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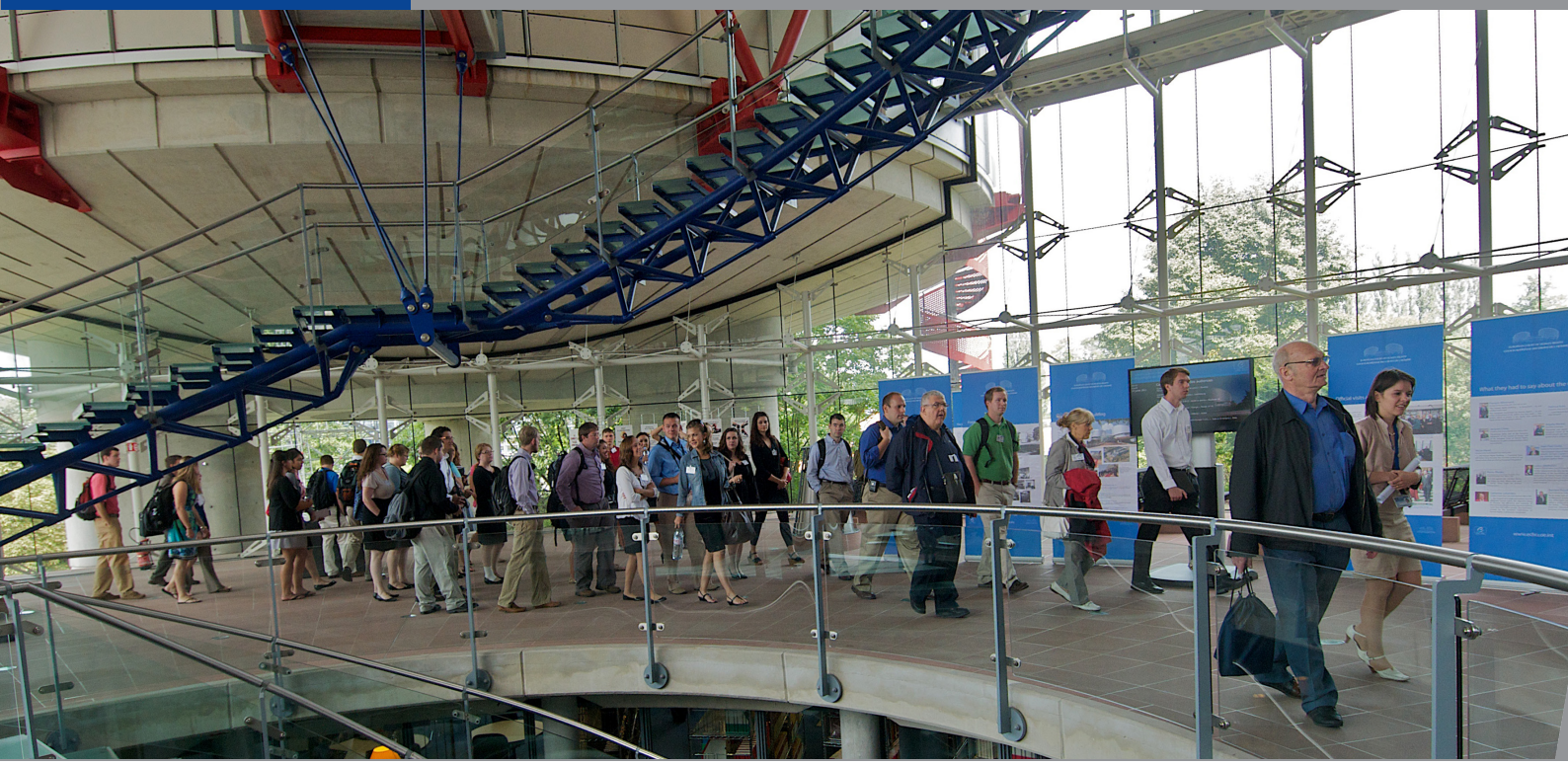

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COUR EUROPÉENNE DES DROITS DE L'HOMME

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FOREWORD

Bringing the Convention closer to home: 200 Information Notes and counting

As my predecessor Erik Fribergh pointed out in the foreword to the 100th edition of the Information Note "effective implementation of the European Convention on Human Rights at national level is crucial for the operation of the Convention system. In line with its subsidiary character the Convention is intended to be applied first and foremost by the national courts and authorities. However, this can only become a reality if [they] are given sufficient access to the Court's judgments and decisions."

These words ring as true today as they did in 2007. In recent years the Court has stepped up its efforts to improve the understanding of leading Convention principles and standards at national level, in line with the conclusions of the High-Level Conferences on the Court. The Court's programme to bring the Convention closer to home has produced significant results, relying as it does on multiple partnerships, publications and platforms such as the HUDOC database, orientation and training videos and a dedicated multilingual Twitter account.[1]

To give but one example of recent achievements, in the last four years alone the Registry's Case-Law Information and Publications Division commissioned or collected nearly 20,000 translations, representing over 30 languages other than English and French, of judgments or case summaries for publication in HUDOC.

The Case-Law Information Note has continued to play a key role in the communications process throughout that time and the intervening years since that 100th edition have seen a number of changes: a new, improved design in 2009; a news and publications section introduced in 2010; the web publication of a monthly cumulative index since 2011; the inclusion of fully searchable individual legal summaries in the HUDOC database since 2012; and the addition of summaries of cases from other European and international jurisdictions since 2014, courtesy of our partners in those courts.

This 200th edition of the Information Note sees two further changes: the provisional (bilingual) notes will henceforth also be available in "reflowable" EPUB and MOBI formats, thereby improving the reader experience for those using tablets, smartphones and e-readers; and the layout has been further modernised in both the provisional and final (monolingual) versions of the Note.

We would like to take this opportunity to thank all partners who assist the Court in its efforts to bring the Convention closer to home. We are particularly pleased that the Information Notes are now being translated *in extenso* into Italian, Russian and Turkish with other partners translating case summaries of particular relevance. We look forward to working with new partners wishing to translate the Note into additional languages.

As always, we welcome your feedback. Should you have suggestions whether on the contents, format or dissemination of the Information Note or comments on the Court's external case-law information more generally, please contact us at publishing@echr.coe.int.

Roderick Liddell,

Registrar of the European Court
of Human Rights

1. For an overview of the Registry's case-law information, training and outreach activities please consult this extract from the Court's Annual Report 2015 (updates are available on the echrpublication account on Twitter).

ARTICLE 2

Positive obligations (substantive and procedural aspects)

Failure by domestic authorities to inspect construction site where child subsequently died and inadequacy of judicial authorities: *violation*

Cevrioğlu v. Turkey, 69546/12, judgment 4.10.2016 [Section II]

Facts – In 1998 the applicant's ten-year-old son drowned after falling into an uncovered water-filled hole on a construction site where he and a friend – who also died in the incident – had been playing. Three municipal officials were prosecuted for causing death by negligence, but the proceedings were ultimately suspended.[2] The applicant and other family members of the deceased children subsequently brought an action for compensation in the administrative courts, but it was dismissed on the grounds that no fault was attributable to the municipality.

In the Convention proceedings, the applicant alleged that the State authorities had failed to enforce the relevant safety measures as the construction site had never been subjected to an inspection and there had been no adequate judicial response to the accident on the part of the domestic courts.

Law – Article 2: The obligation of the State under Article 2 in cases involving non-intentional infringements of the right to life was not limited to adopting regulations for the protection of people's safety in public spaces, but also included a duty to ensure the effective functioning of that regulatory framework.

In the absence of the necessary safety precautions, construction sites, especially in residential areas, had the potential for life-endangering accidents that could impact not only the professional construction workers who were more familiar with the possible risks but also the public at large, including vulnerable groups such as children, who could easily become subject to those risks. That was why, unlike the position in respect of some other activities where the absence of a strict inspection mechanism might not pose a problem in view of their nature and limited extent, the respondent State in the instant case had borne a more compelling responsibility towards the members of the public who had to live with the very real dangers posed by construction work on their doorsteps. While the Court acknowledged that the primary responsibility for the accident in the instant case lay with the owner of the construction site, the failure of the respondent State to enforce an effective inspection system could also be regarded as a relevant factor.

Although the Government had argued that the accident had not been foreseeable as the construction work had only recently started, the Court did not consider it unreasonable to hold the respondent State accountable for its failure to carry out an inspection bearing in mind that the hole had been in existence for at least two to eight months prior to the incident and that the municipality had been aware of the ongoing construction work from day one. While it could not speculate on whether the proper inspection of the construction site would have prevented the accident, such inspection would have forced the owner to close off the site and take precautions around the hole which, judged reasonably, might have exonerated the respondent State from liability under Article 2.

As regards the response of the domestic courts, neither in the criminal proceedings instituted against officials of the municipality nor in the administrative proceedings against the municipality itself had the domestic courts definitively established the shortcomings identified above: the criminal proceedings had been suspended without a judicial assessment of the responsibility of the relevant officials and the administrative court had not engaged in an in-depth examination of the regulatory framework concerning the inspection of construction sites and the municipality's responsibility for enforcing it.

Conclusion: violation (unanimously).

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

Positive obligations (procedural aspect)

Delayed enforcement of sentence imposed on accused found guilty of serious assault on the applicant: *violation*

2. Under section 1(4) of Law no. 4616, which provided that criminal proceedings in respect of certain offences committed before 23 April 1999 should be suspended and eventually discontinued if no offence of the same or of a more serious kind was committed by the defendants within the next five years.

Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia, 2319/14, judgment 13.10.2016 [Section I]

Facts – The first applicant was very seriously injured during a robbery of her home. Her husband, the second and third applicants' father, was also attacked during the same incident and subsequently died from his injuries. The assailants were convicted of aggravated robbery and received prison sentences. However, one of the assailants continued to live in the vicinity of the applicants' neighbourhood for a period of eighteen months before starting to serve his sentence. In their application to the European Court the applicants complained that the delayed enforcement of the prison sentence gave rise to a breach of Article 2 of the Convention.

