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TABLE OF CONTENTS

ARTICLE 8

Respect for private and family life

Failure to hear child's views during protracted custody proceedings: *violation*

Respect for private life

Prohibition of embryo donation for scientific research stemming from an *in vitro* fertilization: *no violation*

Publication of information about prior employment as driver with former security services: *violation*

Respect for correspondence

Large-scale seizure of computer files from lawyers' office: *no violation*

Expulsion

Proposed removal of a mentally ill person who had lived and worked in the host country for more than twenty years: *case referred to the Grand Chamber*

ARTICLE 10

Freedom of expression

Lengthy criminal proceedings against journalist at risk of custodial sentence for publishing article allegedly denigrating armed forces: *violation*

Dismissal of municipal worker for accusing deputy mayor of "perversion of justice": *no violation*

ARTICLE 13

Effective remedy

Lack of suspensive effect of remedy for collective expulsions: *violation*

ARTICLE 34

Victim

Interference with journalist's freedom of expression by lengthy criminal proceedings that were ultimately discontinued: *victim status upheld*

ARTICLE 3

Degrading treatment

Alleged administration of slaps by police officers during police interview: *violation*

Bouyid v. Belgium - 23380/09
Judgment 28.9.2015 [GC]

Facts – The applicants, two brothers, one of whom was a minor at the material time, were questioned separately by the police concerning unrelated incidents. They each alleged that they had been slapped in the face once by police officers. They lodged complaints and applied to intervene as civil parties, but their suits were unsuccessful.

By judgment of 21 November 2013 (see Information Note 168), a Chamber of the Court held unanimously that there had been no violation of Article 3.

Law – Article 3 (*substantive aspect*)

(a) *Establishment of the facts* – In order to benefit from presumptions of fact, individuals claiming to be victims of a violation of Article 3 of the Convention must demonstrate that they display marks of ill-treatment inflicted when they were under the control of the police or a similar authority.

The medical certificates provided by the applicants, which had been drawn up on the day in question shortly after the applicants' departure from the police station, mention erythema and bruising which could have been caused by slaps to the face. Furthermore, it was not disputed that the applicants had not displayed such marks when they had entered the police station.

Finally, while the police officers in question had, throughout the domestic proceedings, consistently denied having slapped the applicants, the latter had equally consistently stated the opposite. Moreover, given the major shortcomings in the criminal investigation conducted, the truthfulness of the police officers' statements cannot be inferred solely from the fact that the investigation failed to provide information to the contrary. Nor is there any evidence to corroborate the theory put forward by the Government at the hearing (but not before the national courts) that the applicants might have slapped themselves in order to create a case against the police.

The Court therefore deemed it sufficiently established that the bruising described in the certificates provided by the applicants had been caused while they were under the control of the officers in the police station.

(b) *Classification of the treatment inflicted on the applicants* – The Government simply denied that any slaps had ever been administered. It appeared from the case file that each slap had been an impulsive act in response to an attitude perceived as disrespectful, which was certainly insufficient to establish the necessity of using such physical force. Consequently, the applicants' dignity had been undermined and there had therefore been a violation of Article 3 of the Convention.

The Court emphasised that the administration of a slap by a police officer to a person who is completely under his control constitutes a serious attack on the latter's dignity.

A slap to the face has a considerable impact on the person receiving it, because it affects the part of the person's body which expresses his individuality, manifests his social identity and constitutes the centre of his senses – sight, speech and hearing – which are used for communication with others.

Given that it may well suffice that the victim is humiliated in his own eyes for there to have been degrading treatment within the meaning of Article 3, a slap – even if it is isolated, not premeditated and devoid of any serious or lasting effect on the person receiving it – may be perceived as a humiliation by the person receiving it.

When the slap is administered by police officers to individuals who are under their control, it highlights the superiority/inferiority relationship. The fact that the victims know that such an act is unlawful, constitutes a breach of moral and professional ethics by the officers and is unacceptable, may furthermore arouse in them a feeling of arbitrary treatment, injustice and powerlessness.

Moreover, persons who are held in police custody or are even simply taken or summoned to a police station for an identity check or questioning – as in the applicants' case – and more broadly all persons under the control of the police or a similar authority, are in a situation of vulnerability. The authorities who are under a duty to protect them flout this duty by inflicting the humiliation of a slap.

The fact that the slap may have been administered thoughtlessly by an officer who was exasperated by the victim's disrespectful or provocative conduct was irrelevant. The Grand Chamber therefore departed from the Chamber's approach on this point. The Convention prohibits in absolute terms torture and inhuman or degrading treatment or

punishment, irrespective of the conduct of the person concerned. In a democratic society ill-treatment is never an appropriate response to problems facing the authorities. The police, specifically, must "not inflict, instigate or tolerate any act of torture or inhuman or degrading treatment or punishment under any circumstances" (European Code of Police Ethics). Furthermore, Article 3 of the Convention imposes a positive obligation on the State to train its law-enforcement officials in such a manner as to ensure their high level of competence in their professional conduct so that no one is subjected to torture or treatment that runs counter to that provision.

Lastly, the first applicant had been a minor at the material time. It is vital for law-enforcement officers who are in contact with minors in the exercise of their duties to take due account of the vulnerability inherent in their young age. Police behaviour towards minors may be incompatible with the requirements of Article 3 of the Convention simply because they are minors, whereas it might be deemed acceptable in the case of adults. Therefore, law-enforcement officers must show greater vigilance and self-control when dealing with minors.

In conclusion, the slap administered to each of the applicants by the police officers while they were under their control in the police station did not correspond to recourse to physical force that had been made strictly necessary by their conduct, and had thus diminished their dignity.

Given that the applicants referred only to minor bodily injuries and had not demonstrated that they had undergone serious physical or mental suffering, the treatment in question could not be described as inhuman or, *a fortiori*, torture. The Court therefore found that the present case involved degrading treatment.

Conclusion: violation (fourteen votes to three).

Article 3 (*procedural aspect*): The investigating authorities had failed to devote the requisite attention to the applicants' allegations, despite their being substantiated by the medical certificates which they had submitted for inclusion in the case file, or to the nature of the act, involving a law-enforcement officer slapping an individual who was completely under his control. Furthermore, the Court notes the unusual length of the investigation. Almost five years elapsed between the first applicant's complaint and the Court of Cassation judgment marking the close of the proceedings, and a period of over four years and eight months had elapsed in the second applicant's case. Therefore, the applicants had not benefited from an effective investigation.

Conclusion: violation (unanimously).

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

Conditions of detention – overcrowding, inadequate living and sanitary facilities, insufficient and substandard food: *violation*

Shishanov v. the Republic of Moldova - 11353/06
Judgment 15.9.2015 [Section III]

(See Article 46 below, page 23)

Effective investigation

Failure to promptly investigate allegations of domestic violence against a minor: *violation*

M. and M. v. Croatia - 10161/13
Judgment 3.9.2015 [Section I]

(See Article 8 below, page 13)

Expulsion

Proposed deportation of young Somali woman to Mogadishu (Somalia): *deportation would not constitute a violation*

R.H. v. Sweden - 4601/14
Judgment 10.9.2015 [Section V]

Facts – In 2011 the applicant, a young Somali woman from Mogadishu, sought asylum in Sweden having stayed there illegally for four years after arriving from Italy via the Netherlands. At an interview in January 2013 the applicant stated, for the first time, that she had fled Somalia with her boyfriend after being forcibly married to an older man and subsequently beaten and thrown off a truck by her uncles when the relationship with her boyfriend was discovered. Her boyfriend and parents had since died and she claimed that if she was returned to Somalia she would have to go back to the man she had been forced to marry and risked being killed by her uncles. Since she lacked a male support network in Somalia she was also at risk of sexual assault and of becoming a social outcast. The Migration Board rejected her asylum application

in June 2013 and ordered her deportation to Somalia after finding that her statements lacked credibility. It noted that she had stayed in Sweden illegally for four years before contacting the immigration authorities and had previously lodged asylum applications in Italy and the Netherlands. In addition, she had initially claimed she had left Somalia because of the war before changing her story to allege that she had fled to escape a forced marriage and risked ill-treatment by her family on her return. The applicant subsequently submitted a petition to have the enforcement of her deportation order stopped, claiming that her uncles had joined the jihadist terrorist group al-Shabaab, forcing her brother to also join the group and killing her sister. The Migration Board rejected her petition in September 2013.

Law – Article 3: In the Court's view, it was clear that, if deported from Sweden, the applicant would be sent to Mogadishu and there was no risk that she would have to transit through or end up in other parts of Somalia. The Court had concluded in *K.A.B. v. Sweden* that the general situation in Mogadishu at that time (September 2013) was not such that returns to that city would breach Article 3. While it was clear that the general security situation there remained serious and fragile, the available sources did not indicate a deterioration since September 2013.

However, unlike the applicant in *K.A.B. v. Sweden* (a male born in 1960), the applicant in the instant case was a young woman who had been living abroad for almost ten years after leaving Somalia at the age of 17. Various reports attested to the difficult situation of women in Somalia, including in Mogadishu. Women and girls had been identified as a particular risk group and there were several concordant reports of serious and widespread sexual and gender-based violence in the country. From these materials it could be concluded that a single woman returning to Mogadishu without access to protection from a male network would face a real risk of living in conditions constituting inhuman or degrading treatment under Article 3.

However, while not overlooking the difficult situation of women in Somalia, including Mogadishu, the Court could not find on the particular facts of the applicant's case that she would face a real risk of treatment contrary to Article 3 if returned to that city. There had been significant inconsistencies in her submissions and the claims concerning her personal experiences and the dangers she faced upon a return had not been plausible. There was no basis for finding that she would return to Mogadishu as a lone woman with the risks that such a situation entailed. Instead, she had to be considered to have access to both family support and a male protection network. Nor had it been shown that she would have to resort to living in a camp for refugees and displaced persons. Accordingly, her deportation to Mogadishu would not involve a violation of Article 3.

Conclusion: deportation would not constitute a violation (five votes to two).

(See *K.A.B. v. Sweden* [GC], 886/11, 5 September 2013, Information Note 166)

ARTICLE 6

Article 6 § 1 (criminal)

Fair hearing

Alleged lack of adequate procedural safeguards to enable accused to understand reasons for jury's guilty verdict in assize court: *case referred to the Grand Chamber*

Lhermitte v. Belgium - 34238/09
Judgment 26.5.2015 [Section II]

In 2008 the applicant was charged with the murder of her five children and tried by an assize court. She did not deny the offence but argued that she had been incapable of controlling her actions. Answering five questions put to it, a jury found the applicant guilty and the assize court, composed of three judges and the jury, sentenced her to life imprisonment. The Court of Cassation dismissed an appeal on points of law by the applicant.

