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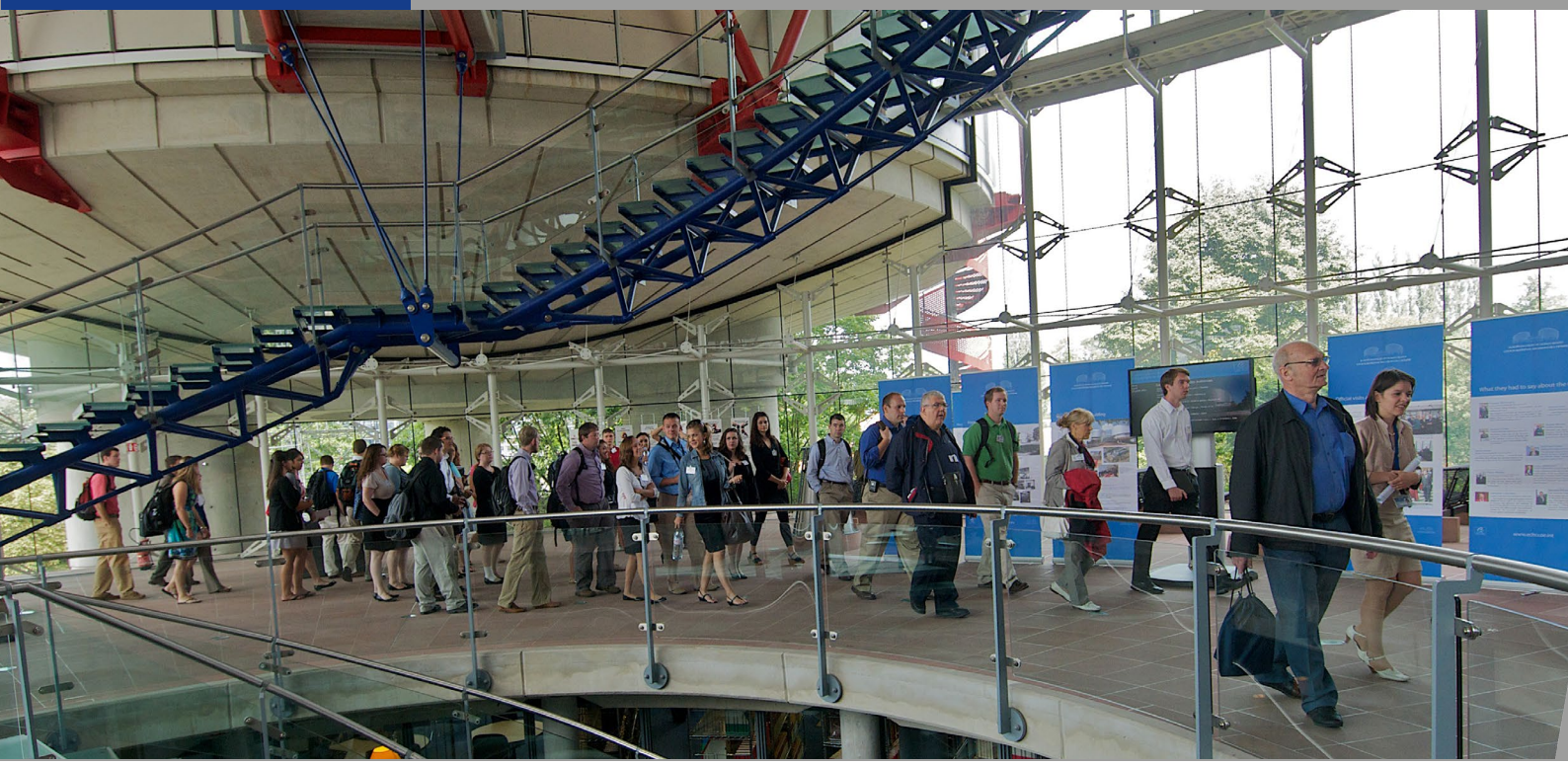

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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Table of contents

ARTICLE 2

Positive obligations (substantive aspect)

Suicide of a mentally ill man voluntarily admitted to State psychiatric hospital for treatment after suicide attempt: *case referred to the Grand Chamber*

Fernandes de Oliveira v. Portugal, 78103/14, judgment 28.3.2017 [Section IV]

The applicant's son had been voluntarily placed in a State psychiatric hospital for treatment following a suicide attempt in early April 2000. On 27 April 2000 he escaped from the hospital premises and jumped in front of a train. He had already been admitted on several occasions to the same hospital due to his mental disability which was aggravated by an addiction to alcohol and drugs. According to his medical records, the hospital was aware of his previous suicide attempts.

In a judgment of 28 March 2017 (see Information Note 205) a Chamber of the Court held, unanimously, that there had been a violation of Article 2 in its procedural aspect. In the Court's view, in the light of the positive obligation to take preventive measures to protect an individual whose life was at risk and faced with a mentally ill-patient who had recently attempted to commit suicide and was prone to escaping, the hospital staff should have been expected to adopt safeguards to ensure that he would not leave the premises and to monitor him on a more regular basis.

On 18 September 2017 the case was referred to the Grand Chamber at the Government's request.

Use of force

Death of mentally ill prisoner after being restrained in a stranglehold by a prison officer: *violation*

Tekin and Arslan v. Belgium, 37795/13, judgment 5.9.2017 [Section II]

Facts – The applicants were the parents of a prisoner suffering from psychiatric disorders who had been placed in an individual cell in the ordinary wing of a prison.

Three prison wardens went to his cell to read out certain specific security measures that were to be adopted. Having been provoked by the applicants' son, they decided to restrain him, for fear of being attacked and in order to place him in an isolation cell. However, he died as a result of the "arm lock" restraint technique used by one of the wardens, assisted by his two colleagues.

The three wardens were prosecuted for voluntary assault resulting in unintentional death. However, the proceedings ended in their acquittal.

Law – Article 2 (*substantive aspect*): The use of force by the prison wardens fell within the grounds set out in Article 2 § 2 (a) of the Convention, namely "in defence of any person from unlawful violence".

(a) *The relevant legal and administrative framework* – While the domestic legal framework governing the use of use of coercive measures by wardens against prisoners authorised the use of force only where the same objective could be achieved by no other means and with due regard to the principle of proportionality, it was nonetheless worded in very general terms and did not contain sufficient clarification as to which coercive measures were authorised and which were prohibited. In particular, the Belgian authorities had not issued any directive prohibiting techniques using physical restraint that could obstruct the airways or, more specifically, cause strangulation, as recommended by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

(b) *Staff training* – The training provided to the prison staff in Belgium at the relevant time had been deficient. The prison staff involved in the present case had received relatively limited training, none of it specifically concerning prisoners suffering from psychiatric disorders. Since the prisoner's death, a six-day training course had been specifically introduced to address the issue of mentally ill prisoners.

(c) *The necessity and proportionality of the force used* – The intervention had not been necessary to restrain an individual who posed a threat to human life and limb, whether his own or that of others.

In addition, the prison staff had known the prisoner and been aware of his state of mental health; he was not held in an ordinary prison wing but in a cell in the prison's psychiatric wing, which was staffed by a workforce that was better trained to deal with individuals who were mentally ill.

In any event, the applicant had been particularly vulnerable on account of his mental illness and the

fact that he was deprived of liberty. Yet the criminal court gave this factor no consideration when analysing the necessity and proportionality of the force used by the prison wardens. On the contrary, the applicant's son seemed to have been dealt with as an ordinary prisoner in full possession of his mental faculties.

There had been no discussion by the prison wardens on how best to proceed in informing the prisoner about the measures in question and in dealing with a potentially negative or aggressive response on his part. Despite the unpredictability of human conduct, the present case had not concerned a random intervention which developed in an unexpected way, thus requiring the prison wardens to respond without preparation. Equally, no measure other than immobilisation and placement in an isolation cell had been envisaged by the three wardens or their superiors.

The risk that a stranglehold could prove fatal was not taught in the training course followed by R. Yet there was no doubt that such a measure could lead to asphyxiation and was therefore potentially lethal.

