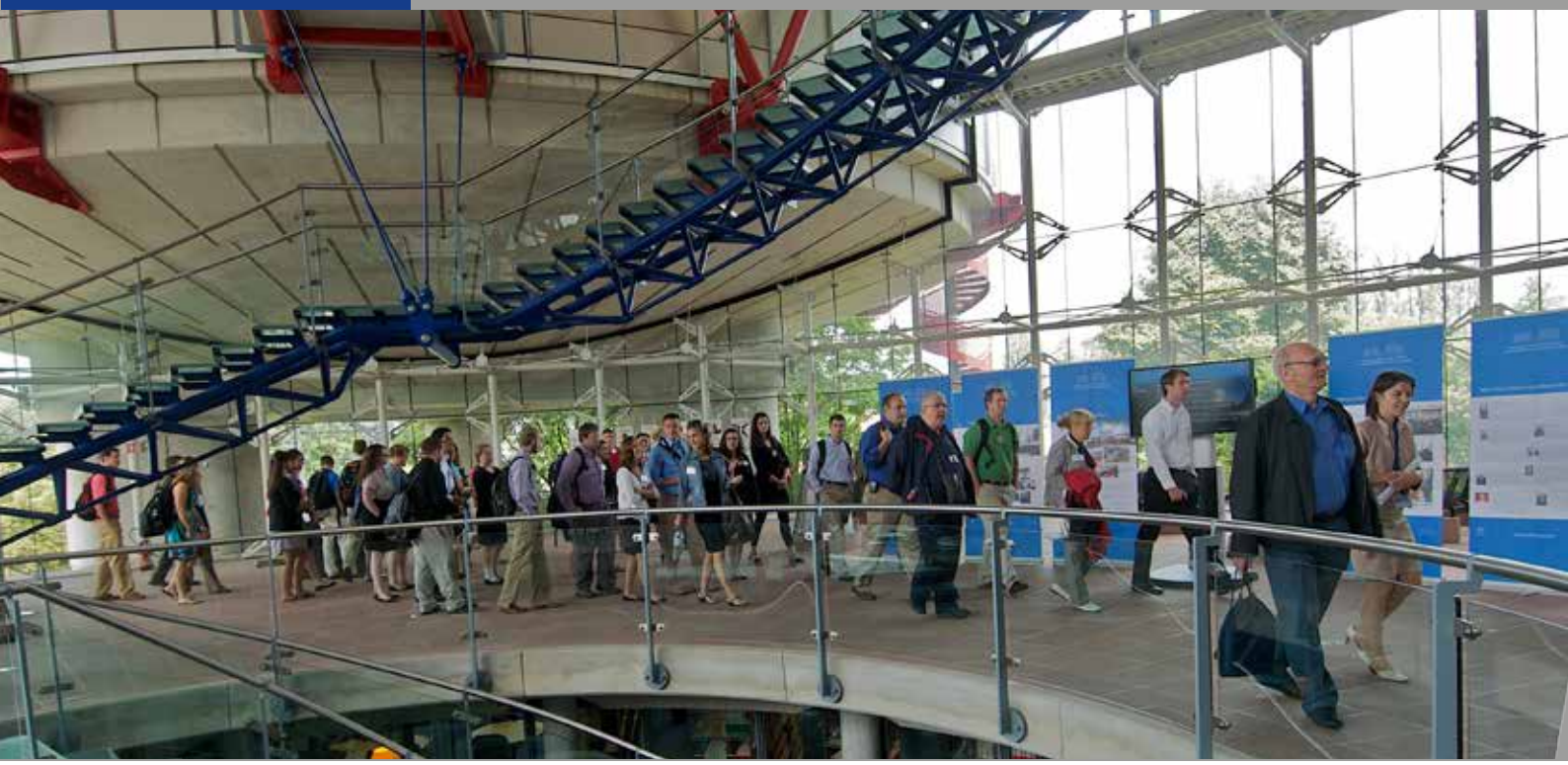
2017

OCTOBER

INFORMATION NOTE 211

Case-law of the European Court of Human Rights



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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

English edition

ISSN 1996-1545

European Court of Human Rights
(Council of Europe)
67075 Strasbourg Cedex
France
Tel: + 33 (0)3 88 41 20 18
Fax: + 33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int
twitter.com/echrpublication

Layout: Publications Unit

Photograph: Council of Europe

Cover: interior of the Human Rights Building (Architects: Richard Rogers Partnership and Atelier Claude Bucher)

Table of contents

ARTICLE 3

Torture, effective investigation

Acts of torture of demonstrators held in police custody during G8 summit: *violation*

Azzolina and Others v. Italy, 28923/09 and 67599/10, judgment 26.10.2017 [Section I]

Facts – The applicants were arrested in various parts of the city of Genoa during the "G8" Summit in 2001, during which an Anti-Globalisation Summit and various demonstrations had been organised, and taken to a barracks which was being used as a provisional place of detention. There they were subjected to acts of violence, humiliations and other forms of ill-treatment.

In *Cestaro v. Italy* (6884/11, 7 April 2015, Information Note 184), which concerned another episode of violent acts committed by the security forces during the same Summit, the Court found a violation of both the substantive and procedural limbs of Article 3. It found that the acts concerned amounted to torture and emphasised the shortcomings of the relevant criminal legislation.

Law – Article 3

(a) *Substantive limb* – The Court referred to the facts established by the domestic courts, which were not contradicted by any of the documents in the case file:

– as soon as they arrived at the barracks the applicants were forbidden to look up at the officers surrounding them; some of them had an "X" drawn with a marker on their cheeks; all of them were forced to stand motionless with their arms and legs apart, facing the fences inside the barracks; they were forced to continue to stand in the same humiliating position inside their cells;

– inside the barracks the applicants were forced to walk bent over forwards with their heads down; in that position they had to go through the "officers' tunnel", that is to say a corridor in the barracks where the police officers stood along both sides threatening and striking them and shouting political and sexual insults at them;

– during the medical examinations the applicants were subjected to comments, humiliations and sometimes threats from the medical staff and the police officers present;

– the applicants' personal effects were confiscated, and even randomly destroyed;

– since the barracks were so small and the violent acts so frequent, all the police officers present were aware of the violence committed by their colleagues and/or subordinates;

– the impugned facts cannot be seen as having been limited in time, occurring during a period when such abusive behaviour might have been caused (although not justified) by high tension and inflamed passions: the events continued over a long period, that is to say between the night from 20 to 21 July and on 23 July, which means that several police teams were successively on duty in the barracks without any significant decrease in the frequency or intensity of the episodes of violence.

The applicants, who put up no physical resistance, sustained a continuous and systematic succession of acts of violence which caused intense physical and psychological suffering. Far from being sporadic, the physical and psychological violence was indiscriminate, constant and to some extent organised, which led to à "kind of dehumanising process reducing the individual to an object on which to exercise violence".

These episodes took place in a deliberately tense, confused and noisy environment, with the officers yelling at the individuals arrested and occasionally singing fascist anthems.

The police officers present, from the lower ranks up to the command level, seriously violated their primary ethical duty to protect persons who had been placed under their supervision and were in a situation of vulnerability.

It is impossible to overlook the symbolic dimension of those acts or the fact that the applicants were not only the direct victims of ill-treatment but also the powerless witnesses of the uncontrolled use of violence against the other persons arrested.

The applicants, who were treated like objects, spent their whole period of detention in a "lawless" environment where the most basic safeguards had been suspended. The aforementioned violence was compounded with other infringements of the applicants' rights:

– none of them was able to contact a relative, a lawyer of their choosing or, where appropriate, a consular representative;

– their personal effects were destroyed in their presence;

– no access was allowed to toilets; in any case the applicants were deterred from trying to access the toilets by the insults, violence and humiliation undergone by those who did request such access;

– the lack of food and bedding, even if this was due to logistical failings rather than any deliberate decision, had further intensified their distress and suffering.

Those repeated acts of violence, reflecting a desire for punishment and revenge, should be considered as acts of torture.

Conclusion: violation (unanimously).

(b) *Procedural limb* – While noting the entry into force in 2017 of new legislation, which is inapplicable to the facts in the present case, creating a specific offence of "torture", the Court considered, on grounds similar to those set out in *Cestaro*, that the respondent State had failed to provide an appropriate criminal and disciplinary response to the acts of torture. Among other matters, it noted the failure to suspend those concerned from duty during the criminal proceedings.

Conclusion: violation (unanimously).

Article 41: EUR 85,000 awarded to the first applicant and EUR 80,000 to each of the other applicants, in respect of non-pecuniary damage, the advances awarded by the domestic courts being deducted where they had already been paid; claim in respect of pecuniary damage rejected.

(The Court reached the same conclusions in two other judgments delivered on the same date: *Blair and Others v. Italy* (1442/14 et al.), concerning the same barracks; and *Cirino and Renne v. Italy* (2539/13 and 4705/13), concerning a prison)

Inhuman or degrading treatment

Conditions of detention of deaf and mute prisoner: *violation*

Ābele v. Latvia, 60429/12 and72760/12, judgment 5.10.2017 [Section V]

Facts – The applicant, who was mute and deaf since birth, complained of the conditions in which he was detained during part of his prison sentence. In particular, he alleged that he had been held for a total of roughly five years in cells in which he had reduced personal space of just under or just over 3 square metres and that, owing to his disability, he had been unable to communicate with fellow inmates or prison staff.

Law – Article 3: In addition to considering the material conditions and length of the applicant's detention, the Court also had to take into account his vulnerable position due to his disability and the fact that the authorities were required to demonstrate special care in guaranteeing conditions corresponding to his disability.

(a) *Period in which applicant disposed of less than 3 sq. m of personal space* – The applicant had disposed of less than 3 sq. m of personal space for over a year. Such a period could not be regarded as "short, occasional and minor" and therefore could not rebut the presumption of a violation of Article 3. The applicant had been subjected to hardship going beyond the unavoidable level of suffering inherent in detention and amounting to degrading treatment.

(b) *Period in which the applicant was allocated between 3 and 4 sq. m of personal space* – The applicant had disposed of just over 3 sq. m. of personal space in two different cells for a period of almost two years. He complained that the reduced personal space coupled with his disability had left him feeling particularly vulnerable and socially isolated as he was unable to engage in any meaningful activities and was not properly understood by either the prison staff or fellow inmates.

The Court noted that while the applicant had been allowed to leave one of the cells (where he was held for eight months) during the day and use the common area, the same did not hold true of the other cell, where he had been held for twice as long and for about twenty-three hours a day unable, in view of his disability, to communicate with his fellow inmates. Throughout his time in these two cells the applicant was not provided with a hearing aid or any particular means of communicating with prison staff.

In the Court's view, the weighty factor of the reduced personal space available to the applicant for a period of almost two years, together with the inevitable feeling of isolation and helplessness in the absence of adequate attempts to overcome his communication problems flowing from his disability, must have caused the applicant to experience

anguish and feelings of inferiority attaining the threshold of inhuman and degrading treatment.

Conclusion: violation (unanimously).

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

(See also *Jasinskis v. Latvia*, 45744/08, 21 December 2010, Information Note 136; and *Z.H. v. Hungary*, 28973/11, 8 November 2012, Information Note 157; and, more generally, *Ananyev and Others v. Russia*, 42525/07 and 60800/08, 10 January 2012, Information Note 148; and *Muršić v. Croatia* [GC], 7334/13, 20 October 2016, Information Note 200)

Effective investigation

Excessive length of proceedings and other shortcomings in prosecution of domestic violence against minor child: *violation*

D.M.D. v. Romania, 23022/13, judgment 3.10.2017 [Section IV]

Facts – The applicant was born in 2001. In February 2004 his mother called a child protection authority to report that he was being abused by her husband, the boy's father. Between March and July 2004 she also complained to the police on five occasions. After the fifth complaint, the authorities launched a criminal investigation. The prosecuting authorities heard evidence from six witnesses and examined psychological reports, which led to the indictment of the applicant's father in December 2007.

