X. Summary of the main judgments and decisions delivered by the Court in 2013

SUMMARY OF THE MAIN JUDGMENTS AND DECISIONS DELIVERED BY THE COURT IN 2013[1]

Foreword

In the course of 2013 the Court was called upon to examine the content and scope of the rights and freedoms safeguarded by the Convention and its Protocols in a number of areas, including same-sex couples, child abduction, domestic violence, foreign nationals, vulnerable individuals or groups, prisoners, the security forces, the length of criminal sentences, the protection of personal data, the Internet and the right of access to information, religious organisations, advertising on matters of public interest and employment disputes. It also considered austerity measures arising from the financial and economic crisis and their impact on the Convention rights, particularly under Article 1 of Protocol No. 1.

The Grand Chamber delivered thirteen judgments, concerning Articles 2, 3, 5 § 1, 6 § 1, 6 § 2[2], 7, 8, 10, 11[3], 14 (taken together with Articles 7 and 8 of the Convention and 1 of Protocol No. 1), 35 § 3, 38 and 46 of the Convention and Article 1 of Protocol No. 12.

It clarified parts of its case-law, particularly with regard to the Court's temporal jurisdiction and the application by the domestic courts of the Hague Convention on the Civil Aspects of International Child Abduction.

The Court gave further guidance on the scope of the margin of appreciation that is to be left to the States, and on their positive obligations under the Convention. It reiterated the importance of applying the Convention, as interpreted by the Court, at national level.

Non-governmental organisations were behind certain important judgments.

The case-law also deals with the interaction between the Convention and European Union law, in particular, the Brussels II *bis* Regulation, and the interplay between the Convention and international law with regard to the United Nations and the issue of immunity. The Court continued to apply the criterion of "equivalent protection", as defined in its *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*

1. This is a selection of judgments and decisions which either raise new issues or important matters of general interest, establish new principles or develop or clarify the case-law. These summaries do not bind the Court.
2. And also Article 3 of Protocol No. 7.
3. And also Article 9.

judgment[4]. For the first time, it examined the extent to which this criterion applied outside the European Union context, in relation to implementation by a Council of Europe member State of obligations arising from its membership of the United Nations.

The Court also examined measures adopted at national level after the delivery of a "pilot judgment" and endorsed certain domestic remedies introduced subsequent to a pilot-judgment procedure, in the areas of length of proceedings[5] and failure to execute final judicial decisions[6].

It applied the pilot-judgment procedure in cases concerning conditions of detention and reassessment of compensation[7].

As an alternative to the pilot-judgment procedure, the Court continued to issue non-binding guidelines to respondent Governments under Article 46 of the Convention[8], with regard to both general and individual measures.

Jurisdiction and admissibility

Jurisdiction of States (Article 1)

The case of *Al-Dulimi and Montana Management Inc. v. Switzerland*[9] concerned the freezing and confiscation of assets, decided by the Swiss authorities pursuant to a Resolution adopted by the United Nations Security Council and the accompanying sanctions list. The Swiss Government submitted that it had been obliged by virtue of its membership of the United Nations and the provisions of the United Nations Charter to give effect to the Resolution in its domestic legal order and, on that account, that its Convention responsibility could not be engaged. The Court rejected that argument, noting that, as in the *Nada v. Switzerland*[10] case and unlike the situation in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*[11], the Swiss authorities had adopted implementing measures in order to give effect to the obligations arising under the Security Council Resolution. In consequence, the Court held that the Swiss State had taken the impugned measures in the exercise of its "jurisdiction" within the

4. [GC], no. 45036/98, ECHR 2005-VI.
5. See, in particular, the decisions in *Müdür Turgut and Others v. Turkey* (dec.), no. 4860/09, 26 March 2013; *Balakchiev and Others v. Bulgaria* (dec.), no. 65187/10, 18 June 2013; and *Techniki Olympiaki A.E. v. Greece* (dec.), no. 40547/10, 1 October 2013.
6. See *Demiroğlu and Others v. Turkey* (dec.), no. 56125/10, 4 June 2013.
7. See *Torreggiani and Others v.* Italy, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, 8 January 2013, and *M.C. and Others v. Italy*, no. 5376/11, 3 September 2013.
8. For example, in the *Vyerentsov v. Ukraine* judgment, no. 20372/11, 11 April 2013, on legislation regulating demonstrations.
9. No. 5809/08, ECHR 2013.
10. [GC], no. 10593/08, ECHR 2012.
11. (dec.) [GC], nos. 71412/01 and 78166/01, 2 May 2007.

meaning of Article 1 of the Convention and that they were therefore capable of engaging Switzerland's responsibility under the Convention.

Admissibility criteria[12]

Exhaustion of domestic remedies (Article 35 § 1)

In the *Uzun v. Turkey* decision[13] the Court examined the effectiveness of a new avenue of redress available before the Turkish Constitutional Court. In concluding that individuals such as the applicant should be required to test this new remedy, the Court took the following elements into consideration: the court fees were not prohibitive, legal aid could be granted and the thirty-day time-limit for filing a complaint with the Constitutional Court was not *a priori* unreasonable; the Constitutional Court, to which a complaint could only be made after other domestic remedies had been exhausted, had been vested with real powers of redress: it could, as appropriate, award damages, order a retrial, adopt interim measures, etc.; in addition, its decisions were binding. The application was therefore declared inadmissible for non-exhaustion of domestic remedies. However, the Court retained its ultimate power of review in respect of any complaints submitted by applicants who had exhausted the available domestic remedies – as required by the principle of subsidiarity, emphasised in the Brighton Declaration. The Court specified that its decision on the effectiveness of the new remedy could be revisited in the light of practical experience, including the extent to which the Constitutional Court applied the Convention case-law.

In the *McCaughey and Others v. the United Kingdom* judgment[14] the Court ruled on the impact of pending domestic proceedings (a civil action and an ongoing investigation) on the Court's examination of the substantive and procedural complaints arising out of alleged unlawful killings which occurred twenty-three years ago. The Court declined to examine the applicants' argument under the substantive head of Article 2 that their relatives had been unlawfully killed. It noted that a civil action was pending and that the issue of the lawfulness or otherwise of the deaths as well as the establishment of the material facts could be determined in the course of those domestic civil proceedings. Further, the Court considered, leaving aside the complaint about delay, that it could not examine the effectiveness of the investigation into the killings having regard to the fact that domestic proceedings had recently been initiated challenging the procedures followed by the inquest from the standpoint of the Article 2 procedural requirements. In consequence, with the exception of the complaint concerning the length of the investigation, the Article 2 complaints as well as the related Article 13

12. See also Article 13 below, on "victim" status.
13. (dec.), no. 10755/13, 30 April 2013.
14. No. 43098/09, 16 July 2013.

complaint were declared inadmissible on grounds of prematurity/non-exhaustion. The delay in the investigation did, however, fall to be examined on the merits as the obligation to carry out investigations promptly and with reasonable expedition applied irrespective of whether the delay had affected the effectiveness of the investigation. There had thus been a breach of Article 2 under its procedural head by reason of excessive investigatory delay.

Six-month time-limit (Article 35 § 1)

The decision in *Yartsev v. Russia*[15] illustrates the Court's more rigorous recent approach to the interpretation of Article 35 § 1 of the Convention, taken together with the relevant Practice Direction, in determining the date of introduction of an application. Thus, the applicant's failure to return to the Registry a duly completed application form before the expiry of the eight-week period referred to in the "Practice Direction on the Institution of Proceedings"[16] proved to be fatal to the admissibility of the application – submitted under Articles 3, 5 and 6 – and the applicant could not rely on his first communication with the Registry as having interrupted the running of the six-month period. The Court therefore dismissed the applicant's complaints for failure to comply with the six-month rule. Further, with regard to the time-limit for the return of the application form, the Court specified that the form must not only be signed and dated during the period of eight weeks from the date of the Registry's letter but must also be posted before the end of that period, thus clarifying point 4 of the Practice Direction (see *Abdulrahman v. the Netherlands*[17]).

In addition, the decision in *Ngendakumana v. the Netherlands*[18] clarified the manner of application of Rule 45 § 1 of the Rules of Court[19]: an application form could not be regarded as validly presented at a given date – even if it contained all the information and documents listed in Rule 47 § 1 – unless it had been signed by the applicant or his or her representative. As a result, an application form signed by proxy by a person unknown did not suspend the six-month period.

Competence ratione temporis *(Article 35 § 3)*

The judgment in *Janowiec and Others v. Russia*[20] sets out the general principles applicable in determining the Court's temporal jurisdiction. Specifically, the Grand Chamber clarified the criteria previously laid down on this issue in the *Šilih v. Slovenia*[21] judgment and developed its case-law in this area.

15. (dec.), no. 13776/11, 26 March 2013.
16. http://www.echr.coe.int/Documents/PD_institution_proceedings_ENG.pdf
17. (dec.), no. 66994/12, 5 February 2013.
18. (dec.), no. 16380/11, 5 February 2013.
19. http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf
20. [GC], nos. 55508/07 and 29520/09, 21 October 2013.
21. [GC], no. 71463/01, 9 April 2009.

Relatives of victims of the 1940 Katyń massacre complained that the Russian authorities' investigation into the massacre had not been adequate or effective, in violation of the State's procedural obligations under Article 2 of the Convention. The Court noted that the applicant's relatives had been executed fifty-eight years before the Convention came into force in respect of Russia. The investigation, which began in 1990, was formally discontinued in 2004, but no investigative measure had been carried out after the critical date of the Convention's entry into force in respect of the respondent State.

The *Janowiec and Others* case is therefore the first in which the lapse of time between the deaths in issue (1940) and the date of entry into force of the Convention in respect of the respondent State (5 May 1998) was not relatively short and in which the major part of the investigation had not been carried out after the Convention's entry into force. The Grand Chamber defined the case-law principles applicable to such a situation.

In the Court's view, a situation of this type could come under its temporal jurisdiction if the triggering event had a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention, as was the case for serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments. The Court specified, however, that this rule could not be applied to events which had occurred prior to the adoption of the Convention on 4 November 1950, for it was only then that the Convention had begun its existence as an international human rights treaty. It followed that a Contracting Party could not be held responsible under the Convention for not investigating even the most serious crimes under international law if they had predated the Convention.

In this instance, the events which might have triggered the obligation to investigate under Article 2 had taken place more than ten years before the Convention came into existence. The Court therefore held that it did not have jurisdiction to examine the complaint.

"Core" rights

Right to life (Article 2)[22]

In the case of *Aydan v. Turkey*[23] a gendarme who was driving a military jeep and faced with demonstrators had used his weapon, on automatic setting, which had resulted in the death of a passer-by on the fringes of

22. See also *McCaughey and Others*, cited above.
23. No. 16281/10, 12 March 2013.

the demonstration. Both the assize court and the Court of Cassation decided not to impose a criminal penalty, since the gendarme had exceeded the limits of self-defence while in an excusable state of emotion, fear or panic.

The Strasbourg Court indicated that the granting of a discharge to a gendarme who had made unjustified use of his firearm, when for the purposes of Article 2 § 2 of the Convention such use of lethal force had not been "absolutely necessary", was incompatible with the requirements of the Convention.

Members of the security forces had to possess the appropriate moral, physical and psychological qualities for the effective exercise of their functions – this applied, *a fortiori*, to members of the security forces operating in a region which was marked by extreme tension at the material time and where such disturbances were to be expected. The granting of a discharge to a gendarme who had made unjustified use of his firearm was liable to be interpreted as giving carte blanche to the security forces. The Court emphasised that the latter had a duty to ensure that such weapons were used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm.

The death of a pregnant woman as the result of the flagrant malfunctioning of certain hospital departments which had led to her being denied access to appropriate emergency treatment, raised the issue of the positive obligations imposed on the State by Article 2 of the Convention. Specifically, the *Mehmet Şentürk and Bekir Şentürk v. Turkey*[24] judgment dealt with the fatal consequences of a failure to provide medical care – recognised as being necessary and urgent – on account of the patient's inability to pay the hospital fees demanded in advance for treatment. The Court found that the State had not met its obligation to protect the deceased woman's physical integrity, in that the relevant hospital departments had failed to provide her with the emergency treatment she obviously required when she arrived at the hospital, given the seriousness of her condition as recognised by the doctors. The domestic law in this regard did not appear to have been capable of preventing the failure to give her the medical treatment required by her condition. It followed that there had been a violation of Article 2.

The fault attributable to the medical staff had gone beyond a mere error or medical negligence, in so far as the doctors, in full awareness of the facts and in breach of their professional obligations, had not taken all the emergency measures necessary to attempt to keep the patient alive. Where a patient was confronted with a failure by a hospital department to provide medical treatment and this resulted in the

24. No. 13423/09, ECHR 2013.

patient's life being put in danger, the fact that those responsible for endangering life had not been charged with a criminal offence or prosecuted could entail a violation of Article 2. The Court also concluded that the procedural limb of Article 2 had been breached in that, having regard to the gravity of the acts and omissions involved, and leaving aside other remedies which may have been available to the applicant, the State had failed to conduct an effective criminal investigation into the circumstances surrounding the death.

The *Turluyeva v. Russia*[25] judgment was the first time in a Chechen disappearance case that the Court found a violation of the positive obligation under Article 2 to protect the right to life (a provision which also imposes the negative obligation not to take life and an obligation to investigate). The applicant's son had last been seen in the hands of the security forces. There was no record of his detention, although there had been eyewitness confirmation both of his detention and possible ill-treatment.

This judgment complemented that in the case of *Aslakhanova and Others v. Russia*[26], in which the Court specified under Article 46 of the Convention a number of remedial measures to be taken in respect of the situation of the victims' families and the effectiveness of investigations into alleged disappearances. The *Turluyeva* judgment underlined the need for an urgent and appropriate reaction by law-enforcement bodies as soon as the authorities receive plausible information that a detainee has disappeared in a life-threatening situation. In this case, the measures to be taken could have included immediate inspection of the premises; employment of expert methods aimed at collecting individual traces that could have been left by the missing person's presence or ill-treatment; and the identification and questioning of the servicemen involved. In all the circumstances, the State authorities' failure to act quickly and decisively had to be regarded as a failure to protect the right to life of the applicant's son, who had disappeared following unacknowledged detention.

Prohibition of torture and inhuman and degrading treatment and punishment (Article 3)

The Grand Chamber summarised its case-law concerning the situation of family members of a "disappeared person" in its *Janowiec and Others* judgment, cited above. It reiterated, in particular, that the suffering of the family members of a "disappeared person", who had gone through a long period of alternating hope and despair, could justify finding a violation of Article 3 on account of the particularly callous attitude of the authorities towards their requests for information. The Grand

25. No. 63638/09, 20 June 2013.
26. Nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, 18 December 2012.

Chamber also reiterated the case-law principles applicable under Article 3 to the relatives of deceased persons and to the circumstances in which the Court would find a separate violation of Article 3 in respect of such relatives.

In order for a separate violation of Article 3 to be found in respect of applicants who were relatives of a victim of a serious human rights violation, there had to be special factors in place giving their suffering a dimension and character distinct from the emotional distress inevitably stemming from the violation itself. Relevant factors included the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member had witnessed the events in question and the applicants' involvement in the attempts to obtain information about the fate of their relatives.

Expulsion

The judgment in *Savriddin Dzhurayev v. Russia*[27] concerned the applicant's abduction by unidentified persons and his forced transfer, in spite of an interim measure issued by the Court under Rule 39 of its Rules of Court to prevent his extradition[28]. The Court found, firstly, that the respondent State had breached Article 3 on account of the failure of the authorities to take preventive operational measures for the applicant's protection against his forcible transfer to Tajikistan, in particular through a Moscow airport. It noted that the authorities had been informed of the applicant's abduction and on that account knew or ought to have known of the risk that his kidnappers would try to fly him out of the country. The Court further held that the authorities had failed to comply with their procedural obligations to conduct an effective investigation into the applicant's abduction and forcible transfer. Lastly, the Court found on the facts that the forcible transfer could not have taken place without the knowledge and either the active or passive involvement of State agents. There had therefore been a further breach of Article 3 on that account.

In its judgment in *K.A.B. v. Sweden*[29] the Court assessed the risks connected with expulsion to Mogadishu for the year 2013. In a 2011 judgment, *Sufi and Elmi v. the United Kingdom*[30], the Court had found that the level of violence there was of such intensity that anyone in the city would be at a real risk of treatment contrary to Article 3 of the Convention. Having regard to the most recent country information, the Court concluded in the *K.A.B. v. Sweden* case that the security situation had improved since 2011 or the beginning of 2012 and that the general level of violence in the city had decreased. While acknowledging that

27. No. 71386/10, ECHR 2013 (extracts).
28. *Supra*.
29. No. 886/11, 5 September 2013.
30. Nos. 8319/07 and 11449/07, 28 June 2011.

the human rights and security situation continued to be serious and fragile and was in many ways unpredictable, the Court found that it was no longer of such a nature as to place everyone in the city at a real risk of treatment contrary to Article 3. Finally, after assessing the applicant's personal situation (he did not belong to any group that was at risk of being targeted by al-Shabaab and he allegedly had a home in Mogadishu, where his wife lived), the Court concluded that he had failed to make out a plausible case that he would face a real risk of being killed or subjected to ill-treatment upon return. On that account Sweden would not be in breach of Article 3 in the event of the applicant's removal to Mogadishu.