The applicant complained before the Court that no reasons had been given for the jury's guilty verdict and the judgment sentencing her.

In a judgment of 26 May 2015 (see Information Note 185) a Chamber of the Court held that there had been no violation of Article 6 § 1 of the Convention, finding in particular that the combination of the questions to the jury, the assize court's sentencing judgment and the subsequent judgment of the Court of Cassation could have enabled the applicant to understand the reasons for her conviction.

On 14 September 2015 the case was referred to the Grand Chamber at the applicant's request.

Article 6 § 1 (administrative)

Access to court

Allegedly insufficient review by the domestic courts of appointment to court presidency: *no violation*

Tsanova-Gecheva v. Bulgaria - 43800/12
Judgment 15.9.2015 [Section IV]

Facts – The applicant is a judge at the Sofia City Court, of which she was Vice-President and then President *ad interim*. When the post of President was advertised she applied, but the Supreme Judicial Council appointed a different candidate. The candidature and appointment of the other candidate received widespread media coverage and were vehemently criticised by numerous journalists and public figures, as the woman in question had been portrayed as a close friend of the then Minister of the Interior. The applicant appealed against the decision of the Supreme Judicial Council to the Supreme Administrative Court. The latter, ruling as a bench of three judges, found in her favour, but solely on the grounds that the vote had taken place by secret ballot. A five-judge bench of the Supreme Administrative Court quashed that judgment, taking the view that the decision of the bench of three judges had not been based on the applicable law. It gave a ruling on the merits and dismissed the applicant's appeal against the Supreme Judicial Council's decision.

In the Strasbourg proceedings the applicant complained that the scope of the judicial review conducted by the Supreme Administrative Court had been insufficient.

Law – Article 6 § 1

(a) *Applicability of Article 6* – Neither Article 6 nor any other provision of the Convention or its Protocols guaranteed a right to be promoted or to hold public office. However, the Court had previously accepted, in circumstances similar to those of the present case, that the right to a lawful and fair recruitment or promotion procedure and the right to equal access to employment and to public office could be regarded as rights that were recognised, at least on arguable grounds, under domestic law, in so far as the domestic courts had acknowledged their existence and had examined the grounds raised by the persons concerned in that regard. That was the situation in the present case.

(b) *Scope of the judicial review and alleged lack of reasons for the judgments of the Supreme Administrative Court* – The European Court's task consisted solely in verifying whether the applicant had had access to a court satisfying the requirements of Article 6 and, more specifically, whether the scope of the judicial review conducted by the Supreme Administrative Court had been sufficient.

The Supreme Administrative Court had been entitled to set aside the decision on several grounds of unlawfulness linked to the procedural and substantive requirements laid down by law, and to refer the case back to the Supreme Judicial Council for a fresh decision in conformity with possible directions issued by the Supreme Administrative Court regarding any irregularities found. However, it had not been empowered to review all aspects of the Supreme Judicial Council's decision. In particular it could not, except where there had been an abuse of powers, call into question the choice made by the Supreme Judicial Council as to who had been the best candidate for the post, and could not substitute its own assessment for that of the Supreme Judicial Council.

Nevertheless, it was not the role of Article 6 to guarantee access to a court that could substitute its opinion for that of the administrative authorities. In that regard particular emphasis had to be placed on the respect to be accorded to decisions taken by the administrative authorities on grounds of expediency and which often involved specialised areas of the law. In the present case, although the domestic case-law conferred quite broad discretion on the Supreme Judicial Council when it came to assessing candidates' qualities and choosing the person best qualified for the post, the Supreme Administrative Court had in fact reviewed whether that choice had involved an abuse of powers, that is, whether it had been made in breach of the purpose of the law. The court had also reviewed compliance with the conditions expressly laid down by the law.

With regard first of all to the nature of the decision in question, it had concerned the appointment of the President of a court. That issue unquestionably entailed the exercise of the discretion enjoyed by the Supreme Judicial Council, the authority specifically mandated to ensure the autonomous operation of the judiciary, particularly with regard to appointments and the disciplinary rules governing members of the judiciary, with the aim of ensuring judicial independence. With that aim in mind the legislature had granted the Supreme Judicial Council wide powers of discretion. In the light of these considerations, it was all the more important for the decision of the Supreme Judicial Council to be accorded the respect normally due to decisions

taken by the administrative authorities on grounds of expediency.

Furthermore, the Supreme Judicial Council's decision had been taken following a selection procedure that contained a number of procedural safeguards. The law and the internal regulations of the Supreme Judicial Council laid down detailed rules on the conduct of the procedure, with the aim of guaranteeing a transparent and fair selection process based on candidates' professional qualities. These included rules designed to ensure that the process was conducted publicly, such as the requirement to publish the vacancy notice, the list of candidates and the transcript of the Supreme Judicial Council's deliberations, as well as rules on the conduct of the vote. Candidates had to be assessed by the proposals and evaluation committee, and could apprise themselves of the findings of that committee and raise objections. They were given an interview by the Supreme Judicial Council, in the course of which they could present their application and reply to members' questions. The Supreme Administrative Court had reviewed compliance with these rules, of its own motion and in response to the parties' submissions. More generally, it had responded to the main arguments raised by the applicant, who, moreover, had not made any submissions concerning the alleged links between the other candidate and the then Minister of the Interior or the Minister's possible interference in the appointment procedure. The Supreme Administrative Court had also confirmed that the reasons given by the Supreme Judicial Council in that regard had been sufficient.

It was true that the allegations regarding the lack of transparency and interference by the political authorities in the appointment procedure in question, and the criticisms made in that regard by the competent international bodies, were a cause for concern. However, while the Court was mindful of the importance of the procedures for appointing and promoting judges and their impact on the independence and proper functioning of the judicial system, it was not its task to express a view on the appropriateness of the choice made by the Supreme Judicial Council or the criteria that should be taken into account.

In view of these considerations, the scope of the Supreme Administrative Court's review had been sufficient for the purposes of Article 6 of the Convention.

Conclusion: no violation (unanimously).

Article 6 § 1 (constitutional)

Access to court

Refusal by the *Cour de cassation* to refer questions to the Constitutional Council for a preliminary ruling: *inadmissible*

Renard and Others v. France - 3569/12
Decision 25.8.2015 [Section V]

Facts – In the course of proceedings to which they were parties, the applicants raised preliminary questions of constitutionality, which the Court of Cassation refused to refer to the Constitutional Council.

Law – Article 6 § 1: The issue at stake in the present case was whether the guarantees of a fair trial applied to the examination of a preliminary question of constitutionality by the ordinary courts, that is to say, the lower courts and the Court of Cassation as opposed to the Constitutional Council.

As the applicants had raised the preliminary questions of constitutionality in the ordinary courts in the course of proceedings relating either to civil rights and obligations or to criminal charges, Article 6 was applicable.

While the preliminary question procedure had allowed litigants, since the 2008 constitutional reform, to contest the constitutionality of a legislative provision in the course of proceedings before the ordinary courts, the Court of Cassation and the *Conseil d'*État were not required to refer the question to the Constitutional Council if they considered, for instance, that the question was not new and that it lacked serious merit. Domestic law granted them a degree of discretion when it came to regulating access to the Constitutional Council. As this discretion was not at odds with the Convention, the Court had to take it into consideration in conducting its review.

In the present case the Court of Cassation had given reasons for its decisions on the basis of the grounds set forth in the legislation for refusing to refer a preliminary question. Accordingly, the Court could discern no appearance of arbitrariness such as to undermine the fairness of the proceedings in question. There had therefore been no unjustified interference with the right of access to the Constitutional Council.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 7

Article 7 § 1

Retroactivity

Compulsory hospitalisation and additional measures ordered following a declaration of exemption from criminal responsibility not amounting to a "penalty": *Article 7 not applicable*

Berland v. France - 42875/10
Judgment 3.9.2015 [Section V]

Facts – In a judgment of February 2009 the Investigation Division of a court found that there was sufficient evidence that the applicant had "wilfully taken the life" of his former girlfriend and that he could not be held criminally responsible for his acts because he suffered from a psychiatric disorder that deprived him of his discernment and his ability to control his actions. The Investigation Division ordered his compulsory hospitalisation and barred him for twenty years from making contact with the civil parties and possessing or carrying a weapon. The Court of Cassation amended the wording of the judgment but dismissed an appeal on points of law lodged by the applicant.

In the Strasbourg proceedings the applicant complained of the retroactive application of the legislation providing for the measures ordered in his case.

Law – Article 7 § 1: The Court first had to determine whether the measures in question had been imposed following the applicant's conviction of an offence. The Investigation Division had delivered a judgment in which it found, firstly, that there was sufficient evidence that the applicant had committed the acts of which he was accused and, secondly, that he lacked criminal responsibility on account of a mental disorder that deprived him of his discernment and his ability to control his actions. The Investigation Division had been careful to specify that "... the finding that there is sufficient evidence that an individual committed the acts of which he is accused in no sense amounts to a conviction but rather establishes the existence of a state that may have legal consequences ...". Previously, the Constitutional Council had ruled that the "finding that there is sufficient evidence that an individual committed the acts of which he is accused" did not amount to an "assessment concerning the commission of those acts" and that the "decision to declare a person exempt from criminal responsibility on account of a mental disorder is not in the nature of a penalty". Furthermore, the discussions among the domestic courts regarding the Investigation Division's finding that there was "sufficient evidence that [the applicant had] committed the acts" had been resolved by the Court of Cassation, which considered that the word "wilfully" should be deleted from such a finding, so that the mental element normally required as one of the constituent elements of an offence could not be taken into consideration in cases where the person being prosecuted had lost his or her discernment. The advocate-general had argued that the state of being exempt from criminal responsibility barred the court from ruling on whether the acts constituted an "offence" under the law, adding that only the substantive element of the offence, "stripped of its punitive connotations", could be assessed in such a situation. In view of the foregoing considerations, the measures in question could not be regarded as having been ordered following the applicant's conviction of an "offence".

Furthermore, in France, the measures imposed on the applicant were not regarded as penalties to which the principle of non-retroactivity applied.