The case was then examined at three levels of jurisdiction. The applicant's father was initially acquitted after the domestic courts found that his "occasionally inappropriate behaviour" towards his son did not constitute a crime. However, following a number of remittals of the case owing to shortcomings in the lower courts' decisions, the County Court ultimately convicted the father in April 2012 of physically and verbally abusing his child after finding that his behaviour was more severe than the type of "isolated or random" violence that could occur when parents were simply punishing their children.

The proceedings eventually ended in November 2012 following an appeal on points of law by both parties. The Court of Appeal reaffirmed that the father had abused his child and gave him a suspended prison sentence whose length was reduced in order to take into account the excessive length of the proceedings. The applicant and the prosecutor complained that no compensation had been awarded. However, the Court of Appeal ruled that it did not have to examine the issue of damages as neither the applicant nor the prosecutor had requested compensation before the lower courts.

Law – Article 3 (*procedural aspect*): The Court reiterated that the States should strive to expressly and comprehensively protect children's dignity. That, in turn, required in practice an adequate legal framework affording protection to children against domestic violence, including (a) effective deterrence against such serious breaches of personal integrity, (b) reasonable steps to prevent ill-treatment of which the authorities have, or ought to have, knowledge, and (c) effective official investigations where an individual raises an arguable claim of ill-treatment.

The essential purpose pursued by the investigation into the allegations of abuse in the applicant's case could be considered to have been achieved as the person responsible for the abuse (the father) was ultimately convicted and sentenced to a term of imprisonment. However, despite this, the investigation had to be regarded as ineffective because it had lasted too long and been marred by serious shortcomings.

(a) *Length of the investigation* – The authorities had first become aware of the applicant's situation in February 2004, when his mother called the child protection authority to report abuse. There was however no indication that anything concrete was done to verify that information, to transmit it to the police or to protect the victims. No action was taken by the authorities in respect of the first four criminal complaints lodged by the mother against the father from March to June 2004. When the investigation did eventually start in July 2004, it lasted for almost three years and six months. Overall, owing to significant periods of inactivity on the part of the investigators and the Forensic Medicine Institute and a series of quashed decisions following omissions of the lower courts, the proceedings lasted eight years and four months at three levels of jurisdiction. That period was excessive.

(b) I shortcomings were apparent in the proceedings: (i) unlike his father, who received a reduction of sentence, the applicant was not offered any form of compensation for the extensive length of the case; (ii) the applicant received no compensation for the abuse to which he had been subjected; (iii) the domestic courts' approach to the issue of

domestic abuse, which appeared to suggest that "isolated and random" acts of violence could be tolerated within the family, was not compatible with either domestic law or the Convention, both of which prohibited ill-treatment, including corporal punishment. Indeed, any form of justification for ill-treating a child, including corporal punishment, undermined respect for children's dignity.

For these reasons, bearing in mind what was at stake for the applicant in the proceedings, the length and pace of the proceedings, and the difference in treatment between the applicant and the perpetrator in respect of that length, as well as the manner in which the courts had dealt with the issue of domestic abuse, the Court concluded that the investigation into the allegations of ill-treatment was ineffective.

Conclusion: violation (unanimously).

Article 6 § 1 (*fair trial*): The Court noted that according to the applicable law (Article 17 of the Code of Criminal Procedure) the domestic courts were under an obligation to rule on the matter of compensation in cases where the victim was a minor and therefore had no legal capacity, even without a formal request from the victim. Both the courts and the prosecutor had to actively seek information from the victim about the extent of the damage incurred. The law thus afforded reinforced protection to vulnerable persons, such as the applicant, by placing an extended responsibility on the authorities to take an active role in this respect. For this reason and in the light of the object of the investigation the proceedings went beyond mere litigation between private individuals and thus engaged the State's responsibility under Article 6 § 1 of the Convention.

Given such unequivocal wording in the domestic law, the Court of Appeal should have examined on the merits the applicant's complaint about the failure to award him compensation. Instead, it had simply observed that neither the applicant nor the prosecutor had requested compensation before the lower courts and thus failed to examine the role of the domestic courts or of the prosecutor in securing the applicant's best interests. That had amounted to a denial of justice, in violation of Article 6 § 1.

Conclusion: violation (four votes to three).

The Court also held unanimously that, in view of its finding of a procedural breach of Article 3, there was no need to give a separate ruling on the applicant's length-of-proceedings complaint under Article 6 § 1.

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

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Access to court, fair hearing

Refusal of domestic courts to award minor victim of domestic violence compensation in absence of a claim: *violation*

D.M.D. v. Romania, 23022/13, judgment 3.10.2017 [Section IV]

(See Article 3 above, page 8)

Oral hearing

Newspaper ordered to publish right of reply in expedited proceedings without a hearing: *no violation*

Eker v. Turkey, 24016/05, judgment 24.10.2017 [Section II]

Facts – The applicant, the publisher of a local newspaper, wrote an article in it criticising the local journalists' association. The association requested a right of reply. As the applicant considered the text of the reply to be insulting and not sufficiently connected to his article, he refused the request. On an application from the association, the Magistrate's Court ordered the publication of the reply. The applicant lodged an unsuccessful appeal with the Criminal Court. In accordance with the law, the courts ruled on the basis of the case file, without holding a hearing.

Law – Article 6 § 1

(a) *Applicability* – Under Turkish law, proceedings concerning the right of reply were not preliminary in nature, but were stand-alone proceedings. Furthermore, although they were conducted before the criminal courts, they mainly concerned the determination of a civil right, namely the right to protection of one's reputation. Accordingly, Article 6 § 1 was applicable under its civil head.

(b) *Merits* – The issue to be determined by the courts was first and foremost whether there had

been an infringement of the association's honour and dignity, on which the existence of a right of reply depended. The courts had then been required to examine the content of the reply in order to ensure that it did not contain anything that might amount to an offence and did not infringe the rights of others, and that its length did not exceed that of the article in question.

Textual and technical issues of this kind concerning the form and content of the reply could be examined and determined adequately on the basis of the parties' observations and the documents submitted by them. There had been no issues of credibility requiring oral presentation of evidence or cross-examination of witnesses. Proceedings concerning the right of reply were conducted separately from any subsequent proceedings for defamation. The sole aim at this stage was to ensure a balance between the criticism directed against persons and the redress sought by the latter.

Under Turkish law, proceedings concerning the right of reply came under an exceptional expedited procedure in which the Magistrate's Court had to rule on applications for publication orders under the right of reply within three days. The time allowed for lodging an appeal against the publication order was three days from the date of service, and the Criminal Court likewise had only three days in which to rule on the appeal.

This requirement to deal with cases swiftly could be considered necessary and justifiable in order to enable untruthful information published in the media to be contested, and to ensure a plurality of opinions in the exchange of ideas on matters of general interest. News was a perishable commodity and to delay its publication, even for a short period, might well deprive it of all its value and interest.

In those circumstances the courts had been entitled to form their opinion on the basis of the case file without holding a hearing.

Conclusion: no violation (unanimously).

The Court also held unanimously that there had been no violation of Article 10.

ARTICLE 6 § 1 (CRIMINAL)

Fair hearing

Refusal to suspend or adjourn criminal proceedings for slander: *no violation*

Tsalkitzis v. Greece (no. 2), 72624/10, judgment 19.10.2017 [Section I]

Facts – In earlier proceedings (*Tsalkitzis v. Greece*, 11801/04, 16 November 2006 – "the 2006 judgment"), the applicant had successfully argued before the European Court that his right of access to a court had been violated by a ruling of the Greek courts upholding the parliamentary immunity from prosecution of a member of parliament against whom he had lodged a criminal complaint alleging breach of duty, extortion and bribery.

The member of parliament had in turn lodged a criminal complaint against the applicant for false accusation, perjury and slander. Having been convicted of the charges at first instance, the applicant appealed arguing that his trial should have been suspended or adjourned until the end of the criminal proceedings he had initiated against the member of parliament. In the Convention proceedings, the applicant complained under Article 6 § 1 that the refusal of the Greek courts to suspend or adjourn the proceedings against him had breached his right to a fair trial.

Law – Article 6 § 1: There were no provisions in the domestic legislation to allow for the suspension of criminal proceedings in cases such as the applicant's, that is when a criminal complaint had not led to prosecution for reasons other than it being unfounded or, more specifically, owing to an act found to be in breach of the Convention. However, the Court's task was not to review the relevant law and practice *in abstracto*, but to ascertain *in concreto* whether the proceedings as a whole, including the refusal of the applicant's request to suspend the proceedings, had infringed his right to a fair trial under Article 6.

The Court could not conclude that the Court of Appeal's reading of the 2006 judgment was, viewed as a whole, the result of a manifest factual or legal error leading to a "denial of justice". In particular, it did not directly flow from the 2006 judgment that that any future criminal proceedings against the applicant related to the same set of facts would have to be adjourned. In addition, the finding of a violation of Article 6 did not generally create a continuing situation or impose a continuing procedural obligation on the respondent State.

The violation of the applicant's right of access to a court established in the 2006 judgment did not automatically render the proceedings conducted against him unfair. Although the two sets of proceedings – the criminal proceedings against the

applicant and his criminal complaint against the member of parliament – were closely linked, they were distinct from each other.

In the proceedings against him, the applicant had been given the opportunity to examine witnesses, adduce documents, be represented by a lawyer and be heard by the domestic courts which examined his case. He was able to submit the arguments he considered relevant and an oral hearing was held both before the first-instance court and the Court of Appeal, which had full competence to assess all the relevant facts and evidence. The applicant had therefore been afforded all the guarantees of a fair trial and had had a real opportunity to defend himself and be acquitted.

The Court did not accept the applicant's argument that he had been deprived of the assistance he would have received had the authorities investigated the member of parliament first. In that connection, it attached significant weight to the different level of proof required in the two set of proceedings, noting that if criminal proceedings had been initiated against the member of parliament his guilt would have had to be proved beyond any reasonable doubt whereas in the proceedings against the applicant any reasonable doubt benefited him as the defendant.

The Court was not convinced that the proceedings conducted against the applicant were unfair or that the domestic courts' refusal to suspend or adjourn them had been so formalistic as to limit unreasonably his access to a court or to render the proceedings as such unfair.

Conclusion: no violation (unanimously).

Reasonable time

Length of proceedings where accused was initially treated as a witness: *violation*

Kalēja v. Latvia, 22059/08, judgment 5.10.2017 [Section V]

Facts – The applicant worked as an accountant in a building management company and fulfilled the duties of a cashier. In December 1997 her colleagues reported to the police that illicit cash withdrawals had been made. On 15 January 1998 the applicant gave a written explanation to the police and on 16 January 1998 criminal proceedings were instigated. The applicant was not informed of that decision at the time. Instead she was issued with a summons to testify and was interviewed on that same date. A witness statement record was drawn up and she was informed of the rights and obligations of witnesses. In the following years she was interviewed as a witness on five more occasions. On 27 January 2005 she was officially charged with misappropriation of funds, thus becoming an accused person, and was informed of her right to have a lawyer. In November 2006 the applicant was convicted of misappropriation of property and on 29 November 2007 the Supreme Court dismissed her appeal on points of law.

Before the European Court the applicant complained about the length of the criminal proceedings against her and that, prior to 27 January 2005, she had been interviewed as a witness and as such had not had the right to legal assistance.

Law – Article 6 § 1

(a) *Period to be taken into consideration* – In criminal matters, the "reasonable time" referred to in Article 6 § 1 began to run as soon as a person was "charged". A "criminal charge" existed from the moment an individual was officially notified by the competent authority of an allegation that he had committed a criminal offence, or from the point at which his situation had been "substantially affected" by actions taken by the authorities as a result of a suspicion against him.

