDS"), he was interned in the psychiatric wing of a prison. In spite of efforts by the applicant himself, together with medical and psychiatric reports and opinions by the CDS indicating that the treatment provided to him was ill-adapted to his situation and that he should be admitted as an in-patient to a specialised institution, he was kept in the psychiatric wing of a prison.

Law – Article 5 § 1 (e): The applicant had not been provided with appropriate care in the prison's psychiatric wing. The CDS had always maintained that the applicant's internment in the psychiatric wings of prisons was provisional, until a better adapted structure could be found. Until the pre-therapy started in 2011, and except for the hormonal treatment administered in 2008 for the applicant's chemical castration, there had been no question of personalised therapeutic care or medical follow-up inside the prison with a view to improving the applicant's situation. In addition, this was not an isolated case. The provision of psychiatric care had been sadly lacking, for both interned individuals and ordinary prisoners, and the situation had constantly worsened on account of the prison overcrowding. That state of affairs had been observed by the domestic authorities and by numerous international organisations. Admittedly, efforts had regularly been made by the Belgian authorities, in addition to those made by the applicant himself, with a view to his admission to a private psychiatric institution, as an inpatient or outpatient. However, whilst the persistent attitude of a detainee might contribute to preventing any change in his detention regime, that did not dispense the authorities from taking the appropriate initiatives to provide the applicant with treatment that was adapted to his state of health and was likely to help him regain his freedom. In the present case the applicant's state of health had improved, on the whole, realistic prospects of re-adaptation had been put forward by the competent authorities, one temporary solution had proved successful and adapted structures were available. In reality it appeared that the structural lack of space in such institutions and their private-law status had been the main obstacles to the applicant's admission. Therefore, as a result of the maintaining of the applicant for seven years in a prison institution, when all the medical and psychiatric or social workers' opinions and competent authorities agreed that it was ill-adapted to his condition and re-adaptation, the conditions of the detention had been incompatible with its purpose.

Conclusion: violation (unanimously).

Article 41: EUR 15,000 in respect of non-pecuniary damage. The applicant's transfer to a suitable institution would constitute the most appropriate means of remedying the violation.

(See, by way of comparison, *De Shepper v. Belgium*, no. 27428/07, 13 October 2009, Information Note no. 123)

Forced confinement for medical reasons of man with no history of psychiatric disorders and who was no danger to himself or others: *violation*

Plesó v. Hungary - 41242/08
Judgment 2.10.2012 [Section II]

Facts – The applicant was referred for medical consultation due to concerns on the part of his family about his behaviour. He was diagnosed as being a paranoid schizophrenic, and his doctor sought a court order for his mandatory institutional treatment. After a hearing at which submissions were heard from the applicant's doctor and from parties concerned about the applicant's behaviour, and relying on a psychiatric evaluation carried out during a forty-minute break in the hearing, the district court ordered the applicant's confinement for treatment.

Law – Article 5 § 1 (e): The Court reiterated the three minimum conditions for lawful detention on the basis of unsoundness of mind: the person concerned must reliably be shown to be of unsound mind; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement must depend upon the persistence of such a disorder. Detention is such a serious measure that it is only justified where other less severe measures have been considered and found to be insufficient to safeguard the individual or public interest.

In the instant case, the applicant's hospitalisation was ordered on the ground that he represented a "significant danger" to his own health.[1] The appli-

1. Section 188 read in conjunction with section 200 of the Health Act provides for compulsory institutional treatment for mental patients who represent a significant danger to their own or others' life, limb or health.

cation here of such an imprecise legal notion in a rather improvised manner was particularly disturbing in the face of the undisputed fact that the applicant in no way represented an imminent danger to himself or others. This should have warranted a more cautious approach on the part of the authorities, given that any encroachment in the Convention rights of those belonging to particularly vulnerable groups such as psychiatric patients can be justified only by "very weighty reasons". Instead, the district court had relied almost exclusively on the medical opinions, an approach that was difficult to reconcile with the paramount importance of independent and impartial judicial decision-making in cases pertaining to personal liberty, especially where, as here, the key opinion had been drawn up by an expert in a forty-minute court session break. Therefore, although the applicant's detention had a formal basis in the national law, the procedure followed was not entirely devoid of the risk of arbitrariness.

Further, even assuming that the condition of "lawfulness" was met in the instant case and, that the applicant was reliably shown to be of unsound mind, the Court found the Government's arguments unconvincing as to whether the mental disorder in question was of a kind or degree warranting compulsory confinement. Given that there was not an imminent danger to the applicant's health, and that the appropriate consideration was whether medical treatment would improve the applicant's condition or prevent its deterioration, it was incumbent on the authorities to strike a fair balance between the competing interests emanating, on the one hand, from society's responsibility to secure the best possible health care for those with diminished faculties and, on the other, from the individual's inalienable right to self-determination (including the right to refuse hospitalisation or medical treatment, that is, the "right to be ill"). Since a core Convention right (personal liberty) was at stake, the State's margin of appreciation in this area was not wide. Indeed, involuntary hospitalisation could be used only as a last resort for want of a less invasive alternative, and only if it carried true health benefits without imposing a disproportionate burden on the person concerned. No true effort to achieve the requisite fair balance had been made in the applicant's case. No in-depth consideration was given to the rational or irrational character of his choice to refuse hospitalisation, to the actual nature of the envisaged treatment, to the medical benefits it could achieve, or to the possibilities of a period of observation or outpatient care. Lastly, no weight whatsoever had been attributed to the applicant's lack of consent, even though he retained full legal capacity.

Taking all of these criteria into consideration, it could not be said that the decision to deprive the applicant of his liberty was based on an assessment of all the relevant factors, and the Court was not persuaded that the applicant's mental disorder was of a kind or degree that warranted compulsory confinement.

Conclusion: violation (unanimously).

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

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Appointment of Official Solicitor to represent mother with learning disabilities in child care proceedings: *no violation*

R.P. and Others v. the United Kingdom - 38245/08
Judgment 9.10.2012 [Section IV]

Facts – The first applicant was the mother of a premature baby who suffered from a number of serious medical conditions requiring constant care. The local authority commenced care proceedings owing to doubts over the ability of the first applicant, who had learning disabilities, to provide such care. The first applicant instructed lawyers to represent her in those proceedings, but amid serious concerns that she was unable to understand their advice, a consultant clinical psychologist was asked to carry out an assessment to determine whether or not she had capacity to provide instructions. The psychologist concluded that she would find it very difficult to understand the advice given by her lawyers and would not be able to make informed decisions on the basis of that advice. The court then appointed the Official Solicitor[1] to act as the first applicant's guardian *ad litem* and to provide instructions to the first applicant's lawyer on her behalf. In her application to the European

1 In England and Wales the Official Solicitor acts for people who, because they lack mental capacity and cannot properly manage their own affairs, are unable to represent themselves and no other suitable person or agency is able and willing to act.

Court, the first applicant complained that the appointment of the Official Solicitor had violated her right of access to a court.

Law – Article 6 § 1: Given the importance of the proceedings to the first applicant – who stood to lose both custody of and access to her only child – and bearing in mind the requirement in the United Nations Convention on the Rights of Persons with Disabilities that State parties provide appropriate accommodation to facilitate disabled persons' effective role in legal proceedings, measures to ensure that her best interests were represented were not only appropriate but also necessary.

The Court therefore had to consider whether the appointment of the Official Solicitor was proportionate to the legitimate aim pursued or whether it impaired the very essence of the first applicant's right of access to a court. The decision to appoint the Official Solicitor was not taken lightly but only after the first applicant's litigation capacity had been thoroughly assessed by a consultant clinical psychologist who had concluded that she would find it very difficult to understand the advice given by her solicitor and would not be able to make informed decisions on the basis of that advice. Although the first applicant did not have a formal right of appeal against the Official Solicitor's appointment, procedures were in place that would have afforded her an appropriate and effective means by which to challenge it at any time. Periodic court reviews of the first applicant's litigation capacity would have caused unnecessary delay and been prejudicial to the welfare to the child, so were not appropriate (although assessments were in any event carried out in the course of the proceedings). Further, although the first applicant might not have fully understood that the Official Solicitor could consent to the making of a placement order regardless of her own personal wishes, she was at all times represented by a solicitor and experienced counsel who should have, and by all accounts did, explain to her the exact role of the Official Solicitor and the implications of his appointment. Consequently, adequate safeguards had been in place to ensure that the nature of the proceedings was fully explained to the applicant and, had she sought to challenge the appointment of the Official Solicitor, procedures had been in place to enable her to do so. That conclusion was not affected by the fact that the Official Solicitor had "borne in mind" the child's best interests in deciding how to act since those interests were the touchstone by which the domestic courts would themselves assess the case. In order to safeguard the first applicant's rights under Article 6 § 1 the Official Solicitor was not required to advance any argument the first applicant wished, so long as her views regarding the child's future were made known to the domestic courts and that is what had been done. Lastly, the first applicant had been able to appeal to the Court of Appeal, had had ample opportunity to put her views to that court, and her arguments were fully addressed in its judgment. Consequently, the very essence of the first applicant's right of access to a court had not been impaired.

Conclusion: no violation (unanimously).