Sentence

In its judgment in *Vinter and Others v. the United Kingdom*[31] the Grand Chamber established the general principles applicable to sentences of life imprisonment. The case was brought before the Court by three applicants who had been sentenced to life imprisonment for various murders. All three were given whole life sentences, which meant that they could only be released on compassionate grounds, which were strictly defined and limited.

The Grand Chamber stated that while the imposition of life sentences on adult offenders who had committed particularly serious crimes was not incompatible with Article 3 of the Convention, that provision required that such sentences be reducible. Both the practice in the Council of Europe member States, and European and international law, emphasised the rehabilitation of life prisoners and the need to offer them the prospect of eventual release. Accordingly, for a life sentence to remain compatible with Article 3, there had to be both a prospect of release, which the Court distinguished from release on compassionate grounds, and a possibility of review.

The Court specified that where, as here, domestic law did not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground arose at the outset, when the whole life sentence was imposed. However, it also clearly stated in the judgment that the finding of a violation should not be understood as giving any prospect of imminent release.

For the first time, the Court examined the length of a sentence imposed by a foreign court and subsequently served in the convicted person's country of origin pursuant to a prisoner-transfer agreement (*Willcox and Hurford v. the United Kingdom*[32]). The case concerned the transfer of two British nationals to the United Kingdom to serve their sentences (life imprisonment, reduced to twenty-nine years and three

31. [GC], nos. 66069/09, 130/10 and 3896/10, ECHR 2013 (extracts).
32. (dec.), nos. 43759/10 and 43771/12, 8 January 2013.

months in one case, and to thirty-six years and eight months in the other) following their convictions in Thailand of possessing or importing drugs. They complained that the sentences imposed in Thailand were excessively long and that their continued enforcement in the United Kingdom violated their rights under Article 3. The Court noted, however, that if the applicants had not been transferred, the conditions of their continued detention in Thailand may well have been harsh and degrading. In the Court's opinion, it would be paradoxical if the protection afforded by Article 3 operated to prevent prisoners being transferred to serve their sentences in more humane conditions.

Prison

The case of *Salakhov and Islyamova v. Ukraine*[33] concerned the lack of appropriate medical care in prison to a detainee who died from Aids two weeks after being released. The Court developed its case-law under Article 3 in respect of the psychological impact of serious human rights violations on the victim's family members, in this case a mother obliged to look on helplessly as her son lay dying in pre-trial detention. Drawing notably on its case-law in respect of relatives of victims of enforced disappearances, the Court found a violation in respect of the mother's mental suffering when faced with the prospect of her son dying in prison from Aids without adequate medical care and while subjected to permanent handcuffing. The Court also found a violation on account of the attitude displayed by the authorities.

The judgment in *D.F. v. Latvia*[34] develops the Court's case-law in relation to the positive obligations of national authorities in respect of prisoners living under the threat of violence from co-detainees. A former paid police informant maintained that he had been at constant risk of violence from his co-prisoners and that it had taken the authorities more than a year to acknowledge that he had been a police collaborator and to transfer him to a safer place of detention.

The Court confirmed that the national authorities had an obligation to take all steps which could be reasonably expected of them to prevent a real and immediate risk to a prisoner's physical integrity of which they had or ought to have had knowledge. It also noted that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment had indicated that prison authorities ought to take specific security measures to deal with the phenomenon of inter-prisoner violence. Such an obligation was all the more pressing in the case of sex offenders and police collaborators, who were at a particularly heightened risk of ill-treatment at the hands of their fellow inmates. On the facts of the applicant's case, and having regard in particular to the

33. No. 28005/08, 14 March 2013.
34. No. 11160/07, 29 October 2013.

absence of an effective mechanism for following up the applicant's real (and acknowledged) fears and responding to them as a matter of urgency, the Court concluded that there had been a breach of Article 3 of the Convention.

Domestic violence

Domestic violence against women raises the question of the State's positive obligations in relation to unlawful acts by private individuals. It is the Court's settled case-law that domestic law must afford adequate protection in practice against violence by private individuals. The authorities' response to such violence must also comply with the positive obligation incumbent on the State.[35]

In the case of *Valiulienė v. Lithuania*[36] the Court found a violation of Article 3 after declining to accept a unilateral declaration by the respondent State acknowledging a violation of Article 8. In this case, procedural flaws and shortcomings in the investigation meant that the prosecution of the violent partner had become time-barred. In *Eremia v. the Republic of Moldova*[37] the Court found that the prosecuting authorities had also undermined the requisite deterrent effect of the criminal law by suspending criminal proceedings that had been brought against a violent husband, in spite of his repeated attacks on his wife[38].

Crackdowns on demonstrations

In *Abdullah Yaşa and Others v. Turkey*[39] the Court examined the firing of a tear-gas grenade from a launcher in the direction of demonstrators. The applicant, who was aged thirteen at the material time, was struck in the face by a tear-gas grenade fired by a police officer. In the circumstances, and having regard to the serious head injuries sustained by the applicant, the Court considered that the fact that the grenade had been fired directly and in a straight line towards a crowd amounted to a disproportionate response, in violation of Article 3.

The Court emphasised that firing a tear-gas grenade directly and in a straight line could not be considered an appropriate action on the part of the police as it could cause serious or even fatal injury; firing tear gas at an upward angle was generally considered the proper method, in so far as it avoided causing injury or death if someone was hit. It followed that policing operations had to be sufficiently regulated by national law, as part of a system of adequate and effective safeguards against arbitrariness, abuse of force and avoidable accidents.

35. See also *Opuz v. Turkey*, no. 33401/02, ECHR 2009.
36. No. 33234/07, 26 March 2013.
37. No. 3564/11, 28 May 2013.
38. See also Article 14 below.
39. No. 44827/08, 16 July 2013.

Police intervention in the home

In *Gutsanovi v. Bulgaria*[40] a prominent local politician, with no history of violence, was arrested at his family home very early in the morning by a special team of armed and masked police officers who had been informed of the presence of sleeping children. When no one responded to their orders to open the front door the police officers forced their way in, waking the applicant's wife and two young children. The applicant was taken to a separate room and the house was searched.

The Court found a breach of Article 3 in respect of the applicant, his wife and children. It based its reasoning on the failure of the authorities to plan and to execute the operation in a way which took account of the situation which presented itself in the applicant's house. The Court's assessment of the proportionality of the force used with reference to the planning and execution stages recalls the approach which the Court developed in Article 2 cases, beginning with *McCann and Others v. the United Kingdom*[41].

The Court explained that its judgment did not go so far as to require security forces to refrain from arresting criminal suspects in their home whenever their children or spouse were present. Nevertheless, the possible presence of a suspect's family members at the scene of the arrest was a circumstance which had to be taken into consideration in planning and executing this type of police operation. This had not been done in the applicant's case and the security forces had not envisaged alternative operational approaches, such as staging the operation at a later hour, or even deploying a different type of officer in the operation. It had been particularly necessary to take the legitimate interests of the wife and underage children into consideration as the wife was not under suspicion and the two daughters were psychologically vulnerable because of their age (five and seven respectively). A psychiatrist had attested to the psychological suffering of the wife and children.

Prohibition of slavery and forced labour (Article 4)

In its decision in *Floroiu v. Romania*[42] the Court examined the remuneration of a detainee, in the form of a reduction in sentence, for work performed in prison. It acknowledged for the first time that work done in prison could be considered as "paid" work not only when the remuneration was financial, but also when it took the form of a substantial reduction of sentence. This was also the first case the Court had examined following the adoption by the Committee of Ministers on 11 January 2006 of a new version of the European Prison Rules

40. No. 34529/10, 15 October 2013.
41. 27 September 1995, Series A no. 324.
42. (dec.), no 15303/10, 12 March 2013.

stipulating that "there shall be equitable remuneration of the work of prisoners"[43].

Right to liberty and security (Article 5)

Deprivation of liberty (Article 5 § 1)

Under the Court's established case-law, the issue of whether there has been a "deprivation of liberty" – thus rendering applicable the guarantees under Article 5 – must be based on the particular facts of each case[44].

The *M.A. v. Cyprus*[45] judgment was delivered in a very specific context: it concerned a large-scale police descent at 3 o'clock in the morning on an encampment of protesting foreign nationals in a city centre, their transfer by bus to a police station and their brief detention in those premises with a view to determining their immigration status. The Court acknowledged that at no time had the applicant or the other protesters offered any resistance; they were never handcuffed; they were not placed in police cells and were well treated – they had received food and drink; and the period spent at the police headquarters was relatively brief. However, it observed that the police operation had been coercive in nature, leaving the applicant and the other protesters with little choice but to comply with the officers' orders. The Court took into consideration a number of factors, including the nature, scale and aim of the operation, and the fact that it was carried out in the early hours of the morning. It concluded that, on the facts, there had been a "deprivation of liberty". In the Court's opinion, the element of coercion had been the decisive factor, not the absence of handcuffs, the applicant's placement in a cell or the other physical restrictions. As to the lawfulness of his detention, while the authorities had admittedly found themselves in a difficult situation, this did not justify a deprivation of liberty without any clear legal basis.

The case of *Gahramanov v. Azerbaijan*[46] concerned the detention of a traveller in an airport for the purposes of a security check by the border police, as his name appeared in the authorities' database marked "to be stopped". He was held on the State Border Service premises pending clarification of his status, and was allowed to leave the airport after it was discovered that the instruction to stop him was the result of an administrative error. This was the first time the Court had examined the issue of the existence of a "deprivation of liberty" in such a situation.

Referring in particular to the principles identified in *Austin and Others*, cited above, the Court considered that where a passenger is

43. See also the judgment in *Stummer v. Austria* [GC], no. 37452/02, ECHR 2011.
44. *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, ECHR 2012.
45. No. 41872/10, ECHR 2013 (extracts).
46. (dec.), no. 26291/06, 15 October 2013.

stopped during border control in an airport by border service officers in order to clarify his or her situation, and where the detention does not exceed the time strictly necessary to accomplish relevant formalities, no issue arises under Article 5. On the facts, there was no indication that the length of the applicant's stay in the room at the airport (a few hours) had exceeded the time strictly necessary for fulfilling the relevant administrative formalities required to clarify his situation. The applicant had been free to leave the airport immediately after the checks had been carried out. In those circumstances, his detention did not amount to a deprivation of liberty within the meaning of Article 5.

In the *Blokhin v. Russia*[47] judgment (not final) the Court examined the lawfulness of the temporary placement in a detention centre for minor offenders of a juvenile. The applicant, then aged twelve, had committed offences punishable under the Criminal Code, but was not prosecuted as he had not reached the age of criminal responsibility. However, he was brought before a court, which ordered his placement in the centre for a period of thirty days in order to "correct his behaviour" and to prevent his committing any further acts of delinquency.

The Court found that the applicant had been deprived of his liberty while in the detention centre. In reaching that conclusion, it noted that the centre was closed and guarded in order to exclude any possibility of leaving the premises without authorisation, inmates were routinely searched on admission, all their personal belongings were confiscated and a strict disciplinary regime was maintained.

Lawful detention (Article 5 § 1)

In the same case, the Court found that the grounds for which the applicant had been placed in the temporary detention centre, namely to "correct his behaviour" and to prevent his committing any further acts of delinquency, did not fall under sub-paragraphs (b), (c) or (d) of Article 5 § 1 and that sub-paragraphs (e) and (f) were clearly not relevant in the circumstances of the case. In particular, it found under sub-paragraph (d) that the applicant's detention could not be considered an interim custody measure preliminary to his placement in a closed educational institution, or to any other measure involving "educational supervision"[48]. On this latter point, the Court considered that the mere fact that some educational measures were taken in respect of the applicant was insufficient to justify his detention under Article 5 § 1 (d), especially since it was clear from the domestic proceedings that the main reason for the applicant's detention was to prevent him from committing further delinquent acts. As regards sub-paragraph (a), the Court observed that the applicant had not been convicted of an offence under the domestic law, since he had not reached the statutory age of

47. No. 47152/06, 14 November 2013.
48. See also *Ichin and Others v. Ukraine*, nos. 28189/04 and 28192/04, 21 December 2010.

responsibility; his placement in a young offenders' centre could not therefore be regarded as "lawful detention by a competent court" within the meaning of Article 5 § 1 (a)[49].

Lawful detention after conviction by a competent court (Article 5 § 1 (a))

The continued detention of a convicted prisoner after the Court had found that the "sentence" imposed was contrary to Article 7 of the Convention raised the issue of the lawfulness of that detention.

In the *Del Río Prada v. Spain* judgment[50] the date of a prisoner's release had been postponed by more than nine years following a change in the domestic case-law which the Court held to have been insufficiently foreseeable in terms of its application to the applicant[51]. As the Court specified, the requirement of foreseeability within the meaning of Article 5 of the Convention had to refer to the law in force at the time of conviction and throughout the entire duration of the detention after that conviction. The Court accordingly concluded that prolonging the detention in such a case was not "lawful" and therefore violated Article 5 § 1.

What conclusion should be drawn from detention imposed by a tribunal whose composition did not comply with the domestic law? In *Yefimenko v. Russia*[52] the applicant was serving a prison sentence which was subsequently shown to have been imposed by a court which was not "established by law". There was nothing to indicate that the two lay judges on the bench had been authorised to sit in the trial, which culminated in the imposition of a prison sentence. In the Court's view, it followed that the period spent in detention as a result of the judgment delivered by that bench had been vitiated by "gross and obvious irregularity". For the first time, the Court found detention to be unlawful within the meaning of Article 5 on the ground that it was not based on a sentence imposed by a "competent tribunal".

The Court has previously held that if a conviction results from a "flagrant denial of justice", the resultant detention is not compatible with Article 5 § 1 (a)[53]. The decision in *Willcox and Hurford*, cited above, examined whether there had been a "flagrant denial of justice" on account of an irrebuttable presumption applied by a foreign court in a drugs case. The first applicant had complained that owing to the irrebuttable presumption in Thai law that drugs beyond a certain quantity were for distribution, he had not been able to argue that they were in fact for his own personal use. He therefore submitted that his

49. The judgment contains a list of the international juvenile justice standards that have been developed by the United Nations and the Council of Europe.
50. [GC], no. 42750/09, 21 October 2013.
51. See Article 7 below.
52. No. 152/04, 12 February 2013.
53. See, in particular, *Stoichkov v. Bulgaria*, no. 9808/02, § 51, 24 March 2005.

trial in Thailand had been flagrantly unfair and his subsequent detention arbitrary. The Court did not find that there had been a flagrant denial of justice in that country. It noted that the first applicant, who had not alerted his national authorities to his concerns regarding the fairness of his trial, had had the benefit of a number of procedural guarantees in the foreign proceedings which had resulted in his conviction and detention. In the absence of a flagrant denial of justice abroad, the applicant's subsequent detention had not been contrary to Article 5 § 1 (a).

Non-compliance with the lawful order of a court (Article 5 § 1 (b))

The Court specified that before a person can be deprived of his or her liberty for "non-compliance with the lawful order of a court", he or she must have had an opportunity to comply with the order and have failed to do so. Thus, in the case of *Petukhova v. Russia*[54], the Court condemned the applicant's placement for several hours in a police station when she had not been informed of the order against her and was therefore never given an opportunity to comply with it. Furthermore, while she might have refused to undergo certain measures suggested by, for example, the health authorities, prior to such measures being ordered by a court, this did not necessarily imply a "refusal to comply" with a court order.

The Court ruled on a deprivation of liberty following failure to pay a fine in the *Velinov v. "the former Yugoslav Republic of Macedonia"* judgment[55]. The applicant was ordered by a court to pay a modest fine, which he failed to do within the time-limit. The fine was then converted into a two-day prison sentence and a detention order was served on the applicant. He thereupon paid the fine to the Ministry of Finance but did not inform the court of the payment. As there was no exchange of information between the court and the Ministry of Finance, the applicant was arrested over eight months later and detained. He was immediately released on producing proof of payment.

The Court found that the applicant's detention was contrary to Article 5 § 1 (b) as the basis for his detention had ceased to exist as soon as he complied with the payment order. The Court found support for this conclusion in the fact that he was immediately released from detention when he produced a copy of the receipt of payment slip.