Law – Article 2: The fact that the force used by the assailants against the first applicant did not turn out to be fatal was merely fortuitous. She had sustained life-threatening injuries and as such Article 2 applied in the circumstances of the case. The Court noted that following the robbery the assailants had been convicted and sentenced. The applicants did not criticise the conduct of the criminal proceedings or the outcome and the Court took the view that the authorities had fulfilled the procedural obligations that arose under Article 2 with respect to the criminal proceedings. However, the requirement of effectiveness of the criminal investigation under Article 2 could also be interpreted as imposing a duty on States to execute their final judgments without undue delay. This was so since the enforcement of a sentence imposed in the context of the right to life must be regarded as an integral part of the procedural obligation of the State under that Article. On the facts of the case, the Court considered that the authorities of the respondent State had not displayed the requisite diligence in enforcing the custodial sentence and the delays, which were entirely attributable to the authorities, could not be regarded as reasonable. The Court therefore concluded that the system of the respondent State with respect to enforcing custodial sentences had not proved efficient in the present case and, accordingly, there had been a violation of the procedural aspect of Article 2 of the Convention.

Conclusion: violation (unanimously).

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

ARTICLE 3

Degrading treatment

Limited personal space in multi-occupancy prison accommodation: *violation*; *no violations*

Muršić v. Croatia, 7334/13, judgment 20.10.2016 [GC]

Facts – In his application to the European Court the applicant complained about a lack of personal space in prison which had, on occasion, fallen below 3 square metres.

In a judgment of 12 March 2015 a Chamber of the Court, by six votes to one, found that there had been no violation of Article 3 of the Convention. In particular, it found that the conditions of the applicant's detention, though not always adequate, had not reached the threshold of severity required to characterise the treatment as inhuman or degrading within the meaning of Article 3 (see Information Note 183).

On 7 July 2015 the case was referred to the Grand Chamber at the applicant's request.

Law – Article 3: The Court's assessment as to whether there has been a violation of Article 3 could not be reduced to a numerical calculation of square metres allocated to a detainee. Such an approach would disregard the fact that, in practical terms, only a comprehensive approach to the particular conditions of detention could provide an accurate picture of the reality for detainees.

However, where the personal space available to a detainee fell below 3 sq. m of floor surface in multi-occupancy accommodation in prisons, the lack of personal space was considered so severe that a strong presumption of a violation of Article 3 arose. The burden of proof was on the respondent Government, who could rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space. The strong presumption of a violation would normally be capable of being rebutted only if the following factors were cumulatively met: the reductions in the required minimum personal space of 3 sq. m were short, occasional and minor; such reductions were accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities; the applicant was confined in what was, when viewed generally, an appropriate detention facility and there were no

other aggravating aspects of the conditions of his or her detention.

In cases where a prison cell measuring in the range of 3-4 sq. m of personal space per inmate was at issue, space remained a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of Article 3 would be found if the space factor was coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements.

In cases where a detainee disposed of more than 4 sq. m of personal space in multi-occupancy accommodation in prison and where therefore no issue with regard to the question of personal space arises, the other aspects of physical conditions of detention remained relevant for the Court's assessment of adequacy of an applicant's conditions of detention.

The applicant had, on occasion, been detained in cells which fell below 3 sq. m and as such, there was a strong presumption of a violation of Article 3. As regards one such occasion lasting twenty-seven days, the strong presumption of a violation could not be called into question. The conditions of the applicant's detention during that period had subjected him to hardship beyond the unavoidable level of suffering inherent in detention and thus amounted to degrading treatment prohibited by Article 3. As regards the other periods during which the applicant disposed of less than 3 sq. m of personal space, the Government had rebutted the strong presumption of a violation. The applicant had been detained in generally appropriate conditions, the non-consecutive periods could be regarded as short and minor reductions in personal space, during which sufficient freedom of movement and out-of-cell activities had been available to him and, as such, the Court considered that these periods did not amount to degrading treatment prohibited by Article 3 of the Convention. The conditions of the applicant's detention in the period when he disposed of between 3 and 4 sq. m of personal space did not amount to inhuman or degrading treatment.

Conclusions:

– violation as regards the period of twenty-seven days in which the applicant disposed of less than 3 sq. m of personal space (unanimously);

– no violation as regards the remainder of the non-consecutive periods in which the applicant disposed of less than 3 sq. m of personal space (ten votes to seven);

– no violation as regards the periods in which the applicant disposed of between 3 and 4 sq. m of personal space (thirteen votes to four).

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

(See also *Ananyev and Others v. Russia,* 42525/07 and 60800/08, 10 January 2012, Information Note 148)

Confinement of defendant in glass cabin during criminal trial: *violation; no violation*

Yaroslav Belousov v. Russia, 2653/13 and 60980/14, judgment 4.10.2016 [Section III]

Facts – The applicant was arrested during the dispersal of a political rally in Bolotnaya Square in Moscow in May 2012 and charged with public-order offences. During the first two months of hearings, the applicant and nine other accused were confined in a very cramped glass cabin. The hearings were subsequently held in a different courtroom equipped with two glass cabins allowing the applicant and other accused more space. In his applications to the European Court the applicant complained, *inter alia*, that this confinement amounted to degrading treatment and impaired his effective participation in the trial. He further alleged a violation of his right to peaceful assembly.

Law

Article 3: The means chosen for ensuring courtroom order and security must not involve measures of restraint which by virtue of their level of severity or by their very nature would bring them within the scope of Article 3 of the Convention. In particular, confinement in a metal cage was contrary to Article 3 of the Convention, having regards to its objectively degrading nature (see *Svinarenko and Slyadnev v. Russia* [GC], 32541/08 and 43441/08, 17 July 2014, Information Note 176).

Although glass cabins did not have the harsh appearance of metal cages and the placement of defendants behind glass partitions or in glass cabins

did not in itself involve an element of humiliation sufficient to reach the minimum level of severity, as was the case with metal cages, that level might be attained if the circumstances of their confinement, taken as a whole, would cause them distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

During the first two months of hearings the applicant had been held with nine other defendants in a glass cabin measuring 5.4 square metres, a setting that left virtually no space between them. He had had to endure the court hearing in those conditions for several hours three days a week during that time. The case was high-profile and the trial had been closely followed by national and international mass media, so the applicant had been permanently exposed to the public at large in that cramped setting. Those elements were sufficient for the Court to conclude that the conditions during the first two months amounted to degrading treatment in breach of Article 3. However, as regards the hearings in the second courtroom, the Court observed that the two-cabin arrangement in that courtroom allowed the applicant at least 1.2 sq. m. of personal space, thus avoiding the inconvenience and humiliation of extreme overcrowding. The alleged hindrance that the installations caused to the applicant's participation in the proceedings and his communication with legal counsel could be considered as elements contributing to the applicant's anxiety and distress but taken alone were not sufficient to pass the threshold of Article 3.

Conclusion: violation as regards the first courtroom (unanimously).

Conclusion: no violation as regards the second courtroom (unanimously).

Article 6 § 1 in conjunction with Article 6 § 3 (b) and (c): Having found a violation of Article 3 in relation to the first hearing room where the applicant had been confined in an overcrowded glass cabin, the Court would find it difficult to reconcile the degrading treatment of the defendant during the judicial proceedings with the notion of fair hearing. It followed that for the first two months of the trial the court hearings in the applicant's case were conducted in breach of Article 6 of the Convention.

In the second hearing room the problem of overcrowding had been resolved but the alleged impediments to the applicant's participation in the proceedings and to his legal assistance had remained. An accused's right to communicate with his lawyer without the risk of being overheard by a third party was one of the basic requirements of a fair trial in a democratic society. The Court was mindful of the security issues a criminal court hearing may involve. However, given the importance attached to the rights of defence, any measures restricting the defendant's participation in the proceedings or imposing limitations on his or her interaction with lawyers should only be imposed in so far as is necessary and should be proportionate to the risks in a specific case. The applicant had been separated from the rest of the hearing room by glass, a physical barrier which to some extent reduced his direct involvement in the hearing. This arrangement made it impossible for him to have confidential exchanges with his legal counsel, to whom he could only speak through a microphone and in close proximity to the police guards. The use of the security installation was not warranted by any specific risks or courtroom order issues but had been a matter of routine. The trial court had had no discretion to order the applicant's placement outside the cabin and did not seem to recognise the impact of the courtroom arrangements on the applicant's defence rights. Nor had it taken any measures to compensate for these limitations. Such circumstances had prevailed for the whole duration of the first-instance hearing, and could not but have adversely affected the fairness of the proceedings as a whole. The applicant's right to participate effectively in the proceedings and to receive practical and effective legal assistance had been restricted, and those restrictions had been neither necessary nor proportionate.

Conclusion: violation (unanimously).

Article 11: The assembly at Bolotnaya Square fell within the scope of Article 11. The applicant's prosecution and criminal conviction for participation in mass disorder had constituted an interference with the exercise of his freedom of assembly, which interference was prescribed by law and pursued the legitimate aims of preventing disorder and crime and protecting the rights and freedoms of others.

As to whether the applicant's conviction was necessary in a democratic society the applicant had been sentenced to two years and three months' imprisonment for attending an authorised public assembly, chanting anti-government slogans, and throwing an unidentified small round object which hit a police officer on the shoulder, causing him pain. The Court accepted that there may have been

a number of individuals in the crowd who contributed to the onset of clashes between the protesters and the police. However, in the applicant's case it was crucial that he had not been found to be among those responsible for the initial acts of aggression; he had thrown the yellow object at the height of the clashes, when the police were already arresting the protesters. Given the applicant's minor role in the assembly and his only marginal involvement in the clashes, the Court did not consider that the risks referred to by the Government – potential civil unrest, political instability and threat to public order – had had any personal relation to the applicant. Those reasons could not therefore justify the applicant's sentence of two years and three months' imprisonment and there had been no pressing social need to sentence the applicant to such a term. The applicant's criminal conviction, and especially the severity of his sentence, could not but have had the effect of discouraging him and other opposition supporters, as well as the public at large, from attending demonstrations and, more generally, from participating in open political debate. The severity of the sanction was grossly disproportionate to the legitimate aims pursued. The applicant's conviction had not been necessary in a democratic society.

Conclusion: violation (unanimously).