Despite the fact that once immobilised on the ground and bound by his hands and feet the applicants' son no longer presented a danger to others, the numerous prison wardens present at the incident failed to carry out even a superficial examination to verify his state of health.

In those circumstances, the use of force had not been "absolutely necessary". The lack of clear rules could also explain why R. had acted in a way that had endangered the applicant's son's life, which would perhaps not have been the case had he received adequate training on how to react in situations such as that with which he was faced.

It did not follow from this finding of the respondent State's responsibility under the Convention that the Court was expressing an opinion on the acquittal of the three prison wardens by the domestic court on grounds relating to their individual criminal responsibility.

Conclusion: violation (unanimously).

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

(See also *Makaratzis v. Greece* [GC], 50385/99, 20 December 2004, Information Note 70; *Saoud v. France*, 9375/02, 9 October 2007, Information Note 101; *Renolde v. France*, 5608/05, 16 October 2008, Information Note 112; and *W.D. v. Belgium*, 73548/13, 6 September 2016, Information Note 199)

Effective investigation

Failure of Turkish and Cypriot authorities to cooperate in murder investigation: *case referred to the Grand Chamber*

Güzelyurtlu and Others v. Cyprus and Turkey, 36925/07, judgment 4.4.2017 [Section III]

The applicants were close relatives of three Cypriot nationals of Turkish-Cypriot origin who were found dead with gunshot wounds in the Cypriot-Government-controlled area of the island in 2005. Criminal investigations were immediately opened by both the Cypriot authorities and by the Turkish (including the "TRNC") authorities. However, although eight suspects were identified by the Cypriot authorities and were arrested and questioned by the "TRNC" authorities, both investigations reached a stalemate and the files were held in abeyance pending further developments. Although the investigations remained open nothing concrete was done after 2008. The Turkish Government were still waiting for all the evidence in the case to be handed over so they could try the suspects, while the Cypriot investigation came to a complete halt following the return by Turkey of extradition requests by the Cypriot authorities. Efforts made through the good offices of the United Nations Peacekeeping Force in Cyprus (UNFICYP) proved fruitless due to the respondent States' persistence in maintaining their positions.

In the Convention proceedings, the applicants complained of a violation of Article 2 by both the Cypriot and Turkish authorities on account of their failure to conduct an effective investigation into the deaths and to cooperate in the investigation.

In a judgment of 4 April 2017 (see Information Note 206), a Chamber of the Court held that there had been a procedural violation of Article 2 by Turkey (unanimously) and by Cyprus (five votes to two) on account of the failure of both States to cooperate effectively with each other and take all reasonable steps necessary to facilitate and realise an effective investigation into the case.

On 18 September 2017 the case was referred to the Grand Chamber at the request of the Governments of both respondent States.

ARTICLE 3

Inhuman and degrading treatment

Conditions in which asylum-seekers were held in airport transit zone: *case referred to the Grand Chamber*

Z.A. and Others v. Russia, 61411/15 et al., judgment 28.3.2017 [Section III]

(See Article 5 § 1 below)

Inhuman treatment, expulsion

Expulsion to Serbia: *case referred to the Grand Chamber*

Ilias and Ahmed v. Hungary, 47287/15, judgment 14.3.2017 [Section IV]

(See Article 5 § 1 below)

ARTICLE 5

ARTICLE 5 § 1

Deprivation of liberty

Twenty-three days' *de facto* confinement in transit zone: *case referred to the Grand Chamber*

Ilias and Ahmed v. Hungary, 47287/15, judgment 14.3.2017 [Section IV]

The applicants, Bangladeshi nationals, arrived in the transit zone situated on the border between Hungary and Serbia and submitted applications for asylum. Their applications were rejected and they were escorted back to Serbia.

In the Convention proceedings, they complained, *inter alia*, that their deprivation of liberty in the transit zone had been unlawful, that the conditions of their allegedly unlawful detention had been inadequate and that their expulsion to Serbia had exposed them to a real risk of inhuman and degrading treatment.

In a judgment of 14 March 2017 a Chamber of the Court held, unanimously, that there had been a violation of Article 3 as regards the applicants' expulsion to Serbia and a violation of Article 5 § 1. In the Court's view the Hungarian authorities had, in breach of Article 3, disregarded country reports and other evidence submitted by the applicants, imposed an unfair and excessive burden of proof and had failed to provide them with sufficient information. As regards Article 5 § 1, the applicants had been deprived of their liberty without any formal decision of the authorities solely by virtue of an elastically interpreted general provision of the law.

The Court also held, unanimously, that there had been no violation of Article 3 as regards the conditions of detention in the transit zone, but violations of Article 5 § 4 and Article 13 taken together with Article 3.

On 18 September 2017 the case was referred to the Grand Chamber at the Government's request.

Asylum-seekers held for lengthy periods in airport transit zone: *case referred to the Grand Chamber*

Z.A. and Others v. Russia, 61411/15 et al., judgment 28.3.2017 [Section III]

The four applicants, who were asylum-seekers, were held in the international transit zone of Sheremetyevo Airport in Russia for periods ranging from five months to one year and ten months after being refused entry into Russia. They had to sleep on a mattress on the floor in the boarding area of the airport, which was constantly lit, crowded and noisy, and were sustained on emergency rations provided by the Russian office of UNHCR. There were no showers. In the Convention proceedings, they complained that they had been unlawfully deprived of their liberty (Article 5 § 1 of the Convention) and of the conditions in which they were held (Article 3).

In a judgment of 28 March 2017 (see Information Note 205) a Chamber of the Court held by six votes to one that there had been a violation of Article 5 § 1 of the Convention. The applicants asylum seekers' confinement for lengthy periods in the airport transit zone without being able to enter Russian territory or a State other than that which they had left amounted to a *de facto* deprivation of liberty for which there was no legal basis in Russian law. The Chamber also found, by six votes to one, a violation of Article 3 on account of the conditions the applicants were forced to endure in the transit zone over extended periods.

On 18 September 2017 the case was referred to the Grand Chamber at the Government's request.

ARTICLE 5 § 4

Review of lawfulness of detention

Rejection of convicted prisoner's appeal against continued detention without affording him opportunity to reply to prosecution's submissions: *Article 5 § 4 applicable; violation*

Stollenwerk v. Germany, 8844/12, judgment 7.9.2017 [Section V]

Facts – The applicant was arrested and remanded in custody in connection with drugs offences. The decision to detain him was reviewed on eight occasions. The applicant was convicted at his trial and given a custodial sentence. He appealed. The trial court also issued a separate order continuing his detention.[1] The applicant's appeal against that order and his subsequent request for a hearing were dismissed by the Court of Appeal.

In the Convention proceedings the applicant complained that the proceedings before the Court of Appeal had been unfair since that court, in breach of the principle of equality or arms, had examined both his appeal against the order for his continued detention and his request for a hearing without affording him an opportunity to reply to the Chief Public Prosecutor's written submissions.

Law – Article 5 § 4: The set of proceedings that led to the court of appeal's decision not to release the applicant pending the outcome of his substantive appeal had commenced after the trial court's judgment convicting him. Accordingly, Articles 5 § 1 (c) and 5 § 3 of the Convention were no longer applicable to the applicant's detention.

Although Article 5 § 4 of the Convention did not normally come into play as regards detention governed by Article 5 § 1 (a) of the Convention (lawful detention after conviction by a competent court), it was applicable in the applicant's case because domestic law provided that a person is detained on remand until his or her conviction becomes final, including during appeal proceedings, and accorded the same procedural rights to all remand prisoners. Where a Contracting State provided for procedures going beyond the requirements of Article 5 § 4 of the Convention, the guarantees afforded by that provision nevertheless had to be respected in those procedures.

It was not disputed that the Court of Appeal took its decisions relating to the continuation of the applicant's detention and his request for a subsequent hearing without informing him of the written observations of the prosecution authorities and giving him the opportunity to comment on them. For review proceedings to be "truly adversarial" and for equality of arms to be ensured, a party had to be informed whenever observations were filed by another party and be given a real opportunity to comment. In addition, as this was the first time the Court of Appeal and the Chief Public Prosecutor's Office had been involved in the proceedings the applicant could not have known their positions regarding his detention.

The proceedings were thus not truly adversarial and the principle of equality of arms had been violated.

Conclusion: violation (four votes to three).

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

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Access to court

Supreme Court ruling that civil courts had no jurisdiction to hear pastor's claim for wrongful dismissal by church: *Article 6 not applicable; inadmissible*

Károly Nagy v. Hungary, 56665/09, judgment 14.9.2017 [GC]

Facts – The applicant was a pastor employed by the Reformed Church of Hungary. In 2005 he was dismissed for a comment he had made in a local newspaper. He brought a compensation claim against the Church in a labour court but the proceedings were discontinued for want of jurisdiction, since the applicant's relationship with his employer was regulated by ecclesiastical law. The applicant subsequently lodged a claim in the civil courts, but this too was ultimately discontinued after the Supreme Court ruled, following an analysis of the contractual relationship, that the civil courts had no jurisdiction either. Before the European Court the applicant contended that the Supreme Court's ruling that the

1. Under German law, a person is detained on remand, rather than after conviction, until his or her conviction becomes final, including during appeal procedures.

State courts had no jurisdiction had deprived him of access to a court, in breach of Article 6 § 1 of the Convention.

In a judgment of 1 December 2015 (see Information Note 191) a Chamber of the Court held, by four votes to three, that there had not been a violation of Article 6 § 1. The Chamber found that, although the Supreme Court had held that the State courts had no jurisdiction to examine the applicant's claim, it had in fact examined the claim in the light of the relevant domestic legal principles of contract law. The applicant could not, therefore, argue that he had been deprived of the right to a determination of the merits of his claim.

On 2 May 2016 the case was referred to the Grand Chamber at the applicant's request.

Law – Article 6 § 1: For Article 6 § 1 in its civil limb to be applicable, there had to be a dispute over a "right" which could be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right was protected under the Convention. In order to decide whether the "right" in question had a basis in domestic law, the starting-point had to be the provisions of the relevant domestic law and their interpretation by the domestic courts. Save in the event of evident arbitrariness, it was not for the Court to question the interpretation of the domestic law by the national courts. It was the right as asserted by the claimant in the domestic proceeding that had to be taken into account in order to assess whether Article 6 § 1 was applicable. Where there was a genuine and serious dispute about the existence of the right asserted by the claimant under domestic law, the domestic courts' decision that there was no such right did not remove, retrospectively the arguability of the claim.

It was undisputed that, in accordance with domestic law, claims involving internal laws and regulations of a church could not be enforced by State organs. It was further uncontested that, should domestic courts establish that an ongoing dispute concerned an ecclesiastical claim unenforceable by domestic organs, they had to terminate the proceedings. The main question that arose before the domestic courts therefore revolved around the exact nature of the applicant's relationship with the Reformed Church.

The applicant's ecclesiastical service was based on his Letter of Appointment, issued by the parish presbyters assigning him to the position of pastor in the Reformed Church of Hungary. Pursuant to the text of that letter, the applicant was asked to perform tasks "defined by ecclesiastical laws and legal provisions". However, instead of turning to the ecclesiastical courts with his pecuniary claims, he first instituted labour proceedings. When those proceedings were discontinued he turned to the civil courts. Following detailed examination of the issue of the State court's jurisdiction and the right of access to a court of persons in ecclesiastical service, all of the national courts discontinued the proceedings holding that the applicant's claim could not be enforced before the national courts since his pastoral service and the Letter of Appointment on which it was based were governed by the ecclesiastical rather than the State law. The Supreme Court had confirmed that the applicant's relationship with the Church had been of an ecclesiastical nature.

Domestic legislation did not provide churches or their officials with unfettered immunity against any and all civil claims. The applicant's claim did not involve a statutory right. Instead, it concerned an assertion that a pecuniary claim stemming from his ecclesiastical service, governed by ecclesiastical law, was actually to be regarded as falling under the civil law. Having carefully considered the nature of his claim, the domestic courts, in so far as they dealt with the substance of the matter, had unanimously held, in accordance with the provisions of domestic law, that that was not the case.

Given the overall legal and jurisprudential framework existing in Hungary at the material time when the applicant lodged his civil claim, the domestic court's conclusion that the applicant's pastoral service was governed by ecclesiastical law and their decision to discontinue the proceedings could not be deemed arbitrary or manifestly unreasonable.

Consequently, having regard to the nature of the applicant's complaint, the basis for his service as a pastor and the domestic law as interpreted by the domestic courts, the applicant had no "right" which could be said, at least on arguable grounds, to be recognised under domestic law. To conclude otherwise would result in the creating by the Court, by way of interpretation of Article 6 § 1, of a substantive right which had no legal basis in the respondent State. Accordingly, Article 6 did not apply to the facts of the applicant's case and the application was incompatible *ratione materiae* with the provisions of the Convention.

Conclusion: inadmissible (ten votes to seven).

ARTICLE 6 § 1 (ADMINISTRATIVE)

Fair hearing, adversarial trial, equality of arms

Lack of access to classified information constituting decisive evidence in judicial-review proceedings: *Article 6 applicable; no violation*

Regner v. the Czech Republic, 35289/11, judgment 19.9.2017 [GC]

Facts – In September 2006 the National Security Authority decided to revoke the security clearance that had been issued to the applicant enabling him to hold the post of deputy to the first Vice-Minister of Defence, on the grounds that he posed a risk to national security. The decision did not, however, indicate which confidential information it was based on, as this was classified "restricted" and could not therefore legally be disclosed to the applicant.

On an appeal by the applicant, the director of the Authority confirmed the existence of a risk. An application by the applicant for judicial review of the decision was subsequently dismissed by the Municipal Court to which the documents in question had been forwarded by the Authority. The applicant and his lawyer were not permitted to consult them. Subsequent appeals by the applicant were unsuccessful.

Relying on Article 6 § 1 of the Convention, the applicant complained that the administrative proceedings had been unfair because he had been unable to have sight of decisive evidence, classified as confidential information, which had been made available to the courts by the defendant.

In a judgment of 26 November 2015, a Chamber of the Court held unanimously that there had been no violation of Article 6 § 1 of the Convention, finding that the decision-making procedure had as far as possible complied with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the applicant's interests.

On 2 May 2016 the case was referred to the Grand Chamber at the applicant's request.

Law – Article 6 § 1

(a) *Applicability* – The applicant's ability to carry out his duties had been conditional on authorisation to access classified information. The revocation of his security clearance had therefore made it impossible for him to perform his duties in full and had adversely affected his ability to obtain a new post in the civil service. In those circumstances the link between the decision to revoke the applicant's security clearance and the loss of his duties and his employment had been more than tenuous or remote. He had therefore been able to rely on a right to challenge the lawfulness of that revocation before the courts.

The employment relationship between the applicant and the Ministry of Defence had been based on the provisions of the Labour Code, which had not contained any specific provisions applicable to functions performed within the State administration, so that at the material time there had been no civil service, in the traditional sense of the term, conferring on public servants obligations and privileges outside the scope of the ordinary law. As employment disputes concerned civil rights within the meaning of Article 6 § 1 of the Convention, the decision withdrawing the applicant's security clearance and the subsequent proceedings had affected his civil rights.

That being so, even assuming that the applicant had to be regarded as having been a civil servant, he had been able to apply to the administrative courts for judicial review of the Authority's decision. It followed that Article 6 was applicable in the present case under its civil limb.

Accordingly, the applicant could claim to have victim status for the purposes of Article 34 of the Convention.

Conclusion: preliminary objections rejected (fifteen votes to two).

(b) *Merits* – In accordance with the requirements of Czech law in the event of legal proceedings challenging a decision refusing to issue or revoking security clearance, the proceedings brought by the applicant had been restricted in two ways with regard to the rules of ordinary law guaranteeing a fair trial: first, the classified documents and information had not been available either to him or to his lawyer, and second, in so far as the decision revoking security clearance had been based on those documents, the grounds for the decision had not been disclosed to him.

