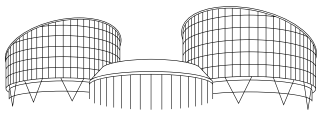

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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ARTICLE 2

Use of force

Unjustified use of potentially lethal force by an off-duty police officer: *Article 2 applicable; violation*

Haász and Szabó v. Hungary - 11327/14 and 11613/14
Judgment 13.10.2015 [Section II]

Facts – The applicants are two women, Ms Haász (the first applicant) and Ms Szabó (the second applicant). After returning from an excursion to a lake, they decided to spend the night in their car. During the night a volunteer law-enforcement officer was tipped off about the sighting of a suspicious car. He informed an off-duty police officer and together they went in search of the car. On noticing the applicants' car, they parked perpendicularly in front of it, got out of their vehicle and started to run towards it. The first applicant, frightened by the sight of two people in civilian clothes running towards her, attempted to drive away. The police officer waved at the car shouting "Police! Stop!" and fired a warning shot. He then shot twice more at the car, the second shot narrowly missing the second applicant's head. The officer eventually put his gun away and presented his police ID at which point it became clear that the incident was based on a misunderstanding. The police officer's superior, investigating the officer's use of his firearm, concluded that while he had no intention of endangering life, his actions had been unprofessional. The Prosecutors Office discontinued the criminal investigation finding that the police officer's use of his firearm had been lawful in face of the danger represented by the car driving towards him and accepting the officer's account that he had fired the shots because he had believed there was a danger to his colleague's life.

In their application to the European Court, the applicants complained of violations of the substantive and procedural limbs of Article 2 of the Convention. The second applicant's application was declared inadmissible as it was lodged out of time.

Law – Article 2

(a) *Applicability* – The fact that the force used against the first applicant was not lethal did not exclude examination of her complaints under Article 2. Even though the police officer had not intended to kill her, the use of a firearm shot in her direction and narrowly missing the second applicant's head had generated a risk of serious injury or loss of life. Thus, she was a victim of conduct which, by its nature, put her life at risk and Article 2 was applicable.

(b) *Substantive limb* – Although the police intervention was not pre-planned, this was not a case in which law-enforcement officers had been called upon to respond to unexpected circumstances in the heat of the moment, since the entire incident had taken place largely as a result of the police officer's own conduct. In those circumstances, where the need to resort to potentially lethal force occurred as a consequence of a series of decisions and measures taken by a police officer, those decisions would engage the State's responsibility to the same extent as the planning and control of police operations.

The police officer had intervened in order to stop the applicants' car as he believed there was a danger his colleague would be run over. However, after discovering the car, the officers had established that there were no signs of any criminal act. There had been no immediate need for action, whether to effect an arrest or to prevent the commission of a crime.

When approaching the applicants and blocking the path of their car the officers did not pay any heed to the fact that neither of the persons in the car was wanted by the police or posed any known danger. The applicants could not possibly have known that the men approaching their car were law-enforcement officers since the officers were dressed in plain clothes, had no insignia and were driving an unmarked car. To approach the car in the dark without any visible identification and create a threatening setting by blocking the car's path had been liable to provoke an unpredictable

reaction from those inside the car. In addition, the conduct of the two officers had been without any instruction or supervision by a senior officer.

In sum, the police officer's actions before the shooting were not reasonable in the light of the available information on the nature of the threat posed and were not conducted in such a way as to minimise the risk of the events unfolding into a life-threatening situation culminating in the use of firearms.

Conclusion: violation (unanimously).

(c) *Procedural limb* – The national authorities' assessment of the events – which did not include any judicial fact-finding – had been limited to examining whether the police officer had committed a criminal offence by the impugned shooting, without any examination of the wider context of, or the events leading up to, the incident. In particular, there had been no examination of the manner in which the operation to track and halt the applicants had been carried out and of the effect it had had on the necessity of using a firearm. There had thus been a lack of thorough and effective investigation into the need to use potentially lethal force.

Conclusion: violation (unanimously).

Article 41: EUR 15,000 to the first applicant in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Use of force
Effective investigation

Death of prisoners in major prison operation and failure of the authorities to establish responsibility: *violations*

Kavaklıoğlu and Others v. Turkey - 15397/02
Judgment 6.10.2015 [Section II]

Facts – This case chiefly concerned an anti-riot operation conducted on 26 September 1999 in Ulucanlar Prison, which was in fact the culmination of a long series of clashes between the prison staff and some of the inmates. The hostilities dated back to 1996. Since that time the authorities had been aware of the problems, which included overcrowding and the age and unsuitability of the prison complex, which was designed to accommodate remand prisoners rather than those who had been convicted. The demands and actions of the prisoners concerned appear to have focused mainly on the lack of living space in the dormitories. In 1996 a first action plan was drawn up but was not implemented. Between 1996 and 1999 no searches were carried out in the three dormitories under the control of the prisoners who were causing the problem. Searches conducted in the remainder of the prison revealed a large quantity of weapons and defensive structures. The situation was the subject of numerous communications between the various authorities, but no action was taken despite the fact that, among other developments, the prisoners had taken control of a fourth dormitory in the meantime. The prisoners were refusing at that time to undergo any checks. In 1999 the authorities concluded that the situation in the prison was not an isolated case and that ringleaders in different prisons were communicating freely with one another by mobile phone and were planning a series of simultaneous riots and escapes. The reports repeatedly referred to the prisoners concerned as "terrorists".

On 26 September 1999 a search operation was carried out in the three dormitories controlled by prisoners. In addition to the auxiliary forces, the operation involved a main squad made up of 250 conscripts and around 70 officers wearing full riot gear and carrying their service weapons, comprising at least 29 pistols, 31 submachine guns and 124 automatic assault rifles. The gendarmes entered the premises at around 4 a.m. Following an attack by prisoners on a non-commissioned officer, the violence escalated and rapidly developed into an uprising. The clashes, in the course of which projectiles, tear gas, firearms and makeshift flame throwers were used, continued until 11.30 a.m. Ten prisoners were killed and around 70 were injured, with four of them sustaining lifethreatening injuries. Fifteen members of the security forces were injured, one of them seriously. There were differing versions of the events after the security forces had regained control, with the prisoners alleging that some of them had been ill-treated.

Several sets of proceedings were opened following these events. Disciplinary proceedings and a criminal investigation were commenced against some members of the prison staff, the gendarmes concerned were prosecuted, full administrative-law actions were brought against the ministerial authorities and a parliamentary inquiry was carried out. Proceedings were also brought against some of the prisoners.

Law – Article 2 (*substantive aspect*)

(i) *The aim of the use of force* – The reason advanced, namely the carrying out of a "general search", did not feature as such among the grounds provided for by Article 2 § 2 of the Convention. Nevertheless,

it had to be interpreted in the light of the request made by the prison management, based on the apparent need to "protect the prison staff" entrusted with the task of carrying out the search. As the staff members in question had not left the building until after the attack on the non-commissioned officer the Court could accept that, at least initially, the aim pursued by the authorities had been compatible with that set out in Article 2 § 2 (a). Subsequently, the prisoners' actions had gradually turned into an attempted uprising. From that point onwards, the aim had no longer been to protect the prison officers responsible for carrying out the searches, but rather to quell a potential insurrection. The measures to be taken to that end could therefore entail recourse to potentially lethal force which was apt to be compatible with the aims set forth in Article 2 § 2 (a) and (c) of the Convention, with the second sub-paragraph predominating.

Nevertheless, in view of the number of persons killed and injured in the present case, a question arose as to whether the actions complained of had exceeded the degree of force that was absolutely necessary. The Court therefore had to examine first and foremost the manner in which the operation had been prepared and supervised.

(ii) *Whether the danger had been foreseeable* – In view of the highly particular circumstances of the case, the issue of foreseeability had to be examined with great care, since the ministerial, prison, judicial and military authorities and the prefecture had been aware of the situation in the prison since at least January 1996. In that connection, the Government's acknowledgment of the problems linked to the fact that the prison had no longer been under the control of the authorities since 1996 had no bearing in terms of Article 2, not only because no information had been provided concerning any specific measures that might at least have been considered in order to prevent the problem from escalating over the years, but also because, in any event, these in no way exempted the State from its responsibility with regard to the planning and implementation of the operation in question. The effective loss of State control over the prison had been the result of failings in the organisation or normal operation of a public service for which the State alone could be held responsible.

(iii) *The authorities' reluctance to intervene* – Several plans of action had been drawn up but none had been put into effect prior to the operation of 26 September, despite the fact that, following the searches carried out elsewhere in the prison, the authorities must have been aware of what was concealed in the three dormitories that had not been searched.

(iv) *The element of spontaneity and the authorities' room for manoeuvre* – The authorities had possessed a large quantity of information that had been confirmed repeatedly, and had had approximately 23 days to make a final assessment and carry out the necessary preparations to avert the danger, on the basis of a plan adapted to this type of crisis. Consequently, no phase of the impugned operation could be said in itself to have been spontaneous, nor could any of the State agents or conscripts be considered to have been responding "in the heat of the action" to a perceived threat to their own lives or the lives of others. In the present case, in which several persons had been injured or had died while under the control of the authorities or of State agents, strong inferences could be drawn from any omission on the Government's part to provide a satisfactory and convincing explanation.

(v) *The action plan and the personnel deployed* – The Court lacked the expertise needed to assess whether and to what extent it had been essential to deploy a force of this kind equipped with combat weapons. However, one thing was clear, namely that in January 1996, well before the situation had deteriorated, the presence of twenty or so soldiers had been considered sufficient to carry out such searches.

(vi) *The gendarmes' operational capability* – The gendarmes and police auxiliary teams could be presumed to have been professionally equipped for this type of action. However, a question arose with regard to the conscripts (of whom there had been around 250). There was nothing to suggest that they had been qualified to take part in the operation.

(vii) *The regulatory framework* – It was not apparent that the operation in question, albeit authorised under domestic law, had been sufficiently regulated by that law through a system of adequate and effective safeguards against arbitrariness and abuse of force and against avoidable accident. That being said, whatever the shortcomings of the rules at the relevant time, there was no reason why they could not have been overcome in practice in the present case by means of the specific instructions issued to the gendarmes both before and during the operation.

(viii) *The instructions and briefing* – The authorities should not have been content with such rudimentary and imprecise supervision of the operation, which had made the use of lethal force virtually

inevitable. In order to fulfil their obligation to protect the right to life they should have assessed the information they possessed with greater care before issuing instructions to the troops, who they knew were trained to kill and would not hesitate to use their firearms if they believed that they were dealing with formidable opponents in the context of an anti-terrorist operation.

(ix) *Alternative strategies* – It should not be overlooked that, at that early stage, the prisoners in question, however intolerable their conduct, had not hitherto presented a very grave threat such as to seriously endanger the lives of their fellow inmates or the prison staff. The danger they represented could not therefore be equated with that represented by determined terrorists. While the intention had indeed been to restore the State's authority, the Turkish authorities should nevertheless have borne in mind that there could be no necessity of using lethal force where the individuals concerned posed no threat to life or limb and were not suspected of having committed a violent offence. However, there was nothing to suggest that the administrative or military authorities had actually assessed the nature of the threat posed by the prisoners and made a distinction between lethal and non-lethal methods, or that they had considered negotiating a peaceful surrender.

(x) *Use of non-lethal methods* – Once the prisoners had been isolated in a part of the prison under the authorities' control, continuing the use of tear gas – accompanied by the spraying of water and foam – in a controlled manner while awaiting an opportunity to contain the situation, had undoubtedly been a credible option that should have been considered before there was any loss of life. However, the way in which the gendarmes had reacted as soon as the non-commissioned officer was attacked suggested that they had quite simply not been prepared to adopt a non-lethal strategy of this kind or to await its outcome. The arguments as to the supposed need to afford no respite to the "terrorists" were sufficient to demonstrate the extent to which the operation had been planned and conducted using a military approach that required unconditional surrender.

(xi) *Possibility of negotiation* – No negotiation had been attempted either before or during the operation. However, the gendarmes, who had of course not been trained for such a complex and sensitive operation and had been issued with prior orders to maintain firm psychological pressure on the prisoners and never to talk to them or allow them to influence their actions in any way, had undoubtedly been incapable of such action. In any event they had made a serious miscalculation, as once the first Molotov cocktail had been thrown clashes became likely if not inevitable.

(xii) *Preliminary conclusion* – The persons in charge of the operation, intent on restoring their authority over the prison, which had long been flouted, and on stigmatising and controlling the lives of certain prisoners in a manner going beyond their physical confinement, had not taken the necessary care to ensure that any risk to life was reduced to a minimum, and had been negligent in their choice of action before and during the operation. As a result of the insufficient attention paid to the information that had been available for years concerning the alarming situation in the prison, no alternative strategy had been studied or considered, making the use of lethal force almost inevitable. The force deployed had thus not been absolutely necessary for the purposes of Article 2 § 2 of the Convention.

(xiii) *The argument that some prisoners had been murdered by their fellow inmates* – This argument had been based purely on conjecture. Nevertheless, in so far as it could be said to demonstrate that the murders in question had taken place outside the control of the authorities, behind the barricades where the gendarmes were failing to control the course of events, the Court noted that the fact that a prison which was placed under the strict control of the State had allegedly eluded its effective control during an operation by the security forces did not in any way relieve the State of its responsibility towards the prisoners.

Conclusion: violation (unanimously).

The Court further held unanimously that there had been a violation of the substantive aspect of Article 2 with regard to those applicants who had not died but who had been victims of the use of firearms or blows with life-threatening consequences. It also held unanimously that there had been a violation of Article 3 on account of the inhuman treatment of the remaining applicants resulting from the physical violence to which they had been subjected and the fact of witnessing the death of their fellow inmates.

Articles 2 and 3 (*procedural aspect*)

(i) *The effectiveness of the proceedings against the prison staff* – The failings on the part of the administrative authorities regarding the running of the prison since 1996 and the presence, among other things, of various types of weapons in the dormitories were factual circumstances which pre-dated the operation and had apparently never been duly

examined in the context of the prosecution or the administrative-law actions. Furthermore, the disciplinary investigation appeared to have been bound to fail owing to the intervention of the superior of the officials concerned, and the criminal investigation had ended in a decision not to prosecute. These factors demonstrated the lack of any willingness on the part of the authorities to identify the members of the prison staff who may have been responsible for the actions complained of in the present case.

(ii) *The effectiveness of the criminal proceedings against the gendarmes* – The complexity of the facts and the large number of suspects and victims did not suffice to explain the lack of tangible and solid progress capable of establishing responsibility more than fifteen years after the events. The administrative proceedings for compensation were also still pending. Accordingly, the various investigations and sets of proceedings had not satisfied the requirements of diligence and promptness.

Conclusion: violation (unanimously).

The Court also held unanimously that there had been no violation of Article 1 of Protocol No. 1 regarding the alleged destruction of personal property.

Article 41: sums ranging between EUR 5,000 and EUR 50,000 to each applicant in respect of non-pecuniary damage; claims in respect of pecuniary damage dismissed.

Disproportionate use of lethal force by the State and lack of effective investigation: *violations*

Abakarova v. Russia - 16664/07
Judgment 15.10.2015 [Section I]

(See Article 46 below, page 48)

Positive obligations (substantive aspect)

Failure to bring an action to establish State responsibility following suicide in custody: *inadmissible*

Benmouna and Others v. France - 51097/13
Decision 15.9.2015 [Section V]

Facts – The applicants were respectively the parents, sisters and brother of M.B., who committed suicide in July 2009 by hanging himself while being held in police custody in connection with an offence of attempted aggravated extortion. His father did not believe that his son had committed suicide and lodged a criminal complaint. The public prosecutor requested the opening of a judicial investigation for unintentional homicide. In September 2010 the investigating judge discontinued the proceedings. The applicants appealed to the Court of Appeal and the Court of Cassation, without success.

Law – Article 2 (*substantive aspect*): The applicants had not brought an action under Article L. 1411 of the Judicature Code, which allowed State responsibility for the defective operation of the justice system to be recognised by the courts, and provided for compensation to be awarded to victims and persons close to them who could demonstrate that they had suffered indirect damage. While the legislation made this type of responsibility contingent on a finding that there had been a denial of justice or gross negligence, developments in the case-law had led the domestic courts to interpret the latter concept more and more extensively.

In previous cases[1] the Court had considered that this remedy had not, at the relevant time, acquired a sufficient degree of legal certainty such that it could and should be used for the purposes of Article 35 § 1 of the Convention in the circumstances under consideration.

However, this reasoning did not apply in the present case, in which the events had occurred considerably later. Furthermore, several judgments had since been delivered by the Court of Cassation concerning State responsibility for the suicide of persons being held in detention in connection with a criminal investigation. Moreover, an application lodged with the Court following one such judgment in 2011, in which the Court of Cassation had found that the State's responsibility was not engaged, had been declared inadmissible. The Court therefore considered that the remedy under Article L. 1411 of the Judicature Code had acquired a sufficient degree of legal certainty – at the latest by March 2011, that is, almost two years before the Court of Cassation judgment of 5 February 2013 – such that it could and should be used for the purposes of Article 35 § 1 of the Convention in the circumstances of the present case.

Accordingly, the fact that the applicants had applied to join the criminal proceedings as civil parties did not exempt them from bringing an action to establish State responsibility for the

1. *Saoud v. France*, 9375/02, 9 October 2007, Information Note 101.

defective operation of the justice system, an action which afforded greater flexibility than a criminal prosecution and consequently had different prospects of success. In order to be successful, a criminal prosecution had to demonstrate that a criminal offence had been committed.

Conclusion: inadmissible (failure to exhaust domestic remedies).

The Court also declared the application inadmissible with regard to the substantive aspect of Article 2 as being manifestly ill-founded, since it had not been demonstrated that the investigation carried out following M.B.'s death had been ineffective.

Positive obligations (procedural aspect)
Extradition

Alleged failure to secure extradition of Irish national to Hungary to serve prison sentence: *inadmissible*

Zoltai v. Hungary and Ireland - 61946/12
Decision 29.9.2015 [Section I]

Facts – The applicant was the father of two young children who were struck and killed by a car driven by an Irish national, T., in Hungary in 2000. Some months later T. was permitted to return to Ireland after his employment contract in Hungary ended. He deposited a sum with the Hungarian authorities as bail and appointed a lawyer to represent him at his trial, which was to take place in his absence. He was subsequently convicted by the Hungarian courts of negligent driving causing death and given a prison sentence.

Following Hungary's accession to the European Union (EU), the Irish authorities received a European arrest warrant in June 2005 and T. was arrested. However, the Irish courts ruled that he could not be said to have "fled" Hungary and so did not come within the terms of the European Arrest Warrant Act 2003, which transposed the EU Council Framework Decision on the European arrest warrant and surrender procedures into Irish law. In 2010 the 2003 Act was amended to remove the reference to "a person having fled" and the Hungarian authorities issued a fresh warrant for T.'s arrest. The Irish Supreme Court ruled, however, that T. could not be surrendered as either the amendment did not disturb his right derived from the earlier proceedings not to be surrendered or the renewed attempt to secure his surrender after so many years constituted an abuse of process. Ultimately T. travelled voluntarily to Hungary to commence his sentence before returning to Ireland to complete it there.

Law – Article 2 (*procedural aspect*)

(a) *Complaint in respect of Hungary* – The Hungarian authorities had prosecuted T. and the criminal proceedings had led to his conviction and sentence, which had been confirmed on appeal approximately two and a half years after the accident. The imperative of establishing the circumstances of the accident and the person responsible for the loss of life had thus been satisfied. Furthermore, in the light of the steps taken by the Hungarian authorities, the applicant had no basis on which to complain of the events subsequent to T.'s conviction. The Hungarian authorities had displayed persistence in seeking his return within the framework of EU law and, once the impediment to return had been removed by the Irish legislature in 2010, had promptly reiterated the request for his surrender to commence his sentence. In sum, there was no basis on which to find a breach of Hungary's procedural obligations under Article 2.

Conclusion: inadmissible (manifestly ill-founded).

(b) *Complaint in respect of Ireland* – As regards the applicant's complaint that he was not involved in the Irish proceedings, the Court considered that while Article 2 required States to ensure the participation of the next-of-kin in proceedings concerning the death of their loved ones, this had no application to the proceedings that took place before the Irish courts. The issues at stake in those proceedings did not concern the causes of the accident or T's liability for the deaths, but the relevant provisions and principles of Irish law and the implementation of the Framework Decision in Ireland. Given the nature of those proceedings the applicant could not derive any right under Article 2 to be involved in that litigation.

As to the applicant's complaint that Ireland had failed to transpose the Framework Decision correctly, the Court observed, first, that its competence as determined by Article 19 of the Convention did not extend to assessing whether a Contracting State had correctly implemented any other of its international legal obligations. Furthermore, the Irish authorities had genuinely and diligently sought to operate the European Arrest Warrant procedure by pursuing the matter to the Supreme Court in the first set of proceedings and subsequently making the necessary legislative amendments before promptly resuming the procedure and taking T. into custody. The second set of proceedings had involved complex questions of Irish law. Although, following

the Supreme Court's ruling, it had not been legally possible to compel T.'s return to Hungary, the Hungarian and Irish authorities had been able to arrange for him to serve out his sentence mainly in Ireland. Ultimately, accountability for loss of life had been enforced. It could not therefore be said that Ireland had failed in any procedural obligation that may have arisen out of the accident.

Conclusion: inadmissible (manifestly ill-founded).

Expulsion

Proposed expulsion to Syria: *expulsion would constitute a violation*

L.M. and Others v. Russia - 40081/14, 40088/14 and 40127/14
Judgment 15.10.2015 [Section I]

(See Article 3 below, page 17)

Failure by court reviewing expulsion order to assess risk that applicant would face the death penalty: *expulsion would constitute a violation*

A.L. (X.W.) v. Russia - 44095/14
Judgment 29.10.2015 [Section I]

Facts – The applicant claimed to be a Russian national, whereas the Russian authorities claimed that he was Chinese. In August 2014 the Russian authorities ordered the applicant's exclusion from Russia since his residence there was undesirable. He was a wanted man in China who was living unlawfully in Russia and thus posed a real threat to public order and security. The applicant appealed arguing that his deportation to China would expose him to a real risk of being subjected to the death penalty. The Russian court rejected that argument on the grounds that the exclusion order was not equal to an automatic expulsion order and that he was free to leave Russia for another country.

Law – Articles 2 and 3: In the case of *Al-Saadoon and Mufdhi v. the United Kingdom* the Court held that capital punishment had become an unacceptable form of punishment no longer permissible under Article 2 as amended by Protocols Nos. 6 and 13 and amounted to "inhuman or degrading treatment or punishment" under Article 3. Even though Russia had never ratified Protocol No. 6 or signed Protocol No. 13, in view of its unequivocal undertaking to abolish the death penalty upon becoming a member of the Council of Europe, the Court considered that Russia was nonetheless bound by an obligation stemming from Articles 2 and 3 not to extradite or deport an individual to another State where there existed substantial grounds for believing that he or she would face a real risk of being subjected to the death penalty. In the applicant's case the domestic courts had made no assessment of the risk of him being subjected to the death penalty if deported to China but had instead concluded that the exclusion order issued did not automatically entail his deportation to China and that he could still leave Russia for another country.