The Court also concluded, unanimously, that there had been no violation of Article 3 of the Convention in respect of the conditions of detention on remand or as regards the alleged failure to provide the applicant with adequate medical assistance; that there had been a violation of Article 3 in respect of the conditions of transfer to and from the courthouse and that there had been a violation of Article 5 § 3.

Article 41: EUR 12,500 in respect of non-pecuniary damage; the most appropriate form of redress would, in principle, be the reopening of the proceedings, if requested.

Inhuman or degrading punishment

Life imprisonment with automatic review after 40 years: *violation*

T.P. and A.T v. Hungary, 37871/14 and 73986/14, judgment 4.10.2016 [Section IV]

Facts – Following the Court's judgment in *László Magyar v. Hungary* in May 2014 finding a violation of Article 3 of the Convention on the grounds that the presidential clemency procedure for life prisoners did not meet the requirement set out in *Vinter and Others v. the United Kingdom* [GC] that life sentences should be reducible, Hungary introduced amending legislation[3] providing, as an additional remedy, for the automatic review of whole life sentences after 40 years.

Both applicants in the instant case were sentenced to terms of life imprisonment with no possibility of parole. In the Convention proceedings, they complained that their whole life sentences remained *de facto* irreducible under the new clemency procedure, in breach of Article 3.

Law – Article 3: The fact that the applicants could hope to have their progress towards release reviewed only after serving 40 years of their life sentences was of itself sufficient for the Court to conclude that the new legislation did not offer *de facto* reducibility of the applicants' whole life sentences. That period was significantly longer than the maximum recommended period of 25 years before review established, on the basis of a consensus in comparative and international law, by the Grand Chamber in *Vinter and Others*. (The Court also noted that, unlike the position in *Bodein v. France*, there was no indication in the present case that any period of pre-trial detention would be taken into account in calculating the time-limit for review.)

The Court also had a number of concerns relating to the remainder of the procedure provided by the new legislation. Firstly, although the general criteria to be taken into account by the Clemency Board in deciding whether or not to recommend a life prisoner for pardon were now clearly set out in a provision which satisfied the requirement for the assessment to be based on objective, pre-established criteria, it did not appear that the criteria equally applied to the President of the Republic, who had the last say as to a possible pardon in each individual case. In other words, the new legislation did not oblige the President to assess whether continued imprisonment was justified on legitimate penological grounds. Furthermore, the new legislation failed to set a time-frame for the President to decide the clemency application or to require reasons to be given for the decision, even if it deviated from the recommendation of the Clemency Board.

3. Act no. LXXII of 2014 amending Act no. CCXL of 2013 on the Execution of Punishments, Measures, Certain Coercive Measures and Confinement for Infractions.

Lastly, although life prisoners could seek presidential clemency in ordinary pardon proceedings even before the expiry of the 40 year-period required for the mandatory pardon procedure, the Court had already found in *László Magyar* that that avenue did not provide *de facto* or de iure reducibility of a life sentence.

In sum, in view of the lengthy period the applicants were required to wait before the commencement of the mandatory clemency procedure and the lack of sufficient procedural safeguards in the second part of that procedure, the Court was not persuaded that the applicants' life sentences could be regarded as reducible for the purposes of Article 3.

Conclusion: violation (six votes to one).

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

(See *László Magyar v. Hungary*, 73593/10, 20 May 2014, Information Note 174; *Vinter and Others v. the United Kingdom* [GC], 66069/09, 130/10 and 3896/10, 9 July 2013, Information Note 165; and *Bodein v. France*, 40014/10, 13 November 2014, Information Note 179; see also the Factsheet on Life imprisonment)

ARTICLE 5

ARTICLE 5 § 1

Deprivation of liberty

Five hours' detention by airport police purportedly investigating claims of ticket forgeries: *violation*

Kasparov v. Russia, 53659/07, judgment 11.10.2016 [Section III]

Facts – In May 2007 the applicant and a group of fellow activists attempted to travel to Samara (Russia) to take part in an opposition rally which had been organised to coincide with an EU-Russia summit. However, they were prevented from boarding their flight from Moscow by police officers who alleged that their tickets were forged. The facts were disputed, but the European Court accepted that when the applicant attempted to check-in at 8.30 on the morning in question his ticket and passport were seized and he was asked to follow a police officer from the check-in hall to a separate room where he remained – with an armed guard stood in the doorway – while being questioned and searched until 1.30 p.m.

Law – Article 5 § 1: The Court found that the applicant had been deprived of his liberty within the meaning of Article 5. Four factors were decisive in that finding: (i) the applicant had had little choice but to follow the police officer as a refusal would have meant disobeying an ostensibly lawful police order; (ii) the presence of the armed guard in the doorway, which clearly prevented him from leaving the room; (iii) the fact that the Government's contention that he had not been arrested could not decisively affect the Court's conclusion as to the existence of a deprivation of liberty; and (iv) the applicant's detention had far exceeded the time strictly necessary for verifying the formalities normally associated with airport travel (contrast with the position in *Gahramanov v. Azerbaijan* (dec.), 26291/06, 15 October 2013, Information Note 168); instead, the police had purportedly began to investigate a suspected offence of forgery, by questioning and searching the applicant and drawing up a report.

The deprivation of liberty clearly did not fall under any of the permitted grounds of detention under sub-paragraphs (a), (b), (d), (e) or (f) of Article 5 § 1. Nor did it come within sub-paragraph (c) of that provision (reasonable suspicion of having committed an offence) as the Government had produced no evidence capable of satisfying the Court that any forgery had been committed, still less that the applicant was reasonably suspected of having participated in it. In any event, the authorities had not officially acknowledged the applicant's deprivation of liberty or complied with the formalities required for a person's detention. An unrecorded deprivation of liberty, in the absence of any plausible explanation by the Government, was in itself sufficient to find a violation of Article 5 § 1.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 11 of the Convention in that the interference with the applicant's right to freedom of assembly caused by his arrest and detention was not prescribed by law.

Article 41: no claim made in respect of damage.

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Impartial tribunal

Indication by judge that litigant's refusal to accept friendly settlement in domestic proceedings might adversely affect the outcome: *violation*

Vardanyan and Nanushyan v. Armenia, 8001/07, judgment 27.10.2016 [Section I]

Facts – The first applicant complained that he had been arbitrarily deprived of his house and plot of land and that he was denied a fair trial in the ensuing court proceedings. He complained, *inter alia*, that one of the judges involved in his case had not been impartial as he had tried to compel him to sign a friendly settlement by threatening him with the negative effects of his refusal.

Law – Article 6 § 1: It was not uncommon in the legal orders of the Contracting States for the parties to be asked whether they are willing to enter into a friendly settlement and for them to be informed of the procedural consequences. This served both the interests of procedural economy and the good administration of justice. However, taking into account the importance of the principle of judicial impartiality, judges enquiring into the parties' willingness to enter into friendly settlements had to exercise caution and refrain from using language which could, assessed objectively, justify legitimately held fears that the judge in question lacked impartiality.

In the present case, the judge had invited the first applicant to consider the friendly-settlement proposal presented to him. However, the language used by the judge during the hearing (he stated that the court always attached importance to the fact that a party had refused to sign a reasonable friendly settlement and that this was the applicant's last opportunity to discuss the settlement) was clearly capable of raising a legitimate fear that the first applicant's refusal to accept a friendly settlement might have an adverse influence on the consideration of the merits of his case. In the Court's view, the judge's conduct had therefore lacked the necessary detachment demanded by the principle of judicial neutrality and raised an objectively justified fear that he lacked impartiality.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been a violation of Article 6 § 1 of the Convention as regards the principles of legal certainty and equality of arms and a violation of Article 1 of Protocol No. 1.

Article 41: reserved.

ARTICLE 6 § 1 (CRIMINAL)

Fair hearing

Impact of confinement in glass cabin on the exercise of an accused's right to participate effectively in proceedings: *violation*

Yaroslav Belousov v. Russia, 2653/13 and 60980/14, judgment 4.10.2016 [Section III]

(See Article 3 above, page 9)

ARTICLE 6 § 1 (ADMINISTRATIVE)

Public hearing, independent and impartial tribunal

Limited scope of review by Supreme Court of Judicial Services Commission's decisions in disciplinary proceedings: *case referred to the Grand Chamber*

Ramos Nunes de Carvalho e Sá v. Portugal, 55391/13, 57728/13 and 74041/13, judgment 21.6.2016 [Section IV]

Three sets of disciplinary proceedings were instituted against the applicant, who was a court judge at the material time. The Judicial Services Commission (JSC) imposed a fine and two penalties on her suspending her from duty.

Applications by the applicant for a review of the establishment of the facts were unsuccessful. The Supreme Court of Justice upheld the JSC's decisions, finding among other things that its task was not to review the facts but only to examine whether the establishment of the facts had been reasonable.

After grouping together the penalties imposed in the three sets of disciplinary proceedings, the JSC imposed a single penalty on the applicant of 240 days' suspension from duty.

The applicant complained before the European Court of a breach of her right to an independent and impartial tribunal, her right to obtain a review of the facts established by the JSC and her right to a public hearing.

In a judgment of 21 June 2016 a Chamber of the Court held, unanimously, that there had been a violation of Article 6 of the Convention. It found, in particular, that the independence and impartiality of the JSC could be open to doubt; that the review carried out by the Supreme Court in the case of the three judges had been insufficient; and that the domestic authorities had failed to provide the safeguards of a public hearing.

On 17 October 2016 the case was referred to the Grand Chamber at the Government's request.

Impartial tribunal

Lack of impartiality, owing to statements made in earlier public report, of Court of Audit to determine balance of accounts in case concerning the *de facto* management of public funds: *violation*

Beausoleil v. France, 63979/11, judgment 6.10.2016 [Section V]

Facts – The procedure applicable to cases of "*de facto* management" of public funds comprises three distinct and independent stages, each of which ends with a final decision against which an ordinary appeal or an appeal on points of law lies: (1) firstly, a court confers the status of "*de facto* accountants" on the persons to be called to account for the use of public funds; (2) secondly, the *de facto* accountants submit their accounts to the court, which examines their revenue and expenditure; if the revenue exceeds the amount assigned for expenditure and the *de facto* accountants have not paid a sum corresponding to the surplus into the public purse, they are deemed to be owing the outstanding balance to the public body concerned; and (3) thirdly, the court may decide to fine the *de facto* managers for interfering with the functions of a public accountant (see *Tedesco v. France*, 11950/02, 10 May 2007, Information Note 97).

The applicant was a former treasurer of a private-law association – a municipality's staff social committee. In 1997 the Court of Audit gave a final judgment declaring him the *de facto* accountant of the public funds that had been wrongfully removed and handled, jointly with the association and the mayor of the municipality (see *Richard-Dubarry v. France*, 53929/00, decision of 7 October 2003 and judgment of 1 June 2004).

The Court of Audit had previously referred to these irregularities in its 1995 public annual report.

In 2008 the Court of Audit determined the final balance on the account in question. The applicant, the association and the mayor were declared, jointly and severally, to be owing the municipality more than EUR 400,000. The *Conseil d'État* dismissed an appeal on points of law by the applicant. Following a previous appeal on points of law, it had dismissed the allegation of a lack of impartiality in the following terms:

– the mere inclusion of references to the same expenditure in a previous public report issued by the Court of Audit could not in principle be regarded as prejudging the decision determining the final balance;

– in the present case, the relevant references in the public report could potentially be regarded as prejudging the existence of transactions amounting to *de facto* management, but not as prejudging the assessment to be made by the Court of Audit when it came to determine the final balance after the precise scale of the *de facto* management had been established.

Law – Article 6 § 1: The only question arising in the present case was whether the references in the 1995 report had prejudged the determination of the final balance.

Admittedly, there was a difference in purpose between the stages of establishing a case of *de facto* management and determining the final balance; during the second stage the court had access to information that had not been in its possession when the public report had been issued.

Nevertheless, this difference did not rule out the possibility that in the particular circumstances of a given case, the references in the public report might be such as to amount to prejudgment of the determination of the final balance. The *Conseil d'État* had itself accepted that eventuality.

The Court of Audit had previously given an explicit and detailed account of the irregular transactions involving the association of which the applicant had been the treasurer:

– the public report had discussed the case as a whole and had not made any distinction between the declaration of *de facto* management and the calculation of the wrongfully disbursed amounts to which it referred;

– the association had been explicitly mentioned in the report, together with a detailed estimate of the sums involved;

– the expenditure had been identified in precise detail (for example, a specific "bonus" paid to officials);

– without explicitly mentioning the applicant by name, the report had made him identifiable by anyone familiar with how the association functioned or wishing to investigate its operations;

– and lastly, the report referred to "extremely detrimental consequences", thus casting judgment on the seriousness of the actions and the scale of the sums involved.

Those factors taken together were sufficient to find that the references in the report could have caused the applicant to fear, on objectively justified grounds, that the Court of Audit might not be impartial when determining the final balance on the account.

It was also to be noted that in subsequent decisions the *Conseil d'État* had clarified the limits beyond which the public report would be deemed to have adopted a definite position precluding the Court of Audit from determining the final balance and from imposing a fine on the persons concerned.

In conclusion, in the present case the Court of Audit had not afforded the guarantees of impartiality required by Article 6 § 1 of the Convention at the stage of determining the final balance.

Conclusion: violation (unanimously).

Article 41: claim in respect of pecuniary damage dismissed.

ARTICLE 6 § 3 (d)

Examination of witnesses

Admission and use of the incriminating conclusions of an absent expert: *no violation*

Constantinides v. Greece, 76438/12, judgment 6.10.2016 [Section I]

Facts – In the course of a criminal investigation concerning the applicant for forgery and use of forged documents, a graphologist's expert report was ordered. The report supported the prosecution case. The applicant subsequently appointed his own expert, who submitted several reports criticising the incriminating report.

At the trial hearing the incriminating report was discussed by the applicant's expert, who defended his own findings. Although the author of the incriminating report had been summoned to appear, she did not attend the hearing and no explanation was given. The applicant was convicted.

On appeal the applicant complained that he had been given no opportunity to put questions to the author of the incriminating report, in breach of his defence rights. However, the Court of Appeal considered it unnecessary to summon the expert in question to appear, taking the view that the applicant's guilt had been sufficiently established by a consistent body of evidence.

Law – Article 6 §§ 1 and 3 (d): In its judgment in *Schatschaschwili v. Germany* ([GC], 9154/10, 15 December 2015, Information Note 191) concerning the non-attendance of prosecution witnesses, the Grand Chamber had found that:

(a) the absence of good reason for the non-attendance of a witness could not of itself render a trial unfair, but was nevertheless an important factor in assessing the overall fairness of a trial, and one which could tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d);

(b) for the purposes of this overall assessment, the existence of sufficient counterbalancing factors had to be reviewed by the Court not only in cases in which the evidence given by an absent witness had been the sole or the decisive basis for the conviction, but also in those cases where it had at the very least carried significant weight and its admission could have handicapped the defence;

(c) the extent of the counterbalancing factors necessary in order for a trial to be considered fair depended on the importance of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors had to carry.

The Court considered that these principles were applicable *mutatis mutandis* to the experts in the present case.

It was true that in the present case the Greek courts had not done everything that could reasonably be expected of them to secure the attendance of the expert who had written the incriminating report.

Furthermore, it was clear from the wording of the first-instance and appeal judgments that the expert

report in question had been regarded as an important document.

Nevertheless, several counterbalancing factors had been present.

Firstly, the applicant had had an opportunity to dispute the conclusions of the incriminating report and had availed himself of that opportunity, in particular by submitting three reports prepared by his own expert, who had presented his findings orally at the trial hearing.

Secondly, the applicant had never explained – even before the Court – why he had wished to question the author of the report at the appeal hearing. It was true that it might have been inappropriate for him to disclose in advance the questions he wished to put to the expert. Nevertheless, it would have been reasonable for him to at least give some indication as to why he considered such questioning to be absolutely necessary or what it would have added to his own expert's findings.

Thirdly, the courts had stressed that the content and findings of the report in question corroborated the witness evidence and a whole series of other official documents. The report had constituted just one of the items of evidence in the case file, which had contained around a hundred documents totalling some 1,500 pages.

In the Court's view, the present case was to be distinguished from:

– cases in which the court which convicted the applicant had had before it an expert report obtained by the prosecution without any participation by the defence, and where the defence had been unable to challenge the report's findings at the hearing (see *Matytsina v. Russia*, 58428/10, 27 March 2014, Information Note 172);

– cases in which the applicant's conviction had been based to a decisive extent on the evidence of witnesses against him whom he had been unable to question at any stage (see, among many other cases, *Nikolitsas v. Greece*, 63117/09, 3 July 2014). The present case did not concern witnesses who had made statements concerning events they had witnessed or learnt about by hearsay. Rather, it concerned an expert report which had been prepared by an independent expert appointed by the judicial authorities during the investigation with the aim of providing the court with information on a technical aspect of the case, and the findings of which had been scrutinised by an expert appointed by the applicant himself.

In sum, while it was true that not everything possible had been done to compel the person in question to appear, the fact remained that she had been merely an expert and not a witness, that her report had not formed the sole or decisive basis for the applicant's conviction, and that sufficient counterbalancing factors had been present in the applicant's case for the Court to consider that the requirements of the adversarial principle had been satisfied. Accordingly, the applicant's defence rights had not been restricted to an extent incompatible with the requirements of a fair trial.

Conclusion: no violation (unanimously).

The Court also held that there had been no violation of Article 6 § 1 with regard to the allegedly insufficient reasoning of the Court of Cassation's judgment.

ARTICLE 7

Nulla poena sine lege

Inconsistent interpretation by the domestic courts of ambiguous provision of domestic law: *violation*

Žaja v. Croatia, 37462/09, judgment 4.10.2016 [Section II]

Facts – The applicant, a Croatian national, was convicted of an administrative offence on account of his alleged breach of customs regulations, having brought his car, registered in the Czech Republic, into Croatia. He complained that, as a result of a wrong interpretation of the relevant law, he had been convicted of and fined for a customs-related administrative offence even though he had done nothing illegal.

Law – Article 7: The purported offence was of a criminal character and thus attracted the guarantees of Article 7. While it was primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation, so that the Court's role was confined to ascertaining whether the effects of such an interpretation were compatible with the Convention, the position was different and the Court's powers of review were greater when it was not the domestic legislation but the Convention itself, in particular Article 7, which expressly referred to the domestic law, in

this instance requiring that there should be a legal basis for a conviction and sentence. In such cases, since a failure to comply with the domestic legislation could in itself entail a violation of the Convention, the Court had to have jurisdiction to decide whether the relevant provision of criminal law had been complied with.

In the light of those principles the Court considered that its task was to examine whether the relevant law in the applicant's case had been foreseeable, that is, whether the applicant's act, at the time it was committed, constituted an administrative offence defined with sufficient precision by domestic and/or international law. In carrying out that examination the Court had to ascertain whether the applicant could have known from the wording of the relevant provision – if need be, with informed legal advice – what acts or omissions would make him liable for the offence.

The Court noted that the wording of the relevant provision gave rise to uncertainty and ambiguity and the practice of the domestic authorities in interpreting the relevant term was inconsistent at the time the applicant allegedly committed the offence. Inconsistent case-law lacked the required precision to avoid all risk of arbitrariness and enable individuals to foresee the consequences of their actions. No one should be forced to speculate, at peril of conviction, whether his or her conduct is prohibited or be exposed to unduly broad discretion on the part of the authorities, particularly if the uncertainty could have been dispelled by drafting the legislation in more precise terms or through judicial interpretation. As a result of the lack of precision, the applicant had not, even with informed legal advice, been able to distinguish between permissible and prohibited behaviour and was thus unable to foresee, with the degree of certainty required by Article 7 of the Convention, that entering Croatia in his car, while arguably having his habitual residence in the Czech Republic, would constitute an offence. By the same token, the room left to those authorities for the interpretation and application of the relevant law had been too wide to provide effective safeguards against arbitrary prosecution, conviction or punishment.

Conclusion: violation (unanimously).

Article 41: The most appropriate form of redress would, in principle, be the reopening of the proceedings, if requested.

(See also *Vasiliauskas v. Lithuania* [GC], 35343/05, 20 October 2015, Information Note 189; and *Kononov v. Latvia* [GC], 36376/04, 17 May 2010, Information Note 130)

ARTICLE 8

Respect for private and family life

Religious education teacher's dismissal following withdrawal of canonical mandate: *no violation*

Travaš v. Croatia, 75581/13, judgment 4.10.2016 [Section II]

Facts – The applicant was employed by the State to teach Catholic religious education in schools. Following his divorce and civil re-marriage, the Church withdrew his canonical mandate and he was dismissed. In his application to the European Court he complained that his dismissal had constituted an unjustified interference with the exercise of his right to private and family life.

Law – Article 8: The Court held that the applicant's dismissal amounted to an interference with his private life. That interference was in accordance with the law and pursued the legitimate aim of protecting the rights and freedoms of the Catholic Church. As to whether it had been necessary in a democratic society, the Court referred to the general principles set out in *Fernández Martínez v. Spain*, and in particular: the status of the applicant, the exposure of his situation, the State's responsibility as an employer, the severity of the sanction and the review by the domestic courts.

The Court noted that the applicant was a layman teacher of Catholic religious education, employed and paid by the State. An agreement between the Holy See and Croatia on education and cultural affairs had made it necessary to hold a canonical mandate to teach Catholic religious education. During the domestic proceedings the applicant had conceded that he had been aware of the consequences of his conduct on his mandate to teach Catholic religious education. It followed that when accepting the job, he had been aware of the importance of the sacrament of matrimony for the Church. He had brought himself into a situation in which he lost his canonical mandate to perform that function. The fact that no publicity had been given to his conduct and lifestyle, seen by the Church as being contrary to the precepts of its teaching and doctrine, was not a decisive element in the

assessment of the consequences of the decision on the applicant's dismissal. The Court attached particular importance to the fact that the applicant had not been dismissed directly following the withdrawal of his canonical mandate by the Church. The schools terminated his contract of employment only after examining the possibility of finding him another suitable post. The applicant had been given a right to an indemnity and it had been open to him to claim unemployment benefit. The Court took the view that this represented a particularly important effort by the State to find a balance in the protection of his private and professional positions and the exercise of the Church's autonomy. There was no doubt that the applicant's dismissal had constituted a sanction entailing serious consequences. However, his dismissal was not directly and unconditionally related to the withdrawal of his canonical mandate but was rather a result of an objective impossibility to find another suitable post for him. It had been open for him to seek other employment in the education system by teaching courses of ethics and culture. The applicant had been able to complain about his dismissal before the competent domestic courts and to lodge a constitutional complaint. The Constitutional Court had examined in detail the special arrangement between the State and the Catholic Church on Catholic religious education in the State education system. It had also examined the reasonableness of the requirement to hold a canonical mandate to teach religious education and its proximity to the mission of disseminating the Church's teachings. The Court found that the domestic courts had taken into account all the relevant factors and had weighed up the interests at stake in depth and detail. Their conclusions did not appear unreasonable. The Court concluded that, having regard to the State's margin of appreciation, the interference with the applicant's right to respect for his private and family life had not been disproportionate.

Conclusion: no violation (unanimously).

(See *Fernández Martínez v. Spain* [GC], 56030/07, 12 June 2014, Information Note 175)

Respect for private life, expulsion

Asylum-seeker living under precarious conditions for years owing to continuing failure of highest appellate authority to decide his appeal: *violation*

B.A.C. v. Greece, 11981/15, judgment 13.10.2016 [Section I]

Facts – The applicant is a Turkish national who is a pro-Kurdish militant. After being arrested and charged in Turkey with undermining the constitutional order of the State, he fled to Greece and sought asylum there in 2002. His application was summarily rejected by the first-instance administrative authority. The applicant lodged an administrative appeal with the Minister for Public Order. In accordance with domestic law, the Minister had to give a decision within 90 days, after obtaining the opinion of the Consultative Asylum Committee. In 2003 the committee interviewed the applicant and expressed an opinion in favour of granting him refugee status (the documents produced substantiated his allegations of torture). However, no explicit response was ever given to the applicant's appeal.

Turkey submitted a request for the applicant's extradition. In 2013 the courts opposed the request on the basis of the risks of ill-treatment and the vague and abstract nature of the alleged offence.

Since 2003 the applicant has lived in Athens, reporting to the police every six months to renew his asylum-seeker's card. His wife joined him in the same year but her presence was not legalised until she was awarded a contract of employment in 2008.

Law

Article 8: The problem arising in the present case did not relate to any removal or deportation orders but to the applicant's precarious and uncertain circumstances during a lengthy period, namely since his appeal – to which he had received no response for more than twelve years – against the rejection of his asylum application. In that context, the applicant's uncertainty regarding his status took on an entirely different dimension from that of an asylum-seeker simply awaiting the outcome, within a reasonable time, of the proceedings concerning his or her application.

Several aspects of these precarious circumstances were to be noted:

– while waiting for a decision, the applicant had worked without a work permit. At the time, asylum-seekers wishing to obtain such a permit were subjected to restrictive conditions: they had to prove, among other things, that no interest in practising a specific profession or working in a certain sector had been shown by unemployed nationals, citizens of other European Union countries or

anyone who already had refugee status, and in addition to this legal obstacle there was a practical difficulty linked to the economic crisis and the high number of unemployed jobseekers;

– as the mere holder of an asylum-seeker's card, the applicant had also been unable to open a bank account or receive a tax identification number – these being prerequisites in order to carry out a professional activity – or even obtain a driving licence or enrol at university;

– with regard to the applicant's private life, it had not been possible or legal for him to live with his wife until 2008, as a result of her obtaining a work permit in Greece for a limited period and not by virtue of any provisions governing family reunion.

It had to be concluded that the failure by the Minister for Public Order to give a decision on the applicant's asylum application was unjustified; no explanation had been given for this state of affairs, which had lasted for more than twelve years despite the fact that the national authorities had ruled that it was necessary to grant the applicant asylum and had also rejected the Turkish authorities' request for his extradition.

Accordingly, the competent authorities had failed to comply with their positive obligation to provide an effective and accessible procedure for protecting the right to respect for private life through appropriate regulations ensuring that the applicant's asylum application was examined within a reasonable time so that he was left in a state of uncertainty for the shortest possible period.

Conclusion: violation (unanimously).

(See, by contrast, the case of a refusal of a residence permit for applicants who were unlawfully present in the host country and were seeking to confront the national authorities with family life as a *fait accompli*: case-law cited in *Jeunesse v. the Netherlands* ([GC] 12738/12, § 103, 3 October 2014, Information Note 178.)

The Court also found a violation of Article 13 in conjunction with Article 8 (unanimously).

Article 3 in conjunction with Article 13: The Court dismissed the Government's argument that the court decisions refusing the applicant's extradition would preclude his being returned to Turkey, finding that the decisions in question had not invalidated the provisional administrative decision refusing his asylum application and could therefore not be deemed to amount to granting him international protection.

The Court thus took the view that the applicant's asylum application was still pending, noting that indications to that effect could be found in police correspondence. Since his legal status remained uncertain, the applicant was at risk of sudden removal to Turkey without the possibility of an effective examination of his asylum application, even though there appeared on the face of it to be a substantial risk that he might be subjected to treatment breaching Article 3 in that country.

Conclusion: violation in the event of the applicant's return to Turkey without an *ex nunc* assessment by the Greek authorities of his personal circumstances in the light of the criteria established in the Court's relevant case-law (unanimously).

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

(See also *R.U. v. Greece*, 2237/08, 7 June 2011)

Respect for private life

Unlawful surveillance of activities of social-insurance claimant by private investigators: *violation*

Vukota-Bojić v. Switzerland, 61838/10, judgment 18.10.2016 [Section III]

Facts – The applicant was injured in a road accident. The accident gave rise to various disputes with her insurance company, and lengthy proceedings, about her capacity to work, the causal link between the alleged extent of her disability and the accident and the amount of benefit to which she was entitled. The applicant underwent a number of medical assessments and following her refusal to undergo a further medical assessment, the insurance company, acting within the framework of powers conferred on it under the State insurance scheme, decided to place her under surveillance. Private investigators commissioned by the insurance company monitored her movements on four different dates over a twenty-three day period. The insurance company sought to rely on the detailed surveillance reports in court proceedings in order to contest the level of disability alleged by the applicant and the accuracy of the medical reports that she relied on. The applicant complained that the secret surveillance of her daily activities ordered by her insurance company had violated her rights

under Article 8 of the Convention. In particular, she alleged a lack of clarity and precision in the domestic legal provisions that had served as the legal basis of her surveillance.

Law – Article 8: The surveillance measure complained of had been ordered by a private insurance company. However, that company had been given the right by the State to provide benefits arising from compulsory medical insurance and to collect insurance premiums. A State could not absolve itself from responsibility under the Convention by delegating its obligations to private bodies or individuals. Given that the insurance company was operating the State insurance scheme and that it was regarded by the domestic regime as a public authority, the company had to be regarded as a public authority and acts committed by it had to be imputable to the respondent State.

As to whether there had been an interference with the applicant's right to respect for private life, the Court observed that she was systematically and intentionally watched and filmed by professionals acting on the instructions of her insurance company on four different dates over a period of twenty-three days. The material obtained was stored and selected and the captured images were used as a basis for an expert opinion and, ultimately, for a reassessment of her insurance benefits. The Court was satisfied that the permanent nature of the footage and its further use in an insurance dispute could be regarded as processing or collecting of personal data about the applicant disclosing an interference with her private life.

The issue before the Court was whether the provisions of domestic law which served as the legal basis for ordering the applicant's surveillance had been sufficiently clear and detailed for the interference to be "in accordance with the law". In that connection, the Court observed that, although the relevant provisions of domestic law did not seem to either expressly include or even imply the recording of images or videos among the investigative measures that could be deployed by insurance companies, the Swiss Federal Court had concluded that the provisions covered surveillance in circumstances similar to the applicant's case. In examining whether domestic law contained adequate and effective guarantees against abuse, the Court observed that it did not indicate any procedures to be followed for the authorisation or supervision of the implementation of secret surveillance measures in the specific context of insurance disputes. In addition, the relevant legal provisions remained silent on the procedures to be followed for storing, accessing, examining, using, communicating or destroying the data collected through secret measures of surveillance. It thus remained unclear where and how long the report containing the footage and photographs of the applicant would remain stored, who would have access to it and whether the applicant had any legal means of contesting the handling of the report. The Court accepted that the surveillance in the case had to be considered to interfere less with a person's private life than, for instance, telephone tapping; it nonetheless had to adhere to general principles on adequate protection against arbitrary interference with Article 8 rights.

For those reasons – and notwithstanding the arguably minor interference with the applicant's Article 8 rights – the Court did not consider that the domestic law had indicated with sufficient clarity the scope and manner of exercise of the discretion conferred on insurance companies acting as public authorities in insurance disputes to conduct secret surveillance of insured persons. In particular, it did not set out sufficient safeguards against abuse. The interference with the applicant's rights under Article 8 had, therefore, not been in accordance with the law.

Conclusion: violation (six votes to one).

The Court also held, unanimously, that the use in the applicant's proceedings of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6 § 1 of the Convention.

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

(See also *De La Flor Cabrera v. Spain*, 10764/09, 27 May 2014; and *Uzun v. Germany*, 35623/05, 2 September 2010, Information Note 133)

Respect for home

Search warrant issued on strength of evidence allegedly obtained in breach of domestic and international law: *no violation*

K.S. and M.S. v. Germany, 33696/11, judgment 6.10.2016 [Section V]

Facts – The German tax authorities instigated proceedings against the applicants for suspected tax evasion after receiving information about the

applicants' assets held in a Liechtenstein bank. The information (together with data relating to many other account holders domiciled in Germany for tax purposes) had been illegally copied by an employee of the bank and purchased by the German secret service before finding its way to the tax authorities.

On the basis of that information, a prosecutor obtained a judicial warrant for the search of the applicants' home. The applicants' challenge to the lawfulness of the search was ultimately dismissed by the Federal Constitutional Court, which found it to be settled case-law that there was no absolute rule that evidence which had been acquired in violation of procedural rules could not be used in criminal proceedings. The Federal Constitutional Court did not find it necessary to decide whether the data had been obtained in breach of international and domestic law, as the lower court was prepared to assume that the evidence might in fact have been acquired unlawfully.

In the Convention proceedings, the applicants complained that the search of their residential premises had violated Article 8 of the Convention, as the search warrant had been based on illegally obtained evidence.

Law – Article 8: The search amounted to an interference with the applicants' right to respect for their home. It was "in accordance with the law" as it was based on Articles 102 and 105 of the Code of Criminal Procedure and it was the settled case-law of the Federal Constitutional Court that there was no absolute rule that evidence acquired in violation of procedural rules could not be used in criminal proceedings. In these circumstances the applicants had been able to foresee – if necessary with the aid of legal advice – that the domestic authorities would consider that the search warrant could be based on the Liechtenstein data despite the fact that they may have been acquired in breach of law. The search pursued the legitimate aim of preventing crime.

The Court went on to consider whether the interference was necessary in a democratic society. In that connection, it considered, firstly, whether adequate safeguards had been in place to protect against arbitrariness and, secondly, whether the measure was proportionate.

(a) *Safeguards against abuse* – The German legislation and practice afforded adequate and effective safeguards against abuse. In so finding, the Court noted that (i) such measures could normally only be ordered by a judge under the limited conditions set out in the Code of Criminal Procedure (reasonable grounds for suspecting an offence and a presumption that the search would lead to the discovery of evidence); (ii) even though there was no absolute rule of the domestic law that evidence acquired in violation of procedural rules could not be used in criminal proceedings, the Federal Constitutional Court's case-law prohibited its use in cases of a serious, deliberate or arbitrary breaches which systematically ignored constitutional safeguards; and (iii) the regional court had applied that case-law when reviewing the lawfulness of the search warrant.

(b) *Proportionality* – The domestic courts could not be said to have overstepped their margin of appreciation in basing the search warrant on the Liechtenstein data, *inter alia*, for the following reasons: (i) the offence in respect of which the search warrant was issued (tax evasion) was serious; (ii) the Liechtenstein data were the only evidence available at the relevant time that suggested that the applicants might have evaded paying tax, so the search warrant appeared to have been the only means of establishing whether they were in fact liable for tax evasion; (iii) there was no indication that the German authorities had at the relevant time deliberately and systematically breached domestic and international law in order to obtain information relevant to the prosecution of tax crimes or were purposely acting in the light of any established domestic case-law confirming that unlawfully obtained tax data could be used to justify a search warrant; (iv) in issuing the search warrant, the German authorities did not rely on real evidence obtained as a direct result of a breach of one of the core rights of the Convention; (v) the search warrant was quite specific in content and scope, containing an explicit and detailed reference to the tax-evasion offence being investigated, with an indication of the items sought as evidence; and (vi) the applicants had not alleged any adverse effect on their personal reputation as a consequence of the executed search of their private premises.

In sum, the interference with the applicants' rights under Article 8 had been necessary in a democratic society.

Conclusion: no violation (unanimously).

(See also *Buck v. Germany*, 41604/98, 28 April 2005, Information Note 74; and *Smirnov v. Russia*, 71362/01, 7 June 2007, Information Note 98; and,

more generally, the Factsheet on the Protection of personal data and the Handbook on European data protection law)

Forced eviction of Roma families and destruction of their homes with no offer of alternative accommodation: *violation*

Bagdonavicius and Others v. Russia, 19841/06, judgment 11.10.2016 [Section III]

Facts – The 33 applicants, six of whom have died and one of whom has disappeared, are members of six Roma families who lived in the same village. They complained about their forced eviction and the demolition of their houses, which were several decades old; according to the authorities, no building permits had been granted for their construction.

Law – Article 8: The demolition of the applicants' houses in execution of judicial decisions amounted to an interference that was in accordance with an accessible, clear and foreseeable law, and was intended to protect the municipality's right to recuperate the plots of land which were occupied by those houses, which had been constructed without building permits.

The occupation of the plots of land in the village by unauthorised buildings, including the applicants' homes, had covered a sufficiently long period and dated back to the Soviet period. The applicants had therefore been able to develop sufficiently close ties with the locality and to establish a community life in it.

The domestic courts had ordered the demolition of the applicants' homes without giving any reasons other than the lack of a building permit and the fact that the land had been occupied unlawfully, and without analysing the proportionality of this measure.

Thus, the possible consequences of demolishing the houses in question and forcibly evicting the applicants had not been taken into account by the domestic courts during or after the judicial proceedings brought by the prosecutor. With regard to the date of and arrangements for the eviction, it had not been shown that the applicants were duly informed about the intervention by the bailiffs in charge of demolishing the houses, or of the practical arrangements for that operation. Equally, the domestic authorities had not conducted a genuine consultation with the applicants about possible rehousing options, on the basis of their needs, prior to their forced eviction.

Conclusion: violation (unanimously).

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

The Court also concluded, unanimously, that there had been no violation of Article 34, since the authorities of the respondent State could not be held to have hindered the applicants in the exercise of their right of individual petition.

(See also *Yordanova and Others v. Bulgaria*, 25446/06, 24 April 2012, Information Note 151)

Respect for home, positive obligations

Lack of appropriate legal framework to protect occupant of flat from harassment by co-owners: *violation*

Irina Smirnova v. Ukraine, 1870/05, judgment 13.10.2016 [Section V]

Facts – The applicant, an elderly woman, lived in a one-bedroomed flat that had been her home for many years and which she had recently acquired in equal shares with her adult son under a privatisation scheme. Her son gave his share in the flat to a third party, V.S., who in company with another man, A.N., began to insult, harass and physically assault the applicant and damage her belongings in an attempt to force her to sell her share in the property. Fearing for her safety, the applicant eventually moved out. Her attempts to recover full possession of the flat through the civil courts were unsuccessful as under Ukrainian law her son had not been required to obtain her consent before entering into the deed of gift in favour of V.S. and a co-owner could not be dispossessed on the grounds on which the applicant relied (unlawful conduct, unsuitability of the flat for joint use and refusal to share in the costs of maintenance). The applicant also made a number of complaints to the police. V.S. and A.N. were convicted of extortion and given prison terms some ten years after her first complaint.

Law

Article 3: The repeated and premeditated nature of the verbal attacks to which the applicant was subjected coupled with the incidents of physical violence by a group of men against a single senior woman reached the threshold of severity required to come within the ambit of Article 3 and engaged

the State's positive duty to set in motion the protective legislative and administrative framework. Although the principal offenders were prosecuted and sentenced to significant prison terms, it nonetheless took the State authorities over twelve years to resolve the matter. In view of the extreme delays in instituting and conducting the criminal proceedings, the State had failed to discharge its positive obligation under Article 3.

Conclusion: violation (unanimously).

Article 8: Under this provision the applicant complained that she had been obliged to tolerate the presence inside her home of persons foreign to her household and their disagreeable, but essentially non-criminal conduct, including discourteous use of the flat and the applicant's belongings, spoliation of the amenities, and noise and other nuisance.

The Court found that the criminal proceedings in which V.S. and A.N. were ordered to pay compensation and were divested of their share in the flat eventually redressed these aspects of the applicant's complaint. However, because of the extreme delays in the proceedings the applicant's rights under Article 8 had been set at naught for a very considerable period.

As to whether the respondent State had an adequate non-criminal legal framework in place providing the applicant with an acceptable level of protection against the intrusions on her privacy and enjoyment of her home, the Court observed that sharing one's home with uninvited strangers, regardless of how sensibly they behave, creates very important implications for a person's privacy and other interests protected by Article 8. Accordingly, where a member State adopts a legal framework obliging private individuals to share their home with persons foreign to their household, it must put in place thorough regulations and necessary procedural safeguards to enable all the parties concerned to protect their Convention interests.

In the instant case, however, Ukrainian law had not afforded the applicant any meaningful forum in which to (i) object against cohabitation with A.N., V.S. and their acquaintances on the ground that such cohabitation created disproportionate consequences for her rights guaranteed by Article 8 of the Convention and (ii) obtain appropriate and expeditious protection against unwanted intrusions into her personal space and home, including, if necessary, by way of an injunction.

While the Court was prepared to accept that civil remedies such as an action for damages, a demand to cease and desist from interfering with enjoyment of another's possessions, or an action for establishing the rules of use of an object of shared property could be helpful in a situation where lawful cohabitants need to settle specific disagreements concerning the use of a common flat, the situation in the present case was much less trivial. The applicant's complaint was that her flat was not suitable for use by more than one family and that V.S. and A.N., had entered it by breaking in and taking possession of it against her will. The Government had not shown how the aforementioned remedies could address and redress the core of the above complaint.

Conclusion: violation (unanimously).

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

(See also, *mutatis mutandis*, *McCann v. the United Kingdom*, 19009/04, 13 May 2008, Information Note 108; *Ćosić v. Croatia*, 28261/06, 15 January 2009, Information Note 115; and *B. v. the Republic of Moldova*, 61382/09, 16 July 2013)

ARTICLE 11

Freedom of peaceful assembly

Conviction and sentence of protester for participation in mass disorder: *violation*

Yaroslav Belousov v. Russia, 2653/13 and 60980/14, judgment 4.10.2016 [Section III]

(See Article 3 above, page 9)

Freedom of association

Dissolution of association of football supporters as a result of repeated acts of violence by members resulting in supporter's death: *no violation*

Les Authentiks and Supras Auteuil 91 v. France, 4696/11 and 4703/11, judgment 27.10.2016 [Section V]

Facts – The two applicant associations belonging to the "*Ultras*" movement at the Paris Saint-Germain (PSG) stadium were dissolved under two Decrees in April 2010 on the ground that some of their members had been involved in repeated collective acts of violence and vandalism during the

2009-2010 football season, including the violence of February 2010 which had ended in the death of one supporter.

The applicant associations submitted requests for a stay of execution of the dissolution orders but these were dismissed by the urgent applications judge of the *Conseil d'État*. Subsequently, the *Conseil d'État* dismissed applications from the applicant associations to set aside the orders.

Law – Article 11: The impugned dissolution measure amounted to an interference with the right to freedom of association, prescribed by law with the aim of preventing disorder and crime.

The *Conseil d'État* did not find any negligence on the part of the applicant associations, but concluded that their involvement in the events that had led to public disorder by certain supporters acting as members of the association had been established.

In order to combat outbreaks of violence in football stadiums the legislature allowed the dissolution of a supporters' association as a collective, rather than an exclusively individual, measure to prevent the serious misconduct noted during sports events, in cases of recurrent acts, and the 2 March 2010 Law had extended that measure to cover extremely serious acts, while at the same time introducing an interim measure that allowed mere suspension of an association's activities.

In so doing the legislature sought to tackle acts of extreme violence which had caused serious physical harm to some supporters and led to the deaths of two of them. In the instant case, the decision had been taken to implement those legislative provisions in the wake of a series of collectively committed acts, involving the throwing of projectiles at the police and violent confrontations leading to the death of one supporter, just when the PSG football season was about to begin. Those decisions were taken in an extremely difficult context threatening the very organisation of football matches which had led to the dissolution of other PSG supporters' associations or clubs. The national authorities could legitimately have considered that there was a "pressing social need" to impose drastic restrictions on groups of supporters, thereby infringing the very essence of freedom of association, in order to prevent and eliminate all risk of public disorder. Accordingly, the impugned measures had been necessary in a democratic society for preventing disorder and crime.

Before ordering the dissolution, the *Préfecture de Police* had issued a large number of stadium bans, which had proved insufficient, but the possibility of a suspension as introduced under a legislative amendment of 2 March 2010, which encroached less on freedom of association, would appear not to have been envisaged, in view of the seriousness of the offences committed by members of the applicant associations and of the imminence of the future matches. The authorities had opted for "halting the vicious circle of violence" and "preventing dangerous emulation among the various associations, which had in fact all been dissolved", and considered that the applicant associations were actually incapable, at that juncture, of preventing their members from causing public disorder. In that regard, in cases of incitement to violence against an individual, a representative of the State or a section of the population, the national authorities benefited from a broader margin of appreciation in their assessment of the necessity of interference under Article 11. Finally, associations whose official object was to promote a football club were of less importance in a democracy than a political party, and consequently the necessity of restricting the right of association did not need to be considered so thoroughly in their case. In view of the scope of the corresponding margin of appreciation, the said distinction and the particular circumstances of the case, the dissolution orders should be regarded as being proportionate to the aim pursued.

In conclusion, the interference was necessary in a democratic society.

Conclusion: no violation (unanimously).

The Court also unanimously held that there had been no violation of Article 6 § 1, given that the parties had been able to debate both the arguments advanced to justify the dissolution order and the use of a different ground, which then become the sole, sufficient justification. Therefore, the use of a different ground by the *Conseil d'État* had not infringed the applicant associations' right to a fair trial.

ARTICLE 18

Restrictions for unauthorised purposes

Pre-trial detention of politician and leader of opposition party, allegedly performed only to

exclude him from the political life of the country: ***case referred to the Grand Chamber***

Merabishvili v. Georgia, 72508/13, judgment 14.6.2016 [Section IV]

The applicant was a Georgian politician who had formerly held high-ranking State offices, including those of Minister of the Interior and Prime Minister, and was the leader of the strongest opposition party. Between 2012 and 2013, soon after the change of power resulting from the parliamentary election of October 2012, criminal proceedings were instituted against him for abuse of power and other offences. The applicant was subsequently placed in pre-trial detention. In 2014 he was convicted of the majority of the charges brought against him. In his application to the European Court the applicant complained, *inter alia*, that his prosecution and arrest had been used by the authorities to exclude him from the political life of the country, in breach of Article 18 of the Convention.

In a judgment of 14 June 2016 a unanimous Chamber of the Court found no violation of Article 5 § 1 in respect of the applicant's pre-trial detention, no violation of Article 5 § 3 as regards the initial court decisions imposing pre-trial detention, but a violation of Article 5 § 3 with regard to a subsequent judicial review of the applicant's detention. It also found a violation of Article 18 read in conjunction with Article 5 § 1 on the grounds that his pre-trial detention had been used not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of the offences with which he had been charged, but also to obtain leverage in connection with an unrelated investigation into the death of the former prime minister and the financial activities of the former head of State (see Information Note 197).

On 17 October 2016 the case was referred to the Grand Chamber at the Government's request.

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Unreasonably high repurchase price demanded for expropriated land compared to compensation paid for the expropriation: ***violation***

Kanaginis v. Greece, 27662/09, judgment 27.10.2016 [Section I]

Facts – In 1976 a plot of land belonging to the applicant was expropriated. However, the expropriation order was revoked by the Council of State in 2002 at the applicant's request, as the public-interest purpose for which the land had been expropriated had never come to fruition. Whereas the applicant had received some EUR 23,000 in compensation for the expropriation, the authorities readjusted that sum, pursuant to Article 12 of Law No. 2882/2001, in line with the annual average consumer price index, and requested that he reimburse approximately EUR 602,000 in return for his land. The applicant then applied to the Council of State to set aside that decision, but his application was dismissed.

The applicant complained to the European Court that the sum which he was called upon to reimburse in order to recover his property was not reasonably proportional to that which he had received in compensation for the expropriation. He submitted that the State was placing a disproportionate and excessive burden on him which could not be justified by any general reason of public interest.

Law – Article 1 of Protocol No. 1

(a) *Applicability* – Domestic law permitted an expropriation to be revoked subject to reimbursement by the landowner of the compensation paid with a readjustment of the amount and the Council of State had set aside the authorities' refusal to revoke the expropriation after finding that the purpose of the expropriation had been abandoned.

The applicant therefore had a pecuniary interest which was recognised under Greek law and was protected under Article 1 of Protocol No. 1.

(b) Merits – The interference with the applicant's right to respect for his property lay in his inability to recover the expropriated land following the revocation of the expropriation by a Council of State judgment on the grounds that it had not achieved its aim, because of the allegedly exorbitant price which he would have had to pay the State. It was not disputed that the interference was prescribed by law and that it had pursued a legitimate aim, namely to ensure that the applicant's repurchase of the land in question would not damage the State's financial interests.

Under the Council of State's judgment, the applicant had secured the revocation of the expropriation of the land which he had owned, giving him at least a legitimate hope of recovering his property. However, he could not be allowed to recover the

land in a manner detrimental to the public interest. Therefore, given that he had been awarded full compensation when his land had been expropriated, it was not unreasonable for the State, thirty years later, to have used the relevant legislation to readjust the amount he had received.

The readjustment formula set out in section 12 of Law No. 2882/2001 involved an equation by which the expropriation compensation received by the person concerned was multiplied by the ratio between the average annual consumer price index from the year when the compensation for the recovery of the property had been established and that pertaining to the date of receipt of the expropriation compensation.

Applying that formula had prevented the competent authority from taking account of other relevant, indeed necessary, factors to ensure proper calculation of the sum to be reimbursed to the State, such as the commercial value of the land at the material time and the value of neighbouring plots of land or others in the same district which had been expropriated at the time. In fact, according to the judgment in the case of *Guiso-Gallisay v. Italy* (just satisfaction) [GC] (58858/00, 22 December 2009, Information Note 125), awards of compensation for expropriation for building land had to correspond to the land's commercial value.

In order to assess the proportionality between the readjusted compensation award and the real value of the applicant's property, regard should be had to developments on the Greek real estate market and the approximately 17 years' length of the revocation procedure.

There was a significant difference between the amount demanded by the State and the real value of the land as indicated in the materials before the Court. That difference could not be considered reasonable in the present case.

Furthermore, under the new wording of section 12 of Law No. 2882/2001 the Administrative Board or the independent expert had to take into account several relevant factors in evaluating the price of a property, such as the value of adjacent or similar plots of land and the potential income from developing the land. Moreover, in the event of a disagreement between the State and the individual on the amount of compensation due, the competent courts could settle the dispute without been required by law to apply criteria such as the average annual consumer price index.

Furthermore, the two administrative decisions under which the competent authority established the amount to be paid to recover the land were still valid. The authorities had unfettered discretion in recalculating the compensation payable should the applicant submit to them any further request to that end. The current value of the land, as estimated by the tax authority was far below that established under the administrative decision. It was therefore clear that the applicant was now in a dead-end situation with the *de facto* impossibility of recovering his property.

Moreover, the Council of State had held, without explaining why, that there had been no violation of the right to the peaceful enjoyment of possessions. Consequently, the applicant had had no real opportunity to effectively challenge the measures infringing his right as secured under Article 1 of Protocol No. 1 before the judicial authorities.

Regard being had to the foregoing considerations, the formula used in the applicant's case at the material time pursuant to section 12 of Law No. 2882/2001 and the reasoning of the Council of State in its judgment had upset the fair balance which must be struck between the requirements of the public interest and the imperatives of protecting the applicant's right to respect for his property.

Conclusion: violation (unanimously).

Article 41: reserved.

Inability of public servant who did not qualify for a pension to obtain reimbursement of her pension contributions: *inadmissible*

Mauriello v. Italy, 14862/07, decision 13.9.2016 [Section I]

Facts – The applicant, who had been employed as a civil servant for ten years, was obliged to retire in December 2000 as she had reached the compulsory retirement age.

The lump sum in lieu of a pension to which the applicant was entitled, amounting to about EUR 7,000, had been paid into the civil-service pension fund with a view to creating her pension account. She thus lost a sum corresponding to a third of her salary, paid in as contributions every month throughout the entire duration of her civil-service employment.

Law – Article 1 of Protocol No. 1: The requirement to pay retirement-pension contributions amounted

in principle to an interference with the right to the peaceful enjoyment of one's possessions, guaranteed by Article 1 of Protocol No. 1. Thus, that provision was applicable in the present case.

The deprivation of the sum in question for the purpose of creating a pension fund was an interference provided for by "law", and had the legitimate aim of guaranteeing the funding of the insurance system, based on the principle of solidarity.

According to the Constitutional Court, the principle of non-reimbursement of contributions and the more general principles of "the unavailability of the contributions" to the pensions fund and the lack of correlation between the contributions paid in and the benefits paid out were not only compatible with the social model, but arose from the very structure of that model. Thus, it was clear from the Constitutional Court's case-law that the legislature enjoyed almost total discretion in striking a balance between the different interests at stake: it could establish the categories of individuals concerned and decide if and to what extent those individuals were entitled to have their contributions returned.

The law recognised entitlement to a pension for civil servants who had worked for at least 15 years. As the applicant had paid contributions for about 10 years, she did not meet the criteria for obtaining a pension. However, she had begun to work and thus to pay contributions at a point when it was certain that she would not obtain entitlement to a pension.

While it was not for the Court to speculate on the reasons why the applicant had chosen to begin working at an age that was too advanced to enable her to obtain entitlement to a pension, it was certain that the contested decision had not come as a surprise and that it had been entirely foreseeable.

In conclusion, given the wide margin of appreciation enjoyed by the State in this area, the interference in question had not amounted to a disproportionate interference with the applicant's right to the peaceful enjoyment of her possessions.

Conclusion: inadmissible (manifestly ill-founded).

PENDING GRAND CHAMBER

Referrals

Ramos Nunes de Carvalho e Sá v. Portugal, 55391/13, 57728/13 and 74041/13, judgment 21.6.2016 [Section IV]

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

Merabishvili v. Georgia, 72508/13, judgment 14.6.2016 [Section IV]

(See Article 18 above, page 25)

OTHER JURISDICTIONS

Inter-American Court of Human Rights

Fair trial guarantees in disciplinary proceedings

Case of Maldonado Ordoñez v. Guatemala, Series C No. 311, judgment 3.5.2016

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

Facts – The applicant, Ms Olga Yolanda Maldonado Ordoñez, had worked at the Office of the Human Rights Ombudsman of Guatemala since 1992. On 21 February 2000 her brothers filed a complaint against her with the Head of the Ombudsman's Office, in which they alleged the falsification of a public document related to inheritance matters and requested that a "moral sanction" be imposed on her. The applicant was notified of the complaint, instructed that there were grounds for dismissal under the Staff Rules of Procedure and informed that she was entitled to submit documents or exculpatory evidence within two days. The applicant presented evidence and argued that the allegations were false. On 16 May 2000 the Human Rights Ombudsman issued Order No. 81-2000 dismissing Ms Maldonado from her posts of interim assistant and educator.

The applicant applied for review with the Office of the Human Rights Ombudsman, requesting that the Order be revoked and that she be immediately reinstated in her job. She argued that she had been dismissed due to family issues, unrelated to any professional misconduct in the course of her employment. This application was rejected on the grounds that the matter was family-related and, consequently, fell within ordinary jurisdiction. The decision stated that the mere fact that complaints had been filed against the applicant was, in itself, indicative of "unwanted conduct for human-rights defenders".

Subsequently, the applicant appealed to the Labour Court of Appeals, which in turn declined to hear the case on the grounds that it had no competence to rule over it. She subsequently lodged a constitutional challenge with the Court of Appeals, sitting

as the Constitutional Court. It was rejected on the grounds that there was no violation of a constitutional provision. The applicant then filed an appeal that was referred to the Constitutional Court, which on 9 October 2001 rejected the appeal.

Law

(a) *Articles 8 (right to a fair trial) and 9 (freedom from ex post facto laws) of the American Convention on Human Rights (ACHR), in relation to Article 1(1) (obligation to respect and ensure rights) thereof* – By recognising the punitive nature of the dismissal proceedings and the outcome thereof, the Inter-American Court considered that the procedural guarantees enshrined in Article 8(2) of the ACHR were part of the minimum guarantees that should have been respected in order for the decisions in question to satisfy the requirements of a fair trial and not to be arbitrary.

The Court determined that the right of the accused to a prior detailed notification of the criminal charges against him or her was also applicable to those matters of other nature stated in Article 8(1) of the ACHR, though such a requirement could be of different intensity or scope. In disciplinary procedures, the Court found that the scope of that guarantee involved the respondent being made aware of the conduct that was alleged to have breached disciplinary rules. In particular, it considered that the applicant should have at least been informed of the grounds of her dismissal and a reference should have been made to the connection between the facts of her case and the rule allegedly infringed. Likewise, it was considered that the applicant had not been notified in clear terms of the reason for which disciplinary proceedings had been instituted and of the specific grounds for her ultimate dismissal. This omission constituted a violation of the applicant's guarantee to a prior notification and of her right to defence.

The Court reiterated that the duty to state the grounds of all decisions is one of the necessary guarantees to safeguard the right to a fair trial. It is linked to the proper administration of justice, which protects the right of citizens to be tried for the reasons provided by law, and gives credibility to the decisions in the context of a democratic society. Therefore, the Court had affirmed that decisions adopted by domestic bodies must be properly substantiated; otherwise they will be considered arbitrary. In this regard, the Court specified that the arguments underlying judicial decision-making and certain administrative acts should clearly state the facts, reasons, and rules on which the authorities relied. In the present case, the Court found that the grounds for the applicant's dismissal were not properly reasoned and justified under the applicable provisions. This constituted a violation of the duty to state the reasons that underlie decision-making.

The Court has also considered that the principle of legality is applicable to disciplinary proceedings, despite the fact that the scope of the latter depends heavily on the matter. The required accuracy of a punitive rule of a disciplinary nature may be different from that which is necessary under the principle of legality in criminal matters, because of the nature of the conflicts that each of them is intended to resolve. The Court concluded that the applicant had been dismissed for conduct that was not set out in the Staff Rules of Procedure as a disciplinary offence and that it did not fall under the provisions that had been invoked to justify the sanction imposed. It therefore found a violation of the principle of legality.

Conclusions: violation of Article 8(2)(b) and (c) in relation to Article 1(1) (unanimously); violation of Articles 8(1) and 9 in relation to Article 1(1) (unanimously).

(b) *Articles 25 (right to judicial protection) and 2 (domestic legal effects) of the ACHR, in conjunction with Article 1(1) thereof* – The Inter-American Court has noted that the remedies must be adequate in order to redress a given violation and must be effective in practice. The latter implies that the analysis by a competent authority of a judicial remedy cannot be reduced to a mere formality. Such authority must examine the parties' arguments and expressly address them. The Court held that the proceedings should lead to the effective protection of the right recognised in the judicial ruling, through the proper application of said ruling.

The Court found that the Guatemalan law was contradictory as to which remedy the applicant should have used to challenge her dismissal. The Court therefore considered that, since the applicant could not count on a simple and effective remedy and in view of the lack of certainty and clarity of the remedies available, she had been deprived of legal protection. This was a violation of the right to judicial protection and of the obligation to adopt legislative or other measures in its domestic law.

Conclusion: violation (unanimously).

(c) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered that the State: (i) publish the judgment and its official summary; (ii) remove Ms Maldonado's dismissal from her "work record" or from any other background record; (iii) clearly specify or regulate, through legislative or other measures, the judicial procedure and competence for the judicial review of any sanction or measure of administrative-disciplinary nature of the Office of the Human Rights Ombudsman, and (iv) pay compensation in respect of pecuniary and non-pecuniary damage, as well as costs and expenses.

COURT NEWS

New film on the ECHR

A new film presenting the European Court of Human Rights has just been produced. Aimed at a wide audience, the film explains how the Court works, describes the challenges faced by it and shows the scope of its activity through examples from the case-law.

Currently available in English and French, the film will be issued in other official languages of the member States of the Council of Europe. It is available on the Court's Internet site (www.echr.coe.int – The Court) and its YouTube channel (www.youtube.com/user/EuropeanCourt).

RECENT PUBLICATIONS

New Case-Law Guide

As part of its series on the case-law relating to particular Convention Articles the Court has recently published a Case-Law Guide on Article 15 (derogation in time of emergency). Translation into French is pending.

All Case-Law Guides can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law).

Guide on Article 15 of the Convention – Derogation in time of emergency (eng)

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

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

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

ENG

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

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE