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COUR EUROPÉENNE DES DROITS DE L'HOMME

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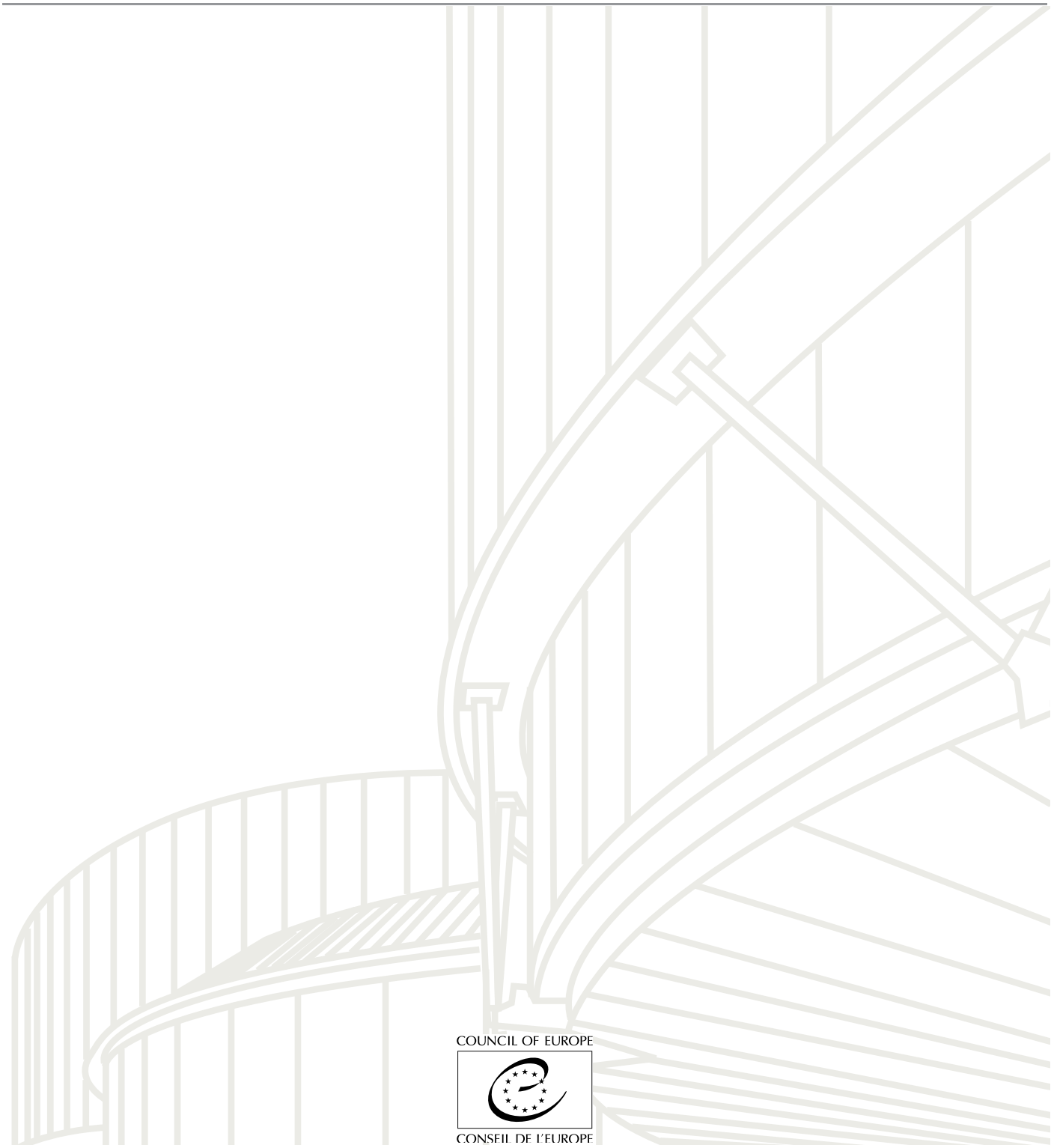

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Aydoğdu v. Turkey - 40448/06
Judgment 30.8.2016 [Section II]

(See Article 46 below, page 24)

Independence and adequacy of investigation into military aircraft crash in which numerous spectators were killed at public air show: *no violation*

Mikhno v. Ukraine - 32514/12
Judgment 1.9.2016 [Section V]

Facts – During a public aerobatics show organised by the Air Force of Ukraine at Sknyliv aerodrome in Lviv in 2002 a military aircraft crashed, killing 77 spectators, including the applicants' relatives. The domestic investigation established that the primary cause of the accident was a technical mistake by a military pilot, in execution of an aerobatics manoeuvre not featured in his mission order, coupled with the failure of the supporting crew to prevent his faulty conduct in time. The investigating authorities also concluded that there had been significant safety-related shortcomings in the organisation of the show deriving from both an insufficiently detailed general regulatory framework and a failure to implement all reasonably available measures to minimise the risk to spectators' lives. Five military officers, including the show directors and the pilots who had ejected before the crash, were sentenced to various prison terms.

Disciplinary proceedings were brought against a number of other servicemen, including several high-ranking Air Force officers, with some being dismissed from service or demoted.

Law

Article 2: The respondent State's responsibility for the accident was engaged on account of the negligent acts and omissions of its military pilots and their supporting crew and of the failures by other competent authorities and officers to put in place necessary procedures, precautions and measures with a view to making the air field safe for spectators and ensuring the crew were adequately prepared for their mission.

The Court examined first whether the respondent State had complied with its procedural obligation under Article 2 before going on to determine whether there was still a need to rule on a substantive breach.

(a) *Procedural limb*

(i) *Independence of the investigation* – In accordance with the domestic law, the prosecutors, investigators and all the judges in the case were military servicemen on the staff of the Armed Forces.

However, there was no subordination or any special relationship between the defendants and the investigators, experts, prosecutors and judges involved in the proceedings. The conclusions reached by the prosecution as to the circumstances of the accident were substantively similar to the conclusions reached by numerous other entities concurrently investigating the accident. There had been no failure to detect or any attempt to conceal any fact or circumstance important for the establishment of the truth. The domestic investigation had thus been sufficiently independent for the purposes of Article 2.

(ii) *Adequacy of the investigation* – There was no appearance of arbitrariness in the domestic decisions which would call for their substantive review in the Convention proceedings: regard being had to the nature of the officers' offences, their punishment was not so lenient as to fall outside the margin of appreciation enjoyed by the domestic judicial authorities.

The domestic decisions not to prosecute certain officers and to acquit the four high-ranking Air Force officials were based on a careful establishment and assessment of the relevant facts. In particular, the judicial authorities found that the immediate cause of the accident was the first pilot's unforeseen decision to deviate from his mission

order and that holding the most senior officers accountable for not having supervised his training and performance any closer would have constituted an overly broad interpretation of the military statutes and other relevant legal acts.

The investigation had sufficiently established the facts that had caused the accident and had attributed both criminal and disciplinary liability to the officers directly and indirectly responsible for it. It had thus met the adequacy requirement for the purposes of Article 2 of the Convention.

(iii) *Promptness, access to the file and other procedural aspects of the investigation* – Regard being had to the factual complexity of the proceedings and the number of participants involved, which included several hundred injured parties, the investigation had not fallen short of the promptness requirement for the purposes of Article 2.

In conclusion, the investigation had been sufficiently independent, adequate and prompt and the applicants had been given necessary access to the proceedings. The respondent State had thus complied with its procedural obligation under Article 2.

(b) *Substantive limb* – The matter under consideration had been sufficiently addressed at the domestic level.

Conclusion: no violation (unanimously).

Article 6 (*independence and impartiality of the military courts*): There was a tendency in international human-rights law to urge States to act with caution in using military courts and, in particular, to exclude from their jurisdiction determination of charges concerning serious human-rights violations, such as extrajudicial executions, enforced disappearances and torture. However, the proceedings at issue in the present case could not be approached in the same manner as proceedings relating to serious intentional human-rights violations, which could not be covered by ordinary military functions. In particular, the present case concerned an accident, resulting in very serious but unintentional damage. The servicemen involved were accused of negligent performance of their duties, the scope of which was in dispute and had to be resolved by the courts. The criminal limb of the present proceedings was therefore very closely connected to the defendants' military service. In those circumstances, the referral of the criminal charges and – regard being had to the domestic legal tradition – the related civil claims to a military court for their contemporaneous examination was not as such incompatible with the Convention.

Nevertheless, the Court had to look at the composition of the military courts concerned and examine the statutory and practical safeguards intended to enable them to act independently and impartially in resolving those claims.

In the present case, the military judges were military servicemen of officer rank (according to the domestic law, such judges were on the staff of the Armed Forces subordinate to the Ministry of Defence). However, nothing in their status suggested that they reported on their performance to any military official. In fact, the domestic law expressly prohibited military judges from carrying out any duties other than the adjudication of cases. The eligibility criteria for the post of military judge (apart from being a military officer) and the procedures for their appointment, promotion, discipline and removal were analogous to those in place for their civilian counterparts. Nothing indicated that either the Ministry of Defence or any career military officers were involved in those procedures.

Moreover, in accordance with the domestic law, military courts were integrated into the system of ordinary courts of general jurisdiction. They operated under the same rules of procedure as the ordinary courts in the determination of criminal cases. That procedure provided the applicants with the same opportunities to participate in the proceedings as they would have been afforded in civilian courts.

As regards court funding and court administration responsibilities, the Supreme Court, which incorporated the Military Panel, was independent. Primary responsibility for administering the inferior military courts was vested in the State Judicial Administration. Although the Ministry of Defence retained some authority in their administration and in taking care of certain benefits for the military court judges, such limited authority in itself did not suffice to cast doubt on the latter's impartiality and independence.

In the absence of any other indications that there existed a special relationship between the defendants and the judges engaged in the adjudication of the applicants' civil claims or any other substantiated arguments by the applicants concerning the judges' objective lack of independence or subjective bias, there was no basis to conclude that the military judges in the present case had lacked structural independence or otherwise acted in the interests of the Armed Forces or the Ministry of Defence when adjudicating the applicants' civil claims.

Conclusion: inadmissible (manifestly ill-founded).

The Court also found, unanimously, violations relating to the excessive length of proceedings (Article 6) and the absence of an effective remedy in that respect (Article 13).

Article 41: EUR 3,600 to the first applicant for non-pecuniary damage, in respect of the excessive length of the proceedings (Articles 6 and 13); claims in respect of pecuniary damage dismissed.

(See also *Svitlana Atamanyuk and Others v. Ukraine*, 36314/06, 1 September 2016)

ARTICLE 3

Degrading treatment

Structural problem resulting in detention for more than nine years in psychiatric wing of prison with no prospect of change or appropriate medical help: *violation*

W.D. v. Belgium - 73548/13
Judgment 6.9.2016 [Section II]

(See Article 46 below, page 23)

Positive obligations (substantive aspect)

Obligation on prison authorities to seek independent medical advice on the appropriate treatment for a drug-addicted prisoner: *violation*

Wenner v. Germany - 62303/13
Judgment 1.9.2016 [Section V]

Facts – The applicant prisoner is a long-term heroin addict. From 1991 to 2008 his addiction was treated with medically prescribed and supervised drug substitution therapy. In 2008 he was imprisoned and this treatment was stopped.