The applicant had not been officially informed about any charges against her before 2005. However, the domestic authorities had been looking into allegations she had committed an offence from the very beginning of the criminal investigation. The police had summoned the applicant not only on 16 January 1998, but also on five more occasions in the subsequent years, for her to give further statements – all in relation to the various episodes of the alleged misappropriation of the company's funds. She was also summoned twice for a confrontation. The domestic authorities were looking into specific allegations against the applicant from the very first day of the criminal investigation and throughout the pre-trial proceedings although her procedural status remained that of a witness.

Taking into account that there had been a suspicion against the applicant, as evidenced, *inter alia*, by the decision of 16 January 1998 to institute criminal proceedings, and that she was questioned about her involvement from the start of the criminal proceedings and throughout them, the appli-

cant had been substantially affected on 16 January 1998. The period to be taken into consideration, therefore, began on 16 January 1998 and ended on 29 November 2007, when the Supreme Court dismissed her appeal on points of law. The criminal proceedings thus lasted nine years and ten months at three levels of jurisdiction.

(b) *Reasonableness of the length of proceedings* – It took the domestic authorities more than seven years and nine months to complete the pre-trial investigation. Serious deficiencies in the investigation were eliminated only after the case had been sent back three times for further investigative measures. It was precisely because of those deficiencies – which had not been resolved in a timely manner – that the pre-trial investigation had lasted for an exceptionally long period and not because the case had been complex or had involved many witnesses. There had also been certain periods of inactivity on the part of the domestic courts. Although the applicant had not been kept in detention pending the determination of criminal charges against her, the charges against her did carry the weight of a prison sentence. In the circumstances of the case the overall length of the criminal proceedings against the applicant was excessive.

Conclusion: violation (unanimously).

Article 6 §§ 1 and 3 (c): The applicant was already substantially affected on 16 January 1998 and it was therefore on that date that the right to legal assistance provided in Article 6 § 3 (c) became applicable. The domestic law at the material time did not provide the right to legal assistance for witnesses 1 and it was undisputed that the applicant, while having the procedural status of a witness, was not informed of any right to legal assistance. In the absence of "compelling reasons" the Court had to apply a very strict scrutiny to its overall fairness assessment.

The applicant's statements remained unchanged during the pre-trial investigation and trial. She did not confess to the crime in question at any stage of the proceedings. Her statements were not cited as evidence when convicting her. Instead, her conviction was based on the testimony of numerous witnesses and other case material. She was given ample opportunity to contest the evidence used against her during the pre-trial investigation and trial. She exercised her rights in that regard at all stages of the proceedings. While it was regrettable that the applicant could not benefit from legal assistance during the pre-trial stage, the overall fairness had not been irretrievably prejudiced by the absence of legal assistance during that stage.

Conclusion: no violation (unanimously).

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

(See also *Ibrahim and Others v. the United Kingdom* [GC], 50541/08, 13 September 2016, Information Note 199)

ARTICLE 6 § 1 (DISCIPLINARY)

Civil rights and obligations, impartial tribunal

Disciplinary proceedings against judge brought and heard by same body: *Article 6 applicable; violation*

Kamenos v. Cyprus, 147/07, judgment 31.10.2017 [Section III]

Facts – At the material time the applicant was a judge and the president of the Industrial Disputes Court in Cyprus. Following complaints by third parties of judicial misconduct by the applicant, the Supreme Court appointed an independent investigating judge to look into the matter. After receiving the investigating judge's report and rather than appointing a prosecutor, the Supreme Court itself framed charges of misconduct against the applicant and called him to appear before the Supreme Council of Judicature (SCJ), which was composed of all the judges of the Supreme Court. The disciplinary proceedings were carried out before the SCJ, which ultimately found the charges proved and, after hearing the applicant, removed him from office.

In the Convention proceedings, the applicant complained under Article 6 § 1 that he had been charged and tried by the same judges, in breach of the principle of impartiality.

1. The new Criminal Procedure Law, which took effect on 1 October 2005, expressly provides the right of witnesses to legal assistance.

Law – Article 6 § 1

(a) *Applicability*

(i) *Criminal aspect* – Misconduct was a disciplinary offence limited and linked to the exercise of judicial functions. The penalty was dismissal but that did not prevent the applicant from practising as a lawyer. The proceedings were therefore of a purely disciplinary nature and did not involve the determination of a criminal charge.

(ii) *Civil aspect* – It was clear from the applicable domestic law that judges, in line with the principle of irremovability and except for exceptional circumstances, had the right to serve their term of office in full until retirement. The outcome of the disciplinary proceedings in the applicant's case was directly decisive for the manner of the exercise of that right. There had thus been a genuine and serious dispute over a "right" which the applicant could claim on arguable grounds under domestic law.

In order to determine whether the "right" claimed by the applicant was "civil" within the autonomous meaning of Article 6 § 1 the Court applied the *Vilho Eskelinen* test. Under this test, a civil servant is excluded from the protection embodied in Article 6 only if two cumulative conditions are fulfilled (a) the national law expressly excludes access to a court for the post or category of staff in question; and (b) the exclusion is justified on objective grounds in the State's interest.

The Court found that the first condition of the *Eskelinen* test – whether national law "expressly excluded" access to a court for the post or category of staff in question – had not been fulfilled. Reviewing its case-law, the Court noted that while an applicant's ability to seek judicial review of the impugned decision or measure tended to be determinative of the question whether or not national law excluded access to a court, it was not a *sine qua non*: even in the absence of judicial review, an applicant may be deemed to have had access to a court for the purposes of the first condition of the *Eskelinen* test if the disciplinary body itself qualified as a "court". That was the position in the applicant's case. Although no review lay from the SCJ's decision to dismiss him, the SCJ was composed of all thirteen judges of the Supreme Court and pursuant to Article 153 § 8 of the Constitution the proceedings before it were of a judicial nature. Judges appearing before it were entitled to be heard and present their case and enjoyed constitutional rights equivalent to those provided by Articles 6 §§ 1, 2 and 3 of the Convention. The SCJ held hearings, summoned and heard witnesses, assessed evidence and decided the questions before it with reference to legal principles. The disciplinary proceedings against the applicant had thus been conducted before a court for the purposes of the *Eskelinen* test.

Since the first condition of the *Eskelinen* test had not been met and both limbs of the test had to be met for Article 6 not to apply to disciplinary proceedings, there was no need to consider the second limb. Article 6 § 1 of the Convention was thus applicable under its civil head to the disciplinary proceedings against the applicant.

Conclusion: admissible (majority).

(b) *Merits* – It was clear from the proceedings and the SCJ's decision that the SCJ did its best to avoid a procedure that was prosecutory in nature in an attempt to prevent an atmosphere of hostility and confrontation in the proceedings. In its efforts to achieve such a goal, it decided not to assign the duties of a prosecutor to the investigating judge or to any other judicial official and did not put questions to the witnesses, other than for clarification purposes. As it observed in its decision, it essentially acted as an audience for the statements by the witnesses. It also put no questions to the applicant.

Nonetheless, the fact remained that the Supreme Court had itself framed the charges against the applicant and then, sitting as the SCJ, conducted the disciplinary proceedings. It had also decided on and dismissed an objection by the applicant concerning the charge sheet.

In such a situation, confusion between the functions of bringing charges and those of determining the issues in the case could prompt objectively justified fears as to the SCJ's impartiality.

Conclusion: violation (six votes to one).

Article 41: EUR 7,800 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Vilho Eskelinen and Others v. Finland* [GC], 63235/00, 19 April 2007, Information Note 96; *Oleksandr Volkov v. Ukraine*, 21722/11, 9 January 2013, Information Note 159; and *Baka v. Hungary* [GC], 20261/12, 23 June 2016, Information Note 197 (and the cases referred to in the legal summary))

ARTICLE 6 § 3 (c)

Defence through legal assistance

Absence of legal assistance for accused during initial phase when she was treated as a witness: *no violation*

Kalēja v. Latvia, 22059/08, judgment 5.10.2017 [Section V]

(See Article 6 § 1 above, page 11)

ARTICLE 8

Respect for private and family life, respect for correspondence

Undue restrictions on foreign national's rights to visits and to use a telephone during pre-trial detention: *violation*

Lebois v. Bulgaria, 67482/14, judgment 19.10.2017 [Section V]

Facts – The applicant, a French national, was arrested in Bulgaria on suspicion of breaking into vehicles. In the Convention proceedings, he complained, *inter alia*, that for twelve days after his arrest he was unable to contact his family or anyone else to inform them of his deprivation of liberty, and that during his time in pre-trial detention he was not provided with sufficient possibilities to receive visits or to speak on the telephone to his family and friends.

Law – Article 8

(a) *Initial twelve-day period* – The applicant's complaint relating to the initial twelve-day period after his arrest was lodged more than six months after that period came to an end and so was out of time. The Court commented, however, that the fact that the applicant had not been able to inform anyone of his deprivation of liberty for twelve days did raise a potentially serious issue under Article 8. In that connection, it noted that (i) the applicant had been kept in handcuffs throughout his (roughly twenty-four-hour) stay in police custody and had not been allowed to use the telephone; (ii) the applicant did not speak Bulgarian and no proper interpretation facilities appeared to have been available; (iii) the applicant had no money on him when he was arrested with which to buy a phonecard and (iv) it had only been with the help of a co-detainee that he had been able to contact the French consulate, which had in turn informed his parents of his arrest and detention.

Conclusion: inadmissible (out of time).

(b) *Subsequent period* – The restrictions on the visits which the applicant could receive while in pre-trial detention could be seen as an interference with his "private life". Further, since under Bulgarian law the applicant had the right to make telephone calls while in pre-trial detention and since inmates in the detention facility had access to a card phone, the limitations on his possibility to use that card phone had likewise to be seen as an interference with his "private life" and "correspondence".

The internal orders setting out the practical details of how inmates in the pre-trial detention facility in which the applicant was kept could exercise their statutory rights to receive visits and use the telephone were not published or made accessible to the detainees in a standardised form. The Government had not established that the applicant was made adequately aware of them, especially given that he did not speak Bulgarian. The restrictions on his visits and use of the card phone appeared to have flowed precisely from the internal arrangements in the pre-trial detention facility, which were governed by those orders. The interference with the applicant's rights under Article 8 was therefore not based on adequately accessible rules and not "in accordance with the law".

Conclusion: violation (unanimously).

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

Respect for private life

Refusal of leave to serve defamation proceedings outside the jurisdiction on grounds that alleged damage to reputation was minimal: *inadmissible*

Tamiz v. the United Kingdom, 3877/14, decision 19.9.2017 [Section I]

Facts – The applicant sought to bring a claim in libel following the publication of a number of comments on a blog, which he regarded as defamatory. The blog was hosted by an Internet blog-publishing service run by Google Inc., a corporation registered in the United States. The applicant was granted permission to serve the claim form on Google Inc. in the United States but Google Inc. was subsequently

successful in having that permission set aside. The English courts concluded that the claim should not be allowed to proceed because both the damage and any eventual vindication would be minimal and the costs of the exercise would be out of all proportion to what would be achieved; in other words there had been no "real and substantial" tort as required to serve defamation proceedings outside the jurisdiction.

Before the European Court the applicant argued that in refusing him permission to serve a claim form on Google Inc., the respondent State had been in breach of its positive obligation under Article 8 to protect his right to reputation.

Law – Article 8: The choice of measures designed to secure compliance with the Contracting States' positive obligation in the sphere of the relations between individuals in principle fell within their margin of appreciation. A number of factors had to be taken into account when determining the breadth of the margin of appreciation to be accorded to the State in such cases: the nature of the activities involved – including the gravity of the interference with private life; the existence or absence of a consensus across the Contracting States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it; and, in cases where the measures which an applicant claimed were required pursuant to positive obligations under Article 8 would have an impact on freedom of expression, the fair balance that had to be struck between the competing rights and interests arising under Article 8 and Article 10. Where the balancing exercise between those two rights had been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the national courts.