(See also *Stanev v. Bulgaria* [GC], no. 36760/06, 17 January 2012, Information Note no. 148; and *Shtukaturov v. Russia*, no. 44009/05, 27 March 2008, Information Note no. 106)

Failure to comply with judgments intended to remedy illegal transfer by authorities of private bank to State-owned entity: *violation*

Süzer and Eksen Holding A.Ş. v. Turkey - 6334/05
Judgment 23.10.2012 [Section II]

Facts – The applicants are Eksen Holding S.A., a limited liability company incorporated under Turkish law, and Mr Süzer, the majority shareholder and chairman. Between them they controlled more than 99% of the capital of a private bank by the name of Kentbank. In 2001, owing to Kentbank's severe financial difficulties, the Bank Regulatory and Supervisory Agency ("the Agency") ordered its compulsory transfer to the Savings Deposits Insurance Fund ("the Fund"). While two sets of administrative proceedings brought by the applicants were still pending, the Agency and the Fund suspended Kentbank's liquidation and merged it with another bank transferred to the Fund. In 2004 two judgments by the Division of the Supreme Court to which the case had been referred back from the full Supreme Court set aside the Agency's orders transferring Kentbank to the Fund and prohibiting it from performing banking operations and accepting deposits. In 2005 a different Division of the Supreme Administrative Court quashed the orders for Kentbank's merger with the other bank, on the grounds that those decisions had been deprived of their legal basis by the 2004 judgments. The applicants requested the Agency on several occasions to comply with the 2004 judgments, relying on the principle of *restitutio in integrum*. The Agency refused. The applicants then lodged two actions seeking the setting-aside of the decisions refusing their requests. In 2005 a Division of the Supreme Administrative Court acknowledged that

there could be instances in which enforcement of a judgment proved impossible, as in the case at hand, where there was no realistic means of restoring Kentbank's legal and financial situation to the position it had been in before its transfer to the Fund. Accordingly, the Agency's refusal to comply had not been in breach of the law. However, in 2008 and 2009 the full Supreme Administrative Court allowed the applicants' claims, holding that, failing enforcement in kind, the applicants should be enabled to set up a new operational bank and that they should be issued with the necessary licences for that purpose. In June 2010 all the administrative proceedings concerning the measures taken in respect of Kentbank were concluded in the applicants' favour and the *ex tunc* nullity of all the disputed administrative acts was upheld in a final decision.

Law – Article 6 § 1: In view of the judgments given against it, the Agency had been constitutionally bound to take all necessary measures to restore the *de facto* and *de jure* situation that was likely to have prevailed had Kentbank not been unlawfully transferred to the Fund. However, the Agency had taken no action whatsoever. Faced with the administrative authorities' complete lack of response, the applicants had been forced to remind it, on two occasions and in writing, of its obligation to comply. It was unacceptable for an applicant who had obtained a final judicial decision against the State to have to bring further actions against the authorities with a view to securing enforcement of the initial obligation. The *de facto* situation described by the domestic courts revealed that it was "objectively impossible" to enforce the judgments in question in kind or, in other words, that an "insurmountable obstacle" existed to such enforcement. Nevertheless, in view of their reasoning, the judgments of the full Administrative Court of 2008 and 2009 amounted to a genuine remedy for the administrative authorities' failure to offer the applicants an equitable alternative solution. As a result of those judgments, the applicants had had an enforceable claim rather than just a general right to receive "assistance" from the State. There had been no possible justification for the administrative authorities' failure to take any steps to implement that solution. The Government argued that the applicants must first apply to the Agency for authorisation to set up a bank and then, if their application was successful, apply for an operating licence, on the understanding that the granting of both those authorisations was within the Agency's discretion. However, the administrative courts had not stipulated that the applicants had to comply with any such prior procedures. Moreover, to do so would contravene the principles of Turkish administrative law and the Court's settled case-law. Laying down conditions of that kind would have been tantamount to depriving the judgments in question of all useful effect, allowing the Agency to assess their relevance and thus call the final judicial decisions into question. In addition to these objective considerations, the Court took account of the Agency's uncooperative attitude regarding its obligation to comply with the two series of judgments given against it. In sum, the applicants should not have had to take any further steps in order to take advantage of the alternative solution which the administrative courts had been obliged to impose on the authorities in view of the latter's failure to implement it of its own accord. Consequently, in failing to date to take the necessary measures to ensure execution of the final and enforceable administrative decisions against it, the respondent State had infringed the applicants' right to a court.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1: The measures taken by the Agency had deprived the applicants of both tangible and intangible property rights linked to the operation of their former bank. The measures had originally come within the Agency's powers of oversight of the Turkish banking sector and its task of ensuring the smooth operation of the latter. Accordingly, in the very specific circumstances of this case, the situation complained of amounted to control of the use of property. However, the measures at issue had been set aside *ex tunc* by the courts. Whether the unlawful situation had existed at the outset of the operation conducted by the Agency or had arisen subsequently was of no relevance, as the interference in question was deemed unlawful with retrospective effect.

Conclusion: violation (unanimously).

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

Article 6 § 1 (criminal)

Fair hearing

Fairness of criminal proceedings undermined by the lack of a proper regulatory framework for the authorisation of test purchases of drugs: *violation*

Veselov and Others v. Russia - 23200/10, 24009/07 and 556/10
Judgment 2.10.2012 [Section I]

Facts – The three applicants were targeted in undercover operations conducted by the police in the form of test purchases of drugs. They each knowingly procured illegal substances during the course of the test purchases, and the operations led to their criminal conviction for drug dealing. In their application to the European Court, they claimed that their actions were atypical and the result of police incitement, and alleged that the test purchases in their cases had been ordered arbitrarily in the absence of prior information about any criminal activity on their part, and that therefore their convictions were unfair. They further complained that their plea of entrapment had not been properly examined in the domestic proceedings.

Law – Article 6 § 1: The Court reiterated general principles from its extensive case law in this area. In particular, when conducting test purchases, it is incumbent on the domestic authorities to ensure that the manner in which they are conducted excludes the possibility of abuse of power, in particular of entrapment. Therefore a system of accountability is essential, but this was not present here. There was no clear and foreseeable procedure for authorising test purchases and no proper regulatory framework, and the Russian system in this respect had not evolved since being found deficient in previous cases.[1] This revealed a structural failure in the Russian system that contrasted with the position in most other Contracting States where the conduct of a test purchase and similar covert operations was subject to a number of procedural restrictions, for example a requirement of authorisation by a judge or public prosecutor.

The deficiencies in the Russian framework could be seen in the present case as the police had not considered investigative steps other than the test purchases to verify the suspicion that the applicants were drug dealers. Further, in each case the purchase had been ordered by a simple administrative decision by the body which had later carried out the operation based on an allegedly voluntary contribution of information by a private source. The decision contained very little information as to the reasons for and purposes of the planned test purchase, and the operation was not subjected to judicial review or any other independent supervision.

Also, in respect of two of the applicants, the private sources had previously acted as police informants. In view of the heightened risk of abuse of procedure in such cases, such sources had to remain strictly passive in the proceedings so as not to incite the commission of an offence, but here they had played an active role. Particularly strong justification had therefore been needed for the purchases – they should have been subject to a stringent authorisation procedure and a requirement that they be documented in a way allowing for subsequent independent scrutiny of the actors' conduct. But in the applicants' situation not only had the authorities left the deficiencies unremedied, they had also taken advantage of them.

The deficient procedure for authorising the test purchases had thus exposed the applicants to arbitrary action by the police and undermined the fairness of the criminal proceedings against them. Further, the domestic courts had failed to adequately examine the applicants' plea of entrapment, and in particular to review the reasons for the test purchases and the conduct of the police and their informants vis-à-vis the applicants. In light of this the criminal proceedings against all three applicants were incompatible with the notion of a fair trial.

Conclusion: violation (unanimously).

Article 41: EUR 3,000 each in respect of non-pecuniary damage; claim by third applicant in respect of pecuniary damage dismissed.

1. See *Vanyan v. Russia*, no. 53203/99, 15 December 2005; *Khudobin v. Russia*, no. 59696/00, 26 October 2006, Information Note no. 90; and *Bannikova v. Russia*, no. 18757/06, 4 November 2010, Information Note no. 135.

Article 6 § 2

Presumption of innocence

Statement by prosecutor when discontinuing criminal proceedings that suspect had atoned for his guilt: *violation*

Virabyan v. Armenia - 40094/05
Judgment 2.10/2012 [Section III]

(See Article 3 above, page 16)

ARTICLE 7

Article 7 § 1

Heavier penalty

Postponement of date of applicant's release following change in case-law after she was sentenced: *case referred to the Grand Chamber*

Del Rio Prada v. Spain - 42750/09
Judgment 10.7.2012 [Section III]

In eight sets of criminal proceedings between 1995 and 2000 the applicant was found guilty of a number of offences linked to terrorist attacks and sentenced to terms of imprisonment totalling more than 3,000 years. The *Audiencia Nacional* combined the various sentences and fixed the term to be served at 30 years, the maximum limit applicable under the 1973 Criminal Code in force at the relevant time. In April 2008 the authorities at the prison where the applicant was serving her sentence decided that, allowing for the remission to which she was entitled for work done since 1987, she should be released in July 2008. Then in May 2008 a new calculation was made based on a judgment of the Supreme Court in February 2006 departing from its previous case-law and establishing the principle that prison benefits and remissions of sentence should be applied to each sentence individually and not to the thirty-year legal maximum term. The date of the applicant's release was accordingly changed to June 2017. The applicant appealed, but to no avail.

In a judgment given on 10 July 2012 a Chamber of the Court held unanimously that there had been violation of Articles 5 and 7 of the Convention (see Information Note no. 154). It considered that the application of the new case-law changing the way of calculating remissions of sentence had not been foreseeable at the time of the applicant's conviction and had amounted to retroactive application, to her detriment, of a change made after the crimes were committed.

On 22 October 2012 the case was referred to the Grand Chamber at the Government's request.