The Court also considered the respondent Government's argument that the applicant should have been required to inform the domestic court that he had paid the fine to the Ministry of Finance. For the Court, it was for the State to have in place an efficient system for the recording of the payment of court fines and the applicant's failure to inform the court that he had paid the fine did not release the State from

54. No. 28796/07, 2 May 2013.
55. No. 16880/08, 19 September 2013.

that obligation. The importance of the applicant's right to liberty required the respondent State to take all necessary measures in order to avoid his liberty being unduly restricted. This judgment adds to the Court's case-law under Article 6 concerning the responsibility of the State to have in place an effective network of information between the judicial and/or administrative authorities[56].

Secure the fulfilment of an obligation prescribed by law (Article 5 § 1 (b))

The judgment in *Ostendorf v. Germany*[57] develops the case-law on preventive police custody. It concerned the detention of a football supporter for four hours in a police station to prevent him from taking part in a brawl around the time of a match, on the ground that he had disobeyed an order to remain with a group of hooligans under temporary police escort. The Court considered that this police custody had been justified under Article 5 § 1 (b) in that its purpose had been "to secure the fulfilment of an obligation prescribed by law" as, for the purposes of that provision, the expression "obligation prescribed by law" could cover a general obligation to keep the peace by not committing a criminal offence. However, detention for such purpose would only be compliant with Article 5 § 1 (b) if the place and time of the offence in question, together with its potential victims, were sufficiently identified.

Rejecting a request by the respondent Government for it to reconsider its case-law on this point, the Court reiterated that sub-paragraph (c) of Article 5 § 1 allowed deprivation of liberty only in the context of criminal proceedings. While the Convention required States to take reasonable steps within the scope of their powers to prevent ill-treatment, such positive obligations on the States under the Convention did not warrant a different or wider interpretation of the permissible grounds for deprivation of liberty, which were exhaustively listed in Article 5 § 1.

Prevent an unauthorised entry into the country (Article 5 § 1 (f))

The *Suso Musa v. Malta*[58] judgment adds to the case-law on the interpretation of the first limb of Article 5 § 1 (f) of the Convention – which authorises a deprivation of liberty of a person "to prevent his effecting an unauthorised entry into the country ..." – following the Grand Chamber judgment in *Saadi v. the United Kingdom*[59]. In *Saadi* the Grand Chamber had considered that until a State had "authorised" entry to its territory, any entry was "unauthorised" and the detention of a person who wished to effect entry and who needed but did not yet have authorisation to do so, could be, without any distortion of

56. *Seliwiak v. Poland*, no. 3818/04, §§ 60 and 62, 21 July 2009. See also *Davran v. Turkey*, no. 18342/03, § 45, 3 November 2009.
57. No. 15598/08, 7 March 2013.
58. No. 42337/12, 23 July 2013.
59. [GC], no. 13229/03, ECHR 2008.

language, to "prevent [his] effecting an unauthorised entry". It dismissed the idea that if an asylum-seeker had surrendered himself to the immigration authorities he was seeking to effect an "authorised" entry and that detention could not therefore be justified under the first limb of Article 5 § 1 (f).

However, the Court's case-law did not appear to offer specific guidelines as to when detention in an immigration context ceased to be covered by the first limb of Article 5 § 1 (f). The applicant's submission that *Saadi* should not be interpreted as meaning that all member States could lawfully detain immigrants pending their asylum applications irrespective of the provisions of their national law was not devoid of merit. Where a State went beyond its obligations and enacted legislation explicitly authorising the entry or stay of immigrants pending an asylum application, any ensuing detention for the purpose of preventing an unauthorised entry might raise an issue as to the lawfulness of detention under Article 5 § 1 (f). In the *Saadi* case, while allowing temporary admission, the national law had not provided for the applicant to be granted formal authorisation to stay or to enter the territory, and therefore no such issue had arisen. Thus, the question of when the first limb of Article 5 ceased to apply because of a grant of formal authorisation to enter or stay was largely dependent on national law, which therefore had to be examined.

The Court went on to find in *Suso Musa* that although the applicant's detention pending a decision on his asylum application was, in the absence of formal authorisation to stay, covered by the first limb of Article 5 § 1 (f) and was authorised by national law, it had nevertheless been arbitrary. The material conditions of detention had been highly problematic from the standpoint of Article 3, and it had taken the Maltese authorities six months to determine whether he should be allowed to remain in Malta. That period was unreasonable. There had therefore been a violation of Article 5 § 1 (f).

Brought promptly before a judge or other officer (Article 5 § 3)

The judgment in *Vassis and Others v. France*[60] develops the Court's case-law on situations where an applicant is arrested on board a ship on the high seas – a situation the Court had already examined in *Rigopoulos v. Spain*[61] and *Medvedyev and Others v. France*[62]. The *Vassis and Others* judgment confirmed that it was not for the Court to take a stand on the possible measures which might be envisaged for the purposes of ensuring compliance with Article 5 § 3 while an intercepted ship is on the high seas. However, once the persons deprived of their liberty had arrived on the territory of the respondent State, the requirement of

60. No. 62736/09, 27 June 2013.
61. (dec.), no. 37388/97, ECHR 1999-II.
62. [GC], no. 3394/03, ECHR 2010.

promptness was much stricter than in cases where the placement in custody coincided with the actual deprivation of liberty. In the case in question, the period of forty-eight hours of police custody – which followed a period of eighteen days' escort at sea – was therefore held to be contrary to the requirement of promptness expressed in Article 5 § 3. The Court reiterated that the aim pursued by Article 5 § 3 was to protect the individual by allowing any ill-treatment to be detected and any unjustified interference with individual liberty to be kept to a minimum through an initial automatic review within strict time constraints that left little flexibility in interpretation.

On the issue of the length of time a person could be held in police custody before being brought before a judge, the Court had already had occasion to find that the maximum acceptable period was four days (see, for example, *McKay v. the United Kingdom*[63]). A shorter period could, however, also give rise to a breach of Article 5 § 3; everything depended on the circumstances of the case. In the *Gutsanovi* judgment, cited above, the Court found that the circumstances militated in favour of finding a breach in respect of a period of three days, five hours and thirty minutes. The Court took into account the specific facts of the case, and in particular the applicant's fragile state of mind in the first days following his arrest, and the absence of any persuasive argument for not bringing him before a judge in the course of the second and third days of his detention.

Procedural rights

Right to a fair hearing (Article 6)

Applicability

The *Blokhin* case, cited above, also raised the issue of the applicability of Article 6 to a procedure used in Russia for dealing with delinquents who had not reached the age of criminal responsibility. The prosecuting authorities had found it established that the applicant had committed acts of extortion on another child. However, since the applicant was below the statutory age of criminal responsibility, no criminal proceedings were opened against him. He was nonetheless brought before a court, which ordered his placement in a temporary detention centre for minor offenders for a period of thirty days in order to "correct his behaviour" and to prevent his committing any further acts of delinquency.

The Court held that Article 6 was applicable to the proceedings which had led to the applicant's detention. Although no criminal proceedings had been brought against him, the nature of the offence, together with the nature and severity of the penalty, in the context of his placement in

63. [GC], no. 543/03, ECHR 2006-X.

a closed centre, were such as to render Article 6 § 1 of the Convention applicable in its criminal limb.

Access to a court (Article 6 § 1)

Access to a court may be impaired by application of the principle of immunity.

– In *Oleynikov v. Russia*[64], the Court ruled on the immunity of a foreign State in relation to a commercial transaction. A Russian national complained that the Russian courts had dismissed his claim for repayment of a loan he had made to the trade representation of the North Korean embassy.

The judgment complements the Court's case-law on State immunity, applying the international-law principle of restrictive immunity to a situation other than an employment dispute. The Court found that the rejection by the national courts of the applicant's claim concerning repayment of a loan made to the North Korean trade representation had impaired the very essence of the applicant's right of access to a court, as they had failed to examine the nature of the transaction underlying the claim or to take into account the relevant provisions of international law.

– The immunity from suit granted to the United Nations before the domestic civil courts was the subject of an inadmissibility decision in the case of *Stichting Mothers of Srebrenica and Others v. the Netherlands*[65]. Surviving relatives of victims of the Srebrenica massacre (July 1995) had brought proceedings against the Netherlands State and the United Nations for failing to protect the civilian population of Srebrenica. They complained that the Netherlands courts had declared inadmissible their case against the United Nations on the ground that the United Nations enjoyed immunity from prosecution before the domestic civil courts.

The Court noted that, since operations established by United Nations Security Council Resolutions under Chapter VII of the United Nations Charter were fundamental to the mission of the United Nations to secure international peace and security, the Convention could not be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations. To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including the effective conduct of its operations.

The Court added that international law did not support the position that a civil claim should override immunity from suit before the

64. No. 36703/04, 14 March 2013.
65. (dec.), no. 65542/12, ECHR 2013 (extracts).

domestic courts for the sole reason that it was based on an allegation of a particularly grave violation of a norm of international law, even a norm of *ius cogens*. Finally, the Court stated that it did not follow from its 1999 judgments in *Waite and Kennedy v. Germany*[66] and *Beer and Regan v. Germany*[67] that in the absence of an alternative remedy the recognition of immunity was *ipso facto* constitutive of a violation of the right of access to a court for the purposes of Article 6 § 1. The absence of an alternative remedy in this case was not imputable to the Netherlands, and in the circumstances of the case, Article 6 of the Convention did not require the State to step in.

The fact that it was impossible for a person deprived of her legal capacity to have direct access to a court to seek restoration of her capacity was examined in the judgment of *Natalia Mikhaylenko v. Ukraine*[68]. The Court emphasised that the fact that incapacitated persons had no right of direct access to a court with a view to having their legal capacity restored was not in line with the general trend at European level[69]. As a result of various shortcomings in this case, judicial review of the applicant's legal capacity had not taken place, which had seriously affected many aspects of her life and amounted to a denial of justice.

In the above-cited case of *Al-Dulimi and Montana Management Inc.*, the Court examined, for the first time in a United Nations context, whether the legal regime governing a Resolution adopted by the United Nations Security Council contained a level of protection equivalent to that guaranteed by Article 6 of the Convention.

The applicants were a senior official in the former Iraqi regime and the company which he managed. Their assets were frozen and subsequently confiscated by the Swiss authorities with a view to their transfer to the post-conflict Development Fund for Iraq, pursuant to Resolution 1483 (2003), adopted by the United Nations Security Council and the accompanying sanctions list. The applicants, whose names appeared on the list, unsuccessfully attempted to contest the lawfulness of the measures taken against them. The Swiss Federal Tribunal ruled that the Swiss courts had no option other than to apply the provisions of the Security Council Resolution, and that the applicants could not rely on Article 6 of the Convention since primacy had to be given to the superior obligations which Switzerland had contracted by virtue of its membership of the United Nations. The Federal Tribunal concluded that the domestic courts were prevented from examining whether, for example, the applicants' names had been correctly included on the

66. [GC], no. 26083/94, ECHR 1999-I.
67. [GC], no. 28934/95, 18 February 1999.
68. No. 49069/11, 30 May 2013.
69. See also *Stanev v. Bulgaria* [GC], no. 36760/06, ECHR 2012.

sanctions list and if this had been done in compliance with all necessary procedural fairness guarantees.

The Court observed that there did not exist any safeguard mechanisms regarding the inclusion of names on the sanctions list, or any procedural mechanisms enabling those whose names appeared on the list to have an independent review of the justification for such inclusion. It also noted that the United Nations Special Rapporteur had flagged the shortcomings in the system. It therefore concluded that in the circumstances the presumption of equivalency of protection had been displaced. Given that the Swiss Federal Tribunal had declined to examine the applicants' allegations, the Court observed that it was required to consider the merits of their complaints. On the facts, it found that the impugned measures amounted to a disproportionate restriction on the applicants' Article 6 rights. The Court referred in its reasoning to, among other things, the fact that the applicants had been deprived of their assets for a substantial period without being able to challenge the authorities' actions.

Fairness of the proceedings (Article 6 § 1)

The case of *Oleksandr Volkov v. Ukraine*[70] concerned disciplinary proceedings brought against a judge of the Supreme Court which culminated in his dismissal for acting in breach of professional standards. The Court noted with disapproval that the domestic law contained no limitation period for application of the sanction. The incidents criticised by the High Council of Justice had taken place seven years earlier. The Court concluded that this had placed the applicant in a difficult position, as he had had to mount his defence with respect, *inter alia*, to events which had occurred in the distant past. While the Court did not find it appropriate to indicate how long the limitation period should have been, it considered that such an open-ended approach to disciplinary cases involving the judiciary posed a serious threat to the principle of legal certainty. There had thus been a violation of Article 6 § 1 on account of the breach of the principle of legal certainty caused by the absence of a limitation period.

The use by a domestic court of incriminating statements by co-accused without a sufficient examination of the circumstances in which they had been made was at the heart of the *Erkapić v. Croatia*[71] judgment. The applicant complained that he had been convicted on the strength of pre-trial incriminating statements which his four co-accused had made under duress, at a time when three of them had been suffering from heroin-withdrawal symptoms and none of them had been adequately represented. His co-accused retracted their statements at the applicant's trial but the domestic courts nevertheless admitted their statements in

70. No. 21722/11, ECHR 2013.
71. No. 51198/08, 25 April 2013.

evidence and relied on them to a decisive extent when convicting the applicant. The Court found a breach of Article 6 § 1. It held that, as a matter of fairness, the trial court should have taken steps to examine the credence of the allegations – for example, by questioning the police officers who had conducted the interviews with the co-accused or by commissioning a medical report on the mental state of those of the co-accused who had maintained that they were suffering from heroin-withdrawal symptoms when being questioned, or by questioning the co-accused's defence lawyers who, it was alleged, had not been present during the police interviews. The Court stressed that a fair trial supposed that, in principle, a court should attach more weight to a witness statement made in court than to a record of his pre-trial questioning produced by the prosecution.

The Court concluded that the domestic courts had failed to examine properly all the relevant circumstances surrounding the police questioning of the applicant's co-accused, and their reliance on their incriminating statements had denied the applicant a fair trial.

The Court has already noted that the system of trial by jury is just one example among others of the variety of legal systems existing in Europe, and that it is not the Court's task to standardise them[72]. In its decision in *Twomey, Cameron and Guthrie v. the United Kingdom*[73] the Court observed that Article 6 does not guarantee the right to be tried by a jury and that trial by a judge sitting alone is an Article 6 compliant procedure. In deciding whether adequate safeguards had been provided to the defence, the fact that what was at stake was the mode of trial rather than conviction or acquittal had to weigh heavily in the balance. The sole issue therefore was whether the trial should continue before a judge sitting alone or a judge sitting with a jury, two forms of trial which in principle were equally acceptable under the Convention. In the Court's opinion, the safeguards in place were commensurate with what was at stake for the applicants.

Independent and impartial tribunal (Article 6 § 1)

The presence of seconded international judges for a renewable two-year term of office on the bench of a court ruling on war crimes was examined in the judgment of *Maktouf and Damjanović v. Bosnia and Herzegovina*[74]. Dismissing a complaint concerning the trial court's alleged lack of independence, the Court referred to the procedures for appointing the international judges and the arrangements for taking up office, and to the obligations attached to the exercise of their judicial functions. There were additional guarantees against outside pressure: the judges in question were professional judges in their respective

72. *Taxquet v. Belgium* [GC], no. 926/05, ECHR 2010.
73. (dec.), nos. 67318/09 and 22226/12, 28 May 2013.
74. [GC], nos. 2312/08 and 34179/08, ECHR 2013 (extracts).

countries and had been seconded to the foreign court. Although their term of office was relatively short, this was understandable given the provisional nature of the international presence at the court in question and the mechanics of international secondments.

In the above-cited *Oleksandr Volkov* judgment, which concerned the dismissal of a Ukrainian Supreme Court judge for breach of oath, the Court examined the compatibility of a judicial disciplinary system with Article 6 § 1. Of particular concern was the composition of the High Council of Justice and the lack of a subsequent judicial-review procedure capable of remedying the lack of independence and impartiality at the initial stages of the disciplinary procedure. The Court noted that with respect to disciplinary proceedings against judges, the need for substantial representation of judges on the relevant disciplinary body had been recognised in the European Charter on the Statute for Judges. It emphasised the importance of reducing the influence of the political organs of the Government on the composition of the High Council of Justice and the need to ensure the requisite level of judicial independence.

Presumption of innocence (Article 6 § 2)

To what extent might the language and reasoning in a refusal to award compensation after an individual's acquittal undermine the presumption of innocence? The judgment in *Allen v. the United Kingdom*[75] provided a response to this question with regard both to the applicability of Article 6 § 2 and to the merits of the complaint. It contains an exhaustive review of the relevant case-law.

The Grand Chamber first reiterated the relevant case-law principles concerning the applicability of Article 6 § 2 to judicial decisions following criminal proceedings which were discontinued or ended with a decision to acquit. In this context, the presumption of innocence meant that if a criminal accusation had been made and the proceedings had resulted in an acquittal, the person who had been the subject of those proceedings was considered innocent under the law and had to be treated as such. Accordingly, and to that extent, the presumption of innocence remained after the conclusion of the criminal proceedings, which made it possible to ensure that the individual's innocence was respected with regard to any accusation whose merits had not been proved. Nevertheless, an applicant seeking to rely on the presumption of innocence in subsequent proceedings would have to show the "existence of a link" between the concluded proceedings and the subsequent proceedings. The acquitted person would be able to rely on the right to be presumed innocent in subsequent proceedings for

75. [GC], no. 25424/09, ECHR 2013.

compensation where a "link" existed with the criminal proceedings which had ended with his or her acquittal. Such a link was likely to be present, for example, where the subsequent proceedings required examination of the outcome of the prior criminal proceedings. The Grand Chamber judgment set out the criteria for the existence of such a "link", which determines the applicability of Article 6 § 2 of the Convention, and the obligation to comply with the presumption of innocence.

The Grand Chamber then gave an exhaustive review of its case-law on the requirements of the presumption of innocence in proceedings subsequent to the closing of criminal proceedings. In this context, the language of the decision and the reasoning used by the domestic authorities ruling on the subsequent action were of "critical importance" in assessing whether or not there had been a violation of Article 6 § 2.

The Court found that there had been no violation of the Convention since, in the context of the proceedings in issue, the language used by the domestic authorities in dismissing the applicant's claims could not be said to have undermined the applicant's acquittal or to have treated her in a manner inconsistent with her innocence.

The presumption of innocence can be infringed not only through the actions of a judge or a court, but also through those of other public authorities. The judgment in *Mulosmani v. Albania*[76] concerned the status of a State agent and whether it engaged the State's responsibility under the Convention for undermining the presumption of innocence. Accusations of murder had been made by the leader of an opposition party against a named individual, who was arrested a year later. The Court observed, firstly, that even if the impugned statement had been made more than a year before the applicant was charged, it had had a continuing impact.

The Court then addressed whether the status of the maker of the accusations – as the chairman of the opposition party and a high-profile figure in political life – could engage the State's liability for a breach of the presumption of innocence. It found that at the relevant time the maker of the accusations, who had subsequently become Prime Minister then President of the Republic, had not acted as a public official and did not hold public office; no public powers had been delegated to him, and his party was legally and financially independent of the State. To all intents and purposes, his statement had been made in a private capacity. The mere fact that his actions might have been socially useful in calling for justice to be rendered did not transform him into a public figure acting in the public interest.

76. No. 29864/03, 8 October 2013.

Defence rights (Article 6 § 3)

In the *Henri Rivière and Others v. France* judgment[77] the Court developed its case-law concerning a request to adjourn a hearing made by a defendant who was not represented by counsel. Unfounded requests for adjournments were undeniably prejudicial to the proper administration of justice. In contrast, requests which were substantiated by supporting documents had to be effectively examined by the domestic courts, which were required to respond to them, with reasons. That response had to make it possible for the Court to ensure that they had effectively examined whether the grounds submitted by the defendant were valid. In this case, the applicant had provided reasons for his inability to attend the hearing and had submitted documents supporting his request for an adjournment. Since the appeal court had failed to give reasons for its refusal to adjourn the hearing, the Court found a violation.

The Court has already identified in its case-law the guiding principles concerning assistance by counsel to a suspect being questioned by the police (see, in particular, *Salduz v. Turkey*[78]). The case of *Bandaletov v. Ukraine*[79] is noteworthy in this context. Although it concerned an applicant who had made a confession at a police station in the absence of a lawyer, unlike the position of the applicants in the previous cases he had been questioned as a witness in connection with a recently opened murder investigation, at a stage when the police had no reason to suspect him. The judgment develops the case-law on the lack of legal representation at the initial stage of the investigation, when the applicant was interviewed as a witness and made a confession. The Court examined the concept of a "suspect". In its opinion, an individual acquired the status of a suspect (calling for the application of Article 6 safeguards) not when such status was formally assigned to him or her, but when the domestic authorities had plausible reasons for suspecting that person's involvement in a criminal offence.

In the above-cited *Blokhin* judgment, the Court examined the issue of the defence rights of a juvenile offender who had not reached the statutory age of criminal responsibility[80]. It found a violation of Article 6 § 1 taken together with Article 6 § 3 (c) and (d) of the

77. No. 46460/10, 25 July 2013.
78. [GC], no. 36391/02, ECHR 2008. See, on the subject of Article 6 § 3 (c), the judgment in *Dvorski v. Croatia* (no. 25703/11, 28 November 2013) stating that "in principle, an accused in criminal proceedings who is bearing the costs of his or her legal representation has the right to choose his or her defence lawyer, save for in exceptional circumstances where it is necessary to override this right in the interests of justice or where this is associated with justifiable and significant obstacles".
79. No. 23180/06, 31 October 2013.
80. See also Article 5 § 1 above, and Article 6 (applicability).

Convention on account of the absence of legal assistance during a 12-year-old's interview with the police[81] and the denial of an opportunity during the special procedure to cross-examine the decisive witnesses against him. The Court noted that these restrictions on the applicant's defence rights were part and parcel of the special legal regime in the respondent State which applied to accused persons who had not attained the statutory age of criminal responsibility. The judgment contains a comprehensive list of the international juvenile justice standards that have been developed by the United Nations at international level and the Council of Europe at regional level.

No punishment without law (Article 7)

The Court examined a number of cases concerning the level of sentences imposed in criminal cases:

– Sentences imposed for war crimes on the basis of the retroactive application of criminal legislation by the State Court of Bosnia and Herzegovina were at the heart of the judgment in *Maktouf and Damjanović* (cited above). In this case, both the former Criminal Code and the new Criminal Code (which was applied in the applicants' case) defined war crimes in the same way, but laid down different ranges of sentence. The former Code laid down a lighter minimum sentence, but the sentences imposed on the applicants were within the ranges of both Codes. Thus, in contrast to previous cases examined by the Court, it could not be stated with any certainty that lower sentences would have been imposed had the former Code been applied. However, what was crucial for the Court was that lower sentences might have been imposed had the former Code been applied. According to the Court, where there existed a real possibility that the retroactive application of the new Code had operated to the applicants' disadvantage with regard to sentencing, it could not be said that they had been afforded effective safeguards against the imposition of a heavier penalty, as required by Article 7.

The Grand Chamber added that there was no general exception to the rule of non-retroactivity, and dismissed the respondent State's arguments that the rule of non-retroactivity of crimes and punishments did not apply in the case.

It added, however, that the finding of a violation of Article 7 did not indicate that lower sentences ought to have been imposed, but simply that it was the sentencing provisions of the former Criminal Code which should have been applied.

81. See also *Salduz*, cited above.

– The Court has already recognised that the distinction between a measure which constitutes a "penalty" and one concerning the "execution" of a penalty is not always clear-cut in practice. In this connection, the judgment in *Del Río Prada* (cited above) makes a significant contribution to the case-law on the applicability of the second sentence of Article 7 § 1 and the concept of a "penalty". Thus, the Grand Chamber indicated that this provision may apply to measures which are introduced after the sentence has been imposed. The Court explained that it was necessary to determine whether a measure taken during the execution of a sentence concerned only the manner of execution of the sentence or, on the contrary, affected its scope. If measures taken by the legislature, the administrative authorities or the courts after the final sentence had been imposed or while the sentence was being served could result in the redefinition or modification of the scope of the "penalty" imposed by the trial court, then those measures fell within the scope of the prohibition of the retrospective application of penalties enshrined in Article 7 § 1 *in fine*. However, changes made to the manner of execution of the sentence did not fall within the scope of that provision[82].

In *Del Río Prada*, the date of the applicant's release had been postponed following a change in the case-law after her conviction. This had had the effect of cancelling out the remissions of sentence for work done in prison to which the applicant was legally entitled on the basis of final judicial decisions. Before the change in the case-law, the remissions could have been deducted from her sentence. As a result, the sentence had been changed into one with no possibility of remission. The Court concluded that the scope of the penalty imposed had been redefined, so Article 7 § 1 was applicable.

Given that this had resulted from a change in the case-law adopted while the sentence was being executed, Article 7 § 1 would be breached unless this change in the scope of the "penalty" had been reasonably foreseeable by the applicant, that is, a change that could be considered to reflect a perceptible line of case-law development. After assessing the relevant domestic law, the Court concluded that, in contrast to the cases of *S.W. v. the United Kingdom*[83] and *C.R. v. the United Kingdom*[84], the departure from the existing case-law in the applicant's case did not amount to an interpretation of criminal law pursuing a perceptible line of case-law development, but had instead been unforeseeable in its application to the applicant and had modified the scope of her sentence to her detriment by requiring her to serve a longer sentence, in breach of the provisions of the second sentence of Article 7 § 1.

82. *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008.
83. 22 November 1995, Series A no. 335-B.
84. 22 November 1995, Series A no. 335-C.

In both the above cases, the Grand Chamber reiterated clearly the absolute nature of the prohibition of the retroactive application of criminal law to the detriment of the individual.

– In its *Camilleri v. Malta* judgment[85] the Court considered a new issue concerning the foreseeability of the criminal law. It noted that, in the situation complained of, the domestic law provided no guidance on the circumstances in which a particular range of sentence applied, and the prosecutor had unfettered discretion to decide the minimum penalty applicable to the same offence. The national courts were bound by the prosecutor's decision and could not impose a sentence below the legal minimum, whatever concerns they might have had as to the use of the prosecutor's discretion. The Court concluded that such a situation did not comply with the requirement of foreseeability of the criminal law for the purposes of the Convention and did not provide effective safeguards against arbitrary punishment, in violation of Article 7 of the Convention.

Also under Article 7, the Court examined the imposition of a penalty (through the confiscation of property) on an individual who, although the subject of a prosecution, was not convicted. The applicant in the *Varvara v. Italy*[86] judgment (not final) was prosecuted in respect of unlawful building works, but the proceedings were later discontinued since they had become time-barred. Despite this, the courts ordered the confiscation of the land and buildings. The case represents a development of the Court's approach in *Sud Fondi Srl and Others v. Italy*[87], in which the applicants had been acquitted. In the instant case, the proceedings were discontinued, with the result that there was never any finding of guilt (or innocence). For the Court, and with reference to its case-law under Article 6 § 2 of the Convention, it could not be accepted that an individual should be made to suffer a criminal penalty without his or her guilt having first been established. It found support for this principle in the fact that, for example, lawful detention under Article 5 § 1 (a) required a "conviction" by a competent court and under Article 6 § 2 an individual was to be presumed innocent "until proved guilty according to law". To uphold the impugned confiscation in the instant case would, for the Court, undermine the notion of lawfulness inherent in Article 7. The notions of "guilty", "criminal offence" and "punishment" contained in Article 7 argued in favour of an interpretation of that provision which required that a person could only be punished once he had been found guilty of the criminal act imputed to him. In the absence of any definitive guilty verdict in the applicant's case, the Court could only conclude that the confiscation of the land and the buildings amounted to a breach of Article 7.

85. No. 42931/10, 22 January 2013.
86. No. 17475/09, 29 October 2013.
87. No. 75909/01, 20 January 2009.

Right to an effective remedy (Article 13)

In the above-cited case of *M.A. v. Cyprus*, the applicant complained under Article 13 of the Convention taken together with Articles 2 and 3 that there had been no remedy with automatic suspensive effect against the deportation order issued against him. As he had been granted refugee status, he could no longer claim to be a "victim" of a violation of Articles 2 and 3. However, the Court found that this did not *ipso facto* render inadmissible his complaint under Article 13, taken together with those Articles, and went on to find a violation in the absence of a remedy with immediate suspensive effect against the deportation order[88].

Civil and political rights

Right to respect for one's private and family life, home and correspondence (Article 8)

Applicability

The case of *Oleksandr Volkov,* cited above, concerned the dismissal of a judge for "breach of oath". The Court found that such a dismissal for professional fault constituted an interference with his right to respect for "private life" within the meaning of Article 8. The dismissal had affected many of his relationships with other people, including relationships of a professional nature. Likewise, it had had an impact on his "inner circle" as the loss of his job must have had tangible consequences for his own and his family's material well-being. Moreover, the reason given for the applicant's dismissal – breach of the judicial oath – suggested that his professional reputation had been affected. Article 8 was therefore applicable.

Can Article 8 of the Convention – which enshrines the right to protection of the reputation – be applied in favour of an applicant where it is the reputation of a deceased close family member that is alleged to have been tarnished? The judgment in *Putistin v. Ukraine*[89] addressed that question. The Court had not previously decided whether the damage to the reputation of an applicant's family could be considered an interference with the right to respect for the applicant's private life.

The Court considered that the reputation of a deceased member of a person's family could, in certain circumstances, affect that person's private life and identity, provided that there was a sufficiently close link between the person affected and the general reputation of his or her family. It went on to find that the applicant had not suffered from the

88. See also *De Souza Ribeiro v. France* [GC], no. 22689/07, ECHR 2012.
89. No. 16882/03, 21 November 2013.

impugned newspaper article, which, he alleged, insinuated that his late father had been a Gestapo collaborator. While the suggestion that a person had collaborated with the Gestapo was a serious matter, the impugned article did not suggest that the applicant's father had been a collaborator, and indeed the applicant's father had not been mentioned by name. While it could not be excluded that a reader of the article might be able to make a link between the article and the applicant's father, that possibility was remote, and would have entailed only a marginal and indirect impact on the applicant's right to reputation. The Court concluded that the authorities had, therefore, not failed in their obligation to secure respect for the applicant's right to reputation as guaranteed by Article 8.

Private life

The case of *Söderman v. Sweden*[90] concerned a violation of a minor's personal integrity by a private individual.

The applicant's stepfather had attempted to secretly film her naked in the bathroom of their home when she was 14 years old, but she had discovered the hidden camera. The film was burned without anyone having seen it. The stepfather was prosecuted for sexual molestation, and the girl submitted a compensation claim in the criminal proceedings. The appeal court ultimately acquitted the stepfather and dismissed the claim for compensation. The domestic courts stated, in particular, that under the applicable law the filming of an individual without his or her consent was not in itself an offence.

The applicant complained before the Court that the legal system in force in her country at the relevant time had not provided her with remedies capable of protecting her from her stepfather's acts.

In its judgment, the Grand Chamber reiterated the States' positive obligations under the Convention to protect children's physical and mental well-being from acts by private individuals.

Noting that the applicant had been affected in highly intimate aspects of her private life and that there had been no physical violence, abuse or contact, the Court considered that the acts in question fell to be examined under Article 8 of the Convention.

The Grand Chamber took a different approach to the Chamber, considering that it was appropriate to examine whether, at the relevant time, the respondent State had in place an "*adequate legal framework providing the applicant with protection*" against such acts. In determining whether the State had complied with its positive obligations under Article 8, the Court assessed each of the civil and criminal-law remedies

90. [GC], no. 5786/08, 12 November 2013.

allegedly availably to the applicant at domestic level at the time of the acts in question, in order to ascertain whether the domestic law afforded her an acceptable degree of protection.

It found that the respondent State had been in breach of its obligations, since at the relevant time no remedy, either criminal or civil, existed under domestic law that would have enabled the applicant to obtain effective protection against the violation of her personal integrity in the specific circumstances of her case.

The above-cited *Oleksandr Volkov* judgment examined whether the dismissal of a judge was compatible with Article 8. The Court assessed the "quality" of the applicable law and stated the reasons why the imposition of such a disciplinary penalty failed to satisfy the requirements of foreseeability and provision of appropriate protection against arbitrariness laid down by Article 8 § 2. The judgment sets out the Court's case-law on the requirement of legislative precision in the drafting of disciplinary rules and penalties. Noting various shortcomings in the applicable disciplinary framework, the Court held that there had been a violation of Article 8.

The Court reaffirmed the importance of the protection of personal data:

– For the first time, it addressed the issue of the safeguards surrounding the collection, storage and use of DNA material of persons convicted of serious criminal offences (decision in *Peruzzo and Martens v. Germany*[91]). In contrast, the case of *S. and Marper v. the United Kingdom*[92] had concerned storage of the DNA profiles of two applicants who had not been convicted of any offence. The applicants in *Peruzzo and Martens* had been convicted of serious criminal offences, and complained that cellular material was to be collected from them and stored in a database in the form of DNA profiles, for the purpose of facilitating the investigation of possible future crimes.

The Court found that the relevant national law provided appropriate safeguards against a blanket and indiscriminate taking and storing of DNA samples and profiles. It also included guarantees against misuse of stored personal data and obliged the authorities to review at regular intervals the continuing justification for the storage of DNA profiles. In consequence, the Court concluded that the interference was proportionate and necessary in a democratic society.

– In the case of *Avilkina and Others v. Russia*[93], a St Petersburg Deputy City Prosecutor instructed the city's hospitals to report every refusal of

91. (dec.), nos. 7841/08 and 57900/12, 4 June 2013.
92. [GC], nos. 30562/04 and 30566/04, ECHR 2008. Also *M.K. v. France*, no. 19522/09, 18 April 2013.
93. No. 1585/09, 6 June 2013.

a transfusion of blood or its components by Jehovah's Witnesses. The measure was taken following complaints about the activities of the first applicant, the Administrative Centre of Jehovah's Witnesses in Russia. Medical data concerning the second and fourth applicants, hospitalised at the relevant time, were disclosed to the prosecutor's office without their consent.

The case provided the Court with an opportunity to emphasise once again the need for specific data-protection guarantees against arbitrary communication of personal health information, having regard to the sensitivity of such data. The Court, following the approach taken in the case of *S. and Marper*, cited above, addressed the perceived deficiencies in the quality of the law in the context of its examination of the necessity test. The Court could accept that the interest of a patient and the community as a whole in protecting the confidentiality of medical data may be outweighed by the need to investigate and prosecute crime. However, it observed that, in contrast to previous cases[94], the applicants had never been under investigation, and there was no evidence whatsoever to suggest that pressure had been brought to bear on them to refuse a blood transfusion. The applicants were never given the opportunity to object to the disclosure of their health data, and were in fact never notified of the decision to forward their files to the prosecutor. The Court was particularly critical of the fact that the law did not place any specific limits on the prosecutor's authority to require the disclosure of an individual's medical record.

The Court was called upon to develop its case-law on the interaction between free speech and privacy rights in relation to the Internet[95], thus building on the judgments in *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*[96]:

– The judgment in *Węgrzynowski and Smolczewski v. Poland*[97] concerned proceedings for the removal from a newspaper's website of an article that had already been found to be defamatory by a domestic court when it first appeared in print. The applicants won a defamation action against two journalists and a newspaper following the publication of the disputed article, which nonetheless still appeared on the newspaper's website without mention of the judicial decision. Their action for a new award of damages and an order for the removal of the article was unsuccessful. They contended that the State had thereby failed to secure protection for their right to respect for their reputation. The Court did not accept that argument.

94. *Z. v. Finland*, 25 February 1997, *Reports of Judgments and Decisions* 1997-I.
95. See also Article 10.
96. Nos. 3002/03 and 23676/03, ECHR 2009.
97. No. 33846/07, 16 July 2013.

The Court noted that the State's positive obligations under Article 8 had also to take account of the Article 10 rights of media professionals and the critical role now played by electronic archives in preserving and communicating news and information to the public. Article 10 of the Convention protected the public's legitimate interest in having access to press archives on the Internet. It would have been open to the second applicant[98] to raise the issue of the online availability of the defamatory article at the time of the first civil action. The domestic courts were however denied the opportunity to address the matter at the appropriate stage. It was important for the Court that the legislative framework in place did in fact allow the applicants to bring a second action and that they were not precluded from doing so by the operation of the principle of *res judicata*. They had sought an order for the removal of the article in their second action. The Court, in agreement with the domestic courts, observed that it was not the role of the courts to rewrite history by expunging all traces of publications which had been found in the past to be defamatory. The second applicant could have requested the rectification of the article by means of the addition of a reference to the earlier judgment finding the article to be defamatory. The respondent State had complied with its obligation to strike a balance between the rights guaranteed under Article 10 and under Article 8, so that there had been no violation of Article 8.

In the case of *Vilnes and Others v. Norway*[99] (not final), the Court found that the State had failed to ensure that the applicants, who were divers, received essential information on the risks associated with the use of rapid decompression tables. The applicants had taken part in deep-sea operations in the North Sea, and particularly test dives. They had been employed by diving companies, contracted by oil companies which were drilling for new wells. As a result of their professional activities, they had developed health problems which had left them disabled. They received disability pensions and, among other allowances, *ex gratia* compensation from the State. The Court reiterated that the Contracting States have an obligation under Article 8 to *provide access* to essential information enabling individuals to assess risks to their health and lives. It added that in certain circumstances this obligation could also encompass a duty to *provide* such information and specified that the scope of this obligation was not limited to risks which had already materialised, but included occupational risks.

The Court considered that, at the relevant time, the State had failed to ensure that diving companies were fully transparent when it came to the use of their respective diving tables. Divers had thereby been denied

98. The complaint was declared inadmissible under Article 35 § 1 of the Convention in respect of the first applicant.
99. Nos. 52806/09 and 22703/10, 5 December 2013.

access to information on differences in decompression times and on the consequences which the use of decompression tables providing for shorter decompression times could entail for their safety and health. As a result, divers had been unable to assess the risk to their health and to give informed consent to the risks involved. The Court had particular regard to the fact that a company applying for a licence to operate in the North Sea did not have to produce its decompression tables to the authorities. Companies were allowed to keep their tables secret for competitive reasons. However, given that at the relevant time concern was being expressed about the use of different decompression tables with different decompression times ranging from rapid to slow, the State should have been alert to the need to ensure that divers had all relevant information at their disposal to enable them to weigh up the risks to their health.

This judgment adds to the case-law on the State's obligation to ensure that private companies respect the right of workers to be apprised of occupational risks.

Private life and home

In the *Eremia* case, cited above, the children of a woman who was attacked by her husband complained on their own behalf about their father's violent and insulting behaviour towards their mother. The national authorities had recognised that the children's psychological well-being had been adversely affected by repeatedly witnessing their father's violence against their mother, and had extended the protection order issued in respect of the mother to include the children. However, the father had breached that order and repeated the offences. Although aware of his conduct, the authorities had taken no effective measures and the violent husband was eventually released from all criminal liability. The Court concluded that there had been a violation of Article 8 in respect of the children, in that the State had failed to comply with its positive obligations to protect them as vulnerable persons.

Private life, home and correspondence

The Court has also ruled on the issue of the scope of the tax authorities' investigative powers in relation to computer servers shared by several companies. In the *Bernh Larsen Holding As and Others v. Norway*[100] judgment, the tax authorities had requested a commercial company to allow tax auditors to make a copy of all data on its server – including documents stocked electronically, even though these were not audit documents, and it shared the server with the other applicant companies. The companies' argument that the tax authorities could only be given access to the files containing documents which were relevant to tax

100. No. 24117/08, 14 March 2013.

assessment or a tax review had been dismissed by the domestic courts. In finding the application inadmissible, the Court pointed to the existence of effective and adequate safeguards against abuse in the relevant legal provisions. It noted that the public interest in ensuring efficient inspection for tax assessment purposes had not encroached on the companies' right to respect for "home" and "correspondence" and their interest in protecting the privacy of persons working for them.

Family life

The Court reaffirmed that there is no obligation on Contracting States under Article 8 of the Convention to extend the right to second-parent adoption to unmarried couples (*X and Others v. Austria*[101]).

In the *X v. Latvia*[102] judgment, the Court ruled on the scope of the procedural obligations incumbent on the national courts with regard to the application of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980. After spending the first few years of her life in Australia the applicant's daughter had, at the age of three years and five months, been taken by her mother to Latvia, without the father's consent. At the father's request, the Latvian authorities ordered the child's "immediate return" to Australia, in application of the Hague Convention.

The Grand Chamber reiterated that there was a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount. It followed directly not only from Article 8 of the Convention, but also from the Hague Convention itself, that a rapid return of a child to its country of habitual residence cannot be ordered automatically or mechanically.

With regard to the application of the Hague Convention by the national courts, the Grand Chamber considered it opportune to clarify an aspect of its *Neulinger and Shuruk v. Switzerland* judgment[103]: when assessing an application for a child's return national courts were not required to carry out an in-depth examination of the entire family situation, but nevertheless had to comply with two procedural obligations. Firstly, "the courts must not only consider arguable allegations of a 'grave risk' for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the

101. [GC], no. 19010/07, ECHR 2013. See also Article 14 below.
102. [GC], no. 27853/09, 26 November 2013.
103. [GC], no. 41615/07, ECHR 2010. The Grand Chamber indicated that paragraph 139 of that judgment "does not in itself set out any principle for the application of the Hague Convention by the domestic courts".

Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted strictly ..., is necessary." Secondly, with regard to a child's return "to the State of ... habitual residence", the courts must satisfy themselves that "adequate safeguards are convincingly provided" in that State, and, in the event of a known risk, that "tangible protection measures" are put in place.

In this case, the applicant had submitted a certificate by a psychologist stating that there existed a risk of trauma for the child in the event of immediate separation from her mother. However, the Riga Regional Court had refused to examine the conclusions of that report in the light of the provisions of Article 13 (b) of the Hague Convention, considering that the report concerned the merits of the custody issue, a separate question from the application for return. Yet, the refusal to take into account such an allegation, which the applicant had substantiated through a certificate issued by a professional, the conclusions of which could disclose the possible existence of a grave risk within the meaning of Article 13 (b) of the Hague Convention, was contrary to the requirements of Article 8 of the Convention. It followed that the domestic courts should not have disregarded those conclusions. Article 8 required that an arguable allegation of "grave risk" to the child in the event of return be effectively examined by the courts and their findings be set out in a reasoned court decision – even if the authorities were bound to comply with the short time-limits laid down by Article 11 of the Hague Convention. Accordingly, there had been a violation of the applicant's right to respect for her "family life".

In a relatively rare occurrence before the Court, in a case concerning the international abduction of children following the divorce of their parents who lived in different countries, the national authorities were confronted with the reaction of the children themselves, who clearly indicated their refusal to return to their mother in another country (*Raw and Others v. France*[104]). Although the children did not want to leave their father, the Court considered that in the context of the application of international-law principles (the Hague Convention and the Brussels II *bis* Regulation), while the children's opinion had to be taken into consideration, their objections were not necessarily sufficient to prevent their return. It found that the national authorities had not taken all the measures that could reasonably have been demanded of

104. No. 10131/11, 7 March 2013.

them to facilitate execution of the judgment ordering the children's return.

The case of *Zorica Jovanović v. Serbia*[105] concerned the State's positive obligations under Article 8 when faced with the disappearance of a child in the days following its birth in a public hospital. The applicant alleged that the respondent State had failed to provide her with any information about the fate of her child[106]. According to the authorities, her son had died shortly after birth in a State hospital. The child's body was never handed over to the applicant, nor was she ever informed of the existence of an autopsy report or of the place of burial. The applicant's complaint that the child had been abducted was ultimately dismissed as unsubstantiated. The Court found a breach of Article 8 with reference, *mutatis mutandis*, to the principles governing the State's duty under Article 3 of the Convention to account for the whereabouts and fate of missing persons[107]: the body of the applicant's son had never been handed over to the applicant or her family, and the cause of death was never determined; the applicant had never been provided with an autopsy report or informed of when and where her son had been buried; his death was never officially recorded; the criminal complaint filed by the applicant's husband would also appear to have been rejected without adequate consideration; and the applicant herself still had no credible information as to what had happened to her son[108].

The judgment in *Ageyevy v. Russia*[109] examined the far-reaching and irreversible decision to revoke an adoption order. The revocation of the order was held to have been disproportionate in the circumstances of the case: the domestic courts had carried out a very superficial examination of the reliability of the information supplied by the authorities indicating that the children's health had been neglected; although the revocation order had been influenced by the criminal proceedings pending against the applicants at the time, the applicants had subsequently been exonerated as regards the allegations of child abuse; no assessment was made of the family bonds that had been established between the applicants and the children and no account was taken of the damage to the emotional security and psychological condition of each of the children that might result from the sudden breaking of such bonds.

105. No. 21794/08, ECHR 2013.
106. The Court confirmed its temporal jurisdiction to examine the merits of the case by referring to its case-law on disappeared persons and the ongoing nature of such situations (*Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, ECHR 2009).
107. *Varnava and Others*, cited above.
108. In view of the potential for further similar applications, the Court adopted its judgment in the form of a pilot judgment, inviting Serbia to create a mechanism aimed at providing individual redress to parents in the applicant's situation.
109. No. 7075/10, 18 April 2013.

The decision in *Povse v. Austria*[110] is the first concerning an application against a State which was required to enforce a request for the return of a child issued by another member State in accordance with the Brussels IIa Regulation – which simplifies the procedure for returning children who have been subjected to unlawful removal or retention. This case provided the Court with an opportunity to confirm the principles first developed in the *Bosphorus* judgment (cited above), while distinguishing the facts from those that had led to its recent decision in *Michaud v. France*[111]. The applicants, a mother and daughter, contended under Article 8 of the Convention that the Austrian courts had limited themselves to ordering the enforcement of the Italian court's return order (issued following an application by the father), and had not examined their argument that the first applicant's return to Italy would constitute a serious danger to her well-being and lead to the permanent separation of mother and child.

The Court accepted that the Austrian court had done no more than implement its obligations under the law of the European Union, namely to give effect to the terms of the Brussels IIa Regulation and to order the child's return in compliance with the request of the Italian court. In contrast to the circumstances of the *Michaud* case – which involved a Directive and therefore the exercise of discretion as to the manner of execution of the measure – the Austrian court was obliged to respect the terms of a certified judgment issued by the Italian court ordering the child's return. Under the *Bosphorus* principles, the Austrian court could be presumed to have been acting in compliance with its Convention obligations, having regard to the fact that the legal order of the European Union secured protection for fundamental human rights in a manner equivalent or comparable to that found in the Convention system and possessed mechanisms for ensuring such protection. The Court's inquiry then focused, again in application of the *Bosphorus* principles, on whether the applicants had rebutted the presumption in the circumstances of the case. It found that they had not.

The Italian court, acting under the Brussels IIa Regulation, had heard the parties and had assessed whether the child's return would entail a grave risk for her. Further, and in contrast to *Michaud*, a preliminary ruling had been sought by the Austrian courts from the Court of Justice of the European Union, which had reviewed the scope of the Regulation and stated, among other things, that any alleged change in circumstances in the applicants' situation since the date of issue of the return order had to be addressed to the Italian courts, which were competent to rule on a possible request for a stay of enforcement of the return order. The Court noted that in *Michaud* no such ruling had been sought, with the

110. (dec.), no. 3890/11, 18 June 2013.
111. No. 12323/11, ECHR 2012.

result that the control mechanism had not been brought into play. It also observed that should any action filed by the applicants before the Italian courts prove unsuccessful, it would be open to them to introduce another application with the Court. For those reasons, the application was dismissed.

Private and family life

The judgment in *B. v. Romania (no. 2)*[112] develops the case-law on the legal protection that must be given to mentally ill patients committed for psychiatric treatment whose children are then placed in care. The Court considered that mentally ill persons committed to a psychiatric institution were entitled to receive adequate judicial protection for themselves and in the decision-making process leading to the subsequent placement of their children. Special protection, in particular through the official appointment of a lawyer or designation of a guardian, had to be available for these vulnerable persons, who had to be given the opportunity to take part effectively in the decision-making process concerning the placement of their children in residential care, and to have their interests represented in that procedure.

The *Ageyevy v. Russia* judgment, cited above, examined the issue of unauthorised disclosure of personal data while the applicants' child was in hospital. The hospital's decision to communicate the child's medical data and to grant the media access to it had interfered with the applicants' Article 8 rights.

For the first time, the Court was called upon to examine the extent of a State's margin of appreciation when it comes to deciding, in the context of the fight against terrorism, on the disposal of the bodies of individuals killed while engaged in acts of terrorism (*Sabanchiyeva and Others v. Russia*[113]; *Maskhadova and Others v. Russia*[114]). The cases concerned the authorities' refusal to return to the applicants the bodies of their relatives, who had been killed during heavy clashes with the security forces, in order to allow them to organise the burials. The authorities relied on domestic-law provisions which precluded the return of the bodies of terrorists who had died in such circumstances.

The Court acknowledged that the authorities were entitled to act with a view to minimising the informational and psychological impact of terrorist acts on the population and protecting the feelings of relatives of victims of terrorism. They could therefore limit the applicants' ability to choose the time, place and manner in which the relevant funeral ceremonies and burial services were to take place and even directly

112. No. 1285/03, 19 February 2013.
113. No. 38450/05, ECHR 2013 (extracts).
114. No. 18071/05, 6 June 2013.

regulate the proceedings. The authorities could also be reasonably expected to intervene in order to avoid possible disturbances during the ceremonies. Such considerations fell squarely within the respondent State's margin of appreciation. However, the key question was whether the authorities had acted in compliance with the requirement of proportionality. The applicants had been denied any participation in the funeral ceremonies or any kind of opportunity to pay their last respects to their deceased relatives. The authorities had failed to make any individual assessment of the circumstances of each case. The applicable law provided for an automatic refusal and the authorities were thus unable to consider alternative means of securing the legitimate aims relied on (public safety and protection of the rights and freedoms of others) which would have caused less impairment of each applicant's Convention rights. It followed that they had failed to strike a fair balance between the conflicting interests.

The place in which a prison sentence is to be served was one of the issues examined in the *Khodorkovskiy and Lebedev v. Russia*[115] judgment. In ruling on this aspect, the Court relied in its reasoning on a body of case-law developed by the former Commission. The applicants complained that the authorities had obliged them to serve their prison sentences in very remote penal colonies, located thousands of kilometres from their homes, and of the consequences of that measure on their relationships with their families.

The Court accepted that, given the geographical situation of the colonies concerned and the realities of the Russian transport system, a journey from Moscow to the colonies was a long and exhausting ordeal, especially for the applicants' young children. While the applicants' families in particular suffered as a result of the remoteness of the location, the applicants themselves were indirectly affected, since they probably received fewer visits than they would have received had they been placed in a prison closer to their Moscow homes. The Court acknowledged that the measure had a basis in domestic law. Furthermore, sending the applicants to remote locations to serve their sentences could be considered to pursue certain of the aims relied on by the Government, namely guaranteeing the applicants' safety and the avoidance of overcrowding in prisons in the areas around Moscow. However, it considered that the measure in question had been disproportionate and was therefore unjustified.

In its judgments in *Garnaga v. Ukraine*[116], which concerned a refusal to allow a change of patronymic, and *Henry Kismoun v. France*[117], which

115. Nos. 11082/06 and 13772/05, 25 July 2013.
116. No. 20390/07, 16 May 2013.
117. No. 32265/10, 5 December 2013.

involved an applicant with two different surnames in two countries who had applied to have only one surname, the Court reaffirmed that the Contracting States enjoyed a wide margin of appreciation when regulating an individual's wish to change his or her name. However, the domestic authorities had failed to balance the relevant interests at stake, namely the applicant's private interest in changing his or her name and the public interest in regulating the choice of name. In both cases, the Court found that there had been violations of Article 8, as the refusals to grant the applicants' requests had not been sufficiently justified by the domestic law or by the authorities in their decisions.

Family and private life and home

A community of travellers, nationals of the respondent State, who had been living in a municipality for many years, complained about an order requiring them to remove all their vehicles, caravans and any buildings, from land on which they had been settled for between five and thirty years (*Winterstein and Others v. France*[118]. The land in question was situated in a zone that had been classified by the land-use plan as a "protected natural zone", in a sector where camping or caravanning was permitted, subject to development or authorisation. The French courts found that the applicants' settlement on the land was in breach of the land-use plan and ordered them to leave, on pain of a fine for each day of delay. The order had not yet been enforced, but a significant number of the applicants had had to leave under the threat of the fine, which continued to be payable by those remaining. Four families had been rehomed in social housing.

The judgment confirmed the case-law in *Yordanova and Others v. Bulgaria*[119], in accordance with which the proportionality principle requires that situations where an entire community and a long period of time are involved should be treated very differently from everyday situations where an individual is evicted from a property that he or she is occupying illegally, and the fact of belonging to a vulnerable minority should be taken into account in this connection. Thus, the vulnerability of Roma and travellers means that special consideration must be paid to their needs and their different way of life. In the applicants' case, the Court applied the *Yordanova* case-law to a situation where the land in question was not municipal property but private land, rented or even owned by the applicants. In addition, the Court pointed out that numerous international and Council of Europe instruments stressed the need, in cases of forced eviction of Roma or travellers, to provide the persons concerned with alternative accommodation, except in cases of *force majeure*.

118. No. 27013/07, 17 October 2013.
119. No. 25446/06, 24 April 2012.

Freedom of thought, conscience and religion (Article 9)

Certain complex cases may oblige the Court to strike a balance between two different rights protected by the Convention. In such situations, the Court recognises that the State enjoys a wide margin of appreciation in striking a balance between the competing Convention rights.

– The case of *Sindicatul "Păstorul cel Bun" v. Romania*[120] required the Court to balance the right to form trade unions with that of the autonomy of religious communities[121] (see Article 11 below);

– The case of *Eweida and Others v. the United Kingdom*[122] concerned the right of employers to safeguard the rights of others, specifically those of homosexual couples, and the applicants' right to manifest their religion.

The extent of the right to manifest one's religion in the workplace or in a professional context was a new issue for the Court. In the *Eweida and Others* judgment, cited above, the Court recapitulated its case-law in this area. In this case, among other issues, the employer's dress code did not allow crosses to be worn in a visible manner. The Court held that the lack of explicit protection in domestic law did not in itself mean that the right to manifest one's religion by wearing a religious symbol at work was insufficiently protected. It recognised that the State enjoyed a wide margin of appreciation in striking a balance between competing Convention rights, and in the context of protecting health and safety in a hospital setting.

Freedom of expression (Article 10)[123]

Can the immediate and powerful impact of broadcasting media justify restrictions, designed to protect the democratic process, on the right to use such media in public debate? The Grand Chamber ruled on this issue in its judgment in *Animal Defenders International v. the United Kingdom*[124]. In this case a non-governmental organisation (NGO) that campaigns on social issues complained about a statutory ban on political advertising, which had prevented it from screening a television advertisement as part of a campaign concerning the treatment of primates.

The Court pointed out that when an NGO drew attention to matters of public interest, it was exercising a public watchdog role of similar importance to that of the press. It also stated that an NGO's right to

120. [GC], no. 2330/09, ECHR 2013 (extracts).
121. *Miroļubovs and Others v. Latvia*, no. 798/05, 15 September 2009.
122. No. 48420/10, ECHR 2013 (extracts).
123. On the issue of this Article's applicability, see *Stojanović v. Croatia*, no. 23160/09, 19 September 2013.
124. [GC], no. 48876/08, ECHR 2013 (extracts).

impart information and ideas of general interest which the public was entitled to receive had to be balanced against the authorities' desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media. The main issue to be decided in this case was the proportionality of the interference under the Convention. The Grand Chamber identified the points relevant to its analysis: the quality of the national parliamentary and judicial reviews of the necessity of the measure, the scope of the prohibition, its limits and the extent of the infringement of freedom of expression, the situation in the other countries in which the Convention was applied, and the possibility of using other media.

The Court attached considerable weight to the exacting and pertinent reviews by the parliamentary and judicial bodies of the criticised regulatory regime, and to their respective opinions. It noted that the relevant Convention case-law had been analysed and that the measure's compatibility with the Convention had been examined at national level.

The Court also considered it important that the prohibition had been drawn up at national level in such a way as to restrict freedom of expression as little as possible.

Furthermore, it noted a lack of consensus among member States on how to regulate paid political advertising in broadcasting. This lack of consensus broadened the margin of appreciation to be accorded to the State as regards restrictions on freedom of expression on matters of public interest.

In addition, access to other media was a key factor in determining the proportionality of a restriction on access to potentially useful media. Though unable to access paid advertising in broadcast media, several other methods of communication had been available to the applicant NGO without restriction, notably the print media, the Internet (including social media) and demonstrations, posters and flyers. In this connection, the Grand Chamber also commented on the impact of new media, the Internet and social media.

Finally, the Court noted that the impact the impugned restriction had had on the applicant NGO did not outweigh the convincing reasons put forward by the State to justify the prohibition on paid political advertising in radio and television broadcasting in the United Kingdom.

The Court also had an opportunity to develop its case-law on the Internet in another case[125], *Neij and Sunde Kolmisoppi v. Sweden*[126], in which the dangers of the Internet were examined. This case concerned the criminal conviction for copyright infringement of two of the co-founders of "The Pirate Bay", a website that facilitates the sharing of

125. See also Article 8.
126. (dec.), no. 40397/12, 19 February 2013.

torrent files (music, films, games, etc.), including when it entails a breach of copyright. The Court explicitly acknowledged that sharing, or allowing others to share, files of this kind on the Internet – even illegally and for profit – fell within the scope of the right to "receive and impart information" for the purposes of Article 10 § 1, and that any interference with the exercise of this right had therefore to be subject to the standard proportionality test in accordance with Article 10 § 2. In addition, such a situation opposed two competing interests which both enjoyed protection under the Convention, namely the right to freedom of expression and intellectual property rights, although the material concerned in the instant case did not enjoy the same level of protection as that afforded to political expression and debate, so that the State had a particularly wide margin of appreciation in this sphere. The Court also cited, as a further ground for dismissing the application, the obligation to protect copyright, which existed both under the relevant legislation and the Convention, and was a valid reason for restricting freedom of expression.

In the *Şükran Aydın and Others v. Turkey*[127] judgment the Court dealt with the sensitive question of the linguistic freedoms of national minorities. The case concerned the conviction and sentencing (to prison terms and/or fines, which had not been executed) of candidates (or their supporters) in parliamentary and municipal elections for having spoken Kurdish during the election campaigns, under a law, since amended, which prohibited the use of any language other than Turkish during election campaigns.

The Court found for the first time that there had been a violation of Article 10 on account of the prohibition on using a language other than the official language in public life; moreover, this was not in the context of communications with public authorities or before official institutions, but in relations with other private individuals. It considered that the right to impart one's political views and ideas and the right of others to receive them would be meaningless if the possibility to use the language which could properly convey these views and ideas was diminished due to the threat of criminal sanctions.

The case-law on the right of access to official documents was developed under Article 10 in the context of two cases brought before the Court by NGOs.

– The judgment in *Youth Initiative for Human Rights v. Serbia*[128] concerned a refusal to allow the applicant organisation access to intelligence information despite a binding decision directing disclosure. The Court found a violation of Article 10 of the Convention on

127. Nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09, 22 January 2013.
128. No. 48135/06, 25 June 2013.

account of the refusal of the Serbian Intelligence Agency to disclose to the applicant organisation information on the number of persons who had been subjected to electronic surveillance over a certain period. The Agency had been required to disclose the information pursuant to a binding decision of the Information Commissioner in favour of the applicant organisation's request.

The Court stressed that the notion of "freedom to receive information" embraced a right of access to information, following the approach developed in the case of *Társaság a Szabadságjogokért v. Hungary*[129] and applied thereafter in *Kenedi v. Hungary*[130]. Noting that the applicant organisation was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, the Court found that there had been an interference with its right to freedom of expression. It considered that the Agency's refusal to disclose relevant information amounted to a restriction that was not "in accordance with the law", in that it was contrary to the clear terms of the decision sent to it by the Information Commissioner. In the operative part of the judgment, the Court directed the Government to ensure that the information in question was made available to the applicant organisation, this being the only real means of putting an end to the violation found (Article 46).

– In the case of *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*[131], the applicant association had requested a regional Real Property Transaction Commission to provide copies of all decisions issued by it over the previous five years in anonymised form. Its request was refused, essentially on the ground that to compile, anonymise and dispatch all these decisions would require substantial resources which would jeopardise the fulfilment of the Commission's other tasks. In examining whether the interference was necessary in a democratic society, the Court considered that the reasons relied on by the domestic authorities were relevant but not sufficient and that the complete refusal to give the applicant association access to any of the Commission's decisions was disproportionate. It noted in this connection that the association was willing to reimburse the costs of the production and mailing of the requested copies and that it had had no difficulty receiving anonymised copies of decisions from all other regional Real Property Commissions. The Court also had regard to the fact that none of the decisions of the Commission in question had been published, whether in an electronic database or in any other form (which

129. No. 37374/05, 14 April 2009.
130. No. 31475/05, 26 May 2009.
131. No. 39534/07, 28 November 2013.

distinguished this case from the above-cited case of *Társaság a Szabadságjogokért*, where the information sought was ready and available). The regional Commission, which, by its own choice, held an information monopoly in respect of its decisions, had thus made it impossible for the applicant association to carry out its research and to participate in a meaningful manner in the legislative process concerning amendments being proposed to the law on real property transactions.

The judgment in *Stojanović*, cited above, concerned the applicability of Article 10 to a situation in which an applicant denies that he or she is the author of statements found to be defamatory. The defamation action related to expressions used or insinuations made in articles written by a journalist following an interview with the applicant or based on the applicant's telephone conversation with a third party. The applicant unsuccessfully relied on Article 10 in his defence to the defamation action while at the same time protesting (again unsuccessfully) that he had never uttered the words attributed to him. According to the applicant, the journalist had made them up.

Before the Court, the Government pleaded that the applicant could not rely on Article 10, since his primary contention was that he was not the author of the statements for which he had been held liable. Furthermore, in order to fully exhaust domestic remedies, the applicant should not have disputed that he had made the statements. He should have argued that by making them he was exercising his right to freedom of expression. The Court found Article 10 to be applicable. It noted that the extent of liability in defamation must not go beyond a person's own words, and that an individual may not be held responsible for statements or allegations made by others. It added that where, as here, the applicant effectively argued that the domestic courts had indirectly stifled the exercise of his freedom of expression by attributing to him, in connection with the interview in which he had criticised the policy of the Minister of Health, statements he had never made and ordering him to pay damages, he was entitled to rely on the protection of Article 10. For the Court, if the applicant's argument proved to be correct, the damages he had been ordered to pay would be likely to discourage him from making criticisms of that kind in the future. The Court proceeded to establish whether the domestic courts had been correct in finding that the statements used in the articles went beyond what the applicant had said and found that Article 10 had been breached in respect of two statements (which, according to the applicant, had been wrongly attributed to him).

In the case of *Perinçek v. Switzerland*[132] (not final) the applicant had made a number of statements regarding the Armenian massacres of

132. No. 27510/08, 17 December 2013.

1915. Although he acknowledged that there had been massacres and deportations of the Armenian people, he declared that the legal characterisation of the events as genocide was an "international lie". On the basis of those comments, he was convicted of the offence of racial discrimination, under a law providing for sanctions against those who, *inter alia*, denied an act of genocide or other crimes against humanity.

The Court accepted that the applicant's declarations were not excluded from the scope of Article 10 by virtue of Article 17 of the Convention, notwithstanding their provocative tenor. It considered it decisive that the applicant's open rejection of the qualification of the events of 1915 as genocide was unlikely of itself to incite to racial hatred. It also noted that the applicant had never in fact been charged with incitement to racial hatred or with trying to justify genocide – both separate offences under the domestic law.

While accepting that protecting the honour and feelings of the families of the victims of the atrocities was a legitimate aim, the Court considered that the criminal sanctions imposed on the applicant could not be justified with reference to the respondent State's margin of appreciation. The judgment indicated the relevant factors to be taken into consideration in assessing this margin.

This was the first case in which the Court examined questions relating to the acceptability of speech which called into question the classification of historical atrocities as genocide. In its reasoning, the Court distinguished the circumstances of the applicant's case from cases in which individuals were punished at the domestic level for the negation of Holocaust crimes.

Freedom of assembly and association (Article 11)

Applicability

The *Sindicatul "Păstorul cel Bun"* case, cited above, develops the case-law on the characteristic features of an employment relationship. In assessing whether the duties performed by a worker amounted to an employment relationship with his or her employer – thus rendering applicable the right to form a trade union within the meaning of Article 11 – the Grand Chamber applied the criteria laid down in the relevant international instruments. It reasserted the principle that no occupational group was excluded from the scope of Article 11 of the Convention.

Right to form trade unions

Religion and trade unions were the key issues in *Sindicatul "Păstorul cel Bun"*. Clergy members wished to set up a trade union without the agreement or blessing of their archbishop, in breach of the statute of

their Church. The trade union was not granted authorisation to register on the ground that registration would seriously imperil the Church's autonomy, such autonomy being the cornerstone of relations between the State and recognised religious communities.

The Court held that respect for the autonomy of religious communities recognised by the State implied, in particular, that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity. It was not the task of the national authorities to act as the arbiter between religious communities and the various dissident factions that existed or might emerge within them.

The domestic courts had to ensure that both freedom of association and the autonomy of religious communities could be observed within religious communities in accordance with the applicable law, including the Convention.

Where interference with the right to freedom of association (Article 11) was concerned, it followed from Article 9 of the Convention that religious communities were entitled to their own opinion as to whether any collective activities of their members might undermine their autonomy and their opinion had in principle to be respected by the national authorities. However, a mere allegation by a religious community that there was an actual or potential threat to its autonomy was not sufficient to render any interference with its members' trade-union rights compatible with the requirements of Article 11. It had also to be shown, in the light of the circumstances of the individual case, that the risk alleged was plausible and substantial and that the impugned interference with freedom of association did not go beyond what was necessary to eliminate that risk and did not serve any other purpose unrelated to the exercise of the religious community's autonomy. The national courts had to ensure that these conditions were satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake.

Furthermore, the wide variety of constitutional models governing relations between States and religious denominations in Europe indicated the lack of a European consensus on this matter. In consequence, the State enjoyed a wider margin of appreciation in this sphere, encompassing the right to decide whether or not to recognise trade unions which operated within religious communities and pursued aims that might hinder the exercise of such communities' autonomy. The Court concluded that there had been no violation of Article 11[133].

133. See also Article 9 above.

Freedom of association

The case of *Vona v. Hungary*[134] concerned the dissolution of a private association on account of anti-Roma rallies and demonstrations organised by its paramilitary wing. The Court rejected a submission by the association's president that the dissolution had violated Article 11. It confirmed that the principles developed in cases such as *United Communist Party of Turkey and Others v. Turkey*[135], *Refah Partisi (the Welfare Party) and Others v. Turkey*[136] and *Herri Batasuna and Batasuna v. Spain*[137] were equally relevant when it came to the assessment of the Convention-compatibility of a forced dissolution of a social organisation, such as the association, given the influence such bodies could have in shaping political life. It found, with reference to the above-mentioned principles, that a State was entitled to take preventive measures to protect democracy *vis-à-vis* entities such as the applicant if a sufficiently imminent prejudice to the rights of others undermined the fundamental values upon which a democratic society rests and functions. For the Court, the State could not be required to wait, before intervening, until a political movement took action to undermine democracy or had recourse to violence. Even if the movement had not made an attempt to seize power and the danger of its policy to democracy was not sufficiently imminent, the State was entitled to act preventively if it was established that such a movement had started to take concrete steps in public life to implement a policy incompatible with the standards of the Convention and democracy.

The Court observed that the repeated holding of rallies organised to keep "Gipsy criminality" at bay, and large-scale paramilitary parading, was a step towards implementing a policy of racial segregation. It shared the domestic courts' findings that such events had an intimidating effect on the Roma minority, and considered that the threat represented by such acts could be effectively eliminated only by removing the organisational backup provided by the association.

Prohibition of discrimination (Article 14)

The judgment in *Fabris v. France*[138] concerned a difference in treatment of a child in respect of his inheritance rights on the sole ground that he had been born out of wedlock. There being no objective and reasonable justification for that difference in treatment, the Court held that there had been a violation of Article 14 of the Convention, taken together with Article 1 of Protocol No. 1. As the Court has previously stated, very weighty reasons are required before a distinction

134. No. 35943/10, ECHR 2013.
135. 30 January 1998, *Reports of Judgments and Decisions* 1998-I.
136. [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II.
137. Nos. 25803/04 and 25817/04, ECHR 2009.
138. [GC], no. 16574/08, ECHR 2013 (extracts).

on grounds of birth outside marriage can be regarded as compatible with the Convention. The Court accepted that the protection of acquired rights could serve the interests of legal certainty and that this constituted a legitimate aim capable of justifying the difference in treatment in the applicant's case. However, protecting the 'legitimate expectation' of the deceased and their families must be subordinate to the imperative of equal treatment between children born outside and children born within marriage. Indeed, and this was crucial, the prohibition of discrimination based on the "illegitimate" nature of the parental affiliation was a "standard of protection of European public order": the Court had consistently held since 1979 that restrictions on children's inheritance rights on grounds of birth were incompatible with the Convention.

The Court was not in principle required to settle disputes of a purely private nature. However, it could not remain passive where a national court's interpretation of a legal act – be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice – appeared unreasonable, arbitrary or blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention.

Noting also that the Court of Cassation had not addressed the applicant's main ground of appeal relating to the alleged infringement of the Convention, the Grand Chamber reaffirmed that, as a corollary of the principle of subsidiarity, the national courts were required to examine pleas related to the rights and freedoms guaranteed by the Convention with particular rigour and care.

The judgment in *X and Others v. Austria*, cited above, dealt with a case of second-parent adoption in a same-sex couple.[139] The issue before the Court was not the general question of same-sex couples' access to second-parent adoption, but whether there had been a difference in treatment between unmarried different-sex couples and same-sex couples in respect of this type of adoption. The case concerned the inability of a partner in a stable lesbian relationship to adopt her partner's child without severing her partner's legal ties with the child. The judgment reached two different findings, depending on whether the applicants' situation was compared with that of a married heterosexual couple or an unmarried heterosexual couple.

Reaffirming the approach taken in *Gas and Dubois v. France*[140], the Grand Chamber stated that with regard to second-parent adoption the

139. For the case of single-parent adoption, see *E.B. v. France* [GC], no. 43546/02, 22 January 2008.
140. No. 25951/07, ECHR 2012.

situation of a stable same-sex couple was not comparable to that of a married couple; in this connection, it reiterated the special status conferred by marriage.

Going on to compare the situation of the stable same-sex couple formed by the applicants with that of an unmarried heterosexual couple, the Court noted that the applicants' sexual orientation had been the sole reason for declaring their appeals inadmissible, since the legislation imposed an absolute prohibition on second-parent adoption for a same-sex couple. Had an identical adoption request been submitted by an unmarried heterosexual couple, the domestic courts would have been required to examine its merits.

The Court stressed the importance of granting legal recognition to *de facto* family life. It pointed out that the best interests of the child was a key notion in the relevant international instruments. It further emphasised that it was not for the Court to state whether the applicants' adoption request should have been granted in the circumstances of the case.

Once the domestic law allowed second-parent adoption in unmarried different-sex couples, the Court had to examine whether refusing that right to unmarried same-sex couples served a legitimate aim and was proportionate to that aim. The respondent State had failed to adduce particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child. The distinction in the national law was therefore held to be incompatible with Article 14 of the Convention taken together with Article 8 when the applicants' situation was compared with that of an unmarried different-sex couple in which one partner wished to adopt the other partner's child.

With regard to the comparative-law materials used by the Court in its judgments, *X and Others v. Austria* (cited above) was highly unusual. Only a limited number of countries could be regarded as a basis for comparison with the respondent State in the area in question (only ten member States of the Council of Europe could serve as points of comparison). The Grand Chamber decided that this sample was too narrow to allow any conclusions to be drawn as to the existence of a possible consensus among Council of Europe member States.

In a separate case, the complaint by two women in a registered civil partnership about the refusal to register one of them as a parent on the birth certificate of the other's child which had been born during their partnership was dismissed by the decision in *Boeckel and Gessner-Boeckel*

v. Germany[141]. The Court found that there had been no violation of Article 14 taken together with Article 8. Birth certificates indicated one's descent. Noting that the case did not concern transgender or surrogate parenthood, the Court found that there was no factual foundation for a legal presumption that the child born to one partner of a same-sex couple during the subsistence of the partnership was the descent of the other cohabiting partner. In that respect the applicants' situation was different from that of a married different-sex couple, in respect of whom there was a legal presumption under national law that the man married to the child's mother at the time of birth was the child's biological father. Accordingly, the applicants were not in a relevantly similar situation to a married different-sex couple when it came to the issue of the entries to be made in a child's birth certificate.

The case of *Vallianatos and Others v. Greece*[142] concerned stable homosexual couples, some of whom lived together, and others who, for professional and social reasons, did not. The Court reiterated that their relationships fell within the concept of "private life" and also of "family life" within the meaning of Article 8, in the same way as those of different-sex couples in the same situation[143].

The applicants complained that the system of civil partnerships created by Greek law ("civil union") was explicitly reserved for couples of opposite sex. They submitted that this introduced a distinction which discriminated against them.

Relying on its judgment in *Schalk and Kopf*, the Court noted that they were in a comparable situation to different-sex couples with regard to their need for legal recognition and protection of their relationships, and observed that the law introduced a difference in treatment that was based on the applicants' sexual orientation.

The Court dismissed the two arguments put forward by the respondent State to justify the legislature's decision. Firstly, same-sex couples were just as capable as different-sex couples of entering into stable committed relationships, and had the same needs for mutual support and assistance. Secondly, the Court acknowledged that the need to protect the family in the traditional sense and to protect the interests of children were legitimate aims. The margin of appreciation afforded to the States in this area was narrow. In the light of the impugned legislation and the relevant explanatory report, the Greek Government had not shown that the pursuit of those aims required them to exclude same-sex couples from the possibility of entering the sole form of civil partnership that

141. (dec.), no. 8017/11, 7 May 2013.
142. [GC], nos. 29381/09 and 32684/09, 7 November 2013.
143. *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010.

would allow them to have their relationship legally recognised by the State.

In addition, the Court noted that a "trend" was currently emerging in the member States of the Council of Europe towards introducing forms of legal recognition of same-sex relationships. Equally, of the nineteen States which authorised some form of registered partnership other than marriage, only two, one of which was Greece, reserved it exclusively for different-sex couples.

The Court concluded that the reasons given by the Government to justify excluding same-sex couples from the official legal regime of civil partnerships, applicable to different-sex couples, were not convincing and weighty. There had therefore been a violation of Articles 8 and 14, taken together.

A measure as radical as the total severance of contact between a father and son on the ground of the father's religious convictions and their possible effects on the child had to be justified by exceptional circumstances, which the State was required to demonstrate. Such a situation engaged both the right to respect for private life and the right to freedom of religion, enshrined in Articles 8 and 9 respectively, and the right to respect for parents' religious and philosophical convictions in their choice of education for their children, guaranteed by Article 2 of Protocol No. 1. The Court emphasised that these rights applied both to married parents and to a separated or divorced parent who did not have custody of his or her child. The principle of proportionality had to be respected, which implied that the national courts should have given consideration to other less drastic measures (*Vojnity v. Hungary*[144]).

The Court examined a dismissal on the grounds of HIV status in the case of *I.B. v. Greece*[145]. The applicant, who was HIV-positive, was dismissed from his employment because his colleagues refused to work with him. The Court of Cassation ultimately found that the dismissal was fully justified by the interests of the employer, in that it served to restore calm in the workplace and to allow the company to function properly. The Court reaffirmed, with reference to its earlier landmark judgment in the case of *Kiyutin v. Russia*[146], that individuals with HIV were a vulnerable group with a history of prejudice and stigmatisation and that the State should be afforded only a narrow margin of appreciation in choosing measures that singled out this group for different treatment on the basis of their HIV status.

144. No. 29617/07, 12 February 2013.
145. No. 552/10, 3 October 2013.
146. No. 2700/10, ECHR 2011.

In the particular circumstances of the case, the Court found that the applicant had been a victim of discrimination on account of his health status, in violation of Article 14 of the Convention taken together with Article 8. It noted, in particular, that the applicant had been dismissed because his employer had bowed to the pressure exerted by the applicant's colleagues. The latter had been informed by the occupational doctor that there was no risk of infection but had nevertheless continued to express their reluctance to work with the applicant. The Court of Cassation had not struck a fair balance between all the interests in issue. In this connection, the Court noted the absence of legislation or well-established national case-law protecting persons with HIV at the workplace.

The judgment in *García Mateos v. Spain*[147] makes it clear that the protection afforded by a national court's judicial decision on the reconciliation of work and family life must not remain illusory. The Court found a violation of Article 6, taken together with Article 14, on account of a failure to enforce a judgment acknowledging gender discrimination against a working mother who had asked to work fewer hours in order to be able to look after her young child. For the first time, the Court found a violation of the right to have a judgment enforced on account of gender discrimination in proceedings of this type.

The judgment in *Gülay Çetin v. Turkey*[148] develops the case-law on protection of the dignity of prisoners who are the subject of a short-term fatal prognosis. A difference in the regimes applicable to convicted prisoners and defendants suffering from incurable diseases in respect of release on health grounds was held to be unjustified. A prisoner suffering from terminal cancer had died before proceedings she had brought to obtain either release on licence, suspension of her detention or a presidential pardon had ended. Through this judgment, the Court confirmed its approach in *Laduna v. Slovakia*[149] (on a difference in treatment between remand and convicted prisoners in exercising the right to receive prison visits) and extended it in particular to the protection of the dignity of prisoners whose days are numbered on account of an incurable illness. The Court indicated that it attached considerable weight to Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe on the European Prison Rules, which states that persons deprived of their liberty are to be treated with respect for their human rights, and, in that connection, that no discrimination is permissible between persons who have been remanded

147. No. 38285/09, 19 February 2013.
148. No. 44084/10, 5 March 2013.
149. No. 31827/02, ECHR 2011. See also, concerning an unjustified difference in treatment between persons in pre-trial detention and convicted persons with regard to conjugal visits, *Varnas v. Lithuania*, no. 42615/06, 9 July 2013.

in custody and those who have been deprived of their liberty following conviction. The Court found that there had been a violation of Article 14 taken together with Article 3.

The above-cited *Eremia* judgment concerned a case of domestic violence entailing a violation of Article 3 taken together with Article 14 on account of the national authorities' discriminatory attitude towards female victims of such violence. The Court reiterated that a State's failure to protect women against domestic violence breached their right to equal protection under the law[150].

The authorities had been well aware that the applicant had been repeatedly subjected to violence by her husband, who had admitted beating his wife. However, the response of the various authorities concerned – the refusal to expedite her divorce, the police pressure to withdraw her criminal complaint, the failure by social services to enforce the protection order and their suggestion she try reconciliation since she was "not the first nor the last woman to have been beaten up by her husband", and the decision by the prosecutor to conditionally suspend the proceedings against the attacker – were indicative not merely of failures or delay, but amounted to the repeated condoning of such violence, thus reflecting a discriminatory attitude towards the applicant as a woman. The Court referred to the findings of the United Nations Special Rapporteur on Violence against Women in respect of the respondent State.

The procedural regime for salary disputes was at the heart of the *Giavi v. Greece*[151] judgment. Specifically, the Court ruled on the existence of different limitation periods between the private sector (five years) and the public sector (two years) for claiming unpaid wage supplements and allowances. It reiterated that submitting claims to a statute of limitations raised no issue under the Convention. Indeed, the existence of limitation periods was a common feature of the domestic legal systems of the Contracting States, and was intended to ensure legal certainty. It was for the States to decide the procedural rules on judicial remedies in such a way as to ensure protection of the rights of State employees, so long as those rules did not in practice render impossible or excessively difficult the exercise of the rights conferred by the domestic legal order. A two-year limitation period did not excessively limit the possibility for State employees to claim, through the courts, any salaries and allowances due to them by the authorities. Moreover, the position of public-sector employees was not comparable to that of private-sector employees. In sum, there had been no violation of Article 1 of Protocol No. 1, taken together with Article 14.

150. See also *Opuz*, cited above.
151. No. 25816/09, 3 October 2013.

Protection of property (Article 1 of Protocol No. 1)

Applicability

The judgment in *N.K.M. v. Hungary*[152] concerned the unforeseen application of a high rate of taxation on a civil servant's severance pay, on the basis of a new law enacted very shortly before notification of her dismissal. The severance constituted a substantive interest which "has already been earned or is definitely payable", which made it a "possession" within the meaning of Article 1 of Protocol No. 1. The fact that tax had been imposed on this income demonstrated that it was regarded as existing revenue by the State, as it would be inconceivable to impose tax on property or revenue that had not been acquired. The Court stressed that the legal right to severance pay was to be regarded as a "possession".

Enjoyment of possessions

The case of *Zolotas v. Greece (no. 2)*[153] raised a new legal issue. It concerned a law which provided that money kept in a bank account that remained dormant for more than twenty years would revert to the State. The Court considered that such a draconian measure, combined with case-law holding that the payment of interest did not constitute activity, was liable to place account holders, in particular when they were private individuals not well versed in civil or banking law, at a disadvantage *vis-à-vis* the bank in question and even the State. The Court added that the State had a positive obligation to protect citizens and to require banks, in view of the potentially adverse consequences of limitation, to keep the holders of dormant accounts informed when the expiry of the period for making claims was approaching, thereby affording them the opportunity to stop the running of the limitation period, for instance by performing a transaction on the account. The Court concluded that there had been a violation of Article 1 of Protocol No. 1.

The question of the public interest with regard to the introduction of austerity measures to cut public spending and respond to the economic and financial crisis, was addressed in the *Koufaki and Adedy v. Greece*[154] decision.

The case concerned the adoption of stringent budgetary measures and their application to all civil servants. The measures, which were of a permanent and retroactive nature and introduced in a context of financial crisis, included 20% cuts in public-sector workers' salaries and pensions and the curtailment of other financial benefits and allowances, such as holiday pay and bonus-month payments. The applicants contested the compatibility of these measures with their rights under

152. No. 66529/11, 14 May 2013.
153. No. 66610/09, ECHR 2013 (extracts).
154. (dec.), nos. 57665/12 and 57657/12, 7 May 2013.

Article 1 of Protocol No. 1. The Court declared the application inadmissible, having regard to the public-interest considerations which underpinned the adoption of the measures and the wide margin of appreciation enjoyed by States in the formulation of economic policy, in particular when it came to tackling a financial crisis which threatened to overwhelm the country. It observed that the effect of the cuts on the applicants' livelihoods was not such as to threaten their well-being. A fair balance had thus been struck.

The application of a transitional programme of austerity measures was the subject of the inadmissibility decision in *Da Conceição Mateus and Santos Januário v. Portugal*[155]. The applicants, pensioners affiliated to Portugal's State pension scheme, complained about cuts imposed on certain of their pension entitlements (holiday and Christmas bonuses). The Court noted that the economic measures underpinning the cuts had been adopted in the public interest, namely to secure Portugal's economic recovery in the medium term. As to the question of proportionality, it observed that the budgetary measures left unchanged the rate of the applicants' basic pension, which they continued to receive for the full twelve months of 2012. In addition, the cuts were only applicable for a period of three years (2012-14). The interference was therefore limited both in time and scope. Moreover it had occurred in an exceptional period of economic and financial crisis. For the Court, it was not disproportionate for the State to reduce its budget deficit on the expenditure side, by cutting salaries and pensions paid in the public sector, notwithstanding the fact that no equivalent cuts had been made in the private sector.

The above-cited case of *N.K.M. v. Hungary* originated in the unforeseen application of a high rate of taxation to severance pay. A few weeks before the applicant, a civil servant, was notified of her dismissal, a new law was enacted, imposing a 98% taxation rate on severance pay beyond a certain threshold. For the applicant, this represented an overall tax burden of approximately 52% on her severance pay, or about three times the general rate of income tax. Notwithstanding its established case-law recognising the Contracting States' wide margin of appreciation in the area of taxation, the Court found that in the circumstances of the case the applicant had been required to bear an excessive individual burden. It was, however, prepared to accept that the measure had been intended to protect the public purse against excessive expenditure.

The Court found that the applicant must have suffered a substantial loss of income at the time she was dismissed, which was at variance with the very aim of a severance package, namely to help those dismissed to

155. (dec.), nos. 62235/12 and 57725/12, 8 October 2013.

get back into the job market. Moreover, the new legislation was introduced very shortly before the applicant's dismissal, leaving her with little time to adjust to a new and extremely difficult financial situation, which she could never have anticipated. The Court also criticised the fact that the law targeted a defined group of government employees and that the majority of citizens had not been obliged to contribute to the same extent to the State budget. It found a violation of Article 1 of Protocol No. 1.

The *Lavrechov v. the Czech Republic*[156] judgment dealt with a new issue under Article 1 of Protocol No. 1, namely forfeiture of bail for failure to comply with the bail conditions, despite the defendant's acquittal in the substantive criminal proceedings.

The Court noted that the purpose of bail was to ensure the proper conduct of criminal proceedings and considered that the fact that the applicant was acquitted did not in itself mean that his prosecution was illegal. It therefore concluded that the outcome of the proceedings was of no direct relevance to the question of forfeiture of the bail. The Court found that in the circumstances a fair balance had been struck between the applicant's rights and the proper conduct of the criminal proceedings in issue: he had been given ample opportunity to appear at trial and must have been aware that he was in breach of his bail conditions. His non-compliance with the conditions of his bail had considerably hampered the conduct of the trial, and it had thus been reasonable for the domestic court to conclude that he had been avoiding prosecution.

For the first time the Court addressed the impossibility for a private individual to recover a final judgment debt in its entirety from a municipality subject to a receivership procedure (the *De Luca v. Italy*[157] judgment (not final)). It rejected the respondent Government's arguments that the local authority's bankruptcy was a justifying factor for the failure to pay the entire sum owed to the applicant and that the offer to pay 80% of the amount in full and final settlement of the debt had been motivated by the intention to ensure equality of treatment of the local authority's creditors. The Court's response was clear: firstly, the local authority was an organ of the State and was required in the instant case to honour a debt which had been contracted by virtue of a final court judgment; secondly, the local authority's lack of resources could not be invoked to excuse the failure to pay the whole of the debt. On that account there had been a breach of the applicant's right to the peaceful enjoyment of his possessions. The Court based its reasoning on the 2002 *Burdov v. Russia*[158] case-law.

156. No. 57404/08, ECHR 2013.
157. No. 43870/04, 24 September 2013.
158. No. 59498/00, ECHR 2002-III.

Right to education (Article 2 of Protocol No. 1)

The Court ruled for the first time on the compatibility with the right to education in the tertiary sector of a *numerus clausus* requirement coupled with an entrance examination. In the case of *Tarantino and Others v. Italy*[159] the applicants challenged the application to them of the *numerus clausus*, following their unsuccessful attempts to obtain a place in the faculties of medicine and dentistry (in Italy the *numerus clausus* applies to certain vocational faculties such as medicine and dentistry in both public and private-sector universities). The Court's reasoning was essentially focused on the proportionality of the restrictions. As to the entrance-examination requirement, it found that assessing candidates through relevant tests in order to identify the most meritorious students was a proportionate measure to ensure a minimum and adequate education level in the universities, and stressed that it was not competent to decide on the content or appropriateness of the tests involved.

As to the *numerus clausus* itself, two justifications had been advanced in favour of its retention: (a) the capacity and resource potential of universities, and (b) society's need for a particular profession. For the Court, resource considerations were clearly relevant. There existed a right to access to education only in as far as it was available and within the limits pertaining to it, and such limits were often dependent on the assets necessary to run educational institutions. The Court declined to find disproportionate or arbitrary the State's regulation of private institutions as well, in so far as such action could be considered necessary to prevent arbitrary admission or exclusion and to guarantee equality of treatment.

As to the second criterion, namely society's need for a particular profession, the Court observed that the training of certain specific categories of professionals constituted a huge investment. It was therefore reasonable for the State to aspire to the assimilation of each successful candidate into the labour market. Indeed, an unavailability of posts for such categories due to saturation represented further expenditure, since unemployment was without doubt a social burden on society at large. Given that it was impossible for the State to ascertain how many graduates might seek to exit the local market and look for employment abroad, the Court could not consider it unreasonable for the State to exercise caution and thus to base its policy on the assumption that a high percentage of them might remain in the country to seek employment there. For these reasons, the Court found that there had not been a violation.

159. Nos. 25851/09, 29284/09 and 64090/09, ECHR 2013 (extracts).

Right to free elections (Article 3 of Protocol No. 1)

In its *Shindler v. the United Kingdom*[160] judgment the Court ruled on restrictions on the right to vote of non-resident nationals. The applicant, a British national, had been living in Italy for more than fifteen years. He was precluded from voting in the United Kingdom on account of statutory provisions which removed the right to vote from British nationals who had been resident abroad for more than fifteen years.

In finding no breach of Article 3 of Protocol No. 1, the Court set out and confirmed its earlier case-law in this sphere. This was an area in which the Contracting States enjoyed a wide margin of appreciation, notwithstanding an emerging consensus on not restricting the right to vote of non-residents. The limitation had pursued a legitimate aim, namely to confine the franchise to those with close connections with the United Kingdom and who were most affected by its laws. The Court accepted that the essence of the applicant's right under Article 3 of Protocol No. 1 had not been impaired, given the length of time during which non-resident nationals continued to enjoy the right to vote – fifteen years – and the fact that the right to vote was reactivated if the national resumed residence in the United Kingdom any time after the end of the fifteen-year period. The Court also had regard to the fact that the justification for the impugned restriction had been the subject of parliamentary debate on several occasions, and remained under active consideration.

General prohibition of discrimination (Article 1 of Protocol No. 12)

Notwithstanding the differences in scope between Article 14 of the Convention and Article 1 of Protocol No. 12, the meaning of the word "discrimination" in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14. The above-cited *Maktouf and Damjanović* judgment reiterated the general principles laid down in 2009 in the case of *Sejdić and Finci v. Bosnia and Herzegovina*[161].

In *Maktouf and Damjanović* the applicants, who had been convicted of war crimes, complained that their cases had been tried by a particular court, although other suspected war criminals had been tried by another court. In the Court's opinion, given the large number of war-crimes cases in post-war Bosnia and Herzegovina, it was inevitable that the burden had to be shared between two courts. If not, the respondent State would not be able to honour its Convention obligation to bring to justice those responsible for serious violations of international

160. No. 19840/09, 7 May 2013.
161. [GC], nos. 27996/06 and 34836/06, ECHR 2009.

humanitarian law in a timely manner. The cases had been allocated on a case-by-case basis with reference to objective and reasonable criteria. The Court held that there had been no violation of either Article 14 of the Convention taken together with Article 7, or of Article 1 of Protocol No. 12.

Other Convention provisions

Just satisfaction (Article 41)

In *Trévalec v. Belgium*[162] the Court examined the situation where, following a principal judgment in which it had found a violation, an applicant was awarded compensation by the State of which he was a national, but which had not been a party to the proceedings before the Court. In the principal judgment, the Court had found a substantive violation of Article 2, in that Belgium had failed in its positive obligation to protect the right to life of the applicant, a French national, and had reserved the matter of just satisfaction. The applicant had obtained a substantial amount of compensation from a French compensation fund for victims of terrorism and other offences, covering both the pecuniary and non-pecuniary damage for which Belgium had been held liable in the principal judgment. In its subsequent judgment concerning just satisfaction, the Court did not award pecuniary damage in addition to the sums that had already been paid at national level, but did make an award in respect of non-pecuniary damage. It specifically stipulated that this sum could not be recovered by the French authorities, even if that State had already paid compensation in respect of such damage. The Court's position is noteworthy, since it had been informed by the French authorities that they were entitled under domestic law to take steps to claim any award made by the Court up to the amount paid to the applicant out of the compensation fund.

Binding force and execution of judgments (Article 46)

General measures

The above-cited *Fabris* judgment confirmed that as a general rule member States were entitled to enact transitional provisions where they adopt legislative reforms with a view to complying with their obligations under Article 46 § 1 of the Convention. The Grand Chamber emphasised, however, that the adoption of general measures required the State concerned diligently to prevent further violations similar to those found in the Court's judgments. This imposed an obligation on the domestic courts to ensure, in conformity with their constitutional order and having regard to the principle of legal certainty, the full effect of the Convention standards, as interpreted by the Court.

162. (just satisfaction), no. 30812/07, 25 June 2013.

The above-cited *Savriddin Dzhurayev* judgment concerned repeated failures to comply with interim measures indicated by the Court under Rule 39 of its Rules of Court and the need for remedial general measures. The Court noted that it had recently found similar violations by Russia in other cases, and that complaints about the disappearance and forcible transfer of applicants to Tajikistan (and Uzbekistan) continued to be regularly lodged with the Court, notwithstanding the indication of Rule 39 measures to the Government. In this judgment, the respondent State was required to take tangible remedial measures with a view to protecting the applicant against the existing risks to his life and health in Tajikistan, and to take other measures, such as carrying out an effective investigation into the incident in issue in order to remedy the procedural violations found by the Court. With a view to preventing the recurrence of further violations in fresh cases, and given that the general protection provided for by the ordinary legal framework had regularly failed in cases such as this, an appropriate mechanism tasked with both preventative and protective functions should be put in place to ensure that applicants benefited from immediate and effective protection against unlawful kidnapping and irregular removal from Russia. The State was also required to avail itself of appropriate procedures and institutional arrangements to ensure effective investigation into every case of a breach of interim measures indicated by the Court.

In the above-cited *Abdullah Yaşa and Others* judgment the Court noted that at the material time the domestic law had not contained any specific provisions regulating the use of tear-gas canisters during demonstrations and no guidelines on their use had been issued to the law-enforcement agencies. Although a circular laying down the conditions governing the use of tear gas had since been issued, the Court considered that the safeguards surrounding the proper use of tear-gas canisters needed to be strengthened, in order to minimise the risk of death or injury resulting from their use.

In the above-cited *McCaughey and Others* judgment the Court noted that delays in investigations into killings allegedly carried out by the security forces remained a recurrent problem in Northern Ireland. For that reason, it considered it appropriate to indicate, under Article 46 of the Convention, that the respondent State was to address this issue as a matter of some priority, in order to ensure that the procedural requirements of Article 2 were complied with expeditiously.

Individual measures

Decisions leading to the dismissal of a Supreme Court judge were at the heart of the *Oleksandr Volkov* judgment (cited above), in which the Court found a violation of Articles 6 and 8 of the Convention. In the main text of the judgment, the Court invited the respondent State to take measures, including legislative measures, with a view to reforming

the system of judicial discipline. In so doing, the authorities were to have due regard to the judgment itself, the Court's relevant case-law and relevant recommendations, resolutions and decisions of the Committee of Ministers. In addition, the Court found that there was a need to introduce general measures for reforming the system of judicial discipline, and that the reopening of the domestic proceedings would not constitute an appropriate form of redress for the violations of the applicant's rights. Having regard to the very exceptional circumstances of the case and the urgent need to put an end to the violations of Articles 6 and 8, the Court, in the operative provisions, required the State to ensure the reinstatement of the applicant in his post as a Supreme Court judge or an equivalent post at the earliest possible date. In its view the applicant's removal from office, in manifest disregard of the above principles of the Convention, "could be viewed as a threat to the independence of the judiciary as a whole".

Hinder the exercise of the right of individual petition (Article 34)

The judgment in *Salakhov and Islyamova* (cited above) concerned the lack of appropriate medical care for a detainee who died from Aids two weeks after his release. The national authorities took three days to comply with the indication given to the State by the Court under Rule 39 of its Rules of Court[163] concerning the need for the immediate hospitalisation and treatment of the prisoner, who was suffering from Aids. In such circumstances, the Court concluded that there had been a violation of Article 34.

Third-party intervention (Article 36)

Article 36 § 1 of the Convention entitles member States to submit written comments in cases in which one of their nationals is an applicant even if they are not a respondent to the application. In the case of *I v. Sweden*[164], the Court interpreted the scope of this provision.

The Court was called on to examine whether the Russian Federation should have been notified of a case brought by the applicants, who were Russian nationals, against Sweden. The answer to this question depended on whether Article 36 § 1 was to be interpreted as meaning that the right of the Contracting State of origin to intervene applied in cases such as this one, in which the applicants were failed asylum-seekers and their reason for applying to the Court was their fear of ill-treatment if returned to their State of origin. The Court concluded that Article 36 § 1 did not apply in a case where an applicant's reason for applying to the Court was fear of being returned to the relevant Contracting State,

163. Under Rule 39 of the Rules of Court, the Court may indicate provisional measures, which are binding on the State concerned. Such measures are indicated only in exceptional circumstances.
164. No. 61204/09, 5 September 2013.

where, it was alleged, he or she would be subjected to treatment contrary to Articles 2 and 3. In such circumstances, the application should not be transmitted to the applicant's State of origin and the Government of that State should not be invited to take part in the procedure. On that account, the Russian Federation had not been notified of the lodging of the application.

Obligation to furnish all necessary facilities (Article 38)

Article 38 of the Convention requires States to furnish all necessary facilities to assist the Court in its task of establishing the facts. Such cooperation on the part of the Contracting States must be regarded as being of the utmost importance for the effective operation of the system of individual petition instituted under Article 34.

In the above-cited *Janowiec and Others* judgment the respondent State refused to submit a copy of a decision requested by the Court in connection with its examination of the application on the grounds that it had been classified "top secret" at domestic level.

The Grand Chamber summarised the case-law applicable where a respondent State fails to produce information requested by the Court. The judgment reaffirmed the scope of the States' procedural obligations in response to the Court's requests and instructions concerning evidence.

The Court explained that "the respondent Government may not rely on domestic legal impediments, such as the absence of a special decision by a different agency of the State, to justify a failure to furnish all the facilities necessary for the Court's examination of the case".

With regard to the domestic decision to classify the information as secret, the Court reiterated that it was not well equipped to challenge the national authorities' opinion in a particular case that national-security considerations were involved. However, even where such considerations were at stake, any measures affecting fundamental human rights had to be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence. Otherwise, if there was no possibility of effectively challenging the executive's assertion that national security was at stake, the State authorities would be able to encroach arbitrarily on rights protected by the Convention.

The national decisions had shed no light on the nature of the national security requirements on which the classified status of the non-communicated document had been based and the decision to classify the document had been subjected only to a limited review by the domestic courts, with no analysis of the merits of the reasons given for maintaining its classification. For its part, the Court was unable to

accept that the submission of a copy of the document in question, as it had requested, could have affected Russia's national security. It therefore found that the respondent State had failed to comply with its obligations under Article 38, on account of their refusal to submit a copy of the document requested.

This judgment also shows that the Court may find a breach by the respondent State of its procedural obligations even in the absence of a violation of a substantive right protected by the Convention. In this particular case, the Court found a separate violation of Article 38 of the Convention.