As to the nature and purpose of the applicant's compulsory hospitalisation, such a measure could only be ordered if a psychiatric expert assessment had established that the mental disorder from which the person declared exempt from criminal responsibility suffered "required treatment and compromised individuals' safety or seriously disrupted public order". Hence, the aim had been firstly to allow the applicant to receive treatment by placing him in a specialised hospital rather than in an ordinary prison, and secondly to prevent a repetition of his actions. Furthermore, the arrangements governing compulsory hospitalisation were the same as those concerning admission for psychiatric treatment following a decision by the representative of the State; in both cases, an application could be made to the courts at any time for the lifting of the measure. The courts then gave a decision based on the recommendations of a panel made up of two psychiatrists and a representative of the hospital team caring for the patient, and after obtaining two expert reports prepared by psychiatrists. Hence, compulsory hospitalisation, the duration of which was not determined in advance, served a preventive and curative purpose rather than a punitive one and did not constitute a penalty.

As to the other two security measures imposed on the applicant, namely the twenty-year bans on making contact with the civil parties and possessing

a weapon, the Court noted that these could be ordered only if they were necessary in order to prevent a repetition of the actions committed by the person declared exempt from criminal responsibility, to protect that person, the victim or the victim's family or to put an end to the disturbance of public order. They were ordered following a psychiatric assessment and must not stand in the way of the treatment being received by the person concerned. Furthermore, while these measures were of limited duration, it was open to the applicant to apply to the judge to have them lifted or varied. The judge gave a ruling on the basis of the findings of a psychiatric expert report. Accordingly, the ordering of the measures in question served a preventive purpose. Lastly, while the applicant risked incurring a penalty if he failed to comply with the measures complained of, a new set of proceedings had to be opened in such a case, and the penalty applied only to persons who were criminally responsible for their actions at the time of their failure to comply.

Consequently, the finding that the applicant was exempt from criminal responsibility and the accompanying security measures did not constitute a "penalty" within the meaning of Article 7 § 1 of the Convention and were to be regarded as preventive measures to which the principle of non-retroactivity under that Article did not apply. Article 7 § 1 of the Convention was therefore not applicable in the present case.

Conclusion: Article 7 § 1 not applicable (five votes to two).

The Court further held that there had been no violation of Article 7 § 1.

ARTICLE 8

Respect for private and family life

Failure to hear child's views during protracted custody proceedings: *violation*

M. and M. v. Croatia - 10161/13
Judgment 3.9.2015 [Section I]

Facts – In the Convention proceedings a mother (the second applicant) and her daughter born in 2001 (the first applicant) complained that the domestic authorities had failed to take steps to protect the first applicant from physical and psychological ill-treatment to which she had been subjected by her father. The father had had custody of the first applicant since 2007, when he and the second applicant had divorced. While in his custody the first applicant was allegedly subjected to frequent episodes of verbal abuse and threats of physical violence by the father. This culminated in an incident of 1 February 2011 when he allegedly hit her in the face and squeezed her throat while verbally abusing her. The following day the applicants reported the matter to the police and informed them of previous instances of verbal and physical abuse. Criminal proceedings were subsequently instituted against the father, but they were still pending at first instance at the time of the European Court's consideration of the case, more than four and a half years after they were initiated.

In parallel, the second applicant instituted civil proceedings against the father seeking custody of the first applicant. Her application for temporary custody was rejected in June 2011 after the domestic court found in reliance on the opinions of forensic experts and social workers that the first applicant was not under threat of further ill-treatment in her father's home. The main custody proceedings were still pending at the date of the European Court's judgment. The first applicant, who had expressed a strong wish to live with her mother and had started experiencing behavioural problems including self-injuring, continued to live with her father against her wishes.

Law

Article 3: In view of the applicant's young age, the acts of domestic violence she had allegedly been exposed to at the hands of her father could be regarded as degrading treatment within the meaning of Article 3. The applicants reported the event of 1 February 2011 to the police authorities the next day and the first applicant's alleged injuries were medically documented. That evidence was in the Court's view sufficient to render the applicants' complaint before the domestic authorities arguable and consequently to trigger both the State's procedural obligation to investigate her allegations and its positive obligation to protect her from further violence.

(a) *Procedural obligations* – As regards the need obligation to investigate, the domestic authorities decided to prosecute only what appeared to be the most serious in a series of violent acts against the first applicant rather than charging her father with one or more offences capable of covering all the instances of alleged ill-treatment, which would have enabled the authorities to address the situation in its entirety. Moreover, the criminal proceedings against the father had lasted for almost four and a half years by the time of the Court's judgment, with substantial delays attributable to the domestic

authorities. As a result, the investigation had not fulfilled the requirements of promptness and reasonable expedition inherent in the notion of effectiveness.

Conclusion: violation (five votes to two).

(b) *Obligation to protect* – The applicants further complained that after the incident of 1 February 2011 the domestic authorities left the first applicant in her father's custody thereby violating their positive obligation to prevent the recurrence of domestic violence against her. However, the Court found that during the period in question the national authorities had taken reasonable steps to assess and weigh the risk of possible further ill-treatment. Notably, the first applicant's situation had been closely monitored by the social authorities through child protection measures which were in place between September 2011 and March 2014. Furthermore, both the recommendation by the local social welfare centre and the combined opinion of the forensic experts had found that the first applicant was not at risk of ill-treatment in her father's home. The court decision in June 2011 to refuse the mother temporary custody of her daughter was based on the relevant social welfare centre's recommendation and other evidence and on the fact that the criminal proceedings against the father were still pending. It had thus been taken after careful consideration of all relevant materials.

Conclusion: no violation (unanimously).

Given the above finding under Article 3 as regards the first applicant, the Court further held that there had been no violation of Article 8 in respect of the second applicant and the State's duty to protect her daughter from ill-treatment.

Article 8: The Court considered that the applicants' complaints that the domestic authorities had ignored the first applicant's wish to live with her mother and that she had not been heard in the custody proceedings raised issues regarding their right to respect for private and family life distinct from those analysed in the context of Article 3 and thus required separate examination.

By itself the fact that the custody proceedings had thus far lasted for over four years and three months sufficed to conclude that the respondent State had failed to discharge its positive obligations under Article 8 of the Convention. In addition, even greater diligence had been called for in the present case because it concerned a traumatised child who, if for no other reason than her parents' conflictual relationship, had suffered great mental anguish which had culminated in self-injuring behaviour. However, it would appear that the domestic courts failed to recognise the seriousness and urgency of the situation and that the protracted character of the proceedings only served to exacerbate the first applicant's plight. The Court was particularly struck by the fact that after four years and three months the first applicant had not yet been heard in the proceedings and had thus not been given a chance to express her views regarding with which parent she wanted to live. Bearing in mind Article 12 of the Convention on the Rights of the Child, in any judicial or administrative proceedings affecting children's rights under Article 8 of the European Convention it could not be said that children capable of forming their own views were sufficiently involved in the decision-making process if they were not provided with the opportunity to be heard and thus to express their views. It would be difficult to argue that, given the first applicant's age and maturity, she was not capable of forming her own views and expressing them freely.

In the present case the forensic experts had established firstly that both parents were equally (un)fit to take care of the first applicant and, secondly, that she wanted to live with her mother. Both parents lived in the same town and the reversal of the custody order would not therefore have entailed her having to change school or otherwise being removed from her habitual social environment. Accordingly, not respecting the first applicant's wishes as regards which parent she wished to live with had, in the specific circumstances of the case, breached her right to respect for private and family life. In addition, the protracted character of the custody proceedings had also violated the second applicant's Article 8 rights.

Conclusion: violations (unanimously).

Article 41: EUR 19,500 to the first applicant and EUR 2,500 to the second applicant in respect of non-pecuniary damage.

Respect for private life

Prohibition of embryo donation for scientific research stemming from an *in vitro* fertilization: *no violation*

Parrillo v. Italy - 46470/11
Judgment 27.8.2015 [GC]

Facts – In 2002 the applicant had recourse to assisted reproduction techniques, undergoing *in vitro* fertilisation (IVF) treatment with her partner at a centre for reproductive medicine ("the centre"). The five embryos obtained from the IVF treatment were placed in cryopreservation, but the applicant's

partner died before the embryos could be implanted. After deciding not to have the embryos implanted, the applicant sought to donate them to scientific research and thus contribute to promoting advances in treatment for diseases that are difficult to cure.

To this end the applicant made a number of unsuccessful verbal requests for release of the embryos at the centre where they were being stored. In a letter of 14 December 2011 the applicant asked the director of the centre to release the five cryopreserved embryos so that they could be used for stem-cell research. The director refused to comply with her request on the grounds that this type of research was banned and punishable as a criminal offence in Italy under section 13 of Law no. 40 of 19 February 2004 ("the Law").

The embryos in question are currently stored in the centre's cryogenic storage bank.

Law – Article 8 of the Convention

(a) *Applicability* – The Court was called upon for the first time to rule on the question whether the right to respect for private life guaranteed by Article 8 of the Convention could encompass the right invoked before it by the applicant to make use of embryos obtained from *in vitro* fertilisation for the purposes of donating them to scientific research.

The subject matter of the case concerned the restriction of the right asserted by the applicant to decide the fate of her embryos, a right which at the very most related to "private life". In the cases examined by the Court that had raised the particular question of the fate of embryos obtained from assisted reproduction, the Court had had regard to the parties' freedom of choice. The Italian legal system also attached importance to the freedom of choice of parties to IVF regarding the fate of embryos not destined for implantation.

In the instant case the Court also had to have regard to the link existing between the person who had undergone IVF and the embryos thus conceived, and which was due to the fact that the embryos contained the genetic material of the person in question and accordingly represented a constituent part of that person's genetic material and biological identity.

Accordingly, the applicant's ability to exercise a conscious and considered choice regarding the fate of her embryos concerned an intimate aspect of her personal life and accordingly related to her right to self-determination. Article 8 of the Convention, from the standpoint of the right to respect for private life, was therefore applicable in the present case.

(b) *Merits* – The ban on donating to scientific research embryos obtained from an *in vitro* fertilisation and not destined for implantation constituted an interference with the applicant's right to respect for her private life. At the time when the applicant had had recourse to IVF there had been no legal provisions regulating the donation of non-implanted embryos obtained by that technique. Consequently, before the Law came into force the applicant had not in any way been prevented from donating her embryos to scientific research.

The Court acknowledged that the "protection of the embryo's potential for life" could be linked to the aim of protecting morals and the rights and freedoms of others. However, this did not involve any assessment by the Court as to whether the word "others" extended to human embryos, in the terms in which this concept was meant by the Government, namely, according to which, in the Italian legal system, the human embryo was considered as a subject of law entitled to the respect due to human dignity.

Whilst the right invoked by the applicant to donate embryos to scientific research was important, it was not one of the core rights attracting the protection of Article 8 of the Convention as it did not concern a particularly important aspect of the applicant's existence and identity. Consequently, and having regard to the principles established in its case-law, the Court considered that the respondent State should be afforded a wide margin of appreciation in the present case.

Furthermore, the question of the donation of embryos not destined for implantation clearly raised "delicate moral and ethical questions". There was no European consensus on the subject, with some States permitting human embryonic cell lines, others expressly prohibiting it and others permitting this type of research only under certain strict conditions, requiring for example that the purpose be to protect the embryo's health or that the research use cells imported from abroad.

The international instruments confirmed that the domestic authorities enjoyed a broad margin of discretion to enact restrictive legislation where the destruction of human embryos was at stake. The limits imposed at European level aimed rather to temper excesses in this area.

The drafting of the domestic Law in question had given rise to substantial discussion that had taken account of the different scientific and ethical

opinions and questions on the subject. It had been the subject of several referendums, which had been declared invalid for failure to reach the required threshold of votes cast. Accordingly, during the drafting process of the Law the legislature had already taken account of the different interests at stake, particularly the State's interest in protecting the embryo and that of the persons concerned in exercising their right to individual self-determination in the form of donating their embryos to research.

The applicant alleged that the Italian legislation on medically assisted reproduction was inconsistent, in support of her submission that the interference complained of was disproportionate. The Court's task was not to review the consistency of the Italian legislation in the abstract. In order to be relevant for the purposes of the Court's analysis, the inconsistencies complained of by the applicant had to relate to the subject of the complaint that she raised before the Court, namely, the restriction of her right to self-determination regarding the fate of her embryos.

With regard to the research carried out in Italy on imported embryonic cell lines taken from embryos that had been destroyed abroad, whilst the right asserted by the applicant to decide the fate of her embryos related to her wish to contribute to scientific research, that could not however be seen as a circumstance directly affecting the applicant. Furthermore, the embryonic cell lines used in Italian laboratories for research purposes were never produced at the request of the Italian authorities. Accordingly, the deliberate and active destruction of a human embryo could not be compared with the use of cell lines obtained from human embryos destroyed at an earlier stage.

Even supposing that there were inconsistencies in the legislation as alleged by the applicant, these were not capable of directly affecting the right invoked by her in the instant case.

Lastly, the choice to donate the embryos in question to scientific research emanated from the applicant alone, since her partner was dead. There was no evidence certifying that her partner, who had had the same interest in the embryos in question as the applicant at the time of fertilisation, would have made the same choice. Moreover, there were no regulations governing this situation at domestic level.

Accordingly, the Government had not overstepped the wide margin of appreciation enjoyed by them in the present case and the ban in question had been necessary in a democratic society.

Conclusion: no violation (sixteen votes to one).

Article 1 of Protocol No. 1: With regard to the applicability of Article 1 of Protocol No. 1 to the facts of the case, the parties had diametrically opposed views on the matter, especially regarding the status of the human embryo *in vitro*. However, it was not necessary to examine here the sensitive and controversial question of when human life began as Article 2 of the Convention was not in issue in the instant case.

With regard to Article 1 of Protocol No. 1, it did not apply to the present case. Having regard to the economic and pecuniary scope of that Article, human embryos could not be reduced to "possessions" within the meaning of that provision. This part of the application was therefore rejected as incompatible *ratione materiae*.

Conclusion: inadmissible (unanimously).

Publication of information about prior employment as driver with former security services: *violation*

Sõro v. Estonia - 22588/08
Judgment 3.9.2015 [Section I]

Facts – After regaining independence from the Soviet Union in 1991, Estonia carried out legislative reforms for transition to a democratic system. It passed the Disclosure Act in February 1995. Under the Act information about the previous employment of individuals who had served in or cooperated with security or intelligence organisations of the former regime would be registered and made public. The applicant had been employed as a driver by the Committee for State Security from 1980 to 1991. In February 2004, he received notice that he had been registered pursuant to the Disclosure Act and that an announcement would be published. He did not exercise his right to lodge a complaint and in June 2004 the announcement was published in the paper and Internet versions of the State Gazette.

The applicant subsequently sought to challenge the notice in the administrative courts. He explained that he had to leave his job because of the publication of the information and that he had only worked as a driver for the security services. Dismissing his complaint, the court of appeal accepted that the application of the Disclosure Act could interfere with a person's fundamental rights, but found that it was impossible to establish with absolute certainty decades later whether a specific driver had performed merely technical tasks or

whether he had also performed substantive tasks which rendered the application of the Disclosure Act proportionate.

Law – Article 8: The published information concerned the applicant's past and affected his reputation and so constituted interference with his right to respect for private life. The interference was based on the Disclosure Act, which was sufficiently clear and accessible and pursued the legitimate aims of preventing disorder and protecting national security, public safety and the rights and freedoms of others.

In assessing the necessity of the interference in a democratic society, there had been no uniform approach among Contracting States regarding measures to dismantle the heritage of former communist totalitarian regimes. The Court had criticised the lack of individualisation of such measures before. In the instant case, the Disclosure Act made no distinction between different levels of former involvement with the KGB. Although the applicant had been informed beforehand about the publication and had had the possibility to contest the information, there had been no procedure available to assess the specific tasks performed by the individual employees of the security services in order to differentiate the danger they might pose several years after their security service careers ended. The Court was not convinced that a reasonable link existed between the legitimate aims pursued by the Government and the publication of information disregarding the specific functions of the former employees. The relevant information had been published thirteen years after the restoration of Estonian independence and such a passage of time must have decreased any threat the applicant could have initially posed to the new democratic system. The Disclosure Act itself did not impose restrictions on the applicant's future employment, but the applicant had nonetheless allegedly been forced to quit his job due to the behaviour of his colleagues. That consequence attested to the seriousness of the interference with his right to private life which interference had in the circumstances been disproportionate.

Conclusion: violation (four votes to three).

Article 41: EUR 6,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Sidabras and Džiautas v. Lithuania*, 55480/00 and 59330/00, 27 July 2004, Information Note 67; *Matyjek v. Poland*, 38184/03, 24 April 2007, Information Note 96; and Žičkus *v. Lithuania*, 26652/02, 7 April 2009)

Respect for correspondence

Large-scale seizure of computer files from lawyers' office: *no violation*

Sérvulo & Associados - Sociedade de Advogados, RL, and Others v. Portugal - 27013/10
Judgment 3.9.2015 [Section I]

In 2006 proceedings were instituted against several Portuguese and German nationals on charges of corruption, acquisition of prohibited interests and money laundering in connection with the purchase by the Portuguese Government of two submarines from a German consortium. The proceedings gave rise to two criminal investigations, the first relating to the actual purchase of the submarines and the second to the payments allegedly made by the German consortium to certain Portuguese companies. State agents were suspected of obtaining pecuniary advantages in the course of these negotiations, to the detriment of the State. Both investigations were conducted under the supervision of the investigating judge who, at the material time, was the only judge of the Central Criminal Investigation Court.

In September 2009 the investigating judge issued two search warrants concerning the business premises of the applicant firm. He stated that the search operations would be supervised by an investigating judge. Owing to another commitment he asked to be replaced on the day of the operations by two investigating judges of the Lisbon Criminal Investigation Court. The search warrants authorised access to all the offices of the applicant firm that had been occupied or used by the lawyers involved in the negotiations concerning the purchase of the submarines and the payments, and ordered:

– the seizure of any document, object or other item of evidence, especially in computerised form, connected to the crimes under investigation;

– the waiving of the requirement to protect the confidentiality of correspondence, stating that access to the computer files should be based on thirty-five keywords;

– the copying of the files covered by professional privilege in stand-alone digital form for submission to the investigating judge.

Lastly, the investigating judge requested that a representative of the Bar Association be present during the operations.

As the applicants lodged an objection against the search operation, the documents that had been seized were placed under seal, without being in-

spected, and sent to the President of the Court of Appeal. In October 2009 the Vice-President of the Court of Appeal ruled that the seizure of the documents and computer files had been proportionate to the aim pursued, namely the administration of justice in highly complex cases, and that there had been no breach of the constitutional principle of respect for privacy. He ordered the documents to be sealed and sent to the Central Criminal Investigation Court. In 2011 the proceedings were divided into two separate investigations. All the documents seized were returned, with the exception of two hard disks which were returned to the applicant firm on conclusion of the second investigation.

The first set of proceedings was discontinued, while in the second set of proceedings the accused were all acquitted.

In the Strasbourg proceedings the applicants complained about the searches carried out in their computer system and the seizure of computer files and emails.

Law – Article 8: The search and seizure operations in question constituted interference with the applicants' right to respect for their correspondence. The interference was in accordance with the law and pursued the legitimate aim of preventing crime. As to whether it had been necessary in a democratic society, several points had to be considered:

(a) *Whether the reasons given had been relevant and sufficient* – In view of the investigations and proceedings in progress, the search warrants had been based on reasonable grounds of suspicion.

(b) *The content and scope of the search and seizure warrants* – The searches carried out in the law firm's computer system had been based on thirty-five keywords linked to the investigation. These had included some words in general use, such as "payments" and "funding", and words routinely used in a firm of lawyers specialising in financial law such as "swap" and "spread". Consequently, at first sight, the scope of the search and seizure warrants appeared to have been wide. Following the review by the investigating judge of the Central Criminal Investigation Court, after which some 850 files had been deleted, 89,000 computer files and 29,000 emails that had been seized were apparently analysed.

(c) *Whether the safeguards against abuse had been adequate and effective* – In accordance with the Bar Association statutes, documents covered by legal professional privilege could not be seized unless the lawyer in question had been placed under formal investigation. The Code of Criminal Procedure and the Bar Association statutes also provided for a number of procedural safeguards concerning search and seizure operations in law firms.

In the present case a lawyer who had previously done work for the applicant firm had been placed under formal investigation for malfeasance in the context of the ongoing criminal investigation. As to the conduct of the operations, the Court noted that:

– several of the applicants had been present during the operations;

– a representative of the Bar Association had also been there;

– an investigating judge had overseen the operations;

– the applicants had immediately made a complaint to the President of the Court of Appeal, with the result that the documents seized had been sealed, without the investigating judge inspecting them before they were sent to the President of the Court of Appeal and before the latter gave his decision;

– a record of the operations had been drawn up which indicated the items that had been seized;

– the Vice-President of the Court of Appeal had examined the applicants' request and found that there had been no flagrant breach of legal professional privilege in the case;

– the investigating judge of the Central Criminal Investigation Court had reviewed the items seized and ordered the destruction of some 850 files on the grounds that they contained information that was either personal, covered by professional privilege or concerned persons other than those placed under investigation.

With regard to the investigating judge of the Central Criminal Investigation Court, there were no grounds for calling into question his assessment. It was true that, at the material time, he had been the only investigating judge in charge of the most complex cases in Portugal. However, he had intervened in the present case in his capacity as investigating judge in order to review the lawfulness of the search and seizure operations and in particular to protect legal professional privilege. Furthermore, he had not been empowered to institute an investigation. The allegations against him had not been sufficiently substantiated to cast doubt on the review he had carried out. Moreover, the examination by the Vice-President of the Court of Appeal had constituted a further safeguard in addition to the review by the investigating judge,

and his decision had given sufficient reasons on this point. Accordingly, the complaint to the President of the Court of Appeal, in addition to the review by the investigating judge, had constituted an adequate and effective remedy such as to compensate for the scope of the search warrants.

As to the fact that the computer files and emails had not been handed back, and the use made of them, the legislation did not require them to be returned immediately. Under the domestic law, the file relating to a criminal case in which the investigation had been discontinued could be kept for the duration of the limitation period for the crimes in question. After a second, separate investigation had been opened, the judge of the Central Criminal Investigation Court had authorised the copying of the criminal investigation file and various attachments for inclusion in the new investigation file. The aim of using that evidence had been to continue to search for information concerning the remaining suspects and events without the continuation of that investigation adversely affecting the persons who were the subject of the first investigation. The reasons given had therefore been legitimate. In the present case the copies requested had related to an investigation closely linked to the investigation giving rise to the seizure operation.

Consequently, notwithstanding the scope of the search and seizure warrants, the safeguards afforded to the applicants against abuse, arbitrariness and breaches of legal professional privilege, and in particular the review conducted by the investigating judge coupled with the intervention of the President of the Court of Appeal, had been adequate and sufficient. The search and seizure of the computer files and emails complained of in the present case had therefore not amounted to interference that was disproportionate to the legitimate aim pursued.

Conclusion: no violation (six votes to one).

Expulsion

Proposed removal of a mentally ill person who had lived and worked in the host country for more than twenty years: *case referred to the Grand Chamber*

Khan v. Germany - 38030/12
Judgment 23.4.2015 [Section V]

In 2005 the applicant, who had arrived in Germany from Pakistan 14 years earlier, committed manslaughter in a state of acute psychosis. She was diagnosed with schizophrenia and confined to a psychiatric hospital. In 2009 her expulsion was ordered as she was found to pose a danger to public safety. In the Convention proceedings, the applicant complained that her expulsion would interfere with her right to respect for her family life with her son and that her specific circumstances had not sufficiently been taken into account.

In a judgment of 23 April 2015, a Chamber of the Court found, by six votes to one, that the applicant's deportation would not constitute a violation of Article 8 of the Convention (see Information Note 184). In particular, the Court did not find that the German authorities had overstepped their margin of appreciation when weighing the impact on the applicant's private life against the danger she posed to public safety.

On 14 September 2015 the case was referred to the Grand Chamber at the applicant's request.

ARTICLE 10

Freedom of expression

Lengthy criminal proceedings against journalist at risk of custodial sentence for publishing article allegedly denigrating armed forces: *violation*

Dilipak v. Turkey - 29680/05
Judgment 15.9.2015 [Section II]

Facts – The applicant, a journalist, published an article criticising the intervention of certain commanding officers of the armed forces in government policy. He was charged with having, by publishing the article, undermined "the hierarchy within the armed forces" (Military Criminal Code) or having denigrated "the armed forces" (Criminal Code). The proceedings lasted for a total of six years and five months before two courts, with a potential sentence of between six months and three years' imprisonment. The proceedings ended with a ruling that prosecution of the offence was time-barred.

Law – Article 10

(a) *Admissibility* – The Government had maintained that the applicant did not have victim status on the ground that, since the criminal proceedings that had been instituted were discontinued on the ground that the prosecution was time-barred, the applicant had not been convicted by any military or other criminal court. The Court considered that the Government's objection raised issues closely linked to the examination of possible interference with the applicant's exercise of his right to freedom

of expression, and hence to the substance of the complaints under Article 10 of the Convention. Accordingly, it decided to join the objection to the merits.

(b) *Merits* – The Court had already held in previous cases that certain circumstances which had a chilling effect on freedom of expression conferred on the persons concerned – who had not been finally convicted – the status of victims of interference with their right to the freedom in question.

Hence, where proceedings based on specific criminal legislation were discontinued on procedural grounds and the person concerned remained at risk of being found guilty and punished, he or she could validly claim to be directly affected by the legislation concerned and therefore to be a victim of a violation of the Convention. In fact, an individual could even argue that a law breached his or her rights in the absence of a specific instance of enforcement, and thus claim to be a "victim" within the meaning of Article 34, if he or she was required either to modify his or her conduct or risk being prosecuted, or if he or she was a member of a category of persons who risked being directly affected by the legislation. Against that background, the existence of legislation which, in very general terms, made certain expressions of opinion punishable and led those who might express such opinions to censor their remarks, could amount to interference with freedom of expression.

At the time of his application to the Court, in which he complained of the criminal proceedings instituted against him, the applicant's case had still been pending before the domestic courts. He had risked a prison sentence of between six months and three years. The criminal proceedings, which had lasted for six and a half years, had eventually ended with a finding that the prosecution was time-barred. Nevertheless, a criminal charge had remained pending against the applicant for a considerable, not to say excessive, length of time; moreover, the applicant had no guarantees, either during the criminal proceedings or in the future, that he would not face judicial proceedings if he wrote further articles, as a journalist and political columnist, on the subject of the relationship between the armed forces and national policy.

The chilling effect of the proceedings against the applicant meant that they could not be said to have entailed purely hypothetical risks for him; rather, they had comprised in themselves real and effective constraints. The ruling that the prosecution was time-barred had merely put an end to the aforementioned risks, but did nothing to alter the fact that these had subjected the applicant to pressure for a certain period of time.

Accordingly, the Court dismissed the Government's objection that the applicant lacked victim status, and held that the proceedings against the applicant amounted to "interference" with the exercise of his right to freedom of expression under Article 10 of the Convention. There had been an accessible legal basis for the measures in question and the interference complained of had pursued the legitimate aims of national security and the prevention of disorder.

In the article in question, the applicant had sharply criticised the generals' political plans and their approach to social issues in Turkey. In instituting and continuing the criminal proceedings against the applicant, the competent authorities had taken the view that his criticism of the generals was to be seen as seeking to undermine the hierarchy within the army or destroy confidence in the generals concerned or, more broadly, as denigrating the armed forces. The competent authorities had therefore prosecuted the applicant on account of his criticism of certain points of view expressed by some generals in the armed forces concerning the political situation in the country.

However, in expressing his reaction to the remarks made by the generals, which he saw as inappropriate intervention by the military in politics, the applicant had been conveying his ideas and opinions on an issue which was unquestionably a matter of general interest in a democratic society. The Court considered in that regard that, if certain officers or generals in the armed forces made public statements on matters of policy, they laid themselves open, like politicians or anyone else taking part in the debate on the subject in question, to comments in response which might include criticism and opposing points of view. In a democratic society senior military officers could not, in this specific sphere, claim immunity from possible criticism.

As to the article written by the applicant, it had in no way been "gratuitously offensive" or insulting and had not incited others to violence or hatred. The comments had not contained any insults or defamatory remarks based on erroneous allegations, or remarks inciting others to violent action against the members of the armed forces.

In these circumstances, the aim of the competent authorities in taking criminal proceedings appeared to have been to impose criminal sanctions for ideas or opinions which were considered disturbing or shocking but which had been expressed in response

to a publicly conveyed point of view concerning matters of policy.

Hence, by continuing the criminal proceedings against the applicant for serious crimes over a lengthy period, the judicial authorities had exercised a chilling effect on his willingness to express his views on matters of public interest. Taking such proceedings had been liable to create a climate of self-censorship affecting both the applicant himself and any journalists planning to comment on the actions and statements of the members of the armed forces in connection with national policy. The dominant position occupied by State institutions required them to display restraint in resorting to criminal proceedings, particularly where other means were available for replying to unjustified attacks and criticisms by the media.

The measure complained of – namely, the continuation over a lengthy period of the criminal proceedings against the applicant based on serious criminal charges attracting a possible custodial sentence – had not been justified by a pressing social need, had in any event not been proportionate to the legitimate aims pursued and therefore had not been necessary in a democratic society.

Conclusion: violation (five votes to two).

Article 41: no claim made in respect of damage.

(See also *Financial Times Ltd and Others v. the United Kingdom*, 821/03, 15 December 2009, Information Note 125; and *Nedim* Şener *v. Turkey*, 38270/11, and Şık *v. Turkey*, 53413/11, judgments of 8 July 2014, summarised in Information Note 176)

Dismissal of municipal worker for accusing deputy mayor of "perversion of justice":
no violation

Langner v. Germany - 14464/11
Judgment 17.9.2015 [Section V]

Facts – The applicant was dismissed from his job in a municipal housing office after accusing the deputy mayor of "perversion of justice" both orally at a staff meeting and in subsequent written comments to the applicant's hierarchical superior. The allegation was made in relation to a demolition order the deputy mayor had issued two years earlier. The applicant also alleged that the deputy mayor had unlawfully attempted to dissolve the sub-division the applicant headed.

The applicant contested his dismissal before the German courts, which ultimately found his dismissal justified. In the Convention proceedings, the applicant complained of a violation of his right to freedom of expression.

Law – Article 10: The applicant's dismissal, which was primarily based on the statements he had made during the staff meeting, had interfered with his right to freedom of expression. That interference was prescribed by law (section 53 of the Collective Agreement for Public Service Employees in connection with section 1 of the Unfair Dismissal Act) and pursued the legitimate aim of protecting the reputation and rights of others.

The Court therefore had to determine whether, in the light of the case as a whole, the sanction imposed on the applicant was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient. In deciding that issue, it had to take into account the circumstances of the case, including what had motivated the applicant's statement, the legal and factual base, the actual wording used and its possible interpretations, its impact on the employer and the sanction inflicted on the applicant.

As to what had motivated the statement, the Court noted that instead of addressing his concerns about the deputy mayor's decision to the mayor or the prosecuting authority, the applicant had raised them at a staff meeting some two years later. The Federal Labour Court had found that the applicant's statement had not been aimed at uncovering an unacceptable situation within the Housing Office but was instead motivated by personal misgivings he had about the deputy mayor in view of the impending dissolution of the applicant's subdivision. The Court therefore considered that the applicant's case was not a "whistle-blowing" case that warranted special protection under Article 10.

Having conducted a thorough examination of the factual and legal situation the Labour Court of Appeal had concluded that the deputy mayor's decision to issue the demolition permit was lawful. As the long-serving head of the sub-division in charge of sanctioning misuse of housing property, the applicant must have been well-acquainted with that legal background. Accordingly, the Court was not satisfied that he had discharged his obligation to carefully verify the accuracy of his allegations.

Likewise, in view of his position, the applicant could reasonably be assumed to have been aware that "perversion of justice" was a serious crime

under the domestic law. In the Court's view, the use of that expression constituted a defamatory accusation – which the applicant had never withdrawn – rather than a criticism in the public interest. As to the impact of the accusations on the employer, the domestic courts had found that they were not only likely to damage the deputy mayor's reputation, but also to interfere seriously with the working atmosphere within the Housing Office. There was, in addition, a risk that they would be made known to a wider public since not everyone present at the meeting was a staff member. Lastly, although the applicant's dismissal had constituted the heaviest sanction possible, the Labour Court of Appeal's view that the municipality could rightfully fear that the applicant would return to his past behaviour if reinstated had not, in the Court's view, been unreasonable.

Having regard to the above considerations and, in particular, to the fact that the Federal Labour Court and the Labour Court of Appeal had both carefully examined the case in the light of the applicant's right to freedom of expression, the Court considered relevant and sufficient the domestic courts' reasons for deciding that the applicant's right to freedom of expression did not outweigh the public employer's interest in his dismissal. There had not, therefore, been a disproportionate interference with the applicant's right to freedom of expression.

Conclusion: no violation (unanimously).

ARTICLE 13

Effective remedy

Lack of suspensive effect of remedy for collective expulsions: *violation*

Khlaifia and Others v. Italy - 16483/12
Judgment 1.9.2015 [Section II]

(See Article 4 of Protocol No. 4 below, page 25)

ARTICLE 34

Victim

Interference with journalist's freedom of expression by lengthy criminal proceedings that were ultimately discontinued: *victim status upheld*

Dilipak v. Turkey - 29680/05
Judgment 15.9.2015 [Section II]

(See Article 10 above, page 19)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies

Failure of a disabled student complaining about inaccessibility of university and court buildings to exhaust domestic remedies: *inadmissible*

Gherghina v. Romania - 42219/07
Decision 9.7.2015 [GC]

Facts – The applicant, who suffered from severe locomotor impairment of the lower limbs, claimed that it was impossible for him to pursue a higher-education degree because the university buildings were not equipped to accommodate him. He did not apply to the appropriate courts to remedy the situation, arguing that there was a dearth of case-law relating to accessibility, that the law did not lay down any deadlines for completing accessibility improvements in public buildings, and lastly, that the buildings housing the courts in question were themselves inaccessible.

Law – Article 35 § 1: For the domestic remedies referred to in the present case to be deemed effective, the applicant needed to have access to remedies capable of leading to the swift adoption of decisions requiring the universities concerned to install suitable facilities for people with disabilities, or to make reasonable accommodation to enable him to continue his studies. Recourse to the appropriate courts also had to secure the applicant a reasonable prospect of obtaining redress for any non-pecuniary or pecuniary damage he might have sustained through being unable to pursue his university studies under the same conditions as other students.

In the present case the applicant could either have applied to the civil courts for an order requiring the universities concerned to install an access ramp and other facilities accommodating his needs, or brought an action in tort with a view to obtaining, where appropriate, a court order for the universities concerned to make good any damage he had sustained, or lodged administrative appeals against the decisions to exclude him from the various universities concerned.

The scarcity of examples of court orders in this field and the absence of a well-established body of domestic case-law predating the application in the present case could be explained by the fact that the protection of the rights of disabled people was a relatively recent branch of domestic law that had

emerged alongside international law and practice regarding disability rights. By applying to the relevant court, the applicant would have created an opportunity for the development of domestic case-law on this subject, which would potentially have been beneficial to anyone else in a similar or comparable situation.

The inaccessibility of the buildings housing the courts in question could not have prevented the applicant from making applications in writing or through a representative, as indeed he had done on other occasions. The applicant had not advanced any argument to justify his failure to take similar action in relation to the complaints forming the subject of the present application.

Lastly, as regards the applicant's contention that it would be unreasonable to require individuals to bring proceedings against the many public service providers concerned in order to ensure that public buildings were made accessible, the national authorities were in the best position to decide on matters of economic and social policy entailing public expenditure.

Conclusion: inadmissible (failure to exhaust domestic remedies).

ARTICLE 46

Execution of judgment – General measures

Respondent State required to take general measures regarding conditions of detention and absence of effective preventive and compensatory remedy

Shishanov v. the Republic of Moldova - 11353/06
Judgment 15.9.2015 [Section III]

Facts – The applicant, who was sentenced in 1996 to an aggregate term of twenty-five years' imprisonment for a variety of serious offences, was held in several detention facilities. His complaints concerned, among other things, overcrowding, inappropriate living and hygiene conditions and the allegedly inadequate quality and quantity of the food.

In February 2014 the applicant was transferred to a detention facility in the Russian Federation.

Law – Article 3

(a) *Admissibility (objection of failure to exhaust domestic remedies)* – The Court had repeatedly held that the domestic remedies available did not afford effective redress for violations of the Convention resulting from poor conditions of detention in the Republic of Moldova.

In the present case the civil action for damages against the State suggested by the Government was a purely compensatory remedy that was not capable of improving the applicant's conditions of detention. The Government had not proved that the domestic case-law consisting in ordering the administrative authorities to pay financial compensation for poor conditions of detention had constituted, at the material time, an established, consistent and therefore foreseeable practice on the part of the civil courts. Accordingly, the Court was not convinced that a civil action for damages, although accessible, had been effective in practice.

As to whether an effective preventive remedy had been available to the applicant, the competent domestic authority had not examined the acts and omissions allegedly contrary to Article 3 from the standpoint of the principles and standards established by the Court's case-law. Furthermore, after finding that the internal rules concerning prisoner hygiene had been breached in one prison, the investigating judge had not ordered the authority concerned to take any specific measures. The shortcomings observed by the investigating judge had been only partially remedied by the prison authorities. Hence, the application to the investigating judge had not been effective in practice.

The Government had further contended that the applicant should have brought a civil action for damages against the State on the basis of the investigating judge's decision. However, even assuming that this remedy had been effective at the material time, prisoners who had obtained a decision in their favour could not be expected to attempt a series of remedies in order to have their fundamental rights recognised.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – Article 3: The conditions of detention of which the applicant complained in each of the three prisons, namely overcrowding, inappropriate living and hygiene conditions and the allegedly inadequate quality and quantity of the food, had exceeded the threshold of severity required under Article 3.

Conclusion: violation (unanimously).

Article 46: The Court had found a violation of Article 3 in the present case on account of overcrowding, inappropriate living and hygiene conditions and the inadequate quality and quantity of the food in the prisons where the applicant had

been detained. Since September 2005[1] the Republic of Moldova had breached Article 3 on similar grounds in over 30 cases, and there were more than 70 pending applications relating primarily to the same issues.

Although the respondent State had taken steps to improve detention conditions, it was required to make an adequate and effective mechanism available to individuals enabling the competent domestic authority to examine the substance of complaints relating to poor conditions of detention and to provide appropriate and sufficient redress.

"Preventive" remedies and those of a "compensatory" nature had to co-exist and complement each other. Hence, where an applicant was detained in conditions contrary to Article 3, the most appropriate form of redress was the prompt cessation of the violation of the right not to be subjected to inhuman and degrading treatment. Furthermore, any person who had been subjected to detention which infringed his or her dignity should be able to obtain compensation for the violation found.

(a) *Preventive remedies* – The best option would be the creation of a special authority responsible for supervising detention facilities. In order for this remedy to be effective, the authority in question would have to (i) be independent of the authorities in charge of the prison system, (ii) guarantee effective participation by prisoners during the examination of their complaints, (iii) examine prisoners' complaints swiftly and diligently, (iv) have available a wide array of legal instruments with which to remedy the problems underlying those complaints and (v) be able to give binding and enforceable decisions. The remedy in question should also enable prompt action to be taken to put an end to imprisonment in conditions contrary to Article 3.

Another option would be to introduce a preventive remedy before a judicial authority by creating a new mechanism or adapting the existing system of application to the investigating judge. In the present case the application to the investigating judge had been ineffective in practice, mainly because the judge had not ordered the administrative authorities to take any specific measures and because the authorities had afforded only partial redress for the shortcomings identified by the judge. Hence, the competent judicial body should have the power to order the prison authorities to take specific remedial action capable of improving the situation not just of the complainant but also of other prisoners. The State should also define the precise arrangements for implementing the measures ordered by the judge.

(b) *Compensatory remedies* – The burden of proof imposed on litigants must not be excessive. Prisoners could be required to demonstrate that there was at least the appearance of a violation of Article 3 and to furnish any evidence that was readily accessible. It would then be up to the domestic authorities to dispute those allegations.

With regard to procedural guarantees, the prisoner's action should be heard within a reasonable time and the rules governing that action should comply with the principle of fairness as set forth in Article 6 § 1 of the Convention. The rules on court fees must not impose an excessive burden on the prisoner. Furthermore, the granting of compensation should not be determined by the applicant's ability to prove that the conduct of the persons responsible or of the specific authorities had been unlawful. Lastly, the amount of compensation granted in respect of non-pecuniary damage should not be unreasonable in comparison with the sums awarded by the Court in similar cases.

The compensatory remedy indicated by the Government in the present case, namely a civil action for damages against the State, had not been effective in practice. The explanatory decision by the Supreme Court of Justice sitting as a full court on 24 December 2012, regarding the examination of cases concerning compensation for pecuniary and non-pecuniary damage caused to prisoners as a result of violations of Articles 3, 5 and 8 of the Convention, took into account most of the principles established by the Court in its case-law on the subject of compensatory remedies. However, the Supreme Court of Justice imposed on the applicant the burden of proving the existence of non-pecuniary damage. In that connection, the finding that the conditions of detention had been incompatible with the requirements of Article 3 of the Convention gave rise in itself to a strong presumption that the prisoner concerned had sustained non-pecuniary damage.

Finally, a reduction of sentence in proportion to the number of days of detention spent in conditions incompatible with the Convention was a form of compensation that might be considered in the case of persons still in detention. At present, the Moldovan criminal courts could reduce the accused's sentence if they found that he or she had been detained in conditions contrary to Article 3. However, the sentence of a person already convicted

1. O*strovar v. Moldova*, 35207/03, 13 September 2005.

could not be reduced, and large numbers of prisoners were therefore not covered by this mechanism. The legislation did not provide for any specific method of calculating the reduction in sentence, and the courts were not required to reduce the sentence in proportion to the number of days of detention spent in conditions contrary to Article 3.

The Court further held that there had been a violation of Article 8 of the Convention for failure to observe the applicant's right to respect for his correspondence.

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

(See also *Ananyev and Others v. Russia*, 42525/07 and 60800/08, 10 January 2012, Information Note 148; and *Stella and Others v. Italy* (dec.), 49169/09 et al., 16 September 2014, Information Note 177)

ARTICLE 1 OF PROTOCOL No. 1

Deprivation of property

Automatic confiscation of means of transport used to smuggle migrants: *violation*

Andonoski v. the former Yugoslav Republic of Macedonia - 16225/08
Judgment 17.9.2015 [Section I]

Facts – In 2007 the applicant, a taxi driver, was stopped by the police when driving three Albanian nationals to a village situated near the Macedonian-Greek border. His passengers had no travel documents and the police therefore arrested them. The applicant was also arrested and his car was seized. An investigation was subsequently opened against him on suspicion of smuggling migrants. However, the charges were withdrawn for lack of evidence that he had been aware that his passengers were illegal migrants. One of the passengers was ultimately convicted of migrant smuggling and sentenced to one year's imprisonment. The trial court in those proceedings ordered the confiscation of the applicant's car on the grounds that it had been used to commit the offence. The applicant unsuccessfully appealed against the confiscation order.

Law – Article 1 of Protocol No. 1: The confiscation of the applicant's car was a permanent measure which entailed a conclusive transfer of ownership. It thus amounted to a deprivation of property. The confiscation order was prescribed by law and pursued the legitimate aim of preventing clandestine immigration and trafficking in human beings. The balance between that aim and the applicant's rights depended on many factors, including the applicant's behavior. His car had been confiscated in the context of criminal proceedings against a third party, after the criminal charges against the applicant himself had been withdrawn. The applicant, who had been making his living as a taxi driver, had no criminal record. There was no indication that his car had previously been used to commit an offence. Nor was there anything to suggest that it would be used to commit further offences. However, the provision of the Criminal Code requiring the automatic confiscation of means of transport used for smuggling migrants did not allow for any exceptions and was applied irrespectively of whether the transport was owned by the offender or by a third party and, if the latter, irrespectively of the third party's behavior or relation to the offence. Such automatic confiscation had deprived the applicant of any possibility to argue his case or to have any prospect of success in the confiscation proceedings. Similarly, the domestic courts, in such circumstances, had no discretion and were unable to examine the case on the basis of any of the factors described above. Lastly, the provision at issue did not provide for the possibility to claim compensation. The confiscation order had thus been disproportionate, in that it had imposed an excessive burden on the applicant.

Conclusion: violation (unanimously).

Article 41: EUR 3,000 in respect of non-pecuniary damage; respondent State required to return the confiscated car to the applicant in the condition it was in when confiscated or, in default, to pay the applicant EUR 10,000 in respect of pecuniary damage.

ARTICLE 4 OF PROTOCOL No. 4

Prohibition of collective expulsion of aliens

Collective expulsion of migrants to Tunisia: *violation*

Khlaifia and Others v. Italy - 16483/12
Judgment 1.9.2015 [Section II]

Facts – In September 2011 the applicants departed from Tunisia together with other persons aboard makeshift vessels with a view to reaching the Italian coast. After several hours at sea the boats were intercepted by the Italian coastguards, who escorted them to the port of the island of Lampedusa. The

applicants were placed in a reception centre. This centre was subsequently destroyed following a riot, and they were transferred to ships moored in Palermo harbour. The Tunisian Consul registered their civil status details. Expulsion orders were issued against the applicants, who denied ever having been served with the corresponding documents. They were then taken to Tunis airport, where they were released.

Law – Article 4 of Protocol No. 4: individual expulsion orders were issued against the applicants. However, these orders were identically worded, the only differences being the personal data of the addressees. Nevertheless, the mere fact of implementing an identification procedure is insufficient to preclude the existence of collective expulsion. Moreover, several factors suggest that in this case the expulsion complained of had in fact been collective in nature. In particular, the expulsion orders did not refer to the personal situations of the persons concerned; the Government produced no documents capable of proving that the individual interviews concerning the specific situation of each applicant had taken place before the adoption of the orders; at the material time, a large number of persons of the same origin were dealt with in the same manner as the applicants; the bilateral agreements with Tunisia were not made public, and provided for the repatriation of illegal Tunisian migrants under simplified procedures, based on the simple identification of the person in question by the Tunisian consular authorities. The foregoing is sufficient to exclude the existence of adequate guaranties on genuine, differentiated consideration of the individual situation of each of the persons concerned.

Conclusion: violation (five votes to two).

Article 13 of the Convention in conjunction with Article 4 of Protocol No. 4: inasmuch as the applicants complained of the lack of an effective remedy to challenge their expulsion on the grounds of its collective nature, it was not established that such a complaint could not have been the subject of an appeal to a magistrate against the expulsion orders. It transpired from the magistrate's decisions produced by the Government that the magistrate had examined the procedure for the adoption of the impugned expulsion orders and had assessed their lawfulness in the light of domestic and constitutional law. There was nothing to suggest that a possible complaint concerning the failure to take into consideration the personal situations of the applicants would have been ignored by the magistrate.

However, the orders had explicitly stated that the lodging of the aforementioned appeal with the magistrate in any case lacked suspensive effect. It follows that such an appeal did not satisfy the requirements of Article 13 of the Convention in so far as it failed to meet the criterion regarding suspensive effect set out in *De Souza Ribeiro*. The requirement imposed by Article 13 to stay the execution of the impugned measure cannot be considered as merely secondary.

Conclusion: violation (five votes to two).

The Court also found a violation of Article 5 §§ 1, 2 and 4, of Article 3 (concerning the conditions in which the applicants were held in the reception centre) and of Article 13 in conjunction with Article 3. It found no violation of Article 3 regarding the conditions of accommodation aboard the ships.

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

(See *De Souza Ribeiro v. France* [GC], 22689/07, 13 December 2012, Information Note 158; see also the Factsheet on Collective expulsions of aliens)

ARTICLE 2 OF PROTOCOL No. 7

Right of appeal in criminal matters

Absence of full review of evidence and facts by Supreme Court hearing criminal appeal: *inadmissible*

Dorado Baúlde v. Spain - 23486/12
Decision 1.9.2015 [Section III]

Facts – Following his conviction of drug-trafficking offences, the applicant brought a cassation appeal before the Supreme Court, alleging that he had not had a fair trial and also that the appeal procedure before the Supreme Court violated his right to have his sentence and conviction reviewed by a higher court as Articles 847-852 of the Code of Criminal Procedure and the Supreme Court's own jurisprudence did not allow a full review of the evidence and facts. In a judgment of 12 April 2011 the Supreme Court dismissed the appeal, stating that the scope of the appeal was in conformity with international standards since it allowed a control of the legality of the evidence and its "reasonable assessment" and a revision of the conviction and sentence.

Law – Article 2 of Protocol No.7: The Court reiterated that the Contracting States dispose in principle of a wide margin of appreciation to determine how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. Thus, the review by a higher court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law. In several member States of the Council of Europe such a review is limited to questions of law or may require the person wishing to appeal to apply for leave to do so.

Given the wide margin of appreciation enjoyed by the States in this sphere, there was no reason to depart from the Supreme Court's conclusion that the appeal had afforded the applicant the right to have his conviction and sentence reviewed by a higher tribunal and that this sufficed for the appeal to be considered in conformity with international standards. In addition, the Supreme Court's judgment had been subject to further review by the Constitutional Court, which had reinforced the applicant's right to a judicial review.

Conclusion: inadmissible (manifestly ill-founded).

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

Lhermitte v. Belgium - 34238/09
Judgment 26.5.2015 [Section II]

(See Article 6 § 1 (criminal) above, page 9)

Khan v. Germany - 38030/12
Judgment 23.4.2015 [Section V]

(See Article 8 above, page 19)

DECISIONS OF OTHER INTERNATIONAL JURISDICTIONS

Inter-American Court of Human Rights

Sexual violence committed during a non-international armed conflict and the investigation thereof

Case of Espinoza Gonzáles v. Peru -
Series C No. 289
Judgment 20.11.2014[1]

Facts – Between 1980 and 2000 Peru was engaged in a conflict between armed groups and agents of the military and police forces. During that time acts of torture and other cruel, inhuman or degrading treatment and punishment constituted a systematic and widespread practice and were used as instruments of the counterinsurgency in the context of criminal investigations into crimes of treason and terrorism. Under these circumstances, a widespread and aberrant practice of rape and other forms of sexual violence took place, which primarily affected women and was framed in a wider context of discrimination against women. Such practices were facilitated by the permanent use of states of emergency and the counterterrorism legislation in force at the time, which was characterised by the absence of minimum guarantees for detainees and, *inter alia*, the power to hold detainees *incommunicado* and in solitary confinement.

In this context, on 17 April 1993 Gladys Carol Espinoza Gonzáles and her partner Rafael Salgado were intercepted in Lima by members of the Abduction Investigations Division (DIVISE) of the Peruvian National Police, who had organised an operation – called "*Oriente*" – in order to find those responsible for the abduction of a businessman. The couple were taken to the premises of the DIVISE and the following day Gladys Espinoza was transferred to the premises of the National Counterterrorism Directorate (DINCOTE). During her initial detention and in both institutions, she was subjected to sexual and physical abuse and other mistreatment by officers of the Peruvian National Police, acts that were confirmed later by medical examinations performed during her stay in DINCOTE.

In June 1993 a military court convicted Gladys Espinoza of the crime of treason, but in February 2003 the Superior Criminal Chamber of the Supreme Court annulled all the criminal proceedings against her in the military jurisdiction. In March 2004 the National Terrorism Chamber convicted her of the "crime against public peace-terrorism" and in November 2004 the Permanent Criminal Chamber of the Supreme Court of Justice increased her sentence from 15 to 25 years in prison. Since

1. 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 Internet site (<www.corteidh.or.cr>).

then, she has served time in various penitentiaries, including Yanamayo Prison.

Finally, despite the fact that since 1993 several claims had been filed in respect of the acts of violence committed against Espinoza and despite the existence of medical reports recounting her injuries, no investigations were initiated until 2012, after the Inter-American Commission of Human Rights served notice, in 2011, of its Admissibility and Merits Report upon the State.

Law

(a) *Preliminary objections* – The respondent State submitted two preliminary objections alleging a lack of jurisdiction both *ratione materiae* and *ratione temporis* of the Inter-American Court to hear alleged violations of Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Belém do Pará Convention"). The Court rejected the first preliminary objection, considering that Article 12 of the Belém do Pará Convention granted jurisdiction to the Inter-American Court by not exempting from its application any of the rules and procedures established for individual communications. In contrast, it upheld the second preliminary objection in part, declaring itself unable to rule on acts that had occurred prior to 4 June 1996, the date Peru ratified the Belém do Pará Convention.

Conclusion: first preliminary objection rejected, second preliminary objection upheld in part (unanimously);

(b) *Article 7 (personal liberty) in relation to Articles 1(1) (non-discrimination) and 2 (domestic legal effects) of the American Convention on Human Rights (ACHR)* – The Inter-American Court found the State internationally responsible for the violation, to the detriment of Gladys Carol Espinoza Gonzáles, of the following paragraphs of Article 7, in relation to Article 1(1) of the ACHR: (a) Article 7(1) and 7(2) because of the lack of an adequate record of the detention; (b) Article 7(1) and 7(4) because she was not informed of the reasons for her detention or notified of the charges against her, in accordance with the standards established under the ACHR; (c) Article 7(1), 7(3), and 7(5) due to the absence of judicial control of the detention for at least 30 days, which meant that the detention became arbitrary; and (d) Article 7(1) and 7(6), in relation also to Article 2, owing to the impossibility of filing an *habeas corpus* petition or any other protective measure while Decree Law 25.659, which established the inadmissibility of protective measures for detainees, suspected or accused of crimes of terrorism, was in force.

Conclusion: violation (unanimously).

(c) *Articles 5(1), 5(2) and 11 (humane treatment and privacy) in relation to Article 1(1) of the ACHR and Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture (ICPPT))* – The Inter-American Court found that during her arrest, Gladys Espinoza had been beaten and had received death threats, and that the State had not justified the use of force by its agents. Moreover, when she was transferred to the facilities of DIVISE and DINCOTE, she was the victim of cruel, inhuman and degrading treatments and remained *incommunicado* for about three weeks without access to her family. She was also the victim of torture because of the psychological and physical violence committed against her with the objective of obtaining information in those detention facilities. She had also been the victim of rape and other forms of sexual violence repeatedly and for an extended period. In this regard, what had happened to the victim was consistent with the widespread practice of rape and sexual violence that had primarily affected women during the armed conflict, thereby constituting torture. Based on these facts, the Inter-American Court found a violation of Article 5(1) and 5(2) in relation to Article 1(1) of the ACHR and Articles 1 and 6 of the ICPPT. It also found a violation of Article 11(1) and 11(2) with respect to the rape and sexual violence.

Additionally, while in the Yanamayo Penitentiary between 1996 and 2001, Espinoza had suffered cruel, inhuman, and degrading treatment due to: (i) the conditions of detention; (ii) the detention regime applicable to detainees accused and/or convicted of terrorism and treason; (iii) the absence of specialised, adequate and opportune medical attention, given the progressive deterioration of the victim's health, as evidenced by the medical reports prepared at the time; and (iv) the extent of the use of force during a police search in August 1999. The Inter-American Court affirmed that sexual violence should never be used by state security forces when exercising the use of force.

Conclusion: violation (unanimously).

Article 1(1) (non-discrimination) in relation to Articles 5 and 11 of the ACHR – The widespread use of sexual violence by the security forces constituted torture and gender-based violence because it affected women by the mere fact of being women. In this context, the body of Gladys Espinoza as a woman was used to obtain information about her

partner and to humiliate and intimidate both. These acts confirmed that State agents used sexual violence and the threat of sexual violence against the victim as a counterinsurgency strategy. As a result, Espinoza had been the victim of individualised discriminatory treatment due to the fact that she was a woman, in violation of Article 1(1), in relation to Articles 5(1), 5(2) and 11 of the ACHR, and Articles 1 and 6 of the ICPPT.

Conclusion: violation (unanimously).

Articles 8 and 25 (fair trial and judicial protection), in relation to Article 1(1) (non-discrimination) of the ACHR – The Court determined that Peru had violated Articles 8(1) and 25 in relation to Article 1(1) of the ACHR and had failed to fulfill its obligations under Articles 1, 6 and 8 of the ICPPT and Article 7(b) of the Belém do Pará Convention (as of the date of ratification), because of the unjustified delay in initiating investigations into the acts committed against Gladys Espinoza, as well as the fact that neither the statements taken from her nor the corresponding medical reports were in accordance with applicable international standards for the collection of evidence in cases of torture and sexual violence, in particular, those related to the collection of declarations and the conducting of medical and psychological evaluations connected with the acts of violence carried out against the victim. The Inter-American Court set out guidelines for the way that victim interviews and medical and psychological exams should be carried out in cases of torture and/or sexual violence. It also set out guidelines for the conduct of medical professionals charged with attending to possible victims of such crimes and determined that States must ensure that such professionals are able to maintain their professional independence.

In addition, the respondent State had failed to comply with its obligation under Article 1(1), in relation to Articles 8, 25 and 2 of the ACHR, Articles 1, 6 and 8 of the ICPPT and Article 7(b) of the Belém do Pará Convention, due to the stereotyped evaluation of evidence carried out by the Permanent Criminal Chamber of the Supreme Court in 2004, and its consequent failure to order an investigation of the violence alleged, all of which constituted discrimination in access to justice for reasons of gender. The Inter-American Court recognised and rejected the gender stereotype that considers women suspected of having committed crimes as intrinsically unreliable or manipulative, especially in the context of criminal proceedings. In addition, it noted that a guarantee of access to justice for women victims of sexual violence must be the provision of rules for the assessment of evidence, so that stereotypical statements and innuendoes are avoided. Such rules had not existed in the present case. Finally, the Inter-American Court concluded that in Peru, the grave pattern of sexual violence against women detained due to their alleged participation in crimes of terrorism and treason was made invisible, which constituted an obstacle to the prosecution of such acts, favouring impunity and constituting gender discrimination in access to justice.

Conclusion: violation (unanimously).

(d) *Reparations* – The Inter-American Court established that its judgment constituted *per se* a form of reparation and ordered the State to: (i) open, promote, conduct, continue and conclude, as appropriate and with due diligence, appropriate criminal investigations and proceedings, in order to identify, prosecute and, if applicable, punish those responsible for the serious violations of Espinoza´s personal integrity; (ii) provide free and immediate medical and psychological or psychiatric treatment, as appropriate, to the victims if requested; (iii) publish the judgment and its official summary; (iv) develop protocols so that cases of torture, rape, and other forms of sexual violence are properly investigated and prosecuted in accordance with the standards specified in the judgment; (v) incorporate the standards established in the judgment into permanent education and training programs aimed at those in charge of criminal prosecution and judgment; (vi) implement a mechanism that will allow all women victims of the widespread practice of rape and other forms of sexual violence during the armed conflict to have free access to specialised medical, psychological and/or psychiatric rehabilitation; (vii) pay the amounts stipulated in the judgment as compensation for non-pecuniary damage and the reimbursement of costs and expenses; and (viii) reimburse the Victims' Legal Assistance Fund.

For an overview of the ECHR case-law on the ill-treatment of women in custody, see the Factsheet on Violence against women.

COURT NEWS

Elections

The Court has elected Guido Raimondi (judge elected in respect of Italy – see photograph) as its new President. Guido Raimondi has been one of the two Vice-Presidents of the Court since 2012.

He succeeds Dean Spielmann, whose term of office expires on 31 October 2015, as President. The Court also elected Işıl Karakaş and András Sajó as the new Vice-Presidents.

President Guido Raimondi

As of 1 November, the Bureau of the Court will be composed as follows:

Guido Raimondi (judge elected in respect of Italy), President;

Işıl Karakaş (judge elected in respect of Turkey), Vice-President;

András Sajó (judge elected in respect of Hungary), Vice-President;

Luis López Guerra (judge elected in respect of Spain), Section President;

Mirjana Lazarova Trajkovska (judge elected in respect of "the former Yugoslav Republic of Macedonia"), Section President;

Angelika Nußberger (judge elected in respect of Germany), Section Presiden

First year's implementation of stricter conditions for introducing applications before the Court

One year on from introducing stricter requirements in lodging an application in a new application form available online, the Court has reviewed the impact of the revised Rule 47 (contents of an individual application) of the Rules of Court and how it has operated in practice. It has issued a report giving details and conclusions (available at <www.echr.coe.int> – Official texts).

While the majority of applicants and their lawyers have had no difficulty in complying with the new requirements, some incoming application forms are not allocated to a judicial body due to failure to include all necessary information or documents or failure to use the Court's current application form. In order to clarify as much as possible what is required of applicants and to assist everyone in successfully lodging their complaints, a guidance document has been prepared setting out the common mistakes in filling in the application form and explaining what to do instead (available at <www.echr.coe.int> – Applicants).

20th anniversary of the Human Rights Building

The Court is identifiable across the world by the symbol of the building in which it is housed: the Human Rights Building. Designed by the British architect Lord Rogers, the Human Rights Building was inaugurated in 1995 and celebrates this year its 20th anniversary.

On that occasion, President Spielmann inaugurated an exhibition on the building (see photo), in the presence, among others, of Ivan Harbour, who developed the design of the Building and is now a partner in the firm of architects Rogers Stirk Harbour + Partners.

More information on the exhibition and the Human Rights Building available at <www.echr.coe.int> (The Court – Human Rights Building)

RECENT PUBLICATIONS

Handbook on European law relating to asylum, borders and immigration

The Russian translation of the updated version of this Handbook – published jointly by the Court and the European Union Agency for Fundamental Rights (FRA) – is now available thanks to the UNHCR Regional Representation for Belarus, Moldova and Ukraine. It can be downloaded from the Court's Internet site (<www.echr.coe.int> – Publications).

Справочник по европейскому законодательству об убежище, границах и иммиграции (rus)

The Swiss Centre of Expertise in Human Rights (SCHR) has taken the initiative to adapt the FRA/ECHR handbook to the legal bases of the Swiss law on aliens and asylum, and has just published the Handbook on Swiss law relating to immigration. This handbook is available in French and German on the websites of the Court (<www.echr.coe.int> – Publications) and of the SCHR (<http://skmr.ch>).

Quarterly activity reports of the Commissioner for Human Rights

The first two quarterly activity reports 2015 of the Council of Europe's Commissioner for Human rights are available on the Commissioner's Internet site (<www.coe.int> – Commissioner for Human Rights – activity reports).

1st quarterly activity report 2015 (Eng)
2nd quarterly activity report 2015 (Eng)