ARTICLE 8

Positive obligations
Respect for private life

Medical authorities' failure to provide timely and unhindered access to lawful abortion to a minor who had become pregnant as a result of rape: *violation*

P. and S. v. Poland - 57375/08
Judgment 30.10.2012 [Section IV]

(See below, page 29)

Positive obligations
Respect for family life

Refusal of permission to adopt owing to prohibition of adoption in child's country of birth: *no violation*

Harroudj v. France - 43631/09
Judgment 4.10.2012 [Section V]

Facts – The applicant is a French national. In 2004 an Algerian court granted her the right to take Zina Hind, a child born in Algeria of unknown parents in November 2003 and abandoned at birth, into her legal care (*kafala*). The applicant also obtained legal authorisation to change the child's name to Hind Harroudj. In February 2004 the applicant took Hind to live in France, where she applied to adopt the child, but her application was rejected in 2007 because the family law of the child's country of origin made no provision for adoption. In Islamic law adoption, which creates family bonds comparable to those created by biological filiation, is prohibited. Instead, Islamic law provides for a form of legal guardianship called "*kafala*". In Muslim States, with the exception of Turkey, Indonesia and Tunisia, *kafala* is defined as a voluntary undertaking to provide for a child and take care of his or her welfare and education.

Law – Article 8: The Court shared the Government's view that the refusal of authorisation to adopt the child did not constitute an "interference" with the applicant's family life. It considered that the complaint should be examined from the point of view of the State's positive obligations. Comparative law revealed that none of the States considered *kafala* equal to adoption, but in France and elsewhere *kafala* produced comparable effects to legal guardianship or supervision, or placement with a view to adoption. Also, there was no clear consensus

among the States as to whether or not the law of the child's country of origin constituted an obstacle to adoption. The margin of appreciation open to the French State here was therefore wide. In refusing the applicant permission to adopt the child the French courts had applied Article 370-3 paragraph 2 of the Civil Code, which prohibits the adoption of a foreign child if the law of his or her country of origin does not authorise adoption. They had also taken into account the provisions of the Hague Conventions of 1993 and 1996, and the New York Convention on the Rights of the Child, which explicitly recognises *kafala* in Islamic law as protecting the child's best interests in the same way as adoption. The refusal of permission to adopt had thus been largely in keeping with the spirit and aims of the international treaties. The acknowledgment of *kafala* in international law was a decisive factor when considering how the States accommodated it in their domestic law and made allowance for the legal issues that might arise. Furthermore, *kafala* was fully accepted in the respondent State and produced effects comparable in this case to guardianship as the child had had no parents when she was taken into care. The domestic courts had emphasised that the applicant had succeeded in giving the child her family name, and enjoyed parental authority that enabled her to take all decisions in the child's interest. It was true that *kafala* created no filial ties, conferred no inheritance rights and did not suffice to entitle the child to acquire the nationality of the guardian. However, the applicant could still include the child in her will and choose a legal guardian to look after her in the event of her own demise. In applying the relevant international conventions the respondent State had made a flexible compromise between the law of the child's country of origin and its own law. In this way French law helped to cushion the restrictions on adoption as the child became more fully integrated into French society. The French Civil Code authorised the adoption of a minor whose personal status was governed by Islamic law "if the minor was born and habitually resided in France". Also, a child who could not be adopted because of his or her personal status under Islamic law had the right, before coming of age, to apply for French citizenship – and thus to become adoptable – if they had lived in France for at least five years in the care of a French national. Indeed, the respondent State submitted, and the applicant did not dispute, that the child could already avail herself of that possibility. In gradually erasing the restrictions on adoption in this manner, the authorities had made an effort to encourage the integration of such children without immediately severing the ties with the laws of their country of origin, thereby respecting cultural pluralism and striking a fair balance between the public interest and that of the applicant. Considering the margin of appreciation left to the States in the matter, there had been no violation of the applicant's right to respect for her family life.

Conclusion: no violation (unanimously).

Respect for private life
Respect for family life

Obstructive behaviour of local authorities in not returning embryos seized pursuant to investigation subsequently acknowledged by domestic court: *no violation*

Knecht v. Romania - 10048/10
Judgment 2.10.2012 [Section III]

Facts – On 24 July 2009 frozen embryos that the applicant had deposited with a private clinic were seized by the authorities due to concerns about the clinic's credentials. The applicant subsequently experienced considerable difficulties in securing a transfer by the State of the embryos to a specialised clinic so that she might use them to become a parent by means of an IVF procedure.[1] The applicant complained that this resulted in a breach of her right to a private and family life.

Law – Article 8: It was not disputed between the parties that Article 8 was applicable. This was appropriate as "private life" is a broad term, encompassing, *inter alia*, elements such as the right to respect for the decisions both to have and not to have a child. Further, the measures under which the embryos were seized were prescribed by law and pursued a legitimate aim, namely the prevention of crime, the protection of health or morals, and the protection of the rights and freedom of others.

In considering whether the measures taken were necessary in a democratic society, the Court noted that its task was not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating matters of artificial procreation, especially since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments. This is an area in which in principle Contracting States enjoy a wide margin of appreciation both in the decision to intervene and in how to establish a system of regulation.

1. *In vitro* fertilisation.

Against this background, it had not been shown that the decision to confiscate the embryos in the context of a criminal investigation of the clinic was arbitrary or unreasonable. However, the effect on the applicant's right to private life of this act had been aggravated by the subsequent obstructive and oscillatory attitude of the responsible authorities which prevented the applicant from transferring her embryos to a specialist clinic despite her efforts. Nevertheless, though this was the case, the domestic courts had expressly acknowledged that the applicant had suffered a breach of her rights under Article 8 on account of the refusal by the authorities to allow the embryo transfer, and had offered her the required redress for the breach, which led to the transfer of the embryos in a relatively short time. Therefore the requisite steps had been taken to secure respect for the applicant's right to respect for her private life.

Conclusion: no violation (unanimously).

(See also *Evans v. the United Kingdom* [GC], no. 6339/05, 10 April 2007, Information Note no. 96; and *S.H. and Others v. Austria* [GC], no. 57813/00, 3 November 2011, Information Note no. 146)

Respect for private life

Disclosure by large-circulation national newspaper of exact residential address of a famous actress: *violation*

Alkaya v. Turkey - 42811/06
Judgment 9.10.2012 [Section II]

Facts – The applicant is well known in Turkey as a cinema and theatre actress. In 2002 her home was burgled while she was there. Three days later a national daily newspaper published a report on the burglary. The article gave details of the applicant's exact address: the area she lived in, the street name and number and the number of her flat. She brought an action for damages which was dismissed by the domestic courts.

Law – Article 8: The choice of one's place of residence was an essentially private matter and the free exercise of that choice formed an integral part of the sphere of personal autonomy protected by Article 8. A person's home address thus constituted personal data or information which fell within the scope of private life and as such was eligible for the protection granted to the latter. It therefore had to be ascertained whether the State had struck a fair balance between the applicant's right to protection of her private life and the right of the opposing party to freedom of expression under Article 10. The decisive element in weighing those rights had to be the contribution which the information that had been published made to a debate on a matter of public interest. The Court noted that the applicant had in no way sought to challenge the publication of the article reporting on the burglary, but had simply complained of the disclosure of her home address. There was no evidence that appeared capable of justifying on public-interest grounds the newspaper's decision to disclose the applicant's address without her consent. Furthermore, the national courts had not weighed up the competing interests at stake, but had merely referred to the fact that the applicant was well known before finding that the disclosure of her address could not be considered liable to make her a target or to infringe her personality rights. Neither did they appear to have taken into consideration the possible repercussions on the applicant's life of the publication of her home address in a national newspaper just a few days after her home had been burgled, despite the fact that she had complained of the inappropriate behaviour of persons who had turned up outside her home and the heightened sense of insecurity she felt as a result. Accordingly, the domestic courts had not afforded the applicant sufficient and effective protection of her private life.

Conclusion: violation (unanimously).

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

The right to private life does not protect a right to take part in public life as a politician: *inadmissible*

Misick v. the United Kingdom - 10781/10
Decision 16.10.2012 [Section IV]

Facts – The applicant was the former Premier and an elected member of the House of Assembly of the Turks and Caicos Islands, a British Overseas Territory in the West Indies. However, in 2009, owing to concerns of systemic corruption, the United Kingdom assumed direct rule over the people of the Territory, dissolved the House of Assembly, and removed all elected officials for a period of two years. The applicant was refused permission to seek judicial review of that decision in the Divisional Court after the respondent Government withdrew the application of Article 3 of Protocol No. 1 to the Convention (right to free

elections) from the Territory. In his application to the European Court the applicant complained under Article 8 of the Convention that his removal from his position as the elected representative of the North Caicos East constituency had violated his right to respect for his private life.

Law – Article 8: It is not for Article 8 to fill a gap in fundamental rights protection which results from the decision of the respondent State to withdraw the application of Article 3 of Protocol No. 1 to the Territory. Therefore Article 8 should not, in principle, be interpreted in such a way as to incorporate the requirements of Article 3 of Protocol No. 1 in respect of territories to which the latter provision does not apply. Further, participation in politics, in particular the exercise of parliamentary mandate, is very much a matter of public life, to which Article 8 can have only limited application. Where aspects strictly related to private or family life are at stake Article 8 considerations may arise notwithstanding the public nature of politics. However, in a case like the present one, where the applicant had not provided any concrete details of how the dissolution of the House of Assembly encroached upon his privacy or private life guarantees, including his ability to develop relationships with the outside world, but merely sought to assert a right to take part in public life as an elected politician, Article 8 was not engaged.

Conclusion: inadmissible (incompatible *ratione materiae*).

Disclosure of information by public hospital about a pregnant minor who was seeking an abortion after being raped: *violation*

P. and S. v. Poland - 57375/08
Judgment 30.10.2012 [Section IV]

Facts – The applicants were a daughter and her mother. In 2008, at the age of fourteen, the first applicant, P., became pregnant after being raped. In order to have an abortion in accordance with the 1993 Law on Family Planning, she obtained a certificate from the public prosecutor that her pregnancy had resulted from unlawful sexual intercourse. However, on contacting public hospitals in Lublin, the applicants received contradictory information as to the procedure to be followed. Without asking whether she wished to see him one of the doctors took P. to see a Catholic priest who tried to convince her to carry the pregnancy to term and got her to give him her mobile phone number. The second applicant was asked to sign a consent form warning that the abortion could lead to her daughter's death. Ultimately, following an argument with the second applicant, the head of gynaecology in the Lublin hospital refused to allow an abortion, citing her personal views, and the hospital issued a press release confirming. Articles were published in local and national newspapers and the case was the subject of discussions on the internet.

P. was subsequently admitted to a hospital in Warsaw, where she was informed that the hospital was facing pressure not to perform the abortion and had received numerous e-mails criticising the applicants for their decision. P. also received unsolicited text messages from the priest and others trying to convince her to change her mind. Feeling manipulated and helpless, the applicants left the hospital two days later. They were harassed by anti-abortion activists and eventually taken to a police station, where they were questioned for several hours. On the same day, the police were informed that the Lublin Family Court had ordered P.'s placement in a juvenile shelter as an interim measure in proceedings issued to divest her mother of her parental rights on the grounds that she was pressurising P. into having the abortion. In making that order the court had regard to text messages P. had sent to her friend saying she did not know what to do. Later that day, the police drove P. to Lublin, where she was placed in a juvenile shelter. Suffering from pain, she was taken to hospital the following day, where she stayed for a week. A number of journalists came to see her and tried to talk to her. After complaining to the Ministry of Health, the applicants were eventually taken in secret to Gdańsk, some 500 kilometres from their home, where the abortion was carried out.

The family court proceedings were discontinued eight months later after P. testified that she had not been forced by her mother to have an abortion. Criminal proceedings that had been brought against P. for suspected sexual intercourse with a minor were also discontinued as was the criminal investigation against the alleged perpetrator of the rape.

Law – Article 8

(a) *Access to lawful abortion*: As to the right of doctors to refuse certain services on grounds of conscience, Polish law had acknowledged the need to ensure that doctors were not obliged to carry out services to which they objected, and put in place a mechanism by which such a refusal could be expressed. This mechanism also included elements allowing the right to conscientious objection to be reconciled with the patient's interests, by making it mandatory

for refusals to be in writing and included in the patient's medical records and, above all, by imposing an obligation on the doctor to refer the patient to another doctor competent to carry out the same service. However, it had not been shown that these procedural requirements and the applicable laws had been complied with in the instant case. The events surrounding the determination of P.'s access to legal abortion had been marred by procrastination and confusion. The applicants had been given misleading and contradictory information and had not received appropriate and objective medical counselling that had due regard to their views and wishes. No set procedure had been available by which they could have their views heard and properly taken into consideration with a modicum of procedural fairness. The difference in the situation of a pregnant minor and that of her parents did not obviate the need for a procedure for the determination of access to lawful abortion whereby both parties could be heard and their views fully and objectively considered and for a mechanism for counselling and for reconciling conflicting views in the minor's best interests. It had not been shown that the legal setting in Poland had allowed for the second applicant's concerns to be properly addressed in a way that would respect her views and attitudes and balance them in a fair and respectful manner against the interests of her pregnant daughter in the determination of such access.

In this connection, civil litigation did not constitute an effective and accessible procedure since such a remedy was solely of a retroactive and compensatory character. No examples had been given of cases in which the civil courts had acknowledged and afforded redress for damage caused to a pregnant woman by the anguish, anxiety and suffering entailed by her efforts to obtain access to abortion.

Effective access to reliable information on the conditions for having a lawful abortion and the procedures to be followed was directly relevant to the exercise of personal autonomy. The notion of private life within the meaning of Article 8 applied both to decisions to become and not to become a parent. The nature of the issues involved in a woman's decision whether or not to terminate a pregnancy was such that the time factor was of critical importance. The procedures should therefore ensure that such decisions were taken in good time. The uncertainty which had arisen in the instant case had resulted in a striking discordance between the theoretical right to a lawful abortion and the reality of its practical implementation. The authorities had thus failed to comply with their positive obligation to secure to the applicants effective respect for their private life.

Conclusion: violation (six votes to one).

(b) *Disclosure of personal and medical data*: The information made available to the public had been detailed enough for third parties to establish the applicants' whereabouts and contact them, either by mobile phone or personally. P.'s text messages to a friend could reasonably be regarded as a call for assistance, addressed to that friend and possibly also to her close environment, by a vulnerable and distraught teenager in a difficult life situation. By no means could it be equated with an intention to disclose information about her pregnancy, her own or her family's views and feelings to the general public and press. The fact that legal abortion in Poland was a subject of heated debate did not confer on the State a margin of appreciation so wide as to absolve medical staff from their uncontested professional obligations regarding medical secrecy. It had not been argued, let alone shown, that in the present case there were any exceptional circumstances of such a character as to justify a public interest in P.'s health. Accordingly, the disclosure of information about her unwanted pregnancy and the hospital's refusal to carry out an abortion had not pursued a legitimate aim. Furthermore, no provision of domestic law had been cited on the basis of which information about individual patients' health issues, even non-nominate information, could be disclosed to the general public in a press release. P. had been entitled to respect for her privacy regarding her sexual life, whatever concerns or interest her predicament had generated in the local community. The national law expressly recognised the rights of patients to have their medical data protected, and imposed on health professionals an obligation to abstain from disclosing information about their patients' conditions. Likewise, the second applicant had been entitled to the protection of information concerning her family life. Yet, despite that obligation, the Lublin hospital had made information concerning the present case available to the press. The disclosure of information about the applicants' case had therefore been neither lawful nor served a legitimate interest.

Conclusion: violation (unanimously).

Article 5 § 1: The essential purpose of the decision to place P. in the juvenile shelter had been to separate her from her parents, in particular her mother, and to prevent the abortion. By no stretch of the imagination could the detention be considered to have been ordered for educational supervision within the meaning of Article 5 § 1 (d), as the Government

had contended. It had been legitimate to try to establish with certainty whether P. had had an opportunity to reach a free and well-informed decision about having recourse to abortion. However, if the authorities had been concerned that an abortion would be carried out against her will, less drastic measures than locking up a fourteen-year old girl in a situation of considerable vulnerability should have at least been considered. Her detention between 4 and 14 June 2008 had thus not been compatible with Article 5 § 1.

Conclusion: violation (unanimously).

Article 3: It was of a cardinal importance that P. was at the material time only fourteen years old. However, despite her great vulnerability, a prosecutor's certificate confirming that her pregnancy had resulted from unlawful intercourse and medical evidence that she had been subjected to physical force, both she and her mother had been put under considerable pressure on her admission to the Lublin hospital. One of the doctors had made the mother sign a declaration acknowledging that an abortion could lead to her daughter's death. No cogent medical reasons had been put forward to justify the strong terms of that declaration. P. had witnessed the argument between the doctor and the second applicant, whom the doctor had accused of being a bad mother. Information about the case had been relayed by the press, in part as a result of the press release issued by the hospital. P. had received numerous unwanted and intrusive text messages from people she did not know. In the hospital in Warsaw the authorities had failed to protect her from contact from people trying to exert pressure on her. Further, when she requested police protection after being accosted by anti-abortion activists, she was instead arrested and placed in a juvenile shelter. The Court was particularly struck by the fact that the authorities had decided to institute a criminal investigation on charges of unlawful intercourse against P., who should have been considered a victim of sexual abuse. That approach fell short of the requirements inherent in the States' positive obligations to establish and apply effectively a criminal-law system punishing all forms of sexual abuse. Although the investigation against the applicant had ultimately been discontinued, the mere fact that it had been instituted showed a profound lack of understanding of her predicament. No proper regard had been given to her vulnerability and young age and to her views and feelings. The approach of the authorities had been marred by procrastination, confusion and a lack of proper and objective counselling and information. Likewise, the fact that P. had been separated from her mother and deprived of her liberty in breach of Article 5 § 1 had to be taken into consideration. In sum, P. had been treated by the authorities in a deplorable manner and her suffering had reached the minimum threshold of severity under Article 3.

Conclusion: violation (unanimously).

Article 41: EUR 30,000 to the first applicant and EUR 15,000 to the second applicant in respect of non-pecuniary damage.

ARTICLE 9

Manifest religion or belief

Restriction on volume of church bell at night: *inadmissible*

Schilder v. the Netherlands - 2158/12
Decision 16.10.2012 [Section III]

Facts – The applicant was a parish priest who used the church bell at 7.15 each morning to call parishioners to attend religious service. Pursuant to complaints by neighbouring residents that the noise disturbed their rest during the night, the applicant was informed that if he did not reduce the volume of the bell between 11 p.m. and 7.30 a.m. a fine would be imposed.

Law – Article 9: The Court was prepared to assume that the measures in question constituted an interference with the right to manifest one's religion. However, the restriction was "prescribed by law" and pursued the legitimate aim of the protection of the rights and freedoms of others. Further, the restriction in the present case could be considered justified as necessary in a democratic society, as a fair balance was struck between the competing interests, and the applicant was not subjected to a blanket ban on ringing the bells of his parish church but only to a restriction on the volume of the bell during the hours of night.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 10

Freedom of expression

Fine and demotion of police-union leader for allegations undermining police force: *no violation*

Szima v. Hungary - 29723/11
Judgment 9.10.2012 [Section II]

Facts – The applicant, a retired senior police officer, was at the material time the chairperson of *Tettrekész* Police Trade Union. In July 2009 she published a number of writings on the Trade Union's website, which was effectively under her editorial control, concerning outstanding remuneration due to police staff, alleged nepotism and undue political influence in the force, and dubious qualifications of senior police staff. She was found guilty of instigation to insubordination, and sentenced to a fine and demotion.

Law – Article 10 read in the light of Article 11: As the applicant was a trade-union leader Article 10 was interpreted in light of Article 11 of the Convention. The applicant's sentence constituted interference with Article 10 that was prescribed by law and pursued the legitimate aim of preventing disorder or crime by preserving order in the armed forces.

Article 10 applied to members of the armed forces just as it did to all other persons within the jurisdiction of the Contracting States. However, the proper functioning of the armed forces was hardly imaginable without legal rules designed to prevent servicemen from undermining discipline. When considering the applicant's trade-union membership, the Court noted that trade-union members must be able to express to their employer their demands as to conditions of work as otherwise they would be deprived of an essential means of action.

In the present case, many of the statements by the applicant brought up labour issues and so their sanctioning appeared questionable. However, she had also repeatedly put forward critical views about the manner in which police leaders managed the force. These had overstepped the mandate of a trade-union leader, as they were not at all related to the protection of labour-related interests of trade-union members. Therefore, they were considered from the general perspective of freedom of expression rather than from the particular aspect of trade-union-related expressions.

Some of the statements by the applicant amounted to value judgments and so enjoyed a high level of protection under Article 10. However the Court shared the view of the domestic courts that the statements were capable of causing insubordination since they might discredit the legitimacy of police actions. While it was of serious concern that the domestic courts had refused to accept evidence from the applicant on some of the material, the applicant had failed to relate her offensive value judgments to the facts. Further, by virtue of her position, the applicant had considerable influence and therefore had to exercise her right to freedom of expression in accordance with the duties and responsibilities which that right carried with it in view of her status and of the special requirement of discipline in the police force. The relatively mild sanction imposed on the applicant – demotion and a fine – could not be regarded as disproportionate in the circumstances.

Conclusion: no violation (six votes to one).

Conviction for swearing at fellow army officers: *inadmissible*

Rujak v. Croatia - 57942/10
Decision 2.10.2012 [Section I]

Facts – The applicant, a soldier in the Croatian Army, was given a suspended prison sentence for tarnishing the reputation of the Republic (an offence under Article 151 of the Croatian Criminal Code). His conviction followed incidents in which he had sworn at fellow recruits and his superiors. In his application to the European Court, he complained of a violation of his right to freedom of expression.

Law – Article 10: Certain classes of speech, such as lewd and obscene speech had no essential role in the expression of ideas. An offensive statement could fall outside the protection of freedom of expression where the sole intent of the offensive statement was to insult. In view of the fact that the applicant's statements mostly concerned vulgar and offensive language, the Court was not persuaded that he had been trying to "impart information or ideas". Rather, from the context in which they were made, his statements appeared to have been made with the sole intention of insulting his fellow soldiers and his superiors and amounted to wanton denigration. They thus fell outside the protection of Article 10, which was not applicable.

Conclusion: inadmissible (incompatible *ratione materiae*).

Freedom to receive information
Freedom to impart information

Ill-treatment by police of journalist attempting to report on a matter of public interest: *violation*

Najafli v. Azerbaijan - 2594/07
Judgment 2.10.2012 [Section I]

Facts – The applicant, a journalist, was beaten with truncheons by the police while reporting on an unauthorised political demonstration which had been organised by opposition parties. The beating occurred during the dispersal of the demonstration, even though, according to the applicant, he had told the police officers he was a reporter. Subsequent to the events in question the applicant was diagnosed with significant injuries, including closed cranio-cerebral trauma, concussion and soft-tissue damage to the crown of the head. A criminal investigation was opened into how the applicant sustained his injuries but was suspended on the grounds that the officers responsible for his injuries could not be identified.

Law – Article 3

(a) *Substantive aspect*: The applicant had produced sufficiently strong and consistent evidence to establish at least a presumption that he had been beaten with truncheons by police officers during the dispersal of the demonstration, and the Government had not provided a convincing rebuttal of that presumption. It had not been shown that the recourse to physical force against the applicant had been made strictly necessary by his own conduct: he had not used violence against the police or posed a threat to them and no other reasons justifying the use of force had been shown. It had therefore been unnecessary, excessive and unacceptable. Given the applicant's injuries, which proved that he had experienced serious physical and mental suffering, the minimum level of severity had been attained.

Conclusion: violation (unanimously).

(b) *Procedural aspect*: The investigation of the applicant's claim of ill-treatment had fallen short of the requirements of Article 3. For example, there had been significant procedural delays and the investigation had not been handled with sufficient diligence. There were also serious doubts as to whether the applicant had been given effective access to the investigation or had been informed of all the procedural steps in a timely manner. Most problematic, however, was the question of the independence and impartiality of the investigation: the task of identifying those responsible for the applicant's beating had been delegated to the same authority whose agents had allegedly committed the offence. The investigation had been suspended on inadequate grounds (an alleged inability to identify the police officers concerned). Lastly, the applicant had been deprived of the opportunity to effectively seek damages in civil proceedings, as he had been required to name specific police officers as defendants. That requirement had constituted an insurmountable obstacle, since the identification of those police officers was the task of the criminalinvestigation, which in the present case was ineffective and lacked independence.

Conclusion: violation (unanimously).

Article 10: The role of the press in imparting information and ideas on matters of public interest undoubtedly included reporting on opposition gatherings and demonstrations which was essential for the development of any democratic society. The applicant had, however, been prevented from reporting through physical ill-treatment and an excessive use of force. The Court could not accept that the police officers had been unable to determine that the applicant was a journalist, as he was wearing a badge and had explicitly stated his occupation. Nor was it relevant that, according to the Government, the officers had no actual intention to interfere with his journalistic activity: what mattered was that, despite clear efforts to identify himself as a journalist who was simply doing his job, the applicant had been subjected to treatment proscribed by Article 3. Accordingly, there had been an interference with his rights under Article 10. That interference was not justified as it was not shown convincingly by the Government that it was either lawful or pursued any legitimate aim. In any event, it clearly could not be considered to have been "necessary in a democratic society".

Conclusion: violation (unanimously).

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

ARTICLE 13

Effective remedy (Article 3)

Rejection of documentary evidence submitted by asylum seekers without any prior verification of its authenticity: *violation*

Singh and Others v. Belgium - 33210/11
Judgment 2.10.2012 [Section II]

Facts – The applicants and their three children were Afghan nationals living in Belgium. They arrived in Belgium in March 2011 on a flight from Moscow. As they did not have the legally required docu-

ments, they were refused entry and the Aliens Office issued directions for their removal on 19 March 2011. The applicants, at the same time, applied for asylum. They told the Belgian authorities that they were Afghan nationals, members of the Sikh minority, and that they had fled Afghanistan for India in 1992 because of the civil war and the attacks and kidnappings endured by the Sikh and Hindu communities there at that time. They had later taken refuge in Moscow. In 2009 the applicants had apparently returned to Kabul, but had not felt safe there and had fled to Belgium. On 13 April 2011 the Office of the Commissioner General for Refugees and Stateless Persons ("CGRA") rejected their applications on the grounds that they had not provided evidence of their Afghan nationality. The applicants appealed against those decisions and produced new documents in evidence. On 24 May 2011 the Aliens Disputes Board ("CCE") dismissed the applicants' appeals and clearly confirmed the CGRA's reasoning, agreeing with it that the applicants had been unable to prove their Afghan nationality or the veracity of the protection granted to them by the United Nations High Commissioner for Refugees (UNHCR). Once the asylum procedure had been closed, the removal decision by the Aliens Office dated 19 March 2011 became enforceable. On 30 May 2011 the applicants applied to the European Court for an interim measure, under Rule 39 of the Rules of Court, to have their removal to Russia suspended, and their request was granted for the duration of the proceedings before it. The applicants were thus given leave to remain in Belgium and were released from the transit zone, as the removal order was no longer immediately enforceable. On 22 June 2011 they lodged an administrative appeal on points of law before the *Conseil d'Etat*, but it was dismissed on 8 July 2011.

Law – Article 13 in conjunction with Article 3: The risk of the applicants' removal to Russia had been suspended with the implementation by the Belgian Government of the interim measure indicated on 30 May 2011. However, the applicants' status had not changed since there was still a removal order against them and they were obliged to leave Belgium. The applicants' fear that the Russian authorities might then send them back to their State of origin was not manifestly ill-founded. As regards their fears about treatment in Afghanistan, the applicants had arrived at the Belgian border with identity documents and copies of pages from two Afghan passports and copies of UNHCR attestations had subsequently been produced. In addition there were a number of reports about discrimination and violence against the Sikh minority in Afghanistan. In the light of that material, the allegations of the applicants, who, in filing an asylum application, had referred to the asylum authorities their fears about a return to Afghanistan, called for a detailed examination by the Belgian authorities and they should have been able to defend their allegations before those authorities in accordance with the requirements of Article 13. Neither the CGRA nor the CCE had sought to ascertain, even incidentally, whether the applicants faced risks within the meaning of Article 3. Such an examination had been overshadowed at the CGRA level by an examination of the applicants' credibility and by the doubts as to the sincerity of their statements. No additional enquiries had been made in order, for example, to authenticate the identity documents presented by the applicants, a step which would have enabled the risks in Afghanistan to be verified or ruled out with greater certainty. The CCE had not made up for that omission even though the applicants had presented to it documents capable of dispelling the doubts expressed by the CGRA as to their identities and previous movements, namely e-mails from a UNHCR official in New Delhi that had been sent through the intermediary of the Belgian Committee for Aid to Refugees, the UNHCR's partner in Belgium, subsequent to the CGRA's decision. Attached to these e-mails were statements from the UNHCR certifying that the applicants had been registered as refugees under the supervision of the UNHCR and confirming the dates declared by the applicants, thus supporting the story they had given when questioned by the Aliens Office. The CCE had given no weight to the documents on the grounds that they were easy to falsify and the applicants were not able to supply the originals. The question raised by the applicants, as to whether by doing so the CCE had hidden behind a strict interpretation of the rules on the filing of new documents, went beyond the Court's subsidiary remit. It sufficed, however, for the Court to note that the only important question in its view, namely whether the documents supported the allegations of the risks in Afghanistan, had not given rise to any investigation, whereas enquiries could have been made, for example, at the offices of the UNHCR in New Delhi, as the UNHCR itself had recommended. In view of the weight attached to Article 3 and the irreversible nature of the potential harm if the risk of ill-treatment materialised, it had been for the domestic authorities to carry out an examination for the purpose of confirming the belief, however legitimate it might have been, that the application for protection

was ill-founded, regardless of the scope of the supervisory authority's remit. The approach actually taken, consisting of dismissing those documents, despite their relevance for the protection request, finding them to have no probative value and without verifying their authenticity as they could easily have done by contacting the UNHCR, had been at odds with the close and rigorous scrutiny that could have been expected of the domestic authorities under Article 13, and had failed to ensure effective protection against treatment in breach of Article 3. Accordingly, the domestic authorities had not examined, in accordance with the requirements of Article 13, the merits of the applicants' arguable complaints under Article 3.

Conclusion: violation (unanimously).

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

ARTICLE 14

Discrimination (Article 3)

Allegations of political motivation for ill-treatment not objectively verifiable: *no violation*

Failure to take reasonable steps to investigate allegations of political motivation for ill-treatment: *violation*

Virabyan v. Armenia - 40094/05
Judgment 2.10.2012 [Section III]

(See Article 3 above, page 16)

Holding of homosexual prisoner in total isolation for more than eight months to protect him from fellow prisoners: *violation*

X v. Turkey - 24626/09
Judgment 9.10.2012 [Section II]

(See Article 3 above, page 15)

Discrimination (Article 8)

Refusal to award compensation to serviceman for discrimination with respect to his right to parental leave: *violation*

Hulea v. Romania - 33411/05
Judgment 2.10.2012 [Section III]

Facts – The applicant had been in the army since 1991. In December 2001 his second child was born. For the first ten months the applicant's wife, a teacher, took parental leave, which could be extended to the child's second birthday. In September 2002 the applicant applied to his hierarchical superior for parental leave. This request was repeated on several occasions. However, the Ministry of Defence refused on the grounds that the legislation defining the status of army personnel provided for parental leave only for women. In September 2003 the applicant, who considered this refusal discriminatory, brought an action against the Ministry of Defence before the county court. His action was dismissed. In his appeal to the court of appeal against that decision the applicant raised an objection alleging the unconstitutionality of the legal provision governing the status of military personnel. By a decision of February 2005 the Constitutional Court agreed to examine the question of constitutionality, and held that the legislative provision in question infringed the principles of equality before the law and of non-discrimination on grounds of sex, both enshrined in the Constitution. The court of appeal then dismissed the applicant's appeal in a final judgment of 13 April 2005, holding that the statutory provision in question was not applicable, since the applicant had not submitted documentary evidence that he had paid the contributions necessary to benefit from parental leave. It also refused to grant compensation in respect of non-pecuniary damage, finding that his claim was unsubstantiated.

Law – Article 14 in conjunction with Article 8: For the purposes of parental leave, the applicant, a serviceman, was in a position similar to that of servicewomen. That situation led the Constitutional Court to find, at the applicant's request, that the ineligibility of servicemen for parental leave under the Military Personnel (Status) Act amounted to discrimination on grounds of sex. Furthermore, although since 2006 the legislation in Romania – as in a significant number of member States – had provided that servicemen were entitled to the same parental leave as servicewomen, the applicant had not been permitted to take such leave. In addition, his action for damages in respect of the discrimination experienced through the refusal to grant parental leave was dismissed by the court of appeal on the grounds that he had not provided evidence of having paid his social-insurance contributions or of his alleged non-pecuniary damage. With

regard to non-pecuniary damage, the Court considered that the court of appeal's approach had been too formalistic; the Court had already noted that such an approach, which placed on the applicant an obligation to establish the existence of non-pecuniary damage through evidence capable of demonstrating external signs of his mental or psychological suffering, had had the result of depriving him of the compensation to which he was entitled. As to the payment of social-security contributions, the issue of parental leave, the entitlement to which was governed by the Military Personnel (Status) Act in a discriminatory manner with regard to servicemen, was distinct from that of potential benefits. Even supposing that the applicant had not paid his social contributions, the court of appeal had completely failed to examine his right to parental leave, possibly without pay. In addition, it had not given the applicant an opportunity to demonstrate payment of such contributions to social and medical insurance schemes, especially since, as a serviceman, he belonged to a social-security scheme that was separate from the public-law scheme. Moreover, no complaints had been brought against the applicant alleging any failure to pay compulsory social contributions since joining the army in 1991. Thus, the court of appeal's refusal to award the applicant compensation for the violation of his right not to be discriminated against in the exercise of his rights concerning his family life did not appear to have been based on sufficient grounds. In this respect, it was irrelevant that the court of appeal had not advanced discriminatory grounds in its decision, since it had refused, without sufficient reasons, to compensate the non-pecuniary damage caused by the discrimination experienced by the applicant on account of the refusal to grant him parental leave.

Conclusion: violation (unanimously).

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

(See *Konstantin Markin v. Russia* [GC], no. 30078/06, 22 March 2012, Information Note no. 150)

Discrimination (Article 1 of Protocol No. 1)

Inability of small landholders, in contrast to large landholders, to have land removed from control of approved hunters' association other than on ethical grounds: *no violation*

Chabauty v. France - 57412/08
Judgment 4.10.2012 [GC]

Facts – The applicant inherited two plots of land with a total surface area of approximately ten hectares. The land is included in the hunting grounds of the approved municipal hunters' association ("ACCA"). He holds a hunting permit. In France, hunting rights over land belong in principle to the landowner. However, a Law provides for the pooling of hunting grounds within ACCAs. Landowners whose property forms part of the hunting grounds of an ACCA automatically become members of the association. They lose their exclusive hunting rights over their own land but have the right to hunt throughout the area covered by the hunting grounds. The owners of land with a surface area above a certain statutory threshold may, however, object to the inclusion of their land in the ACCA's hunting grounds or request its removal from them. Since the entry into force of the Law of 26 July 2000, landowners who are opposed to hunting as a matter of personal conviction also have this option, irrespective of the surface area of their land, enabling them to prohibit hunting on their land, including by themselves. In 2002 the applicant informed the Prefect that he wished to have his land removed from the ACCA's hunting grounds. The Prefect informed him of the procedure to follow in order to have his land removed on account of his opposition to hunting for reasons of conscience. In 2003 the applicant explained to the Prefect that his request for removal of the land was based not on his personal convictions but on the difference in treatment between large and small landowners. In 2004 the request was rejected on the grounds that the applicant had ceased to cite his original reasons, namely his personal convictions, and that he was the holder of a valid hunting permit for the current season. In 2005 the *Conseil d'Etat* rejected an application by the applicant to have that decision set aside.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: It was apparent from the judgment in *Chassagnou and Others*[1] that the Court's findings of a violation in that case had been based to a decisive degree on the fact that the applicants were opposed to hunting on ethical grounds and that issues of conscience were at stake for them. This was also what the French legislature and the Committee of Ministers had inferred from that judgment, which had been executed by means of the enactment of the Law of 26 July 2000.

1. *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, 29 April 1999, Information Note no. 5.

Hence, as the applicant was not opposed to hunting on ethical grounds, no violation of Article 14 in conjunction with Article 1 of Protocol No. 1 could be inferred in the present case from the *Chassagnou and Others* judgment. It remained to be determined whether the fact that only owners of land in excess of a certain surface area could avoid its inclusion in the ACCA's hunting grounds in order to retain their exclusive right to hunt on it constituted, to the applicant's detriment, a source of discrimination between small and large landowners in breach of the Convention. The difference in treatment complained of by the applicant fell within the scope of "control of the use of property", a sphere in which the Court acknowledged that States had a wide margin of appreciation. This was particularly so since, while the criterion for making a distinction – "on the ground of property" – could in some circumstances give rise to discrimination prohibited by the Convention, it did not feature among the criteria regarded by the Court as unacceptable as a matter of principle. In its decision in *Baudinière and Vauzelle*,[1] the Court had acknowledged that the formation of large, regulated hunting entities as the result of the pooling of hunting grounds within the ACCAs was conducive to ecologically balanced game management, and that by thus seeking to control the impact of hunting on the ecological balance, the French legislation was aimed at the protection of the natural environment, an aim which was indisputably in the general interest. In addition, landowners whose land was included in an ACCA's hunting grounds merely lost the exclusive right to hunt on their land; their property rights were otherwise unaffected. In exchange, they obtained automatic membership of the ACCA, which allowed them not only to hunt on the whole of the association's hunting grounds but also to participate in the collective management of hunting throughout that area. Furthermore, landowners who had previously derived an income from hunting or who had made improvements to the land for hunting purposes before joining an ACCA were also entitled to compensation on that basis. In these circumstances, and having regard to the margin of appreciation to be left to the Contracting States, the fact of obliging only small landowners to pool their hunting grounds with the aim – which was legitimate and in the general interest – of promoting better management of game stocks was not in itself disproportionate to that aim.

Conclusion: no violation (unanimously).

1. *Baudinière and Vauzelle v. France* (dec.), nos. 25708/03 and 25719/03, 6 December 2007.

ARTICLE 34

Hinder the exercise of the right of petition

Secret transfer of person at risk of ill-treatment in Uzbekistan and in respect of whom a Rule 39 measure was in force to third-party State where he was beyond the protection of the Convention: *violation*

Abdulkhakov v. Russia - 14743/11
Judgment 2.10.2012 [Section I]

(See Article 3 above, page 13)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies
Effective domestic remedy

Failure to exhaust new remedy providing for compensation but not release in case where unreasonably lengthy detention had already ended: *preliminary objection allowed*

Demir v. Turkey - 51770/07
Decision 16.10.2012 [Section II]

Facts – On 14 February 2000 the applicant was remanded in custody in connection with an operation against an illegal organisation. His conviction was upheld by the Court of Cassation on 6 July 2009. Throughout the proceedings, at regular intervals, the domestic courts ordered that his custody be extended.

Law – Article 35 § 1: As a general rule, a remedy in respect of the length of pre-trial detention, within the meaning of Article 5 § 3 of the Convention must, in order to be effective, provide its user with the possibility of obtaining release from the detention in question. However, in the case of a claim based on Article 5 § 3, as already established in respect of Article 5 § 1, when the pre-trial detention had already ended it had to be ascertained whether the detainee could have used a remedy by which to obtain, first, recognition of the unreasonable nature of the length of the detention, and second, an award of compensation in respect of that finding. If that were the case, the remedy had to be used in principle. The remedy introduced by Article 141 § 1 (d) of the Code of Criminal

Procedure (CCP) was not capable of securing the applicant's release. Moreover, it could not be used while the proceedings against him were still pending. Its only purpose therefore was to obtain compensation. However, the applicant's pre-trial detention within the meaning of Article 5 § 3 of the Convention had come to an end with his conviction at first instance, that conviction having become final on 6 July 2009. Consequently, from that date onwards, the applicant had been entitled to seek compensation under Article 141 of the Code of Criminal Procedure, but he had failed to do so. Furthermore, the award of such compensation would have had to be preceded by a finding that the length of the pre-trial detention had not been reasonable. By using that remedy the applicant could thus potentially have obtained recognition of the unreasonable nature of the impugned measure and also redress for the damage he had suffered. In addition, as the Article in question was a new statutory provision adopted for the specific purpose of creating a remedy to redress that type of grievance, there was an interest in bringing the matter before the domestic courts to enable them to apply the provision. However, this finding was without prejudice to the possibility of re-examining the question of the relevant remedy, and in particular the capacity of the domestic courts to establish, in applying Article 141 § 1 (d) of the Code of Criminal Procedure, case-law that was consistent and compatible with Convention requirements.

Conclusion: preliminary objection allowed (majority).

Article 35 § 3 (b)

No significant disadvantage

Complaint that work inspectors had entered a private garage during the owner's absence and without his permission: *inadmissible*

Zwinkels v. the Netherlands - 16593/10
Decision 9.10.2012 [Section III]

Facts – In his application to the European Court the applicant complained, *inter alia*, that work inspectors had entered his garage without permission to question two people they suspected of not holding work permits. In the domestic proceedings, the Regional Court held that because the applicant's garage was not directly connected to his house, the inspectors had not needed permission to enter. The Administrative Jurisdiction Division of the Council of State dismissed the applicant's appeal on technical grounds.

Law – Article 35 § 3 (b): The Court examined the question of the admissibility of the complaint under this head (no significant disadvantage) of its own motion. The applicant's subjective perception that he had not been treated fairly and disagreed with the outcome of the case at the domestic level, although relevant, did not suffice for the Court to conclude that he had suffered a significant disadvantage. As to the second criterion, whether respect for human rights as defined in the Convention required an examination of the application on the merits, the Court concluded that that was not the case either. As to whether there had been due consideration by a domestic tribunal, the facts of the applicant's case taken as a whole disclosed no denial of justice at the domestic level. His grievances had been considered by the Regional Court and the Administrative Jurisdiction Division. The fact that his complaint had not been subject to a decision on the merits before the latter court (the highest national judicial body in the Netherlands) did not constitute an obstacle to inadmissibility under Article 35 § 3 (b), it being noted that a full consideration of the merits of the Article 8 complaint had been conducted by the Regional Court. To construe the contrary would prevent the Court from rejecting any claim, however insignificant, where an appeal had been dismissed by the highest domestic authority in accordance with national provisions, as in the instant case. Such an approach would be neither appropriate nor consistent with the object and purpose of the new provision. The applicant's case had therefore been duly considered by a domestic tribunal.

Conclusion: inadmissible (no significant disadvantage).

ARTICLE 46

Pilot judgment – General measures

Respondent State required to provide within one year domestic remedy for length of proceedings before the civil courts

Glykantzi v. Greece - 40150/09
Judgment 30.10.2012 [Section I]

Facts – In March 1996 the applicant brought pay-related proceedings before the Court of First Instance against the public hospital where she worked. She was unsuccessful and following her

second appeal on points of law, the case was referred back, in February 2009, to the court of appeal. The case is still pending before the court of appeal, in which a hearing was scheduled for 6 November 2012.

Law – The Court found that there had been violations of Article 6 § 1 and Article 13 of the Convention.

Article 46: The problem of length of proceedings in Greece had already given rise to two pilot judgments: *Vassilios Athanasiou and Others*[1] concerning administrative proceedings, and *Michelioudakis*[2] concerning criminal proceedings. However, as the Committee of Ministers had noted in its interim Resolution of 2007,[3] this issue also affected civil proceedings. In this connection, whilst various legislative measures had recently been taken as regards the domestic law, the Greek legal system still provided no remedy by which a litigant could assert the right to have his or her civil action dealt with within a reasonable time. In view of the foregoing, it was appropriate to apply the pilot-judgment procedure in the present case and the situation in question had to be regarded as reflecting a practice that was incompatible with the Convention. The Greek authorities were thus required, within a period of one year, to introduce a remedy or a combination of effective remedies that genuinely guaranteed sufficient redress for the excessive duration of civil proceedings. As regards remedies for the purposes of expediting the proceedings or obtaining compensation, a significant number of member States had put in place procedures that were, to varying degrees, simpler than the ordinary court procedures. For example, the examination of a complaint by a single judge, written procedures, lower advances on court costs and dispensing with a public hearing, were all measures that could, if appropriate, be implemented in order to facilitate the handling of the above-mentioned complaints and avoid overloading the courts' dockets, which could lead to additional delays in judicial proceedings. Pending the adoption by the Greek authorities of the necessary measures at domestic level, the communicated applications before the Court, in all cases where the sole subject-matter was the duration of civil proceedings before the Greek courts, would be adjourned for a period of one year from the date on which the present judgment became final.

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

1. *Vassilios Athanasiou and Others v. Greece*, no. 50973/08, 21 December 2010, Information Note no. 136.
2. *Michelioudakis v. Greece*, no. 54447/10, 3 April 2012, Information Note no. 151.
3. Interim Resolution CM/ResDH(2007)74 in which the Committee of Ministers called on the Greek authorities to remedy the problem of the excessive length of proceedings before the administrative courts.

Individual measures

Respondent State required to conclude without delay thirteen-year preliminary investigation into villagers' deaths at the hands of the military and to take the delays into account when assessing compensation

Nihayet Arıcı and Others v. Turkey - 24604/04
Judgment 23.10.2012 [Section II]

(See Article 2 above, page 12)

ARTICLE 1 OF PROTOCOL No. 1

Possessions

Legislative change depriving non-residents of certain entitlements under health care insurance contracts: *inadmissible*

Ramaer and Van Willigen v. the Netherlands
- 34880/12
Decision 23.10.2012 [Section III]

Facts – The applicants are Netherlands nationals in receipt of Netherlands old-age pensions. They reside in Belgium and Spain respectively. Until 1 January 2006 they had the benefit of Netherlands private health care insurance which entitled them to health care according to Netherlands standards. Following the entry into force of the Health Care Insurance Act on that date, however, the system was changed and, by virtue of Council of the European Communities Regulation (EEC) 1408/71, the applicants became entitled to health care according to the basic health care regimes of their countries of residence. Health care up to the Netherlands standard has, in the applicants' submission, become much more expensive: the applicants have to take out additional private insurance, and some health care expenses are no longer refundable.

Law – Article 1 of Protocol No. 1: The applicants had no "possession" within the meaning of Article 1 of Protocol No. 1. Their entitlements under their former contracts of insurance had been extinguished

when the contracts were terminated *ex lege* as from 1 January 2006. The applicants had not alleged that claims arising from their insurance companies and existing on or before that date were extinguished or reduced and their expectations were not based on a legal provision or a legal act such as a judicial decision. Rather, they were based on the hope that their insurance contracts would be continued, or renewed, on terms no less favourable than those they had enjoyed previously. In that connection, the Court reiterated that there was a difference between a hope, however understandable, of securing an asset, and a legitimate expectation, which must be more concrete and based on a legal provision or act.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 1 of Protocol No. 12: The Court accepted that place of residence constituted "an aspect of personal status" for the purposes of Article 1 of Protocol No. 12 and that the entry into force of the new health care legislation had created a situation in which the applicants were treated differently from Netherlands residents, and also from each other depending on their respective countries of residence. The applicants were not, however, in a relevantly similar position to those comparator groups. As was apparent from its drafting history, the Health Care Insurance Act was intended to provide an essentially territorial system for all persons lawfully resident in the Netherlands. As a result of their choice to reside in other European Union countries the applicants were entitled in their respective countries of residence to health care under the same regime as the local population. The country concerned was reimbursed for any health care it provided by the Netherlands, which in turn had the right to require the applicants to contribute. Any complementary health care insurance was optional. The position was thus similar to that in *Carson and Others*[1] in which the Court had found that resident and non-resident pensioners were not in a relevantly similar position.

Conclusion: inadmissible (manifestly ill-founded).

The Court also declared inadmissible as being manifestly ill-founded the applicants' complaints under Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 (on the grounds of its finding that the latter provision was inapplicable) and under Article 6 § 1 of the Convention.

1. *Carson and Others v. the United Kingdom* [GC], no. 42184/05, 16 March 2010, Information Note no. 128.

Deprivation of property

Compensation significantly lower than current cadastral value of land expropriated following restoration of Latvian independence: *violation*

Vistiņš and Perepjolkins v. Latvia - 71243/01
Judgment 25.10.2012 [GC]

Facts – The applicants acquired five plots of land under contracts of donation signed in 1994 on an island that is mainly occupied by port facilities and is part of the city of Riga. The plots had previously been expropriated illegally by the Soviet Union, but the donors had recovered their title in the context of denationalisation in the early 1990s. The cadastral value of the land as indicated at the time of the donation was insignificant, but in 1996, following its incorporation into the Port of Riga, it was estimated at about EUR 900,000 for the land belonging to the first applicant and for that of the second totalled about EUR 5,000,000. In 1997 the Latvian Parliament enacted a law for the expropriation of land for the needs of the State within the Free Port of Riga. The compensation awarded to the applicants was fixed at EUR 850 and EUR 13,500, respectively, in accordance with the new statutory provision setting as the ceiling for such compensation the cadastral value as at 22 July 1940, multiplied by a conversion ratio. In 1999 the applicants brought proceedings to obtain rent arrears for the use of their land since 1994 and were awarded, respectively, the equivalent of about EUR 85,000 and EUR 593,150. They further requested the courts to annul the cadastral registration of the State's title, arguing in particular that the procedure provided for by the 1923 General Expropriation Act had not been complied with; but their claims were dismissed on the ground that the expropriation was not based on the 1923 General Act but on a special law of 1997.

On 8 March 2011 a Chamber of the Court found that there had been no violation of Article 1 of Protocol No. 1 or of Article 14 of the Convention (see Information Note no. 139).

Law – Article 1 of Protocol No. 1: In the present case there had been a "deprivation of possessions", within the meaning of the second sentence of that Article.

(a) *Lawfulness of the interference* – In Latvian law the formal and final decision on expropriation was taken not by the executive but by Parliament in the form of a special law. This was a feature of the

Latvian legal system, dating back to 1923, and enshrined in the Constitution in 1998. The general principles and objectives of the expropriation system set up by Latvian law did not, as such, raise any issue of lawfulness within the meaning of Article 1 of Protocol No. 1. Prior to the adoption, in 1997, of the regulation and the enactment of the special Law confirming it, the applicants could have expected that any expropriation of their property would be carried out in accordance with the 1923 General Expropriation Act. The Court had doubts as to whether the expropriation at issue had been carried out "subject to the conditions provided for by law", having regard in particular to the derogation applied to the applicants and to the procedural safeguards that were – or were not – attached to it.

(b) *Legitimate aim of the interference* – The Government had argued that the State needed the expropriated land, situated near the Free Port of Riga, to extend, renovate and rebuild the port's infrastructure. The Court had no reason to believe that those grounds were manifestly devoid of a reasonable basis.

(c) *Proportionality of the interference* – The value of the properties at issue had been assessed on three separate occasions. The applicants themselves had initially decided to indicate an exceptionally low value for their land and the parties agreed that this evaluation had been solely for the purpose of calculating registration duty. Leaving aside the question of the parties' good faith in terms of their tax obligations, it was noteworthy that this calculation had never been referred to in the subsequent expropriation and compensation procedure. The Latvian authorities had been justified in deciding not to compensate the applicants for the full market value of the expropriated property and much lower amounts could suffice to fulfil the requirements of Article 1 of Protocol No. 1, for three reasons. Firstly, because the actual market value of the land could not objectively be determined, in particular because of the exclusive right of purchase introduced for the benefit of the State and local authorities by the Ports Act. Secondly, because the land at issue was subject to a statutory servitude for the benefit of the port. Lastly, because the applicants had not invested in the development of their land and had not paid any land tax, the tax-reassessment procedure subsequently initiated against them by Riga City Council having been unsuccessful. However, there was an extreme disproportion between the official cadastral value of the land and the compensation received by the applicants: the sum paid to the first applicant was less than one thousandth of the cadastral value of his land, and the second had received a sum some 350 times lower than the total cadastral value of all his properties. In the Court's view, such disproportionate awards were virtually tantamount to a complete lack of compensation. Only very exceptional circumstances could justify such a situation. It was accordingly for the Court to ascertain whether such circumstances existed in the present case, by examining, in turn, the applicants' personal situations and conduct, and the general historical and political background to the impugned measure.

(i) *Applicants' personal circumstances*: The applicants' good faith as to the acquisition of the property in question had never been disputed at national level. The Latvian authorities had never taken legal action to challenge the validity of the 1994 contracts of donation. On the contrary, they had formally recognised the applicants' right of ownership by registering the land in their names and by paying them rent. In those circumstances the Court did not find any reason to question the conformity of the donations with the requirements of Latvian law or the validity of the applicants' right of ownership. The donations had been made in return for certain services rendered by the applicants to the donors. It would therefore be incorrect, strictly speaking, to assert that the property in question had been acquired "free of charge". In any event, the manner in which the applicants had acquired their property could not be held against them. Similarly, whilst it was true that the applicants had possessed their land for only about three years, that fact did not affect the value of the property and did not by itself justify a significant reduction in compensation. Consequently, the applicants' personal circumstances and conduct did not in themselves justify the award of such minimal sums.

(ii) *Historical and political background*: By the time of their expropriation, all the disputed plots of land had already, with final effect, been denationalised and allotted to individuals. In this connection, the Court could not equate individuals who had not yet recovered their property with those who were already in possession of a valid title deed. The context of the present case was different from that of *Jahn and Others v. Germany*,[1] in the following three aspects in particular. Firstly, the laws in the present case had been enacted by a democratically elected parliament and there was no reason why the applicants could not maintain their rights,

1. *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, 30 June 2005, Information Note no. 76.

except in the event of fraudulent enrichment to the detriment of the former owners, but neither the validity of the contracts of donation nor the good faith of the applicants had been called into question by the Latvian authorities. Similarly, the applicants' status as property owners was unquestionably sound and the claims deriving from the enjoyment of their possessions had been further strengthened by the Free Commercial Port of Riga Act, which had subjected their land to profitable servitudes. Secondly, all the events at issue had taken place more than three years after the final re-entry into force of the democratic Constitution of 1922 and more than five years after the restoration of independence of Latvia, that is to say, well after the end of the period of historic upheaval. It followed that, whilst it had still been open to the Latvian legislature, in 1997, to correct any errors that might have been committed during the land reform, it could nevertheless have been expected to uphold the principle of legal certainty and to refrain from imposing excessive burdens on individuals. Thirdly, the expropriation at issue had been of benefit solely to the State, which had not redistributed any of the property to individuals. The present case was therefore not one where a manifestly unjust situation resulting from a process of denationalisation had to be remedied by the legislature *ex post facto* within a relatively short time in order to restore social justice.

Furthermore, shortly after being deprived of their properties, the applicants had received significant amounts from the Free Commercial Port of Riga for the rent arrears due to them and in respect of the servitudes. Those amounts – calculated this time on the basis of the current value, and not that of 1940 – were respectively 95 times higher than the compensation granted to the first applicant and 40 times higher than that granted to the second. Noting that the rent arrears due to the applicants derived from a separate legal basis from that of the compensation awarded to them, the Court was unable to agree with the Government's argument that the former sufficed to make up for the insignificance of the latter. In any event, the disproportion between the rent arrears and the compensation awarded confirmed that the compensation had been unreasonably low. Lastly, the Government had failed to show that the legitimate aim relied on, namely that of optimising the management of the Riga Port infrastructure in the general context of the State's economic policy, could not be fulfilled by less drastic measures than expropriation compensated for by purely symbolic sums. The State's budgetary difficulties did not constitute an imperative capable of justifying the adoption of such exceptional measures. In principle, it was not for the Court to indicate to the Contracting Parties what concrete legislative or regulatory measures should be taken in order to comply with their obligations. That being said, an exchange of land or a reduction in the rent due to the applicants – for as long as the State did not have the requisite budgetary resources to expropriate their land in return for fair compensation – were conceivable examples of such measures. Lastly, the authorities could have calculated the compensation on the basis of the cadastral value of the land at the date on which the applicants had actually lost their title instead of using the cadastral value from 1940. However, there was no evidence in the file that such measures had been discussed or even envisaged at national level. In those circumstances, even though Article 1 of Protocol No. 1 did not, in the present case, require the reimbursement of the full cadastral or market value of the expropriated properties, the disproportion between their current cadastral value and the compensation awarded was too significant for it to find that a "fair balance" had been struck between the interests of the community and the applicants' fundamental rights. The State had overstepped the margin of appreciation afforded to it and the expropriation complained of by the applicants had imposed on them a disproportionate and excessive burden, upsetting the "fair balance" to be struck between the protection of property and the requirements of the general interest.

Conclusion: violation (twelve votes to five).

Article 41: question reserved.

ARTICLE 2 OF PROTOCOL No. 1

Right to education
Respect for parents' religious and philosophical convictions

Closure of schools teaching in Latin script and harassment of pupils wishing to be educated in their national language: *violation*

Catan and Others v. the Republic of Moldova and Russia - 43370/04, 8252/05 and 18454/06
Judgment 19.10.2012 [GC]

(See Article 1 above, page 9)

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

Del Rio Prada v. Spain - 42750/09
Judgment 10.7.2012 [Section III]

(See Article 7 above, page 26)

COURT NEWS

Elections

During its autumn session held from 1 to 5 October 2012, the Parliamentary Assembly of the Council of Europe elected four new judges to the Court: Valeriu Grițco in respect of the Republic of Moldova, Faris Vehabović in respect of Bosnia and Herzegovina, Dmitry Dedov in respect of the Russian Federation and Ksenija Turković in respect of Croatia. Judges Grițco and Vehabović will begin their nine-year terms in office no later than three months after 2 October 2012, and Judges Dedov and Turković will begin their nine-year terms no later than three months after 1 November 2012.

The Court has elected a new Section Vice-President – Alvina Gyulumyan (Armenia) – for a term running from 1 November 2012 to 31 January 2014.