An attack on personal honour and reputation had to attain a certain level of seriousness and to have been carried out in a manner causing prejudice to the personal enjoyment of the right to respect for private life. That threshold test was important. The reality was that millions of Internet users posted comments online every day and many of those users expressed themselves in ways that might be regarded as offensive or even defamatory. However, the majority of comments were likely to be too trivial in character, and/or the extent of their publication was likely to be too limited, for them to cause any significant damage to another person's reputation. The Court agreed with the national courts that while the majority of comments about which the applicant complained were undoubtedly offensive, for the large part they were little more than "vulgar abuse" which was common in communication on many Internet portals.

Although the applicant had ultimately been prevented from serving proceedings on Google Inc., that was not because such an action was inherently objectionable to the national courts. Rather, having assessed the evidence before them, they concluded that the applicant's claim did not meet the "real and substantial tort" threshold required. That conclusion was based, to a significant extent, on the courts' finding that Google Inc. could only, on the most generous assessment, be found responsible in law for the content of the comments once a reasonable period had elapsed after it had been notified of their potentially defamatory nature. The approach of the national courts had been entirely in keeping with the position in international law.[2] Nothing in the case of *Delfi AS v. Estonia* [GC], (64569/09, 16 June 2015, Information Note 186), upon which the applicant relied heavily, cast doubt on that position.

It was clear from domestic law that the primary purpose of the "real and substantial tort" test was to ensure that a fair balance was struck between Articles 8 and 10; in other words, in applying that test the national courts were, in fact, ensuring that there would be no interference with Google Inc.'s right to freedom of expression in a case where the interference with the applicant's reputation was "trivial". While the domestic proceedings in the present case preceded delivery of the Grand Chamber judgment in *Delfi AS*, in substance the national courts had addressed the specific aspects of freedom of expression identified therein as relevant for the concrete assessment of the interference in question.

---

2. See the Declaration on freedom of communication on the Internet, Committee of Ministers of the Council of Europe, 28 May 2003; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"); Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005.

Having particular regard to the important role that information society service providers such as Google Inc. performed in facilitating access to information and debate on a wide range of political, social and cultural topics, the Court considered that the respondent State's margin of appreciation in the applicant's case was necessarily a wide one. Furthermore, having discerned no "strong reasons" which would justify substituting its own view for those of the national courts, it found that they had acted within that wide margin of appreciation and had achieved a fair balance between the applicant's right to respect for his private life under Article 8 and the right to freedom of expression guaranteed by Article 10 and enjoyed by both Google Inc. and its end users.

Conclusion: inadmissible (manifestly ill-founded).

Respect for family life

Temporary placement of children in care owing to family's lack of means and parental neglect: *no violation*

Achim v. Romania, 45959/11, judgment 24.10.2017 [Section IV]

Facts – Following an inquiry conducted by the social services and the lack of action on their recommendations, the Roma applicants' seven children were taken into care on account of their insecure material living conditions and the parents' failure to provide them with adequate healthcare and education.

Law – Article 8: The temporary placement of the applicants' seven children in care, the prolongation of the measure and the withdrawal of the applicants' parental authority over all their children amounted to an interference with the applicants' exercise of their right to respect for their family life. That interference was in accordance with the law and pursued the legitimate aim of protecting the rights and freedoms of others.

(a) *The placement in care of the applicants' children and the maintenance of that measure* – The domestic courts found that the applicants had not provided their children with appropriate material living conditions, that they had neglected their state of health and educational and social development and had failed to cooperate with the social services.

Before proposing the children's placement in care the social services assessed the family's situation, identifying its material deficits and then differentiating them from the applicants' parental shortcomings. They issued recommendations to be followed by the applicants in order to prevent their children from suffering any neglect. Regular monitoring of the applicant's family was then put in place. The inquiry was extended to their entourage and the reports submitted were not based exclusively on the findings of the social services and their interactions with the applicants. In view of the lack of cooperation from the parents, the authorities found it difficult to monitor the situation of the children and to provide them with the requisite support. In view of the applicants' failure to take any practical action and to cooperate with the authorities, the court ordered the emergency placement of the children, followed by a temporary placement order.

The domestic courts did not solely base their decisions to order the children's temporary placement on the findings regarding the applicants' material shortcomings. In those conditions, and in the best interests of the children, the temporary placement order could not be criticised under Article 8 of the Convention.

The court of appeal upheld the temporary placement order, still in the best interests of the children, while the applicants were showing signs of improving their material living conditions and had begun to cooperate with the authorities. Having assessed all the facts submitted and compared the family's situation when the children had been placed in care with the applicants' situation when the case was examined, as regards both their material living conditions and the developing relations between the applicants and their children and their cooperation with the social services, the court found a clear improvement in the applicants' material living conditions, although it considered that the applicants had not yet followed all the recommendations of the social services and that their conduct did not yet suggest that they were shouldering their responsibilities in terms of raising their children in a completely safe environment.

That being the case, both the social services and the domestic courts were concerned not only about improving the family's material living conditions but also about the applicants' awareness of the role they should be playing as parents. Consequently, maintaining the placement measure was justified by "relevant and sufficient" reasons.

(b) *Measures taken to reunite the family* – The order issued in the present case was aimed at providing temporary care for the applicants' children. Moreover, the six eldest children were all placed together in the same care centre in order to preserve their family relationship. On the grounds of his age, the

youngest child was placed with a childminder, in accordance with the applicable legal provisions. It appears from the case file that the children's development and state of health improved during their placement and that their situation was closely and frequently monitored by the social services.

The domestic authorities had taken the requisite action to ensure that the applicants could visit their children every month and that the visits could take place in an atmosphere conducive to the development of the family relationships. Telephone contact was also maintained. Finally, the social services carefully prepared the children's return to their parents by organising a meeting of the youngest child with his brothers and sisters and his parents. Similarly, they allowed the eldest children to spend their holidays with the family. The authorities had thus consistently and genuinely endeavoured to preserve relations between the children and their parents.

The social services strove to monitor the applicants' situation and advise them on how to improve their financial situation and parenting skills.

As soon as the applicants had shown a willingness to cooperate with the authorities and the first signs of an improvement in their situation had emerged, practical measures were quickly adopted to meet the conditions laid down by the social services for the children's return. Under those circumstances, the authorities had taken all the action which could reasonably have been expected of them to facilitate the children's return to the applicants.

Therefore, the applicants' children's temporary placement had been ordered for reasons which were not only relevant but also sufficient. Similarly, the placement measure had, right from the outset, been imposed on a temporary basis. By closely monitoring the children's and the applicants' situations the competent authorities had steadfastly pursued the aim of safeguarding the children's best interests, while at the same time seeking a fair balance between the applicants' and the children's rights. Consequently, the interference with the applicants' right had been "necessary in a democratic society".

Conclusion: no violation (unanimously).

(See also *K. and T. v. Finland* [GC], 25702/94, 12 July 2001, Information Note 32; *Saviny v. Ukraine*, 39948/06, 18 December 2008, Information Note 114; and *Soares de Melo v. Portugal*, 72850/14, 16 February 2016, Information Note 193)

ARTICLE 9

Freedom of conscience, freedom of religion, manifest religion or belief

Conviction of conscientious objectors for refusing to perform military or alternative service: *violation*

Adyan and Others v. Armenia, 75604/11, judgment 12.10.2017 [Section I]

Facts – The four applicants were Jehovah's Witnesses and conscientious objectors. In July 2011 they were convicted of evading conscription to military and alternative service and sentenced to two and a half years' imprisonment. They had argued in their defence that the alternative service provided for under domestic law was not of a genuinely civilian nature, as it was supervised by the military authorities, and was punitive in nature as it lasted 42 months compared to 24 months for military service.

In the Convention proceedings, the applicants complained of a violation of their rights guaranteed by Article 9 (freedom of thought, conscience and religion).

Law – Article 9: The applicants' refusal to be drafted to military and alternative service was a manifestation of their religious beliefs and their conviction for draft evasion therefore amounted to an interference with their freedom to manifest their religion.

In contrast to the position in *Bayatyan v. Armenia* [GC] the applicants in the present case had had the opportunity to refuse compulsory military service for reasons of conscience and to perform instead "alternative labour service" pursuant to sections 2 and 3 of the Alternative Service Act, since such service had been introduced in Armenia since 2004 and was performed outside the armed forces of Armenia. However, that fact alone did not suffice to conclude that the authorities had discharged their obligations under Article 9 of the Convention. The Court also had to verify that the allowances made were appropriate for the exigencies of an individual's conscience and beliefs. Although the States enjoyed a certain margin of appreciation regarding the manner in which their systems of alternative service were organised and implemented, the right to conscientious objection guaranteed by Article 9 would be illusory if a State were allowed to organise and implement its system of alternative service

in a way that would fail to offer – whether in law or in practice – an alternative to military service of a genuinely civilian nature and one which was not deterrent or punitive in character.

(a) *Whether the service was of a genuinely civilian nature* – The Court considered that the alternative labour service available to the applicants at the material time was not of a genuinely civilian nature. Although it was undisputed that it was of a civilian nature (the servicemen were assigned as orderlies to various civilian institutions, such as orphanages and retirement homes), other factors – such as authority, control, applicable rules and appearances – had to be taken into account when deciding whether alternative service was of a genuinely civilian nature. In the applicants' case, the Court noted that military authorities were actively involved in the supervision of their service and had the power to influence their service by ordering their transfer to another institution or place of service; certain aspects of the alternative labour service were organised in accordance with military regulations; the alternative service was not sufficiently separated hierarchically and institutionally from the military system at the material time; and, lastly, as regards appearances, alternative civilian servicemen were required to wear a uniform and to stay at their place of service.

(b) *Could the alternative labour service be perceived as being deterrent or punitive in character?* –The alternative labour service would have lasted 42 months compared to 24 months for armed military service. Its length was thus significantly longer than the maximum period of one and a half times the length of armed military service laid down by the European Committee of Social Rights.[3] Such a significant difference in duration of service must have had a deterrent effect and could be said to contain a punitive element.

***

In sum, the authorities had failed, at the material time, to make appropriate allowances for the exigencies of the applicants' conscience and beliefs and to guarantee a system of alternative service that struck a fair balance between the interests of society as a whole and those of the applicants.

Conclusion: violation (unanimously).

Article 41: EUR 12,000 each in respect of non-pecuniary damage.

(See also *Bayatyan v. Armenia* [GC], 23459/03, 7 July 2011, Information Note 143)

ARTICLE 10

Freedom of expression

Criminal conviction of newspaper editor for publishing articles by Chechen separatists: *violation*

Dmitriyevskiy v. Russia, 42168/06, judgment 3.10.2017 [Section III]

Facts – The applicant was the chief editor of a regional newspaper. In 2004 the newspaper published two articles that were believed to have been written by two Chechen separatist leaders who were wanted in Russia on serious criminal charges. In the first article, the author urged Chechens to choose peace and get rid of the President by voting against him in the pending presidential elections. In the second, the author alleged that the Chechen people were being subjected to a continuing genocide orchestrated by the Kremlin. The applicant was charged under Article 282 § 2 of the Criminal Code with incitement to hatred or enmity and the humiliation of human dignity. He was subsequently convicted after a linguistic expert appointed by the trial court concluded, *inter alia*, that the authors of the articles had sought to incite racial, ethnic or social discord, associated with violence and the use of terrorist methods. The applicant was given a two-year suspended sentence and four years' probation for having published the articles.