The Court noted the powers conferred on the domestic courts. They had unlimited access to all the classified documents on which the Authority had based itself in order to justify its decision; they

had power to carry out a detailed examination of the reasons relied on by the Authority for not disclosing the classified documents; and they could order disclosure of those that they considered did not warrant that classification. They could also assess the merits of the Authority's decision revoking security clearance and quash, where applicable, an arbitrary decision. Their jurisdiction encompassed all the facts of the case and was not limited to an examination of the grounds relied on by the applicant, who had been heard by the judges and had also been able to make his submissions in writing.

The domestic courts had duly exercised the powers of scrutiny available to them in this type of proceedings, both regarding the need to preserve the confidentiality of the classified documents and regarding the justification for the decision revoking the applicant's security clearance, giving reasons for their decisions with regard to the specific circumstances of the present case.

Accordingly, the Supreme Administrative Court had considered that disclosure of the classified documents could have had the effect of disclosing the intelligence service's working methods, revealing its sources of information or leading to attempts to influence possible witnesses. It had explained that it was not legally possible to indicate where exactly the security risk lay or to indicate precisely which considerations underlay the conclusion that there was a security risk, the reasons and considerations underlying the Authority's decision originating exclusively in the classified information. Accordingly, there was nothing to suggest that the classification of the documents in question had been decided arbitrarily or for a purpose other than the legitimate interest indicated as being pursued.

According to the Supreme Administrative Court, it had been unequivocally clear from the classified documents that the applicant no longer satisfied the statutory conditions for being entrusted with secrets. His conduct had posed a national security risk. In that connection, in March 2011 the applicant had been prosecuted for participation in organised crime; aiding and abetting abuse of public power; complicity in illegally influencing public tendering and public procurement procedures; and aiding and abetting breaches of binding rules governing economic relations. It was understandable that where such suspicions existed the authorities considered it necessary to take rapid action without waiting for the outcome of the criminal investigation, while preventing the disclosure, at an early stage, of suspicions affecting the persons in question, which would run the risk of hindering the criminal investigation.

Nonetheless, it would have been desirable – to the extent compatible with the preservation of confidentiality and effectiveness of the investigations concerning the applicant – for the national authorities, or at least the Supreme Administrative Court, to have explained, if only summarily, the extent of the review they had carried out and the accusations against the applicant. In that connection the Court noted with satisfaction the positive new developments in the Supreme Administrative Court's case-law.

Regard being had to the proceedings as a whole, to the nature of the dispute and to the margin of appreciation enjoyed by the national authorities, the restrictions curtailing the applicant's enjoyment of the rights afforded to him in accordance with the principles of adversarial proceedings and equality of arms had been offset in such a manner that the fair balance between the parties had not been affected to such an extent as to impair the very essence of the applicant's right to a fair trial.

Conclusion: no violation (ten votes to seven).

(See *Fitt v. the United Kingdom* [GC], 29777/96, 16 February 2000, Information Note 15*; Ternovskis v. Latvia*, 33637/02, 29 April 2014; *Schatschaschwili v. Germany* [GC], 9154/10, 15 December 2015, Information Note 191; and *Miryana Petrova v. Bulgaria*, 57148/08, 21 July 2016)

ARTICLE 6 § 1 (ENFORCEMENT)

Reasonable time

Failure to take execution stage of proceedings into account when determining start of limitation period for length-of-proceedings claim: *violation*

Bozza v. Italy, 17739/09, judgment 14.9.2017 [Section I]

Facts – At the close of judicial proceedings lodged in 1994 against the National Social Security Agency concerning the recalculation of a pension, the applicant obtained a judgment in his favour on appeal, which became final in January 2004. As the amount due had not been paid by the author-

ities, she obtained an attachment order from the enforcement judge in January 2005.

The "Pinto" remedy subsequently requested by the applicant in May 2005 to obtain compensation for the length of the proceedings was declared out of time on the grounds that the "final domestic decision" to be taken into account when determining the starting point of the limitation period (six months) was not the decision of the enforcement judge but the decision on the merits.

In its recent case-law the Court of Cassation had reversed that is approach – which separated the merits and the execution – in favour of a global assessment of what constituted a reasonable time.

Law – This case essentially concerned the questions: (i) whether, in the procedural framework of the "Pinto" remedy, the decision by the enforcement judge could be considered as the "final domestic decision" in the main proceedings within the meaning of Article 35 of the Convention; and (ii) if so, whether the dismissal of the claim for just satisfaction by the "Pinto" courts had amounted to a violation of the applicant's right to a hearing within a reasonable time, within the meaning of Article 6 § 1 of the Convention.

(a) *Admissibility*

Article 35 § 1 (*six-month time-limit*): The Government's preliminary objection that the application had been out of time was added to the merits and dismissed for the reasons set out below.

(b) *Merits*

Article 6 § 1 (*reasonable time*): Although it was not completely aligned with the Strasbourg Court's case-law, the change in approach introduced by the Court of Cassation in 2016 was consistent with a global assessment of the length of the proceedings. At the time of the present case, however, the Italian courts observed a strict separation between the proceedings on the merits and the execution proceedings.

The present case concerned a judgment against the State. In accordance with the Court's case-law, there had therefore been no requirement for the applicant to institute any enforcement proceedings: once the judgment had become binding and enforceable in January 2004 as the respondent authorities knew or ought to have known that they were required to pay the applicant the amount due. Execution of the judgment had not posed any particular difficulties.

In the absence of spontaneous payment by the authorities, the right asserted by the applicant had became effective only when the enforcement judge imposed the attachment order.

In consequence, it was the decision of the enforcement judge that had to be regarded as the "final domestic decision" in the main proceedings.

As to the length of the "proceedings" as understood in this overall framework (from 1994 to 1998, then from 1999 to 2005), its excessive nature was evident from well-established criteria in the Court's case-law and its conclusions in numerous similar cases.

Conclusion: violation (unanimously).

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

ARTICLE 6 § 3 (b)

Adequate facilities

Alleged inability of defendant in criminal proceedings to examine surveillance videotapes used in evidence against her: *case referred to the Grand Chamber*

Murtazaliyeva v. Russia, 36658/05, judgment 9.5.2017 [Section III]

(See Article 6 § 3 (d) below)

ARTICLE 6 § 3 (d)

Examination of witnesses

Inability of defence in criminal proceedings to question witnesses: *case referred to the Grand Chamber*

Murtazaliyeva v. Russia, 36658/05, judgment 9.5.2017 [Section III]

The applicant, an ethnic Chechen, was arrested and convicted of preparing an act of terrorism, inciting others to commit an act of terrorism, and carrying explosives. She was sentenced to nine years' imprisonment, reduced to eight years and six months on appeal.

In the Convention proceedings, the applicant complained, in particular, that she had not been able to effectively examine the surveillance videotapes which had been used as evidence against her in the domestic proceedings and that she had not been

able to question a witness testifying on her behalf nor two attesting witnesses.

In a judgment of 9 May 2017 a Chamber of the Court held, unanimously, that there had been no violation of Article 6 §§ 1 and 3 (b); by four votes to three that there had been no violation of Article 6 §§ 1 and 3 (d) as regards the complaint concerning the absence of the witness testifying on her behalf; and by five votes to two that there had been no violation of Article 6 §§ 1 and 3 (d) as regards the two attesting witnesses. In the Court's view the applicant's conviction was based on abundant evidence against her and the witness on her behalf was unlikely to have outweighed it or strengthened the applicant's position. As regards the two attesting witnesses, the overall fairness of the trial had not been prejudiced and the applicant had been able to effectively present her case and the arguments in her defence.

On 18 September 2017 the case was referred to the Grand Chamber at the applicant's request.

ARTICLE 8

Respect for private life, respect for correspondence

Monitoring of an employee's use of the Internet at his place of work and use of data collected to justify his dismissal: *violation*

Bărbulescu v. Romania, 61496/08, judgment 5.9.2017 [GC]

Facts – The applicant was dismissed by his employer, a private company, for using the company's internet network during working hours in breach of the internal regulations, which prohibited personal use of company computers. Over a certain period of time, his employer had monitored his communications on a Yahoo Messenger account which he had been asked to set up for the purpose of responding to customers' enquiries. The records produced during the domestic proceedings showed that he had exchanged messages of a strictly private nature with other people.

In the Convention proceedings, the applicant argued that the termination of his contract had been based on a breach of his right to respect for his private life and correspondence and that the domestic courts had failed to protect that right.

In a judgment of 12 January 2015 a Chamber of the Court held, by six votes to one, that there had been no violation of Article 8. In the Chamber's view, there was no indication that the domestic authorities had failed to strike a fair balance, within their margin of appreciation, between the applicant's right to respect for his private life under Article 8 and his employer's interests (see Information Note 192).

On 6 June 2016 the case was referred to the Grand Chamber at the applicant's request.

Law – Article 8

(a) *Applicability* – The kind of internet instant messaging service at issue was a form of communication enabling individuals to lead a private social life. In addition, the notion of "correspondence" covered the sending and receiving of communications, even on an employer's computer.

The applicant had certainly been informed of the ban on personal internet use laid down in his employer's internal regulations. However, he had not been informed in advance of the extent and nature of his employer's monitoring activities, or of the possibility that the employer might have access to the actual contents of his communications.

It was open to question whether the employer's restrictive regulations had left the applicant with a reasonable expectation of privacy. Be that as it may, an employer's instructions could not reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continued to exist, even if these could be restricted in so far as necessary.

The applicant's communications in the workplace were therefore covered by the concepts of "private life" and "correspondence". Accordingly, Article 8 of the Convention was applicable in the present case.

(b) *Merits* – In the light of the particular circumstances of the case, having regard to the conclusion concerning the applicability of Article 8 and to the fact that the applicant's enjoyment of his right to respect for his private life and correspondence had been impaired by the actions of a private employer, the complaint had to be examined from the standpoint of the State's positive obligations.

Few member States had explicitly regulated the question of the exercise by employees of their right to respect for their private life and correspondence in the workplace. The Contracting States should therefore be granted a wide margin of appreciation

in assessing the need to establish a legal framework governing the conditions in which an employer could adopt a policy regulating electronic or other communications of a non-professional nature by its employees in the workplace.

However, proportionality and procedural guarantees against arbitrary action were essential. In that context, the domestic authorities should treat the following factors as relevant: whether the employee had been notified of the possibility that the employer might take measures to monitor correspondence and other communications, and of the implementation of such measures; the extent of the monitoring by the employer and the degree of intrusion into the employee's privacy; whether the employer had provided reasons to justify monitoring the employee's communications; whether it would have been possible to establish a monitoring system based on less intrusive methods and measures than directly accessing the content of the employee's communications; the consequences of the monitoring for the employee subjected to it; and whether the employee had been provided with adequate safeguards, especially when the employer's monitoring operations had been of an intrusive nature. Lastly, the domestic authorities should ensure that employees whose communications had been monitored had access to a remedy before a judicial body with jurisdiction to determine, at least in substance, how the criteria outlined above had been observed and whether the impugned measures had been lawful.

The domestic courts had correctly identified the interests at stake – by referring explicitly to the applicant's right to respect for his private life – and also the applicable legal principles of necessity, purpose specification, transparency, legitimacy, proportionality and security set forth in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data The domestic courts had also examined whether the disciplinary proceedings had been conducted in an adversarial manner and whether the applicant had been given the opportunity to put forward his arguments.

The applicant did not appear to have been informed in advance of the extent and nature of his employer's monitoring activities, or of the possibility that the employer might have access to the actual content of his messages. The domestic courts had omitted to determine whether the applicant had been notified in advance of the possibility that the employer might introduce monitoring measures, and of the scope and nature of such measures. To qualify as prior notice, the warning from the employer had to be given before the monitoring activities were initiated, especially where they also entailed accessing the contents of employees' communications.

The question of the scope of the monitoring and the degree of intrusion into the applicant's privacy had not been examined by any domestic court, even though the employer appeared to have recorded all the applicant's communications during the monitoring period in real time, accessed them and printed out their contents.

The domestic courts had not carried out a sufficient assessment of whether there had been legitimate reasons to justify monitoring the applicant's communications. In addition, neither the County Court nor the Court of Appeal had sufficiently examined whether the aim pursued by the employer could have been achieved by less intrusive methods than accessing the actual contents of the applicant's communications.

Moreover, neither court had considered the seriousness of the consequences of the monitoring and the subsequent disciplinary proceedings. In this regard, the applicant had received the most severe disciplinary sanction, namely dismissal.

The domestic courts had not determined whether, when the employer had summoned the applicant to give an explanation for his use of company resources, in particular the internet, it had in fact already accessed the content of the communications in issue. The national authorities had not established at what point during the disciplinary proceedings the employer had accessed that content. Accepting that the content of communications could be accessed at any stage of the disciplinary proceedings ran counter to the principle of transparency (Recommendation CM/Rec(2015)5 of the Committee of Ministers to member States on the processing of personal data in the context of employment).

That being so, the domestic courts had failed to determine, in particular, whether the applicant had received prior notice from his employer of the possibility that his communications on Yahoo Messenger might be monitored; nor had they

had regard either to the fact that he had not been informed of the nature or the extent of the monitoring, or to the degree of intrusion into his private life and correspondence. In addition, they had failed to determine, firstly, the specific reasons justifying the introduction of the monitoring measures; secondly, whether the employer could have used measures entailing less intrusion into the applicant's private life and correspondence; and thirdly, whether the communications might have been accessed without his knowledge.

Thus, notwithstanding the respondent State's wide margin of appreciation, the domestic authorities had not afforded adequate protection of the applicant's right to respect for his private life and correspondence and had consequently failed to strike a fair balance between the interests at stake.

Conclusion: violation (eleven votes to six).

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

(See also the Factsheet on Workplace surveillance)

Respect for family life, positive obligations

Failure to take adequate steps to enforce order for children's return under Hague Convention: *violation*

Sévère v. Austria, 53661/15, judgment 21.9.2017 [Section V]

Facts – The applicant was the father of twins born in 2006 and lived with their mother, a dual French and Austrian national, in the family home in France. Under French law, the couple shared joint custody. However, in December 2008, following a dispute, the mother left France with the children and took them to Austria. In February 2009 the applicant brought proceedings in Austria under the Hague Convention and the Brussels IIa Regulation seeking the children's return.[2] The Austrian courts found in his favour after rejecting the mother's allegations that the children would be at risk of abuse by the applicant if returned. In December 2009 the Austrian authorities made an initial attempt to enforce the return order but were unable to trace the mother and children.

Subsequently, after obtaining psychological expert evidence and after a series of applications and appeals stretching over several years, the Austrian courts finally refused to enforce the return order amid concerns that the children risked being separated from their mother on a return to France (as she faced a one-year prison sentence there for wrongly removing the children) and that there was a grave risk that such separation would severely traumatise and psychologically harm the children within the meaning of Article 13 (b) of the Hague Convention.[3]

Law – Article 8: The Court accepted that a change in the relevant circumstances could exceptionally justify the non-enforcement of a final return order. However, having regard to the State's positive obligations under Article 8 and the general requirement of respect for the rule of law, the Court had to be satisfied that the change was not brought about by the State's own failure to take all measures that could reasonably be expected to facilitate the enforcement of the return order.

The Austrian courts had issued the return order relatively swiftly and given detailed and comprehensive reasons why they considered that the mother's allegations of sexual abuse of the children by the applicant were not credible. After the return order had become final and the mother had failed to comply with it, they had reacted expeditiously by ordering the enforcement of the order and attempting to enforce it by searching for the mother and the children at the known addresses. However, after that first unsuccessful attempt no further steps towards enforcement were taken. The Austrian Government had not submitted any convincing reasons why the domestic courts did not consider any further coercive measures which could have convinced the mother of the legal need to comply with the return order. With the passage of time, the courts' focus had shifted more and more from the unproven allegations of sexual abuse to the possibility of the children being further traumatised in the event of their return to France. Nearly five and a half years after the initial attempt at enforcement

2. Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000.

3. Article 13 (b) of the Hague Convention provides that a State is not bound to order the return if there is a grave risk that it would expose the child to physical or psychological harm.

they finally decided against enforcing the return order on the grounds that the children had adapted well to living in Austria and were very likely to be further traumatised on their return because of the imminent separation from their mother. The change in circumstances was thus primarily determined by the passage of time and – regard being had to the failure to adopt any further coercive measures, including measures to locate the family – was mainly attributable to the conduct of the Austrian authorities. In sum, the applicant had not received effective protection of his right to respect for his family life.

Conclusion: violation (unanimously).

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

(See also the Factsheet on International Child Abductions)

ARTICLE 10

Freedom of expression

Order banning publication of images from which accused in murder trial could be identified: *no violation*

Axel Springer SE and RTL Television GmbH v. Germany, 51405/12, judgment 21.9.2017 [Section V]

Facts – Photographers working for the applicant media companies attended hearings during a murder trial to take still photographs and make video-recordings. During the trial, the presiding judge made an order banning the publication of images from which the accused could be identified. Before the European Court the applicants' alleged that the order had given rise to a violation of Article 10.

Law – The question before the Court was whether the judicial order was necessary in a democratic society. Where the right to freedom of expression was being balanced against the right to respect for private life, the criteria laid down in the Court's case law had to be taken into account.[4] The criteria were not exhaustive and were to be transposed and adapted in the light of the particular circumstances of the case. That applied in particular to cases where the presumption of innocence under Article 6 § 2 of the Convention came into play. In the case at hand the criteria included: the contribution to a debate of public interest, the degree to which the person affected was known, the influence on the criminal proceedings, the circumstances in which the photographs were taken, the context, form and consequences of the publication, as well as the severity of the sanction imposed.

The crime at issue had been brutal but it had been committed within a family following a private dispute in a domestic setting. There were no indications that it had gained particular notoriety. The person affected was not a public figure, but an ordinary person who was the subject of criminal proceedings. While the accused had confessed to the crime, a confession in itself did not remove the protection of the presumption of innocence. A confession might, under certain circumstances, have an impact on the balancing of the competing rights. The presiding judge had taken into consideration that the confessions and their credibility had to be assessed at the end of the main hearing, according to the domestic law, and not before it had begun. That applied all the more as the accused suffered from a schizoid personality disorder. The accused had never sought to contact the media nor make any public comments but had expressly asked to be protected from reporting that identified him. The order banned merely the publication of images from which the accused could be identified. Any other reporting on the proceedings was not restricted. As regards the consequences of a breach of the court order, the potential barring from further reporting on the case was equally limited to proceedings against the accused. The order did not have a chilling effect on the applicant media companies contrary to their rights under Article 10.

A careful balancing act had been carried out by the presiding judge. The judge had clearly addressed the conflict between opposing interests and had applied the domestic legal provisions by carefully weighing the relevant aspects of the case. In view of the margin of appreciation available to national authorities in the context of restrictions on reporting on criminal proceedings, the presiding judge had chosen the least restrictive of several possible measures. Consequently, the interference with the applicant companies' right to freedom of expression was necessary in a democratic society.

Conclusion: no violation (unanimously).

4. See *Axel Springer AG v. Germany* [GC], 39954/08, Information Note 149; and *Bédat v. Switzerland* [GC], 56925/08, Information Note 194.

Freedom to receive information

Refusal of request by a private individual not a party to the proceedings for copy of the judgment: *Article 10 not applicable; inadmissible*

Sioutis v. Greece, 16393/14, decision 29.8.2017 [Section I]

Facts – After reading an Article on a news website concerning the outcome of defamation proceedings (to which he was not a party) between a Member of Parliament and a businessman, the applicant requested a copy of the court's decision. His request was refused on the grounds that he lacked a legitimate interest.[5]

In the Convention proceedings the applicant complained of a breach of his right under Article 10 of the Convention to receive information.

Law – Article 10: Following the test laid down in *Magyar Helsinki Bizottság*, the case turned on whether access to the decision in the defamation proceedings was instrumental for the exercise of the applicant's right to freedom of expression, in particular his freedom to receive and impart information. In making that assessment, the Court had regard to (a) the purpose of the information request; (b) the nature of the information sought; (c) the role of the applicant; and (d) whether the information was ready and available.

(a) *Purpose of the request* – The impugned decision was adopted following a public hearing, was publicly pronounced and was accessible to the public at the registry of the court. The applicant's request concerned merely receipt of a copy of the decision and not access to the text of the decision, which he had not been refused. The applicant, who was not in any way personally concerned by the litigation, based his request on a general interest in being informed, arguing that all decisions should be available to the public and that that would promote the legitimate aims of transparency, accountability and the good administration of justice. However, he did not invoke any specific reason why a copy of the decision was necessary to enable him to exercise his freedom to receive and impart information and ideas to others.

(b) *Nature of the information sought* – The information, data or documents to which access is sought must generally meet a public interest test in order to prompt a need for disclosure under the Convention. The decision sought concerned litigation between private parties. Although both parties were publicly known, the nature of the information sought did not meet the necessary public interest test in order to prompt a need for disclosure.

(c) *Role of the applicant* – An important consideration was whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public "watchdog". However, unlike the applicants in previous cases in which the Court had found Article 10 to be applicable, the applicant in the instant case did not invoke any special role he might have had in enhancing the public's access to news and facilitating the dissemination of information. The purpose of his activities could not therefore be said to have been an essential element of informed public debate (contrast with the position in the cases of *Társaság*, *Magyar Helsinki Bizottság* and *Roşiianu*, in which the requests for information were made respectively by an association, an NGO and a journalist.

In view of the Court's findings under (a), (b) and (c), it was unnecessary to determine whether the information sought by the applicant was ready and available. In the circumstances, receiving a copy of the court's decision was not instrumental to the applicant's exercise of his freedom to expression. Article 10 did not, therefore, give the applicant the right to obtain a copy or embody an obligation on the Government to impart such information to the applicant).

Conclusion: inadmissible (incompatible *ratione materiae*).

(See also *Társaság a Szabadságjogokért v. Hungary*, 37374/05, 14 April 2009, Information Note 118; *Magyar Helsinki Bizottság v. Hungary* [GC], 18030/11, 8 November 2016, Information Note 201; and *Roşiianu v. Romania*, 27329/06, 24 June 2014, Information Note 175)

ARTICLE 14

Discrimination (Article 1 of Protocol No. 1)

Difference in entitlement to continued payment of State pension for pensioners employed in

5. Under Greek law (Article 22 § 2 of the Code for the Organisation of Courts), parties to proceedings can receive copies of or extracts from decisions or relevant documents of any set of proceedings, except criminal cases. Third parties can obtain a copy or extract only if they can prove that they have a legitimate interest, which is left to the discretion of the competent judge.

civil service and pensioners employed in private sector: *no violation*

Fábián v. Hungary, 78117/13, judgment 5.9.2017 [GC]

Facts – In 2012 the applicant, who was already in receipt of an old-age pension, took up employment as a civil servant. In 2013 an amendment to the Pension Act 1997 entered into force suspending the payment of old-age pensions to persons simultaneously employed in certain categories of the public sector. The amendment did not apply to pensioners working in the private sector. As a consequence, the payment of the applicant's pension was suspended. His administrative appeal against that decision was unsuccessful. In the Convention proceedings, the applicant complained of an unjustified and discriminatory interference with his property rights.

In a judgment of 15 December 2015 (see Information Note 191) a Chamber of the Court held, unanimously, that there had been a violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 (and therefore that it was not necessary to consider the complaint under Article 1 of Protocol No. 1 only). In particular, the Chamber held that the Government's arguments to justify the difference in treatment between publicly and privately employed retirees were unpersuasive and thus not based on any "objective and reasonable justification".

On 2 May 2016 the case was referred to the Grand Chamber at the Government's request.

Law

Article 1 of Protocol No. 1: The lawfulness of the interference was not in dispute and the Court found no reason to doubt that the prohibition on the simultaneous disbursement of salaries and pensions to which the applicant was subjected served the general interest of the protection of the public purse. The question was whether the interference struck a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights.

In examining whether the national authorities had acted within their margin of appreciation, the Court had to have particular regard to the factors which its case-law relating to the reduction, suspension or discontinuance of social-security pensions, had identified as being of relevance, namely the extent of the loss of benefits, whether there was an element of choice, and the extent of the loss of means of subsistence.

The case at hand did not concern the permanent, complete loss of the applicant's pension entitlements, but rather the suspension of his monthly pension payments. The suspension was of a temporary nature and was resumed when the applicant left State employment. It did not therefore strike at the very substance of his right and the essence of the right was not impaired. Once the legislation at issue had entered into force, the applicant was able to choose between discontinuing his employment in the civil service and continuing to receive his pension, or remaining in that employment and having his pension payments suspended. He opted for the latter. It was clear that when the applicant's old-age pension payments were suspended he continued to receive his salary. The suspension of his pension payments by no means left him devoid of all means of subsistence.

A fair balance had thus been struck between the demands of the general interest of the community and the requirements of the protection of the applicant's fundamental rights and he had not been made to bear an excessive individual burden.

Conclusion: no violation (unanimously).

Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: The first issue was whether the applicant, as a person in receipt of an old-age pension subsequently employed in the civil service, was in an analogous or relevantly similar situation compared with a person in receipt of an old-age pension subsequently employed in the private sector. The elements which characterised different situations, and determined their comparability, had to be assessed in the light of the subject-matter and purpose of the measure which made the distinction in question.

Three of the elements to be taken into account had been widely reflected in a long-standing line of the Court's case-law recognising a distinction between civil servants and private employees.[6]

6. See for example *Valkov and Others v. Bulgaria*, 2033/04, 25 October 2011, Information Note 145; *Heinisch v. Germany*, 28274/08, 21 July 2011, Information Note 143; and *Vilho Eskelinen and Others v. Finland* [GC], 63235/00, 19 April 2007, Information Note 96.

Firstly, Contracting Parties, by necessity, enjoyed wide latitude in organising State functions and public services, including such matters as regulating access to employment in the public sector and the terms and conditions governing such employment. Secondly, for institutional and functional reasons, employment in the public sector and in the private sector was typically subjected to substantial legal and factual differences, not least in fields involving the exercise of sovereign State power and the provision of essential public services. Thirdly, it could not be assumed that the terms and conditions of employment, including the financial ones, or the eligibility for social benefits linked to employment, would be similar in the civil service and in the private sector, nor could it therefore be presumed that those categories of employees would be in relevantly similar situations in that regard. The applicant's case revealed a need to take a fourth factor into account, namely the role of the State when acting in its capacity as employer. In particular, as employers, the State and its organs were not in a comparable position to private-sector entities either from the perspective of the institutional framework under which they operated or in terms of the financial and economic fundamentals of their activities; the funding bases were radically different, as were the options available for taking measures to counter financial difficulties and crises.

Both State and private sector employees were affiliated to the compulsory social-security pension scheme to which they contributed in the same way and to the same extent. Nevertheless, that was not in itself sufficient to establish that they were in relevantly similar situations. Following the amendment to the Pensions Act 1997, it was the applicant's post retirement employment in the civil service that entailed the suspension of his pension payments. It was precisely the fact that, as a civil servant, he was in receipt of a salary from the State that was incompatible with the simultaneous disbursement of an old-age pension from the same source. As a matter of financial, social and employment policy, the impugned bar on simultaneous accumulation of pension and salary from the State budget had been introduced as part of legislative measures aimed at correcting financially unsustainable features in the pension system of the respondent State. That did not prevent the accumulation of pension and salary for persons employed in the private sector, whose salaries, in contrast to those of persons employed in the civil service, were funded not by the State but through private budgets outside the latter's direct control.

The applicant had not demonstrated that, as a member of the civil service whose employment, remuneration and social benefits were dependent on the State budget, he was in a relevantly similar situation to pensioners employed in the private sector.

Conclusion: no violation (eleven votes to six).

(See also *Béláné Nagy v. Hungary* [GC], 53080/13, 13 December 2016, Information Note 202; *Valkov and Others v. Bulgaria*, 2033/04, 25 October 2011, Information Note 145; *Khamtokhu and Aksenchik v. Russia* [GC], 60367/08 and 961/11, 24 January 2017, Information Note 203; *Panfile v. Romania* (dec.), 13902/11, 20 March 2012)

ARTICLE 35

ARTICLE 35 § 1

Exhaustion of domestic remedies, effective domestic remedy – Turkey

Availability of civil remedy in damages for damage to reputation: *inadmissible*

Saygılı v. Turkey, 42914/16, decision 11.7.2017 [Section II]

Facts – The applicant, who considered that two articles published in a daily newspaper had been defamatory of him, lodged a complaint against the editors of the newspaper in question and requested that criminal proceedings be brought against them. The public prosecutor subsequently decided that there was no case to answer in respect of the applicant's complaint; his appeal against that decision was dismissed.

The applicant applied to the Constitutional Court, complaining that the judicial authorities had not protected him from the alleged attacks on his honour and reputation through the contested press articles. The Constitutional Court, basing its decision on the relevant case-law, declared his complaint inadmissible for failure to exhaust the available remedies, on the grounds that the applicant had failed to bring a civil action for compensation against the newspaper editors.

Law – Article 8: Turkish law provided that persons complaining of defamation had the option not only of bringing a civil action before the civil courts, but

also that of filing a complaint to request that criminal proceedings be initiated. From 2013 the Constitutional Court's case-law had held that the civil remedy was a "more effective" remedy in this area, and that individuals alleging a breach of their right to the protection of reputation were required to bring an action for damages before the civil courts to ensure compliance with the rule of exhaustion of all remedies. Only then could they bring an individual application before the Constitutional Court.

Thus, the effective and appropriate remedy under Turkish law with regard to complaints concerning attacks on the right to protection of one's reputation was a civil action for damages before the civil courts, and the applicant had been required to make use of this remedy before submitting his complaint to the Court.

Conclusion: inadmissible (failure to exhaust domestic remedies).

(See also Resolution no. 1577 (2007) of the Parliamentary Assembly of the Council of Europe, entitled "Towards decriminalisation of defamation", which called on the member States "to ensure that civil law provides effective protection of the dignity of persons affected by defamation")

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Suspension of State pension for pensioner employed in the civil service: *no violation*

Fábián v. Hungary, 78117/13, judgment 5.9.2017 [GC]

(See Article 14 above, page 19)

Cancellation of shareholding and personal liability for company's debts after it was struck off the register for failure to comply with statutory requirements: *case referred to the Grand Chamber*

Lekić v. Slovenia, 36480/07, judgment 14.2.2017 [Section IV]

The applicant was a minority shareholder and former managing director of a company that was struck off the court register of companies pursuant to the Financial Operations of Companies Act (FOCA) after a lengthy period of insolvency and inactivity. As a result of the striking off, the applicant's shareholding in the company was cancelled and, as an active member of the company, he became personally liable (jointly and severally with other active members) for the company's debts. He paid more than EUR 30,000 from his own assets to settle a claim by the company's main creditor. In the Convention proceedings, the applicant complained, *inter alia*, that his right to the peaceful enjoyment of his possessions had been violated in breach of Article 1 of Protocol No. 1.

In a judgment of 14 February 2017 (see Information Note 204), a Chamber of the Court held that Article 1 of Protocol No. 1 was applicable as (i) the applicant had been directly affected by the dissolution as his shareholding had been cancelled and he had incurred personal liability for the company's debts and (ii) despite its questionable economic value, the shareholding could still be considered a "possession" as, prior to the dissolution, the applicant had still been entitled to exercise a number of rights of a pecuniary nature. On the merits, the Chamber held unanimously that there had been no violation of Article 1 of Protocol No. 1 as the domestic courts' finding that the applicant was liable for the payment of the company's debts was reasonable given that he had been an active member of the company and was responsible for various irregularities in its operation.

On 18 September 2017 the case was referred to the Grand Chamber at the applicant's request.

PENDING GRAND CHAMBER

Referrals

Fernandes de Oliveira v. Portugal, 78103/14, judgment 28.3.2017 [Section IV]

(See Article 2 above, page 6)

Güzelyurtlu and Others v. Cyprus and Turkey, 36925/07, judgment 4.4.2017 [Section III]

(See Article 2 above, page 7)

Ilias and Ahmed v. Hungary, 47287/15, judgment 14.3.2017 [Section IV]

(See Article 5 § 1 above, page 8)

Z.A. and Others v. Russia, 61411/15 et al., judgment 28.3.2017 [Section III]

(See Article 5 § 1 above, page 8)

Murtazaliyeva v. Russia, 36658/05, judgment 9.5.2017 [Section III]

(See Article 6 § 3 (d) above, page 13)

Lekić v. Slovenia, 36480/07, judgment 14.2.2017 [Section IV]

(See Article 1 of Protocol No. 1 above, page 21)

OTHER JURISDICTIONS

Human Rights Review Panel

Enforced disappearances in Kosovo

Case of D.V., E.V., G.T., Veselinovic, H.S and I.R. v. EULEX – nos. 2014-11 to 2014-17, case of Sadiku-Syla v. EULEX – no. 2014-34 (decisions on merits 19.10.2016)

[The European Union established the Human Rights Review Panel on 29 October 2009 with a mandate to review alleged human rights violations by EULEX Kosovo (European Union Rule of Law Mission in Kosovo) in the conduct of its executive mandate. If the Panel, which is an independent body, determines that a violation has occurred, its findings may include non-binding recommendations for remedial action by the Head of Mission.

In reaching its determination, the Panel is empowered to apply human rights instruments. Of particular importance to the work of the Panel are the European Convention on Human Rights and the UN International Covenant on Civil and Political Rights (ICCPR).

In its decisions and findings the Panel has consistently had recourse in its case-law to the Convention standards developed by the European Court of Human Rights. For further information on the work of the Human Rights Review Panel please see its website and its Annual Report 2016.]

This group of cases concerned murdered and missing persons, the so called "enforced disappearance" cases that came about as a result of the armed conflict in Kosovo in the latter half of 1999 and in early 2000. The complainants alleged that there were inadequate criminal investigations to establish the facts and that there was a consequent failure to determine the responsibility of the perpetrators.

The Panel had regard to the standards developed by the European Court of Human Rights under Article 2 of the Convention in so far as it imposed on the public authorities a procedural obligation to establish facts concerning alleged breaches of the right to life. It examined the scope of these obligations in the context of the executive mandate of EULEX. It held that the procedural response expected of the Mission must be commensurate to the gravity of the alleged violation and importance of the protected rights, but also that the scope of the obligations of the Mission could not go further than the limited nature of the Mission's executive mandate dictated.

It held that EULEX's investigative efforts were insufficient and resulted in a violation of the complainants' rights guaranteed by Articles 2 and 3 of the Convention and by Article 13 in conjunction with Article 2 of the Convention.

United Nations Committee on Economic, Social and Cultural Rights (CESCR)

Family with young children evicted from rented room in flat without alternative housing

Ben Djazia and Bellili v. Spain, Communication no. 5/2015, views 20.6.2017

Facts – The authors of the communication had lived together in a flat in Madrid since their marriage in 2009. In 2012 they stopped receiving unemployment benefits and were unable to continue paying their rent. In 2013 they were evicted from their home with their children aged one and three.

Before the Committee on Economic, Social and Cultural Rights they complained that they had been evicted in violation of Article 11 of the International Covenant on Economic, Social and Cultural Rights (right to an adequate standard of living), without consideration being given either to the fact that they had no alternative accommodation or to the consequences their eviction would have, in particular, on their young children.

Law – The human right to adequate housing, which is derived from the right to an adequate standard of living, was of central importance for the enjoyment of all economic, social and cultural rights and was integrally linked to other human rights including the International Covenant on Civil and Political rights. The right to housing had to be ensured to all persons irrespective of income or access to economic resources. All persons should possess a degree of security of tenure which guaranteed legal protection against forced eviction, harassment and other threats. Forced evictions were prima facie incompatible with the requirements of the International Covenant on Economic, Social and Cultural Rights and could only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law. Where an eviction was justified the competent authorities had to guarantee that it was carried out in accordance with law and was compatible with the Cove-

nant, including with the principle of human dignity and observing the general principles of reasonableness and proportionality.[7]

The Committee noted that the authors had refused to leave the rented room despite the fact that the lessor had informed them in good time that the contract would not be renewed and that the lease had ended on 31 August 2012. From June 2012 the authors had been unable to pay the monthly rent. The Committee considered that that constituted a legitimate cause that could justify the authors' eviction.

Spanish law did not impose an obligation on the domestic authorities to conduct an evaluation of the possible effects of an eviction although, in practice, they did and judges were not always required by law to suspend eviction until an alternative dwelling was available. The law did not clearly and expressly state that judges had the power or could order other authorities, such as social services, to take coordinated action to prevent a person evicted from their home becoming homeless. It was in that context that the authors had been evicted despite having no alternative accommodation.

The Committee therefore considered that the eviction constituted a violation of their right to adequate housing unless the State party could convincingly demonstrate that, despite taking all reasonable steps using all available resources and having considered the particular circumstances of the authors, it had not been possible to satisfy their right to housing. In the present case, the onus on the State was even greater as the measure affected minor children.

The State party did not dispute the fact that the family needed public housing and met the requirements for requesting public housing. However, it had argued implicitly that it only had limited resources. The Committee considered that argument inadequate since the State party had not shown that it had made every possible effort, using all the resources at its disposal, to satisfy the right to housing in favour of persons, who, like the authors, were in a situation of particular need. The authors' eviction, without alternative housing, had thus constituted a violation of their right to adequate housing.

Conclusion: violation of Article 11 § 1, read individually and in conjunction with Articles 2 § 1 and 10 § 1.

Individual recommendations: Spain to take all necessary measures to help the family obtain adequate housing and to pay them compensation.

General recommendations: Spain to ensure that its legislation and practice comply with its obligations under the International Covenant on Economic, Social and Cultural Rights to secure the right to adequate housing, in particular by (a) affording a right to judicial review of the consequences of eviction, (b) improving coordination between the courts and the social services, (c) not evicting vulnerable persons without prior consultation and using all available resources to provide them with alternative accommodation and (d) by making arrangements to provide housing for people with low incomes.

RECENT PUBLICATIONS

Finding and understanding the case-law

A translation into Spanish of this document has been published on the Court's Internet site (www.echr.coe.int – Case-law).

Buscar y comprender la jurisprudencia (spa)

7. See the United Nations Committee on Economic, Social and Cultural Rights General comment No. 4: The right to adequate housing (art. 11(1) of the Covenant).

Case-Law Guides: updates and translations

Updates to 31 August 2017 in English and French have just been published regarding the Guides on Article 4 of the Convention (Prohibition of slavery and forced labour) and Article 3 of Protocol No. 1 (right to free elections). Moreover, some guides have just been translated into Albanian (Article 6 (civil limb) of the Convention, Articles 2 and 3 of Protocol No. 1 and Article 4 of Protocol No. 4).

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

Guide on Article 4 of the Convention (eng)

Guide sur l'Article 4 de la Convention (fre)

Guide on Article 3 of Protocol No. 1 (eng)

Guide sur l'Article 3 du Protocole n° 1 (fre)

Udhëzues mbi nenin 6 të Konventës (aspekti civil) (alb)

Udhëzues rreth nenit 2 të Protokollit nr. 1 (alb)

Udhëzues rreth nenit 3 të Protokollit nr. 1 (alb)

Udhëzues rreth nenit 4 të Protokollit nr. 4 (alb)

Commissioner for Human Rights

The second quarterly activity report 2017 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 2017 (eng)

2e rapport trimestriel d'activité 2017 (fre)

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

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

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

ENG

www.echr.coe.int

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

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

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