The Court was not convinced by those arguments since the exclusion order against the applicant mentioned explicitly that if he did not leave Russia before the stated deadline he would be deported. Moreover, since his Russian passport had been seized it appeared to be impossible for the applicant to leave Russia for another country within the three-day time-limit imposed by the exclusion order. Lastly, it was not disputed by the parties that there was a substantial and foreseeable risk that, if deported to China, the applicant would be given the death penalty following trial on the capital charge of murder.

Conclusion: expulsion would constitute a violation of Articles 2 and 3 (unanimously).

The Court also found, unanimously, violations of Article 3 in its substantive aspect on account of the applicant's poor conditions of detention in two different facilities.

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

(See *Al-Saadoon and Mufdhi v. the United Kingdom*, 61498/08, 2 March 2010, Information Note 128)

ARTICLE 3

Degrading treatment

Allegedly inadequate detention conditions in prison facility: *no violation*

Story and Others v. Malta - 56854/13, 57005/13 and 57043/13
Judgment 29.10.2015 [Section V]

Facts – In their application to the European Court the applicants complained that the detention conditions in the sector hosting foreign detainees in the Corradino Correctional Facility in Paola were inadequate.

Law – Article 3: The Court noted at the outset that the applicants were not suffering from any partic-

ular health condition likely to make their detention more burdensome, nor had there been any deterioration of their physical or mental condition while they were in detention. In fact, they were regularly visited by doctors and prescribed the relevant medical treatment.

As to the alleged lack of personal space, the applicants each had their own cell with individual sleeping place and there was no problem of overcrowding. It did not appear that the cells were particularly damp or mouldy, bearing in mind the particularly humid climate of the country. The windows and ventilators in the cells could supply enough light and ventilation. In this regard, the Court reiterated that in the absence of any indications of overcrowding or malfunctioning of the ventilation system and artificial lighting, the negative impact of metal shutters did not, on its own, reach the threshold of severity required under Article 3 of the Convention. Nevertheless, prison authorities had to ensure that all ventilators were fully functional in all cells and that detainees were supplied with the equipment needed to open and keep open high windows. While the lack of a heating or dehumidifying system was regrettable, the Court noted that detainees could request further blankets or warmer clothing, which the authorities were required to supply promptly.

The Court further noted that the toilet in the applicants' cell was not separated from the living area and was not equipped with an automated flushing system. As water was not always readily available to enable flushing with a bucket, this raised hygiene concerns. Further, the failure of the authorities to ensure a regular supply of both hot and cold water in the showers and to keep them in working order was unfortunate and the Court would remain vigilant in future cases in this respect.

Conversely, the availability and duration of outdoor exercise raised no particular concern as inmates were free to move around and access the exercise yard and other recreational facilities for more than 10 hours a day.

In sum, while the Court was concerned about a number of matters, it was not convinced that the overall conditions of detention, and the medical treatment received by the applicants, had subjected them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention or that their health and well-being were not adequately protected.

Conclusion: no violation (six votes to one).

(See also the Factsheets on Detention conditions and treatment of prisoners and on Prisoners' health-related rights)

Expulsion

Proposed deportation to Iraq of family threatened by al-Qaeda: *case referred to the Grand Chamber*

J.K. and Others v. Sweden - 59166/12
Judgment 4.6.2015 [Section V]

The applicants, a married couple and their son, are Iraqi nationals. They applied for asylum in Sweden on the grounds that they risked persecution in Iraq by al-Qaeda as the husband had worked for American clients for many years. Attempts had been made on their lives, the husband had twice been wounded and one of his daughters was shot and killed in October 2008. The Swedish Migration Board rejected the application. Its decision was upheld by the Migration Court in 2012 on the grounds that the criminal acts of al-Qaeda had been committed several years before and the husband no longer had any business with the Americans. In the event that a threat still remained, it was probable that the Iraqi authorities had the will and capacity to protect the family. The applicants' health was not so poor as to amount to exceptionally distressing circumstances.

In a judgment of 4 June 2015 a Chamber of the European Court held, by five votes to two, that the implementation of the deportation order against the applicants would not give rise to a violation of Article 3 of the Convention. In reaching that conclusion, it noted that the husband had ceased his business with the Americans in 2008, that the most recent substantiated violent attack by al-Qaeda against the applicants had taken place in October 2008 and that the applicant family had stayed in Baghdad until December 2010 and September 2011, respectively, without having substantiated that they were subjected to further direct threats. The Chamber therefore endorsed the Swedish authorities' assessment that there was insufficient evidence to conclude that the applicants would face a real risk of being subjected to treatment contrary to Article 3 upon a return to Iraq.

On 19 October 2015 the case was referred to the Grand Chamber at the applicants' request.

Proposed expulsion to Syria: *expulsion would constitute a violation*

L.M. and Others v. Russia - 40081/14, 40088/14 and 40127/14
Judgment 15.10.2015 [Section I]

Facts – The applicants are two Syrian nationals and a stateless Palestinian who had his habitual residence in Syria. In 2013 they entered Russia. In 2014 a district court found them guilty of administrative offences (breach of immigration rules and working without a permit) and ordered their expulsion and their detention pending expulsion. On 27 May 2014 a regional court rejected their appeals, finding that the alleged danger to the applicants' lives as a result of the ongoing conflict did not in itself constitute sufficient grounds to exclude expulsion in respect of those guilty of administrative offences in the sphere of immigration. On 30 May 2014 the Court decided to indicate to the Russian Government, under Rule 39 of the Rules of Court, that the applicants should not be expelled to Syria for the duration of the proceedings before the Court. Two applicants have since then remained in a detention centre for foreign nationals, while the third escaped. Their applications for refugee status and temporary asylum were unsuccessful.

Law

Articles 2 and 3: While challenging the possibility of expulsion, the applicants had relied, *inter alia*, on the practice of the Russian Federal Migration Service in respect of people originating from Syria and the UNHCR recommendation not to carry out expulsions to Syria. They had also submitted individualised information about the risks in the event of return. The arrival of a significant number of asylum-seekers from Syria and the need for that group to have additional protection could not have been unknown to the relevant authorities. The applicants had thus presented the national authorities with substantial grounds for believing that they faced a real risk to their lives and personal security if expelled.

However, the scope of review by the domestic courts had been confined to establishing that the applicants' presence in Russia was illegal. The domestic courts had avoided engaging in any in-depth discussion about the dangers referred to by the applicants and international as well as national sources describing the situation in Syria. The applicants had attempted to lodge requests for asylum and refugee status, but had been prevented from effectively participating in those proceedings. In sum, the applicants' allegations had not been dully examined by the domestic authorities in any of the proceedings.

The present judgment was the first to evaluate the allegations of a risk of danger to life or ill-treatment in the context of the ongoing conflict in Syria. According to the UNHCR documents, most European countries did not carry out involuntary returns to Syria. The latest UN reports described the situation as a "humanitarian crisis" and spoke of the "immeasurable suffering" of civilians, massive violations of human rights and humanitarian law by all parties and the resulting displacement of almost half of the country's population.

Furthermore, the applicants originated from Aleppo and Damascus, where particularly heavy fighting had been raging. They were young men, who in the view of Human Rights Watch were in particular danger of detention and ill-treatment. One of the applicants had referred to the killing of his relatives by armed militia. Another applicant as a stateless Palestinian belonged to a group in need of international protection. The applicants had thus put forward a well-founded allegation that their return to Syria would be in breach of Articles 2 and/or 3 of the Convention. The Government had not presented any arguments or relevant information that could dispel those allegations, or referred to any special circumstances which could ensure sufficient protection for the applicants if returned.

Therefore, an expulsion to Syria would give rise, if implemented, to a violation of Article 2 and/or Article 3 of the Convention.

Conclusion: expulsion would constitute a violation (unanimously).

Article 5 § 1 (f): Since administrative removal amounted to a form of "deportation" within the meaning of Article 5 § 1 (f), that provision was applicable in the instant case. Since the applicants' detention pending expulsion had been ordered by the court with jurisdiction in connection with an offence punishable by expulsion, the initial decision authorising the applicants' detention had been in compliance with the letter of the national law. During this initial period of detention, the authorities were still investigating whether their removal would have been possible. However, after the decision of the regional court no real action had been taken with a view to expulsion and the applicants had remained in detention without any

indication of the time-limit or conditions related to the possibility of review.

Conclusion: violation (unanimously).

(See *Azimov v. Russia*, 67474/11, 18 April 2013, Information Note 162)

Article 34: In their communications with the domestic authorities and their representative before the Court the applicants had relied on the possibility of meeting locally based lawyers and human rights defenders. Those meetings had been denied or made subject to formalities that were difficult to overcome. Furthermore, the applicants had not been given access to a telephone and could not therefore communicate properly with their representatives. In addition to being in detention, the applicants had a very poor command of Russian and had no family or social network which made them particularly at risk of unacceptable practice. They had complained that they had been forced to sign statements withdrawing their asylum requests. These statements, which had had negative consequences on the proceedings, had later been retracted by the applicants as having been given under duress and without a proper interpreter. The Court noted with concern the absence of any meaningful reaction from the relevant authorities to those complaints.

Thus the applicants' communication with their representatives had been seriously obstructed, preventing them from effectively participating in the domestic proceedings or the proceedings before the Court. The restrictions on the applicants' contact with their representatives had constituted an interference with the exercise of their right of individual petition.

Conclusion: failure to comply with Article34 (unanimously).

Article 46: The respondent State was required to ensure the applicants' immediate release.

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

ARTICLE 5

Article 5 § 1

Liberty of person

Applicant's unacknowledged detention and forcible transfer from Ukraine to Russia in breach of extradition procedure: *violation by Ukraine*

Belozorov v. Russia and Ukraine - 43611/02
Judgment 15.10.2015 [Section I]

Facts – On 3 November 2000 two Russian police officers arrived in Ukraine with a warrant issued by a Russian prosecutor to carry out a search at the applicant's home. The head of the Ukrainian local criminal investigation department instructed his subordinates to assist the Russian police. On the same day, a Ukrainian and two Russian police officers arrested the applicant. He was handcuffed and his apartment was searched. According to the applicant, he then remained in the custody of the Ukrainian and Russian police, who on the next day escorted him to a local airport, where the Russian officers took the next flight to Moscow together with him. On arrival, he was formally arrested and detained on suspicion of murder. His pre-trial detention was extended several times. In 2003 he was convicted of conspiracy to murder. The applicant's parents' lodged complaints with various Ukrainian authorities, alleging, in particular, abuse of power and the unlawfulness of the search, arrest and detention. Even though administrative proceedings were brought against the officials concerned, and the Ukrainian police officer who had been involved in arresting the applicant was reprimanded, no criminal proceedings were opened.

Law

Article 1 (*jurisdiction*): The applicant's complaints about the search of his apartment and his arrest and forced transfer to Russia had been directed against both the Ukrainian and Russian Governments. Until the applicant boarded the plane to Russia on 4 November 2000, he fell within the jurisdiction of Ukraine. The Ukrainian officials had been aware of the informal character of the Russian request for assistance and of its unlawfulness under Ukrainian law and the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters ("the 1993 Minsk Convention"). Moreover, despite the presence of the Russian officials and their alleged participation in the events of 3 and 4 November 2000, the Ukrainian authorities had been in control throughout all the episodes, including the applicant's arrest, the search of his home, his overnight detention in the police station and subsequent transfer to the airport and through the airport security checks.

Thus the events of 3 and 4 November 2000 fell within the jurisdiction of Ukraine.

Conclusion: within the jurisdiction of Ukraine (unanimously).

Article 5 § 1: After the applicant's interview of 3 November 2000 he had remained in police custody and the next day had been forcibly transferred to Moscow, in breach of the specific procedure in extradition cases set out in the Minsk Convention, which had been disregarded by both the Russian and Ukrainian authorities. The Ukrainian officials had been aware that the request for extradition was informal. No explanation had been given by the Ukrainian Government regarding the applicant's detention between 3 and 4 November 2000 and his subsequent transfer to Moscow. During that period the applicant had therefore been held in unacknowledged detention and transferred to Russia in complete disregard of the safeguards enshrined in Article 5.

Conclusion: violation by Ukraine (unanimously).

The Court also found unanimously a violation of Article 8 by Ukraine on account of the unlawful search of the applicant's apartment.

The Court found unanimously violations of Article 5 §§ 3 and 4 by the Russian Federation on account of the excessive length of the applicant's pre-trial detention, his inability to attend hearings concerning the extension of his detention, serious delays in the examination of certain appeals and a failure to examine other appeals.

Article 41: EUR 12,500 to be paid by Ukraine and EUR 5,000 to be paid by Russia in respect of non-pecuniary damage.

Article 5 § 1 (f)

Expulsion

Detention of asylum-seekers in respect of whom interim measure by Court preventing their removal was in force: *violation*

L.M. and Others v. Russia - 40081/14, 40088/14 and 40127/14
Judgment 15.10.2015 [Section I]

(See Article 3 above, page 17)

Article 5 § 4

Review of lawfulness of detention

Thirteen days' detention without charge under anti-terrorism legislation: *no violation*

Sher and Others v. the United Kingdom - 5201/11
Judgment 20.10.2015 [Section IV]

Facts – The applicants, Pakistani nationals, were arrested and detained in connection with an anti-terrorism operation. Their homes were searched over a period of some 10 days pursuant to warrants covering a lengthy list of items, including correspondence, books and electronic equipment. The applicants remained in custody for a total of 13 days after a District Judge authorised their further detention at two successive hearings. Part of the first hearing was held in closed session to enable the judge to scrutinise and ask questions regarding material withheld from the applicants detailing the police operation and ongoing investigation. The applicants were legally represented at the open hearings but did not have a special advocate to represent them during the closed session. They were ultimately released without charge.

In the Convention proceedings, the applicants complained under Article 5 § 4 of the Convention that they had been denied an adversarial procedure during the hearings of the applications to prolong their detention and under Article 8 that their homes had been searched pursuant to warrants which were unjustifiably broad in scope.

Law

Article 5 § 4: The Court was satisfied that the threat of an imminent terrorist attack had provided ample justification for the imposition of some restrictions on the adversarial nature of the proceedings concerning the warrants for further detention, for reasons of national security. The relevant legislation set out clear and detailed procedural rules governing proceedings for warrants of further detention and those rules had been followed in the proceedings, which were judicial in nature.

While it was true that part of the first hearing had been closed, the procedure which allowed the District Judge to exclude the applicants and their lawyers from any part of a hearing enabled him to conduct a penetrating examination of the grounds relied upon by the police to justify further detention in order to satisfy himself, in the detained person's best interests, that there were reasonable grounds for believing that further detention was necessary. The District Judge was best placed to ensure that no material was unnecessarily withheld from the applicants.

It was further clear that the District Judge had had the power to appoint a special advocate if he considered such appointment necessary to secure the fairness of the proceedings. In that connection, it was noteworthy that the applicants had not

requested the appointment of a special advocate at any stage. At the open hearings, the senior police officer making the application had explained orally why the application was being made and, at the second hearing, provided details regarding the progress of the investigation and the examination of material seized. The applicants were legally represented and their solicitor had been able to cross-examine the police officer witness, and had done so at the first hearing.

The Court was therefore satisfied that there had been no unfairness in the proceedings leading to the grant of the warrants of further detention. In particular, the absence of express legislative provision for the appointment of a special advocate did not render the proceedings incompatible with Article 5 § 4.

Conclusion: no violation (six votes to one).

Article 8: The sole issue before the Court was whether the search of the applicants' homes had been necessary in a democratic society. While acknowledging that the search warrant had been couched in relatively broad terms, the Court noted that the specificity of the list of items susceptible to seizure in a search by law-enforcement officers would vary from case to case depending on the nature of the allegations in question. Cases such as the applicants', which involved allegations of a planned large-scale terrorist attack, posed particular challenges, since, while there might be sufficient evidence to give rise to a reasonable suspicion that an attack was under preparation, an absence of specific information about the intended nature of the attack or its targets made precise identification of items sought during a search impossible. The complexity of such cases could justify a search based on terms that were wider than would otherwise be permissible. Multiple suspects and the use of coded language compounded the difficulty while the urgency of the situation could not be ignored. To impose under Article 8 the requirement that a search warrant identify in detail the precise nature of the items sought and to be seized could seriously jeopardise the effectiveness of an investigation where numerous lives might be at stake. In cases of this nature, the police had to be permitted some flexibility to assess, on the basis of what was encountered during the search, which items might be linked to terrorist activities and to seize them for further examination.

It was also relevant that the applicants had a remedy in respect of the seized items in the form of *ex post facto* judicial review or a claim for damages and had not sought to challenge the seizure of any specific item or contended that any item had been seized or searched for unjustifiably.

The search warrants could not, therefore, be regarded as having been excessively wide and the authorities had been entitled to consider that the resultant interference with the applicants' right to respect for their private lives and homes was necessary in a democratic society.

Conclusion: no violation (unanimously).

(See also *A. and Others v. the United Kingdom* [GC], 3455/05, 19 February 2009, Information Note 116)

ARTICLE 6

Article 6 § 1 (civil)

Access to court
Fair hearing

Decision regarding restitution of places of worship based on "wishes of the adherents of the communities which owned the properties": *case referred to the Grand Chamber*

Greek-Catholic Parish of Lupeni and Others v. Romania - 76943/11
Judgment 19.5.2015 [Section III]

In 1948 the applicants – entities belonging to the Eastern-Rite Catholic (Greek-Catholic or Uniate) Church – were dissolved on the basis of Legislative Decree no. 358/1948. By virtue of the decree, all property belonging to that denomination was transferred to the State, except for parish property, which was transferred to the Orthodox Church in accordance with Decree no. 177/1948, which provided that if the majority of a church's adherents became members of a different church, property belonging to the former would be transferred to the ownership of the latter. In 1967 the church building and adjacent churchyard that had belonged to the applicant parish were entered in the land register as having been transferred to the Romanian Orthodox Church.

After the fall of the communist regime in December 1989, Legislative Decree no. 358/1948 was repealed by Legislative Decree no. 9/1989. The Uniate Church was officially recognised in Legislative Decree no. 126/1990 on certain measures concerning the Romanian Church United with Rome (Greek-Catholic Church). Article 3 of that decree provided that the legal status of property that had belonged to Uniate parishes was to be determined by joint committees made up of representatives of

both Uniate and Orthodox clergy. In reaching their decisions, the committees were to take into account "the wishes of the adherents of the communities in possession of these properties".

Article 3 of Legislative Decree no. 126/1990 was supplemented by Government Ordinance no. 64/2004 of 13 August 2004 and Law no. 182/2005. The decree, as amended, specified that in the event of disagreement between the members of the clergy representing the two denominations on the joint committee, the party with an interest entitling it to bring judicial proceedings could do so under ordinary law.

The applicant parish was legally re-established on 12 August 1996. The applicants took steps to have the church building and adjoining courtyard returned to them. Meetings of the joint committee failed to resolve the matter. The applicants therefore instituted judicial proceedings under ordinary law, but without success. The courts based their decision on the special criterion of "the wishes of the adherents of the communities in possession of these properties".

In a judgment of 19 May 2015 (see Information Note 185), a Chamber of the Court held, unanimously, that there had been no violation of Article 6 § 1 or of Article 14 taken together with Article 6 § 1.

The Court considered that the applicants had been able to exercise their right of access to a court. It also found that the interpretation made by the domestic courts of the facts submitted to them for examination had not been arbitrary, unreasonable or capable of affecting the fairness of the proceedings, but had simply been a case of application of the domestic law. Lastly, in light of the aim pursued and its reasonable justifications, the national legislature's adoption of the impugned criterion had not been discriminatory.

On 19 October 2015 the case was referred to the Grand Chamber at the applicants' request.

Article 6 § 1 (criminal)

Fair hearing

Denial, without relevant and sufficient reasons, of access to a lawyer of the suspect's own choosing during police questioning: *violation*

Dvorski v. Croatia - 25703/11
Judgment 20.10.2015 [GC]

Facts – In 2007 the applicant was arrested in connection with a number of crimes and questioned as a suspect by the police. During questioning the applicant confessed to the offences with which he was charged, and his confession was admitted in evidence at his trial. In 2008 the applicant was ultimately convicted of aggravated murder, armed robbery and arson and sentenced to forty years' imprisonment.

In his application to the European Court the applicant complained that following his arrest the police had denied him access to a lawyer (G.M.) his parents had hired to represent him, that he had therefore had to accept the services of a lawyer called in by the police (M.R.), and that he had been forced to incriminate himself without the benefit of a lawyer of his own choice. In a judgment of 28 November 2013 a Chamber of the Court held, by five votes to two, that there had been no violation of Article 6 §§ 1 and 3 (c) of the Convention. On 14 April 2014 the case was referred to the Grand Chamber at the applicant's request (see Information Note 173).

Law – Article 6 §§ 1 and 3 (c): Unlike the position in *Salduz v. Turkey*, where the applicant was denied access to a lawyer during police questioning, the instant case concerned a situation where the applicant was afforded access from his first interrogation, but not – according to his complaint – to a lawyer of his own choosing. In contrast to cases involving denial of access, where "compelling reasons" were required for questioning a suspect without representation, the more lenient requirement of "relevant and sufficient" reasons was applied in situations raising the less serious issue of "denial of choice". While national authorities had to have regard to a suspect's wishes as to his or her choice of legal representation, they could override those wishes when there were relevant and sufficient grounds for holding that this was necessary in the interests of justice. Where relevant and sufficient grounds were lacking, a restriction on the free choice of defence counsel would entail a violation of Article 6 § 1 in conjunction with § 3 (c) if it adversely affected the defence, regard being had to the proceedings as a whole.

(a) *Whether the applicant was represented by a lawyer of his own informed choice* – The Court found it established that G.M. had attempted to see the applicant at the police station before the questioning started but was told to leave, without the applicant being informed of his presence. Accordingly, although the applicant had formally chosen M.R. to represent him during the police questioning, his

choice was not an informed one because he did not know that his parents had hired G.M.

(b) *Whether there were relevant and sufficient reasons for restricting the applicant's access to the lawyer of his choosing* – The only reason cited by the Government for not allowing G.M. access to the applicant was that he did not have a proper power of attorney to represent him. However, the evidence in the case file indicated that G.M. had been given a written power of attorney by the parents, as permitted by the domestic law. The police had thus been under an obligation to at least inform the applicant that G.M. was at the police station, but this they had omitted to do. In these circumstances, the Court was not convinced that the applicant's inability, as a result of the police's conduct, to designate G.M. as his representative was supported by relevant and sufficient reasons.

(c) *Whether the fairness of the proceedings as a whole was prejudiced* – Where, as in the instant case, it was alleged that the appointment or choice of lawyer had influenced or led to the making of an incriminating statement by the suspect at the very outset of the criminal investigation, careful scrutiny by the authorities, notably the national courts, was called for. However, the reasoning employed by the national courts in relation to the legal challenge mounted by the applicant concerning the manner in which his confession had been obtained by the police was far from substantial. No national authority had taken any steps to establish the relevant circumstances surrounding G.M.'s visit to the police station in connection with the applicant's questioning by the police. In particular, the national courts had made no real attempt to provide reasons supporting or justifying their decision in terms of the values of a fair criminal trial as embodied in Article 6 of the Convention. The Court was therefore not convinced that the applicant had had an effective opportunity to challenge the circumstances in which M.R. was chosen to represent him.

In the instant case, it could be presumed that the consequence of the police's conduct had been that, instead of remaining silent at his first police interview as he was entitled to do, the applicant had made a confession which was later admitted in evidence against him. He had subsequently contested the manner in which that confession had been obtained by the police. Although there was other evidence against him, the significant likely impact of his initial confession on the further development of the criminal proceedings could not be ignored. In these circumstances, the consequence of the police's conduct in preventing the chosen lawyer from having access to the applicant had undermined the fairness of the subsequent criminal proceedings taken as a whole.

Conclusion: violation (sixteen votes to one).

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

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

Use in evidence of "statement of surrender and confession" obtained as a result of ill-treatment and without access to a lawyer: *violation*

Turbylev v. Russia - 4722/09
Judgment 6.10.2015 [Section I]

Facts – In 2005 the applicant was arrested on suspicion of having committed a robbery. While in police custody, he confessed to having participated in the crime and signed a record of his "surrender and confession" which had been drawn up by the police. When questioned in the presence of a lawyer the following day, the applicant retracted the confession, explaining that he had made it as a result of ill-treatment by the police. A criminal investigation into the alleged ill-treatment was opened in 2005. The proceedings were subsequently terminated and reopened on several occasions before being eventually terminated in 2007. In the same year, the applicant was convicted and sentenced to six years' imprisonment. The judgment was upheld on appeal and the Supreme Court ultimately dismissed a request for supervisory review.

Law – Article 6 §§ 1 and 3 (c): In their submissions to the Court the Government had acknowledged that the applicant had been subjected to ill-treatment at the hands of the police in breach of Article 3 of the Convention and had not disputed that his confession statement had been obtained as a result of such treatment. However, they had argued that the confession was not the sole evidence on which the applicant's conviction was based and that other evidence adduced by the prosecution would in any event have secured his conviction. In the Court's view, however, the right not to be subjected to

torture or to inhuman or degrading treatment or punishment was an absolute right, permitting no exception in any circumstances. Therefore, the use in criminal proceedings of evidence obtained in breach of Article 3 rendered the proceedings automatically unfair, irrespective of the probative value of the confession statements and irrespective of whether their use was decisive in securing the defendant's conviction.

In addition, before giving a "statement of surrender and confession" the applicant was not informed of the right to legal assistance. The absence of a requirement, under domestic law, of access to a lawyer for a statement of surrender and confession was used to circumvent his right as a *de facto* suspect to legal assistance and to secure the admission of his statement, obtained without legal assistance, in evidence to establish his guilt. This had irretrievably prejudiced the rights of the defence. Even assuming that the applicant was informed of the right not to incriminate himself before making his statement, he could not be said to have validly waived his privilege against self-incrimination in view of the Court's finding that the statement was made as a result of ill-treatment by the police. It followed that the domestic courts' use in evidence of the statement of the applicant's surrender and confession obtained as a result of his ill-treatment in violation of Article 3 and in the absence of access to a lawyer had rendered the applicant's trial unfair.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 3 in its substantive and procedural aspects on account of the applicant's ill-treatment suffered during his police custody and on account of the ineffective investigation into the related complaints.

Article 41: EUR 20,000 in respect of non-pecuniary damage.

Assize court judgment containing statement of reasons for jury's guilty verdict: *inadmissible*

Matis v. France - 43699/13
Decision 6.10.2015 [Section V]

Facts – The applicant was convicted of murder by an Assize Court. The jury answered one question only, and detailed reasons were given for the judgment.

Law – Article 6 § 1: In previous cases[1] the Court had considered the issue of the reasons provided for Assize Court judgments involving juries. A reform had since been conducted inserting a new Article into the Code of Criminal Procedure providing for the introduction of a *feuille de motivation* (a document giving reasons for judgments). That document sets out the main charges where were debated during the proceedings, developed during the deliberations and ultimately formed the basis for the decision to find the applicant guilty as charged. The number and precision of the facts enumerated in the *feuille de motivation*, which in the present case tallied with the findings of the investigating judges division in their indictment, were such as to apprise the applicant of the reasons for her conviction. Having regard to that document and its content, it was immaterial that only one question had been put. Consequently, the applicant had benefited from sufficient safeguards to enable her to understand the judgment convicting her.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Taxquet v. Belgium* [GC], 926/05, 16 November 2010, Information Note 135)

Article 6 § 1 (administrative)

Civil rights and obligations
Independent tribunal

Limited judicial review of administrative decision relating to housing of homeless family: *Article 6 § 1 applicable; no violation*

Fazia Ali v. the United Kingdom - 40378/10
Judgment 20.10.2015 [Section IV]

Facts – The applicant, a parent of two young children, was a homeless person in priority need of accommodation within the meaning of Part VII of the Housing Act 1996 ("the 1996 Act"). Having turned down a first offer of accommodation by her local authority, she was informed on the telephone that a further viewing had been arranged and that a letter would follow. The letter stated that if she refused that offer without good cause, the authority would consider that it had discharged its duty towards her. The applicant denied ever receiving the letter, but she did view the property and

1. See *Agnelet v. France*, 61198/08, and *Legillon v. France*, 53406/10, judgments of 10 January 2013, summarised in Information Note 159.

decided to refuse that offer also. The authority then notified her in writing that it considered that it had discharged its duty. Its decision was upheld by the Homelessness Review Officer in an internal review procedure. The applicant's subsequent appeal to the County Court on points of law was dismissed on the grounds that the only issue was whether she had received the letter of offer relating to the second property and that there was no need for the County Court to hear evidence on that point as it had been properly and fairly determined by the Review Officer. The applicant's further appeals to the Court of Appeal and Supreme Court were dismissed on the grounds that the County Court had conducted "sufficient review" of the Review Officer's decision for the purposes of Article 6 § 1 of the Convention.

In the Convention proceedings, the applicant complained that her inability to appeal to an independent and impartial tribunal in respect of the relevant factual finding had amounted to a violation of Article 6 § 1 of the Convention.

Law – Article 6 § 1

(a) *Applicability* – The applicant had a legally enforceable right by virtue of section 193 of Part VII of the 1996 Act to be provided with accommodation, albeit a right that could cease to exist in certain conditions. The court proceedings in question clearly concerned a "dispute" over the continuing existence, if not the content, of that right; the dispute was genuine and serious; and the result of the proceedings was directly decisive for the right in question.

As to whether the right was a "civil right", the applicant's case differed from previous cases in which rights to welfare assistance had been recognised as civil, as the assistance to be provided under section 193 of the 1996 Act not only was conditional but could not be precisely defined (compare, for example, *Tsfayo v. the United Kingdom*, 60860/00, 14 November 2006), in which the dispute concerned a fixed financial amount of housing benefit). Accommodation was a "benefit in kind" and both the applicant's entitlement to it and the subsequent implementation in practice of that entitlement by the Council were subject to an exercise of discretion. Nonetheless, the Court was not persuaded that all or any of these factors necessarily militated against recognition of such an entitlement as a "civil right". There was no convincing reason to distinguish between the applicant's right to be provided with accommodation and the right to housing benefit that had been asserted by the applicant in *Tsfayo*. Article 6 § 1 was therefore applicable.

(b) *Merits* – The Homelessness Review Officer who conducted the internal review could not be regarded as an "independent tribunal" within the meaning of Article 6 § 1 of the Convention. Nevertheless, under the Court's case-law, where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are subject to subsequent control by a judicial body that has "full jurisdiction" and does provide the guarantees of Article 6 § 1. In practice, that requirement will be satisfied where the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient review".

In determining that issue, the Court had to examine the whole of the legislative scheme in question, and, in particular, whether the adjudicatory process by which the applicant's "civil rights" were "determined", taken as a whole, had provided a due enquiry into the facts. The Court was satisfied that there had existed sufficient factual grounds for the Review Officer to conclude that the applicant had received a letter of offer and noted that, in any event, there was no question of any injustice or unfairness as even if the applicant had not received the letter, she had viewed the property and turned it down for wholly unrelated reasons. The enquiry before the Review Officer had been accompanied by a number of significant procedural safeguards and while the County Court did not have jurisdiction to conduct a full rehearing of the facts, the appeal available to the applicant did permit it to carry out a certain review of both the facts and the procedure.

In considering whether the legislative scheme, taken as a whole, had provided a due enquiry into the facts, the Court also had to have regard to the nature and purpose of the scheme. Indeed, in relation to administrative-law appeals, the question whether the scope of judicial review afforded was "sufficient" may depend not only on the discretionary or technical nature of the subject-matter of the decision appealed against and the particular issue the applicant wished to ventilate before the courts, but also, more generally, on the nature of the "civil rights and obligations" at stake and the nature of the policy objective pursued by the underlying domestic law.

The scheme at issue in the present case was designed to provide housing to homeless persons. It was therefore a legislative welfare scheme covering a

multitude of small cases and intended to bring as great a benefit as possible to needy persons in an economical and fair manner. With regard to the "determination" of rights and obligations deriving from such a social welfare scheme, when due enquiry into the facts had already been conducted at the administrative adjudicatory stage, Article 6 § 1 of the Convention could not be read as requiring that the judicial review before a court should encompass a reopening with a rehearing of witnesses, as that would have significant implications for both the statutory scheme and the court and tribunal system.

In sum, the judicial scrutiny in the applicant's case had been of sufficient scope to satisfy the requirements of Article 6 § 1.

Conclusion: no violation (unanimously).

Article 6 § 3 (c)

Defence through legal assistance

Use in evidence of the "statement of surrender and confession" obtained as a result of ill-treatment and without access to a lawyer: *violation*

Turbylev v. Russia - 4722/09
Judgment 6.10.2015 [Section I]

(See Article 6 § 1 (criminal) above, page 22)

Legal assistance of own choosing

Failure to inform suspect that his family had appointed a lawyer to represent him during police questioning: *violation*

Dvorski v. Croatia - 25703/11
Judgment 20.10.2015 [GC]

(See Article 6 § 1 (criminal) above, page 21)

Article 6 § 3 (d)

Examination of witnesses

Use in evidence of statements by attesting witnesses who did not appear at the trial: *inadmissible*

Shumeyev and Others v. Russia - 29474/07
Decision 22.9.2015 [Section I]

Facts – On the basis of information implicating the applicants in drug-dealing, the police decided to carry out an undercover operation in the form of a simulated purchase of drugs from the applicants by undercover agents. They invited two randomly chosen attesting witnesses to observe the progress of each operation. In their pre-trial depositions the attesting witnesses confirmed that the undercover agents had been searched prior to the staged purchase and had bought substances from the applicants with marked banknotes. They also stated that the police had subsequently searched the applicants or their premises, and seized and sealed controlled substances and other relevant evidence. Since they failed to appear in court for various reasons, the attesting witnesses' pre-trial statements regarding the investigative measures were read out in court and admitted in evidence, despite the applicants' objections.

Law – Article 6 §§ 1 and 3 (d): Russian criminal law contained separate provisions on material witnesses and attesting witnesses and designated the latter without using the Russian word for "witness". Attesting witnesses were expected to have no knowledge of the case and did not testify about the circumstances of the case or the defendants' guilt or innocence. They thus did not formally hold witness status under Russian law. In the applicants' cases, they were chosen at random and invited by the investigator to observe an investigative measure, without having any knowledge of the criminal cases in question. They confirmed in their depositions that the investigative measures had actually been carried out and attested to their substance, progress and results. In essence, the statements of the attesting witnesses duplicated the contents of the corresponding police records and contained no new relevant information.

The criminal proceedings against all four applicants were generally fair. They had been able to avail themselves of existing procedural safeguards against possible police abuse in the course of both the investigation and the trial. In particular, they could seek the amendment and clarification of the pertinent records, bring motions before the investigator and the court, question the undercover agents and police officers, raise objections and ask the courts to exclude any illegally obtained evidence. Considering the repetitive nature of the depositions made by the attesting witnesses and the remedies available to the applicants against possible procedural irregularities, the contribution by the attesting witnesses to the proceedings was limited. Their depositions had not served to a material degree as a basis for their convictions and were, in essence, redundant evidence which did not require the appearance of the attesting witnesses in court.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 7

Article 7 § 1

Nullum crimen sine lege

Conviction in 2004 for alleged genocide of Lithuanian partisans in 1953: *violation*

Vasiliauskas v. Lithuania - 35343/05
Judgment 20.10.2015 [GC]

Facts – In 2004 the applicant was convicted under Article 99 of the new Lithuanian Criminal Code of the genocide of a political group in 1953 and sentenced to six years' imprisonment. That provision entered into force on 1 May 2003 and, unlike the Convention on the Prevention and Punishment of the Crime of Genocide 1948 ("the Genocide Convention")[1], included political groups among the range of protected groups.

The conviction arose out of the applicant's alleged participation in the killing of two Lithuanian partisans in January 1953. At the time, Lithuania was under Soviet rule and the applicant was a member of the Ministry of State Security (MSB) of the Lithuanian Soviet Socialist Republic. His conviction was upheld on appeal, but the court of appeal noted that, in addition to being members of a political group, the partisans were also "representatives of the Lithuanian nation" and "could therefore be attributed not only to political, but also to national and ethnic groups" in other words, to groups listed in the Genocide Convention.

In his application to the European Court, the applicant complained of a violation of Article 7 of the European Convention in that his conviction for genocide had no basis in public international law as it stood in 1953. The Chamber of the Court to which the case was initially allocated relinquished jurisdiction to the Grand Chamber.

Law – Article 7: The Court's function was to assess whether there had been a sufficiently clear legal basis, having regard to the applicable law in 1953, for the applicant's conviction of genocide and, in particular, whether the conviction was consistent with the essence of that offence and could reasonably have been foreseen by the applicant at the time of his participation in the operation in which the two partisans were killed.

The conviction was based upon domestic legal provisions (Article 99 of the new Lithuanian Criminal Code) that were not in force in 1953 and had been applied retroactively. There had thus been a violation of Article 7 of the Convention unless it could be established that the conviction was based upon international law as it stood at the relevant time.

Genocide was clearly recognised as a crime under international law in 1953: it had been codified in the 1948 Genocide Convention after being acknowledged and condemned by the UN General Assembly Resolution 96(I) of 11 December 1946. The instruments of international law prohibiting genocide had thus been sufficiently accessible to the applicant.

However, in the Court's view the applicant's conviction for the crime of genocide could not be regarded as consistent with the essence of that offence as defined in international law at the material time and had therefore not been reasonably foreseeable by him.

Firstly, it was clear that international law in 1953 did not include "political groups" within the definition of genocide. Article II of the Genocide Convention listed four protected groups – national, ethnical, racial or religious – but did not refer to social or political groups. Indeed, the *travaux préparatoires* to the Genocide Convention disclosed an intention by the drafters not to include political groups in the list of protected persons. All references to the crime of genocide in subsequent international law instruments described that crime in similar terms. The fact that certain States had later decided to criminalise genocide of a political group in their domestic laws did not alter the reality that the text of the 1948 Convention did not. Nor was there a sufficiently strong basis for finding that customary international law as it stood in 1953 included "political groups" among those falling within the definition of genocide.

Secondly, as regards the Lithuanian Government's submission that because of their prominence the partisans were "part" of the national group and thus protected by Article II of the Genocide Convention, the Court noted that in 1953 there was no case-law by any international tribunal to provide judicial interpretation of the definition of genocide and the *travaux préparatoires* provided little guidance on what the drafters meant by the term "intent to destroy, in whole or in part".

1. Article II of the Genocide Convention defines genocide as certain acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

While it was reasonable to find that in 1953 it would have been foreseeable that the term "in part" contained a requirement as to substantiality, it was not until a half a century later that judicial guidance had emerged from cases before the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Court of Justice to indicate that, in addition to its numerical size, the "prominence" of the targeted part within the protected group could also be a useful consideration.[1] That development was not something the applicant could have foreseen in 1953.

Thirdly, although the court of appeal had rephrased the trial court's finding that Lithuanian partisans were members of a separate political group by stating that they were also "representatives of the Lithuanian nation, that is, the national group", it had not explained what the notion "representatives" entailed or provided much historical or factual account as to how the Lithuanian partisans represented the Lithuanian nation. Nor did the partisans' specific mantle with regard to the "national" group appear to have been interpreted by the Supreme Court. Thus, even if the international courts' subsequent interpretation of the term "in part" had been available in 1953, there was no firm finding in the establishment of the facts by the domestic criminal courts to enable the Court to assess on which basis they had concluded that the Lithuanian partisans had constituted a significant part of the national group. Nor was it immediately obvious that the ordinary meaning of the terms "national" or "ethnic" in the Genocide Convention could be extended to cover partisans. The domestic courts' conclusion that the victims came within the definition of genocide as part of a protected group was therefore an interpretation by analogy, to the applicant's detriment, which had rendered his conviction unforeseeable.

The Court also examined, and rejected, the Lithuanian Government's argument that the applicant's acts were criminal according to the general principles of law recognised by civilised nations and thus came within the provisions of the second paragraph of Article 7 of the Convention. It confirmed that that provision did not allow for any general exception to the rule of non-retroactivity, but was intended to ensure there was no doubt about the validity of prosecutions after the Second World War of the crimes committed during that war. The two paragraphs of Article 7 were interlinked and to be interpreted in a concordant manner. Accordingly, since the applicant's conviction could not be justified under Article 7 § 1, it could not be justified under Article 7 § 2 either.

Conclusion: violation (nine votes to eight).

Article 41: In the light of the very particular circumstances of the case, the finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

(See also *Korbely v. Hungary* [GC], 9174/02, 19 September 2008, Information Note 111; and *Kononov v. Latvia* [GC], 36376/04, 17 May 2010, Information Note 130)

1. See, for example, the ICJ judgment of 3 February 2015 on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), § 142.

ARTICLE 8

Respect for private life

Television broadcast showing non-blurred image of an individual obtained using a hidden camera: *violation*

Bremner v. Turkey - 37428/06
Judgment 13.10.2015 [Section II]

Facts – In June 1997 the applicant appeared in footage filmed using a hidden camera for a television documentary about meetings arranged by him with a person who had responded to his advertisement for free Christian literature. The presenter indicated that the programme concerned covert activities in Turkey by "foreign pedlars in religion".

In June 1997 the public prosecutor brought proceedings against the applicant for insulting God and Islam. He was found not guilty by the Criminal Court in April 1998. The applicant then sued the presenter and producers of the documentary for damages. At last instance his claim was dismissed, the court finding that the offending footage was part of a documentary on a newsworthy subject of interest to public opinion.

The applicant claimed that he had subsequently been obliged by his landlord, for security reasons, to vacate his flat and that he had ultimately been removed to Bulgaria by the authorities.

Law – Article 8: The documentary concerned religious proselytising, which was clearly a subject

of general interest, and thus an area where media freedom enjoyed a heightened level of protection.

The documentary was critical and used derogatory terms such as "pedlar in religion" to describe the applicant. That expression amounted to a value judgment and as such was not susceptible of proof. In addition, media freedom allowed for a certain degree of exaggeration, or even provocation.

The documentary did not contain any gratuitous personal attacks against the applicant and did not amount to hate speech, given that it did not incite hatred or violence against a religious group and did not denigrate the convictions or beliefs of any such group.

As regards the method used to produce the documentary, a technique as intrusive and as damaging to private life as a hidden camera must in principle be used restrictively. Nevertheless, the use of covert investigation techniques might prove necessary for certain types of documentary. However, such a method of last resort had to be used in compliance with ethical principles and with restraint.

As regards the balance between the rights involved, the applicant had not placed himself in the public arena except in so far as he had published an advertisement in a newspaper. The fact of having a discussion with the person who had responded, and with friends of that person, could not have led him to suspect that he might be the subject of public criticism. He quite legitimately thought that he was merely meeting a group of individuals interested in Christianity.

No general-interest justification could be found in the documentary or in the parties' observations for the journalists' decision to broadcast his image without taking any precautions, for example by blurring it. Particularly in view of the fact that the applicant was not famous, there was nothing to suggest that the broadcasting of his image would be newsworthy or useful.

In those conditions, the broadcasting of the applicant's image without any precaution could not be regarded as a contribution to a debate on a matter of general interest for society, regardless of the degree of public interest in the subject of religious proselytising.

In addition, none of the domestic courts seemed to have assessed the degree of contribution of the broadcasting of the applicant's image, without blurring it, to a debate in the general interest.

Having regard to all those considerations, and in spite of the margin of appreciation afforded to the State in such matters, the Court found that, as to the broadcasting of the applicant's image without blurring it, the Turkish authorities had not struck a fair balance between the competing interests. The manner in which they had dealt with the case had not provided the applicant with adequate and effective protection of his right to his own image and therefore to respect for his private life.

Conclusion: violation (unanimously).

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

Covert surveillance of a detainee's consultations with his lawyer and with the person appointed to assist him, as a vulnerable person, following his arrest: *violation; no violation*

R.E. v. the United Kingdom - 62498/11
Judgment 27.10.2015 [Section IV]

Facts – Part II of the Regulation of Investigatory Powers Act 2000 (RIPA) combined with the Covert Surveillance Code of Practice permits covert surveillance in certain circumstances.

Between 15 March 2009 and 8 May 2010 the applicant, an Irish national, was arrested and detained three times in connection with the murder of a police officer believed to have been killed by dissident Republicans. When first arrested he was assessed by a medical officer as being mentally vulnerable, which meant that he could not be interviewed in the absence of an appropriate adult (a relative or guardian). During the first two periods of detention his solicitor received assurances from the Police Service of Northern Ireland (PSNI) that his consultations with the applicant would not be subject to covert surveillance.

The applicant was arrested for the third time on 4 May 2010 before being released, without charge, four days later. On this occasion, the PSNI refused to give an assurance to his solicitor that their consultations would not be subject to covert surveillance. An application by the applicant for judicial review of that decision was dismissed in September 2010 after the High Court ruled that the statutory provisions governing covert surveillance were clearly defined and sufficiently detailed and precise.

Law – Article 8: The Court proceeded on the basis that there had been an interference with the applicant's right to respect for his private life. The

interference pursued the legitimate aims of protecting national security and preventing disorder and crime. It had a basis in domestic law (RIPA and the Covert Surveillance Code of Practice), which law was sufficiently accessible. In view of their similarity in the special context of secret surveillance measures, the issue whether the domestic law was also adequately foreseeable was addressed jointly with the question whether the interference had been necessary in a democratic society.

(a) *Surveillance of legal consultations* – The Government had argued that under the Court's case-law less stringent safeguards were required in covert surveillance cases (such as the applicant's) than those the Court had laid down in interception-of-communication cases such as *Weber and Saravia v. Germany* and, in relation to Part I of RIPA, *Kennedy v. the United Kingdom*. The Court observed, however, that the decisive factor was not the technical definition of the interference, but the level of interference with the right to respect for private life.

The surveillance of legal consultations constituted an extremely high degree of intrusion and was analogous to the interception of a telephone call between a lawyer and client. Article 8 afforded "strengthened protection" to exchanges between lawyers and their clients, as lawyers would be unable to defend their clients if they were unable to guarantee that their exchanges would remain confidential. Consequently, the same safeguards from arbitrary interference were required for surveillance of legal consultations as in interception-of-communications cases, at least insofar as those principles could be applied to the form of surveillance in question.

The Court found that the relevant provisions were sufficiently clear as regards (i) the nature of the offences that could give rise to covert surveillance, (ii) the categories of persons liable to such surveillance and (iii) the duration, renewal and cancellation of the surveillance measures. However, it was not satisfied that the provisions of Part II of RIPA and the Covert Surveillance Code of Practice afforded persons affected by the surveillance of legal consultations with sufficient safeguards as regards the examination, use and storage of the material, the precautions to be taken when communicating the material to other parties, and the circumstances in which recordings were to be erased or the material destroyed. These provisions were to be contrasted with the more detailed provisions of Part I of RIPA and the Interception of Communications Code of Practice which the Court had approved in *Kennedy*.[1] Further, although a new service procedure (the Police Service of Northern Ireland Service Procedure, 'Covert Surveillance of Legal Consultations and the Handling of Legally Privileged Material') had since put in place further safeguards for the secure handling, storage and destruction of material obtained through covert surveillance, it was not in force during the applicant's detention in May 2010.

Consequently, during the relevant period of the applicant's detention the impugned surveillance measures, insofar as they may have been applied to him, had not met the requirements of Article 8 § 2 of the Convention as elucidated in the Court's case-law.

Conclusion: violation (unanimously).

(b) *Surveillance of consultations between detainee and appropriate adult* – The surveillance of consultations between a vulnerable detainee and an appropriate adult appointed to assist him or her following arrest also constituted a significant degree of intrusion. However, the surveillance did not take place in a private place, but in a police station and, unlike legal consultations, consultations with an appropriate adult were not subject to legal privilege and did not attract the "strengthened protection" accorded to consultations with lawyers or medical personnel. The detainee would not, therefore, have the same expectation of privacy as during a legal consultation. The Court therefore applied a less strict standard and focused on the more general question of whether the legislation adequately protected detainees against arbitrary interference with their Article 8 rights and was sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities were entitled to resort to covert measures.

The Court concluded that the provisions concerning the possible surveillance of consultations between vulnerable detainees and appropriate adults had been accompanied by adequate safeguards against abuse. In this connection it noted

1. Part I of RIPA and the Interception of Communications Code of Practice limit the number of persons to whom intercepted material is made available and restrict the extent to which it is disclosed and copied; impose a broad duty to keep intercepted material secret; prohibit disclosure to persons who do not hold the necessary security clearance or do not "need to know" about the material; criminalise the disclosure of intercept material; and require the secure storage of intercepted material and its secure destruction as soon as it is no longer required.

that: authorisations for surveillance had to be regularly reviewed and were cancelled if the criteria were no longer met; authorisation could only be granted for three months at a time and detailed records of all authorisations had to be kept; the scheme was supervised by surveillance commissioners; the admissibility of evidence obtained through surveillance was subject to the control of the trial judge; and aggrieved parties could bring a claim to the Investigatory Powers Tribunal, which had power to award compensation, to quash or cancel orders and to order the destruction of any records.

Conclusion: no violation (unanimously).

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

(See *Weber and Saravia v. Germany* (dec.), 54934/00, 29 June 2006, Information Note 88; and *Kennedy v. the United Kingdom*, 26839/05, 18 May 2010, Information Note 130)

Extensive media coverage of a criminal trial and publication of photographs of the accused: *inadmissible*

H.-Ł. v. Poland - 14781/07 et al.
Decision 15.9.2015 [Section IV]

Facts – In 2012 the applicant was sentenced to 25 years' imprisonment for murder. Since this was the first case in Poland in which the victim had met her alleged murderer on the internet, it attracted great media and public attention. The applicant brought proceedings against several publishers complaining about the disclosure of personal data, the dissemination of untrue information about him, a breach of the presumption of innocence and publication of photographs of him, but without success.

Law – Article 8: The published information fell within the scope of the applicant's private life.

The domestic courts had established beyond doubt that the statements challenged by the applicant had a sufficient factual basis, being largely based on official documents, such as the indictment. The journalists had been present at the hearings, which were held in public, and had reported on their observations. The domestic courts had considered that the statements had not at any point disregarded the applicant's right to be presumed innocent. The murder trial had been a matter of legitimate public interest, concerning as it did the possible dangers of dating people met on the internet.

The photographs taken of the applicant at the trial had been published with the permission of the prosecutor and the trial court. Their publication was justified by the nature of the alleged offences as more victims had contacted the authorities after seeing the photographs. Owing to the broad media interest, the press had also been allowed to be present at and to record parts of the hearings. In that connection, the Court recalled that the Contracting States enjoy a wide margin of appreciation in regulating the freedom of press to record hearings and transmit images from them. In the particular circumstances of the case, the State had acted within its margin of appreciation in assessing the needs to protect the applicant's privacy and to ensure the fair administration of justice.

Furthermore, the domestic courts had found that the applicant had suffered no prejudice in connection with the impugned publications. He had failed to substantiate either before the domestic courts or before the Court that he had suffered particular harm to his moral and psychological integrity or to his private life.

In their assessments, the domestic courts had carried out a careful balancing exercise between the conflicting rights at stake in conformity with the Convention standards, in the light of a legitimate interest for the public to be informed of the occurrence of an unusually violent and serious crime. It was justified to find that the public interest in publishing the information in question, which had originated in public criminal proceedings, had outweighed the applicant's right to the protection of his private life.

Conclusion: inadmissible (manifestly ill-founded).

Refusal to permit change of name with pejorative connotations if mispronounced: *inadmissible*

Macalin Moxamed Sed Dahir v. Switzerland - 12209/10
Decision 15.9.2015 [Section II]

Facts – The applicant, of Somali origin, had been living in Switzerland since 1997. She got married in 2003. In 2005 she requested permission to add her maiden name to her husband's surname and her request was granted. However, when the applicant's maiden name is pronounced according to the rules of "Western" pronunciation, it takes on a disparaging or even humiliating meaning in Somali: "*macalin*" meaning "rotten skin" and "*moxamed*" meaning "toilets". In 2008 the appli-

cant asked for the spelling of her name to be changed so that it would be pronounced properly. The national authorities refused on account of the importance in Switzerland of the uniformity of surnames and the fact that the erroneous pronunciation did not produce a disparaging meaning in any of the Swiss national languages.

Law

Article 8: It was in the public interest to guarantee the stability of a person's surname to ensure legal certainty in social relations. Names played a decisive role for the identification of individuals. The applicant had not sought to replace the old spelling of her name by another but had wished to use either spelling depending on the circumstances. Such a situation would clearly run counter to the principle of uniformity in the recording of surnames. To avoid that problem the Swiss authorities had informed the applicant that she would need to have the spelling of her surname changed by the Somali authorities. However, the applicant had not shown that she had taken such steps, but had merely provided an old official Somali document acknowledging that the requested spelling of her name had equal value. Moreover, the situation complained of by the applicant arose only when her name was pronounced according to "Western" rules of pronunciation in the presence of a Somali speaker. In addition, her request had been given an in-depth examination, by both the administrative authorities and the various courts, leading to well-reasoned judgments.

Conclusion: inadmissible (manifestly ill-founded).

Article 14 taken together with Article 8

(a) *Difference in treatment on grounds of language* – It was of some importance, in assessing the possible breach of the applicant's right to respect for her private life, that the language in which the offensive meaning was heard was Somali. Her situation was not therefore comparable to that of persons whose names took on a ridiculous or humiliating meaning in the widely spoken national languages.

(b) *Difference in treatment* vis-à-vis *certain migrants whose change of name was authorised* – The migrants referred to by the applicant had been authorised to change their names because they could not be pronounced by Swiss people. The applicant, by contrast, had not argued that her name was impossible to pronounce for people not familiar with Somali. She was therefore not in a comparable situation to that of those other migrants.

Conclusion: inadmissible (manifestly ill-founded).

Respect for private life
Respect for home

Issue of wide-ranging search warrant in case of suspected terrorist activity: *no violation*

Sher and Others v. the United Kingdom - 5201/11
Judgment 20.10.2015 [Section IV]

(See Article 5 § 4 above, page 19)

Respect for family life

Placement order for adoption irreversibly severing children's contact with their mother and contrary to the conclusions of the court appointed expert: *violation*

S.H. v. Italy - 52557/14
Judgment 13.10.2015 [Section IV]

Facts – The applicant, the mother of three children, suffered from depression. In August 2009 the social services informed the Minors Court that, on a number of occasions, the children had been admitted to hospital following the accidental ingestion of medication. Urgent proceedings were opened in that court, which ordered their placement in an institution. The parents acknowledged that on account of the applicant's depression they had had difficulties, but said that they could look after the children with the help of the social services.

The social services proposed a family support plan and the children returned to their parents in January 2010. The father left the family home and the applicant was admitted to hospital as her health worsened. In the light of those developments, the court ordered the children's placement in an institution and granted the parents a right of access.

In March 2010 a procedure was opened by the court with a view to the children's adoption. The applicant opposed this, insisting that no situation of abandonment existed in reality. The experts appointed by the court to assess the family situation and the parents' capacity to fulfil their role considered a series of support measures to enable the children's return to their family, with a fresh assessment of the parents' capacity after six months. The experts' report was filed in the court's registry in January 2011.

In March 2011 the court declared the children adoptable, in spite of the experts' indications and without leaving any opportunity for the support

measures to be put in place and brought to fruition. That decision was upheld by the Court of Appeal and the Court of Cassation.

In February 2014 the applicant appealed against the adoptability decision to the Minors Court. In support of her request she submitted medical documentation attesting that her health had, in the meantime, improved, and seeking to prove that the conditions justifying the declaration of adoptability were not satisfied.

Law – Article 8: Unlike other cases that the Court had had occasion to examine, the children in the present case had not been exposed to a situation of violence or of physical or psychological ill-treatment,[1] or to sexual abuse.

The procedure for declaring the children adoptable had been opened on account of the worsening of the applicant's state of health, which had led to her admission to hospital, and the disruption of the family situation following the parents' separation.

The Court had no doubt that, in the circumstances, an intervention by the competent authorities in order to protect the children's interest had been necessary. It had some doubt, however about the adequacy of the intervention decided and took the view that the authorities had not made sufficient efforts to protect the mother-child relationship. Other solutions were practicable, such as those envisaged by the experts and in particular the introduction of specific social assistance such as to enable the difficulties related to the applicant's health to be overcome, thus preserving the family relationship while protecting the children's best interests.

On a number of occasions, the applicant had sought the intervention of the social services to obtain support in looking after her children. Her requests did not reflect a lack of capacity to exercise her role as parent and did not justify the court's decision to declare the children adoptable. A response by the authorities to the applicant's requests for help could have protected both the children's interest and the maternal bond. It would also have been in conformity with the recommendations of the experts' report and the provisions of the law whereby a permanent severance of the family bond must remain the last resort.

Even though less radical solutions were available, the domestic courts had nevertheless declared the children adoptable in spite of the experts' recommendations, thus leading to their final and irreversible removal from their mother. In addition, the three children were placed in three different foster families, resulting not only in the break-up of the family but also the separation of the siblings.

The necessity, which was paramount, of preserving as far as possible the bond between the applicant – who was in a situation of vulnerability – and her sons had not been duly taken into consideration. The judicial authorities merely considered the family difficulties, which could have been overcome by specific social assistance, as indicated in the experts' report. While it was true that an initial series of support measures had been put in place in 2009 and had failed on account of the applicant's illness and her separation from her husband, those circumstances did not suffice to justify the removal of any opportunity for the applicant to re-establish a relationship with her children.

Having regard to those considerations and notwithstanding the State's margin of appreciation in such matters, the Italian authorities, by only envisaging the final and irreversible severance of the family relationship, when other solutions to safeguard both the children's interest and the family bond would have been practicable, had not made appropriate and adequate efforts to ensure respect for the applicant's right to live with her children, thus disregarding her right to respect for her family life, as guaranteed by Article 8 of the Convention.

Conclusion: violation (unanimously).

Article 41: EUR 32,000 for non-pecuniary damage.

(See also *Kutzner v. Germany*, 46544/99, 26 February 2002, Information Note 39; and *Couillard Maugery v. France*, 64796/01, 1 July 2004, Information Note 66; see also the Factsheet on Parental rights)

ARTICLE 10

Freedom of expression

Criminal conviction for rejecting legal characterisation of atrocities committed by Ottoman Empire against the Armenian people from 1915 as "genocide": *violation*

Perinçek v. Switzerland - 27510/08
Judgment 15.10.2015 [GC]

Facts – The applicant is a doctor of laws and chairman of the Turkish Workers' Party. In 2005 he took part in various conferences during which he publicly denied that there had been any genocide

1. See, for example, *Y.C. v. the United Kingdom*, 4547/10, 13 March 2012, Information Note 150.

of the Armenian people by the Ottoman Empire in 1915 and subsequent years. In particular, he described the idea of an Armenian genocide as an "international lie". The Switzerland-Armenia Association lodged a criminal complaint against the applicant on account of his comments. The applicant was ordered to pay ninety day-fines of 100 Swiss francs (CHF), suspended for two years, a fine of CHF 3,000, which could be replaced by thirty days' imprisonment, and the sum of CHF 1,000 in compensation to the Switzerland-Armenia Association for non-pecuniary damage.

In a judgment of 17 December 2013 (see Information Note 169) a Chamber of the Court held by five votes to two that there had been a violation of Article 10 of the Convention. On 2 June 2014 the case was referred to the Grand Chamber at the Government's request.

Law – Scope of the case: Not only was the Court not required to determine whether the massacres and mass deportations suffered by the Armenian people at the hands of the Ottoman Empire from 1915 onwards could be characterised as genocide within the meaning of that term in international law; it also had no authority to make legally binding pronouncements, one way or the other, on this point.

Article 17: The decisive point – whether the applicant's statements had sought to stir up hatred or violence, and whether by making them he had attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it – was not immediately clear and overlapped with the question whether the interference with the applicant's right to freedom of expression had been "necessary in a democratic society". Accordingly, the question of the application of Article 17 had to be joined to the merits of the applicant's complaint under Article 10.

Conclusion: question of the application of Article 17 joined to the merits (fourteen votes to three).

Article 10: The applicant's conviction and punishment, coupled with the order to pay damages to the Switzerland-Armenia Association, constituted an interference with the exercise of his right to freedom of expression. The Court nevertheless decided to examine first whether Article 16 of the Convention was applicable in the present case.

(a) *Applicability of Article 16* – Although the applicant in the present case was indeed an alien, the Court did not find that Article 16 could provide a justification for the interference in question. While the European Commission of Human Rights had noted that this Article reflected an outdated understanding of international law, the Council of Europe's Parliamentary Assembly had called for it to be repealed. It had never been applied by the former Commission or the Court, and unbridled reliance on it to restrain the possibility for aliens to exercise their right to freedom of expression would run against the Court's rulings in cases in which aliens had been found to be entitled to exercise this right without any suggestion that it could be curtailed by reference to Article 16. Indeed, the Court had specifically noted that, since the right to freedom of expression was guaranteed by Article 10 § 1 of the Convention "regardless of frontiers", no distinction could be drawn between its exercise by nationals and foreigners.[1]

Bearing in mind that clauses permitting interference with Convention rights were to be interpreted restrictively, the Court found that Article 16 should be construed as only capable of authorising restrictions on "activities" that directly affected the political process. As that was not the case in this instance, Article 16 could not be prayed in aid by the Swiss Government.

In conclusion, Article 16 of the Convention had not authorised the Swiss authorities to restrict the applicant's exercise of the right to freedom of expression in this case.

(b) "*Prescribed by law*" – The applicant could reasonably have foreseen – if need be, with appropriate advice – that his statements in relation to the events of 1915 and the following years might result in criminal liability under Article 261 *bis* § 4 of the Criminal Code.

The fact that an earlier prosecution in relation to similar statements had resulted in an acquittal did not alter that finding. The Swiss courts could not be blamed for the absence of more ample case-law concerning the determination of whether these events had amounted to "a genocide" within the meaning of Article 261 *bis* § 4. Their approach in the applicant's case could reasonably have been expected, especially in view of the intervening adoption by the Swiss National Council of a motion recognising the events in question as genocide. This approach did not amount to a sudden and unforeseeable change in case-law or to an extension of the scope of a criminal statute by analogy.

1. *Cox v. Turkey*, 2933/03, 20 May 2010, Information Note 130.

The interference with the applicant's right to freedom of expression had thus been sufficiently foreseeable, and therefore "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

(c) *Legitimate aims*

(i) "*Prevention of disorder*" – The Court found that the expressions "the prevention of disorder" and "*la défense de l'ordre*" in the English and French texts of Article 10 § 2 could best be reconciled by means of a less extensive interpretation since the words used in the English text appeared to be only capable of a narrower meaning. Accordingly, as the Government's arguments relating to, *inter alia*, the legal interests protected by Article 261 *bis* related to the broader meaning, they were of little relevance.

Furthermore, the Government had not demonstrated that in acting to penalise the applicant's statements, the Swiss authorities had been of the view that they had led to disorder. There was no evidence that any confrontations had in fact taken place at the two rallies referred to at which the applicant had been a speaker, and which had taken place about a year before the events leading to the applicant's conviction. Above all, none of those aspects had been mentioned by the Swiss courts in their decisions in the criminal case against the applicant. Lastly, there was no evidence that at the time of the public events at which the applicant had made his statements the Swiss authorities had perceived those events as capable of leading to public disturbances and had attempted to regulate them on that basis, or that statements of this kind could have risked unleashing serious tensions and giving rise to clashes.

Accordingly, the interference with the applicant's right to freedom of expression had not pursued the aim of "prevention of disorder".

(ii) "*Protection ... of the rights of others*" – Bearing in mind that many of the descendants of the victims and survivors of the events in question – especially those in the Armenian diaspora – constructed their identity around the perception that their community had been the victim of genocide, the Court accepted that the interference with the statements in which the applicant had denied that the Armenians had suffered genocide had been intended to protect that identity, and thus the dignity of present-day Armenians. At the same time, it could hardly be said that by disputing the legal characterisation of the events, the applicant had cast the victims in a negative light, deprived them of their dignity or diminished their humanity. Nor did it appear that he had directed his accusation that the idea of the Armenian genocide was an "international lie" towards the victims or their descendants. However, the Court could not overlook the fact that at one of the events where he had spoken, the applicant had referred to the Armenians involved in the events as "instruments" of the "imperialist powers", and accused them of "carrying out massacres of the Turks and Muslims". That being so, the interference had also been intended to protect the dignity of those persons and thus the dignity of their descendants.

The interference with the applicant's right to freedom of expression could therefore be regarded as having been intended "for the protection of the … rights of others".

(d) *Necessity of the interference in a democratic society* – The Court was not required to determine whether the criminalisation of the denial of genocides or other historical facts could in principle be justified. Being constrained by the facts of the case, it was limited to reviewing whether or not the application of Article 261 *bis* § 4 of the Criminal Code in the applicant's case had been "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

It had to be determined whether it had been necessary to protect the "rights of others" at issue by way of criminal-law measures. This concerned the rights of Armenians to respect for their and their ancestors' dignity, including their right to respect for their identity, which was constructed around the understanding that their community had suffered genocide. In the light of the Court's case-law, in which it had accepted that Article 8 of the Convention, under its "private life" heading, was applicable both to ethnic identity and to the reputation of ancestors, the Court agreed that these were rights protected under that Article.

The Court was thus faced with the need to strike a balance between two Convention rights: the right to freedom of expression under Article 10 and the right to respect for private life under Article 8.

(i) *Nature of the applicant's statements* – The applicant's statements had touched upon historical and legal issues, but the context in which they had been made – at public events where the applicant was addressing like-minded supporters – showed that he had been speaking as a politician, not as a historical or legal scholar. He had taken part in a long-standing controversy that the Court had already accepted, in a number of cases against

Turkey, as relating to an issue of public concern and described as a "heated debate, not only within Turkey but also in the international arena".

Moreover, while being fully aware of the acute sensitivities attached by the Armenian community to the issue in relation to which the applicant had spoken, the Court, taking into account the overall thrust of his statements, did not perceive them as a form of incitement to hatred or intolerance. The applicant had not expressed contempt or hatred for the victims of the events in question, having noted that Turks and Armenians had lived in peace for centuries. He had not called the Armenians liars, used abusive terms with respect to them, or attempted to stereotype them. His strongly worded allegations had been directed against the "imperialists" and their allegedly insidious designs with respect to the Ottoman Empire and Turkey.

Could the statements in issue nevertheless be seen as a form of incitement to hatred or intolerance towards the Armenians on account of the applicant's position and the wider context in which they were made? In cases that had come before the former Commission and the Court concerning statements in relation to the Holocaust, this had, for historical and contextual reasons, invariably been presumed. However, the Court did not consider that the same could be done in this case, where the applicant had spoken in Switzerland about events which had taken place on the territory of the Ottoman Empire about 90 years previously. While it could not be ruled out that statements relating to those events could likewise promote a racist and anti-democratic agenda, and could do so through innuendo rather than directly, the context did not require this to be automatically presumed, and there was not enough evidence that this had been so in the present case.

Furthermore, the attempts by the Government and some of the third parties to portray the applicant as an extremist wont to exercise his right to freedom of expression in an irresponsible and dangerous manner could not be reconciled with the fact that in two cases brought by him against Turkey, the Court had found violations on account of interferences with his exercise of that right.[1]

The fact that the applicant's statements had concerned the Armenians as a group could not in itself serve as a basis to infer a racist agenda since, in view of the definition of the term "genocide" in international law, any statements relating to the propriety of classifying a historical event in that way were bound to concern a particular national, ethnical, racial or religious group.

In the Court's view, the applicant's statements, read as a whole and taken in their immediate and wider context, could not be seen as a call for hatred, violence or intolerance towards the Armenians. They had admittedly been virulent and reflected an intransigent position on the applicant's part, but it should be recognised that they appeared to include an element of exaggeration as they had sought to attract attention.

It followed that the applicant's statements, which concerned a matter of public interest, had been entitled to heightened protection under Article 10 of the Convention, and that the Swiss authorities had had only a limited margin of appreciation to interfere with them.

(ii) *Context of the interference*

(α) *Geographical and historical factors*

The Court's case-law showed that, in view of the historical context in the States concerned, Holocaust denial, even if dressed up as impartial historical research, invariably connoted an anti-democratic and anti-Semitic ideology.

By contrast, it had not been argued that there was a direct link between Switzerland and the events that had taken place in the Ottoman Empire in 1915 and the following years. The only such link could come from the presence of an Armenian community on Swiss soil, but it was a tenuous one. The controversy sparked by the applicant was external to Swiss political life, given that he was a foreigner and would return to his country. There was, moreover, no evidence that at the time when the applicant had made his statements the atmosphere in Switzerland was tense and could result in serious friction between Turks and Armenians there.

Nor could the applicant's criminal conviction in Switzerland be justified by the situation in Turkey, whose Armenian minority was alleged to suffer from hostility and discrimination. Neither the Swiss courts nor the Government had referred to the Turkish context. The Government's attempt to justify the interference by reference to Article 16 of the Convention showed that they were chiefly concerned with the domestic political context.

It was true that at present, especially with the use of electronic means of communication, no message could be regarded as purely local. It was also laudable, and consonant with the spirit of universal protection of human rights, for Switzerland to seek

1. *Socialist Party and Others v. Turkey*, 21237/93, 25 May 1998, and *Perinçek v. Turkey*, 46669/99, 21 June 2005.

to defend the rights of victims of mass atrocities regardless of the place where they had taken place. However, the broader concept of proportionality inherent in the phrase "necessary in a democratic society" required a rational connection between the measures taken by the authorities and the aim they had sought to realise through these measures; in other words, the measures had to have been reasonably capable of producing the desired result. It could hardly be said that any hostility that existed towards the Armenian minority in Turkey was the product of the applicant's statements in Switzerland, or that the applicant's criminal conviction in Switzerland had protected that minority's rights in any real way or made it feel safer. There was, moreover, no evidence that the applicant's statements had in themselves provoked hatred towards the Armenians in Turkey, or that he had on other occasions attempted to instil hatred against Armenians there.

Lastly, there was no evidence that the applicant's statements had had a direct effect on the undeniable hostility of some ultranationalist circles in Turkey towards the Armenians in that country, or on other international contexts, such as France, which was home to the third-largest community in the Armenian diaspora.

(β) *The time factor*

A considerable amount of time – about 90 years – had elapsed between the applicant's statements and the tragic events to which he had referred, and at the time when he had made the statements there had surely been very few survivors of these events. While this was still a live issue for many Armenians, especially those in the diaspora, the time element could not be disregarded. Whereas events of relatively recent vintage could be so traumatic as to warrant, for a period of time, an enhanced degree of regulation of statements relating to them, the need for such regulation was bound to recede with the passage of time.

(iii) *Extent to which the applicant's statements affected the rights of the members of the Armenian community* – The Court was aware of the immense importance attached by the Armenian community to the question whether the tragic events of 1915 and the following years were to be regarded as genocide, and of that community's acute sensitivity to any statements bearing on that point. However, it could not accept that the applicant's statements at issue in this case had been so wounding to the dignity of the Armenians who had suffered and perished in these events and to the dignity and identity of their descendants as to require criminal-law measures in Switzerland. The sting of the applicant's statements had not been directed towards those persons but towards the "imperialists" whom he regarded as responsible for the atrocities. This, coupled with the amount of time that had elapsed since the events to which the applicant had been referring, led the Court to the conclusion that his statements could not be seen as having had the significantly upsetting effect sought to be attributed to them.

Nor was the Court persuaded that the applicant's statements – in which he had denied that the events of 1915 and the following years could be classified as genocide but had not disputed the actual occurrence of massacres and mass deportations – could have had a severe impact on the Armenians' identity as a group. Statements that contested, even in virulent terms, the significance of historical events that carried a special sensitivity for a country and touched on its national identity could not in themselves be regarded as seriously affecting their addressees. The Court did not rule out that there might exist circumstances in which, in view of the particular context, statements relating to traumatic historical events could result in significant damage to the dignity of groups affected by such events, for instance if they were particularly virulent and disseminated in a form that was impossible to ignore. The only cases in which the former Commission and the Court had accepted the existence of such circumstances without specific evidence were those relating to Holocaust denial. However, as already noted, this could be regarded as stemming from the very particular context in which those cases had unfolded.

Lastly, the applicant's statements had been made at three public events. Their impact was thus bound to have been rather limited.

(iv) *Existence or lack of consensus among the High Contracting Parties* – In the past few years there had been fluctuating developments in this domain in the legal systems of the High Contracting Parties.

Some High Contracting Parties did not criminalise the denial of historical events. Others, using various methods, criminalised only the denial of the Holocaust and Nazi crimes. A third group criminalised the denial of Nazi and communist crimes. A fourth group criminalised the denial of any genocide. At European Union level, the applicable provisions had a wide scope but at the same time linked the requirement to criminalise genocide denial to the need for it to be capable of having tangible negative consequences.

The Court acknowledged this diversity. It was nevertheless clear that, by criminalising the denial of any genocide, without the requirement for such denial to be likely to incite to violence or hatred, Switzerland stood at one end of the comparative spectrum. In those circumstances, and given that in the present case there were other factors which had a significant bearing on the breadth of the applicable margin of appreciation, the comparative-law position could not play a weighty part in the Court's conclusion with regard to this issue.

(v) *Could the interference be regarded as required under Switzerland's international law obligations?* – Having established that the applicant's statements could not be seen as a form of incitement to hatred or discrimination, the Court needed only to determine whether Switzerland had been required under its international law obligations to criminalise genocide denial as such.

There were no international treaties in force in respect of Switzerland that required in clear and explicit language the imposition of criminal penalties on genocide denial as such. Nor did this appear to be required under customary international law. It could not therefore be said that the interference with the applicant's right to freedom of expression had been required, let alone justified, by Switzerland's international obligations.

(vi) *Method employed by the Swiss courts to justify the applicant's conviction* – From the analysis carried out by the domestic courts, it was unclear whether the applicant had been penalised for disagreeing with the legal classification ascribed to the events of 1915 and the following years or with the prevailing views in Swiss society on this point. In the latter case, the applicant's conviction had to be seen as inimical to the possibility, in a "democratic society", of expressing opinions that diverged from those of the authorities or any sector of the population.

(vii) *Severity of the interference* – The form of interference at issue – a criminal conviction that could even result in a term of imprisonment – was a serious sanction, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies. The same applied here: what mattered was not so much the severity of the applicant's sentence but the very fact that he had been criminally convicted, which was one of the most serious forms of interference with the right to freedom of expression.

(vii). *Balancing the applicant's right to freedom of expression against the Armenians' right to respect for their private life* – An interference with the right to freedom of expression that took the form of a criminal conviction inevitably required detailed judicial assessment of the specific conduct sought to be punished. In this type of case, it was normally not sufficient for the interference to have been imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general terms; what was required instead was that it had been necessary in the specific circumstances. However, a perusal of the reasons for the Swiss courts' judgments in the applicant's case did not show that they had paid any particular heed to this balance.

The Court therefore had to carry out the balancing exercise itself.

Taking into account all the elements analysed above – that the applicant's statements had related to a matter of public interest and had not amounted to a call for hatred or intolerance, that the context in which they had been made had not been marked by heightened tensions or special historical overtones in Switzerland, that the statements could not be regarded as having affected the dignity of the members of the Armenian community to the point of requiring a criminal-law response in Switzerland, that there had been no international law obligation for Switzerland to criminalise such statements, that the Swiss courts appeared to have censured the applicant for voicing an opinion that diverged from the established ones in Switzerland, and that the interference had taken the serious form of a criminal conviction – the Court concluded that it had not been necessary in a democratic society to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case.

Conclusions: violation of Article 10 (ten votes to seven); Article 17 not applicable (thirteen votes to four).

Article 41: finding of a violation sufficient in itself for non-pecuniary damage; claim for pecuniary damage rejected.

(Concerning Article 17, see *Leroy v. France*, 36109/03, 2 October 2010, Information Note 112; concerning Article 16, see *Piermont v. France*, 15773/89 and 15774/89, 27 April 1985)

Arrest and conviction of journalist for not obeying police orders during a demonstration: *no violation*

Pentikäinen v. Finland - 11882/10
Judgment 20.10.2015 [GC]

Facts – In 2006 the applicant was sent to report on a demonstration in his capacity as a journalist and photographer. When the demonstration turned violent, the police decided to prevent the demonstrators from marching and to allow a peaceful demonstration to be held on the spot. They later sealed off the area and ordered the protesters to disperse. Despite being repeatedly asked to leave the scene, the applicant decided to remain with the demonstrators. Shortly afterwards he was arrested along with a number of demonstrators and detained for over 17 hours. He was subsequently found guilty of disobeying police orders but no penalty was imposed. That decision was upheld on appeal and the applicant's subsequent complaint to the Supreme Court was rejected.

In a judgment of 4 February 2014 a Chamber of the Court held, by five votes to two, that there had been no violation of Article 10 (see Information Note 171). On 2 June 2014 the case was referred to the Grand Chamber at the applicant's request.

Law – Article 10: When assessing the necessity of the interference with the applicant's freedom of expression the Court had to weigh two competing interests: the interest of the public in receiving information on an issue of general interest and that of the police in maintaining public order in the context of a violent demonstration. In this connection, the Court stressed the "watchdog" role of the media in providing information on the authorities' handling of public demonstrations and the containment of disorder. Any attempt to remove journalists from the scene of a demonstration had therefore to be subjected to strict scrutiny. On the other hand, the protection afforded by Article 10 to journalists was subject to the proviso that they act in conformity with the principles of responsible journalism. Accordingly, journalists exercising their freedom of expression undertook "duties and responsibilities" which meant that they could not claim immunity from criminal liability for the sole reason that the offence in question was committed during the performance of their journalistic functions.

As to the applicant's arrest, the case file disclosed no reason to doubt that the police orders to disperse the demonstration were based on a reasonable assessment of the facts. Moreover, the preventive measures taken against the likelihood of the events turning violent appeared justified. They were directed not only at the "abstract" protection of public order but also at the safety of individuals at or in the vicinity of the demonstration, including members of the media and, therefore, the applicant himself. As to the applicant's conduct, the Court first noted that his physical appearance during the demonstration did not clearly distinguish him from the protesters, as he was not wearing any distinctive clothing or other signs capable of identifying him as a journalist. It was thus likely that he was not readily identifiable as a journalist prior to his arrest. Had he wished to be acknowledged as a journalist by the police, he should have made sufficiently clear efforts to identify himself as such by wearing distinguishable clothing, keeping his press badge visible at all times or by any other appropriate means. As a journalist reporting on police actions, he had to have been aware of the legal consequences of disobeying police orders and so, by not doing so, had knowingly taken the risk of arrest. Furthermore, nothing in the case file suggested that the applicant would not have been able to continue to perform his professional duty in the immediate vicinity had he obeyed the order to leave the cordoned-off area.

As to the applicant's detention, although he was held at the police station for seventeen and a half hours, because of his status as a journalist he was one of the first to be interrogated and released. Further, although it was not entirely clear how his camera equipment and memory cards were treated after his arrest, it did not appear that his equipment was confiscated at any point and he was allowed to keep all the photographs he had taken without any restrictions on their use.

As to the conviction, although the applicant was ultimately found guilty of contumacy towards the police no penalty was imposed. Any interference with his journalistic freedom had been of limited extent, given the opportunities he had had to cover the event adequately. The Court emphasised that the conduct sanctioned by the criminal conviction was not the applicant's journalistic activity as such, but his refusal to comply with a police order at the very end of a demonstration which had been judged by the police to have become a riot. In this respect, the fact that the applicant was a journalist did not entitle him to preferential or different treatment in comparison to others at the scene. Indeed, the legislation of the majority of the Council of Europe member States did not confer any special status on journalists when they failed

to comply with police orders to leave the scene of a demonstration. Furthermore, the concept of responsible journalism required that whenever journalists had to choose between the general duty to abide by the ordinary criminal law and their professional duty to obtain and disseminate information, and chose the second option, they had to be aware that they assumed the risk of being subject to legal sanctions, including those of a criminal character. Finally, no penalty was imposed on the applicant on the grounds that his act was considered "excusable": as a journalist, he had been confronted with contradictory expectations arising from obligations imposed on him by the police, on the one hand, and by his employer, on the other. His conviction thus amounted only to a formal finding that he had committed the offence and as such could hardly, if at all, have any "chilling effect" on persons taking part in demonstrations. The applicant's conviction could therefore be deemed proportionate to the legitimate aims pursued.

Conclusion: no violation (thirteen votes to four).

(See also *Stoll v. Switzerland* [GC], 69698/01, 10 December 2007, Information Note 103; *Animal Defenders International v. the United Kingdom* [GC], 48876/08, 22 April 2013, Information Note 162; and *Morice v. France* [GC], 29369/10, 23 April 2015, Information Note 184)

Applicant's denial of responsibility for materials which led to his prosecution and conviction: *violation*

Müdür Duman v. Turkey - 15450/03
Judgment 6.10.2015 [Section II]

Facts – The applicant was the director of a district branch of a political party. In 2000, in the aftermath of a public demonstration, the police conducted a search of the branch premises and found various items related to the PKK (Kurdistan Workers' Party) and its leader, Mr Öcalan. As a consequence, the applicant was prosecuted, and subsequently convicted to six months' imprisonment for praising and condoning acts proscribed by law.

Law – Article 10: The Court first had to determine whether there had been an interference with the applicant's exercise of his right to freedom of expression, since in the domestic proceedings he had denied any knowledge of the material found in his office and had distanced himself from it. The Court observed that the offence the applicant had been convicted for was indisputably directed at activities falling within the scope of freedom of expression and he had been sanctioned for engaging in such activities, despite his denial of any knowledge of the materials. In such circumstances, his conviction constituted an interference with his right to freedom of expression. To hold otherwise would be tantamount to requiring him to acknowledge the acts of which he had stood accused, thus running counter to the right not to incriminate oneself, which is a crucial aspect of the right to a fair trial protected by Article 6 of the Convention. Moreover, not accepting that a criminal conviction constituted an interference, on the grounds that an applicant had denied any involvement in the acts at issue, would lock him in a vicious circle that would deprive him of the protection of the Convention.

As to the necessity of the interference, the applicant had been prosecuted and convicted merely for keeping illegal material in the party's office, an act interpreted by the domestic courts as an indication of support for and approval of an illegal organisation and its leader. However, neither in the domestic court decisions nor in the Government's submissions was there any indication that the material in question advocated violence, armed resistance or an uprising. The applicant's conduct could not therefore be construed as support for or approval of unlawful acts committed by Mr Öcalan and the PKK. Moreover, the domestic courts' reasoning failed to indicate whether they had examined the proportionality of the interference and the balancing of rights taking into account freedom of expression. Accordingly, the reasons given by the domestic courts for convicting and sentencing the applicant could not be considered relevant and sufficient to justify the interference with his right to freedom of expression. Finally, the Court noted the severity of the penalty imposed on the applicant. In these circumstances, his conviction had been disproportionate to the aims pursued and accordingly was not "necessary in a democratic society".

Conclusion: violation (unanimously).

Article 41: EUR 12,500 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Feridun Yazar and Others v. Turkey*, 42713/98, 23 September 2004; *Bahçeci and Turan v. Turkey*, 33340/03, 16 June 2009; and *Bülent Kaya v. Turkey*, 52056/08, 22 October 2013)

Civil liability of a professor for having criticised the election procedure of a university governing body: *violation*

Kharlamov v. Russia - 27447/07
Judgment 8.10.2015 [Section I]

Facts – The applicant, a university professor in physics, was sued in defamation after he had expressed, during a university-wide conference for the election of the university's senate, his view that the elected academic senate could not be considered a legitimate body because of shortcomings in the election process. The domestic courts found that the applicant was liable for defamation on the ground that, on the strength of the available evidence, the senate elections had been run in full compliance with the applicable regulations.

Law – Article 10: The applicant had expressed his views at an academic assembly open to all university staff. He had been found liable for his speech, which brought to light a matter of professional concern, namely the opacity of the academic senate election. The impugned interference therefore had to be assessed in the context of its professional environment. The composition of the ruling body of the university and the procedure for designation of candidates to the election were of central importance for the university staff, and discussion around these issues formed an integral part of the organisation of the academic life and self-governance. The debate had taken place in public and the issue raised by the applicant had concerned a matter of general interest, which the applicant had been entitled to bring to the attention of his colleagues. There was no evidence that the domestic courts had performed a balancing exercise between the need to protect the university's reputation and the applicant's right to impart information on issues of general interest concerning the organisation of the academic life.

The domestic authorities had also failed to take into account the fact that the "dignity" of an institution could not be equated to that of human beings. In the Court's view, the protection of the university's authority was a mere institutional interest, which did not necessarily have the same strength as "the protection of the reputation or rights of others".

Furthermore, the domestic courts found that the applicant's statement was a factual accusation and that he had failed to discharge the burden of proof resting on him. However the thrust of the applicant's speech was his severe discontent with the manner in which the academic senate had been elected. He had voiced his personal comment on a matter of public interest for university staff and had succeeded in showing that his impugned value judgment had a sufficient factual ground by relying on fellow professors' testimonies corroborating his claim. He had not resorted to offensive or intemperate language and had not gone beyond the generally accepted degree of exaggeration.

The domestic courts had thus overstepped the narrow margin of appreciation afforded to them regarding a debate of public interest and the interference had not been necessary in a democratic society.

Conclusion: violation (unanimously).

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

ARTICLE 11

Freedom of peaceful assembly

Criminal sanctions for farmers blocking traffic on major roads for two days: *no violation*

Kudrevičius and Others v. Lithuania - 37553/05
Judgment 15.10.2015 [GC]

Facts – The applicant farmers obtained authority to stage a peaceful protest to draw attention to the Government's alleged lack of action in response to agricultural sector problems. The demonstrations were initially held peacefully as per the authorisations. However, negotiations with the Government stagnated. In order to put pressure on the Government, the applicants went beyond the authorisations and blocked three major highways for two days causing significant disruption. The blockage ended when their demands were met. The applicants were subsequently convicted of "rioting" and sentenced to 60 days' imprisonment, suspended for one year. They were also ordered not to leave their places of residence for more than seven days without the authorities' prior agreement.

In a judgment of 26 November 2013 a Chamber of the Court held, by four votes to three, that there had been a violation of Article 11 of the Convention (see Information Note 168). On 14 April 2014 the case was referred to the Grand Chamber at the Government's request.

Law – Article 11

(a) *Applicability* – The applicants' conviction had not been based on any involvement in or incitement to violence, but on the breach of public order resulting from the roadblocks. The disruption of traffic was not a side-effect of a meeting held in a public place, but rather the result of intentional action by the farmers. However, physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others was not at the core of freedom of assembly as protected by Article 11, which might have implications for any assessment of "necessity" to be carried out under the second paragraph of that provision. At the same time, the applicants' conduct was not of such a nature and degree as to remove their participation in the demonstration from the scope of protection of the right to freedom of peaceful assembly. There was no indication that they had undermined the foundations of a democratic society. Article 11 was therefore applicable.

(b) *Merits* – The applicants' conviction amounted to an interference with their right to freedom of peaceful assembly. The interference had a legal basis in the domestic law. The domestic courts' interpretation of the relevant provision of the Criminal Code was neither arbitrary nor unpredictable. The permits to hold peaceful assemblies contained a warning about the possible liability of the organisers. Moreover, it should have been clear to the applicants that disobeying the lawful and explicit orders of the police to lift the roadblocks could engage their responsibility. The impugned interference was thus "prescribed by law" and had pursued the legitimate aims of the "prevention of disorder" and of the "protection of the rights and freedoms of others".

The moving of the demonstrations from the authorised areas onto the highways had been a clear violation of the conditions stipulated in the permits. That action had been taken without any prior notice to the authorities and without asking them to amend the terms of the permits. The applicants could not have been unaware of those requirements. Furthermore, their action had not been justified by a need for an immediate response to a current event. The Court had no reason to question the assessment of the domestic courts that the farmers had had at their disposal alternative and lawful means to protect their interests, such as the possibility of bringing complaints before the administrative courts.

In so far as the intentional roadblocks were aimed at pressuring the Government to accept the farmers' demands, that feature distinguished the instant case from those in which the Court had observed that demonstrations might cause a certain level of disruption to ordinary life, including disruption to traffic. In cases where demonstrators tried to prevent or alter the exercise of an activity carried out by others, the Court had concluded that the inflicting of sanctions had been a reaction proportionate to the legitimate aim of protecting the rights and freedoms of others. The same conclusion should *a fortiori* be reached in the instant case, as the actions of the demonstrators had not been directly aimed at an activity of which they disapproved, but at the physical blocking of another activity which had no direct connection with the object of their protest.

As could be seen from the Court's case-law, the intentional serious disruption, by demonstrators, to ordinary life and to the activities lawfully carried out by others, to a more significant extent than that caused by the normal exercise of the right of peaceful assembly in a public place, might be considered a "reprehensible act" and therefore justify the imposition of penalties, even of a criminal nature. Even though the applicants had not performed acts of violence or incited others to engage in such acts, the almost complete obstruction of three major highways in blatant disregard of police orders and of the needs and rights of the road users had constituted conduct which could be described as "reprehensible". Bearing in mind the margin of appreciation to be accorded in such circumstances, the respondent State had clearly been entitled to consider that the interests of protecting public order outweighed those of the applicants in resorting to roadblocks as a means for the farmers to achieve a breakthrough in their negotiations with the Government.

As to the conduct of the authorities, the police had confined themselves to ordering the applicants to remove the roadblocks and to warning them about their possible liability. They had chosen not to disperse the gatherings even when the applicants refused to obey their lawful orders. When tensions had arisen between the farmers and the truck drivers, the police had urged the parties to the conflict to calm down in order to avoid serious confrontations. Despite the serious disruptions caused by the applicants' conduct the authorities had thus showed a high degree of tolerance. They had, moreover, attempted to balance the interests of the demonstrators with those of the users of the highways, in order to ensure the peaceful conduct of the gathering and the safety of all citizens, thus

satisfying any positive obligation that they might be considered to have had.

As to the sanctions imposed on the applicants, the penalty applied was a lenient 60-day custodial sentence whose execution had been suspended for one year. The applicants had not been sentenced to pay fines and the only actual consequence of their conviction was the obligation, lasting one year, to obtain authorisation if they wanted to leave their places of residence for more than seven days. Such inconvenience did not seem disproportionate when compared to the serious disruption of public order provoked by the applicants.

Lastly, since there was no uniform approach among the member States as to the legal characterisation – as a criminal or an administrative offence – of the obstruction of traffic on a public highway, the domestic authorities had not overstepped the limits of their wide margin of appreciation by holding the applicants criminally liable for their conduct. The fact that other individuals might have obtained more lenient treatment did not necessarily imply that the sanctions imposed on the applicants had been disproportionate.

In sum, the domestic authorities had struck a fair balance between the legitimate aims of the "prevention of disorder" and of the "protection of the rights and freedoms of others", on the one hand, and the requirements of freedom of assembly on the other, and based their decisions on an acceptable assessment of the facts and on reasons which were relevant and sufficient.

It was not necessary for the Court to address the arguments put forward by the parties in order to determine whether the measures adopted by the authorities could have been justified in the light of the case-law of the Court of Justice of the European Union (CJEU).[1] The role of the CJEU had been to establish whether the EU member States had complied with their obligation to ensure the free movement of goods, while the Court's task in the instant case was to determine whether there had been an infringement of the applicants' right to freedom of assembly.

Conclusion: no violation (unanimously).

(See *Bukta and Others v. Hungary*, 25691/04, 17 July 2007, Information Note 99; *Lucas v. the United Kingdom* (dec.), 39013/02, 18 March 2003; *Barraco v. France*, 31684/05, 5 March 2009, Information Note 117)

1. *Eugen Schmidberger, Internationale Transporte and Planzüge v. Austria* (C-112/00, judgment of 12 June 2003) and *Commission v. France* (C-265/95, judgment of 9 December 1997).

Conviction and sentence to five days' detention for failing to obey police order to stop participating in unauthorised demonstration: *violation*

Gafgaz Mammadov v. Azerbaijan - 60259/11
Judgment 15.10.2015 [Section I]

Facts – The applicant was arrested during a police operation to disperse a peaceful demonstration he was attending in support of an opposition group. The demonstration had gone ahead in the city centre despite authorisation being refused to hold it there. The applicant was subsequently prosecuted under the Code of Administrative Offences. However, rather than being charged with a breach of the rules governing the holding of assemblies under Article 298 of the Code (for which the prescribed penalty was a fine or a reprimand), he was charged under Article 310.1 with failing to comply with a lawful order of the police, an offence carrying a custodial sentence. He was convicted and sentenced to five days' administrative detention.

Law – Article 11: Both the dispersal of the demonstration and the applicant's arrest and conviction had interfered with the applicant's right to freedom of peaceful assembly.

As to the lawfulness of that interference, the Court had serious concerns about the foreseeability and precision of the Azerbaijani legislation governing public assemblies and the risk of such assemblies being abusively banned or dispersed. A number of reports by international bodies had stressed that the system of prior notification laid down by the Constitution had been replaced in practice by a system of authorisation pursuant to powers contained in the Law on Freedom of Assembly. The Court also had doubts regarding the credibility of the formal ground invoked by the authorities for the applicant's arrest and conviction: the applicant was arrested and convicted for failing to comply with the lawful order of a police officer, whereas in fact the key basis for the proceedings against him was the lack of authorisation for the demonstration. However, the Court decided not to limit its examination under Article 11 to the lawfulness of the interference since a more conspicuous problem arose with respect to the necessity of the interference.

In that connection, the Court noted that the authorities had not explained why, after receiving notice of the planned demonstration, they decided to refuse "authorisation" and to disperse it rather than take measures to minimise disruption and ensure safety. The domestic courts had not attempted to examine whether the absence of authorisation justified dispersing the demonstrators. Since the Constitution required only notification, not authorisation, the Court considered that the authorities had thus ignored the circumstances that were particularly relevant when assessing whether dispersal was necessary.

As to the applicant's arrest and conviction, despite the fact that the underlying reason for his conviction was his participation in an unauthorised peaceful demonstration – conduct which at the time did not carry a custodial penalty – the applicant was sentenced to five days' administrative detention on charges that he "had failed to stop participating in the unauthorised demonstration". This arbitrary reference to an administrative offence as a ground for his arrest and conviction had thus made it possible to apply a penalty which was otherwise not applicable. In addition, the authorities had made no effort to balance the applicant's right under Article 11 of the Convention to participate in the demonstration against any damage this might cause to other public or private interests.

In sum, the authorities had failed to act with due tolerance and good faith as regards the applicant's right to freedom of assembly, had not adduced sufficient and relevant reasons justifying the interference, and had imposed a sanction which was disproportionate in the circumstances.

Conclusion: violation (unanimously).

The Court also found, unanimously, violations of Article 5 and Article 6 §§ 1 and 3 of the Convention.

Article 41: EUR 15,600 in respect of non-pecuniary damage.

ARTICLE 13

Effective remedy

Effectiveness of remedy in length- of-proceedings cases insufficiently established when application was lodged: *violation*

Valada Matos das Neves v. Portugal - 73798/13
Judgment 29.10.2015 [Section I]

Facts – In June 2003 the applicant brought proceedings in the administrative court against the mayor and other authorities, seeking to have his contract of employment recognised after it had been terminated. The case was referred to the Administrative and Tax Court. Between 2006 and 2008 the applicant made several enquiries as to the progress of the proceedings. In July 2012 he wrote to the court complaining of the delay in examining his case. The court gave judgment in the applicant's favour in March 2013. The mayor appealed. The applicant asked the court to discontinue the appeal proceedings, on the grounds that the mayor had not filed pleadings within the time allowed. The court discontinued the proceedings in May 2013.

Law – Article 13: The applicant's complaint concerning the length of civil proceedings in the administrative court appeared on the face of it to be "arguable", since the proceedings had lasted more than nine years. He had therefore been entitled to an effective remedy in that regard.

(a) *Compatibility of an action to establish non-contractual liability with general principles* – Having regard to its own observations and the considerations set out in the *Martins Castro and Alves Correia de Castro v. Portugal* judgment, the Court considered that the domestic courts' practice had evolved significantly over the past few years as regards the assessment of actions to establish non-contractual liability under section 12 of Law no. 67/2007 of 31 December 2007. The change had become consolidated within the domestic courts' case-law following the Supreme Administrative Court's judgment of 27 November 2013, to the extent that the remedy had acquired the requisite degree of legal certainty to enable and oblige applicants to use it for the purposes of Article 35 § 1 of the Convention. The Court thus concluded that from 27 November 2013, an action to establish non-contractual liability under section 12 of the above-mentioned Law constituted an effective remedy in respect of an alleged violation of the right to a hearing within a "reasonable time" within the meaning of Article 6 § 1 of the Convention. Nevertheless, as a secondary consideration, to ensure that the length of proceedings involving actions to establish non-contractual liability did not compromise the progress noted and the remedy's effectiveness as confirmed in the present case, the Court recommended that the respondent State remain attentive and, where appropriate, refrain from appealing against judgments in which a breach of the reasonable-time requirement had been found and compensation awarded to the claimants.

(b) *Requirement to make use of this remedy in the present case* – The Court found it reasonable to presume that the Supreme Administrative Court's judgment of 27 November 2013 had gained publicity at domestic level, particularly in legal circles, six months after its delivery – that is, from 27 May 2014 – given that it could have been consulted via the database of the Supreme Administrative Court's case-law available on its website. Accordingly, the public must have been aware of the judgment by 27 May 2014. This was the date from which applicants had to be required to have made use of the remedy in question for the purposes of Article 35 § 1 of the Convention. That conclusion applied both to completed proceedings and to proceedings that were still pending at domestic level, since domestic case-law did not make any distinction between pending and completed proceedings.

The application in the present case had been lodged on 25 November 2013, by which date the remedy had not acquired the requisite degree of certainty to enable and oblige applicants to use it for the purposes of Article 35 § 1 of the Convention.[1] Moreover, it would now be impossible for the applicant to bring an action of this kind because there was a three-year limitation period, which started to run from the date on which the person concerned had become aware of the delay in the proceedings in accordance with domestic case-law.

Accordingly, the applicant could not be criticised for failing to avail himself of an action to establish non-contractual liability under section 12 of Law no. 67/2007 of 31 December 2007. The Court therefore dismissed the Government's preliminary objection of failure to exhaust domestic remedies.

Conclusion: violation (unanimously).

The Court also found a violation of Article 6 § 1 on account of the unreasonable length of the proceedings, which had lasted 9 years, 11 months and 20 days.

Article 41: EUR 11,830 for non-pecuniary damage; claim for pecuniary damage rejected.

(See *Martins Castro and Alves Correia de Castro v. Portugal*, 33729/06, 10 June 2008, Information Note 109)

1. See also *Depauw v. Belgium* (dec.), 2115/04, 15 May 2007, Information Note 97.

ARTICLE 14

Discrimination (Article 1 of Protocol No. 1)

Denial of refugee card on the basis that the applicant was the child of a displaced woman rather than a displaced man: *violation*

Vrountou v. Cyprus - 33631/06
Judgment 13.10.2015 [Section IV]

Facts – In 2003 the applicant applied for a refugee card under a scheme introduced in 1974 for war victims and persons displaced from areas occupied by the Turkish armed forces or evacuated to meet the needs of the National Guard. Under the scheme, refugee cards made their holders eligible to a range of benefits, including housing assistance. The applicant's request was rejected because, while her mother was a displaced person, her father was not. The applicant's ensuing judicial proceedings were unsuccessful.

After the applicant lodged her application to the European Court, the 1974 scheme was amended, so that children of displaced women became eligible for housing assistance on the same terms as the children of displaced men as of 2013.

Law – Article 14 in conjunction with Article 1 of Protocol No. 1: In 2003 the primary condition of entitlement to housing assistance was that the person applying for it had to be the holder of a refugee card. Hence, had the applicant at that time had the right to be issued with a refugee card, she would also have had a right, enforceable under domestic law, to receive housing assistance. Therefore, housing assistance constituted a "benefit" for the purposes of Article 1 of Protocol No. 1 and the facts of this case fell within the ambit of that provision.

The Court further established the existence of a difference in treatment on the grounds of sex on account of the fact that, in being entitled to a refugee card (and thus to housing assistance) the children of displaced men enjoyed preferential treatment over the children of displaced women.

As to whether there was a reasonable and objective justification for this difference in treatment, the main argument advanced by the Government was the socio-economic differences between women and men allegedly existing in Cyprus when the scheme was introduced. However, the Court recalled that this kind of reference to "traditions, general assumptions or prevailing social attitudes" provided insufficient justification for a difference in treatment on grounds of sex. Moreover, even

assuming it reflected the general nature of economic life in rural Cyprus in 1974, it did not justify regarding all displaced men as breadwinners and all displaced women as incapable of fulfilling that role. Nor could it justify subsequently depriving the children of displaced women of the benefits to which the children of displaced men were entitled, particularly when most benefits the children of displaced men were entitled to did not refer to a means test. Nor could the difference in treatment be justified simply by reference to the need to prioritise resources in the immediate aftermath of the 1974 invasion.

As to the margin of appreciation the State allegedly enjoyed in choosing the timing and means for extending the 1974 scheme to the children of displaced women, the Court noted that the scheme had excluded the children of displaced women for almost forty years. Budgetary considerations alone could not justify such a difference in treatment based solely on gender, particularly when the successive expansions of the scheme between 1974 and 2013 had themselves had financial consequences. Furthermore, the fact that the scheme had persisted for so long and yet continued to be based solely on traditional family roles as understood in 1974 meant that the State had exceeded any margin of appreciation it enjoyed in this field. Very weighty reasons would have been required to justify such a long-lasting difference in treatment. None had been shown to exist. There was accordingly no objective and reasonable justification for the difference in treatment.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 13 on account of the lack of effective remedies at the material time which to enable the applicant to challenge the discriminatory nature of the scheme.

Article 41: EUR 4,000 in respect of non-pecuniary damage; EUR 21,500 in respect of pecuniary damage.

(See also *Konstantin Markin v. Russia* [GC], 30078/06, 22 March 2012, Information Note 150)

ARTICLE 33

Inter-State application

Alleged widespread human rights violations in Crimea and eastern Ukraine: *communicated*

Ukraine v. Russia (IV) - 42410/15
[Section III]

On 29 September 2015 the European Court of Human Rights invited the Russian Government to submit its observations on the admissibility of a new inter-State application lodged by the Government of Ukraine on 27 August 2015, under Article 33 of the Convention.

The application 42410/15 concerns the events in Crimea and Eastern Ukraine mainly as from September 2014.

In their submissions, the Ukrainian Government maintain that Russia has exercised and continues to exercise effective control over Crimea and, by controlling separatists and armed groups there, *de facto* control over the regions of Donetsk and Luhansk. According to the Ukrainian Government, Russia is therefore responsible for numerous violations of the Convention in those areas falling within its jurisdiction.

In particular, the Ukrainian Government allege that in Crimea there have been cases of disappearances of opposition activists and members of the Crimean Tatar community and in the regions of Donetsk and Luhansk deaths of civilians and military personnel have occurred almost daily due to the use of force by armed groups controlled by Russia. They also maintain that, both in Crimea and in the Donetsk and Luhansk regions, Ukrainian civilians and military personnel have been tortured and ill-treated by armed groups controlled by Russia. They further refer to arbitrary arrests of Crimean Tatars and pro-Ukrainian activists, to searches and seizures of churches and to the abduction and detention of priests as hostages. They state that, due to the Russian control of Crimea, the operation of the Ukrainian law-enforcement and judicial authorities there is suspended, while some of the judicial personnel continue to work there, applying Russian law. In the Donetsk and Luhansk regions, Ukrainian TV channels can no longer operate, and freedom of journalists is further restricted by compulsory registration of all media. The Government of Ukraine also complain of misreporting and the use of derogatory expressions in respect of Ukraine, its representatives and population in the media both in Russia and the South-East of Ukraine, referring in this context to "hate speech".

They also allege that there have been further measures of unlawful expropriation of property; and in schools in Crimea and certain districts of the Donetsk and Luhansk regions there is no instruction in Ukrainian and the Crimean Tatar language. Lastly in the areas controlled by Russia, citizens could not participate in the elections to

the Ukrainian Parliament, while the elections which took place in those areas did not meet the requirements of the Convention.

Communicated under Articles 2, 3, 5, 6, 8, 9, 10, 11, 14 and 18 of the Convention, and Articles 1, 2 and 3 of Protocol No. 1.

In addition to the inter-State applications, some 1,400 individual applications apparently related to the events in Crimea or the hostilities in Eastern Ukraine are currently pending before the Court.

(See also the communicated case in *Ukraine v. Russia*, 20958/14 and 43800/14, Information Note 179).

ARTICLE 34

Hinder the exercise of the right of application_

Restrictions on the asylum-seekers' contact with their representatives: *failure to comply with Article 34*

L.M. and Others v. Russia - 40081/14, 40088/14 and 40127/14
Judgment 15.10.2015 [Section I]

(See Article 3 above, page 17)

Seizure, during search of his lawyer's office on unrelated matter, of applicant's case file concerning his application to the Court: *failure to comply with Article 34*

Annagi Hajibeyli v. Azerbaijan - 2204/11
Judgment 22.10.2015 [Section I]

Facts – In his application to the European Court, the applicant complained of a violation of Article 3 of Protocol No. 1 to the Convention on the grounds that his request for registration as a candidate in parliamentary elections in 2010 had been refused arbitrarily.

While the application was still pending, the applicant's lawyer was arrested on charges of tax evasion and abuse of power. During a search of the lawyer's office, a number of documents were seized, including the file concerning the applicant's case before the European Court.

Law – Article 34: The principles of effective exercise of the right of individual petition and of adversarial process required that in proceedings before the Court each party should enjoy unhindered access to copies of all the material relating to the case pending before it. After the seizure of the case file, neither he nor his lawyer had had access to the materials relating to the applicant's application for a period of 76 days. Removal from the applicant's possession of his copy of the case file by the state authorities, for whatever reason, constituted an interference with the integrity of the Court proceedings and required serious justification and compensatory measures if it was to be considered acceptable.

In the present case, the domestic authorities were or should have been aware that the applicant's lawyer was representing numerous clients before the Court. However, no reservation was put in place with regard to privileged client documents kept in his office. Moreover, although the search warrant specified that any material seized had to be related only to the charges brought against the lawyer, the prosecution authorities overstepped its scope by seizing the applicant's case file, which was not so related, without justification.

The Court stressed that a failure by the respondent Government to comply with their procedural obligation under Article 34 of the Convention did not necessarily require that the alleged interference should have actually restricted, or had any appreciable impact on, the exercise of the right of individual petition. The State's procedural obligation had to be enforced irrespective of the eventual outcome of the proceedings and in such a manner as to avoid any actual or potential chilling effect on the applicants or their representatives. It followed that the Government's argument that no activity relating to the applicant's case had actually taken place during the period when his case file was in the authorities' possession was irrelevant. At the time of the seizure the applicant could not foresee for how long his case file would remain in the authorities' possession and whether any correspondence would take place during that period. The very fact that the applicant and his lawyer were deprived of access to their copy of the case file for a lengthy period of time, without justification or any compensatory measures, constituted in itself undue interference with the integrity of the proceedings and a serious hindrance to the effective exercise of the applicant's right of individual petition.

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

The Court also found, unanimously, a violation of Article 3 of Protocol No. 1 as the applicant had not been afforded sufficient safeguards to prevent

an arbitrary decision to refuse his registration as a candidate.

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

(See also *Janowiec and Others v. Russia* [GC], 55508/07 and 29520/09, 21 October 2013, Information Note 167; *Tahirov v. Azerbaijan*, 31953/11, 11 June 2015, Information Note 186)

Applicant induced to make statements undermining his application before the Court: *failure to comply with Article 34*

Sergey Antonov v. Ukraine - 40512/13
Judgment 22.10.2015 [Section V]

Facts – In 2012 the applicant, who was serving a prison sentence and had been diagnosed with HIV, complained that he had not received adequate medical assistance in detention, in particular, antiretroviral therapy (ART) treatment after his arrest. He also complained that he had been intimidated by the pre-trial detention centre authorities and their medical staff in order to induce him to make statements that the medical assistance he had received had been adequate and that possible shortcomings such as the absence of ART had to be imputed to the applicant himself.

After a meeting with his lawyer, the applicant unsuccessfully complained about the alleged pressure to the prosecutor's office.

Law – Article 34: The Government had provided a handwritten note signed by the applicant stating that he had no complaints about the medical staff, in contradiction of his submissions before the Court, both before and after the date on the note. The Government had not specified the circumstances in which the note had been obtained. However, the Court was concerned that it had been obtained ten days after the Court had invited the Government under Rule 39 of the Rules of Court to ensure that the applicant was provided with the appropriate medical assistance.

The Government had further submitted that the applicant's allegations about psychological pressure on him had been duly checked and had not proved true. The Court, however, noted that the applicants' complaints had been transferred by the prosecutor to the prison authorities, whose subordinates had been suspected of intimidating the applicant. Furthermore, all the evidence submitted by the Government had originated either from the prison staff or from the applicant's fellow inmates, who had been under the control of the prison authorities. The Court was therefore not convinced by the Government's arguments.

Given the applicant's consistent submissions and in the absence of any other credible explanation about the origin of the handwritten note, the Court accepted that the applicant had indeed been approached by the authorities to induce him to make statements which would undermine his application before the Court. In these circumstances it found that the State had failed to fulfil its obligation not to hinder the effective exercise of the right of individual petition.

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

The Court also found unanimously a violation of Article 3 on account of the inability of the pre-trial detention centre authorities to promptly diagnose the applicant's condition and to provide prompt and comprehensive medical assistance, which amounted to inhuman and degrading treatment and a violation of Article 13 on account of the lack of an effective and accessible remedy under domestic law for the applicant's complaint in respect of the lack of appropriate medical assistance.

Article 41: EUR 7,000 in respect of non-pecuniary damage.

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies
Effective domestic remedy – Hungary

Domestic remedy made possible by EU law not yet exhausted: *effective remedy; inadmissible*

Laurus Invest Hungary Kft and Others v. Hungary - 23265/13 et al.
Decision 8.9.2015 [Section II]

Facts – The applicant companies operated slot machine and other gaming arcades. In 2012 the Hungarian Parliament adopted a law which restricted the activities of arcades and put an end, generally, to the operation of slot machine terminals. Some of the applicant companies sued the State for compensation for the loss of business they had sustained, relying on the law of the European Union. The domestic court hearing the claim requested a preliminary ruling from the Court of Justice of the European Union (CJEU) regarding

the compatibility of the Hungarian law and the manner of its implementation with the freedom to provide services guaranteed by Article 56 of the Treaty on the Functioning of the European Union (TFEU) and whether EU law conferred on individuals a right to claim compensation for damage suffered as a result of the infringement of the relevant EU law.

The CJEU stated that an infringement of Article 56, including by legislation, gave rise to a right for individuals to obtain from the member State concerned compensation for the damage suffered as a result, provided the infringement was sufficiently serious and there was a direct causal link between the infringement and the damage sustained, a matter to be determined by the national court. It also noted that a national law which is restrictive from the point of view of Article 56 is also capable of limiting the right to property enshrined in Article 17 of the EU Charter of Fundamental Rights. At the date of the Court's judgment, the case was still pending before the Hungarian courts.

In their application to the European Court the applicants complained that the invalidation of their licences to operate the arcades and slot machines had amounted to an unjustified deprivation of property, in breach of Article 1 of Protocol No. 1, alone and in conjunction with Article 14 of the Convention.

Law – Article 35 § 1: According to Article 267 of the TFEU and the well-established case-law of the CJEU, a preliminary ruling by the CJEU on the interpretation of an EU law is binding on the referring national court. Furthermore, pursuant to the principle of "sincere co-operation", the authorities of the EU member States have the task of ensuring, within the sphere of their competence, observance of the rules of EU law, as interpreted by the CJEU, and the judicial protection of an individual's rights under EU law. Consequently, the Court was satisfied that guidance provided by a preliminary ruling had to be observed not only in the specific dispute which had given rise to the referral but indirectly also in other cases, even those concerning legal relationships which had arisen before the CJEU gave its ruling.

The CJEU's ruling therefore provided the Hungarian courts with guidance as to the criteria to be applied in the pending case. According to that guidance, justification for the restriction complained of had also to be interpreted in the light of the general principles of EU law, in particular the fundamental rights guaranteed by the EU Charter.

It followed that the litigation before the Hungarian authorities ought to be capable of encompassing the issue of justification for the alleged breach of the rights guaranteed by Article 1 of Protocol No. 1. The method of scrutiny laid down by the CJEU bore close resemblance to that applied by the Court for the purposes of Article 1 of Protocol No. 1. Indeed, the assessment required by the CJEU explicitly relied, at least in part, on the Strasbourg case-law. In these circumstances, substituting the Court's own assessment for that of the Hungarian courts as oriented by the CJEU, without awaiting the outcome of those proceedings, would be tantamount to ignoring the Court's subsidiary role.

The Court was therefore satisfied that the case pending before the Hungarian courts offered a reasonable prospect of success for the applicants to have their claims adjudicated on the merits and, potentially, to obtain damages. It thus constituted an effective remedy requiring exhaustion.

Conclusion: inadmissible (failure to exhaust domestic remedies).

ARTICLE 46

Execution of judgment – General measures
Execution of judgment – Individual measures

Respondent State required to reopen criminal proceedings and to ensure effective protection of applicant's rights as a vulnerable victim

Abakarova v. Russia - 16664/07
Judgment 15.10.2015 [Section I]

Fact – In 2000, when the applicant was eight years old, the Russian military conducted an aerial attack on a village in Chechnya which killed the applicant's family and left her severely injured. A criminal investigation into the attack was opened that same year. The investigation was terminated on several occasions and then reopened following the Court's judgments in the cases of *Isayeva v. Russia* (57950/00, 24 February 2005, Information Note 72) and *Abuyeva and Others v. Russia* (27065/05, 2 December 2010, Information Note 136), respectively. The applicant learned about the ongoing criminal investigation only in 2006 and subsequently informed the military prosecutor of the deaths of her five family members and of the injuries she had suffered in the course of the airstrike. The last set of proceedings was ultimately discontinued in

2013 on account of the alleged legitimacy of the military action in the circumstances.

Law – Article 2

(a) *Substantive limb* – In the *Isayeva* and *Abuyeva and Others* cases, the Court had concluded that the planning and execution of the airstrike on the applicant's village had been carried out in violation of Article 2 because the use of lethal force by State agents had been disproportionate. In the present case the Court could not but reach the same conclusion and reaffirm that, while the military operation at issue had pursued a legitimate aim, it had not been planned or executed with the requisite level of care with respect to the lives of the civilian population.

Conclusion: violation (unanimously).

(b) *Procedural limb* – In the *Abuyeva and Others* case the Court had found that all the major flaws of the investigation into the events of February 2000 indicated in the 2005 *Isayeva* case had persisted throughout the second set of proceedings, which ended in 2007. However, in the present case it also appeared that, to date, none of the issues raised in the *Abuyeva and Others* judgment had been resolved. In particular, the names of the victims' deceased relatives had not been recorded by the investigation and nothing had been done by the domestic authorities to acknowledge the applicant's situation as a vulnerable victim and to take measures in order to ensure the effective protection of her rights in the course of the proceedings. In particular, when the applicant was finally questioned and granted victim status in the criminal case this had occurred without the participation of a legal guardian or representative, in breach of the domestic legal norms. Moreover, she had not been informed in 2007 of the decision to terminate the proceedings and her deceased relatives had not been named in the 2013 decision to terminate the investigation as being among those who had died in the impugned events. Therefore, the inadequacy of the investigation had not been the result of objective difficulties that could be attributed to the passage of time or the loss of evidence, but rather of the investigating authorities' unwillingness to establish the truth and punish those responsible.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 13 in conjunction with Article 2 on account of the flaws of the criminal investigation, which had in turn undermined the effectiveness of any other remedy that might have existed.

Article 46: In carrying out the investigation in the applicants' case the respondent State had manifestly disregarded the specific findings of the Court in the *Isayeva* and *Abuyeva and Others* cases and no previously identified defect of the investigation had been resolved to date. In fact, the criminal investigation had still not succeeded in establishing the relevant factual circumstances concerning the events, including a complete list of the victims and of the causes of the deaths and injuries, in carrying out an independent expert report of the compatibility of the lethal force used with the principle of "absolute necessity", or in attributing individual responsibility between the commanders and the civilian authorities for the aspects of the operation which led to the breach of Article 2.

It was therefore incumbent on the Committee of Ministers, acting under Article 46 of the Convention, to continue to address the issue of what could be required from the respondent Government by way of compliance, through both individual and general measures. In the light of the Court's findings, these measures should focus not only on the continued criminal investigation, but also on non-judicial mechanisms aimed at ensuring that similar occurrences do not recur in the future, and that the applicant's rights are adequately protected in any new proceedings, including through access to measures for obtaining reparation for the harm suffered.

Article 41: EUR 300,000 in respect of non-pecuniary damage; EUR 12,600 in respect of pecuniary damage.

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Lawyer fined for declining to act as *ex officio* legal counsel: *no violation*

Konstantin Stefanov v. Bulgaria - 35399/05
Judgment 27.10.2015 [Section IV]

Facts – In 2005 the applicant, a practicing lawyer, was appointed by a district court as *ex officio* counsel of a defendant in criminal proceedings. At the first hearing the applicant stated that he would represent the defendant only if the domestic court determined his remuneration at or above the legal minimum. As the presiding judge refused, the applicant declined to represent the defendant and left the hearing room. As a consequence, he was fined the equivalent of EUR 260. His appeal was ultimately dismissed.

Law – Article 1 of Protocol No. 1: The fine constituted an interference with the applicant's right to the peaceful enjoyment of his possessions. As to the lawfulness of the interference, the relevant domestic provisions were conflicting both as to when the *ex officio* legal fees had to be determined by the courts and as to their amount. However, the Court noted that the domestic court had fined the applicant on the basis of a provision of the Criminal Procedure Code, which, in the hierarchy of domestic legal sources, prevailed over the provisions invoked by the applicant. Given that the applicant was a lawyer, both this basic principle and the content and meaning of the particular provision of the Code should have been sufficiently clear to him and the consequences of its application foreseeable. Moreover, any dispute about the applicant's remuneration should not have taken precedence over the proper conduct of the judicial proceedings, which in turn should not have been the forum where such a dispute was resolved. The Court therefore found that the applicant had been fined on the basis of an accessible, clear and foreseeable legal provision which pursued the legitimate aim of ensuring the smooth operation of the justice system.

As to whether a "fair balance" was struck between the general interest and the protection of the applicant's rights, the Court first noted that causing the postponement of the hearing without a valid reason represented an obstacle to the smooth functioning of the justice system. The respondent State enjoyed a wide margin of appreciation in deciding how that conduct should be punished. Importantly, the applicant had had at his disposal a procedural guarantee by which to challenge the penalty and had done so. There was nothing to show that the decision-making process resulting in the fine complained of had been unfair or arbitrary. Lastly, although the amount of the fine was the maximum that could be imposed under the relevant legal provision, it was not prohibitive, oppressive or disproportionate. Finally, the present situation had to be distinguished from cases which concerned the right of lawyers to express themselves freely in their capacity as defence counsel, which had been addressed from the standpoint of freedom of expression.[1]

In the circumstances, a fair balance had been struck between the general interest and respect for the applicant's right to property. The interference had not, therefore, imposed an excessive burden on the applicant.

Conclusion: no violation (unanimously).

1. See, for example, *Nikula v. Finland*, 31611/96, 21 March 2002, Information Note 40; and *Morice v. France* [GC], 9369/10, 23 April 2015, Information Note 184.

Control of the use of property
Deprivation of property

Confiscation of means of transport used for transporting drugs: *violation*

Ünsped Paket Servisi SaN. Ve TiC. A.Ş. v. Bulgaria
- 3503/08
Judgment 13.10.2015 [Section IV]

Facts – In 2007 a lorry belonging to the applicant, a Turkish company running logistics services, was stopped for inspection at a customs post. Drugs were discovered and seized and criminal proceedings were brought against the driver. The lorry was seized as material evidence. The lorry driver later concluded a plea bargain agreement with the prosecutor, which included a one-and-a-half-year prison sentence for the driver and forfeiture of the lorry. The applicant company was unable to participate in the criminal proceedings against the driver, but asked the criminal court not to confiscate the lorry, which was worth over three times the value of the drugs and therefore could not be confiscated under the domestic law. However, the criminal court confirmed the plea bargain agreement in a decision which was not subject to appeal and became enforceable the same day. The applicant company's action against the driver to recover the value of the lorry was unsuccessful as he had no assets.

Law – Article 1 of Protocol No. 1: The confiscation of the lorry represented an interference with the applicant company's property rights. The interference was based on the relevant provisions of the domestic law, which were sufficiently accessible, precise and foreseeable.

The confiscation had pursued the legitimate aim of fighting illegal drug-trafficking. However, the national courts had not considered the legality of the confiscation under the domestic law and, in particular, whether the value of the vehicle significantly exceeded that of the smuggled drugs. Nor, despite the lack of any evidence that the applicant company knew or should have known of the offence, had they examined its conduct as owner of the vehicle. Indeed, there was no possibility for an examination of the owner's case under the domestic law. The absence of such an analysis had not allowed a fair balance to be struck between the different interests involved.

The forfeiture would only have complied with the Convention requirements if it were carried out in accordance with a procedure offering appropriate safeguards against arbitrariness. In the present case there was no procedure available domestically to the applicant company to bring its case before the relevant authorities. The State could not relieve itself of its Convention responsibility to provide for such a procedure by asking a person who had not been tried for the criminal offence that led to the confiscation to seek recovery of their property from a third party.

The applicant company had thus borne an individual and excessive burden which could have been rendered legitimate only if it had had the opportunity to challenge effectively the forfeiture of its property resulting from the criminal proceedings to which it had not been a party. However, it had not had such an opportunity and therefore the fair balance which should have been struck between the protection of the applicant's right to property and the requirements of the general interest had been upset.

Conclusion: violation (unanimously).

Article 41: reserved.

(See also *Andonoski v. the former Yugoslav Republic of Macedonia*, 16225/08, 17 September 2015, Information Note 188)

ARTICLE 3 OF PROTOCOL No. 1

Vote
Stand for election

Annulment of election results in several polling stations without any possibility to hold new elections: *violations*

Riza and Others v. Bulgaria - 48555/10 and 48377/10
Judgment 13.10.2015 [Section IV]

Facts – The applicants were a Bulgarian political party Dvizhenie za Prava i Svobodi (the Movement for rights and freedoms – "DPS"), Mr Riza, a member of that party, and 101 other Bulgarian nationals who had exercised their right to vote in polling stations in Turkey, where they were living, at the time of the Bulgarian parliamentary elections of 2009. The party DPS and Mr Riza had stood for election. The DPS obtained over 600,000 votes, i.e. over 14% of valid votes, giving it the position of third political party in the country. It was the clear winner in the polling stations where the 101 applicants had voted. The party thus had 38 MPs including Mr Riza.

The members of another political party challenged the lawfulness of the election of 7 DPS MPs and complained of serious breaches of electoral law in all the polling stations opened on Turkish territory. In its judgment of 16 February 2010, after noting anomalies in electoral rolls and ballot reports, the Constitutional Court decided to annul the ballots in the 23 polling stations that had been opened in Turkey by Bulgarian diplomatic representations and to subtract all the votes obtained in those stations from the election results of each of the political parties, i.e. a total of 18,358 votes, of which 18,140 had been cast for the DPS. Among those votes were those cast by the 101 applicants. Their votes were not counted for the calculation of the electoral threshold of 4% and those of the 101 votes which had been in favour of the first six parties in the election were not taken into account for the allocation of seats between the parties at national level. According to the new distribution of seats, the DPS lost one seat in Parliament, under the proportional representation system, to the party which had won the election, and Mr Riza was deprived of his office as MP.

Law – Article 3 of Protocol No. 1: The annulment by the Constitutional Court of the ballot in the polling stations in question, the removal of Mr Riza from his office as MP and the loss for the DPS of one seat in Parliament attributed on a proportional basis had constituted an interference with the exercise by the 101 applicants of their active electoral right and by Mr Riza and the DPS of their passive electoral right. In particular, as regards the active right, it was not limited only to the act of choosing one's preferred candidate in secret and placing one's vote in the ballot box; it also involved the possibility for each voter to have an influence on the composition of the legislature, subject to compliance with the rules laid down by electoral law.

The proceedings before the Constitutional Court, as provided for by the Constitution and electoral law, had the legitimate aim of ensuring compliance with electoral law and thus the lawfulness of the ballot and the election results. It was then necessary to establish whether the decision-making process had been surrounded by sufficient safeguards against arbitrariness. Notwithstanding the fact that the DPS and Mr Riza had not formally been parties to the proceedings in question, they had actually taken part in them through the intermediary of the DPS' parliamentary group, and they had thus

had the possibility of submitting their arguments against the annulment of the election results in the polling stations opened in Turkey and of challenging effectively the arguments of the claimants.

As regards the fact that the Constitutional Court judgment could not be appealed against, no provision of the Convention or its Protocols obliged the Contracting States to put in place a second level of jurisdiction for electoral disputes, still less to provide for an appeal against the decisions of constitutional courts where the latter were entrusted with the examination of post-election disputes.

As to the annulment of the ballot in 22 out of the 23 polling stations in question, the decision-making process followed by the Constitutional Court was not in conformity with the standards developed by the case-law of the European Court. In particular, the constitutional court had given purely formal grounds for annulling the election in those polling stations. Furthermore, that part of the decision was based on factors that were not enshrined, in a sufficiently clear and foreseeable manner, in domestic law, and it had not been shown that those factors had oriented the choice of the voters or distorted the result of the election.

The Constitutional Court had thus confined itself to noting the total or partial absence of the voting records in the archives of the competent State bodies in order to annul the results in four polling stations, without seeking to establish whether the records in those stations had been completed, signed and handed over in their entirety to the Bulgarian diplomatic services in Turkey by the respective local electoral boards. The Constitutional Court had therefore based that part of its decision on a factual observation which did not show in itself that the electoral process in those four polling stations had been vitiated by any defects.

The Constitutional Court had decided to annul the elections in eighteen other polling stations on the ground that the lists of voters registered on the day of the election did not bear the signature of the chairman or of the secretary of the local electoral board. This had been a recurring omission concerning about 42% of all polling stations opened abroad, thus corroborating the finding that domestic law was not sufficiently clear on that point. This omission, which was purely technical in nature, thus did not show in itself that the election process in those eighteen polling stations was vitiated by defects to an extent that justified the annulment of the election results.

As regards the twenty-third and last polling station, where the results had been annulled because the number of voters was missing from the first page of the record, the mistake had most probably been made on the day of the ballot by the members of the local electoral board and could thus be regarded as an indication of electoral fraud. However, the Bulgarian Constitutional Court had not taken into account the fact that the Bulgarian electoral legislation in force at the material time did not provide for the possibility of organising fresh elections if the ballot was annulled, in determining whether the annulment of the election results would be a proportionate measure in the light of Article 3 of Protocol No. 1. The holding of fresh elections in that last polling station would, however, have reconciled the legitimate aim behind the annulment of the election results, namely the preservation of the legality of the electoral process, with the rights of the voters and the candidates standing for election.

In view of the lacunae in domestic law and the lack of any possibility of holding fresh elections, the impugned judgment, which was based on purely formal arguments, had caused an unjustified breach of the rights of the 101 applicants, and of Mr Riza and the DPS, to participate in the legislative elections as voters and candidates, respectively.

Conclusion: violation (unanimously) in respect of the voting rights of the 101 applicants; violation (six votes to one) in respect of the right of Mr Riza and the DPS to stand for election.

Article 41: finding of a violation sufficient in itself for the non-pecuniary damage sustained by the 101 applicants and Mr Riza; claims of pecuniary damage by Mr Riza and the DPS dismissed.

Stand for election

Lack of effective examination of the applicants' complaints concerning election irregularities: *violation*

Gahramanli and Others v. Azerbaijan - 36503/11
Judgment 8.10.2015 [Section I]

Facts – The applicants stood as candidates for the opposition parties in the parliamentary elections of 2010. They complained of the unlawful interference with the election process by electoral commission members, undue influence on voter choice, obstruction of observers and ballot-box stuffing. Their complaints were dismissed by the Central Electoral Commission (CEC) and by the domestic courts as unsubstantiated.

Law – Article 3 of Protocol No. 1: The applicants had put forward a very serious and arguable claim disclosing an apparent failure to hold free and fair elections in their constituency. Therefore the alleged irregularities, if duly confirmed as having taken place, were indeed potentially capable of thwarting the democratic nature of the elections. The applicants' allegations were based on the statements by observers. The OSCE/ODIHR[1] Observation Mission Final Report on the Parliamentary Elections of 7 November 2010, which gave a general account of the most frequent problems identified during the election process, indirectly corroborated the applicant's claims. The respondent state was therefore under an obligation to provide a system for undertaking an effective examination of the applicant's complaints.

However, the assessment of evidence carried out by the CEC had not been adequate and comprehensive. First, despite the requirements of the Electoral Code, the applicants' presence at the CEC hearing had not been ensured, depriving them of the possibility of arguing their position. The CEC might not even have held a genuine hearing since in practice it adopted an expert group member's opinion unquestioningly, without discussing the substance of the complaints. Nor had the CEC given adequate consideration to the observers' statements concerning the alleged irregularities that had been submitted by the applicants as evidence in support of their complaint. None of those observers had been called to be questioned and no further investigation had been carried out in respect of their allegations. The CEC had referred, on the other hand, in general terms, to statements collected from some other observers denying any irregularities, without making them available for the applicants and without a convincing explanation as to why these statements had been given more weight than the observers' statements presented by the applicants.

The domestic courts had not remedied these shortcomings and upheld the CEC's findings, without conducting an independent examination of the arguments raised or addressing the applicants' complaints about the shortcomings in the CEC procedure.

Moreover, the Constitutional Court had prematurely confirmed the country-wide election results as lawful, while the applicants were still in the process of seeking redress for alleged breaches of their electoral rights in their constituency through the existing appeal system and while the period afforded by law for lodging an appeal with the Supreme Court was still pending. The Supreme Court had thus been no longer able to take any decision affecting the election results in the applicant's constituency. The Constitutional Court's decision had therefore deprived the remedy available to the applicants of all prospect of success and rendered the entire system for examining individual election related complaints futile and illusory in the applicants' case.

The conduct of the electoral commissions and courts and their respective decisions had revealed an apparent lack of any genuine concern for combatting the alleged instances of electoral fraud and protecting the applicants' right to stand for election.

Furthermore the proportion of pro-ruling-party members in all electoral commissions, including the CEC, was particularly high. That was one of the systemic factors contributing to the ineffectiveness of the examination by the CEC of the applicants' election-related complaint. It fell to the Committee of Ministers to supervise, in the light of the information provided by the respondent State, the execution of the Court's judgment and to follow up on the implementation of general measures and evolution of the system of electoral administration in line with the Convention. An effort by the respondent State envisioning a reform of the structural composition of the electoral commissions should therefore be encouraged with the aim of improving the effectiveness of examination of individual election related complaints.

Conclusion: violation (unanimously).

Article 41: EUR 10,000 to each applicant in respect of non-pecuniary damage; claims in respect of pecuniary damage dismissed.

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

J.K. and Others v. Sweden - 59166/12
Judgment 4.6.2015 [Section V]

(See Article 3 above, page 16)

Greek-Catholic Parish of Lupeni and Others v. Romania - 76943/11
Judgment 19.5.2015 [Section III]

(See Article 6 § 1 (civil) above, page 20)

1. Organization for Security and Co-operation in Europe/ Office for Democratic Institutions and Human Rights.

DECISIONS OF OTHER INTERNATIONAL JURISDICTIONS

Court of Justice of the European Union (CJEU)

Inability to obtain revision of a final court decision in civil proceedings despite such a possibility existing in administrative proceedings

Dragoș Constantin Târșia v. Statul român and Serviciul Public Comunitar Regim Permise de Conducere și Înmatriculare a Autovehiculelor - C69/14
Judgment (Grand Chamber) 6.10.2015

To have his car registered in Romania, Mr Târșia had been obliged to pay a tax which was subsequently declared incompatible with European Union law. The procedural rules applicable to civil proceedings did not offer any opportunity to bring an action for revision of a final judicial decision for a breach of EU law, although such an action could be brought pursuant to the procedural rules governing administrative proceedings.

The Romanian courts asked the CJEU to give a preliminary ruling on the compatibility with EU law of such a discrepancy between the rules governing civil proceedings and those governing administrative proceedings.

The CJEU had already taken the view that EU law did not require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a domestic situation which was incompatible with EU law. That being said, if such a possibility were provided for in domestic law, it had to prevail, in accordance with the principles of equivalence and effectiveness, so that the situation at issue would be brought back into line with EU law.

In the present case, the CJEU concluded that the principles of equivalence and effectiveness had to be interpreted as not precluding a situation where there was no possibility for a national court to revise a final decision of a court or tribunal made in the course of civil proceedings when that decision was found to be incompatible with an interpretation of EU law upheld by the CJEU after the date on which that decision had become final, even though such a possibility did exist as regards final decisions of a court or tribunal incompatible with EU law made in the course of administrative proceedings.

The CJEU judgment is available at <http://curia.europa.eu>.

Transfer of personal data to the United States by Facebook under the "Safe Harbour Privacy Principles"

Maximillian Schrems v. Data Protection Commissioner - C- 362/14
Judgment (Grand Chamber) 6.10.2015

This case concerned a request by the Irish High Court for a preliminary ruling on the interpretation of Articles 25(6) and 28 of the Data Protection Directive[1] and the validity of the EU Commission's Decision of 26 July 2000[2] concerning the adequacy of data protection afforded in the United States.

The Directive provides that personal data may be transferred to States that are not members of the EU only if they ensure an adequate level of protection of the data. In its Decision the Commission found that adequate protection should be attained where data transfers were made to the United States in accordance with the "Safe Harbour Privacy Principles" issued by the US Department of Commerce on 21 July 2000 to which US organisations may adhere on a voluntary basis.

The claimant in the Irish proceedings was a Facebook user who was concerned that data he had provided to Facebook was transferred from Facebook's Irish subsidiary to servers located in the United States, whose law and practice could not in his view, in the light of the Edward Snowden revelations in 2013 concerning the activities of the US intelligence services, be said to offer sufficient protection against surveillance by the public authorities.

The CJEU held, firstly, that the existence of a Commission decision finding that a non-member State ensures an adequate level of protection of the

1. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
2. Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce.

personal data transferred could not eliminate or even reduce the powers available to the national supervisory authorities under the EU Charter of Fundamental Rights and the Directive. Nevertheless, the CJEU alone had jurisdiction to declare an EU act, such as a Commission decision, invalid. Consequently, where a national authority or the person who has brought the matter before the national authority considers that a Commission decision is invalid, that authority or person must be able to bring proceedings before the national courts so that they may refer the case to the CJEU if they too have doubts as to the validity of the Commission decision.

As to the validity of the Commission's Decision, the CJEU observed that, in view of the importance of the protection of personal data and the large number of persons whose fundamental rights were liable to be infringed, the Commission's discretion as to the adequacy of the level of protection ensured by a third country was reduced, with the result that review of the requirements stemming from Article 25 of the Directive, read in the light of the Charter, should be strict.

The Commission's Decision concerned only the adequacy of the protection under the safe harbour principles. Without needing to establish whether those principles ensured a level of protection essentially equivalent to that guaranteed within the EU, the CJEU noted that they applied solely to self-certified US organisations receiving personal data from the EU, and United States public authorities were not required to comply with them. Furthermore, US national security, public interest and law-enforcement requirements prevailed over the safe harbour principles and US organisations were bound to disregard the principles where they conflicted with those requirements. Despite this potential for interference with the fundamental rights of persons whose personal data were liable to be transferred to the United States, the Commission's Decision did not contain any finding regarding the existence of rules intended to limit any such interference or to the existence of effective legal protection against such interference.

Turning to the level of protection within the European Union, the CJEU stressed the need for clear and precise rules and sufficient guarantees against abuse, especially where data was subjected to automatic processing and there was a significant risk of unlawful access. Above all, derogations and limitations in relation to the protection of personal data were to apply only in so far as they were strictly necessary. Legislation was not limited to what was strictly necessary where it authorised, on a generalised basis, storage of all the personal data of all the persons whose data was transferred from the EU to the United States without any differentiation, limitation or exception being made in the light of the objective pursued and without an objective criterion being laid down by which to determine the limits of the access of the public authorities to the data and of its subsequent use. In particular, legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life. Likewise, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, did not respect the essence of the fundamental right to effective judicial protection.

In sum, the Commission had not stated in its Decision that the United States in fact "ensured" an adequate level of protection by reason of its domestic law or its international commitments. Consequently, without there being any need to examine the content of the safe harbour principles, the Decision 2000/520 had failed to comply with the requirements laid down in Article 25(6) of the Directive, read in the light of the Charter, and was accordingly invalid.

The CJEU judgment and press release are available at <http://curia.europa.eu>.

For an overview of the legal frameworks of both the European Union and the Council of Europe and of the key jurisprudence of the CJEU and ECHR on data protection, see the Handbook on European data protection law (<www.echr.coe.int> – Publications).

For further information on the ECHR case-law, see the Factsheet on the Protection of personal data (<www.echr.coe.int> – Press).

Continued automatic indefinite ban on voting despite entry into force of more lenient criminal law

Thierry Delvigne v. Commune de Lesparre Médoc and préfet de la Gironde - C650/13
Judgment (Grand Chamber) 6.10.2015

Until 1994, under French law, a person convicted of a serious criminal offence was automatically and

permanently deprived of his or her civic rights. After the reform of the Criminal Code, that ban ceased to be automatic and now has to be imposed by a court for a period not exceeding 10 years. However, that new rule does not apply to convictions by a final judgment delivered before the new Code entered into force.

In 1988 Mr Delvigne was convicted by a final judgment of a serious crime in France. On the basis of the criminal law in force at that time, he was automatically permanently deprived of his civic rights, including his right to vote in elections to the European Parliament.

Mr Delvigne challenged in the French courts the maintaining of his exclusion from the electoral roll in spite of the entry into force of more lenient criminal legislation. The courts sought a preliminary ruling from the CJEU.

The CJEU considered that the ban to which Mr Delvigne was subject was proportionate in so far as it took into account the nature and gravity of the criminal offence committed and the duration of the penalty. The voting ban in question could, at the time, only be imposed on persons convicted of an offence that was punishable by at least five years' imprisonment. In addition, French law entitled a person in Mr Delvigne's situation to apply for and obtain the reinstatement of the civic rights lost. The CJEU found that it was possible to maintain a ban which, by operation of law, precluded persons convicted of a serious crime from voting in elections to the European Parliament.

The CJEU added that this conclusion was not called into question by the rule of retroactive effect of the more lenient criminal law. The French legislation was limited to maintaining the permanent deprivation of the right to vote resulting from a criminal conviction only in respect of final convictions by judgment delivered at last instance under the old Criminal Code. The national legislature had wanted to ensure that the deprivation of the right to vote resulting from a criminal conviction did not immediately and automatically disappear on the entry into force of the new Criminal Code, when the latter maintained the deprivation of the right to vote in the form of an additional penalty.

In any event, that legislation expressly provided for the possibility of persons subject to such a ban applying for, and obtaining, the lifting of that ban, even where that ban resulted, by operation of law, from a criminal conviction under the old Criminal Code.

The CJEU judgment and press release are available at <http://curia.europa.eu>.

See also the factsheet on Prisoners' voting rights in ECHR case-law (<www.echr.coe.int> – Press).

Legislation of a member State which imposes a prison sentence on a third-country national who unlawfully enters its territory in breach of an entry ban

Criminal proceedings against Skerdjan Celaj
- C290/14
CJUE (Fourth Chamber) 1.10.2015

The public prosecutor's office brought criminal proceedings against Mr Skerdjan Celaj in an Italian court and sought a sentence of imprisonment of eight months on the basis of a piece of Italian legislation which prescribed a sentence of imprisonment of between one and four years for any third-country national who unlawfully entered Italy in breach of an entry ban. The Italian court asked the CJEU whether Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ("the Return Directive") precluded that legislation.

In April 2012 Mr Celaj, an Albanian national who had been in Italy, was made the subject of a deportation order and a removal order, accompanied by a three-year entry ban. Mr Celaj left Italian territory in September 2012 and subsequently re-entered the country in breach of the entry ban issued against him.

The CJEU held that the Return Directive must be interpreted as not, in principle, precluding legislation by a Member State providing for the imposition of a prison sentence on an illegally staying third-country national who, after having been returned to his country of origin in the context of an earlier return procedure, unlawfully re-entered the territory of that State in breach of an entry ban.

The imposition of such a criminal-law sanction was subject to full observance both of fundamental rights, particularly those guaranteed by the European Convention on Human Rights, and, as ap-

plicable, of the Convention relating to the Status of Refugees signed in Geneva in 1951.

The CJEU judgment and press release are available at <http://curia.europa.eu>.

For an overview of the legal frameworks of both the European Union and the Council of Europe and of the key jurisprudence of the CJEU and ECHR on immigration, see the Handbook on European law relating to asylum, borders and immigration (<www.echr.coe.int> – Publications).

Obligation to inform in advance persons whose personal data are subject to transfer and processing between two public administrative bodies

Smaranda Bara e.a. v. Președintele Casei Naționale de Asigurări de Sănătate e.a. and Others - C201/14
Judgment (Third Chamber) 1.10.2015

This case concerned a reference for a preliminary ruling submitted by a Romanian Court of Appeal concerning the compatibility with Directive 95/46/EC[1] of the transfer by the Romanian tax authority to the National Health Insurance Fund of data relating to the declared income of self-employed workers. The Court of Appeal asked whether EU law allowed an administrative body in a Member State to transfer personal data to another administrative body with a view to subsequent processing without the data subjects being informed of such transfer and processing.

In its judgment the CJEU held that the requirement of fair processing of personal data laid down in the Directive required a public administrative body to inform the data subjects of the transfer of those data to another public administrative body for the purpose of their processing by the latter in its capacity as recipient of those data. The Directive expressly required that any restriction on the obligation to provide information should be imposed by legislative means.

The Romanian law which provided for free transfer of personal data to health insurance funds did not constitute prior information enabling the data controller to dispense with his obligation to inform the persons from whom the data were collected. That law defined neither what information could be transferred nor how it should be transferred, such matters being dealt with exclusively in a bilateral protocol concluded between the tax authority and the health insurance fund.

As regards the subsequent processing of the data transferred, the Directive provided that the data controller should inform the data subjects of his own identity, the purposes of the processing and any additional information required in order to ensure fair processing of the data. That additional information should cover the categories of data concerned and the availability of a right of access and rectification.

The CJEU observed that the processing by the National Health Insurance Fund of the data transferred by the tax authority required that the data subjects be informed of the purposes of such processing and the categories of data concerned. In this case the health insurance fund had failed to provide the applicants with that information.

The CJEU found that EU law did not permit the transfer and processing of personal data between two administrative bodies in a Member State without the data subjects being informed in advance.

The CJEU judgment and press release are available at <http://curia.europa.eu>.

For an overview of the legal frameworks of both the European Union and the Council of Europe and of the key jurisprudence of the CJEU and ECHR on data protection, see the Handbook on European data protection law (<www.echr.coe.int> – Publications).

For further information on the ECHR case-law, see the Factsheet on the Protection of personal data (<www.echr.coe.int> – Press).

Inter-American Court of Human Rights

Applicability of international humanitarian law in assessing alleged extrajudicial executions during a hostage rescue operation in a non-international armed conflict

Case of Cruz Sánchez et al. v. Peru - Series C No. 292
Judgment 17.4.2015[2]

1. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

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

Facts – Between 1980 and 2000 Peru experienced an armed conflict. Among the armed groups that participated in the conflict was the Túpac Amaru Revolutionary Movement (MRTA).

On the night of 17 December 1996, 14 members of the MRTA entered the Japanese Ambassador's residence in Lima where a reception was being held and took some 600 guests hostage. They later released most of the hostages but 72 people remained in the residence. After several rounds of negotiations with the MRTA failed to resolve the crisis, the Peruvian President set in motion a rescue operation ("Chavín de Huántar") on 22 April 1997 using about 80 assault commandos. The operation secured the release of the hostages. One hostage, two commandos and the 14 MRTA members lost their lives. Several hostages and officials were wounded.

The 14 MRTA members were reportedly killed during the confrontation with the military. However, a statement to the press in December 2000 and a letter subsequently sent to the Judiciary in 2001 by a former hostage prompted doubts about the circumstances in which three MRTA members – Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Victor Solomon Peceros Pedraza – had died and as to whether they were victims of extrajudicial executions.

In 2001 an investigation was opened following the filing of complaints. It led to the opening of criminal proceedings in the ordinary courts. However, following a jurisdictional ruling by the Supreme Court of Justice, the case against the commandos was transferred to a military court, which in 2003 decided to dismiss it. The ordinary courts continued to hear the case regarding the civil authorities, which was then accumulated to the proceedings regarding the alleged cover-up. When the case was submitted to the Inter-American Court, there had been no final decision in the proceedings before the ordinary courts. As a supervening fact, the Third Special Criminal Liquidation Chamber of the Superior Court of Lima issued a judgment on 15 October 2012 in which all the defendants were acquitted, except for one defendant who was found to have been in contempt of court. On 24 July 2013 the Transitory Criminal Chamber of the Supreme Court of Justice ruled against nullification of the sentence. In 2007 criminal proceedings were instituted against the former Peruvian President and another person, and a new investigation was pending at the date of the Inter-American Court's judgment into the events related to the death of Mr Cruz Sánchez.

Law

(a) *Preliminary matters* – The Court accepted a partial acknowledgment of international responsibility by Peru regarding the length of the proceedings before the criminal courts. It rejected the respondent State's preliminary objections.

(b) *Article 4(1) (life) in relation to Article 1(1) (respect and ensure rights) of the American Convention on Human Rights (ACHR)* – The Inter-American Court reiterated that the assessment of the use of force should be done with regard to all the circumstances and context surrounding the facts of the case. In the instant case, there were three factors that needed to be taken into account in defining the criteria for the analysis of the State´s obligations: first, the existence of an armed conflict not of an international character; second, that the use of force against members of the MRTA had occurred within the framework of a hostage rescue operation; and third, that the alleged victims were MRTA members who had actively participated in hostilities.

The Inter-American Court deemed that it was useful and appropriate to take into account common Article 3 of the four Geneva Conventions and customary international humanitarian law, given its specificity in the field. It noted that international humanitarian law did not displace the applicability of Article 4 of the ACHR, but influenced the interpretation of the treaty clause which prohibited arbitrary deprivation of life on the grounds that the facts occurred in the context of an armed conflict and on the occasion of such conflict.

Given that the ACHR did not explicitly define the scope that the Court must assign to the concept of "arbitrariness" that qualifies a deprivation of life as contrary to the treaty in situations of armed conflict, it was appropriate to resort to the applicable *corpus iuris* of international humanitarian law in order to determine the scope of State obligations to respect and ensure the right to life in such situations.

The Inter-American Court recognised that the use of force by the State had been carried out within an operation by security forces with a precise objective: to secure the release of the hostages who had been held by MRTA members at the residence since 17 December 1996. Therefore, it had been legitimate for the State to initiate the use of force in the circumstances of the case, as it met the need of freeing the hostages alive, provided that the relevant provisions of international humanitarian law and human rights were respected.

The alleged victims in this case were not civilians, but MRTA members, who had actively participated in hostilities. However, they could potentially be beneficiaries of the safeguards contained in common Article 3 of the four Geneva Conventions, as long as they had stopped participating in the hostilities and could be identified as *hors de combat*.

The relevant factual dispute, thus, centred on whether Mr Cruz Sánchez, Ms Meléndez Cueva and Mr Peceros Pedraza had stopped taking part in hostilities at the time they were killed and thus enjoyed the protection afforded by the applicable rules of international humanitarian law. To that end, the Court examined the relevant facts for each alleged victim and determined, in each particular circumstance, if the person was actively involved in the hostilities or not at the time of the events.

(i) *Death of Mr Cruz Sánchez* – From the evidence in the case file, the Court determined that Mr Cruz Sánchez was found dead on a concrete platform outside the passageway of the residence with only one injury caused by a firearm projectile. Since the last time he was seen alive he was in a situation of *hors de combat* in the custody of the State, the Court found that the *onus probandi* should be reversed and it was for the State to provide a satisfactory and convincing explanation of what had happened. However, the State had failed to provide a plausible and satisfying alternative explanation regarding the way in which he had died in areas under the exclusive control of the State. The Peruvian judicial authorities had also determined that he "was killed after being arrested" once the residence premises had been dominated and the hostages had been evacuated. Hence, the Court concluded that it constituted an extrajudicial execution.

Conclusion: violation of Article 4(1) in conjunction with Article 1(1) (five votes to one).

(ii) *Deaths of Ms Meléndez Cueva and Mr Peceros Pedraza* – Ms Meléndez Cueva and Mr Peceros Pedraza were found dead in a room on the second floor of the residence, with multiple projectile wounds. Commandos affirmed that they had been shot during the evacuation of the hostages. The Inter-American Court found no reason to depart from the conclusion of the national judicial authorities that their deaths occurred when they were still taking part in hostilities. Since the evacuation of hostages was ongoing, they could have represented, ultimately, a threat to the lives and safety of the hostages. Therefore, from the overall analysis of the evidence in the case file, the Court found that no sufficient elements had arisen to affirm that State action against Ms Meléndez Cueva and Mr Peceros Pedraza would amount to an arbitrary deprivation of life resulting from the use of lethal weapons in a manner contrary to the principles of international humanitarian law.

Conclusion: insufficient evidence to determine the international responsibility of the State for the violation of Article 4(1) in conjunction with Article 1(1) (five votes to one).

(c) *Articles 8(1) and 25(1) (judicial guarantees and protection) in relation to Articles 1(1) and 2 (domestic legal effects) of the ACHR* – The fact that the deaths had occurred in the context of a non-international armed conflict did not relieve the State of its obligation to initiate an investigation, initially on the use of force that had lethal consequences. In this case, the hypothesis of alleged extrajudicial executions had come to light several years after the events, so it was not possible to impose upon the State an obligation to investigate from the beginning according to international standards developed in cases of extrajudicial executions. Furthermore, the Inter-American Court found that the period between the time the State was informed of the alleged extrajudicial executions and the date in which the investigation began was reasonable, so that there was no violation of the duty to initiate an investigation ex officio.

The Court concluded that there had been irregularities in the handling of the crime scene; that the removal of the bodies was not performed in a reliable, technical or professional manner; and that there was a lack of rigour in the autopsies conducted in 1997. Thus, the first steps of the investigation and initial collection of evidentiary material had lacked minimum diligence.

Furthermore, the proceedings before the Peruvian courts had not been carried out within a reasonable time and the State had not demonstrated that it had taken the necessary steps to locate the defendant in contempt.

The Inter-American Court held that the intervention of the military jurisdiction had breached the parameters of exceptionality and the restrictions that characterise it. It recalled that allegations of extrajudicial executions are acts that relate to events and criminal offences which under no circumstances have a connection with military discipline or missions.

It further noted that after the decision by the Supreme Court of Justice in favour of the military jurisdiction, both the Constitutional Court and the Supreme Court of Justice had established

general and binding criteria in the sense that the military courts should not adjudicate crimes involving human-rights violations.

The Inter-American Court held that a specific ruling on the violation of the right to know the truth was not necessary given the violations declared previously and the particularities of the case.

Conclusion: violation of Articles 8(1) and 25(1) of the ACHR, in conjunction with Article 1(1); no violation of Article 2 of the ACHR (five votes to one).

(d) *Article 5(1) (personal integrity) in relation to Article 1(1) of the ACHR* – The Inter-American Court concluded that the State had violated the right to personal integrity to the detriment of Mr Cruz Sánchez's brother as regards the suffering in connection with the extrajudicial execution of his relative and the absence of an effective investigation.

Conclusion: violation (five votes to one).

(e) *Reparations* – The Inter-American Court established that its judgment constituted *per se* a form of reparation and ordered that the State: (i) effectively conduct the investigation and/or the pending criminal proceedings to identify, prosecute and, if applicable, punish those responsible for the events related to the extrajudicial execution of Mr Cruz Sánchez; (ii) provide free and immediate psychological or psychiatric treatment, as appropriate, to Mr Cruz Sánchez's brother if requested; (iii) publish the judgment and its official summary; (iv) pay the amount stipulated in the judgment as reimbursement of costs and expenses; and (v) reimburse the Victims' Legal Assistance Fund.

COURT NEWS

Elections

During its autumn session, the Parliamentary Assembly of the Council of Europe elected Alena Poláčková as judge to the court in respect of the Slovak Republic. Her nine-year term in office will begin no later than three months after her election.

In October the Plenary Court elected Françoise Elens-Passos as Deputy Registrar of the Court as from 1 December 2015 for a five-year term of office.

COURTalks-disCOURs – Video on admissibility

The Court has just launched the first COURTalks-disCOURs video produced in cooperation with the Council of Europe's HELP Programme. This fifteen-minute video provides judges, lawyers and other legal professionals, as well as civil society representatives, with an overview of the admissibility criteria which all applications must meet in order to be examined by the Court. Posted on YouTube, it is subtitled in 14 different languages.

The video, text in printable format and list of relevant cases are available on the Court's Internet site (<www.echr.coe.int> – Case-law).

Multilingual Twitter account for news on case-law publications and translations

In October the Court launched a multilingual Twitter account (<ECHRPublication>) reserved for news on case-law publications, translations and the HUDOC case-law database (<http://hudoc.echr.coe.int>).

Since the Court launched its programme "Bringing the Convention closer to home" in 2012, over 15,000 case-law translations have been published in HUDOC, representing nearly 30 languages. Additionally, the Court has teamed up with various partners wishing to translate its case-law guides, handbooks and factsheets. These translations are also published on the Court's Internet site (<www.echr.coe.int>).

Network for the exchange of case-law information with national superior courts

The Court has just launched the Network for the exchange of information on the case-law of the

European Convention on Human Rights. The initiative is designed to promote the exchange of information between the Strasbourg Court and the national superior courts and would help ensure that the decisions handed down were consistent with European case-law.

The focal points for the exchange will be the research departments of the superior courts and the Jurisconsult of the ECHR. Several European superior courts have already announced their intention to join the Network over the coming months.

RECENT EVENTS

Round Table on the reopening of proceedings

A round table on the reopening of proceedings following a judgment of the ECHR took place in Strasbourg on 5-6 October. Organised by the Department for the Execution of Judgments of the Court, this event gathered representatives of some forty States Parties to the Convention for an exchange of views on their experiences and practices in the field.

The programme, the text of the different interventions and the conclusions of the round table are available on the Council of Europe's Internet site (<www.coe.int> – Execution of judgments).

Death Penalty Day: Europe underlines its firm opposition to capital punishment

Ahead of the World and European Day against the Death Penalty, which took place on 10 October, the Council of Europe and the European Union issued a joint declaration[1] underlining their firm opposition to capital punishment and calling on countries across Europe to move towards abolition. They also called on those European countries which have not yet done so to ratify two Protocols to the European Convention on Human Rights which aim to abolish the death penalty:

• Protocol No. 6, concerning the abolition of the death penalty in peacetime, has been ratified by 46 of the 47 Council of Europe member States. Russia signed the Protocol in 1997 but has yet to ratify it.

1. Available on the Council of Europe's Internet site : <www.coe.int>.

• Protocol No. 13 outlaws the use of the death penalty in all circumstances, including wartime. Armenia signed the Protocol in 2006, but has yet to ratify it. Azerbaijan and Russia have not yet signed the Protocol.

For more information on death penalty in the Court's case-law, see the Factsheet on Death penalty abolition (<www.echr.coe.int> – Press).

Conference on freedom of expression

Over 400 participants attended the conference on 13-14 October in Strasbourg on the theme "Freedom of expression: still a precondition for democracy?". They assessed the major challenges facing freedom of expression today, as guaranteed by Article 10 of the Convention. One of the key issues was to define how the system of the Convention can best overcome these challenges beyond the specific legal tradition in member States.

More information can be found on the Council of Europe's Internet site (<www.coe.int> – Directorate General Human Rights and Rule of Law).

Effective implementation of the European Convention on Human Rights

Practices and trends in the implementation of the Convention by various States and the execution of the judgments of the Court were the focus of discussion of an international conference, organised by the Council of Europe and the Constitutional Court of the Russian Federation on 22-23 October.

Over two days, leading experts from the Council of Europe member States exchanged national experiences in the effective implementation of the Convention with Russian judges, Government officials and academics. The results of the conference are expected to provide better guidance to all States Parties to the Convention and help achieve more effective implementation of the Convention at the national level.

More information can be found on the Council of Europe's Internet site (<www.coe.int> – Directorate General Human Rights and Rule of Law).

RECENT PUBLICATIONS

Case-Law Overview

The Court has published an Overview of its case-law for the first six months (January-June) of 2015

containing a selection of cases of interest from a legal perspective. The overview has been published annually up till now, but will henceforth be published twice a year.

This Overview and previous editions can be downloaded from the Court's Internet site (<www.echr.coe.int> – Case-law).

Overview of the Court's case-law (eng) / Aperçu de la jurisprudence de la Cour (fre)

Guide on Article 9

The Court has just published in French only (for the time being) a Guide on Article 9 (Freedom of thought, conscience and religion) as part of its series on the case-law relating to particular Convention Articles. The case-law guides can be downloaded from the Court's Internet site (<www.echr.coe.int> – Case-law).

Guide sur l'article 9 – Liberté de pensée, de conscience et de religion (fre)

Admissibility Guide: new translations

With the help of the Governments of Liechtenstein and Turkey, translations into German and Turkish of the third edition of the Practical Guide on Admissibility Criteria have now been published on the Court's Internet site (<www.echr.coe.int> – Case-law).

Leitfaden zu den Zulässigkeitsvoraussetzungen (ger)

Kabul edilebilirlik kriterlerini uygulama rehberi (tur)

Handbook on European non-discrimination law: version adapted to Azerbaijan

The International Organization for Migration (IOM)/Mission in Azerbaijan has taken the initiative to adapt the FRA/ECHR Handbook on European non-discrimination law to the legal framework and referral mechanism in Azerbaijan.

This handbook is available in Azerbaijani and English on the Internet sites of the Court (<www.echr.coe.int> – Publications) and of the IOM (<http://iom.az>).

Handbook on European data protection law: new translations

Translations into Danish, Latvian and Swedish of the Handbook – which was published jointly by the Court and the European Union Agency for Fundamental Rights (FRA) in 2014 – are now available. A translation into Korean is also available, produced by the Law School of Chonnam National University, in Korea.

All 25 linguistic versions of the Handbook on European data protection law can be downloaded from the Court's Internet site (<www.echr.coe.int> – Publications).

Håndbog om europæisk databeskyttelseslovgivning (dan)

Rokasgrāmata par Eiropas tiesību aktiem datu aizsardzības jomā (lav)

Handbok om den europeiska lagstiftningen om skydd av personuppgifter (swe)

유럽정보보호법 (kor)