In the Convention proceedings, the applicant complained of a violation of his freedom of expression secured by Article 10 of the Convention.

Law – Article 10: The applicant's conviction had interfered with the exercise of his freedom of expression. The Court proceeded on the assumption that the interference could be regarded as prescribed by law and it was prepared to accept that it pursued the aims of protecting national security, territorial integrity and public safety and preventing disorder and crime.

3. Conclusions XIX-1 of 24 October 2008 regarding compliance by Greece with Article 1 § 2 of the European Social Charter (The right to work: effective protection of the right of the worker to earn his living in an occupation freely entered upon).

In order to determine whether the applicant's conviction in connection with those articles was "necessary in a democratic society", the Court had particular regard to the applicant's status, the nature of the articles and their wording, the context in which they were published, and the approach taken by the domestic courts to justify the interference.

The applicant was the chief editor of a regional newspaper and in that capacity his task was to impart information and ideas on matters of public interest. The two articles, presumably written by two Chechen separatist leaders, concerned governmental policies in the region and were part of a political debate on a matter of general and public concern. While the Court was mindful of the very sensitive nature of that debate, it noted that the fact that the presumed authors were leaders of the Chechen separatist movement and were wanted in Russia on a number of very serious criminal charges could not in itself justify interfering with the freedom of expression of those who published the articles.

The first article was written in quite a neutral and even conciliatory tone and could not be construed as stirring up hatred or intolerance on any ground, let alone fuelling violence capable of provoking any disorders or undermining national security, territorial integrity or public safety. Although the second article was more virulent and strongly worded, using expressions such as "genocide", "criminal madness by the bloody Kremlin regime", "Russia's terror", "terrorist methods" and "excesses", it was an integral part of freedom of expression to seek the historical truth and a debate on the causes of acts of particular gravity which could amount to war crimes or crimes against humanity had to be able to take place freely. Moreover, it was in the nature of political speech to be controversial and often virulent.

Overall, the views expressed in the articles could not be read as an incitement to violence or as instigating hatred or intolerance liable to result in violence. There was nothing in the articles other than a criticism of the Russian Government and their actions in the Chechen Republic. However acerbic that criticism might have been it did not go beyond the acceptable limits, which were particularly wide with regard to the government.

As to the approach taken by the domestic courts, their decisions in the applicant's case were profoundly deficient. Firstly, the crucial legal finding as to the presence in the impugned articles of elements of "hate speech" was made by the linguistic expert rather than by the courts themselves. That situation was unacceptable as all legal matters had to be resolved exclusively by the courts. Secondly, there was nothing in the domestic courts' decisions to show that they had made any attempt to assess whether the impugned statements could be detrimental to national security, territorial integrity or public safety, or to public order. The domestic authorities had thus failed to base their decision on an acceptable assessment of all relevant facts and to provide "relevant and sufficient" reasons for the applicant's conviction.

Lastly, both the applicant's conviction and the severe sanction imposed were capable of producing a chilling effect on the exercise of journalistic freedom of expression in Russia and dissuading the press from openly discussing matters of public concern, in particular, those relating to the conflict in the Chechen Republic.

The domestic authorities had thus overstepped the margin of appreciation afforded to them for restrictions on debates on matters of public interest.

Conclusion: violation (unanimously).

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

(See also *Perinçek v. Switzerland* [GC], 27510/08, 15 October 2015, Information Note 189; and *Fatullayev v. Azerbaijan*, 40984/07, 22 April 2010, Information Note 129)

Publisher ordered to pay damages to individual it had referred to as a presumed member of the mafia: *no violation*

Verlagsgruppe Droemer Knaur GMBH & Co. KG v. Germany, 35030/13, judgment 19.10.2017 [Section V]

Facts – The applicant company, a book-publishing house, had been ordered to pay EUR 10,000 in damages to a person referred to, in a book that it had published, as a presumed member of the mafia. The company had based the relevant passage on, *inter alia*, an internal report of the Federal Office of Criminal Investigations. The domestic courts considered that the applicant company had not complied with its duty to carry out thorough research and had seriously interfered with the personality

rights of the person in question. Before the European Court the applicant company, alleged that the order to pay damages had infringed its right to freedom of expression.

Law – Article 10: The question before the Court was whether a fair balance had been struck between the freedom of expression of the applicant company and the right to the protection of private life and reputation of the person in question. The relevant criteria to be considered in the context of balancing those competing rights were: the contribution to a debate of public interest; the degree to which the person affected was well known; the subject of the news report; the method of obtaining the information and its veracity; the prior conduct of the person concerned; the content, form and consequences of the publication; and the severity of the sanction imposed.

In particular, as regards the method of obtaining the information and its veracity, the Court reiterated that the safeguard afforded by Article 10 to journalists in relation to reporting on issues of public interest was subject to the proviso that they were acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. Special grounds were required before the media could be dispensed from their ordinary obligation to verify factual statements that were defamatory of private individuals. Whether such grounds existed depended in particular on the nature and degree of the defamation in question and the extent to which the media could reasonably regard their sources as reliable with respect to the allegations. The latter issue had to be determined in the light of the situation as it presented itself at the material time and required, in turn, consideration of other elements such as the authority of the source, whether a reasonable amount of research had been conducted before publication, whether the persons defamed had been given the opportunity to defend themselves and the urgency of the matter.

The press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports or on information provided by a press officer at the public prosecutor's office without having to undertake independent research. However, the domestic court found that the applicant company had exaggerated the level of suspicion conveyed by the internal official reports and had been unable to prove the presented high level of suspicion by means of additional facts. The domestic courts had also pointed out that the reports of the Federal Office of Criminal Investigation had not been meant for publication and could therefore not exonerate journalists or authors from their journalistic duty to carry out their own research. A distinction had to be made between public official reports or official press releases and internal official reports. While journalists could rely on the former without further research, the same could not be held for the latter. Both categories of sources had to be clearly identified and the information taken from them should not be presented in an exaggerated way. That held particularly true in regard to reports concerning allegations of criminal conduct, where the right to be presumed innocent was at issue. The domestic courts' conclusion that the applicant company had not provided sufficient evidence to corroborate the allegation was not unreasonable.

The domestic courts had carefully balanced the competing rights concerned, in conformity with the criteria laid down by the Court's case-law, and had attached fundamental importance to the veracity of the message conveyed. In the circumstances and having regard to the margin of appreciation enjoyed by the domestic courts when balancing competing interests, there were no strong reasons for the Court to substitute its view for that of the domestic courts.

Conclusion: no violation (six votes to one).

(See also *Couderc and Hachette Filipacchi Associés v. France* [GC], 40454/07, 10 November 2015, Information Note 190; and *Von Hannover v. Germany (no. 2)* [GC], 40660/08 and 60641/08, 7 February 2012, Information Note 149)

Freedom to receive information, freedom to impart information

Journalist compelled to give evidence against source who had already come forward: *violation*

Becker v. Norway, 21272/12, judgment 5.10.2017 [Section V]

Facts – In August 2007 the applicant, a journalist, wrote an article concerning a company quoted on the stock exchange, based on a telephone conversation with a Mr X and a letter drafted by an attorney.

In June 2010 Mr X was indicted for market manipulation and insider trading. He was accused of having requested the attorney to draft the letter which gave the impression that it had been written on behalf of a number of bond holders concerned about the company's liquidity, finances and future, when in fact, it had been written solely on behalf of Mr X, who owned a single, recently acquired bond. Following the publication of the applicant's article, the price of the company's stock fell.

The applicant was subsequently questioned by the police, who informed her that Mr X had admitted giving her the letter. The applicant said she was willing to state that she had received the letter but she refused to give additional information on the grounds that journalistic sources were protected.

During the criminal proceedings against Mr X, the applicant was summoned as a witness. Relying on domestic law and Article 10 of the Convention, she refused to testify. The first-instance court held that the applicant had a duty to give evidence about her contacts with Mr X in relation to the attorney's letter. In 2011 the Supreme Court dismissed the applicant's appeal, holding that no violation of the Convention would arise where a source had come forward and as such, there was no source to protect. The principle justification for source protection was based on the consequences that the disclosure of a source's identity might have for the free flow of information. The applicant was fined EUR 3,700 for an offence against the good order of court proceedings.

Before the European Court the applicant alleged that she had been compelled to give evidence that would have enabled her journalistic sources to be identified, in violation of her right under Article 10 to receive and impart information.

Law – Article 10: The case turned on whether the interference with the applicant's rights had been necessary in a democratic society. In that connection, the Court referred to the principles governing the protection of journalistic courses developed in a series of judgments.[4] The Court had not previously had occasion to consider the specific question arising in the present case. However, its case-law indicated that a journalist's protection under Article 10 could not automatically be removed by virtue of a source's own conduct.

When assessing whether the interference had been necessary the Court had to examine whether relevant and sufficient reasons had been adduced for ordering the applicant to give testimony. The circumstances concerning Mr X's identity were only one element in that assessment. While agreeing with the Supreme Court that the fact that a source had come forward might be apt to mitigate some of the concerns intrinsic to measures implying source disclosure, the knowledge of Mr X's identity could not be decisive for the proportionality assessment.

The protection afforded to journalists when it came to their right to keep their sources confidential was two-fold as it related not only to the journalist, but also and in particular to the source who volunteered to assist the press in informing the public about matters of public interest. Accordingly, the circumstances with respect to both Mr X's motivation for presenting himself as a "source" to the applicant and his coming forward during the investigation suggested that the degree of protection under Article 10 to be applied in the present case could not reach the same level as that afforded to journalists assisted by persons of unknown identity.

That Mr X had been charged with having used the applicant as a tool to manipulate the market was relevant to the proportionality assessment. Source disclosure had become an issue in the instant case at a time when there were no questions of, for example, preventing further injury to the company or its shareholders. The source's harmful purpose had therefore carried limited weight when the order to testify was made.

The decision as to whether the order against the applicant was necessary mainly turned on an assessment of the need for her evidence during the criminal investigation and subsequent court proceedings against Mr X. Mr X had not argued that it was necessary that the impugned order be imposed on the applicant for the purpose of safeguarding his rights. While account had to be taken of the gravity of the alleged offences, the applicant's refusal to disclose her source did not at any point hinder the investigation or the proceedings against Mr X. The prosecuting authority had lodged

4. See *Goodwin v. the United Kingdom* [GC], 17488/90, 27 March 1996; Sanoma Uitgevers B.V. v. the Netherlands [GC], 38224/03, 14 September 2010, Information Note 133; and Financial Times Ltd and Others v. the United Kingdom, 821/03, 15 December 2009, Information Note 125.

its indictment against Mr X without having received any information from the applicant that could reveal her source. The domestic courts had not been prevented from considering the merits of the charges. After the applicant appealed against the order compelling her to give evidence, the prosecutor had stated that he would not seek an adjournment as the prosecuting authority still considered the case to be adequately disclosed without the applicant's testimony. Finally, the domestic courts judgments against Mr X gave no indication that the applicant's refusal to give evidence had raised any concerns on their part regarding the case or evidence against Mr X.

The Court had previously emphasised that a chilling effect would arise wherever journalists were seen to assist in the identification of anonymous sources. In the present case the disclosure order was limited to ordering the applicant to testify on her contact with Mr X, who had himself declared that he was the source. While it might be true that the public perception of the principle of non-disclosure of sources would suffer no real damage in this situation, the Court considered that the circumstances in the present case were not sufficient to compel the applicant to testify. The reasons adduced in favour of compelling the applicant to testify, though relevant, were insufficient. Thus, even bearing in mind the appropriate level of protection applicable to the particular circumstances of the case the Court was not convinced that the impugned order was justified by an overriding requirement in the public interest and, hence, necessary in a democratic society.

Conclusion: violation (unanimously).

Article 41: Respondent State required to reimburse any fine paid by the applicant; no claim made in respect of non-pecuniary damage.