In his application to the European Court, he complained under Article 3 of the Convention about the refusal of the prison authorities to provide him with drug substitution treatment, which he claimed was the only adequate response to his medical condition. The applicant criticised the authorities' failure to allow a doctor from outside the prison to examine the necessity of treating him with drug substitution medication, which had proved successful when offered to him over the course of a seventeen-year period prior to his imprisonment.

Law – Article 3: It was for the Government to provide credible and convincing evidence showing that the applicant had received comprehensive and adequate medical care in detention. A number of strong elements indicated that drug substitution treatment could be regarded as the requisite medical treatment for the applicant. He was a manifest and long-term opioid addict. All his attempts to overcome his addiction had failed and it could no longer be expected with sufficient probability that he could be cured of his drug addiction. It was further uncontested that the applicant suffered from chronic pain linked to his long-term drug consumption. Prior to his detention he had been treated with medically prescribed and supervised drug substitution therapy for seventeen years. The Federal Medical Association's Guidelines for the Substitution Treatment of Opiate Addicts clarified that substitution treatment was a scientifically tested therapy for manifest opiate addiction. Drug substitution therapy was, in principle, available both outside and inside prisons in Germany (as in the majority of member States of the Council of Europe), and was actually provided in practice in prisons in several *Länder* other than Bavaria where the applicant was detained.

The Court noted that there was a strong indication that drug substitution treatment could be regarded as the required medical treatment for the applicant: this was confirmed both by the doctors who had prescribed the applicant drug substitution therapy prior to his detention as well as by two external doctors, one of whom had examined the applicant in person. This meant that the domestic authorities were under an obligation to examine with particular scrutiny whether the continuation of the abstinence-oriented therapy was to be considered the appropriate medical response.

However, there was no indication that the domestic authorities, with the help of expert medical advice, had examined the necessity of drug substitution treatment with regard to the criteria set by the relevant domestic legislation and medical guidelines. Despite the applicant's previous medical treatment with drug substitution therapy for seventeen years, no follow-up had been given to the opinions expressed by external doctors on the necessity to consider providing the applicant with that treatment again.

Conclusion: violation (unanimously).

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

(See the Research Report on Health-related issues in the case-law of the ECHR and the Factsheet on Prisoners' health-related rights)

Expulsion

Proposed deportation to Iraq of family threatened by al-Qaeda: *deportation would constitute a violation*

J.K. and Others v. Sweden - 59166/12
Judgment 23.8.2016 [GC]

Facts – The applicants, a married couple and their son, were Iraqi nationals. In 2010 and 2011 respectively they applied for asylum in Sweden on the grounds that they risked persecution in Iraq by al-Qaeda as the first applicant had worked for American clients and operated out of a US armed forces base in Iraq for many years. He and his family had been the subject of serious threats and violence from al-Qaeda from 2004 to 2008. Attempts had been made on their lives, the first applicant had twice been wounded, his brother had been kidnapped in 2005, and his daughter killed in October 2008 when the car in which she and the first applicant were travelling was shot at. At that point the first applicant stopped working and the family moved to a series of different locations in Baghdad. Although his business stocks were attacked four or five times by al-Qaeda members, the first applicant stated that he had not received any personal threats since 2008 as the family had repeatedly moved around. The first applicant left Iraq in 2010 and was followed by the second and third applicants in 2011.

The Swedish Migration Board rejected their application for asylum. Its decision was upheld by the Migration Court in 2012 on the grounds that the criminal acts of al-Qaeda had been committed several years before and the first applicant no longer had any business with the Americans. In the event that a threat still remained, it was probable that the Iraqi authorities had the will and capacity to protect the family.

In a judgment of 4 June 2015 (see Information Note 189) a Chamber of the European Court held, by five votes to two, that the implementation of the deportation order against the applicants would not give rise to a violation of Article 3 of the Convention. On 19 October 2015 the case was referred to the Grand Chamber at the applicants' request.

Law – Article 3: The Court reiterated that the expulsion of an alien by a Contracting State could give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds had been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country. The assessment of whether a real risk of proscribed treatment existed had to be made in the light of the present-day situation and had to focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances.

(a) *General situation* – The Court accepted that although the security situation in Baghdad City had deteriorated, the intensity of violence had not reached a level which would constitute, as such, a real risk of treatment contrary to Article 3. It went on to assess whether the applicants' personal circumstances were such that they would face such a risk if they were expelled to Iraq.

(b) *Personal circumstances* – The Court noted that, as asylum-seekers were normally the only parties able to provide information about their own personal circumstances, the burden of proof should in principle lie on them to submit, as soon as possible, all evidence relating to their individual circumstances needed to substantiate their application for international protection. However, it was also important to take into account all the difficulties which asylum-seekers could encounter abroad when collecting evidence.

Specific issues arose when an asylum-seeker alleged that he or she had been ill-treated in the past, since past ill-treatment could be relevant for assessing the level of risk of future ill-treatment. Having regard to its previous case-law1, Article 4 § 4 of the EU Qualification Directive[2] and paragraph 19 of the UNHCR Note on Burden and Standard of

1. The Court cited *R.C. v. Sweden*, 41827/07, 9 March 2010, Information Note 128; *R.J. v. France*, 10466/11, 19 September 2013; and *D.N.W. v. Sweden*, 29946/10, 6 December 2012.
2. Article 4 § 4 of Council Directive 2004⁄83⁄EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (as recast by Directive 2011⁄95⁄EU of 13 December 2011) provides: "the fact that an applicant has already been subject to persecution or serious harm, or direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated".

Proof in Refugee Claims,[1] the Court considered that the fact of past ill-treatment provided a strong indication of a future, real risk of treatment contrary to Article 3 in cases in which an applicant had made a generally coherent and credible account of events that was consistent with information from reliable and objective sources about the general situation in the country at issue. In such circumstances, it would be for the Government to dispel any doubts about that risk.

In the applicants' case, the Court saw no reason to cast doubt on the Migration Agency's findings that the family had been exposed to the most serious forms of abuse by al-Qaeda from 2004 until 2008 or to question the applicants' allegation that indirect threats against them and attacks on the first applicant's business stock had continued after 2008 and that they had only escaped further abuse by going into hiding as they were unable to avail themselves of the Iraqi authorities' protection as the latter were infiltrated by al-Qaeda. The applicants' account of events between 2004 and 2010 was generally coherent and credible and consistent with relevant country-of-origin information available from reliable and objective sources. There was thus a strong indication that they would continue to be at risk from non-State actors in Iraq. It was therefore for the respondent Government to dispel any doubts about that risk.

It appeared from various reports from reliable and objective sources that persons who collaborated in different ways with the authorities of the occupying powers in Iraq after the war had been and continued to be targeted by al-Qaeda and other groups. The first applicant had belonged to the group of persons systematically targeted for their relationship with American armed forces and his contacts with the American forces had been highly visible as his office was situated at the United States military base. The Court therefore found that all three applicants would face a real risk of continued persecution by non-State actors if returned to Iraq.

As to the ability of the Iraqi authorities to provide them with protection in the event of a return, the Iraqi authorities' capacity to protect their people had to be regarded as diminished. Although the current level of protection might still be sufficient for the general public in Iraq, the situation was different for individuals, such as the applicants, who were members of a targeted group. The Court was therefore not convinced, in the particular circumstances of the applicants' case, that the Iraqi State would be able to provide them with effective protection against threats by al-Qaeda or other private groups in the current situation.

The cumulative effect of the applicants' personal circumstances and the Iraqi authorities' diminished ability to protect them therefore created a real risk of ill-treatment in the event of their return to Iraq.

Conclusion: deportation would constitute a violation (ten votes to seven).

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

1. Paragraph 19 states: "While past persecution or mistreatment would weigh heavily in favour of a positive assessment of risk of future persecution, its absence is not a decisive factor. By the same token, the fact of past persecution is not necessarily conclusive of the possibility of renewed persecution, particularly where there has been an important change in the conditions in the country of origin".

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Inadmissibility of appeal on points of law due to failure to comply with statutory requirement to formulate a "legal question" at the end of a ground of appeal: *no violation*

Trevisanato v. Italy - 32610/07
Judgment 15.9.2016 [Section I]

Facts – In 2007, having lost an appeal in an employment dispute, the applicant wished to take his case to the Court of Cassation. But that court declared his appeal inadmissible for failure to formulate the point of law (*quesito di diritto*) underlying his ground of appeal, as then required by the Code of Civil Procedure[2].

Law – Article 6 § 1: The domestic provision in question had pursued a legitimate aim, in seeking to reconcile the requirements of legal certainty and of the proper administration of justice. According to the case-law of the Court of Cassation prior to the applicant's appeal, the point of law to be set out represented the meeting-point between the solution in the specific case and the formulation of a general legal principle applicable to similar cases. The aim pursued was thus to preserve the role of the Court of Cassation in ensuring a uni-

2. Article 366 *bis*, which was repealed in 2009.

form interpretation of the law, while preserving the appellant's interest in obtaining, if appropriate, the quashing of the decision appealed against.

As to the proportionality of the measure in relation to the aim pursued, the formal requirement imposed on the applicant had not been excessive.

The rule applied by the Court of Cassation was not judge-made but had been introduced by the legislature through the Code of Civil Procedure, in fact well before the lodging of the appeal in question. The applicant's lawyer should thus have been aware of the relevant obligations and could have foreseen the consequences of failure to comply with the rule, based on the wording of the statutory provision and the Court of Cassation's interpretation, which had been sufficiently clear and coherent.

To have required the applicant to conclude his ground of appeal with a paragraph summing up the reasoning and explicitly identifying the legal principle alleged to have been breached had not entailed any particular effort on the part of the applicant's lawyer. It was moreover pointed out that only lawyers registered on a special list on the basis of certain qualifications were entitled to represent parties before the Italian Court of Cassation.

Accordingly, the decision could not be regarded as an excessively formalistic interpretation of the ordinary rules such as to preclude an examination on the merits of the applicant's case.

Conclusion: no violation (unanimously).

Independent and impartial tribunal

Alleged lack of independence and impartiality of military courts: *inadmissible*

Mikhno v. Ukraine - 32514/12
Judgment 1.9.2016 [Section V]

(See Article 2 above, page 7)

Article 6 § 1 (criminal)

Criminal charge
Fair hearing

Bus driver found guilty of causing road accident in proceedings in which he was not involved: *Article 6 applicable; violation*

Igor Pascari v. the Republic of Moldova - 25555/10
Judgment 30.8.2016 [Section II]

Facts – In 2009 the applicant, a bus driver, was involved in an accident with a car in which no one was injured. The driver of the car, P.C., was found responsible for the accident and fined. P.C. contested that decision and the domestic courts eventually found that the applicant was responsible for the accident under the Code of Administrative Offences. However, no sanction was imposed on him in view of the statutory limitation period. The applicant was not involved in the proceedings and only found out about them at a later date. Under domestic law he was not able to challenge the domestic courts' decision.

Law – Article 6

(a) *Applicability* – The Government contended that the applicant's complaint under Article 6 § 1 was incompatible *ratione materiae* because the proceedings from which he had been absent were not criminal proceedings for the purposes of Article 6 of the Convention.

The Court observed that the act considered as an offence and punished by the Code of Administrative Offences was directed towards all citizens and not towards a given group possessing a special status. The fine and penalty points provided for by that provision were not intended as pecuniary compensation for damage but were punitive and deterrent in nature. That was particularly true when taking into consideration the effect of the penalty points, which could lead to the suspension of a driving licence for between six and twelve months. The Court reiterated that a punitive character is the customary distinguishing feature of criminal penalties. Although, due to a technicality, the applicant was not punished in the way provided for by the domestic law, what was decisive was the potential penalty rather than the one actually imposed. Article 6 § 1 was therefore applicable under its criminal head.

Conclusion: preliminary objection dismissed (majority).

(b) *Merits* – There was no dispute between the parties about the fact that the applicant was not involved in the proceedings which ended with the finding that he was responsible for the accident. Although that finding did not amount to a final determination of his guilt, it had a decisive effect on such a determination. The judgment had the effect of *res judicata* in respect of both the applicant and P.C., if only for making the latter immune from responsibility for the accident. Since in a car accident involving two vehicles, there should be at least one person responsible, the final exclusion of

P.C.'s responsibility by the domestic courts implicitly predetermined the applicant's guilt.

Conclusion: violation (four votes to three).

Article 41: EUR 2,500 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Ziliberberg v. Moldova*, 61821/00, 1 February 2005)

Access to court

Unduly formalistic refusal to reinstate appeal proceedings lodged with wrong court by psychiatric patient: *violation*

Marc Brauer v. Germany - 24062/13
Judgment 1.9.2016 [Section V]

Facts – In his application to the European Court the applicant complained that he had been denied access to a court in violation of Article 6 § 1 of the Convention. In the domestic proceedings the applicant had sought to appeal against an order by a Regional Court for his confinement in a psychiatric hospital. The applicant, who had a previous history of psychiatric treatment, was in court with his court-appointed lawyer when the order was made and immediately stated that he wanted a change in representation and to appeal against the decision himself. The presiding judge informed him of the time (seven days) and form for lodging an appeal and the court-appointed lawyer also sent him a letter advising on the procedure. The applicant then typed up and signed his appeal, but sent it to the wrong court and it did not reach the correct destination until after the time-limit had expired. The applicant's request to the Federal Court of Justice to reinstate the proceedings under Article 44 of the Code of Criminal Procedure on the grounds that he was not responsible for the failure to comply with the time-limit was rejected, despite the applicant's contention that the letter of advice he had received from his court-appointed lawyer was misleading.

Law – Article 6 § 1: Although short, the seven-day time-limit for appealing did not of itself raise an issue under Article 6 § 1 as (a) it did not concern the motivation of the appeal (for which a different time-limit applied) and (b) appellants who, through no fault of their own, were prevented from complying with the time-limit could apply for reinstatement of the proceedings under Article 44 of the Code of Criminal Procedure as the applicant had done.

The Court observed that the Federal Court of Justice's finding that the appeal was lodged out of time was primarily based on the fact that the applicant had addressed his written appeal to the wrong court. The decisive issue was thus whether the applicant's mistake had justified denying him access to a second-instance court. The Court found that it had not. An accumulation of extraordinary factors had affected the lodging of the appeal: the applicant was particularly vulnerable as he was deprived of his liberty in a psychiatric hospital; his court-appointed lawyer had terminated his mandate and had given potentially misleading advice about the procedure for appealing; and it had taken several days for the appeal to be forwarded through the postal services to the correct court.

Bearing in mind that the applicant had already announced in the courtroom his wish to appeal, the Federal Court of Justice's decision to refuse reinstatement of the proceedings was not proportionate. To hold otherwise would be too formalistic and contrary to the principle of practical and effective application of the Convention. The applicant's right of access to a court had thus been restricted in such a way and to such an extent that the very essence of the right was impaired.

Conclusion: violation (unanimously).

Article 41: no claim made in respect of damage.

Article 6 § 1 (administrative)

Impartial tribunal

Lack of a prosecuting party in administrative offence proceedings: *violation*

Karelin v. Russia - 926/08
Judgment 20.9.2016 [Section III]

Facts – The applicant was convicted of an administrative offence. In his application to the European Court he complained that the absence of a prosecuting party in the case against him had violated Article 6 of the Convention as regards the requirement of impartiality.

Law – Article 6 § 1: The Court reiterated that impartiality normally denoted the absence of prejudice or bias. The existence of impartiality was determined according to both a subjective and an objective test. As regards the objective test, in deciding whether in any given case there was a legitimate reason to fear that a particular judge lacked impartiality, the viewpoint of the person

concerned was important but not decisive. What was decisive was whether that fear could be held to be objectively justified. In the applicant's case the administrative proceedings had been set in motion by a police officer, who compiled an administrative offence record and transmitted it to the court. At the same time, the police officer was not a prosecuting authority in the sense of a public official designated to oppose the defendant in the proceedings and to present and defend the accusation on behalf of the State before a judge. The relevant domestic provisions relating to administrative proceedings did not require a prosecutor to attend court hearings and attached no particular consequences to his or her absence from such a hearing. In such circumstances, the Court concluded that there was no prosecuting party in the case.

The lack of a prosecuting party had an effect on the operation of the presumption of innocence during trial and, by implication, on the question of the trial court's impartiality. In a situation where the trial court had no alternative but to undertake the task of presenting – and carrying the burden of supporting – the accusation during the hearing, the Court was not convinced that there had been sufficient safeguards in place to exclude legitimate doubts as to any adverse effect such a procedure might have had on the trial court's impartiality. The Court considered that where an oral hearing was judged opportune for the judicial determination of a criminal charge against a defendant, the presence of a prosecuting party was appropriate in order to avert legitimate doubts that may otherwise arise in relation to the impartiality of the court. The Court further observed the subsequent lack of a prosecuting party in the appeal proceedings as well and concluded that the appeal proceedings had not remedied the impartiality matter arising at trial.

Conclusion: violation (unanimously).

Article 46: The Court had previously examined applications relating to the administrative-offence proceedings under Russian law and found violations of Article 6 of the Convention, in particular on account of the fairness requirement. It considered that general measures at the national level were therefore called for.

In that connection, the respondent State was required above all, through appropriate legal and/or other measures, to secure in its domestic legal order a mechanism providing sufficient safeguards for ensuring impartiality of the courts dealing with administrative-offence cases, by way of introducing a prosecuting authority (a representative of a prosecutor's office or another public authority) where there is an oral hearing, or by other appropriate means.

Article 41: EUR 2,500 in respect of non-pecuniary damage; question of whether it is appropriate and practicable to reopen the domestic proceedings could usefully be addressed by the respondent State.

(See also *Thorgeir Thorgeirson v. Iceland*, 13778/88, 25 June 1992; *Ozerov v. Russia*, 64962/01, 18 May 2010; *Krivoshapkin v. Russia*, 42224/02, 27 January 2011; and *Weh and Weh v. Austria* (dec.), 38544/97, 4 July 2002)

Article 6 § 3 (c)

Defence through legal assistance

Delayed access to a lawyer during police questioning owing to exceptionally serious and imminent threat to public safety: *violation; no violation*

Ibrahim and Others v. the United Kingdom - 50541/08 et al.
Judgment 13.9.2016 [GC]

Facts – On 21 July 2005, two weeks after 52 people were killed as the result of suicide bombings in London, further bombs were detonated on the London public transport system but, on this occasion, failed to explode. The perpetrators fled the scene. The first three applicants were arrested but were refused legal assistance for periods of between four and eight hours to enable the police to conduct "safety interviews".[1] During the safety interviews they denied any involvement in or knowledge of the events of 21 July. At the trial, they acknowledged their involvement in the events but claimed that the bombs had been a hoax and were never intended to explode. The statements made at their safety interviews were admitted in evidence against them and they were convicted of conspiracy to murder. The Court of Appeal refused them leave to appeal.

The fourth applicant was not suspected of having detonated a bomb and was initially interviewed by

1. A safety interview is an interview conducted urgently for the purpose of protecting life and preventing serious damage to property. Under the Terrorism Act 2000, such interviews can take place in the absence of a solicitor and before the detainee has had the opportunity to seek legal advice.

the police as a witness. However, he started to incriminate himself by explaining his encounter with one of the suspected bombers shortly after the attacks and the assistance he had provided to that suspect. The police did not, at that stage, arrest and advise him of his right to silence and to legal assistance, but continued to question him as a witness and took a written statement. He was subsequently arrested and offered legal advice. In his ensuing interviews, he consistently referred to his written statement, which was admitted as evidence at his trial. He was convicted of assisting one of the bombers and of failing to disclose information about the bombings. His appeal against conviction was dismissed.

In their applications to the European Court the applicants complained that their lack of access to lawyers during their initial police questioning and the admission in evidence at trial of their statements had violated their right to a fair trial under Article 6 §§ 1 and 3 (c) of the Convention.

In a judgment of 16 December 2014 (see Information Note 180), a Chamber of the Court found, by six votes to one, that there had been no violation of Article 6 §§ 1 and 3 (c). On 1 June 2015 the case was referred to the Grand Chamber at the applicants' request.

Law – Article 6 § 1 in conjunction with Article 6 § 3 (c)

(a) *General principles*

(i) *Clarification of the principles governing restrictions on access to a lawyer* – The Grand Chamber considered it necessary to clarify the two stages of the *Salduz*[1] test for assessing whether a restriction on access to a lawyer was compatible with the right to a fair trial and the relationship between those two stages. It recalled that the first stage of the *Salduz* test required the Court to assess whether there were compelling reasons for the restriction, while the second stage required it to evaluate the prejudice caused to the rights of the defence by the restriction, in other words, to examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair.

The criterion of compelling reasons was a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect, restrictions on access to legal advice were permitted only in exceptional circumstances, and had to be of a temporary nature and be based on an individual assessment of the particular circumstances of the case. Relevant considerations when assessing whether compelling reasons had been demonstrated was whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying them.

Where a respondent Government convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this could amount to compelling reasons to restrict access to legal advice for the purposes of Article 6. However, a non-specific claim of a risk of leaks could not.

As to whether a lack of compelling reasons for restricting access to legal advice was, in itself, sufficient to found a violation of Article 6, the Court reiterated that in assessing whether there has been a breach of the right to a fair trial it is necessary to view the proceedings as a whole, and the Article 6 § 3 rights as specific aspects of the overall right to a fair trial rather than ends in themselves. The absence of compelling reasons does not, therefore, lead in itself to a finding of a violation of Article 6.

However, the outcome of the "compelling reasons" test was nevertheless relevant to the assessment of overall fairness. Where compelling reasons were found to have been established, a holistic assessment of the entirety of the proceedings had to be conducted to determine whether they were "fair" for the purposes of Article 6 § 1. Where there were no compelling reasons, the Court had to apply a very strict scrutiny to its fairness assessment. The failure of the respondent Government to show compelling reasons weighed heavily in the balance when assessing the overall fairness of the trial and could tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (c). The onus would be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice.

(ii) *Principles governing the right to notification of the right to a lawyer and the right to silence and privilege against self-incrimination* – In the light of the nature of the privilege against self-incrimination and the right to silence, in principle there

1. *Salduz v. Turkey* [GC], 36391/02, 27 November 2008, Information Note 113.

could be no justification for a failure to notify a suspect of these rights. Where access to a lawyer was delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer and his right to silence and privilege against self-incrimination took on particular importance. In such cases, a failure to notify would make it even more difficult for the Government to rebut the presumption of unfairness that arises where there are no compelling reasons for delaying access to legal advice or to show, even where there are compelling reasons for the delay, that the proceedings as a whole were fair.

(b) *Application of the principles to the facts*

(i) *First three applicants* – The Government had convincingly demonstrated in the case of the first three applicants the existence of an urgent need when the safety interviews were conducted to avert serious adverse consequences for the life and physical integrity of the public. The police had had every reason to assume that the conspiracy was an attempt to replicate the events of 7 July and that the fact that the bombs had not exploded was merely a fortuitous coincidence. The perpetrators of the attack were still at liberty and free to detonate other bombs. The police were operating under enormous pressure and their overriding priority was, quite properly, to obtain as a matter of urgency information on any further planned attacks and the identities of those potentially involved in the plot. There was a clear legislative framework basis for the restriction in domestic law regulating the circumstances in which access to legal advice for suspects could be restricted and offering important guidance for operational decision-making, an individual decision to limit each of the applicants' right to legal advice was taken by a senior police officer based on the specific facts of their cases and there had been strict limits on the duration of the restrictions, which had to end as soon as the circumstances justifying them ceased to exist and in any case within 48 hours.

There had thus been compelling reasons for the temporary restrictions on the first three applicants' right to legal advice.

The Court also concluded that in the cases of each of the first three applicants and notwithstanding the delay in affording them access to legal advice and the admission at trial of statements made in the absence of legal advice, the proceedings as a whole had been fair. In so finding it noted among other things that (a) apart from errors made when administering the cautions, the police had adhered strictly to the legislative framework and to the purpose of the safety interviews (to obtain information necessary to protect the public) and the applicants had been formally arrested and informed of their right to silence, their right to legal advice and of the reasons for the decision to restrict their access to legal advice; (b) the applicants were represented by counsel and had been able to challenge the safety interview evidence in *voir dire* proceedings before the trial judge, at the trial and on appeal; (c) the statements made during the safety interviews were merely one element of a substantial prosecution case against the applicants; (d) in his summing up to the jury, the trial judge had summarised the prosecution and defence evidence in detail and carefully directed the jury on matters of law, reminding them that the applicants had been denied legal advice before the safety interviews; and (e) there was a strong public interest in the investigation and punishment of terrorist attacks of this magnitude, involving a large-scale conspiracy to murder ordinary citizens going about their daily lives.

Conclusion: no violation (fifteen votes to two).

(ii) *The fourth applicant* – As with the first three applicants, the Grand Chamber accepted that there had been an urgent need to avert serious adverse consequences for life, liberty or physical integrity. However, it found that the Government had not convincingly demonstrated that those exceptional circumstances were sufficient to constitute compelling reasons for continuing with the fourth applicant's interview after he began to incriminate himself without cautioning him or informing him of his right to legal advice. In so finding, it took into account the complete absence of any legal framework enabling the police to act as they did, the lack of an individual and recorded determination on the basis of the applicable provisions of domestic law of whether to restrict his access to legal advice and, importantly, the deliberate decision by the police not to inform the fourth applicant of his right to remain silent.

In the absence of compelling reasons for the restriction of the fourth applicant's right to legal advice, the burden of proof shifted to the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice. The Grand Chamber found that the Government had not discharged that burden, for the following reasons: (a) the decision, without any basis in domestic law and contrary to the guidance given in the applicable code of practice, to continue to question the fourth applicant as a witness meant that he was

not notified of his procedural rights; this constituted a particularly significant defect in the case; (b) although the fourth applicant had been able to challenge the admissibility of his statement in a *voir dire* procedure at the trial, the trial court did not appear to have heard evidence from the senior police officer who had authorised the continuation of the witness interview and so, along with the court of appeal, was denied the opportunity of scrutinising the reasons for the decision and determining whether an appropriate assessment of all relevant factors had been carried out; (c) the statement formed an integral and significant part of the probative evidence upon which the conviction was based, having provided the police with the framework around which they subsequently built their case and the focus for their search for other corroborating evidence; and (d) the trial judge's directions left the jury with excessive discretion as to the manner in which the statement, and its probative value, were to be taken into account, irrespective of the fact that it had been obtained without access to legal advice and without the fourth applicant having being informed of his right to remain silent. Accordingly, while it was true that the threat posed by terrorism could only be neutralised by the effective investigation, prosecution and punishment of all those involved, the Court considered that in view of the high threshold applicable where the presumption of unfairness arises and having regard to the cumulative effect of the procedural shortcomings in the fourth applicant's case, the Government had failed to demonstrate why the overall fairness of the trial was not irretrievably prejudiced by the decision not to caution him and to restrict his access to legal advice.

Conclusion: violation (eleven votes to six).

Article 41: fourth applicant's claim in respect of pecuniary damage dismissed; not necessary to make an award in respect of non-pecuniary damage in circumstances of the case.

(See *Salduz v. Turkey* [GC], 36391/02, 27 November 2008, Information Note 113; and *Dayanan v. Turkey*, 7377/03, 13 October 2009, Information Note 123)

Lawyer not permitted to conduct his own defence in criminal proceedings: *relinquishment in favour of the Grand Chamber*

Correia de Matos v. Portugal - 56402/12 [Section I]

In February 2008 a complaint was lodged against the applicant, a lawyer, for allegedly insulting a judge. In February 2010 the public prosecutor's office filed the prosecution's submissions against the applicant.

In March 2010 the applicant requested the opening of the adversarial investigation proceedings in the Criminal Investigation Court and sought permission to conduct his own defence. In an order of September 2010 the court agreed to open the investigation but found that the applicant was not entitled to act in the criminal proceedings without the assistance of defence counsel.

The applicant appealed unsuccessfully to the Court of Appeal against that order. However, the decision dismissing his appeal was not served on the applicant, as the Court of Appeal took the view that service was not required under Article 113 § 9 of the Code of Criminal Procedure.

The case was set down for hearing before the investigating judge in October 2010, but the applicant requested several adjournments, claiming that he had not been notified of the Court of Appeal decision. The investigating judge refused the applicant's last request for adjournment of the hearing on the grounds that the Court of Appeal had given a final ruling on his request to conduct his own defence. The judge also upheld the charges against the applicant and referred the case to the Criminal Court in September 2012.

In October 2012 the applicant lodged a constitutional appeal against the investigating judge's decision. In a judgment of January 2013 the Constitutional Court declared the appeal inadmissible.

At the time the application was lodged the proceedings were still pending before the Criminal Court.

In his application to the Court the applicant complains of the domestic court decisions refusing him permission to conduct his own defence in the criminal proceedings against him and requiring that he be represented by a lawyer.

The case was communicated under Article 6 §§ 1 and 3 (c) of the Convention. On 13 September 2016 a Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber.

ARTICLE 9

Freedom of thought
Freedom of conscience

Assessment of the genuineness of an objection to military service by commission composed of majority of military officers: *violation*

Papavasilakis v. Greece - 66899/14
Judgment 15.9.2016 [Section I]

Facts – Law no. 3421/2005 on the enlistment of Greek citizens provides for civilian work as an alternative to military service, by placing conscientious objectors at the disposal of the various public services. Such placement is decided by the Ministry of National Defence further to an opinion given by a Special Board, which examines, either on the basis of documents or after hearing the person concerned, whether the conditions are met for conscientious-objector status to be granted. The Law provided for the following composition of the Special Board: two university professors specialising in philosophy, social and political sciences and psychology, a member of the State Legal Counsel's Office as chair, and two high-ranking officers of the armed forces (one from the recruitment unit, the other from the health service); in other words, three civilians and two military officers.

When the applicant, who requested conscientious-objector status, appeared before the Special Board, only the chair and the two officers were present. He explained that the main reason for his request was his objection to violence. While he had connections with the Jehovah's Witnesses, he had not yet been baptised. He also stated that he was prepared to carry out alternative service for fifteen months instead of nine, which was the normal duration of military service. The Board rejected his request for conscientious-objector status and the Minister of Defence likewise. The applicant appealed against that decision to the Supreme Administrative Court, challenging in particular the composition of the Special Board, but he was unsuccessful. In 2014 he was ordered to pay a fine of EUR 6,000 for insubordination.

Law – Article 9: As the Court had previously found, States had a positive obligation in such matters which was not confined to ensuring that, under domestic law, there was a procedure for examining requests for conscientious-objector status; that procedure also had to be effective and accessible.[1] One of the essential conditions for the effectiveness of the procedure was the independence of the individuals conducting it.

Domestic law had clearly provided after careful consideration that the Special Board had to be composed of an equal number of army officers and members of civil society having specific knowledge in such matters, together with a lawyer as chair. Accordingly, if the Special Board had sat with all of its members present, the majority would have been civilians. However, only the two officers and the chair were present on the day the applicant was interviewed.

As the Court had previously found, concerning a conscientious objector examined by a tribunal composed only of military officers in respect of military offences, the individual could understandably be afraid of appearing before judges belonging to the army, which was basically a party to the proceedings, and could thus have legitimately feared that the tribunal would be unduly guided by biased considerations.[2]

Moreover, in his recommendation of 2013, the Greek Ombudsman had noted that, while for conscientious objectors classified as "religious" the board required no more than a certificate from the religious community concerned and did not even call them to an interview, the "ideological" objectors were often required to answer questions about sensitive personal information.

The applicant could thus legitimately have feared that, not being a member of a religious community, he would not succeed in conveying his ideological beliefs to career officers with senior positions in the military hierarchy.

In view of the fact that army headquarters would then send the file to the Minister of Defence, appending thereto a draft ministerial decision in accordance with the Board's proposal, the Minister did not afford any greater safeguards of impartiality and independence, even though such safeguards were necessary to reassure a conscientious objector who had appeared, as in the present case, before a board that was made up of a majority of high-ranking army officers. As to the scrutiny of the

1. See in particular *Savda v. Turkey*, 42730/05, 12 June 2012, Information Note 153; on the principle and conditions of the application of Article 9 to cases of conscientious objectors to military service, see *Bayatyan v. Armenia* [GC], 23459/03, 7 July 2011, Information Note 143.
2. *Feti Demirtaş v. Turkey*, 5260/07, 17 January 2012, Information Note 148.

Supreme Administrative Court in the event of an appeal against the Minister's decision, it concerned only the "lawfulness" of the decision and did not extend to the merits of the assessments by the members of the Special Board.

The Court thus took the view that, to comply with the letter and spirit of the law, if members of the Board were unable to sit on the day when a conscientious objector was to be interviewed, arrangements had to be made so that it would meet in the conditions of equal representation laid down by domestic law.

Consequently, the competent authorities had not fulfilled their positive obligation to ensure that the interviewing of conscientious objectors by the Board took place in conditions that guaranteed procedural efficiency and the equal representation required by domestic law.

Conclusion: violation (unanimously).

Article 41: EUR 2,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed, the fine not yet being final.

ARTICLE 10

Freedom of expression

Failure of political party chair to prevent congress delegates from speaking in Kurdish: *Article 10 applicable; violation*

Semir Güzel v. Turkey - 29483/09
Judgment 13.9.2016 [Section II]

Facts – The applicant, vice-president of a political party, was prosecuted for having allowed participants at the general congress he was chairing to speak in Kurdish during their interventions. At the relevant time, it was a criminal offence for a political party to use any language other than Turkish at congresses and meetings. In his application to the European Court the applicant complained that his prosecution was in breach of his right to freedom of expression under Article 10 of the Convention.

Law – Article 10: The Court reiterated that Article 10 protected not only the substance of ideas and information expressed but also the form in which they were conveyed. In deciding whether a certain act or form of conduct fell within the ambit of Article 10, an assessment had to be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or engaging in the conduct in question. Criminal proceedings were initiated against the applicant for not preventing some of the delegates from speaking Kurdish. The applicant had acted in this way despite warnings from a government superintendent, which, from an objective point of view, could be seen as an expressive act of defiance towards an authority representing the State. Furthermore the applicant had made it clear that he had not used his power as chairperson to intervene when certain delegates spoke in Kurdish because of his view that Kurdish should be used in all areas of life; that those who spoke Kurdish were speaking in their mother tongue; and that it was neither legal nor ethical for him to intervene and to force people to speak in a language other than their mother tongue.

The Court concluded that through his particular conduct the applicant had in fact exercised his right to freedom of expression within the meaning of Article 10 of the Convention and that Article was thus applicable in the present case. The Court further held that the relevant law (section 81(c) of Law no. 2820 on the regulation of political parties) was not clear enough to have enabled the applicant to foresee that he would face criminal proceedings and accordingly, the interference with his freedom of expression was not prescribed by law.

Conclusion: violation (unanimously).

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

ARTICLE 14

Discrimination (Article 1 of Protocol No. 1)

Alleged discrimination of Gurkha Soldiers as regards their pension entitlement: *no violation*

British Gurkha Welfare Society and Others v. the United Kingdom - 44818/11
Judgment 15.9.2016 [Section I]

Facts – Nepalese Gurkha soldiers have served the British Crown since 1815. The Gurkhas were originally based abroad, but since 1 July 1997 they have been based in the United Kingdom. Historically they were discharged to Nepal and it was presumed that they would remain there during

retirement. In 2004 a change was made to the United Kingdom Immigration Rules permitting Gurkhas who retired on or after 1 July 1997 to apply for settlement in the United Kingdom. This was later extended to all former Gurkhas who had served in the British Army for at least four years. In 2007 an offer was made to Gurkhas who retired after 1 July 1997 to transfer their accrued rights to a pension after that date from the Gurkha Pension Scheme to the Armed Forces Pension Scheme applying to Non-Gurkha soldiers on a year-for-year basis. Years served preceding that date were transferred under an actuarial calculation amounting to approximately 27% of a pensionable year of a Non-Gurkha soldier. Gurkhas retiring before this date did not qualify for this transfer.

In their application to the European Court the applicants complained under Article 14 in conjunction with Article 1 of Protocol No. 1 that the significantly lower pension entitlement of Gurkha soldiers attached to the British Army who had retired or served most of their time before 1 July 1997 amounted to discriminatory treatment on grounds of nationality.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: The Court was satisfied that the Gurkha soldiers were in a relatively similar situation to other soldiers in the British Army and that they could be regarded as having been treated less favourably than them in respect of their pension entitlement. It reiterated that where an alleged difference in treatment was on grounds of nationality, very weighty reasons had to be put forward before it could be regarded as compatible with the Convention. However, it also had to be mindful of the wide margin of appreciation usually allowed to the State under the Convention when it came to general measures of economic or social strategy.

The amendments to the Immigration Rules reflected the significant change in the position of the Gurkhas over time and as a result of this change the domestic authorities considered that the difference in their pension entitlement could no longer be justified on legal or moral grounds. A number of options for the transfer were considered but rejected for financial reasons. Consequently, the authorities opted to allow only the transfer of pension rights accrued after 1 July 1997 on a year-for-year basis, and, in doing so, made an exception to their general policy of not enhancing pension schemes retrospectively. For those Gurkhas who retired after 1 July 1997, any pension entitlement accrued prior to that date was accrued at a time when they had no ties to the United Kingdom and no expectation of settling there following their discharge from the Army. Although the majority of Gurkhas falling into this category did subsequently settle in the United Kingdom it had to be borne in mind that the purpose of an armed forces pension scheme was not to enable the soldier to live without other sources of income following retirement from the Army. Most retired soldiers continued to be economically active once they left the armed forces. In fact, the evidence submitted by the Government indicated that many of those Gurkhas who retired after 1 July 1997 and who remained in the United Kingdom had gone on to find other gainful employment there.

The Court did not consider that the selection of 1 July 1997 as a cut-off point had been arbitrary. It represented the date of transfer of the Gurkhas' home base to the United Kingdom and was therefore the date from which the Gurkhas started to form ties with that country. Those who retired before that date had no ties to the UK and the Gurkha pension scheme continued to be the best scheme to meet their needs since the payments under that scheme were more than adequate to provide for their retirement in Nepal. For the above reasons, the Court concluded that any difference in treatment was thus objectively and reasonably justified.

Conclusion: no violation (unanimously).

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies
Six-month period

Application alleging violation of Article 2 of the Convention lodged less than six months after final decision in civil proceedings but more than six months after final decision in criminal proceedings: *inadmissible*

Jørgensen and Others v. Denmark - 30173/12
Decision 28.6.2016 [Section II]

Facts – The first and second applicants were relatives of two men who were killed in December 2001 when police shot at a four-wheel-drive vehicle in which they were travelling. The police said they had been acting in self-defence after their patrol car was rammed several times. The Regional State Prosecutor immediately initiated a criminal investigation into the police officers' conduct, but

decided not to prosecute after finding that the officers had acted in justified self-defence. His decision was ultimately upheld by the Director of Public Prosecutions (DPP) in February 2005. In December 2006 the applicants issued proceedings for compensation in the civil courts. Their claims were dismissed by the High Court in a decision that was upheld by the Supreme Court in November 2011.

In the Convention proceedings, the applicants alleged a violation of Article 2 of the Convention. Their application was lodged in May 2012, within six months of the Supreme Court's decision, but more than six months after the DPP's decision. The Government submitted that the applicants had failed to comply with the six-month rule.

Law – Article 35 § 1: The crucial question was whether the subsequent civil proceedings before the civil courts, which had full jurisdiction to determine whether the disputed account of events and the investigation were compatible with Articles 2 and 3 of the Convention, were also an effective remedy within the meaning of Article 35 § 1 which the applicants were required to exhaust.

The Court noted that the Regional State Prosecutor's account of the events and assessment of the evidence had been supervised by both the Police Complaints Board and the DPP. Neither the initial investigation against the police officers nor the reopened investigation had led to criminal proceedings against them as it was found that they had been acting in justified self-defence.

In these circumstances, the Court was not convinced that instituting subsequent civil proceedings would, in general, have increased the possibility of the courts finding a violation of Article 2 of the Convention (which would have led to a reopening of the investigation and possible criminal proceedings). It noted, in particular, that the civil proceedings were initiated more than two years after the final decision by the DPP, that no new decisive evidence had been discovered in the meantime and that both the High Court and the Supreme Court had unanimously found against the applicants.

Accordingly, the civil proceedings subsequent to the DPP's final decision were not a remedy requiring exhaustion and the application had been lodged out of time.

Conclusion: inadmissible (out of time).

Article 35 § 3 (b)

No significant disadvantage

Complaint that national courts had failed to recognise that a pupil's temporary suspension from school in breach of his procedural rights under domestic law also constituted a violation of his rights under Article 2 of Protocol No. 1: *inadmissible*

C.P. v. the United Kingdom - 300/11
Decision 6.9.2016 [Section I]

Facts – The applicant, a minor, was suspended from school, purportedly as a precautionary measure, following complaints about his conduct by another pupil. The suspension lasted for about three months. The applicant was given tuition at home during part of that period. In proceedings for judicial review of the decision to suspend him, the Supreme Court held that the suspension was unlawful under domestic law as the applicant had not been given an opportunity to put forward his version of events and no reasons had been given for the suspension. It declined, however, to find a breach of Article 2 of Protocol No. 1 to the Convention, finding that the applicant had not been denied effective access to the educational facilities available to pupils who were suspended from school.

Law – Article 35 § 3 (b): The Court accepted the Government's submission that the principal "disadvantage" suffered by the applicant was the lack of a finding by the national courts that the same failings which had rendered his temporary exclusion from school unlawful under domestic law also constituted a violation of Article 2 of Protocol No. 1. It found that, in the circumstances of the case, the applicant could not be said to have suffered a "significant disadvantage" in the sense of important adverse consequences. Firstly, there did not appear to have been any evidence to suggest that he had sustained any actual prejudice as a result of his unlawful suspension. Secondly, since the failings impugned by the applicant were essentially of a procedural nature, were the Court to declare the application admissible and find a violation, it would not be able speculate whether the outcome would have been different and less detrimental to the applicant had a procedure embodying adequate safeguards protecting his right to education been followed. Any prejudice sustained by the applicant regarding his right to education in substantive terms was thus speculative.

The Court further observed that, subsequent to the Supreme Court's judgment in the applicant's case, it had given appropriate guidance on the issue of the scope of Article 2 of Protocol No. 1 in a judgment specifically concerning the United Kingdom.[1] Thus, the general interpretative problem raised in the applicant's case had been resolved and could not constitute a compelling reason to warrant an examination on the merits. Lastly, since the applicant's legal challenge of his suspension from school had been examined by the national courts at three levels of jurisdiction (including by the Supreme Court which had considered in substance the same subject-matter of complaint as that raised in the present application) the case had been "duly considered by a domestic tribunal".

Conclusion: inadmissible (no significant disadvantage).

ARTICLE 37

Striking out applications

Assurance that the applicant would not be expelled on the basis of the expulsion order which was the subject of the application: *struck out*

Khan v. Germany - 38030/12
Judgment 21.9.2016 [GC]

Facts – The applicant moved from Pakistan to Germany in 1991 with her husband. Three years later her son was born. She and her husband divorced. The applicant worked as a cleaner in different companies and obtained a permanent residence permit in Germany in 2001. In 2005 she 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. Her mental health subsequently improved and she was granted days of leave and allowed to work full-time in the hospital laundry. The applicant lodged appeals on the grounds 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. The domestic courts found that, in addition to a risk of reoffending, the applicant was not integrated into German society since she spoke no German and basic medical care for psychiatric patients was available in big cities in Pakistan. Following a recommendation in a medical report, she was released on probation. She continued to work, showed balanced behaviour and was in regular contact with her son.

In a judgment of 23 April 2015 (see Information Note 184), 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. 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. On 9 February 2016 the Government requested that the Court strike the application out of its list of cases.

Law – Article 37: The Court noted that the German Government had given an assurance that the applicant would not be expelled on the basis of the expulsion order which was the subject of her application. The Government had further undertaken to ensure that any further decision to expel the applicant would be taken only after she had received a thorough medical examination and would take into account the time that had passed since the 2009 expulsion order. The Court had no reason to doubt the validity of the assurances and their binding effect. Furthermore, the applicant had been granted tolerated residence status. The Court noted that, should the German authorities issue a new expulsion order, the applicant would have remedies available under domestic law for challenging the order. Moreover, she would have the opportunity, if necessary, to lodge a fresh application with the Court. As such, the Court concluded that the applicant faced no risk of being expelled at that time or in the foreseeable future and found that there were no special circumstances requiring the continued examination of the application. In view of the subsidiary nature of the supervisory mechanism established by the Convention, the Court considered that it was not justified to continue the examination of the application.

Conclusion: struck out (sixteen votes to one).

1. *Ali v. the United Kingdom*, 40385/06, 11 January 2011, Information Note 137.

Exceptional circumstances justifying unilateral declaration in absence of prior attempt to reach a friendly settlement: *struck out following unilateral declaration*

Telegraaf Media Nederland Landelijke Media B.V. and van der Graaf v. the Netherlands - 33847/11
Decision 30.8.2016 [Section III]

Facts – In their application to the European Court the applicants complained that a search and seizure operation conducted at the home of the second applicant, a journalist on a newspaper (*De Telegraaf*) published by the first applicant, had breached their rights under Article 10 of the Convention. The operation had taken place pursuant to a warrant issued by a regional court in connection with the suspected leak of State secrets to the newspaper. In the Convention proceedings, the Government issued a unilateral declaration acknowledging a violation of Article 10 and offering to reimburse the applicants' costs and expenses before the Court. The applicants asked the Court to dismiss the declaration.

Law – Article 37 § 1: Rules 62 and 62A of the Rules of Court were based on the premise, reflected in Article 39 of the Convention, that friendly-settlement negotiations are normally concluded after the Court has placed itself at the disposal of the parties concerned for that particular purpose. In the present case, the Government had attempted to reach a friendly settlement directly with the applicants, through their representatives, without the involvement of the Court. The question therefore arose whether "exceptional circumstances" obtained within the meaning of Rule 62 § 2 that justified the filing of a unilateral declaration.

In finding that such circumstances did exist, the Court noted that (i) despite the lack of supervision of the friendly-settlement negotiations by the Court, there was no reason to believe that there was or could have been any abuse by either party or any imbalance in power, particularly bearing in mind that the applicant company was a corporate body and the proprietor of a major newspaper with national coverage, and that both applicants were ably represented by experienced counsel throughout; (ii) the Court had developed the principles governing the protection of journalistic sources in a series of judgments; (iii) the applicants had not sought just satisfaction going beyond a finding of a violation of the Convention and reimbursement of their costs and expenses and (iv) the Government had introduced legislation aimed at preventing the recurrence of violations such as that recognised in the present case in the future.

The Court was therefore satisfied that the Government's unilateral declaration offered a sufficient basis for finding that respect for human rights as defined in the Convention and the Protocols did not require it to continue its examination of the application.

Conclusion: strike out (majority).

ARTICLE 46

Pilot judgment – General measures

Respondent State required to reduce number of detainees held in prison psychiatric wings without access to suitable therapeutic treatment

W.D. v. Belgium - 73548/13
Judgment 6.9.2016 [Section II]

Facts – The applicant, who is classified by the authorities as having a "mental disability", has been detained continuously since 2007 in a prison social protection unit for acts held to constitute sexual assault. He complains that besides access to the prison psychiatric service, he has not been given any treatment or personalised medical support. Furthermore, because of the refusal of residential care centres and psychiatric hospitals to admit him, he has remained in detention without any realistic prospect of treatment in an outside institution, and thus without any hope of reintegrating into the community.

Law – Article 3 (*substantive aspect*): Without underestimating the efforts made by the authorities to find an outside facility to provide care for the applicant, they had nevertheless proved to no avail because the institutions contacted had refused to admit him. This detrimental situation for the applicant was in reality the result of a structural problem. On the one hand, the medical care available to those detained in prison psychiatric wings was inadequate, and on the other, placement outside the prison system was often impossible, either because of the lack of available or suitable places in psychiatric hospitals or because the legislative framework did not allow the social protection authorities to order the admission of such individuals to outside facilities that regarded them as undesirable.

The national authorities had not taken sufficient care of the applicant's health to ensure that he was not left in a situation breaching Article 3 of the

Convention. His continued detention for more than nine years in a prison environment without suitable treatment for his mental condition or any prospect of social reintegration amounted to degrading treatment.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been a violation of Article 5 § 1 (e) of the Convention in that the applicant's detention for more than nine years in a facility ill-suited to his condition had broken the link required by Article 5 § 1 (e) between the purpose and the practical conditions of detention, and a violation of Article 5 § 4 in the absence of an effective remedy capable in practice of affording redress for the situation of which he was the victim and preventing the continuation of the alleged violations.

Article 41: EUR 16,000 in respect of non-pecuniary damage.

Article 46: The Court decided to apply the pilot-judgment procedure in the present case, bearing in mind the number of individuals potentially concerned in Belgium and the findings of violations to which their applications could give rise.

The Belgian State had already taken significant measures in the context of a wide-ranging reform of mental health care and psychiatric detention. Such measures were likely to alleviate the phenomenon of the continued detention in a prison environment of offenders with mental disorders and the ensuing consequences. The Court welcomed the steps taken and planned by the national authorities and could only encourage the Belgian State to continue its efforts.

The Court encouraged the Belgian State to take action to reduce the number of offenders with mental disorders who were detained in prison psychiatric wings without receiving appropriate treatment, in particular by redefining the criteria justifying psychiatric detention, along the lines envisaged by the legislative reform under way in Belgium. In the same vein, the Court welcomed the objective, now enshrined in law, of providing appropriate therapeutic support to psychiatric detainees with a view to their reintegration into the community.

The respondent Government were given a period of two years to remedy both the general situation, in particular by taking steps to implement the legislative reform, and the situation of any applicants who had lodged similar applications with the Court before the delivery of the judgment in the present case and any who might apply to the Court subsequently. For present and future applicants, redress could be afforded through *ad hoc* measures that could be specified in friendly settlements or unilateral declarations adopted in accordance with the relevant requirements of the Convention.

Accordingly, pending the adoption of remedial measures, proceedings in all similar cases were adjourned for two years with effect from the date on which the judgment in the present case became final.

(See *L.B. v. Belgium*, 22831/08, 2 October 2012, Information Note 156; *Claes v. Belgium*, 43418/09, 10 January 2013, Information Note 159; *Bamouhammad v. Belgium*, 47687/13, 17 November 2015, Information Note 190; and *Murray v. the Netherlands* [GC], 10511/10, 26 April 2016, Information Note 195)

Execution of judgment – General measures

Respondent State required to identify causes of structural malfunctioning of health service, find appropriate solutions and change the rules governing forensic medical expert reports

Aydoğdu v. Turkey - 40448/06
Judgment 30.8.2016 [Section II]

Facts – The applicants are a married couple. On 6 March 2005 at around 4.30 p.m. the first applicant was taken to Atatürk Hospital, where she promptly gave birth by Caesarean section to a premature baby girl. The baby was suffering from respiratory distress syndrome requiring emergency treatment and special technical facilities which were not available at the hospital. Consequently, at around 6 p.m. the baby was transferred by ambulance to Behçet Uz Hospital on the doctors' orders.

The baby was admitted to the neonatal department as there was no space available in the intensive-care unit. On arriving at the hospital, the second applicant was informed that the neonatal department was unable to provide the necessary treatment but that if he could find another hospital with the requisite facilities, the baby could be transferred there.

On the morning of 8 March the premature child was transferred to the intensive-care unit and placed on mechanical ventilation. At around 11 p.m. she was found dead by a nurse.

Law

Article 2 (*substantive aspect*): The staff at Atatürk Hospital had displayed negligence, marked by a lack of coordination. The real problem, moreover, resulted from the ill-considered and poorly organised transfers of premature babies to Behçet Uz Hospital, and the position of other university hospitals in the region, which did not accept transfers of this kind. Atatürk Hospital had neither an appropriate unit for premature babies nor the technical facilities for treating them. In 2004, 354 of the 387 premature babies born at the hospital had had to be transferred to other institutions in questionable conditions.

This chronic state of affairs, which was clearly a matter of common knowledge at the relevant time, showed that the authorities responsible for health care could not have failed to realise that there was a real risk to the lives of multiple patients, and that they had not taken the steps within their powers that could reasonably have been expected to avert that risk, in particular because of the lack of a regulatory framework laying down rules for hospitals to ensure protection of the lives of premature babies, including the applicants' daughter.

Besides the negligence attributable to the medical staff, a causal link had therefore also been established between the death in the present case and the above-mentioned structural problems.

Accordingly, the applicants' daughter had to be regarded as having been the victim of negligence and structural deficiencies, the combined effect of which had been to prevent her from receiving appropriate emergency treatment, thus amounting to a life-endangering denial of medical care.

Conclusion: violation (unanimously).

Article 2 (*procedural aspect*): The arrangements laid down in Law no. 4483 on the prosecution of civil servants and other public officials had been systematically criticised and had given rise to frequent findings of violations by the Court on account of the lack of independence of the investigative bodies, the inability of complainants to participate effectively in investigations and the inadequate judicial scrutiny of the decisions of the bodies concerned. There were no particular circumstances justifying a departure from those conclusions in the present case.

In addition, in the forensic expert reports considered by the domestic courts the experts had never answered the only fundamental questions from which they could have determined whether, leaving aside the coordination problems and the structural deficiencies, the death of the applicants' daughter had been due to medical negligence or whether it had stemmed from the refusal to provide certain specific forms of treatment for premature babies with respiratory distress syndrome. Given that the court-ordered expert reports had been drawn up without the involvement of a specialist in neonatology, the branch of medicine at the heart of this case, they were at odds with the guidelines established in the domestic case-law concerning the need for appropriate scientific qualifications in this area. As a result of these deficient expert reports, no authority had been capable of providing a coherent and scientifically grounded response to the problems arising in the present case and giving an informed assessment of any liability on the part of the doctors.

This state of affairs was incompatible with the procedural obligation under Article 2, which in the present case had specifically required the national authorities to take steps to secure the evidence likely to provide a complete and accurate record of the events and an objective analysis of the clinical findings as to the cause of the applicants' daughter's death.

The criminal proceedings in issue had lacked the requisite effectiveness to be able to establish and punish any breach of the right to the protection of the baby's life in the present case as a result of the medical care complained of.

Conclusion: violation (six votes to one).

Article 41: EUR 65,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Article 46: The national authorities, in cooperation with the Committee of Ministers of the Council of Europe, were in the best position to identify, at national and/or regional level, the various causes of the structural defects in the health system and to provide general solutions to alleviate them, including improved regulation of transfer procedures and better quality health care in the field of prenatal and neonatal medicine in order to prevent similar violations in the future.

Independent administrative and disciplinary investigations, to be launched promptly by the authorities without requiring a formal complaint and to be conducted under the supervision of the highest competent body of the public service in question, could play a central role in the search for

appropriate solutions for establishing the circumstances in which treatment had or had not been provided and any failings that might have influenced the course of events.

Accordingly, the procedure for forensic medical examinations had to include sufficient safeguards, requiring for example that the bodies and/or specialists that could be called upon to carry out such examinations should have qualifications and skills corresponding fully to the particularities of each case under review, and the credibility and effectiveness of this procedure should be guaranteed, in particular by making it compulsory for forensic medical experts to give proper reasons in support of their scientific opinions.

The perspective set out in paragraph 138 of the Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe member States, issued on 12 December 2014 by the European Commission for the Efficiency of Justice (CEPEJ), which urged member States to "either introduce legal regulations concerning the rights and responsibilities of experts in judicial process or control, or review whether the existing guidelines in the matter meet the prescribed minimum standards of the rules of conduct for experts", would offer sufficient guidance to the respondent State in choosing the means to put in place.

(See also *Mehmet Şenturk and Bekir Şenturk v. Turkey*, 13423/09, 9 April 2014, Information Note 162, and *Asiye Genç v. Turkey*, 24109/07, 27 January 2015, Information Note 181)

Respondent State required to take general measures to ensure judicial impartiality in administrative-offence proceedings

Karelin v. Russia - 926/08
Judgment 20.9.2016 [Section III]

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

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Costs ordered in civil proceedings amounted to disproportionate burden: *violation*

Cindrić and Bešlić v. Croatia - 72152/13
Judgment 6.9.2016 [Section II]

Facts – In January 1992, during the war in Croatia, the applicants' parents were taken from their home in the then occupied part of the country by two men and shot dead. The investigation into their deaths is ongoing. The applicants brought an unsuccessful civil action in connection with the killings against the State and were ordered to pay costs in the amount of approximately EUR 6,800, which in their view breached their right to peaceful enjoyment of their possessions and their right of access to a court.

Law – Article 1 of Protocol No. 1: The Court considered that the costs order amounted to an interference with the applicants' right to peaceful enjoyment of their possessions and that the interference had been lawful and pursued a legitimate aim. The key issue was whether a fair balance had been struck between the general interest and the applicants' rights under Article 1 of Protocol No. 1. The Court had to ascertain whether, by reason of the State's interference, the applicants had had to bear a disproportionate and excessive burden. It had been alleged that the applicants' parents had been abducted from their home in a then occupied village by two police officers, taken to a nearby village and shot dead, solely because of their Croatian ethnic origin. The civil claim had been dismissed in its entirety on the grounds that the State had not been liable for damage resulting from the killings committed on territory which at the material time had been outside their control. As such, the applicants had been ordered to reimburse the costs of the State's representation by the State Attorney's Office in an amount equal to that of an advocate's fee. It could not be said that the applicants' civil action against the State was entirely devoid of any substance or was manifestly unreasonable. The applicants' view that the damage caused to them by the killing of their parents had been covered by the relevant legislation had not been unreasonable, since at that time it had not been possible for them to know how that legislation would be interpreted. The Court attached considerable importance to the fact that the opposing party in the proceedings at issue was the Croatian State, represented by the State Attorney's Office and that the costs of that office in the civil proceedings at issue were assessed on the basis of an advocate's fee. However, that office, since it was financed from the State budget, was not in the same position as an advocate. Another important factor was that of the applicants' individual financial situation. The Court accepted that paying the amount ordered by the national courts appeared burdensome for them. In light of these factors, the Court considered that ordering the applicants to bear the full costs of the State's representation in

the proceedings at issue amounted to a disproportionate burden on them.

Conclusion: violation (unanimously).

The Court also concluded, unanimously, that there had been a violation of Article 6 § 1 of the Convention (as there had been a disproportionate restriction of the applicants' right of access to court) and that there had been no violation of Article 2 (right to life).

Article 41: EUR 5,000 in respect of non-pecuniary; EUR 3,400 in respect of pecuniary damage.

ARTICLE 3 OF PROTOCOL No. 1

Free expression of the opinion of the people

Refusal to terminate mandate of European Parliament members elected as a result of eligibility threshold declared unconstitutional: *inadmissible*

Strack and Richter v. Germany - 28811/12 and 50303/12
Decision 5.7.2016 [Section V]

Facts – The applicants, who were eligible to vote in the 2009 elections to the European Parliament,[1] filed electoral complaints concerning a statutory rule requiring political parties to reach a minimum of 5% of the votes cast at national level before they could be allocated any of the 99 German seats in the European Parliament. As a consequence of that mechanism, several parties were not taken into account in the allocation of seats, even though they would have won one or two seats had the threshold not existed. The Federal Constitutional Court found the 5% threshold to be contrary to the German Basic Law as it violated the principles of equality of votes and equal opportunities for political parties, and declared it null and void. However, in the interest of parliamentary stability, it did not invalidate the election results, and called neither for new elections of the German MEPs nor for the rectification of the election results.

Law – Article 3 of Protocol No. 1: Given that the impugned decision of the Federal Constitutional Court might have caused the applicants' votes to be "wasted", the Court was willing to assume an interference with their individual right to vote. Regarding the lawfulness of this interference, while declaring unconstitutional the statutory provision concerning the 5% threshold, the Federal Constitutional Court had approved its application until the next elections.

The European Court had previously accepted that a national constitutional court might set a time-limit for the legislature to enact new legislation, allowing an unconstitutional provision to remain applicable for a transitional period. Moreover, in the German legal system, a challenged measure generally remained lawful when the Federal Constitutional Court decided that nullifying a provision would only take effect at a later stage, sometimes defining transitional regulations. This applied to cases of electoral complaints, in which the Federal Constitutional Court was given the power to decide what consequences an electoral error might entail. The decision at issue was therefore in accordance with domestic law.

The Federal Constitutional Court had also pursued a legitimate aim, namely that of preserving parliamentary stability.

Regarding the proportionality of the interference, the Federal Constitutional Court had given relevant and sufficient reasons as to why neither the polling nor the allocation of seats had to be repeated. Indeed, it was not unreasonable to assume that replacing the German MEPs, even only in part, would likely have had a negative effect on the work of the European Parliament, especially in political groups and in the committees. Moreover, with 99 of the 736 seats in the European Parliament in 2009, Germany was the Member State with by far the largest number of seats.

Electoral thresholds were intended in the main to promote the emergence of sufficiently representative currents of thought within a country. In particular, the Court had previously found no issue with the 5% thresholds applied at the 1979 elections to the European Parliament in France, at the elections to the Latvian Parliament and to the parliament of a German *Land*, as well as with the 6% threshold concerning parties nominated for the legislature of the Canary Islands. The Court had also found acceptable the 10% threshold in the particular circumstances of the 2002 parliamentary election in Turkey.[2]

1. In accordance with European Union law, elections to the European Parliament are held in all Member States by proportional representation.

2. *Yumak and Sadak v. Turkey* [GC], 10226/03, 8 July 2008, Information Note 110.

In the present case, European Union law explicitly allowed Member States to set electoral thresholds of up to 5% of votes cast and a considerable number of Member States relied on this faculty. Moreover, the number of "wasted" votes in the instant case had amounted only to some 10%, a rather low quantity compared to the high count of "wasted" votes in majority voting systems, equally accepted by the Convention,[1] or, for example, in the Turkish 2002 parliamentary elections (45.3%).[2]

Given the compatibility, in principle, of electoral thresholds with the relevant provision of the Convention, the impugned decision of the Federal Constitutional Court had not, *a fortiori*, curtailed the rights in question to such an extent as to impair their very essence and therefore could not be considered disproportionate. The wide margin of appreciation which the Convention afforded the Contracting States in these matters had not been overstepped.

Conclusion: inadmissible (manifestly ill-founded).

Article 13 of the Convention: The applicants had had recourse to electoral complaints before the Federal Parliament and the Federal Constitutional Court. Both institutions had the power to rectify certain electoral errors. The manner in which those proceedings had been conducted guaranteed the applicant an effective remedy in respect of his complaint under Article 3 of Protocol No. 1.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 2 OF PROTOCOL No. 4

Freedom to choose residence

Policy imposing length-of-residence and type of income conditions on persons wishing to settle in inner-city area of Rotterdam: *case referred to the Grand Chamber*

Garib v. the Netherlands - 43494/09
Judgment 23.2.2016 [Section III]

The Inner City Problems (Special Measures) Act, which entered into force on 1 January 2006, empowered a number of named municipalities, including Rotterdam, to take measures in certain designated areas including the granting of partial tax exemptions to small business owners and the selecting of new residents based on their sources of income. In 2005 the applicant moved to the city of Rotterdam and took up residence in a rented property in the Tarwewijk district. Following the entry into force of the Inner City Problems (Special Measures) Act, Tarwewijk became a designated area under a Rotterdam by-law. After being asked by her landlord to move to another property he was letting in the same district, the applicant applied for a housing permit as required by the new legislation. However, her application was rejected on the grounds that she had not been resident in the Rotterdam Metropolitan Region for the requisite period and did not meet the income requirement. Her subsequent appeals were unsuccessful. In 2010 the applicant moved to the municipality of Vlaardingen, which was also part of the Rotterdam Metropolitan Region.

In a judgment of 23 February 2016 (see Information Note 193), a Chamber of the Court found, by five votes to two, that there had been no breach of Article 2 of Protocol No. 4. In particular, the Court held that, in principle, the State had been entitled to adopt the impugned legislation and policy and in the circumstances the domestic authorities had been under no obligation to accommodate the applicant's preferences.

On 12 September 2016 the case was referred to the Grand Chamber at the applicant's request.

REFERRAL TO THE GRAND CHAMBER

Garib v. the Netherlands - 43494/09
Judgment 23.2.2016 [Section III]

(See Article 2 of Protocol No. 4 above)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Correia de Matos v. Portugal - 56402/12
[Section I]

(See Article 6 § 3 (c) above, page 17)

1. *Mathieu-Mohin and Clerfayt v. Belgium*, 9267/81, 2 March 1987.
2. *Yumak and Sadak*, cited above.

OTHER INTERNATIONAL JURISDICTIONS

Court of Justice of the European Union (CJEU)

Assessment of risk of inhuman or degrading treatment where non-EU State requests extradition of EU citizen

Aleksei Petruhhin - C-182/15
Judgment (Grand Chamber) 6.9.2016

The request for a preliminary ruling by the Latvian Supreme Court had been made in the context of an extradition request issued by the authorities of State that was not a member of the European Union (Russia) to the Latvian authorities in relation to a national of an EU member State (Estonia); the two main questions were as follows:

(i) Whether, for the purposes of applying an extradition agreement between a member State and a non-member State, the same level of protection must be guaranteed to a national of another member State as is guaranteed to a citizen of the requested State under the rule prohibiting extradition of nationals, on the basis of the principles of non-discrimination on grounds of nationality and of the freedom of EU citizens to move and reside within the Union.

(ii) Whether the requested member State must verify (and if so, according to what criteria) that the extradition complies with the safeguards established in the EU Charter of Fundamental Rights.

As to the first aspect, in the view of the CJEU, the exchange of information with the member State of which the person concerned was a national had to be given priority in order to afford the authorities of that member State, in so far as they had jurisdiction, pursuant to their national law, to prosecute that person for offences committed outside national territory, the opportunity to issue a European arrest warrant for the purposes of prosecution. In cooperating accordingly with the member State of which the person concerned was a national and giving priority to that potential arrest warrant over the extradition request, the host member State would act in a manner which was less prejudicial to the exercise of the right to freedom of movement while avoiding, as far as possible, the risk that the offence prosecuted would remain unpunished.

On the question concerning the Charter,[1] referring to its judgment of 5 April 2016, *Aranyosi and Căldăraru*,[2] the CJEU observed that:

(a) the prohibition of inhuman or degrading treatment or punishment under Article 4 of the Charter was absolute in that it was closely linked to respect for human dignity, the subject of Article 1 of the Charter;

(b) according to the case-law of the European Court of Human Rights, the existence of declarations and accession to international treaties guaranteeing respect for fundamental rights in principle were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices resorted to or tolerated by the authorities which were manifestly contrary to the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[3]

Transposing to the present question the position adopted in *Aranyosi and Căldăraru*, the CJEU concluded as follows:

(a) In so far as the competent authority of the requested member State was in possession of evidence of a real risk of inhuman or degrading treatment of individuals in the requesting third State, it was bound to assess the existence of that risk when called upon to decide on the extradition of a person to that State.

(b) To that end, the competent authority of the requested member State had to rely on information that was objective, reliable, specific and properly updated. That information could be obtained from, *inter alia*, judgments of international courts, such as judgments of the European Court of Human Rights, judgments of courts of the requesting third State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations.

1. Under Article 19 of the Charter, no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.
2. C-404/15 and C-659/15, Information Note 195.
3. *Saadi v. Italy* [GC], 37201/06, 28 February 2008, Information Note 105.

Inter-American Court of Human Rights

Equality before the law and non-discrimination in the access to a pension for same-sex couples

Case of Duque v. Colombia - Series C No. 310
Judgment 26.2.2016[1]

Facts – The applicant, Mr Ángel Alberto Duque, lived with his same-sex partner until the latter's death on 15 September 2001 as a consequence of acquired immunodeficiency syndrome (Aids). The applicant's partner was affiliated to the Colombian Fund Management Company of Pensions and Severance (COLFONDOS S.A.). On 19 March 2002 the applicant presented a written request to be informed about the requirements for obtaining a survivor's pension. COLFONDOS indicated that he did not hold a beneficiary status in accordance with the applicable law. On 26 April 2002, given the negative response of COLFONDOS, the applicant filed a "*tutela*" action, requesting that the pension be recognised and paid to him. The Tenth Municipal Civil Court of Bogotá denied the "*tutela*" action, finding that "the petitioner does not meet the qualifications required by law to be recognised as the beneficiary of the pension and that no provision or judgment has recognised, in that regard, any right to same-sex couples". The decision was appealed against by the applicant, and upheld in its entirety on 19 July 2002 by the Twelfth Municipal Civil Court of Bogotá.

The Colombian regulations in force at the time provided that the beneficiaries of the survivor's pension were "for life, the spouse or the surviving permanent companion" (Law no. 100 of 23 December 1993) and that "[f]or all civil effects, a *de facto* partnership, is a partnership between a man and a woman who, without being married, form a single and permanent community of life" (Law no. 54 of 28 December 1990). The decree implementing Law no. 100 indicated that "for the purposes of entitlement to the survivor pension, the quality of permanent companion will be h[e]ld by the last person of different sex to the deceased to have shared marital life with the deceased for a period of not less than two (2) years" (Decree 1889 of 3 August 1994). However, since 2007 the Colombian Constitutional Court has recognised, through its jurisprudence, an entitlement to pension, social-security and property rights for same-sex couples. It established that Law no. 54 also applied to same-sex couples. Subsequently, it determined that the coverage afforded by the social-security system's health contributory regime could also extend to same-sex couples. In 2008 the Constitutional Court concluded, in judgment no. C-336, that permanent partners in same-sex couples who demonstrated such status had the right to a survivor's pension. It also ruled in 2010 that the death of one of the partners of a same-sex couple prior to notification of judgment no. C-336 did not justify the survivor being denied a survivor's pension.

Law

(a) *Preliminary objections* – The State submitted two preliminary objections regarding the non-exhaustion of domestic remedies. The objections were rejected on the grounds that the State had not disclosed the necessary information to the Inter-American Commission when deciding on the admissibility of the case. A further preliminary objection was submitted regarding the facts invoked in support of the alleged violation of the rights to life and personal integrity. This was also rejected on the grounds that this argument could not be analysed as a preliminary objection, since it related to the probative weight of the evidence for the determination of the facts.

(b) *Article 24 (right to equal protection) of the* American Convention on Human Rights *(ACHR), in relation to Articles 1(1) (obligation to respect and ensure rights) and 2 (domestic legal effects)* – The Inter-American Court reiterated that Article 1(1) of the ACHR is a rule of general scope which extends to all provisions of the treaty, and provides for the obligation of State Parties to respect and ensure the free and full exercise of rights and freedoms recognised thereof "without discrimination". Article 24 of the ACHR prohibits *de iure* discrimination with respect to all laws passed by the State and its application.

During the proceedings the State recognised the existence of a "continued international wrongful act, during at least part of the period for which the provisions that did not allow for the recognition of pension benefits for same-sex couples were in force". Accordingly, it argued that the internationally wrongful act had ceased with the issuance of the Constitutional Court's C-336 judgment which amended the rules that were the cause of the applicant's human-rights violations. Further, it stated that as of 2010 there was an appropriate and effective remedy available for the recognition of pension benefits to same-sex couples. However, the Inter-

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 website (<www.corteidh.or.cr>).

American Court concluded that, notwithstanding the changes that had occurred at the domestic level, the compatibility between the Colombian legal system and the principle of non-discrimination and of the right to equality before the law had to be analysed taking into consideration the time when the violations occurred.

Thus, in order to perform the analysis, it proceeded to determine: (a) whether the Colombian provisions established a difference in treatment; (b) if the difference in treatment referred to categories protected by Article 1(1) of the ACHR, and (c) if the difference in treatment was of a discriminatory nature.

The Court found that the Colombian legislation regulating *de facto* marital unions and the property regime between permanent companions, as well as the regulatory decree that created the social-security system, established a difference in treatment between heterosexual couples who could form a marital union and same-sex couples who could not form such a union.

It reiterated that sexual orientation and gender identity are protected categories under the ACHR. Therefore, the ACHR prohibited any discriminatory law, act or practice based on sexual orientation. Consequently, no provision, decision or practice of domestic law, whether by State or private authorities, could diminish or restrict, in any way, the rights of a person based on their sexual orientation. Any potential restriction of a right based on one of the protected categories would need to be based on rigorous and weighty reasons. This implied that the reasons used by the State to justify differential treatment should be particularly serious and grounded in an exhaustive analysis.

In the present case, the Court found that the State had not provided any explanation regarding the pressing social need for or purpose of the differential treatment, or why recourse to such differential treatment was the only way to achieve such purpose. It referred to regulations and jurisprudence of some of the countries in the region that had recognised access to survivor pensions for same-sex couples, stating that a person's sexual preferences did not constitute an obstacle to the realisation of rights to access a survivor pension.

Moreover, the Court recalled that in the case of *Atala Riffo and daughters v. Chile*[1] it had ruled that the alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities could not be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered and that the fact that this was a controversial issue in some sectors and countries and not necessarily a matter of consensus could not lead it to abstain from issuing a decision, since in doing so it must refer solely and exclusively to the stipulations of the international obligations arising from a sovereign decision by the States to adhere to the ACHR.

In Mr Duque's case, the Court concluded that the State had not presented objective and reasonable justification for the restriction on his access to a survivor's pension based on sexual orientation. Accordingly, it found that the distinction set out in Colombian law on the basis of sexual orientation for access to a survivor's pensions was discriminatory. By not allowing him equal access to a survivor's pension Colombia was responsible for the violation of his right to equality and non-discrimination.

In addressing the State's allegations that the internationally wrongful act had ceased and had been remedied or repaired, the Court noted that, even if it was true that the applicant could, since 2010, have applied for a survivor's pension without being discriminated against, it was also true that there was no certainty that the pension would be granted or that recognition would have retroactive effect to the time it was the subject of differential treatment in 2002. In this regard, the Court concluded that the internationally wrongful act that had operated to the applicant's detriment had not yet been fully remedied, since the retroactive payments he could receive would not be equivalent to those he would have received if he had not been treated differently in a discriminatory manner.

With regard to the alleged violation of Article 2 of the ACHR, the Court considered that, in accordance with the normative and jurisprudential developments in Colombia concerning the recognition and protection of same-sex couples, it did not have the elements to conclude that there existed a violation of the obligation to adopt domestic legal provisions.

Conclusion: violation of Article 24 in relation to Article 1(1) (four votes to two); no violation of Article 2 in relation to Articles 24 and 1(1) (four votes to two).

1. Case of *Atala Riffo and daughters v. Chile* (merits, reparations and costs), judgment of 24 February 2012. Series C No. 239, § 92.

(c) *Article 8(1) (right to a fair trial) and Article 25 (right to judicial protection) of the ACHR, in conjunction with Articles 1(1) and 2 thereof* – In relation to the right to judicial protection, the Inter-American Court indicated that it had no means of verifying that there was not, in Colombia, a suitable and effective remedy to request payment of the survivor's pension for same-sex couples. That conclusion was based on the fact that it was not possible to perform an analysis, in abstract terms, of the suitability and effectiveness of existent remedies in the contentious administrative jurisdiction, and the application for judicial review and appeal against the decision of COLFONDOS, since these remedies were not filed. Consequently, the Court considered that the State had not violated this right.

As to the alleged violation of the applicant's judicial guarantees through the use of discriminatory stereotypes in judicial decisions, the Court held that the State was not responsible as it was not possible to verify whether the authorities had acted for reasons that went beyond the express provisions of Colombian law.

Conclusion: no violation (four votes to two).

(d) *Articles 4(1) (right to life) and 5(1) (right to personal integrity) of the ACHR in relation to Articles 1(1) and 1(2) thereof* – The Inter-American Court found that the State was not responsible for the violation of the applicant´s rights to personal integrity and life because: (a) no evidence had been provided of damage to his psychological or moral integrity derived from the resolutions issued; (b) no evidence had been submitted to infer that his health had been affected or that the State had failed to provide medical care, and (c) no information had been provided that could lead to the conclusion that in the applicant's case the alternative social-security system would have provided lower quality health protection than the contributory scheme.

Conclusion: no violation (four votes to two).

(e) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered that the State: (i) publish the judgment and its official summary; (ii) guarantee the applicant priority regarding the processing of any application for a survivor's pension, and (iii) pay compensation in respect of non-pecuniary damage, as well as costs and expenses.

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The statistics in the country profiles, which provide wide-ranging information on human-rights issues in each respondent State, have been updated to the end of the first semester 2016. All country profiles can be downloaded from the Court's Internet site (<www.echr.coe.int> – Press).

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All factsheets can be downloaded from the Court's Internet site (<www.echr.coe.int> – Press).

Case-Law Guides: new translations

Translations into Bulgarian of the guides on Article 6 of the Convention (civil and criminal limbs) – provided by the Bulgarian Helsinki Committee – have just been published on the Court's Internet site (<www.echr.coe.int> – Case-law).

Ръководство по член 6 от Конвенцията – Право на справедлив съдебен процес (гражданскоправен аспект) (bul)

Ръководство по член 6 от Конвенцията – Право на справедлив съдебен процес (наказателноправен аспект) (bul)

Joint FRA/ECHR Handbooks: new translations

Translations into Latvian and Swedish of the Handbook on European law relating to the rights of the child – which was published jointly by the Court, the Council of Europe and the European Union Agency for Fundamental Rights (FRA) in 2015 – are now available.

All FRA/ECHR Handbooks can be downloaded from the Court's Internet site (<www.echr.coe.int> – Case-law).

Rokasgrāmata par Eiropas tiesību aktiem bērnu tiesību jomā (lav)

Handbok om europeisk rätt rörande barnets rättigheter (swe)

Commissioner for Human Rights

The second quarterly activity report 2016 of the Council of Europe's Commissioner for Human rights is available on the Commissioner's Internet site (<www.coe.int> – Commissioner for Human Rights – Activity reports).

2nd quarterly activity report 2016 (eng)