ARTICLE 14

Discrimination (Article 8)

Legislation permitting deferral of prison sentence for mothers, but not fathers, of young children: *no violation*

Alexandru Enache v. Romania, 16986/12, judgment 3.10.2017 [Section IV]

Facts – The applicant, who had been sentenced to seven years' imprisonment, filed two applications for a stay of execution of sentence. He argued, in particular, that he wanted to look after his child, who was only a few months old. However, his applications were dismissed by the domestic courts on the grounds that the stay of execution laid down in Article 453 § 1 (b) of the former Code of Criminal Procedure for convicted mothers up to their child's first birthday had to be interpreted strictly and that the applicant could not request its application by analogy.

Law – Article 14 read in conjunction with Article 8

(a) *Whether the applicant's situation was comparable to that of a female prisoner with a child under the age of one year* – Under Romanian law there was a difference in treatment between two categories of prisoners with children under the age of one: women, on the one hand, who could be granted a stay of execution of sentence, and men on the other, who were not eligible for a stay.

The introduction of stays of execution of prison sentences was primarily geared to safeguarding the best interests of the children in question, ensuring that they received adequate attention and care during their first year of life; however, such attention and care could be provided either by the mother or by the father, despite the possible differences in their relationship with their children. Furthermore, entitlement to a stay of execution continued until the child's first birthday, and therefore extended beyond the period following the mother's pregnancy and the birth itself.

Thus the applicant could claim to be in a similar situation to that of the female prisoners in question.

(b) *Whether the difference in treatment was objectively justified* – Female prisoners were not automatically entitled to a stay of execution of sentence. The domestic courts conducted a detailed assessment of applications and dismissed them where the applicant's personal situation did not justify a stay.

Romanian criminal law in force at the material time provided all prisoners, regardless of sex, with other channels for requesting a stay of execution of sentence. For instance, the domestic courts could consider whether there were any special circumstances surrounding the execution of the sentence which might have serious consequences for the prisoner personally, but also for his or her family or employer. The applicant had availed himself of this

remedy, but the difficulties which he mentioned did not enter into the category of special circumstances set out in the law.

It is true that nowadays progress towards gender equality is a major aim in the member States of the Council of Europe and that only very cogent considerations could induce one to deem such differential treatment compatible with the Convention.

The aim of the legal provisions in question was to take account of specific personal situations, including pregnancies in female prisoners and the period prior to the baby's first birthday, having regard, in particular, to the special bonds between mother and child during that period. In the specific sphere relevant to the present case, those considerations could provide a sufficient basis to justify the differential treatment of the applicant.

Motherhood has specific features which need to be taken into consideration, often by means of protective measures. International law provides that the adoption by States Parties of special measures to protect mothers and motherhood should not be considered as discriminatory. The same applies where the woman in question has been sentenced to imprisonment.

In the light of the foregoing considerations and having regard to the broad margin of appreciation available to the respondent State in this sphere, there was a reasonable relation of proportionality between the means used and the legitimate aim pursued. The impugned exclusion therefore did not amount to a difference in treatment prohibited under Article 14 read in conjunction with Article 8 of the Convention.

Conclusion: no violation (five votes to two).

The Court also found a violation of Article 3 concerning the applicant's conditions of detention.

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

(See also *Petrovic v. Austria*, 20458/92, 27 March 1998; *Konstantin Markin*, *v. Russia* [GC], 30078/06, 22 mars 2012, Information Note 150; and *Khamtokhu and Aksenchik v. Russia* [GC], 60367/08 and 961/11, 24 January 2017, Information Note 203)

Different-sex couple denied access to registered partnership reserved exclusively for same-sex couples: *no violation*

Ratzenböck and Seydl v. Austria, 28475/12, judgment 26.10.2017 [Section V]

Facts – The applicants, a different-sex couple, lodged an application to enter into a registered partnership under the Registered Partnership Act. Their application was refused on the basis that they did not meet the legal requirements; registered partnerships were exclusively reserved for same-sex couples. Their appeals were dismissed. Before the European Court the applicants complained that they had been discriminated against on the basis of their sex and sexual orientation because they had been denied access to a registered partnership.

Law – Article 14: The Court had not yet had an opportunity to examine the question of differences in treatment based on sex and sexual orientation relating to the exclusion from a legal institution for recognition of a relationship from the viewpoint of a different-sex couple. So far, the Court's relevant case-law in such matters had originated from applications lodged by same-sex couples whose complaints concerned the lack of access to marriage and lack of alternative means of legal recognition. The Court's examination of alleged discriminatory treatment in such matters had thus been conducted from the standpoint of a minority group whose access to legal recognition was still an area of evolving rights with no established consensus among the Council of Europe member States.

Different-sex couples were in principle in a relevantly similar or comparable position to same-sex couples as regards their general need for legal recognition and protection of their relationship. The exclusion of different-sex couples from registered partnerships had to be examined in the light of the overall legal framework governing the legal recognition of relationships. Registered partnerships had been introduced in Austria as an alternative to marriage in order to make available to same-sex couples, who remained excluded from marriage, a substantially similar institution for legal recognition. Thus, the Registered Partnership Act in fact counterbalanced the exclusion of same-sex couples in terms of access to legal recognition of their relationships which had existed before the Act entered into force. The institutions of marriage and registered partnerships were essentially complementary in Austrian law.

The applicants, as a different-sex couple, had access to marriage. That satisfied – contrary to same-sex couples before the enactment of the Registered

Partnership Act – their principal need for legal recognition. They had not argued a more specific need. Their opposition to marriage had been based on their view that a registered partnership was a more modern and lighter institution. However, they had not claimed to have been specifically affected by any difference in law between those institutions. That being so, the applicants, being a different-sex couple to which the institution of marriage was open while being excluded from concluding a registered partnership, were not in a relevantly similar or comparable situation to same-sex couples who, under the domestic current legislation, had no right to marry and needed the registered partnership as an alternative means of providing legal recognition to their relationship.

Conclusion: no violation (five votes to two).

(See also *Schalk and Kopf v. Austria*, 30141/04, 24 June 2010, Information Note 131; and *Fábián v. Hungary* [GC], 78117/13, 5 September 2017, Information Note 210)

ARTICLE 37

Striking out applications

Continued examination of cases originating in systemic problem identified in *Yuriy Nikolayevich Ivanov v. Ukraine*: *struck out*

Burmych and Others v. Ukraine, 46852/13 et al., judgment (striking out) 12.10.2017 [GC]

(See Article 46 below)

ARTICLE 46

Pilot judgment

Division of responsibility between the Court and the Committee of Ministers following failure to execute a pilot judgment

Burmych and Others v. Ukraine, 46852/13 et al., judgment (striking out) 12.10.2017 [GC]

Facts – The first five applicants were part of a group of 12,143 similar applications pending before the Court. The cases originated in the same problem as had been identified in the pilot judgment of *Yuriy Nikolayevich Ivanov v. Ukraine* (40450/04, 15 October 2009, Information Note 123), namely a systemic problem of non-enforcement or delayed enforcement of domestic court decisions, combined with the absence of effective domestic remedies in respect of such shortcomings.

Law

Article 46

(a) *Preliminary considerations* – At the heart of the applications lay the division of competence established by the Convention between, on the one hand, the Court, whose function it was to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto" and, on the other, the Committee of Ministers whose function it was to supervise the execution of the final judgments of the Court.

The understanding of that division of responsibility had evolved in the light of the Court's case-law and notably the proliferation of structural and systemic violations of the Convention. The introduction of the pilot-judgment procedure by the Court had been designed to deal with the phenomenon of repetitive cases arising from such violations. It had now become necessary for the Court to clarify where the responsibilities lay in addressing issues arising out of a failure to execute a pilot judgment.

Despite the significant lapse of time since the delivery of the *Ivanov* pilot judgment in October 2009, the Ukrainian Government had failed to implement the requisite general measures capable of addressing the root causes of the systemic problem and to provide an effective remedy securing redress to all victims at national level. The continued failure to take appropriate general measures had led the Court to adopt a practice of dealing with the *Ivanov* follow-up cases in an accelerated, simplified summary procedure for grouped judgments and strike-out decisions, essentially limited to a statement of a violation and award of just satisfaction. However, that had not had any meaningful impact on the overall systemic problem, nor had it resulted in any apparent progress in the execution process.

Since the introduction of the first applications in 1999 the Court had received some 29,000 *Ivanov*-type applications, of which 14,430 had been examined by various judicial formations of the Court. However, 12,143 of those applications, the majority of which were lodged in the years 2013-2017, were still awaiting judicial examination.

According to data presented by the Government to the Committee of Ministers, the number of persons with unenforced judicial decisions in Ukraine stood at some 120,000.

If the Court examined the present cases and all the other follow up cases in the same or a similar manner, it would face the inevitable prospect that growing numbers of applicants in Ukraine would turn to it for redress in the future. The Court ran the risk of operating as part of the Ukrainian legal enforcement system and substituting itself for the Ukrainian authorities. That task was not compatible with the subsidiary role which the Court was supposed to play under Articles 1 and 19, and ran directly counter to the logic of the pilot-judgment procedure developed by the Court. The Court had to therefore consider how the situation could best be addressed in a way which respected the rationale of the pilot-judgment procedure, in accordance with the principle of subsidiarity underpinning that rationale. In particular, it had to examine whether it should act as a mechanism for awarding compensation in respect of the large numbers of repetitive applications which followed pilot or leading judgments whose execution was to be supervised by the Committee of Ministers.

(b) *The object and purpose of the pilot judgment procedure* – The pilot-judgment procedure had been conceived as a response to the growth in the Court's caseload, caused by a series of cases deriving from the same structural or systemic dysfunction, and to ensure the long-term effectiveness of the Convention machinery. The dual purpose of the procedure was, on the one hand, to reduce the threat to the effective functioning of the Convention system and, on the other, to facilitate the most speedy and effective resolution of a dysfunction affecting the protection of Convention rights in the national legal order. By incorporating into the process of execution of the pilot judgment the interests of all other existing or potential victims of the systemic problem identified, the procedure aimed to afford proper relief to all actual and potential victims of that dysfunction, as well as to the particular applicant in the pilot case.

The *Ivanov* pilot judgment had clearly not succeeded in achieving that aim. Post-*Ivanov* cases accounted for almost one third of all the repetitive applications pending before the Court and the volume of cases had continued to grow despite the measures taken and guidance given. Nothing was to be gained, nor would justice be best served, by the Court's repetition of its findings in a lengthy series of comparable cases, which would place a significant burden on its own resources, with a consequent impact on its considerable caseload. Only a lasting solution to the root cause of the problem adopted in the execution process could provide an adequate response to the present situation.

(c) *Whether it was justified to continue examination of Ivanov-type applications having regard to Articles 19 and 46 of the Convention* – A requirement to continually deliver individual decisions in cases where there was no longer any live Convention issue could not be said to be compatible with the Court's principle task under Article 19. Nor did that judicial exercise contribute usefully or in any meaningful way to the strengthening of human rights protection under the Convention. The time had come for the Court to redefine its role in circumstances where the respondent State had failed to take general remedial measures within a reasonable time and the consequences that should be drawn from that in the light of Article 46 of the Convention.

The division of tasks between the Court and the Committee of Ministers was clear – the Court could assist the respondent State in fulfilling its obligations under Article 46 by seeking to indicate the type of measure that might be taken by the State in order to put an end to a systemic problem identified. However, it was for the Committee of Ministers to supervise the execution of the judgment and ensure that the State had discharged its legal obligation under Article 46, including the taking of such general remedial measures as may be required by the pilot judgment in relation to affording relief to all the other victims, existing or potential, of the systemic defect found.

The situation faced by the Court in the *Ivanov*-type cases in essence derived from an ineffective execution of the Court's final judgment, requiring the adoption of general measures under the supervision of the Committee of Ministers in order to eliminate the root cause of a systemic problem which was continually generating numerous applications to the Court. The problems involved were fundamentally of a financial and political nature and their resolution lay outside the Court's competence under the Convention. It was incumbent on the respondent State and the Committee of Ministers to ensure that the Court's *Ivanov* pilot judgment was fully implemented and that, in addition

to the necessary general measures addressing the root cause of the problem, individual applicants were provided with appropriate relief at domestic level, including a scheme offering redress for the Convention violation identified by the Court that would serve the same function as an award under Article 41 of the Convention.

(d) *Conclusion* – The legal issues under the Convention concerning prolonged non enforcement of domestic decisions in Ukraine had already been resolved in the *Ivanov* pilot judgment. The Court had thereby discharged its function under Article 19 of the Convention. The present case and all similar 12,143 cases pending before the Court, as well as any similar future cases to be submitted to it, were part and parcel of the process of execution of the pilot judgment. Their resolution, including individual measures of redress, had to be encompassed by the general measures of execution to be put in place by the respondent State under the supervision of the Committee of Ministers. Consequently, all such cases fell to be dealt with under the execution process and had to be notified to the Committee of Ministers in its capacity as the body which, under the Convention system, had the responsibility to oversee redress and justice for all the victims affected by the systemic problem found in a pilot judgment.

Having regard to the respective competences of the Court and the Committee of Ministers under Articles 19 and 46 of the Convention, the Court was forced to conclude that no useful purpose was served in terms of the Convention's aims in its continuing to deal with these cases in accordance with the practice hitherto followed.

Article 37: The interests of the applicants and all other existing and potential victims of the systemic problem in question were more appropriately protected in the execution process. As such, the Convention aims were not best served by continuing to deal with post-*Ivanov* cases and therefore, the continued examination of the case was not justified within the meaning of Article 37 § 1 (c).

The grievances raised in these applications had to be resolved in the context of the general measures required by the execution of the *Ivanov* pilot judgment, including the provisions of appropriate and sufficient redress for the Convention violations found in that judgment, which measures were subject to the supervision of the Committee of Ministers. Accordingly, respect for human rights within the meaning of Article 37 § 1 *in fine* did not require such continued examination of the applications in question from the point of view of individual redress. Nor did the case raise important issues more generally concerning the duties to be observed by the Contracting States in that field, other than those already clarified in the different phases of the pilot-judgment procedure. On the contrary, the overall interest of the proper and effective functioning of the Convention system militated in favour of the approach as set out by the Court in these applications.

Conclusion: struck out (ten votes to seven).

(See, on the question of pilot judgments generally, *Broniowski v. Poland* [GC], 31443/96, 22 June 2004, Information Note 65)

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions, deprivation of property

Inability to obtain restitution of nationalised properties or to secure compensation: *violation*

Dickmann and Gion v. Romania, 10346/03 and 10893/04, judgment 24.10.2017 [Section IV]

Facts – The Court's pilot judgment *Maria Atanasiu and Others v. Romania* (30767/05 and 33800/06, 12 October 2010, Information Note 134), indicated that general measures were required to address the deficiencies of the restitution mechanism enacted in Romania after the fall of the communist regime. In May 2013 Law no. 165/2013 came into force, setting out various procedures available to petitioners seeking settlement of their restitution claims. In *Preda and Others v. Romania* (9584/02 et al., 29 April 2014, Information Note 173) the Court considered the new law and found that the mechanism established offered a range of effective remedies that needed to be exhausted in certain cases but that the law did not contain any provisions of a procedural or substantive nature affording redress on the matter of the existence of final judgments validating concurrent titles to property with respect to the same residential property.

The applicants complained that their inability to obtain restitution of their nationalised properties or to secure compensation amounted to a breach of Article 1 of Protocol No. 1.

Law – Article 1 of Protocol No. 1: The applicants had obtained final decisions acknowledging the unlawfulness of the seizure of their property by the State. The domestic courts had confirmed their entitlement to reparatory measures in view of their status as former owners or successor in title to the former owners.

Having established that the applicants had a "possession" within the meaning of Article 1 of Protocol No. 1, the Court was further called upon to examine whether the impugned deprivation of those possessions as a result of the sale by the State of the property to third parties had been appropriately remedied and compensated for via the mechanism created for that purpose by the State. Although Law no. 165/2013 had generally reformed the restitution mechanism by setting out precise time-limits for each administrative stage, as well as clear criteria for the functioning of the compensation mechanism, it had not amended the administrative procedure to make it effective for claimants such as the applicants. It followed that the applicants whose title to residential property had been acknowledged and their entitlement to reparatory measures confirmed by the courts, but who could not enjoy their possessions because the State had sold the property, did not benefit from any mechanism allowing them to obtain appropriate compensation for the deprivation of their possessions.

That deprivation, in combination with the total lack of compensation, imposed on the applicants a disproportionate and excessive burden in breach of their right to the peaceful enjoyment of their possessions.

Conclusion: violation (unanimously).

Article 41: EUR 96,000 to Ms Dickmann and EUR 60,000 jointly to Mr and Ms Gion in respect of pecuniary and non-pecuniary damage.

Peaceful enjoyment of possessions

Disability allowance reduced following reassessment finding further reduction in capacity to work: *violation*

Krajnc v. Slovenia, 38775/14, judgment 31.10.2017 [Section IV]

Facts – The applicant, who had been certified as having a work-related disability, was in receipt of an allowance. Some years later he sustained a shoulder injury and a reassessment of his disability found that his capacity to work had been further reduced. In the meantime, the relevant legislation had been reformed and due to the changes in the law his disability allowance was reduced following the reassessment to less than half of the amount he had previously been receiving. The applicant's appeals against this decision were unsuccessful.

Before the European Court, the applicant complained that the reduction of the benefit in respect of his disability had violated his rights under Article 1 of Protocol No. 1.

Law – Article 1 of Protocol No. 1: If a contracting State had legislation in force providing for the payment as of right of a welfare benefit, that legislation had to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements. Where the amount of a benefit was reduced or discontinued, that could constitute interference with possessions requiring justification. Any interference had to be reasonably proportionate to the aim sought to be realised. The requisite fair balance would not be struck where the person concerned bore an individual or excessive burden.

The new legislation had stipulated that those who had acquired rights under the previous system would continue to enjoy them after it came into force. That had reinforced the applicant's legitimate expectation of continuing to receive an allowance following the legislative reform. It was only when his disability was found to have deteriorated – a fact which he could have hardly predicted and prepared for – that he became affected by the new legislation. The differential treatment of two groups of unemployed disabled workers – those whose disabilities remained unchanged and those whose disabilities had deteriorated – which resulted in the applicant being suddenly divested of his disability benefit while being at the time same time further limited in working opportunities, carried great weight in the assessment of the proportionality issue. It was significant that the applicant had been unemployed and evidently had difficulties pursuing gainful employment due to his disability. That vulnerability was precisely what the disability benefit in question was meant to address. The decrease in the applicant's disability benefit, which seriously affected his means of subsistence, was not mitigated by any transitional measure allowing him to adapt to the new situation.

The reform in legislation concerning pension and disability insurance served a legitimate purpose and had resulted in the increased employment of disabled workers. However, notwithstanding the State's wide margin of appreciation in the field, the applicant had had to bear an excessive individual burden, which upset the fair balance that had to be struck between the protection of property and the requirements of general interest.

Conclusion: violation (unanimously).

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

(See also *Béláné Nagy v. Hungary* [GC], 53080/13, 13 December 2016, Information Note 202)

ARTICLE 4 OF PROTOCOL No. 4

Prohibition of collective expulsion of aliens

Group of migrants immediately taken back to neighbouring country's territory after climbing border fences: *violation*

N.D. and N.T. v. Spain, 8675/15 and 8697/15, judgment 3.10.2017 [Section III]

Facts – In August 2014 a group of about 80 sub-Saharan migrants, including the applicants, attempted to enter Spain by scaling the barriers surrounding the town of Melilla, a Spanish enclave on the North African coast. Once they had crossed the barriers, they were arrested by members of the *Guardia Civil*, who handcuffed them and returned them to the other side of the border, without an identification procedure or the possibility of explaining their personal situation.

Orders for expulsion were subsequently issued against the applicants, who had succeeded *in re*-entering Spain illegally. Their administrative appeals, and the asylum application lodged by one of them, were dismissed.

Law

(a) *Jurisdiction of the respondent State (Article 1)* – It was immaterial whether the barriers scaled by the applicants were located in the territory of Spain or Morocco: from the moment the applicants climbed down from those barriers, they had been under the continuous and exclusive *de facto* control of the Spanish authorities. Speculation as to the powers, functions and action of the Spanish security forces or the nature and purpose of their intervention could not lead to any other conclusion. In consequence, there was no doubt that the alleged facts fell within the jurisdiction of Spain within the meaning of Article 1.

(b) *Admissibility*

(i) *Victim status* (Article 34)

(α) *Evidence* – The Court rejected as follows the Government's doubts as to whether the applicants were indeed part of the group of migrants concerned:

– the applicants had given a coherent account of the circumstances, their countries of origin and the difficulties that had led them to the makeshift camp on Mount Gurugu (a migrant camp on the neighbouring Moroccan territory), and of their participation with other migrants in the attempt to scale the barriers surrounding the Beni-Enzar border crossing on 13 August 2014, with the aim of entering Spanish territory; they had provided video images which appeared credible;

– the Government did not deny the existence of summary expulsions; shortly after the events in question it had even amended the Institutional Act on the rights and freedoms of foreign nationals, with a view to legalising these "on-the-spot expulsions". In any event, they could not rely on the fact the applicants had not been identified when they were themselves responsible for that circumstance.

(β) *Absence of loss* – The fact that the applicants had subsequently succeeded in entering Spanish territory by other means could not divest them of their status of victims of the Convention violations alleged in this application, as those allegations had not been the subject of any examination in the course of the subsequent proceedings.

Conclusion: preliminary objection dismissed (unanimously).

(ii) *Exhaustion of domestic remedies* (Article 35): It was immaterial that the applicants had not lodged judicial appeals against the deportation orders issued against them after their second entry into Spain. These orders had been issued subsequent to the facts complained of this present application, which concerned only the collective expulsion following the events of 13 August 2014.

Conclusion: preliminary objection dismissed (unanimously).

(c) *Merits* – Article 4 of Protocol No. 4: The question of the applicability of this provision was joined to the merits.

(i) "*Expulsion*" – It was not necessary at this point to establish whether the applicants had been deported after having entered Spanish territory or whether they had been turned back before they had been able to do so. Even interceptions on the high seas fell within the ambit of Article 4 of Protocol No. 4 (*Hirsi Jamaa and Others v. Italy* [GC], 27765/09, 23 February 2012, Information Note 149); logically, it could not be otherwise for a refusal to grant leave to enter the national territory to persons who arrived illegally by land. It was against their will that the applicants, who had been under the continuous and exclusive control of the Spanish authorities, had been sent back to Morocco.

(ii) *"Collective" nature* – The applicants had had imposed on them a general measure, consisting in containing and driving back the migrants' attempts to cross the border illegally. The removal measures were taken without any prior administrative or judicial decision. At no point were the applicants subjected to any identification procedure. In the absence of any examination of the applicants' individual situations, their deportation had to be considered collective in nature.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been a violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4.

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

(See also the Guide on Article 4 of Protocol No. 4 and the Factsheet Collective expulsions of aliens)

OTHER JURISDICTIONS

Court of Justice of the European Union (CJEU)

Law imposing minimum physical height requirement on all candidates for admission to police college entrance exam

Ypourgos Esoterikon and Ypourgos Ethnikis paideias kai Thriskevmaton v. Maria-Eleni Kalliri, C-409/16, judgment 18.10.2017 (CJEU First Chamber)

A competition notice for entry to the Greek police college for the academic year 2007/08 incorporated a provision of Greek law stipulating that all candidates, irrespective of their gender, had to be at least 170 cm in height. The Supreme Administrative Court, in the context of an appeal lodged by a female candidate who did not meet the height requirement against the decision refusing to allow her to take part in the competition, sought a preliminary ruling from the CJEU as to whether EU law precluded national legislation laying down the same minimum physical requirement for both male and female candidates in the competition for entry to the police college.

In its judgment the CJEU observed that the national legislation treated persons wishing to participate in the competition for entry to the police college identically, irrespective of their gender. According to the CJEU's settled case-law, indirect discrimination arose where a national measure, albeit formulated in neutral terms, worked to the disadvantage of far more women than men. In the instant case the national court had found that a much larger number of women than men were less than 170 cm in height, such that, by the application of that law, women were very clearly at a disadvantage compared with men as regards admission to the competition. It followed that the law at issue in the main proceedings gave rise to indirect discrimination.

Nevertheless, under the second indent of Article 2(2) of Directive 76/207[5], such a law did not constitute indirect discrimination prohibited by that directive if it was objectively justified by a legitimate aim and if the means of achieving that aim were appropriate and necessary.

While it was true that the exercise of police functions involving the protection of persons and goods, the arrest and custody of offenders and the conduct of crime-prevention patrols might call for the use of physical force requiring a particular physical aptitude, the fact remained that certain police functions, such as providing assistance to citizens

5. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002.

or traffic control, did not clearly require the use of significant physical force.

Furthermore, even if all the functions carried out by the Greek police required a particular physical aptitude, it did not appear that such an aptitude was necessarily connected with being of a certain minimum height and that shorter persons naturally lacked that aptitude.

In that context, account could be taken of the fact that until 2003 Greek law had required, for the purposes of admission to the competition for entry to the police college, different minimum heights for men and for women, since the minimum height for the latter had been fixed at 165 cm, compared with 170 cm for men. Different minimum heights were also required by the Greek armed forces, the port police and the coastguard service.

In any event, the aim pursued by the law could be achieved by measures that were less disadvantageous to women, such as pre-selection of candidates to the competition for entry into the police college on the basis of specific tests allowing their physical ability to be assessed.

It followed that, subject to the assessments that it was for the national court to carry out, the law in question did not appear to be either appropriate or necessary to achieve the legitimate objective that it pursued.

Responsibility under Dublin III Regulation for dealing with request for international protection where applicant is not transferred to EU Member State initially responsible within six-month time-limit

Majid Shiri, C-201/16, judgment 25.10.2017 (CJEU Grand Chamber)

An Iranian national challenged before the Austrian courts the refusal of his application for international protection in Austria and his transfer to Bulgaria. The latter State, via which he had entered the European Union and where he had also lodged a similar application, had previously agreed to take him back. The Iranian national argued that, under Dublin III Regulation 6, Austria had become responsible for examining his application, as he had not been transferred to Bulgaria within the six-month time-limit after the Bulgarian authorities' agreement to take him back.

The Austrian Upper Administrative Court asked the CJEU: (i) whether under the Dublin III Regulation the expiry of the six-month time-limit in question was in itself sufficient to entail this transfer of responsibility between the Member States; and (ii) whether a person seeking international protection could, in the context of an appeal against a transfer decision against him or her, rely on the expiry of the six-month transfer period as defined in Article 29 (1) and (2) of this Regulation.

With regard to the first question, the CJEU pointed out that Article 29 (2) of the Dublin III Regulation was to be interpreted as meaning that, if the transfer was not carried out within the six-month time-limit as defined in Article 29 (1) and (2) of this Regulation, responsibility was transferred automatically to the requesting Member State, without it being necessary for the member State responsible to refuse to take charge of or to take back the person concerned. Such an interpretation was, moreover, consistent with the objective of rapid processing of applications for international protection, in so far as it ensured, in the event of a delay in the "take charge" or "take back" procedure, that the examination of the application for international protection was carried out in the Member State where the applicant was present, so as not to delay that examination further.

As to the second question, the CJEU noted that the time-limits set out in Article 29 of the Dublin III Regulation were intended to provide a framework not only for the adoption but also for the implementation of the transfer decision and that, in consequence, those periods could expire after the transfer decision had been adopted. However, the competent authorities of the requesting Member State could not, in such a situation, carry out the transfer of the person concerned to another Member State and were, on the contrary, required to take, of their own initiative, the measures necessary to acknowledge the responsibility of the first Member State and to initiate without delay the examination of the application for international protection lodged by that person.

6. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

That said, regard being had to the objectives of guaranteeing effective protection of the persons concerned and of determining rapidly the member State responsible for processing an application for international protection, in the interests both of applicants for such protection and of the proper general functioning of the system established by the Dublin III Regulation, the applicant had to have available an effective and rapid remedy, enabling him or her to rely on the expiry of the six-month time-limit that occurred after the transfer decision had been adopted.

In the present case, the right which Austrian legislation accorded to an applicant for international protection to plead circumstances subsequent to the adoption of the decision to transfer him, in an action brought against that decision, had met that obligation.

Inter-American Court of Human Rights (IACtHR)

State obligations with respect to personnel under military training

Case of Ortiz Hernández et al. v. Venezuela, Series C No. 338, judgment 22.8.2017

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

Facts – On 15 February 1998 Mr Johan Alexis Ortiz Hernández, a 19-year-old cadet, passed away in a public hospital after receiving bullet wounds during an exercise at a military facility where he was training to become a member of the National Guard. The circumstances in which the incident occurred remain unclear. An investigation into his death was opened in the military jurisdiction but did not advance beyond the intermediate stage of the proceedings. Mr Ortiz Hernández's father submitted an application for *amparo* (constitutional recourse) seeking an order for the investigation to be transferred to the ordinary jurisdiction. The Constitutional Chamber of the Supreme Court of Justice admitted the *amparo* and annulled the proceedings in the military jurisdiction, except for the evidence that could not be reproduced. The case was deferred to the Office of the Prosecutor, which ordered a new investigation in 2003. At the time the Inter-American Court rendered its judgment, the facts had not been clarified and no one had been held accountable. Mr Ortiz Hernández's parents suffered threats and harassment due to their efforts to pursue justice. At the public hearing before the Inter-American Court, the State made a partial acknowledgement of its international responsibility.

Law

(a) *Articles 4(1) (right to life) and 5(1) (right to personal integrity) of the American Convention on Human Rights (ACHR), in conjunction with Article 1(1) (obligation to respect and ensure rights without discrimination)* – The Inter-American Court highlighted the fact that Mr Ortiz Hernández was in a situation of subjection with regard to the State as he was a cadet at the military academy. In this regard, the Court held that even though military activity carries an inherent risk because of the nature of the specific functions, the State is obliged to protect the life and personal integrity of the members of the armed forces in all aspects of military life, including military training and in maintaining military discipline. Accordingly, the State is obliged to undertake preventive measures to minimise the risk faced by members of the armed forces during military life.

The Inter-American Court further observed that even though it could be legitimate to recreate conditions similar to those likely to be faced during military missions, so that military training was as realistic as possible, such conditions must not create excessive risks to the life and integrity of the personnel. States were free to regulate and determine the appropriate form the training should take, provided it remained within those limits.

The Inter-American Court conducted a threefold assessment of the State´s responsibility. Firstly, it analysed the regulation and execution of the training exercise, with particular reference to the use of live ammunition. The second aspect concerned non-compliance with security measures designed to protect the life and personal integrity of the cadets, including foresight and access to adequate and timely medical treatment. Finally, the Court examined the arbitrary character of the death and the plausibility of the hypotheses that indicated that it was not simply due to a failure to adopt the necessary security and preventive measures for handling firearms, but may have been caused by a weapon fired at close range and may have been an intentional homicide. As a result, the Court found the State responsible for the violation of Articles 4(1) and 5(1) of the ACHR, in relation to Article 1(1) thereof.

Conclusion: violation in respect of Mr Ortiz Hernández (unanimously).

(b) *Articles 8(1) (right to a fair trial) and 25(1) (right to judicial protection), in relation to Articles 1(1) (obligation to respect and ensure rights) and 2 (domestic legal effects) of the ACHR* – The Inter-American Court recalled its jurisprudence regarding the limits of military jurisdictions to examine facts constituting human-rights violations. It noted that the case did not relate to facts and criminal offences connected to military discipline and activity so the investigation should have been conducted under the ordinary jurisdiction. Furthermore, it found that during the investigation the State had omitted to take certain essential measures that were required to determine the circumstances in which the death had occurred, such as preserving the crime scene and ensuring the inviolability of the chain of custody of the evidence. Nor had the State taken appropriate action to find the accused, who was in contempt of court. In this regard, the investigation had not satisfied the requirements of due diligence. The State was thus responsible for the violation of Articles 8(1) and 25(1) of the ACHR, in relation to Articles 1(1) and 2 thereof, to the detriment of Mr Ortiz Hernández's parents.

Conclusion: violation in respect of Mr Ortiz Hernández's parents (unanimously).

(c) *Reparations: The Inter-American Court established that the judgment constituted per se a form of reparation and ordered that the State* – (i) continue and conduct, with due diligence and in a reasonable time, the ongoing investigation and criminal proceedings and open an effective investigation if deemed necessary; (ii) determine, through the competent public institutions, the responsibility of the public officials who had contributed to the procedural delays and the denial of justice; (iii) take all action required to guarantee the security of Mr Ortiz Hernández's parents in their pursuit of justice; (iv) provide free, immediate, adequate and effective psychological and/or psychiatric treatment to those victims who requested it; (v) publish and broadcast the judgment and its official summary; (vi) perform an act acknowledging the State's international responsibility; (vii) designate one year's class of graduates of the military academy with the name Johan Alexis Ortiz Hernández; (viii) expressly indicate the type of ammunition to be used in all military training, according to their nature and purpose, and strictly justify the need to use live ammunition in a specific exercise; and (ix) pay compensation in respect of pecuniary and non-pecuniary damage, as well as costs and expenses.

COURT NEWS

Elections

During its Autumn Session held from 9 to 13 October 2017, the Parliamentary Assembly of the Council of Europe elected Lado Chanturia judge of the Court in respect of Georgia. His nine-year term in office will commence no later than three months after his election.

Information material

A large number of information documents and videos about the Court and its case-law have been translated into the official languages of the Council of Europe member States. Alongside these languages, Arabic, Chinese and Japanese versions have also been produced to ensure wider dissemination of the Court's work and a greater understanding of how it functions.

The documents are accessible via the Court's Internet site (www.echr.coe.int) and the videos can be viewed on its YouTube channel (https://www.youtube.com/user/EuropeanCourt)

RECENT PUBLICATIONS

Case-Law Guides

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 8 of the Convention (right to respect for private and family life). Translation into French is pending.

Updates in English and French of the following guides have also just been published:

Guide on Article 4 of the Convention (prohibition of slavery and forced labour);

Guide on Article 6 (civil limb) of the Convention (right to a fair trial); and

Guide on Article 4 of Protocol No. 7 (right not to be tried or punished twice).

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

Case-Law Guides and Research Reports: new translations

The Court has recently published on its Internet site (www.echr.coe.int – Case-law) a Ukrainian translation of the Guide on Article 15 of the Convention (derogation in time of emergency) and a Lithuanian translation of the Research Report on freedom of religion.

Europos Žmogaus Teisių Teismo praktikos religijos laisvės tema apžvalga (lit)

Керівництво зі статті 15 Конвенції – Відступ від зобов'язань під час надзвичайної ситуації (ukr)

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

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

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

ENG

www.echr.coe.int

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

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE