

OVERVIEW OF THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

2014



 WOLF LEGAL PUBLISHERS



Published by
Wolf Legal Publishers (WLP)
P.O. Box 313
5061 KA Oisterwijk
The Netherlands/Pays-Bas
info@wolfpublishers.nl
www.wolfpublishers.com

Printed on demand by CPI Wöhrmann Print Service (Zutphen, the Netherlands) on FSC paper (www.fsc.org)

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Cover photo: Council of Europe

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ISBN: 978-94-624-0289-8

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FOREWORD

I welcome the decision to publish annually, as a separate publication in its own right, the Overview of the Court's principal judgments and decisions. While the Overview also appears in the Court's Annual Reports, a dedicated publication is in line with the prominence which has been given to the continuing need to reinforce efforts to disseminate the key case-law of the Court. The Court has been particularly active in this field over the years, as attested by the constant attention it gives to the development of the HUDOC database and the important work it has carried out in publishing the Case-law Information Notes, the *Practical Guide on Admissibility Criteria*, and the series of case-law guides and thematic Factsheets.

It is essential that the case-law of the Court is known and applied at the domestic level. I would recall that, following the High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", the Brussels Declaration of 27 March 2015 stressed "the importance of further promoting knowledge of and compliance with the Convention within all the institutions of the States Parties, including the courts and parliaments, pursuant to the principle of subsidiarity".

I believe that this new initiative will contribute to this endeavour. To be familiar with the Court's jurisprudence is central to the proper application of the Convention at the domestic level. The publication is also timely, since it coincides with the development of the Superior Court Network, which is intended to create a practical and useful means of exchanging relevant information on Convention case-law and related matters.

The Overview is intended to focus on the most important cases which the Court has dealt with over the year in question. The cases are selected by the Jurisconsult's Directorate on the basis of their jurisprudential interest. They may raise issues of general interest, establish new principles or develop or clarify the case-law. The Overview will obviously refer to those judgments and decisions which are published in the Court's official *Reports of Judgments and Decisions* series. The approach is to draw attention to the salient points of the cases,

allowing the reader to appreciate the jurisprudential significance of a particular case.

Finally, I would like to thank Wolf Legal Publishers for making this publication possible. Both the 2014 and 2015 editions are being published at the same time. I look forward to the Overview establishing itself as an essential source of information on the Court's case-law, for the benefit of everyone involved in human rights protection.

Guido Raimondi
President of the European Court
of Human Rights
Strasbourg, February 2016

INTRODUCTION

In the course of 2014 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 variety of areas including family life in an immigration context, asylum-seekers, religious organisations, inmates, vulnerable persons, trade unions, the legal recognition of a change of sex, surrogate motherhood, the prevention of terrorism, the use of weapons by the security forces, elections, and the protection of property.

It also considered respect for private life in the context of a labour dispute. For the first time it ruled on matters such as the conformity with Article 6 § 1 of the system of plea bargaining, the immunity from civil suit of a head of State and the protection afforded by Article 11 to members of the armed forces, and in respect of secondary industrial action.

The Grand Chamber delivered nineteen judgments. These important cases made a contribution to the Court's case-law on the rights and freedoms guaranteed by Articles 1, 2, 3, 5, 8, 9, 14, 34, 35 § 1, 38, 41 and 46 of the Convention, Article 4 of Protocol No. 4 and Article 4 of Protocol No. 7. Two of these judgments were in inter-State cases (Article 33 of the Convention).

In a case concerning international armed conflict, the Court considered the concept of State 'jurisdiction' within the meaning of Article 1 of the Convention and the application of Article 5 guarantees in the light of the rules of international humanitarian law. It developed its case-law on the issue of amnesties. The Court also delivered judgments in cases opposing the individual against the authorities on matters such as education, health, religion, banking and immigration, and on moral and ethical issues. It reiterated that respect for human dignity forms part of the very essence of the Convention and for the first time recognised the concept of "living together" in society as a legitimate aim.

Further guidance was given on the conditions of admissibility. For the first time the Court ruled that a non-governmental organisation had standing to lodge an application on behalf of a deceased mentally disabled man whose extreme vulnerability had prevented him from defending his interests before the domestic authorities. The Grand

Chamber also examined issues relating to just satisfaction, in particular the question of the applicability of Article 41 of the Convention in inter-State cases.

Among other matters to be examined by the Court were the interaction between the Convention and European Union law on matters such as the Dublin II Regulation, the procedure for obtaining a preliminary ruling from the Court of Justice of the European Union in Luxembourg, and elections to the European Parliament.

The Court also examined the interaction between the Convention and international law – in particular humanitarian law, the law on State immunity and the law on State succession – and in a number of judgments cited decisions of other international courts.

There were developments in the case-law on the scope of the margin of appreciation to be afforded to member States and of their positive obligations under the Convention.

The Court examined measures taken by the States after the delivery of “pilot judgments” concerning redress for the unlawful removal of names from the register of permanent residents, the confiscation or nationalisation of property by communist regimes, delays in court proceedings, expropriation, and prison overcrowding.¹

It applied the pilot-judgment procedure in proceedings concerning the recovery of foreign-currency deposits, and the non-enforcement or delayed enforcement of domestic judgments imposing obligations in kind on State authorities.²

As an alternative to the pilot-judgment procedure, the Court continued in a number of judgments to indicate to Governments under Article 46 of the Convention general or individual measures.

1. *Kurić and Others v. Slovenia (just satisfaction)* [GC], no. 26828/06, ECHR 2014; *Preda and Others v. Romania*, nos. 9584/02 et al., 29 April 2014; *Xynos v. Greece*, no. 30226/09, 9 October 2014; *Yıldız and Yanak v. Turkey* (dec.), no. 44013/07, 27 May 2014; *Stella and Others v. Italy* (dec.), no. 49169/09, 16 September 2014.

2. *Ališić and Others v. Bosnia-Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, ECHR 2014; *Gerasimov and Others v. Russia*, nos. 29920/05 et al., 1 July 2014.

JURISDICTION AND ADMISSIBILITY

Jurisdiction of States (Article 1)

The case of *Jaloud v. the Netherlands*³ concerned the killing of an Iraqi national during the occupation of Iraq by the United States and the United Kingdom and the alleged failure properly to investigate the death. Following the declaration of the end of hostilities in May 2003, the Netherlands Government contributed troops to the Stabilisation Force in Iraq (SFIR) and these were stationed in the south-eastern area under the command of a British officer. The applicant's son was shot at a vehicle checkpoint under Netherlands command on the night of 21 April 2004. Earlier that same night the checkpoint had come under fire and the Iraqi soldiers stationed there had returned fire, apparently without causing casualties on either side. Netherlands servicemen had been called to the checkpoint to investigate that incident. Very shortly after they arrived, the car in which Mr Jaloud was sitting in the passenger seat approached the checkpoint at speed without stopping. The driver later said that he had not seen the checkpoint. The car came under fire, first from the contingent of Iraqi soldiers and then from a Netherlands soldier (Lieutenant A), who had thought the shots fired by the Iraqis had come from inside the car. The car came to a halt and it became clear that Mr Jaloud had been mortally wounded. It was not possible to tell in the course of the subsequent investigation whether it was an Iraqi soldier or Lieutenant A who had fired the lethal shots. Before the Court, the applicant (Mr Jaloud's father) alleged a violation of Article 2 of the Convention.

Both the Netherlands Government and the Government of the United Kingdom, which intervened as a third party, disputed that the Netherlands had jurisdiction in respect of the incident, reasoning that the case was distinguishable from *Al-Skeini and Others v. the United Kingdom*⁴, since the Netherlands had never assumed any of the public powers normally to be exercised by a sovereign government and since

3. *Jaloud v. the Netherlands* [GC], no. 47708/08, 20 November 2014.

4. *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011.

there had been no assertion of physical authority and control over Mr Jaloud before he was shot. The respondent Government also insisted that the killing could not be attributed to the Netherlands, since the Netherlands troops in Iraq were under the command of the United Kingdom and since, in any event, the checkpoint had been manned by Iraqi soldiers, with the Netherlands troops present only to observe and advise.

The interest of this judgment lies in the way in which it deals with the issue of “jurisdiction”. The Grand Chamber recalled the principles on jurisdiction set out in *Al-Skeini and Others*. It went on to find that the shooting was attributable to the Netherlands, since it retained full command over its military personnel in Iraq and, in particular, had authority over the Rules of Engagement they followed. In addition, while the checkpoint where the shooting happened was manned by Iraqi personnel, they were under the command and direct supervision of a Netherlands Royal Army officer. The Court continued: “The checkpoint had been set up in the execution of the SFIR’s mission, under United Nations Security Council Resolution 1483 ... to restore conditions of stability and security conducive to the creation of an effective administration in the country. The Court is satisfied that the respondent Party exercised its ‘jurisdiction’ within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint. That being the case, the Court finds that the death of Mr ... Jaloud occurred within the ‘jurisdiction’ of the Netherlands, as that expression is to be construed within the meaning of Article 1 of the Convention.”

The *Hassan v. the United Kingdom*⁵ judgment concerned the arrest in Iraq by British forces of an Iraqi national and his detention in a facility operated by the United States during the international hostilities in 2003. The respondent Government argued that the case did not fall within its extraterritorial jurisdiction for the purposes of Article 1 of the Convention. They acknowledged that extraterritorial jurisdiction could arise where State agents operating extraterritorially took an individual into custody. However, they submitted that that basis of jurisdiction should not apply in the active hostilities phase of an international armed conflict, where the agents of the Contracting

5. *Hassan v. the United Kingdom* [GC], no. 29750/09, ECHR 2014.

State were operating in territory of which they were not the occupying power, and where the conduct of the State should instead be subject to the requirements of international humanitarian law. The Court rejected that argument as being inconsistent with the case-law of the International Court of Justice, holding that international human rights law and international humanitarian law could apply concurrently. It reiterated the principles it had established in the *Al-Skeini and Others* judgment, cited above, concerning the exercise by a Contracting State of its “jurisdiction” within the meaning of Article 1 outside its territory. As to the respondent Government’s second argument – that on entering the detention facility the prisoner had been transferred into the custody of the United States – the Court examined the arrangements in place at the facility and noted that the United Kingdom had retained authority and control over all aspects of the detention relevant to the complaints the applicant had raised under Article 5 of the Convention. The Court therefore rejected the Government’s submission that the prisoner was not within their “jurisdiction”.

The judgments in *Al-Nashiri v. Poland*⁶ and *Husayn (Abu Zubaydah) v. Poland*⁷ concerned the secret detention and torture in Poland by the US authorities of persons suspected of terrorism. An interesting aspect of these cases is the Court’s examination of Poland’s responsibility under Article 1 of the Convention for the activities carried out by the CIA on its territory. The Court noted that the Polish authorities had been complicit and had cooperated in the CIA rendition, secret detention and interrogation operations on its territory when, considering the widespread public information available at the time, it ought to have known that by permitting these activities it was exposing the applicants to a serious risk of treatment that was contrary to the Convention.

The Court concluded that Poland’s responsibility to secure to everyone within its jurisdiction the rights and freedoms guaranteed by the Convention was engaged. In that connection, the Court’s reasoning under Article 3 is of particular note: even though the torture inflicted by the CIA inside its Polish facility was the CIA’s exclusive responsibility and it was unlikely that Polish officials had known exactly what was happening inside, the Court found that Poland had been required by

6. *Al-Nashiri v. Poland*, no. 28761/11, 24 July 2014.

7. *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, 24 July 2014.

Article 1 taken together with Article 3 to take measures to ensure that individuals within its jurisdiction were not subjected to treatment proscribed by Article 3. Instead of taking such measures, however, Poland had knowingly facilitated the entire process and created the conditions for it to occur, without making any attempt to prevent it. The Court concluded that, even if the Polish authorities had not witnessed or participated in the abuse endured by the applicants, the Polish State had to be regarded as responsible under Article 3 of the Convention.

Admissibility criteria

***Locus standi* (Article 34)⁸**

The judgment in *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*⁹ concerned the standing of a national non-governmental organisation (NGO) to lodge an application with the Court on behalf of a deceased person. The NGO had not received any instructions from the deceased or had any links with him. In contrast to previous cases in which the Court had examined this issue, the deceased in the instant case, a young Roma man with severe mental disabilities and suffering from HIV infection, was highly vulnerable and had no next of kin. He had spent his entire life in State care and had died in hospital. The authorities had not appointed a guardian or other representative to provide him with appropriate legal assistance, despite a statutory requirement to do so.

Although it had had no significant contact with the deceased during his lifetime and had not received any authority or instructions from him or any other competent person, the NGO had lodged an application with the Court concerning the circumstances of his death (Articles 2, 3 and 13 of the Convention). It had previously issued various sets of domestic proceedings with a view to elucidating the circumstances in which he had died. In the Court's view, it was of considerable significance that neither the NGO's capacity to act for the deceased nor the NGO's representations on his behalf had been questioned or challenged by the relevant domestic authorities, who had acquiesced in those proceedings.

8. For further cases of relevance under Article 34, see *S.A.S. v. France* [GC], no. 43835/11, ECHR 2014 (extracts), reported under Articles 8 and 9 below, and *Krušić v. Croatia* (dec.), no. 10140/13, 25 November 2014, reported under Article 8.

9. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, ECHR 2014.

In the judgment the Court sets out the specific reasons which led it to find that the NGO had standing to act as the deceased's *de facto* representative, notwithstanding the lack of a power of attorney and the young man's death before the application was lodged. It goes on to add that acknowledging the NGO's standing to act as the deceased's representative was consonant with the approach followed under Article 5 § 4 in the case of "persons of unsound mind" (Article 5 § 1 (e)). In this connection, it emphasised that special procedural safeguards could be called for to protect the interests of persons who, on account of their mental disabilities, were not fully capable of acting for themselves.

The *Ergezen v. Turkey* judgment¹⁰ ruled on the standing of a deceased applicant's heirs. The applicants, who were remand prisoners, contested the lawfulness of their detention under Article 5 §§ 3, 4 and 5 of the Convention, the length of the criminal proceedings and the lack of an effective remedy by which to assert those complaints (Article 6 § 1 and Article 13). One of the applicants died while the application was still pending before the Court. His widow and children wished to continue the application.

The judgment is noteworthy in so far as it clarifies the conditions which must be complied with by the heirs of a deceased applicant to the Court. For the latter, the decisive question is not whether the substantive rights in issue are transferable (which is the case when an applicant dies before lodging an application with the Court), but whether the heirs can claim a legitimate interest in requesting the Court to deal with the case on the basis of the applicant's expressed wish to avail himself of his individual and personal right to individual petition under Article 34. This broad interpretation of the standing of an heir enabled the Court in the instant case to find that not only could the deceased applicant's heirs pursue the complaints under Article 5 §§ 3 and 4, they could also continue his complaint under Article 5 § 5 of the Convention notwithstanding that the right to compensation guaranteed by that provision could only be exercised once the criminal proceedings against him had come to an end.¹¹

10. *Ergezen v. Turkey*, no. 73359/10, 8 April 2014.

11. Compare with the decision in *Brūzītis v. Latvia* (dec.), no. 15028/04, 26 August 2014, concerning the lack of *locus standi* of the niece of an applicant who had died in the course of the proceedings before the Court; she had received an authority to act from the applicant in order to pursue his application, lodged under Article 3.

Exhaustion of domestic remedies (Article 35 § 1)¹²

The inter-State case of *Georgia v. Russia (no. 1)*¹³ concerned the arrest, detention and expulsion of large numbers of Georgian nationals from the Russian Federation in the autumn of 2006. The Court found that from October 2006 a coordinated policy of arresting, detaining and expelling Georgian nationals had been put in place which amounted to an administrative practice. Accordingly, in line with the Court's settled case-law, the rule requiring exhaustion of domestic remedies did not apply.

In so finding, the Court noted that there was nothing to undermine the credibility of the figures indicated by the Georgian Government: 4,600 expulsion orders against Georgian nationals, of whom approximately 2,380 were detained and forcibly expelled. The events in question – the issuing of circulars and instructions, mass arrests and expulsions of Georgian nationals, flights with groups of Georgian nationals from Moscow to Tbilisi, and letters sent to schools by Russian officials with the aim of identifying Georgian pupils – had all occurred during the same period in late September/early October 2006. The concordance in the description of those events in the reports of international governmental and non-governmental organisations was also significant.

As regards the question of effectiveness and accessibility of the domestic remedies, which could be regarded as additional evidence of whether or not an administrative practice existed, the material before the Court indicated there had been real obstacles in the way of Georgian nationals seeking to use the available remedies, both in the Russian courts and following their expulsion to Georgia. They had been brought before the courts in groups. Some had not been allowed into the courtroom, while those who were allowed into the courtroom complained that their interviews with the judge had lasted an average of five minutes with no proper examination of the facts. They had subsequently been ordered to sign court decisions without being able to read the contents or obtain a copy. They did not have an interpreter or a lawyer and, as a general rule, were discouraged from appealing by both the judges and the police officers. In Georgia, there were practical obstacles to using the remedies because of the closure of transport links

12. See also under Article 2 "Right to life" below, *Brincat and Others v. Malta*, nos. 60908/11 et al., ECHR 2014 (extracts).

13. *Georgia v. Russia (no. 1)* [GC], no. 13255/07, ECHR 2014 (extracts).

between the two countries and difficulties in contacting the consulate of the Russian Federation in Georgia.

The case of *Mocanu and Others v. Romania*¹⁴ concerned judicial proceedings which followed the violent crackdown on demonstrations in Bucharest in June 1990 against the regime then in power. During these events, Mrs Mocanu's husband was shot dead and another applicant, Mr Stoica, was subjected to ill-treatment. The applicants complained under Articles 2 and 3 of the Convention that the respondent State had failed to fulfil its obligations under those provisions to conduct an effective, impartial and thorough investigation capable of leading to the identification and punishment of those responsible for the repression. The Government contended that the applicants had failed to exhaust domestic remedies as they should have brought an action in tort against the State. This raised the issue of what constitutes an adequate domestic remedy under Article 35 § 1 of the Convention for alleged violations of the substantive and procedural aspects of Articles 2 and 3 in the specific context of the unlawful use of force by State agents.

Reiterating the general principles applicable in this sphere the Grand Chamber stated that where the unlawful use of force by State agents – as opposed to mere fault, omission or negligence – was involved, civil or administrative proceedings aimed solely at awarding damages, rather than ensuring the identification and punishment of those responsible, were not adequate and effective remedies capable of providing redress for complaints based on the substantive aspect of Articles 2 and 3 of the Convention. In the instant case, the applicants' complaints concerned the States' procedural obligation under those provisions to carry out an investigation capable of leading to the identification and punishment of those responsible for the unlawful use of force. The Grand Chamber held that this also applied to the State's procedural obligation under those provisions as the obligation to conduct an effective investigation could be rendered illusory if an applicant were required to bring an action leading only to an award of damages. It therefore rejected the Government's preliminary objection based on the alleged failure to exhaust a domestic remedy.

14. *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, ECHR 2014 (extracts).

Six-month time-limit (Article 35 § 1)

In *Mocanu and Others*, cited above, one of the applicants, Mr Stoica, alleged that he had been arrested and ill-treated by police officers. A preliminary investigation was opened into these violent events in 1990. Eleven years later, in 2001, Mr Stoica lodged a criminal complaint. In 2009 the investigation was closed by a decision not to bring a prosecution, and that decision was upheld in 2011. Mr Stoica's application – alleging a procedural violation of Article 3 – was lodged with the Court in 2008.

The case is of interest with regard to the degree of diligence required of applicants under the six-month rule when their complaint is one of a failure to hold an effective investigation into ill-treatment.

The Government argued that the application was out of time as Mr Stoica had only joined the criminal proceedings that had started in 1990 some eleven years later and had delayed lodging his application with the Court. The applicant explained that he had felt vulnerable as a result both of the deterioration in his health following his alleged ill-treatment and of the sensation of powerlessness he had experienced on account of the large number of victims of the repression and of the lack of a prompt reaction by the authorities capable of reassuring him and encouraging him to come forward.

The Court acknowledged that the psychological effects of ill-treatment inflicted by State agents could undermine a victim's capacity to complain to the national authorities. In the instant case, the majority of victims had found the courage to lodge a complaint before the domestic authorities only after developments in the investigation in 1998 and 2000. In the exceptional circumstances of the case, Mr Stoica's vulnerability and feeling of powerlessness, which he shared with numerous other victims who had also waited for many years before lodging a complaint, amounted to a plausible and acceptable explanation for his inactivity from 1990 to 2001 (see also *El-Masri v. the former Yugoslav Republic of Macedonia*¹⁵). In addition, the delay had not been such as to obstruct the investigation.

Although the applicant had lodged his application with the Court more than seven years after lodging his criminal complaint, the Court found that he had not shown a lack of diligence, since he had regularly requested information on progress in the proceedings; he could

15. *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 142, ECHR 2012.

legitimately have believed that the investigation was effective; and he could reasonably have awaited its outcome, so long as there was a realistic possibility that the investigative measures were moving forward. Accordingly, the application had not been out of time.

The decision in *Sokolov and Others v. Serbia*¹⁶ concerned the non-enforcement of judgment debts owed by a State-owned company and the application of the six-month rule. The applicants obtained final judgments against the company requiring it to pay them salary arrears and costs and expenses. The applicants were ultimately unable to secure the payment of all of the money owed to them on account of the company's insolvency following a court decision ordering its liquidation. That decision became final on 3 July 2008, the date of its publication in the Official Gazette.

The applicants lodged applications against Serbia on 20 May 2010, complaining that it had breached Article 6 and Article 1 of Protocol No. 1 on account of its failure to enforce fully the judgments in their favour.

The decision is interesting in that the Court dismissed the applicants' complaints under the six-month rule. According to the established case-law, non-enforcement of final judgment debts awarded against the State or, as in the applicants' case, its entities give rise – in the absence of domestic remedies – to a continuing breach of the Convention, which displaces the six-month rule (see, for example, *Iatridis v. Greece*¹⁷). It is not open to the State to cite the lack of its own resources or the bankruptcy of its dependent debtors to justify non-enforcement, since the State continues to remain liable for non-payment. However, in the applicants' case the Court found that the continuing situation could not postpone the application of the six-month rule indefinitely. The Court had regard to domestic law which provided that following the termination of insolvency proceedings a debtor company was no longer considered liable to discharge its debts and the State was not obliged to assume them where the debtor company was a State entity. On that account, it found that the applicants should have been more diligent and should have lodged their applications by, at the latest, 3 July 2008, when the insolvency decision had become final. By that

16. *Sokolov and Others v. Serbia* (dec.), nos. 30859/10 et al., 14 January 2014.

17. *Iatridis v. Greece* [GC], no. 31107/96, § 50, ECHR 1999-II.

stage it should have been apparent to the applicants that there was no realistic prospect under domestic law of a favourable outcome to the resolution of the remainder of their claims. It is interesting that the Court in its reasoning had regard to other contexts where it has found that an applicant cannot plead a continuing situation to defeat the application of the six-month rule, most notably where in a disappearance case he or she fails to exercise due diligence (*Varnava and Others v. Turkey*¹⁸).

Since 1 January 2014 the formal requirements for lodging an application with the Court have become stricter as a result of amendments to Rule 47 of the Rules of Court. Application forms sent to the Court must contain all the requested information and be accompanied by copies of the relevant documents. These formalities are relevant to the computation of the six-month time-limit under Article 35 § 1 as, for the purposes of that provision, time will only cease to run once all the requirements of Rule 47 have been satisfied.

The decision in *Malysh and Ivanin v. Ukraine*¹⁹ illustrates how the new rules operate in practice.

The applicants were duly informed by the Court that their initial submissions were incomplete and that the six-month period would be interrupted only when a complete application was sent. However, the first applicant failed, without any explanation, to provide within the time-limit copies of documents relevant to the exhaustion of domestic remedies. Although the second applicant claimed he had encountered difficulties in preparing his application, this was not supported by any evidence or persuasive argument and the Court found that he had not provided an “adequate explanation” within the meaning of Rule 47 § 5.1 (a) for not complying with the requirements. Both applications were therefore declared inadmissible as being out of time.

18. *Varnava and Others v. Turkey* [GC], nos. 16064/90 et al., §§ 159-72, ECHR 2009.

19. *Malysh and Ivanin v. Ukraine* (dec.), nos. 40139/14 and 41418/14, 9 September 2014.

“CORE” RIGHTS

Right to life (Article 2)

Obligation to protect life

The judgment in *Centre for Legal Resources on behalf of Valentin Câmpeanu*²⁰, cited above, concerned a young man of Roma ethnicity, who had been abandoned at birth, was HIV-positive and suffered from severe mental disabilities. He died prematurely at the age of eighteen in a psychiatric hospital that was not equipped to deal with his infection. He had lived in various State-run institutions. Shortly before his death, he was in an advanced state of psychiatric and physical degradation, was suffering from malnutrition and did not have appropriate medication, and his physical living conditions on a day-to-day basis were described as appalling.

The Court emphasised the scope of the State’s positive obligations with regard to the treatment and care of such a vulnerable individual, who had lived his whole life in the hands of the authorities. It examined the decision-making process responsible for the provision of appropriate care and medicine to Mr Câmpeanu. It also placed his individual situation in the general context of conditions at the psychiatric hospital in which he died. At the relevant time, in the light of reports by various international bodies, including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Romanian authorities had recognised the deficiencies regarding the heating and water systems, the living and sanitary conditions and the provision of medical care. They had therefore been fully aware of the very difficult situation which had led to a rise in the number of deaths during the winter. Thus, by deciding to place Mr Câmpeanu in that hospital notwithstanding his heightened state of vulnerability, they had unreasonably put his life in danger (for the death of children in similar conditions, see *Nencheva and Others v. Bulgaria*²¹). In addition to the violation of the substantive aspect of

20. *Centre for Legal Resources on behalf of Valentin Câmpeanu*, *supra* note 9.

21. *Nencheva and Others v. Bulgaria*, no. 48609/06, 18 June 2013.

Article 2, the Court held that there had been a procedural violation, the authorities having failed to elucidate the circumstances surrounding his death and in particular the identity of those responsible.

In the case of *Marro and Others v. Italy*²², the applicants' son and brother died as a result of a drug overdose while in prison. He had a history of drug abuse, but had confirmed to the prison authorities that he was no longer dependent on drugs. He showed no signs of drug-related dependency or mental problems while in prison. His cellmate had tested positive for drugs and was in fact facing drug-trafficking charges.

The decision is interesting in that it highlights the scope of the State's positive obligation under Article 2 to protect the lives of drug addicts in places of detention. The Court observed that the fact that a deceased detainee was able to have access to illegal drugs could not of itself be considered to be a failure to comply with Article 2 positive obligations. It stressed that the authorities were required to take measures in order to combat drug trafficking, the more so in a secure setting such as a prison. That being said, this could not be construed as an absolute obligation, and the authorities could not be required to ensure that drugs would not enter or circulate within a prison in any circumstances. The authorities enjoyed a considerable degree of discretion in how they went about preventing the circulation and use of drugs in prison.

On the facts of the case, the Court found that the Government had discharged their obligation under Article 2, having regard to the various measures taken by the prison authorities to prevent drugs from being brought into the prison and given that the behaviour of the deceased had not been such as to require the authorities to take particular measures to prevent him from having access to drugs. While it was accepted that the cellmate had tested positive for drugs, it was impossible to establish a causal connection between his ability to obtain drugs and Mr Marro's death as the result of an overdose.

The *Brincat and Others*²³ judgment, cited above, concerned workers' exposure to asbestos in the workplace. The applicants complained,

22. *Marro and Others v. Italy* (dec.), no. 29100/07, 8 April 2014.

23. *Brincat and Others*, *supra* note 12.

essentially under Articles 2 and 8, that their health had suffered on account of their exposure to asbestos when working at a State-owned shipyard from the 1950s/1960s to early 2000. One of the applicants, A., died of asbestos-related cancer in 2006. He had worked in the shipyard from 1959 to 1974. His wife and children had lodged the application on his behalf.

The Court concluded that there had been a violation of Article 2 in respect of A. and a violation of Article 8 in respect of the other applicants, who had not been able to substantiate that they were suffering from life-threatening illnesses. The judgment is interesting in a number of ways.

In addressing the Government’s non-exhaustion plea, the Court reaffirmed that in the event of a breach of Articles 2 and 3 of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies. For the Court, the same was necessarily true of the applicants’ complaint under Article 8, which in this specific case was closely connected to the said provisions. The Court accordingly rejected the Government’s argument that there was no general or absolute obligation on States to pay compensation for non-pecuniary damage in such cases. The Government, like the domestic courts, relied on the Court’s judgment in the case of *Zavoloka v. Latvia*²⁴. The Court noted that this was a very broad reading of *Zavoloka*, in which all it had held was that there was no right to non-pecuniary damage in the specific circumstances of that case, where the applicant’s daughter had died as a result of a traffic accident due to the negligence of a third party and where no responsibility, whether direct or indirect, could be attributed to the authorities. That case was to be distinguished from the instant case.

The Court observed that the duty to protect the right to life under Article 2 applied in cases involving exposure to asbestos at a workplace run by a public body (see *Öneryıldız v. Turkey*²⁵). A.’s family could rely on Article 2, in that the medical information indicated that A.’s death was likely to have been the result of asbestos exposure and he had been exposed to asbestos at the shipyard over a considerable period of time. On the other hand, the medical information supplied by the other applicants, while indicating that their health had been adversely affected

24. *Zavoloka v. Latvia*, no. 58447/00, § 40, 7 July 2009.

25. *Öneryıldız v. Turkey* [GC], no. 48939/99, § 71, ECHR 2004-XII.

as a result of their exposure to asbestos, did not confirm that cancer was inevitable or that they suffered from life-threatening conditions. Article 2 did not therefore apply. However, the Court observed that the scope of the positive obligations under Article 2 of the Convention largely overlapped with the scope of those under Article 8 (ibid., §§ 90 and 160). The applicants' family and private lives had clearly been affected by their exposure to asbestos. On that account it was appropriate to examine these applicants' complaints under Article 8 (relying on the judgment in *Roche v. the United Kingdom*²⁶).

The Court further noted the commonality between Articles 2 and 8 when it came to the nature of the State's positive obligations and the practical and other measures expected of them to secure respect for the rights guaranteed by those provisions (see *Öneryıldız*, cited above, *Budayeva and Others v. Russia*²⁷, and *Vilnes and Others v. Norway*²⁸). For that reason it conducted a global overview of the critical issue before it, namely whether the authorities knew or ought to have known of the dangers arising from exposure to asbestos at the material time (for the Court, this was at least from the early 1970s) and, in the affirmative, whether sufficient preventive measures had been taken to protect those at risk. Its analysis of the state of knowledge at the relevant time as well as its assessment of the authorities' reaction – regulatory and other – can be compared with the approach followed in cases such as *O'Keeffe v. Ireland*²⁹ and *Vilnes and Others*, cited above). The Court concluded that in view of the seriousness of the threat in issue, despite the State's margin of appreciation as to the choice of means, the Government had failed, in the circumstances of the case, to satisfy their positive obligations, to legislate or take other practical measures, under Article 2 (in respect of A.) and Article 8 (in respect of the remaining applicants).

Effective investigation

The judgment in *Jelić v. Croatia*³⁰ concerned the effectiveness of the investigation into a war crime. In November 1991 the applicant's husband, who was of Serbian ethnic origin, was taken from his home

26. *Roche v. the United Kingdom* [GC], no. 32555/96, §§ 155-56, ECHR 2005-X.

27. *Budayeva and Others v. Russia*, nos. 15339/02 et al., § 146, ECHR 2008 (extracts).

28. *Vilnes and Others v. Norway*, nos. 52806/09 and 22703/10, § 220, 5 December 2013.

29. *O'Keeffe v. Ireland* [GC], no. 35810/09, ECHR 2014 (extracts).

30. *Jelić v. Croatia*, no. 57856/11, 12 June 2014.

in Sisak (Croatia) by masked and armed men. He was later found dead. No steps were taken between 1992 and 1999 to investigate the killing. Thereafter the investigating authorities interviewed several witnesses who testified that they could identify the persons directly involved in the killing of the applicant’s husband. It would appear that these leads were not pursued. However, several senior police officials at the time were put on trial and one of them, a commander of the police force in the Sisak area, was eventually convicted of war crimes against the civilian population in that he had allowed the killing of persons of Serbian origin and had failed to take adequate measures to prevent such killings.

In the Convention proceedings, the applicant complained of the killing of her husband and the inadequacy of the investigation.

Referring to the principles established in *Janowiec and Others v. Russia*³¹, the Court found that its temporal jurisdiction only covered the latter aspect of the allegation.

The Court found a breach of Article 2 under its procedural limb. The finding was essentially based on the failure of the authorities to carry out an adequate and effective investigation into the circumstances surrounding the killing of the applicant’s husband. The Court had particular regard to the failure to follow up credible leads regarding the identities of the direct perpetrators of the killing. The fact that the authorities were at the time involved in multiple investigations into the killings of other individuals during the war in Croatia could not be seen to exonerate them from the need to follow up such leads. For the Court, where the names of potential perpetrators had been given to the authorities by reliable witnesses, some of whom were direct eyewitnesses, the authorities should be expected to take the appropriate steps to bring those responsible to justice. No exceptional circumstances were advanced by the Government for not pursuing the leads, thus undermining both the applicant’s right to obtain justice in the form of retribution for the murder of her husband as well as the deterrent function of the criminal law. On this point, the instant case can be distinguished from the Court’s recent inadmissibility decision in the case of *Gürtekin and Others v. Cyprus*³² (see below; see also *Palić v. Bosnia and Herzegovina*³³).

31. *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, ECHR 2013.

32. *Gürtekin and Others v. Cyprus* (dec.), nos. 60441/13, 68206/13 and 68667/13, 11 March 2014.

33. *Palić v. Bosnia and Herzegovina*, no. 4704/04, § 65, 15 February 2011.

The case is noteworthy for the manner in which the Court addressed the argument that, at the end of the day, a senior police official had been convicted of war crimes against the civilian population. In what would appear to be its first pronouncement on the matter of superior (command) responsibility in the context of Article 2, the Court declared that “in the case at issue there is a deficiency which undermines the effectiveness of the investigation and which could not be remedied by convicting only those in command. In the context of war crimes the superior (command) responsibility is to be distinguished from the responsibility of their subordinates. The punishment of superiors for the failure to take necessary and reasonable measures to prevent or punish war crimes committed by their subordinates cannot exonerate the latter from their own criminal responsibility”. In reaching that conclusion, the Court referred to the position under the Statute of the International Criminal Court (Article 25), the Statute of the International Criminal Tribunal for Rwanda (Article 6) and the Statute of the International Criminal Tribunal for the Former Yugoslavia (Article 7).

The case is also of interest in that it deals with the Convention responsibilities of the authorities in a post-conflict/post-ratification context. Whilst allowance may be made for the difficulties which confront new Contracting States emerging from conflict in establishing their capacity to create effective and independent investigative mechanisms and in dealing with numerous war-crimes cases (Croatia has opened investigations into 3,436 alleged perpetrators of war crimes against a background of 13,749 reported victims of war), such difficulties cannot of themselves relieve the authorities of their procedural obligations under Article 2.

The case of *Gürtekin and Others*, cited above, concerned the decision to close a fresh investigation into killings carried out in the 1960s. The applicants were the relatives of Turkish-Cypriot missing persons whose remains were discovered during the exhumation programme carried out by the United Nations Committee for Missing Persons in Cyprus. The disappearance of the applicants' relatives dated back to the inter-communal conflict in Cyprus in 1963-64. The applicants essentially complained about the ineffectiveness of the investigation into their relatives' deaths following the discovery of their bodies. Having regard to the manner in which the authorities of the respondent State had carried out the investigation, the Court concluded that it had not been

shown that it had fallen short of the minimum standards required by Article 2.

The case is interesting for its description of the scope of a fresh investigation into events which had taken place many years previously and how the scope of the obligation to investigate will vary according to the nature of the purported new evidence or information which triggers the new investigation.

The applicants also contended that the decision that the evidence collected during the fresh investigation was insufficient to justify a prosecution should have been submitted for decision by a court. In response to that argument, the Court stated that it did not consider that the procedural obligation under Article 2 necessarily required that there should be judicial review of investigative decisions as such. Where such review of investigative decisions existed, they were doubtless a reassuring safeguard of accountability and transparency. However, it was not for the Court to micro-manage the functioning of, and procedures applied in, criminal investigative and justice systems in Contracting States, which might well vary in their approach and policies. No one model could be imposed (see, *mutatis mutandis*, *McKerr v. the United Kingdom*³⁴).

The decision in *Harrison and Others v. the United Kingdom*³⁵ concerned the reopening of an investigation into a disaster in the wake of new information.

In 1989, ninety-six football supporters were killed in a crush at a football stadium. Inquests into the deaths were terminated in 1991, the coroner’s jury having reached a majority verdict of accidental death in all cases. An independent inquiry into the tragedy conducted by a judge concluded in 1990 that the main cause was the failure of police control. No criminal or disciplinary proceedings were brought against any of the police officers responsible for the policing of the stadium at the time.

In September 2012, following the disclosure of new information at the insistence of the families of the victims, an independent panel reported that the risks of overcrowding and crushing at the stadium

34. *McKerr v. the United Kingdom*, no. 28883/95, § 143, ECHR 2001-III.

35. *Harrison and Others v. the United Kingdom* (dec.), nos. 44301/13, 44379/13 and 44384/13, 25 March 2014.

were known and foreseeable and expressed concerns about the emergency response to the events which had unfolded at the stadium. Subsequent to the publication of the report, the original inquest verdicts were quashed and new inquests ordered. The full inquest hearings began on 31 March 2014. A new criminal inquiry and investigation was conducted into allegations of police misconduct in the aftermath of the tragedy.

It was against this background that the applicants, families of some of the victims, lodged an application with the Court. The applicants essentially maintained that the new developments confirmed that the authorities had never conducted an effective investigation into the disaster. They also complained that they had had to wait for over twenty-four years for an Article 2 compliant investigation to be carried out into the deaths of their family members.

The Court dismissed the applications as being premature. It considered that the key question before it was whether an Article 2 procedural obligation to investigate the deaths had been revived and, if so, what should be the nature of such obligation. In the light of the new findings of the independent panel, the Court concluded that the authorities were under a Convention obligation to take fresh investigative measures. The findings constituted new evidence casting doubt on the effectiveness of the original inquest and criminal investigations. The Court considered that the measures recently taken were comprehensive in scope and represented a speedy response to the panel's findings.

The decision is noteworthy in that it confirms that the Article 2 procedural obligation can be revived when new evidence or information comes into the public domain which challenges the effectiveness of an earlier investigation which has been closed (see *Hackett v. the United Kingdom*³⁶, *Brecknell v. the United Kingdom*³⁷ and *Williams v. the United Kingdom*³⁸). Significantly, the Court observed in the instant case that even where no Article 2 procedural obligation existed, it was in the interests of governmental transparency and of justice in the wide sense for a government to arrange for a further review in connection with a national tragedy, in response to the concerns of victims or their families who were not satisfied with the results of the terminated investigations carried out in accordance with national law, notwithstanding that the tragedy had occurred many years earlier.

36. *Hackett v. the United Kingdom* (dec.), no. 34698/04, 10 May 2005.

37. *Brecknell v. the United Kingdom*, no. 32457/04, 27 November 2007.

38. *Williams v. the United Kingdom* (dec.), no. 32567/06, 17 February 2009.

The decision is also significant in that the Court rejected the applicants’ complaint about the twenty-four year period of delay in the investigation. For the Court, it would be wrong to see the revival of the procedural obligation incumbent on the United Kingdom under Article 2 following the emergence of new relevant information as the continuation of the original obligation to investigate, bringing with it the consequence that the State could be taxed with culpable delays going back many years. Attaching retroactive effect in this way was likely to discourage governments from taking any voluntary steps that might give rise to the revival of the procedural obligation under Article 2.

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

Obligation to protect from sexual abuse

The *O’Keeffe v. Ireland* judgment³⁹ concerned State protection of schoolchildren against sexual abuse by teaching staff. Over a period of several months in 1973 the applicant, then aged nine, was subjected to sexual abuse by the principal teacher in her school. Two years earlier a parent had made a similar complaint against the same teacher to the priest who managed the school, but the complaint had not been forwarded to any State authority. Subsequent allegations of a similar nature by other parents met with the same lack of response. The teacher in question resigned but continued to teach until his retirement. In 1995, when the events were brought to the attention of the State authorities, an investigation was opened. The teacher was charged with 386 offences of sexual abuse allegedly committed over a fifteen-year period against twenty-one former pupils. He pleaded guilty to twenty-one sample charges and was sentenced to imprisonment. The applicant brought a civil action claiming damages against the teacher, the Department of Education and the State. The teacher was ordered to pay damages but the courts ruled that the State could not be held liable for the acts of which he had been accused.

The applicant argued in particular that the system of primary education in Ireland at the time of the events had failed to protect her against the sexual abuse committed in 1973. She complained that she

39. *O’Keeffe*, *supra* note 29.

had had no effective domestic remedy by which to complain of the State's failure to protect her against such acts.

The judgment is noteworthy in that it deals, in the context of primary education, with the State's positive obligation to protect children against sexual abuse and the requirement to provide an effective domestic remedy by which to complain of the State's failure to afford protection (Articles 3 and 13).

The issue of State liability for ill-treatment of this kind inflicted by a teacher was central to the Court's reasoning. That reasoning focused on two points: (i) whether, at the time of the offence, the State should have been aware of the risk of sexual abuse of minors in schools; and (ii) whether the State legal system afforded schoolchildren adequate protection against such treatment.

The Court stressed that the prevention of sexual abuse of minors required effective criminal provisions backed up by law-enforcement machinery, which had to include mechanisms for the detection and reporting of any ill-treatment by and to a State-controlled body, especially where the perpetrator of the abuse was in a position of authority *vis-à-vis* the child. The State's responsibility under the Convention was engaged if it failed to take reasonable steps which had a real prospect of altering the course of events or minimising the damage caused. The fact that education was not State-managed did not exempt the State from these obligations (the school in question had been run by a private entity not subject to State control).

The Court held that the public authorities had a positive obligation to protect minors against ill-treatment, an obligation that was of acute importance in the context of primary education. That obligation had already existed in 1973 at the time of the events in the present case. The Court noted that the public inquiries carried out in Ireland had recorded a significant number of prosecutions for sexual offences committed by adults against minors. In that context it had to be considered that the State had been informed of the extent of the problem. However, it had not put in place any mechanism of effective State control against the risks of such abuse occurring. On the contrary, it had maintained a system which allowed the non-State manager of the school to take no action in response to the initial complaints of sexual abuse against the teacher in question and allowed the latter subsequently to abuse the applicant. The Court found a violation of the substantive aspect of Article 3 on account of the State's failure to protect the applicant. It found no violation of the State's procedural obligations in the present case.

Furthermore, the applicant should have had a remedy available to her by which to establish possible State liability for the abuse to which she had been subjected. The criminal conviction of the perpetrator of the abuse could not be said to constitute an “effective remedy” for the applicant within the meaning of Article 13 of the Convention. The Government had not demonstrated in the present case that the remedies against the State on which they relied had been effective. The Court also found a violation of Article 13 taken in conjunction with the substantive aspect of Article 3 on account of the lack of an effective remedy enabling the applicant to complain of the State’s failure to protect her.

Use of metal cage in court

The judgment in *Svinarenko and Slyadnev v. Russia*⁴⁰ concerned a practice of placing defendants in metal cages when they appeared before a court in criminal proceedings. During the hearings, the applicants, who were in pre-trial detention, were surrounded by metal bars, which were covered by a wire ceiling, and guarded by armed police guards who remained beside the cage. They perceived their confinement in a cage, as if they were dangerous criminals who had already been found guilty, as degrading treatment. The Grand Chamber’s judgment develops new principles on the use, inside courtrooms during criminal trials, of measures of constraint, and especially confinement.

The Court stated that order and security in the courtroom must not involve measures of restraint which by virtue of their level of severity or by their very nature would bring them within the scope of Article 3. The Court accordingly examined whether the situation complained of – confinement in a cage in the courtroom throughout an entire jury trial which lasted more than a year, with several hearings held almost every month, in the presence of numerous witnesses and members of the public – had reached the minimum level of severity to bring it within the scope of Article 3. It found that it had. In particular, the Court emphasised that the fact that the impugned treatment had taken place in the courtroom during a trial brought into play the elements of a fair trial, such as, in the instant case, the principle of the presumption of innocence and the importance of the appearance of the fair administration of justice. It also referred to international sources on

40. *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, ECHR 2014 (extracts).

the subject. In this context, the Court therefore held that the applicants must have had objectively justified fears that their exposure in a cage during hearings would convey to their judges, who were to take decisions on the issues concerning their criminal liability and liberty, a negative image of them as being dangerous to the point of requiring such an extreme physical restraint, thus undermining the presumption of innocence. This must have caused them anxiety and distress, given the seriousness of what was at stake for them in the proceedings in question. Their exposure to the public gaze must also have aroused negative feelings.

In the Court's opinion, the use of such cages in this context could never be justified under Article 3, contrary to what the Government had submitted in their observations with reference to an alleged threat to security. The Court was of the view that the threat to security alleged by the Government was, in any event, unsubstantiated.

More generally, the Court held that, regardless of the concrete circumstances in the present case, the very essence of the Convention was respect for human dignity and the object and purpose of the Convention as an instrument for the protection of individual human beings required that its provisions be interpreted and applied so as to make its safeguards practical and effective.

For that reason, it considered that holding a person in a metal cage during a trial constituted in itself – having regard to its objectively degrading nature which was incompatible with the standards of civilised behaviour that were the hallmark of a democratic society – an affront to human dignity in breach of Article 3. The Court therefore found that there had been “degrading treatment”, prohibited by Article 3.

Disproportionate use of force

The *Anzhelo Georgiev and Others v. Bulgaria*⁴¹ judgment concerned the use of electrical-discharge weapons during a police operation. Masked police officers raided the offices of the applicants' company. In the course of the operation they used electrical-discharge weapons in contact mode, allegedly to overcome the applicants' resistance and to prevent them from destroying evidence. Some of the applicants sustained burns as a result.

This is the first time the Court has addressed on the merits the use of electrical-discharge weapons by law-enforcement officers. It noted that

41. *Anzhelo Georgiev and Others v. Bulgaria*, no. 51284/09, 30 September 2014.

when such weapons are applied in contact mode, they are known to cause intense pain and temporary incapacitation. Bulgarian law at the time lacked any specific provisions on the use of electroshock devices by the police. The police were not trained in their use. It further observed that the CPT in its 20th General Report had expressed strong reservations regarding the use of electrical-discharge weapons in contact mode. The Court pointed out that properly trained law-enforcement officers have many other control techniques available to them when they are in touching distance of a person who has to be immobilised. On the facts of the case, and having regard to the inadequacy of the investigation into the applicants’ allegations, the Court found that the use of electrical-discharge weapons was disproportionate.

Prison

The applicant in *Budanov v. Russia*⁴² was a prisoner with severe neurological problems. Over a period of several years he received medical treatment in prison that was inappropriate for his disorder and led to his becoming dependent on psychotropic drugs. He underwent two courses of treatment for the initial disorder and for his addiction. The applicant alleged that the prison authorities had not afforded him adequate medical assistance.

The Court held that there had been a violation of Article 3. In its reasoning it took into consideration, in addition to the shortcomings in the medical treatment administered by the authorities, the secondary effects which it had had on the applicant. It found that the applicant had been subjected to prolonged mental and physical suffering, diminishing his human dignity.

The *Lindström and Mässeli v. Finland*⁴³ judgment concerned two prisoners being held in isolation who were forced to wear overalls covering them from neck to foot and “sealed” with plastic strips, on the grounds that they were suspected of attempting to smuggle drugs into the prison. The applicants alleged that there had been instances in which they had been forced to defecate in their overalls, as prison guards had not been able to escort them to a toilet quickly enough, and that they had not been allowed to change afterwards or to wash

42. *Budanov v. Russia*, no. 66583/11, 9 January 2014.

43. *Lindström and Mässeli v. Finland*, no. 24630/10, 14 January 2014.

throughout their period in isolation. Proceedings were brought against the prison director and other prison staff. The domestic courts found that the allegations against the prison guards were unfounded and dismissed the charges.

The judgment is interesting in that the Court made clear that the use of closed overalls in prison in order to combat drug trafficking could, in some specific circumstances, raise an issue under Article 3.

That was not the situation in the present case, as the domestic courts had found that the applicants had not produced any evidence to support their allegations concerning the possibly humiliating elements of their treatment. Furthermore, where there were convincing security needs, the practice of using closed overalls during a short period of isolation did not, in itself, reach the threshold of severity required under Article 3. The Court therefore found no violation of Article 3.

In the case of *Tali v. Estonia*⁴⁴ pepper spray, physical force and a telescopic baton were used against the applicant in order to overcome his resistance after he refused to comply with the orders of prison officers. He was then handcuffed and later confined in a restraint bed for three hours and forty minutes. As to the use of force the Court found, in view of the cumulative effect of the measures used, that the applicant had been subjected to inhuman and degrading treatment in violation of Article 3.

The judgment addresses the use of pepper spray against a prisoner. The Court took note of the CPT's view that pepper spray should not be used in confined spaces, and never deployed against a prisoner who had already been brought under control. Having regard to the serious effects which the use of pepper spray had on health in a confined space, the more so where large doses were administered, the Court found no justification for its use in the circumstances of the present case. It had regard to the fact that the prison officers had alternative means at their disposal to immobilise the applicant.

Extradition

The judgment in *Trabelsi v. Belgium*⁴⁵ concerned the extradition of an individual to a non-Contracting State where he was to be tried on

44. *Tali v. Estonia*, no. 66393/10, 13 February 2014.

45. *Trabelsi v. Belgium*, no. 140/10, 4 September 2014.

charges of terrorism and faced the risk of an irreducible life sentence if convicted. The applicant, a Tunisian national, was extradited from Belgium to the United States of America. The extradition went ahead notwithstanding the Court’s indication to Belgium under Rule 39 of the Rules of Court that the applicant should not be transferred to the United States pending the outcome of the Strasbourg proceedings.

The applicant complained, among other things, that if convicted in the United States he would receive a life sentence without benefit of review. Referring to the criteria set out in *Vinter and Others v. the United Kingdom*⁴⁶, he maintained that, by its act of extradition, Belgium’s responsibility under Article 3 of the Convention had thereby been engaged.

The Court found that there had been a breach of Article 3. It reiterated that the Grand Chamber in *Vinter and Others* had stressed that if domestic law did not provide any mechanism or possibility for review of a whole-life sentence, the incompatibility with Article 3 on this ground already arose at the moment of the imposition of the whole-life sentence and not at a later stage of incarceration. The Court observed in that connection that United States law did not provide for the possibility of a review allowing the domestic authorities to “consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds” within the meaning of the *Vinter and Others* case-law.

The judgment is of jurisprudential interest in that (i) it underlines the absolute character of the prohibition of treatment contrary to Article 3; (ii) it extends the preventive function of that provision to cases where the risk of imposition of an irreducible life sentence has not yet materialised and, on that account, it marks a development in the Court’s previous approach in cases such as *Harkins and Edwards v. the United Kingdom*⁴⁷ and *Babar Ahmad and Others v. the United Kingdom*⁴⁸; and (iii) it implies that the required minimum level of severity for the guarantees of Article 3 to come into play should not

46. *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, ECHR 2013 (extracts).

47. *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, 17 January 2012.

48. *Babar Ahmad and Others v. the United Kingdom*, nos. 24027/07 et al., 10 April 2012.

be different in cases concerning removal of persons to States which are not Contracting Parties to the Convention.

Removal pursuant to Dublin Regulation

The judgment in *Tarakbel v. Switzerland*⁴⁹ concerned the removal of a family of Afghan asylum-seekers to Italy in accordance with the European Union's Dublin Regulation. The application was lodged by eight Afghan nationals (a couple and their six minor children) who had travelled to Europe from Iran, where they had lived for fifteen years. On arriving in Italy they were first placed in a reception facility before being transferred to the Reception Centre for Asylum-Seekers in Bari. Two days later they left the centre without permission and travelled to Austria, where they lodged an application for asylum which was rejected. After receiving a request from Austria, the Italian authorities agreed to take charge of the applicants. On an unknown date the applicants travelled to Switzerland where they sought asylum. However, the Swiss authorities ordered their removal on the ground that, in accordance with the Dublin Regulation (by which Switzerland was bound under the terms of an association agreement with the European Union), Italy was the State responsible for examining the application. The applicants' appeal to the Swiss courts was dismissed.

Relying on Article 3 of the Convention, the applicants alleged that if they were returned to Italy "in the absence of individual guarantees concerning their care", they would be subjected to inhuman and degrading treatment linked to the existence of "systemic deficiencies" in the reception arrangements for asylum-seekers in Italy. They also lodged complaints under Articles 8 and 13 of the Convention.

The Court referred in its judgment to failings noted in 2012 in both the Recommendations of the Office of the United Nations High Commissioner for Refugees and a report published by the Commissioner for Human Rights of the Council of Europe. Noting the glaring discrepancy between the number of asylum applications and the number of places available in the reception facilities and the difficult living conditions in the centres, the Court reiterated that, as a "particularly underprivileged and vulnerable" population group, asylum-seekers required special protection under Article 3. That requirement was particularly important where children were concerned, even if they were accompanied by their parents. In view of the

49. *Tarakbel v. Switzerland* [GC], no. 29217/12, 4 November 2014.

existing reception arrangements in Italy, the Court considered that the Swiss authorities did not possess sufficient assurances that if returned there the applicants would be taken charge of in a manner adapted to the age of the children. It followed that there would be a violation of Article 3 if the applicants were returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that they would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.

The judgment is noteworthy in that it imposes on national authorities a heightened obligation to ensure that appropriate reception facilities exist for asylum-seekers in other States Parties to the Convention, especially where vulnerable persons such as children are concerned.

Sentence

In the case of *Harakchiev and Tolumov v. Bulgaria*⁵⁰, the applicants are serving, respectively, a life sentence without commutation and a life sentence with commutation. They are both held under the strict detention regime for life prisoners: this entails confinement to their permanently locked cells for the greater part of the day and their isolation from other prisoners. They alleged, in particular, that Mr Harakchiev’s life sentence, not being subject to review, amounted to inhuman and degrading punishment and that the nature of the strict regime applied to both of them as well as the material conditions of their detention amounted to torture or inhuman and degrading treatment. The Court found a violation of Article 3 on all counts.

With regard to Mr Harakchiev’s life sentence without commutation, the Court was not persuaded that at the time he was sentenced in 2004 and up until the date of the reforms adopted in 2012 his sentence was *de jure* and *de facto* reducible. It was only in 2012 that greater clarity had been introduced with regard to the manner in which the (vice-)presidential power of clemency was exercised. A ruling of the Constitutional Court given in 2012 had further clarified practice and procedure in this area. It also appeared that one criterion now being applied in deciding whether to commute a life sentence was proof of the prisoner’s rehabilitation.

Applying the principles laid down in *Vinter and Others*⁵¹, cited above, the Court concluded that there had been a breach of Article 3, given

50. *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, ECHR 2014 (extracts).

51. *Vinter and Others*, *supra* note 46.

that at the time his sentence became final (in 2004), Mr Harakchiev did not have a realistic chance of release.

As for his situation in the period after 2012, the Court noted that, despite the new clemency policy, the deleterious effects of what it termed an “impoverished regime”, coupled with the unsatisfactory material conditions in which the applicant was kept, must have seriously weakened the possibility of his reforming himself and thus entertaining a real hope that he might one day achieve and demonstrate his progress and obtain a reduction of his sentence. In practice he remained in permanently locked cells and isolated from the rest of the prison population, with very limited possibilities to engage in social interaction or work, throughout the entire period of his incarceration. To that was to be added the lack of consistent periodic assessment of his progress towards rehabilitation. Accordingly, his life sentence could not be regarded as *de facto* reducible in the period following the 2012 reforms.

The interest of the case lies in the Court's observations on the interconnection between the opportunities available to a prisoner to demonstrate progress towards rehabilitation and the prospects of early release. The Court reiterated that the Convention did not guarantee as such a right to rehabilitation for prisoners and that Article 3 did not impose on the authorities an “absolute” duty to provide prisoners with rehabilitation or reintegration programmes and activities. At the same time, it stressed that Article 3 did require the authorities to give life prisoners a chance, however remote, to some day regain their freedom. In the Court's view, the applicant had been deprived of that chance.

Articles 2 and 3 of the Convention in conjunction with Article 1 of Protocol No. 6

In the case *Al-Nashiri*⁵², cited above, the Court held that Poland had violated Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 by enabling the CIA to transfer the applicant from its territory to a US military commission, thus exposing him to a foreseeable serious risk that he could be subjected to the death penalty following his trial⁵³.

52. *Al-Nashiri*, *supra* note 6.

53. Under Article 46 the Court held that Poland was required to seek to remove, as soon as possible, the risk that the applicant could be subjected to the death penalty following his “extraordinary rendition” to the US authorities, by seeking assurances from those authorities that such a penalty would not be imposed on him.

Right to liberty and security (Article 5)

The *Hassan*⁵⁴ judgment, cited above, concerned the actions of the British forces in Iraq following the 2003 invasion of that country. The applicant was a senior member of the party in power before the invasion. His brother (who was subsequently found dead in unexplained circumstances) was arrested while mounting armed guard on the roof of the applicant’s house where other weapons and documents of military-intelligence value were discovered. He was detained on suspicion of being a combatant or a civilian posing a threat to security under the Third Geneva Convention Relative to the Treatment of Prisoners of War and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War pending determination of his status. Following two interviews by military-intelligence officers, he was deemed to be a civilian of no intelligence value who did not pose a threat to security and was released a few days later at an external drop-off point. The applicant alleged that his brother’s arrest and detention were arbitrary and unlawful and lacking in procedural safeguards, in breach of Article 5 of the Convention.

Of particular interest in this case is the application of the Convention during armed conflict outside the territory of the Contracting States. Specifically, the case raises the question of the compatibility of internment under the Third and Fourth Geneva Conventions with the States’ obligations under Article 5 of the Convention in the absence of a valid derogation under Article 15 by the respondent State (the United Kingdom had not lodged a request under Article 15 to derogate from its Article 5 obligations).

The Court observed that detention under the powers provided for in the Third and Fourth Geneva Conventions was not congruent with any of the permitted grounds of deprivation of liberty set out in sub-paragraphs (a) to (f) of Article 5 § 1. However, for the first time in its history, it had been invited by a member State to “disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law”. The judgment establishes important principles concerning the interpretation of Article 5 in cases of international armed conflict. The starting-point for the Court’s examination was its constant practice of interpreting the Convention in the light of the general rules of interpretation set out in the Vienna Convention on the

54. *Hassan*, *supra* note 5.

Law of Treaties of 23 May 1969, of State practice and of the relevant rules of international law.

The Court accepted that the lack of a formal derogation under Article 15 of the Convention did not prevent it from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5. It nonetheless considered that even in situations of international armed conflict, the safeguards under the Convention continued to apply, albeit interpreted against the background of the provisions of international humanitarian law. It therefore rejected the Government's submission that Article 5 was inapplicable.

Specifically, the following principles applied where a person was detained in an international armed conflict: (i) in order to be "lawful" within the meaning of Article 5 § 1, the deprivation of liberty must comply with the rules of international humanitarian law, and most importantly, be in keeping with the fundamental purpose of that provision, which is to protect the individual from arbitrariness; (ii) as regards procedural safeguards, Article 5 §§ 2 and 4 must be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law while providing sufficient guarantees of impartiality and fair procedure to protect against arbitrariness; and (iii) the provisions of Article 5 will be interpreted and applied in the light of the relevant provisions of international humanitarian law only where this is specifically pleaded by the respondent State.

The Court found no violations of Article 5 §§ 1, 2, 3 or 4. From the established facts the capture and detention of the applicant's brother, who must have been aware of the reasons for his brief detention, appeared consistent with the powers available to the United Kingdom under the Third and Fourth Geneva Conventions and was not arbitrary.

It will be observed that the Court's approach is consistent with the International Court of Justice's own case-law on the coexistence in situations of armed conflict of the protection afforded by international humanitarian law and by international human rights conventions.

Speedy review (Article 5 § 4)

The judgment in *Shcherbina v. Russia*⁵⁵ concerned the meaning of the term "speedy" in the context of an examination of the lawfulness of

55. *Shcherbina v. Russia*, no. 41970/11, 26 June 2014.

detention for extradition purposes ordered by a non-judicial authority. The case raised the issue as to the compatibility of a sixteen-day period of delay between the applicant’s request for judicial review of the lawfulness of his detention for the purposes of his extradition under Article 5 § 1 (f) of the Convention and the decision given in the Article 5 § 4 proceedings. In normal circumstances, such period would be considered to be “speedy” for the purposes of Article 5 § 4 and therefore Convention-compliant (see, for example, *Khodorkovskiy v. Russia*⁵⁶). However, in the applicant’s case the decision to detain him had been taken by a prosecutor and not by a court. Furthermore, the Court observed that the decision-making procedure leading to the applicant’s detention had not provided the applicant with any due-process guarantees, since the order for his detention had been made in camera without the applicant’s involvement. The Court also noted that the prosecutor had in fact had no powers to order the applicant’s detention.

Having regard to the above considerations the Court found that, in the circumstances as described, the standard of “speediness” under Article 5 § 4 “[came] closer to the standard of ‘promptness’ under Article 5 § 3”. In the applicant’s case, the sixteen-day period of delay was excessive, with the result that there had been a breach of Article 5 § 4. The Court confined itself to the facts of the applicant’s case and did not elaborate further on what might be considered an acceptable period of delay in such circumstances.

Prohibition of collective expulsion of aliens (Article 4 of Protocol No. 4)

In the case of *Georgia v. Russia (no. 1)*⁵⁷, cited above, the Court pointed out that Article 4 of Protocol No. 4, which prohibits the collective expulsion of aliens, was applicable irrespective of the question whether or not the Georgian nationals were lawfully resident on Russian territory. During the period in question the Russian courts had made thousands of expulsion orders against Georgian nationals. Even though, formally speaking, a court decision had been made in respect of each Georgian national, the Court considered that the conduct of the expulsion procedures during that period and the number of Georgian nationals expelled from October 2006 onwards had made it impossible

56. *Khodorkovskiy v. Russia*, no. 5829/04, § 247, 31 May 2011.

57. *Georgia v. Russia (no. 1)*, *supra* note 13.

to carry out a reasonable and objective examination of the particular case of each individual. While every State had the right to establish its own immigration policy, problems with managing migration flows could not justify practices incompatible with the State's obligations under the Convention. The Court concluded that the expulsion of Georgian nationals during the period in question amounted to an administrative practice in breach of Article 4 of Protocol No. 4.

PROCEDURAL RIGHTS IN CIVIL PROCEEDINGS

Right to a fair hearing (Article 6)

Applicability

Is Article 6 applicable to leave-to-appeal proceedings? In *Valchev and Others v. Bulgaria*⁵⁸ the Court left open the question whether such proceedings determine civil rights or obligations. In the case of *Hansen v. Norway*⁵⁹ it noted that the prevailing approach seems to be that Article 6 § 1 is applicable also to leave-to-appeal proceedings (citing *Monnell and Morris v. the United Kingdom*⁶⁰, and *Martinie v. France*⁶¹), and that the manner of its application depends on the special features of the proceedings involved, account being taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein (*Monnell and Morris*, § 56). It held that Article 6 was therefore applicable in the instant case.

Access to a court (Article 6 § 1)

The judgment in *Jones and Others v. the United Kingdom*⁶² concerned a civil claim filed by the applicants alleging torture which was barred on account of the immunity invoked by the defendant State and its officials.

The applicants, who were British nationals, alleged that they had been tortured by State agents in the Kingdom of Saudi Arabia. Their claim for compensation against the Kingdom of Saudi Arabia (in the case of the first applicant) and its officials (all applicants) was

58. *Valchev and Others v. Bulgaria* (dec.), nos. 47450/11, 26659/12 and 53966/12, 21 January 2014.

59. *Hansen v. Norway*, no. 15319/09, 2 October 2014.

60. *Monnell and Morris v. the United Kingdom*, 2 March 1987, § 54, Series A no. 115.

61. *Martinie v. France* [GC], no. 58675/00, §§ 11 and 53-55, ECHR 2006-VI.

62. *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, ECHR 2014.

ultimately dismissed by the House of Lords in 2006 for reasons of State immunity (as reflected in the State Immunity Act 1978). In the Convention proceedings the applicants contended that they had been denied access to a court, in breach of Article 6 of the Convention.

The case is noteworthy in that the Court was asked to examine the continuing relevance of the Grand Chamber's judgment in the case of *Al-Adsani v. the United Kingdom*⁶³ and to decide in particular whether it could be said that at the time the first applicant's claim was struck out (2006) there was, in public international law, a *jus cogens* exception to the duty to accord immunity to a State in civil proceedings based on allegations of torture made against that State. The Court first of all examined whether there had been an evolution in the accepted international standards on this matter since the *Al-Adsani* judgment. For the Court, the conclusive answer to this question was given by the judgment of the International Court of Justice (ICJ) in February 2012 in the case of *Germany v. Italy*⁶⁴. In that judgment, the ICJ clearly established that, by February 2012, no *jus cogens* exception to State immunity had yet emerged. On that account, the Court was able to conclude that the domestic courts' reliance on the doctrine of State immunity to defeat the first applicant's civil action against the Kingdom of Saudi Arabia had to be considered compliant with Article 6 requirements: the restriction had a basis in domestic law (the State Immunity Act 1978); it pursued a legitimate aim (compliance with international law in order to promote comity and good relations between States through the respect of another State's sovereignty); and it was proportionate in that it was an inherent limitation generally and still accepted at the relevant time by the community of nations as part of the doctrine of State immunity.

The issue of whether the doctrine of State immunity could extend to officials of the State was not part of the *Al-Adsani* case. In the instant case, the Court found it clear from its analysis of international and domestic case-law and materials that State immunity in principle offered individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State under the same cloak as protected the State itself. But what of acts of torture – was there a *jus cogens* exception to the grant of immunity enabling civil claims to be filed against them and examined on the merits? On this

63. *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI.

64. *Germany v. Italy* (Jurisdictional Immunities of the State), 3 February 2012.

important point, the Court concluded that while there was some emerging support at the international level in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials, the weight of authority suggested that the State's right to immunity could not be circumvented by suing its servants or agents instead. The Court further noted that State practice on the question was inconclusive, with evidence of both the grant and the refusal of immunity *ratione materiae* in such cases. In the applicants' case the House of Lords had had regard to all of the competing arguments and it could not be reproached for having concluded that, when it came to allegations of conduct amounting to torture, customary international law did not admit of any exception to the general rule of immunity *ratione materiae* for State officials in the sphere of civil claims where immunity was enjoyed by the State itself.

It is of interest that in finding that there was no breach of Article 6 on this point, the Court also concluded that, in the light of current developments in this area of public international law, this was a matter which needed to be kept under review by Contracting States.

In the *Urechean and Pavlicenco v. Republic of Moldova*⁶⁵ judgment, the Court considered the question of presidential immunity in defamation proceedings. The applicant politicians attempted to sue the (then) President of the Republic of Moldova for allegedly defamatory statements he had made about them in the course of televised interviews. The domestic courts dismissed their action on the grounds that, under the Constitution and by way of an exception to the ordinary rules governing civil responsibility, the President of the Republic enjoyed immunity and could not be held liable for opinions expressed in the exercise of his mandate.

In the Convention proceedings the applicants alleged that they had been denied their right of access to a court for the determination of their civil rights, in breach of Article 6 of the Convention.

The case is noteworthy in that this is the first occasion on which the Court has had to address the immunity from civil suit from which the president of a country benefits, as opposed to such form of immunity conferred on members of parliament. The latter issue has been

65. *Urechean and Pavlicenco v. Republic of Moldova*, nos. 27756/05 and 41219/07, 2 December 2014.

considered in cases such as *A. v. the United Kingdom*⁶⁶; *Cordova v. Italy (no. 1)*⁶⁷; *Cordova v. Italy (no. 2)*⁶⁸; and *De Jorio v. Italy*⁶⁹. In reaching its conclusion in the instant case, in particular as regards the legitimacy of the aims pursued by such restrictions and their proportionality in a given set of circumstances, the Court drew on the principles established in those authorities.

The Court found a breach of Article 6 of the Convention for the following reasons. It noted, firstly, that the domestic courts had not addressed the question whether the President of the Republic of Moldova had made the statements in the exercise of his mandate, but had confined themselves to a reading of the relevant constitutional provision, which itself did not define the limits of the immunity. It further noted that that provision was both absolute in that it could not be made to yield to other imperatives, and perpetual in that the President could not be held liable after he left office for allegedly libellous statements made by him in the exercise of his mandate. For the Court, “blanket inviolability and immunity are to be avoided”.

It is noteworthy that in the above-cited case of *A. v. the United Kingdom*, the Court had inquired into the existence of other means whereby the applicant in that case could have sought redress for the allegedly defamatory statements made by a member of parliament. In the instant case, the Government submitted that the applicants, being politicians, should have resorted to the media to counter the President's allegations about them. The Court observed in reply that in view of the findings in the case of *Manole and Others v. Moldova*⁷⁰, concerning the administrative practice of censorship on State television at the time, it was not persuaded that the applicants had at their disposal an effective means of responding to the accusations made against them by the Head of State at prime time on a television channel with national coverage.

The *Howald Moor and Others v. Switzerland*⁷¹ judgment dealt with the application of limitation periods in the specific case of an asbestos-

66. *A. v. the United Kingdom*, no. 35373/97, ECHR 2002-X.

67. *Cordova v. Italy (no. 1)*, no. 40877/98, ECHR 2003-I.

68. *Cordova v. Italy (no. 2)*, no. 45649/99, ECHR 2003-I (extracts).

69. *De Jorio v. Italy*, no. 73936/01, 3 June 2004.

70. *Manole and Others v. Moldova*, no. 13936/02, ECHR 2009 (extracts).

71. *Howald Moor and Others v. Switzerland*, nos. 52067/10 and 41072/11, 11 March 2014.

related disease. The applicants were the widow and daughters of a mechanic who died a year and a half after learning that he had developed a disease caused by the asbestos to which he had been exposed over many years in the course of his work. In 2005 the applicants brought actions for damages which were dismissed by the Swiss courts, in particular on the grounds that they were time-barred. The courts found that, where liability claims were concerned, the law provided for an absolute time-limit of ten years which began running on the date on which the person concerned had been exposed to the asbestos dust, irrespective of when the damage had occurred or become apparent. The applicant's last proven exposure to asbestos had been in 1978.

The interest of the case lies in the application of limitation periods in cases involving diseases for which the latency period may be several decades.

In view of the exceptional circumstances of this case, the Court held that there had been a violation of the right of access to a court, while at the same time confirming the legitimacy of the aims pursued by the application of limitation periods, notably the aim of legal certainty. It considered that, in the case of persons suffering from diseases which, like those caused by asbestos, could not be diagnosed until many years after the triggering events, the systematic application of the rules on limitation periods was liable to deprive the individuals concerned of the chance to assert their rights before the courts. Hence, the Court considered that in cases where it was scientifically proven that a person could not have known that he or she was suffering from a particular disease, that fact should be taken into account when calculating the limitation period.

Fairness of the proceedings (Article 6 § 1)

For the first time the Court found a breach of Article 6 of the Convention on account of a domestic court's unreasoned rejection of a request to refer a matter to the Court of Justice of the European Union (CJEU) for a preliminary ruling (*Dhabbi v. Italy*⁷²).

The applicant was a Tunisian national at the relevant time (he has since obtained Italian nationality). He worked legally in Italy and paid social-security contributions there. He applied for a family allowance, but his application was refused since he was not an Italian national. He challenged the refusal, relying on the association agreement between

72. *Dhabbi v. Italy*, no. 17120/09, 8 April 2014.

the European Union and Tunisia, which had been ratified by Italy. In the proceedings before the Court of Appeal, the applicant requested that a preliminary ruling be sought from the CJEU on whether Article 65 of the agreement provided a basis for refusing to grant a family allowance to a Tunisian worker lawfully on the territory of Italy. The Court of Appeal held that Article 65 did not apply to family allowances and only Italian citizens and other European Union nationals were eligible to claim such allowances. The applicant appealed to the Court of Cassation, again requesting that a preliminary ruling be sought from the CJEU on the interpretation of the agreement. The Court of Cassation observed that Article 65 did not cover social-assistance benefits such as the allowance claimed by the applicant for his family. On that account, Tunisian nationals were not entitled to them.

The Court found that there had been a breach of Article 6 § 1. It noted that the judgment of the Court of Cassation contained no mention of the applicant's request for a preliminary ruling. Furthermore, there was no indication of the reasons why it had been rejected. This made it impossible to establish whether the Court of Cassation had considered the applicant's request to be irrelevant, or already covered by the doctrine of *acte clair*. The Court also noted that there had been no reference in the judgment to CJEU case-law. It reiterated the principles which inform its approach in this area, according to which national courts against whose decisions there is no remedy under national law, and which refuse to refer to the CJEU a preliminary question on the interpretation of European Union law that has been raised before them, are obliged to give reasons for their refusal in the light of the exceptions provided for in the case-law of the CJEU. They are thus required to indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the CJEU, or that the correct application of European Union law is so obvious as to leave no scope for any reasonable doubt (see, for example, the decision in *Vergauwen and Others v. Belgium*⁷³).

The *Hansen*⁷⁴ judgment, cited above, concerned the failure of a filtering instance to give reasons for its refusal to admit an appeal for exami-

73. *Vergauwen and Others v. Belgium* (dec.), no. 4832/04, §§ 89-90, 10 April 2012.

74. *Hansen*, *supra* note 59.

nation. The High Court refused to admit the applicant's civil appeal for examination on the grounds that "it was clear that it would not succeed". This was the formula set out in the Code of Civil Procedure. The applicant's appeal against this decision was rejected by the Appeals Leave Committee of the Supreme Court. Before the European Court the applicant complained that the domestic courts had dismissed his appeal without giving sufficient reasons.

The Court noted that the impugned decision had been taken within the framework of a filtering procedure introduced into Norway's Code of Civil Procedure in the interests of procedural economy. The High Court's role in the appeal proceedings was not to examine the case afresh but to review the first-instance court's decision. The Court observed, however, that the High Court's jurisdiction was not limited to questions of law and procedure but extended also to questions of fact and that in the particular circumstances of the applicant's case the High Court's reasoning had not addressed the essence of the issue to be decided by it. The Court also took into account the fact that the High Court, in refusing to admit the applicant's appeal, was not acting as a court of final instance in so far as its procedure could form the subject of an appeal to the Appeals Leave Committee of the Supreme Court. The Court considered that the reasons stated by the Court of Appeal for refusing to admit the applicant's appeal did not make it possible for the applicant to exercise effectively his right to appeal to the Supreme Court. It therefore found a violation of Article 6 § 1.

The judgment is noteworthy in so far as it requires, apparently for the first time, appeal courts (second instance) tasked with the role of filtering unmeritorious appeals and whose jurisdiction covers matters of both fact and law in civil cases to provide some reasons for refusing to admit an appeal for examination. Norwegian law now makes such provision.

PROCEDURAL RIGHTS IN CRIMINAL PROCEEDINGS

Right to a fair hearing (Article 6)

Fairness of the proceedings (Article 6 § 1)

The judgment in *Natsvlishvili and Togonidze v. Georgia*⁷⁵ was the first in which the Court explored fully the compatibility of plea-bargaining arrangements with the notion of a fair procedure for the purposes of Article 6.

In the first applicant's case, an agreement was reached between the defence and the prosecution according to which the prosecutor undertook to request the trial court to convict the applicant without an examination of the merits of the case and to seek a reduced sentence in the form of a fine. The trial court approved the agreement, found the applicant guilty and sentenced him to the payment of a fine. The decision could not be appealed.

In the Convention proceedings the first applicant alleged that the plea-bargaining procedure, as provided for by domestic law at the material time and applied in his case, had been an abuse of process and unfair. He accepted that the bargain he had concluded with the prosecution had entailed a waiver of certain procedural rights. However, he contended that the waiver had not been accompanied by effective safeguards.

The Court noted at the outset that plea bargaining between the prosecution and defence was a common feature of European criminal-justice systems. Initiatives aimed at securing a reduction in sentence or a modification of charges in return for a guilty plea or cooperation with the investigating authorities were not of themselves open to criticism. The important matter was to determine whether or not the procedure was accompanied by safeguards in order to prevent abuse. The Court addressed that question with reference to the circumstances of the applicant's case. It found on the facts that: (i) the bargain had

75. *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, 29 April 2014.

been voluntarily entered into by the applicant in full awareness of the relevant circumstances and the consequences of so doing (in fact, the applicant himself had proposed the conclusion of an agreement); (ii) the applicant was at all stages represented by lawyers including at the time of the plea-bargain negotiations with the prosecution; (iii) the applicant confirmed on several occasions before the prosecutor and the judge overseeing the validity of the agreement that he had understood its contents and the legal consequences which it entailed for him; (iv) the precise terms of the agreement, which was signed by the applicant and included a summary of the negotiations leading to it, had been submitted to the trial judge for consideration at a public hearing; and (v) the trial judge was not bound to approve the agreement. It would have been open to the judge to reject the agreement if satisfied that either the terms of the agreement or the accompanying procedure were tainted by unfairness.

The Court thus concluded that the first applicant's acceptance of the plea bargain had been an undoubtedly conscious and voluntary decision. That decision could not be said to have resulted from any duress or false promises made by the prosecution. On the contrary, it had been accompanied by sufficient safeguards against possible abuse of process.

The *H. and J. v. the Netherlands*⁷⁶ decision concerned the use in the applicants' criminal prosecution for torture of statements they had made on a confidential basis in asylum proceedings. The applicants were Afghan nationals and high-ranking officers in the former military-intelligence service of the communist regime (KhAD/WAD). They requested asylum in the Netherlands shortly after the fall of the communist regime. In the course of the asylum proceedings, they were required to state the truth about their reasons for seeking asylum, including their careers in KhAD/WAD. They were denied asylum but were not deported because of the threat of treatment contrary to Article 3 of the Convention. They were, however, prosecuted for crimes of torture in accordance with the Convention Against Torture and duly convicted.

The applicants complained that information extracted from them by the administrative authorities during the asylum proceedings had

76. *H. and J. v. the Netherlands* (dec.), nos. 978/09 and 992/09, 13 November 2014.

been used against them in the criminal proceedings, whereas they had been promised that anything they told the authorities would be treated in confidence.

The Court rejected the applicant's complaints under Article 6. It held that under the *aut dedere aut judicare* principle enshrined in the Convention Against Torture and the Geneva Conventions, it was not merely the right but the bounden duty of the Netherlands to prosecute the applicants. The applicants had gone to the Netherlands of their own accord and invoked that State's protection. For this to be granted, they had to satisfy the Netherlands authorities that they were entitled to protection. Since they bore the burden of proof in this connection, the Netherlands authorities had been entitled to demand the full truth from them. The promise of confidentiality in asylum proceedings is intended to ensure that asylum-seekers' statements do not come to the knowledge of the very entities or persons from whom they need to be protected. Conversely, a practice of confidentiality appropriate to the processing of asylum requests should not shield the guilty from condign punishment.

This decision is of interest in that it establishes that statements made by asylum-seekers in order to be granted asylum are not considered to have been extracted under compulsion and may subsequently be used against them in criminal proceedings in the same State.

Presumption of innocence (Article 6 § 2)

The judgment in *Karaman v. Germany*⁷⁷ dealt with the applicability of the presumption of innocence in circumstances where statements concerning a suspect under investigation are contained in a judgment handed down against his or her co-accused who were tried separately.

The applicant and several other persons were suspected of fraud. The preliminary criminal proceedings against the applicant were separated from the investigation against the co-accused. The trial court convicted the co-accused of aggravated fraud. At that stage the applicant had not been formally indicted. The judgment described in detail how the scheme had been organised. It originally indicated the applicant's full name (initials were used in the version published on the Internet) and explicitly stated, with reference to the particular circumstances, that the applicant had played a prominent role in the criminal venture.

77. *Karaman v. Germany*, no. 17103/10, 27 February 2014.

Before the Court the applicant alleged a breach of Article 6 § 2 with reference to the statements in the trial court's judgment mentioning his involvement in the offence in issue.

The Court held that the right to be presumed innocent applied and might in principle be engaged by premature expression of an accused's guilt made in the context of a separate trial of his or her co-accused, even if the impugned statements were not binding on the court which ultimately tried the accused.

The Court accepted that in complex criminal proceedings involving several persons who could not be tried together, references by the trial court to the involvement of third parties, who might later be tried separately, might be indispensable for the assessment of the guilt of those on trial. It noted that criminal courts were bound to establish facts relevant for the assessment of the criminal responsibility of the accused as accurately and precisely as possible, and they could not present decisive facts as mere allegations or suspicions. For the Court, this also applied to facts concerning the involvement of third parties. However, it warned that if such facts had to be introduced, the court should provide no more information than was necessary for the assessment of the criminal responsibility of those on trial.

In reaching the conclusion that there had been no breach of Article 6 § 2 in the applicant's case, the Court considered the following factors to be relevant: (i) it had been unavoidable for the assessment of the guilt of one of the co-accused to mention in detail the role played by all the persons involved, including the applicant; (ii) the language used by the trial court had made it sufficiently clear that any mention made of the applicant did not entail a determination of his guilt; and (iii) the introductory remarks to the judgment's Internet publication and the Federal Constitutional Court's decision in the case had emphasised that it would be contrary to the presumption of innocence to attribute any guilt to the applicant on the basis of the outcome of the trial against the applicant's co-accused.

Defence rights (Article 6 § 3)

Article 6 § 3 (e)

The *Baytar v. Turkey*⁷⁸ judgment concerns the absence of an interpreter during police questioning. The applicant, a Turkish national of Kurdish origin, was arrested when visiting her brother in prison. Without an

78. *Baytar v. Turkey*, no. 45440/04, 14 October 2014.

interpreter being present, she was questioned in Turkish by police officers in connection with a document that had been found in her possession. It is unclear whether she declined the assistance of a lawyer at that stage. The applicant gave an explanation for the document. She was brought before a judge. Realising that the applicant did not have a sufficient command of Turkish, the judge asked a member of her family to interpret for her. The applicant made a statement concerning the document which did not match the explanation which she had given earlier to the police. She was remanded in custody. At her subsequent trial, she was assisted by a lawyer and an interpreter. In convicting her, the court relied among other things on the inconsistent statements she had made at the pre-trial stage. The applicant complained that her trial had been unfair on account of the prejudice caused by the absence of an interpreter during the police questioning.

The Court noted that in a previous decision (*Diallo v. Sweden*⁷⁹) it had observed, in line with the reasoning in *Salduz v. Turkey*⁸⁰, that the assistance of an interpreter should be provided during the investigating stage unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (*Diallo*, § 25). On the facts of the instant case, it noted that it had not been disputed that the applicant did not understand Turkish. It emphasised that an accused's choice in police custody not to exercise his right to silence or to waive the presence of a lawyer was premised on the accused being able to understand clearly the facts alleged against him. Without the assistance of an interpreter at the police station, the applicant in the instant case was unable to appreciate the consequences of declining the assistance of a lawyer or of responding to questions. In the event, her answers during the police interview were used against her at her trial. The Court further noted that the provision of interpretation in the remand proceedings was deficient, given that the judge had simply enlisted the help of a member of the applicant's family without checking his language skills.

Right of appeal in criminal matters (Article 2 of Protocol No. 7)

In the *Shvydka v. Ukraine*⁸¹ judgment, the Court considered the meaning of effective review of conviction and/or sentence by a higher

79. *Diallo v. Sweden* (dec.), no. 13205/07, 5 January 2010.

80. *Salduz v. Turkey* [GC], no. 36391/02, §§ 54-55, ECHR 2008.

81. *Shvydka v. Ukraine*, no. 17888/12, 30 October 2014.

tribunal. The applicant, a member of an opposition party, took part in a gathering on the occasion of the country's Independence Day. The then President of Ukraine, Viktor Yanukovich, attended the ceremony and laid a wreath. After the ceremony the applicant detached from the wreath part of the ribbon bearing the words "the President of Ukraine V.F. Yanukovich" in order to express her disagreement with his policies.

The applicant was subsequently found guilty of petty hooliganism and sentenced to ten days' administrative detention. She appealed against her conviction and sentence on the first day of her detention. Three weeks later the appeal court upheld the first-instance decision. By that time the applicant had served her sentence in full as an appeal had no suspensive effect when a minor offence, such as the offence committed by the applicant, was sanctioned by a term of administrative detention.

The case develops the case-law under Article 2 of Protocol No. 7 in that the Court concluded that the right to have one's sentence or conviction reviewed by a higher tribunal will be breached in a case where such review takes place after the sentence involving deprivation of liberty imposed at first instance has been served in full. In reaching that conclusion, and with reference to the facts of the applicant's case, the Court emphasised that an appellate review was not capable of curing the defects of the lower court's decision at that stage.

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

The *Marguš v. Croatia*⁸² judgment concerned the proceedings brought against a commander in the Croatian army for the murder and serious wounding of civilians in 1991 during the war in Croatia. The first set of criminal proceedings was terminated in 1997 under a general amnesty law. The applicant was subsequently prosecuted a second time for the same offences. In 2007 he was found guilty of war crimes against the civilian population and was sentenced to imprisonment.

In the Convention proceedings the applicant alleged, in particular, a breach of his right not to be tried twice for the same offence. The Government argued that the Court lacked temporal jurisdiction as the amnesty decision had been adopted before the date of entry into force

82. *Marguš v. Croatia* [GC], no. 4455/10, ECHR 2014.

of the Convention in respect of Croatia. However, the Court noted that the applicant had been convicted of the same offences after that date. Consequently, the mere fact that the first set of proceedings had been concluded before that date could not act as a bar to the Court's jurisdiction *ratione temporis*.

The Court had to address the specific issue of the applicability of Article 4 of Protocol No. 7 where an unconditional amnesty had been granted for acts amounting to grave breaches of fundamental human rights.

Firstly, the Court noted that the criminal proceedings against the applicant had concerned charges involving civilians' right to life under Article 2 of the Convention, and arguably their rights under Article 3. It observed that, according to its well-established case-law, granting amnesty in respect of the killing and ill-treatment of civilians would run contrary to the State's obligations under Articles 2 and 3 since it would hamper the investigation of such acts and lead to impunity for those responsible, in breach of the protections guaranteed by those Articles of the Convention. Furthermore, the Convention and its Protocols had to be read as a whole and interpreted in such a way as to promote internal consistency and harmony between their various provisions. This applied in the present case to the guarantees contained in Article 4 of Protocol No. 7 and States' obligations under Articles 2 and 3 of the Convention.

Secondly, the Court examined the situation from the standpoint of international law. It observed that there was a growing tendency in international law to consider the granting of amnesties in respect of grave breaches of human rights to be unacceptable as being incompatible with the universally recognised obligation for States to prosecute and punish the perpetrators of such breaches. Even if it were to be accepted that amnesties were possible where there were some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there was nothing to indicate that there were any such circumstances in his case.

Hence, in view of the obligations flowing from Articles 2 and 3 of the Convention and the requirements and recommendations of the international mechanisms and instruments, the Court held that Article 4 of Protocol No. 7 – which guaranteed the right not to be tried twice for the same offence – was not applicable to the second set of proceedings brought against the applicant or to his conviction, after he had been granted amnesty, for war crimes against the civilian population.

It is interesting to note that the Court based its reasoning on a wide range of international sources emanating from several international conventions, bodies and courts, including the Inter-American Court of Human Rights and the International Criminal Court.

CIVIL AND POLITICAL RIGHTS

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

Applicability

The *Emel Boyraz v. Turkey*⁸³ judgment is principally concerned with the applicability of the private-life aspect of Article 8 to a dismissal on grounds of gender from public-sector employment. The applicant, a woman, was appointed to the post of security officer in a branch of a State-run electricity enterprise. She was subsequently dismissed because she did not fulfil the requirements of the post of “being a man” and “having completed military service”. The applicant unsuccessfully challenged her dismissal before the domestic courts.

In the Convention proceedings the applicant complained under Article 14 of the Convention that the decisions given against her in the domestic proceedings amounted to discrimination on grounds of sex. The Court ruled in favour of the applicant.

The judgment is noteworthy in that the Court, at the time of communication of the application to the Government, *ex officio* raised the applicability of Article 8 to the circumstances of the applicant's case, even though the applicant had never framed her complaint in terms of an interference with her right to respect for her private life, relying instead solely on the provisions of domestic law regarding sex equality. The Government in response pleaded that neither Article 8 nor Article 14 were engaged in the applicant's case, stressing that the Convention did not guarantee a right to recruitment to a public-service job.

Turkey has not ratified Protocol No. 12 to the Convention. On that account, the success of the applicant's case depended on whether or not the facts she relied on fell within the scope of one of the substantive provisions of the Convention, it being accepted by the Court that according to its well-established case-law (see in this connection

83. *Emel Boyraz v. Turkey*, no. 61960/08, 2 December 2014.

*Vogt v. Germany*⁸⁴ and *Otto v. Germany*⁸⁵) “the right to recruitment to the civil service is not as such guaranteed by the Convention”. That being said, the Court gave weight to the fact that the applicant had in fact been nominated to the post of security officer, a post in the civil service in Turkey, and had worked on a contractual basis in that position for almost three years before being dismissed on account of her sex. The question for the Court was whether that fact alone allowed the applicant to rely on Article 8, thereby triggering the application of Article 14. The Court found that it did. In its opinion, the concept of “private life” extends to aspects relating to personal identity and a person’s sex is an inherent part of his or her identity. Thus, a measure as drastic as dismissal from a post on the sole ground of sex has adverse effects on a person’s identity, self-perception and self-respect and, as a result, his or her private life. Furthermore, the applicant’s dismissal had had an impact on her “inner circle” as the loss of her job must have had tangible consequences for the material well-being of her and her family. The Court added that the applicant’s dismissal affected a wide range of her relationships with other people, including those of a professional nature, as well as her ability to practise a profession which corresponded to her qualifications.

Having found Article 14 to be applicable, the Court went on to find a breach of that provision in conjunction with Article 8. It concluded that there had been no reasonable and objective justification for the impugned difference in treatment and the applicant had thus been the victim of discrimination on grounds of her sex.

Private life

The judgment in *Fernández Martínez v. Spain*⁸⁶ concerned the refusal to renew the employment contract of a priest who had been working as a religious-education teacher in a State secondary school for seven years on the basis of annual renewable contracts. He complained of being prevented from continuing to teach the Catholic faith because of the publicity given to his family and personal situation as a married priest and father of five children and his membership of an organisation that opposed official Church doctrine. A journalist had reported on the situation in 1996 in a newspaper article which contained a

84. *Vogt v. Germany*, 26 September 1995, § 43, Series A no. 323.

85. *Otto v. Germany* (dec.), no. 27574/02, 24 November 2005.

86. *Fernández Martínez v. Spain* [GC], no. 56030/07, ECHR 2014.

photograph showing the applicant with his family. In 1997 the request for dispensation from the obligation of celibacy, which the applicant had made thirteen years previously, was granted. A few weeks later the diocese informed the Ministry of Education of the termination of the applicant's employment as a teacher in the school where he had been working.

The Court observed that the non-renewal of the applicant's contract, on account of events mainly relating to personal choices he had made in the context of his private and family life, had seriously affected his chances of carrying on his specific professional activity. It concluded that Article 8 was applicable. While the decision not to renew the contract had been taken by the bishop, it was the State administrative authorities who, as the applicant's employer, had enforced the decision, resulting in the cessation of his employment. Accordingly, the Court considered that there had been "interference" with the exercise by the applicant of his right to respect for his private life.

The judgment is also of interest in weighing up the interests at stake: on the one hand, the applicant's right to his private and family life and, on the other, the right of religious organisations to autonomy (for interference with the freedom of association of the members of a religious community, see *Sindicatul "Păstorul cel Bun" v. Romania*⁸⁷). As a consequence of their autonomy, religious communities could demand a certain degree of loyalty from those working for them or representing them. The specific mission assigned to the person concerned in a religious organisation was a relevant consideration in determining whether that person should be subject to a heightened duty of loyalty. That being said, 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' right to respect for their private or family life compatible with Article 8. The Court stressed the limits to the autonomy of a religious community in that situation, linked to the conditions to be satisfied subject to the review of the national courts.

In the present case, by signing his successive employment contracts, the applicant had knowingly and voluntarily accepted a heightened duty of loyalty towards the Catholic Church, which limited the scope of his right to respect for his private and family life to a certain degree.

87. *Sindicatul "Păstorul cel Bun" v. Romania* [GC], no. 2330/09, ECHR 2013 (extracts).

Moreover, teaching the Catholic faith to adolescents could be considered a crucial function requiring special allegiance. The applicant had agreed to the public disclosure (via the newspaper article) of his situation as a married priest and his association with what the bishop considered to be a protest-oriented meeting; in the Court's view, by so doing he had severed the special bond of trust that was necessary for the fulfilment of the tasks entrusted to him. The Court considered that the situation of a teacher of religious education who belonged to and publicly promoted an organisation advocating ideas that ran counter to the teaching of that religion had to be distinguished from, for example, that of a language teacher who was at the same time a member of the Communist Party (*Vogt* judgment, cited above⁸⁸). The former was bound, for reasons of credibility among others, by a heightened duty of loyalty towards the Church. The fact of being seen as campaigning publicly in movements opposed to Catholic doctrine also ran counter to that duty. In the Court's view, the fact that the applicant was employed and remunerated by the State was not such as to affect the extent of the duty of loyalty imposed on him. As to the severity of the sanction imposed in the instant case, the Court stressed in particular that the applicant had knowingly placed himself in a situation that was incompatible with the Church's precepts. The Court held that there had been no violation of Article 8.

The *Kononova v. Russia*⁸⁹ judgment concerned the right to respect for private life and the presence of medical students during child birth. The applicant was admitted to a public hospital in anticipation of the birth of her child. At the time of her admission, she was handed a booklet advising patients about their possible involvement in the hospital's clinical-teaching programme. The applicant was informed that her delivery was scheduled for the next day and that medical students would be present. The delivery took place as scheduled in the presence of doctors and medical students. According to the applicant, she had objected in the delivery room to the students' presence.

The domestic courts dismissed the applicant's civil action, essentially on the grounds that the relevant legislation did not require the written consent of a patient to the presence of medical students at the time of

88. *Vogt*, *supra* note 84.

89. *Kononova v. Russia*, no. 37873/04, 9 October 2014.

delivery. The applicant had been given a copy of the hospital's booklet which contained an express warning about the possible presence of medical students and there was no evidence to show that she had raised an objection.

In the Convention proceedings, the applicant complained that the presence of the medical students during the birth of her child without her express consent amounted to a breach of Article 8.

The Court found that there had been "an interference" with the applicant's right to respect for her private life, given the sensitive nature of the medical procedure in question and the fact that medical students had observed it, thereby having access to confidential medical information about the applicant's condition. The Court noted that the interference had a legal basis in section 54 of the Health Care Act. However, it found that that provision was of a general nature, and was mainly aimed at enabling medical students to take part in the treatment of patients as part of their clinical education. It did not contain any safeguards capable of affording protection to the privacy rights of patients. This serious shortcoming was further exacerbated by the manner in which the hospital and the domestic courts had addressed the issue.

In this connection, the Court noted that the information notice issued by the hospital contained a rather vague reference to the involvement of students in "the study process" without specifying the exact scope and degree of their involvement. Moreover, the information was presented in such a way as to suggest that the applicant had no choice in the matter. The domestic law did not require the hospital to obtain the applicant's written consent. The domestic courts' finding that the applicant had given her implicit consent was not relevant and was in any case unreliable. More importantly, the domestic courts had not taken into account other relevant circumstances, such as the inadequacy of the information in the hospital's booklet, the applicant's vulnerable condition at the time of notification of the information, and the availability of alternative arrangements in case the applicant decided to object to the presence of the students during the birth. For these reasons the Court concluded that the presence of medical students during the birth of the applicant's child had not complied with the lawfulness requirement of Article 8 § 2.

The judgment is noteworthy in that it deals with a novel aspect of the right to respect for one's private life. It confirms the importance of adequate safeguards against arbitrary interference with patients' rights in the context of medical procedures, including child birth, and

emphasises in particular the notion of free and informed consent in the patient-hospital relationship.

The case of *Jelševar and Others v. Slovenia*⁹⁰ raised the issue of the extent to which it is compatible with Article 8 of the Convention for an author of a work of fiction to draw on the lives of individuals as a source of inspiration for depicting the characters who make up the book. Put differently, how is artistic freedom to be reconciled with the right to respect for private life in such circumstances?

A writer published a novel based on the life of a woman. The applicants recognised the novel and the characters depicted in it as the story of their family, in particular of their late mother, even though the character portraying her in the novel (the main character) had been referred to by another name. The applicants sued the writer for breach of personality rights, referring to certain passages in the book which they considered offensive to the memory of their mother. Before the domestic courts several neighbours, friends and acquaintances testified that they had easily made the connection between the story and the applicants' family. The Constitutional Court ultimately dismissed the applicants' claims, stating that the average reader would not consider the events narrated in the book as facts about real people. Furthermore, the descriptions of the applicants' mother were not in any way derogatory, and it had not been the intention of the author to cause offence.

In the Convention proceedings the applicants contended that the Constitutional Court had failed to strike a fair balance between their own right to respect for their private and family life and the writer's freedom of expression.

The Court declared the case inadmissible as manifestly ill-founded on the basis of the principles set out in *Von Hannover v. Germany (no. 2)*⁹¹ and *Axel Springer AG v. Germany*⁹². It accepted that an attack on the applicants' late mother could have an impact on the applicants' own rights protected by Article 8 (*Putistin v. Ukraine*⁹³). However, the Court found that the approach taken by the Slovenian Constitutional Court to the issue of the balance to be struck between the competing

90. *Jelševar and Others v. Slovenia* (dec.), no. 47318/07, 11 March 2014.

91. *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, ECHR 2012.

92. *Axel Springer AG v. Germany* [GC], no. 39954/08, 7 February 2012.

93. *Putistin v. Ukraine*, no. 16882/03, § 33, 21 November 2013.

interests – namely, whether an average reader would consider the story as real (non-fictional) and whether an average reader would consider it as offensive – was a reasonable one, in line with its own case-law.

The decision is noteworthy in that (i) it reaffirms the importance of artistic freedom in the context of a fictional literary work; and (ii) it applies and adapts the existing case-law to a situation where a real-life person is used as a prototype for a fictional character in a novel, a long-established and normal literary practice (compare and contrast *Lindon, Otchakovsky-Laurens and July v. France*⁹⁴, examined under Article 10, where a well-known politician designated by his real name was directly used as a character in a fictional story).

Private and family life⁹⁵

In *Hämäläinen v. Finland*⁹⁶ the Grand Chamber examined the issue of gender identity in the sphere of family life. The applicant had undergone male-to-female gender reassignment surgery and complained that she was unable to obtain full recognition of her new gender unless her marriage was transformed into a registered partnership. Since her spouse did not consent to this transformation, and a divorce would go against their religious convictions, the applicant's new gender could not be recorded in the population register. She considered this a violation of her right to private and family life, guaranteed under Article 8.

The Grand Chamber took a different approach to the Chamber, preferring to analyse the complaint from the perspective of a positive obligation rather than a negative interference. Relying on comparative-law analysis, the Court noted that there was still no European consensus on allowing same-sex marriages and no consensus in those States which did not allow same-sex marriages as to how to deal with gender recognition in the case of a pre-existing marriage (the situation in the applicant's case). Accordingly, Finland had to be afforded a wide margin of appreciation, also taking into account the sensitive moral and ethical issues at stake.

The Grand Chamber took a pragmatic and practical approach to the problem faced by the applicant after noting that that she had several options open to her. It found that it was not disproportionate

94. *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, ECHR 2007-IV.

95. See also *Brincat and Others*, *supra* note 12.

96. *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014.

to require her marriage to be converted into a registered partnership, as that was a genuine option which provided legal protection for same-sex couples that was almost identical to that of marriage. The minor differences between these two legal concepts were not capable of rendering the Finnish system deficient from the point of view of the State's positive obligation. In conclusion, the system as a whole was not disproportionate in its effects on the applicant and a fair balance had been struck between the competing interests in the case.

The case of *Mennesson v. France*⁹⁷ concerned the refusal of the domestic authorities to recognise the parentage of children born as the result of a surrogacy arrangement entered into abroad. The issue was the impossibility for a French couple (the first two applicants) to obtain recognition under French law of their legal parent-child relationship with twin girls (the third and fourth applicants) born in California following a surrogacy arrangement. The twins' birth certificates issued in California on the basis of a judgment of the Californian Supreme Court stated that the first and second applicants were their parents.

The daughters had US passports and were able to enter France with the first and second applicants. The couple subsequently experienced difficulties in having the particulars of the US birth certificates entered in the civil register, since surrogacy was prohibited in France. The Court of Cassation ultimately ruled that the refusal to enter the particulars of the US birth certificates in the French civil register was justified on the basis that surrogacy was against French international public policy ("*l'ordre public international français*").

In its judgment, the Court found that Article 8 was applicable under both the family and private-life aspects of that provision. Moreover, the interference was in accordance with the law and pursued a legitimate aim. As to the latter test, the Court accepted the domestic authorities' view that the situation of surrogate mothers had to be borne in mind and that the refusal to recognise surrogacy arrangements was therefore justified by the need to protect the rights and freedoms of others. As to the necessity test, the Court observed that there was no consensus in Europe on the lawfulness of surrogacy or on the question of the legal recognition of surrogacy arrangements which were concluded abroad. States therefore had a wide margin of appreciation regarding

97. *Mennesson v. France*, no. 65192/11, 26 June 2014.

both aspects, but that margin had to be reduced given that the issues at stake related to an essential aspect of individual identity, namely the legal parent-child relationship.

The judgment is noteworthy for its innovative distinction between the four applicants' right to family life on the one hand, and the twins' right to respect for their private lives on the other. Finding no violation of the right to respect for family life, the Court based its reasoning on the fact that the non-recognition of the legal parent-child relationship between the first and second applicants and the twins did not prevent the latter from living in France. The Court, like the Court of Cassation, accepted that they did face difficulties daily. However, such difficulties were not insurmountable and did not prevent them from living together in conditions broadly comparable to those of other families.

However, turning to the twins' right to respect for their private lives, the Court noted that they were in a situation of legal uncertainty with regard to their legal parentage, an essential element of their identity. While the French authorities accepted that the twins were treated under Californian law as being the children of the first and second applicants, they denied them that status under French law. The Court found that this contradictory approach undermined the identity of the third and fourth applicants within French society. The Court also referred to the possible consequences which non-recognition of their status had on the twins' access to French nationality and their ability to inherit from the first and second applicants. It highlighted the fact that the first applicant was the twins' biological father but that his status as such was not recognised under French law. The Court considered that the French authorities had not given sufficient weight to the best interests of the child when balancing the interests at stake. It concluded that there had been a violation with regard to the twins' right to respect for their private lives and found it unnecessary to examine the complaint under Article 14 read in conjunction with Article 8.

The *Hanzelkovi v. the Czech Republic*⁹⁸ judgment concerned a court order requiring a new-born child to be immediately returned to hospital. The applicant gave birth in a public hospital. Some hours after the delivery she left the hospital with her baby without, it would appear, clearly informing the staff of her intention. The applicant had arranged to see

98. *Hanzelkovi v. the Czech Republic*, no. 43643/10, 11 December 2014.

her own paediatrician on leaving the hospital. However her paediatrician was not available to see her and the baby, and informed the hospital of this. A doctor attached to the hospital immediately alerted social services about his concern that if not cared for in hospital, the health and possibly the life of the new-born infant could be at risk. Subsequently, a judge, basing his decision on the doctor's assessment of the situation, ordered the baby to be immediately returned to the hospital. The order was served on the applicant at her home by a court bailiff and she and her child were escorted back to the hospital in the company of the police and social services. They remained in the hospital for a period of seventy-two hours. At no point did the baby have health problems.

The applicant essentially complained in the Convention proceedings that the authorities had unlawfully interfered with her right to respect for her private and family life, in breach of Article 8.

The Court agreed with the applicant. It found that in the circumstances of the case the interim-measures judge had not inquired sufficiently into the reality of the risk to the infant's health or given consideration to other, less intrusive, ways of protecting the child's health. The judge had relied entirely on the doctor's concerns, which had been provoked by the communication from the applicant's paediatrician, but which had not been substantiated. For the Court, one possibility would have been to conduct an examination of the infant's state of health before ordering its return to the hospital. This option was not pursued. The court order had to be implemented immediately, leaving no possibility for it to be discontinued in the event that the child was found to be in good health at the applicant's home, as proved to be the case. In the light of these and other considerations, the Court found that there had been a disproportionate interference with the applicant's Article 8 right.

The judgment is of interest in that it illustrates the Court's readiness in appropriate cases to subject the risk-to-health assessments made by health professionals and the courts in perceived emergency situations to strict scrutiny when the right to respect for private and family life is at stake.

Private life and correspondence

The judgment in *Nusret Kaya and Others v. Turkey*⁹⁹ concerned the restrictions imposed on prisoners' use of a non-official language when telephoning family members.

99. *Nusret Kaya and Others v. Turkey*, nos. 43750/06 et al., ECHR 2014 (extracts).

The applicants, prisoners of Kurdish ethnicity, complained about the formalities which they had to comply with in order to use the prison telephone to contact members of their families. According to the prison regulations applicable at the time, all prisoners who wished to communicate with the outside world in a language other than Turkish had to obtain the prior authorisation of the prison authorities. The prison authorities recorded all telephone conversations between prisoners and the outside world, including those conducted in Turkish. In order to obtain the necessary authorisation, prisoners had to be non-Turkish speakers or be able to prove that their correspondents could not understand Turkish. In that event, the prison authorities would proceed to verify whether the prisoners' declarations were correct, the expense of doing so being borne by the prisoner in question.

In the Convention proceedings the applicants maintained that the formalities imposed on them breached their right to respect for family life. The Government essentially relied on considerations of internal prison security and the risk of escape to justify the formalities.

The Court found that there had been a breach of Article 8 in the circumstances of the applicants' cases. In the first place, the Court noted that the possibility of communicating with family members in one's mother tongue concerned not just correspondence but also family life. Secondly, it found that the impugned regulations applied indiscriminately to all prisoners, with no consideration being given to the nature of the offences they had committed or to whether or not a particular prisoner represented a threat to prisoner security. Thirdly, the domestic authorities were aware of the fact that Kurdish was widely spoken in Turkey (compare and contrast the situation in *Baybaşın v. the Netherlands*¹⁰⁰), including by prisoners when communicating with their families. For the Court, there was nothing on the facts of the applicants' cases which called into question their assertions that they communicated with their families in Kurdish and that Kurdish was the only language which the latter understood. On that account, the requirement that the applicants demonstrate that their family members could not communicate with them in Turkish because they only understood Kurdish was not supported by relevant and sufficient justification.

100. *Baybaşın v. the Netherlands* (dec.), no. 13600/02, 6 October 2005.

Family life

The *Jeunesse v. the Netherlands*¹⁰¹ judgment concerned the refusal of a residence permit for a Surinamese national living in the Netherlands with her Dutch husband by whom she had three children. The applicant had entered the Netherlands in 1997 on a tourist visa. After the expiry of her visa forty-five days later she continued to live in the country – without a visa – with her future husband (whom she married in 1999) and their children who, like their father, were Netherlands nationals. Her successive applications for a residence permit were dismissed, *inter alia*, on the ground that she did not hold a provisional residence visa issued by the Netherlands mission in Suriname.

The applicant considered that she should have been exempted from the obligation to apply for a residence permit from overseas. In the Convention proceedings, she complained that the refusal of a residence permit had infringed her right to respect for her family life.

The Grand Chamber reiterated that Contracting States have the right to require that any request by an alien for residence on their territory should be made from abroad. They are under no obligation to allow foreign nationals to await the outcome of immigration proceedings on the national territory. The instant case can be distinguished from cases concerning “settled migrants” (persons who have already been formally granted a right of residence in a host country). Its interest lies in the applicant’s situation as an illegal immigrant whose family were all Netherlands nationals. It concerns the extent of the State’s public-order interests in controlling immigration where family life has commenced and developed unlawfully.

The Court observed that, where confronted with a *fait accompli*, the removal of the non-national family member by the authorities would be incompatible with Article 8 only in exceptional circumstances. Such circumstances were present in the applicant’s case in which the authorities had failed to strike a fair balance between the competing interests of the applicant, her husband and their children in maintaining their family life in the Netherlands and the State’s public-order interests in controlling immigration. The respondent State had thus failed to secure the applicant’s right to respect for her family life under Article 8 of the Convention.

The exceptional circumstances peculiar to the applicant’s case were considered cumulatively: with the exception of the applicant the

101. *Jeunesse v. the Netherlands* [GC], no. 12738/10, 3 October 2014.

family was composed entirely of Netherlands nationals; the applicant had lived quite openly in the Netherlands for more than sixteen years (the authorities knew her address) and did not have a criminal record; while there were no insurmountable obstacles preventing the family from settling in the applicant's country of origin, forcing them to do so would result in a degree of hardship; lastly, the domestic authorities had not had sufficient regard to the impact the applicant's removal was likely to have on the children. According to the Court, "national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it".

The judgment thus clarifies (i) the scope of the State's positive obligations under Article 8 to protect the right to respect for family life in immigration cases; (ii) the State's margin of appreciation where family life has been established during an illegal overstay; and (iii) the matters to which the State must have regard to ensure effective protection of the best interests of any children who are directly concerned.

The decision in *D. and Others v. Belgium*¹⁰² essentially concerned the time taken by the Belgian authorities to provide the applicants with a travel document allowing a child born in Ukraine as the result of a surrogacy arrangement to return to Belgium with the applicants following his birth. The child was born on 26 February 2013. On 31 July 2013 the Brussels Court of Appeal upheld the applicants' challenge to the refusal to issue a travel document in the child's name, being satisfied that the applicants had by that stage sufficiently substantiated that the first applicant was the child's biological father and that the authorities' earlier public-order concerns about the circumstances surrounding the child's birth had now been addressed. The child arrived in Belgium accompanied by the applicants on 6 August 2013.

The decision is interesting in that the Court dealt with the question whether the applicants and the child enjoyed family life within the meaning of Article 8 prior to his departure from Ukraine. The applicants had had very limited and only sporadic contact with the child between the date of his birth and his arrival in Belgium. Referring to

102. *D. and Others v. Belgium* (dec.), no. 29176/13, 8 July 2014.

the cases of *Pini and Others v. Romania*¹⁰³ and *Nylund v. Finland*¹⁰⁴, the Court observed that Article 8 could be relied on whenever there was the potential for family life to develop at a future stage. In the instant case, the applicants wished to care for the child as his parents from the moment of his birth and had taken steps to enable him to live with them as a family. It was established that an effective family life existed in Belgium. For that reason, the Court found that Article 8 was applicable and that there had been an interference with the applicants' right to respect for family life on account of the period of three months and twelve days during which they were (for the most part) separated from the child. However, the Court found the complaint to be manifestly ill-founded.

It held that the time taken by the Belgian authorities to confirm the legality of the circumstances surrounding the child's birth could not be considered unreasonable. The Convention could not compel a State to admit automatically to its territory a child born as the result of a surrogacy arrangement. It was only natural that the authorities should first conduct a number of legal inquiries. The applicants should have been aware of the need to ensure that they were in possession of all necessary documentation, including proof of parenthood, in order to obtain the requested travel document without undue delay.

The *Kruškić v. Croatia*¹⁰⁵ decision examines the scope of protection of family life between grandparents and grandchildren. The application concerned a dispute between the grandparents (the first two applicants) and the father over the custody and placement of his two children (the third and fourth applicants). The applicants complained essentially under Article 8 of the Convention.

The Court first considered whether the first and second applicants were entitled to lodge an application on behalf of the third and fourth applicants. It found that, in the particular circumstances of the case, they had no standing to do so given that, among other things, the children's parents had at no stage been divested of their parental rights. This part of the application was declared incompatible *ratione personae* with the provisions of the Convention and rejected.

103. *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, § 143, ECHR 2004-V (extracts).

104. *Nylund v. Finland* (dec.), no. 27110/95, ECHR 1999-VI.

105. *Kruškić v. Croatia* (dec.), no. 10140/13, 25 November 2014.

The decision is worthy of comment as regards the first and second applicants' complaint under Article 8 regarding the domestic courts' decision to give custody of their grandchildren to the father. The Court, relying mostly on case-law of the former Commission, examined the scope of the family life enjoyed by grandparents with their grandchildren. It pointed out that, in normal circumstances, the relationship between grandparents and grandchildren is different in nature and degree from the relationship between parent and child and on that account generally calls for a lesser degree of protection. It considered that the right to respect for family life of grandparents in relation to their grandchildren primarily entails the right to maintain a normal grandparent-grandchild relationship through contact between them, which normally takes place with the agreement of the person who has parental responsibility. The Court noted on the facts of the instant case that the domestic proceedings pertaining to the contact and access rights claimed by the applicants were still pending. This part of their complaint was therefore premature.

The Court accepted that in a situation where grandchildren were left without parental care grandparents could be entitled under Article 8 to have their wish to have their grandchildren formally entrusted to their care taken into account when decisions on matters such as their placement are to be taken. This situation did not arise in the instant case. The Court considered that Article 8 cannot be construed as conferring any other custody-related right to grandparents. For that reason, the measures adopted in the present case, namely the removal of the grandchildren from the applicants' care and the grant of custody to their father, did not amount to interference with the applicants' right to respect for their family life. The Court therefore declared this part of the complaint inadmissible as being manifestly ill-founded.

Home and correspondence

In the case of *DELTA PEKÁRNY a.s. v. the Czech Republic*¹⁰⁶ an inspection was carried out of the applicant company's premises on the same date that administrative proceedings were brought against it for suspected breaches of the competition rules. Since, in accordance with the relevant domestic law, notification of the opening of the proceedings had been signed by the head of the competition authority the

106. *DELTA PEKÁRNY a.s. v. the Czech Republic*, no. 97/11, 2 October 2014.

inspection was able to proceed, without any prior authorisation by a judge or right to judicial review.

Before the Court, the applicant company alleged a violation of its right to respect for home and correspondence.

The interesting feature of this judgment is the Court's analysis of the necessity for the interference in a democratic society. Referring to the *Smirnov v. Russia*¹⁰⁷ judgment, the Court examined whether the lack of prior judicial authorisation for the search had been offset by effective *ex post facto* judicial review of the lawfulness of and necessity for the measure.

The Court found that there had been no adequate or sufficient safeguards against arbitrariness in place, and therefore held that there had been a violation of Article 8.

It noted that when the inspection was carried out neither the facts alleged to have given rise to a presumption of breaches of the competition rules nor the documents sought by the competition authority were clearly identified. Although the search had been followed by two sets of judicial proceedings, the courts had not scrutinised the manner in which the competition authority had exercised its power to assess the appropriateness, length and scope of the inspection. The Court found the following safeguards were lacking: (i) prior judicial authorisation for the inspection; (ii) effective *ex post facto* review of the need for the interference; and (iii) any rules governing the possible destruction of copies taken during the inspection. While some procedural guarantees had been in place during the inspection, they were insufficient to prevent the risk of abuse by the competition authority.

Right to respect for private life and freedom to manifest one's religion or belief (Articles 8 and 9)

The *S.A.S. v. France*¹⁰⁸ case, cited above, concerned a Muslim French national who complained that she was no longer allowed to wear the full-face veil in public following the entry into force, on 11 April 2011, of a law prohibiting the concealment of one's face in public places. A practising Muslim, she said that she wore the burqa and niqab in accordance with her religious faith, culture and personal convictions. She added that neither her husband nor any other member of her family had put pressure on her to dress in this manner and that she

107. *Smirnov v. Russia*, no. 71362/01, 7 June 2007.

108. *S.A.S. v. France*, *supra* note 8.

was content not to wear the niqab in certain circumstances but wished to be able to wear it when she chose to do so, since her aim was not to annoy others but to feel at inner peace with herself. Before the Court, the applicant alleged a violation of Articles 8, 9, 10 and 14 of the Convention.

The Court accepted that the applicant could claim to be a “victim” of the alleged violation, dismissing the Government’s preliminary objection that she had brought an *actio popularis*. As to the merits, the Court examined the applicant’s complaints under Article 8 and, in particular, Article 9. While personal choices as to one’s appearance related to the expression of an individual’s personality, and thus fell within the notion of private life, the applicant had complained that she was prevented from wearing in public places clothing that she was required to wear by her religion, thus mainly raising an issue with regard to the freedom to manifest one’s religion or beliefs. The Court found that there had been a “continuing interference” with the exercise of the rights relied upon, that this interference had been “prescribed by law” and that it pursued two legitimate aims: “public safety” and the “protection of the rights and freedoms of others”.

As regards the first aim (public safety) the Court found that the interference had not been “necessary in a democratic society” as the aim could have been fulfilled by a mere obligation to show one’s face and to identify oneself where a risk for the safety of persons or property was established. As to the second aim (protection of the rights and freedoms of others) the Court rejected the Government’s arguments based on the two fundamental values of respect for gender equality and respect for human dignity. However, it accepted their submission concerning a third value: respect for the minimum requirements of life in society (“living together”). Given the importance of the face in social interaction, the Court accepted that the barrier raised by a veil concealing the face was perceived by the respondent State as breaching the right of others to live in a space of socialisation which made living together easier. However, in view of the flexibility of the notion of “living together” and the resulting risk of abuse, the Court had to engage in a careful examination of the necessity of the impugned limitation.

In the instant case, the prohibition on wearing the veil was not expressly based on the religious connotation of the clothing in question but solely on the fact that it concealed the face (compare and

contrast with the case of *Ahmet Arslan and Others v. Turkey*¹⁰⁹). This was a sphere in which the State enjoyed a wide margin of appreciation. Further, given that the statutory penalties – a fine of 150 euros maximum and/or an obligation to follow a citizenship course – were among the lightest the legislature could have envisaged, the Court accepted that the impugned measure had been proportionate. It found no violation of either Article 8 or Article 9.

In addition to its novel factual and legal context, the judgment is interesting in that: (i) it recognised protection of “living together” as a legitimate aim capable of justifying a limitation on a Convention right; (ii) it emphasised that a State which entered into a legislative process of this kind ran the risk of reinforcing the stereotypes which affect certain sections of the population and of encouraging intolerance when, on the contrary, it should be promoting tolerance.

Freedom of expression (Article 10)

In the case of *Murat Vural v. Turkey*¹¹⁰ the applicant was convicted under the Law on Offences Committed against Atatürk (Law no. 5816) for pouring paint over five statues of Kemal Atatürk in protest against Kemalist ideology and sentenced to just over thirteen years' imprisonment. The applicant complained under Article 10 of the severity of the punishment he had received for expressing his opinions. While accepting that Kemal Atatürk is an iconic figure in modern Turkey, the Court nonetheless concluded that the applicant's actions could not justify the imposition of such a severe sanction. It added that peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence. It was true that the applicant's acts had taken the form of a physical attack on property. In the Court's opinion, however, those acts were not of such a level of gravity as to justify the custodial sentence provided by Law no. 5816.

The judgment is interesting in that the Court found that the applicant's conduct amounted to symbolic speech or “expressive conduct” and therefore enjoyed the protection of Article 10. From an objective point of view, the applicant's conduct could be seen as an act of expression. The applicant had not in fact been convicted of an offence of vandalism, but of having insulted the memory of Kemal Atatürk.

109. *Ahmet Arslan and Others v. Turkey*, no. 41135/98, 23 February 2010.

110. *Murat Vural v. Turkey*, no. 9540/07, 21 October 2014.

The case of *Gough v. the United Kingdom*¹¹¹ also concerns the forms of expression protected by Article 10. The applicant was repeatedly convicted and detained for causing breaches of the peace by being naked in public in what he claimed was an expression of his opinion on the subject of nudity. He alleged a breach of Article 10. The Court found no violation.

Of interest in the judgment is the question of the applicability of Article 10. The Court considered that since the applicant had chosen to be naked in public in order to give expression to his opinion as to the inoffensive nature of the human body, his public nudity could be seen as a form of expression protected by that provision.

A further point concerns the issue of the proportionality of the repressive measures taken as a result of the applicant's deliberately repetitive antisocial conduct over a number of years. Noting that the cumulative impact of the numerous prison sentences served (over seven years in total) was severe, the Court examined the authorities' response to someone who continually refused to obey the law.

The Court stressed the applicant's own responsibility for his fate by wilfully persisting over a long period in conduct he knew full well went against the standards of accepted public behaviour when other avenues for the expression of his opinion on nudity or for initiating a public debate on the subject had been open to him. He had insisted upon his right to appear naked in all places, including in the courts and in prison. In the Court's view, however, he should have demonstrated tolerance of and sensibility to the views of other members of the public whom the authorities were under a duty to protect from public nuisances and the State had a wide margin of appreciation in this sphere. The measures had thus met a "pressing social need" for Convention purposes.

The decision in *Stichting Ostade Blade v. the Netherlands*¹¹² concerned the scope of the protection of journalists' sources. In the wake of a series of bomb attacks in Arnhem, the editors of a magazine issued a press release announcing that they had received a letter from an organisation claiming responsibility for the latest incident and that

111. *Gough v. the United Kingdom*, no. 49327/11, 28 October 2014.

112. *Stichting Ostade Blade v. the Netherlands* (dec.), no. 8406/06, 27 May 2014.

they intended to publish the letter in the next edition. The premises of the magazine were searched the day after the issue of the press release, under the authority of an investigating judge. The editors were informed before the start of the search that the search was aimed at retrieving the letter. One of the editors responded that the letter was not on the premises. The search then proceeded. Several computers and other materials were subsequently removed from the premises. An editor of the magazine later reported that the letter had been destroyed the day it was received.

In the Convention proceedings the applicant foundation – which was responsible for the publication of the magazine – argued that the search of the magazine's premises amounted to a violation of its right to protect its journalistic sources, contrary to Article 10.

The Court rejected that argument. It observed that not every individual who was used by a journalist for obtaining information could be considered a “source” within the meaning of its case-law in this area (see, for example, *Goodwin v. the United Kingdom*¹¹³, *Financial Times Ltd and Others v. the United Kingdom*¹¹⁴, *Sanoma Uitgevers B.V. v. the Netherlands*¹¹⁵ and *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*¹¹⁶). With reference to its decision in the case of *Nordisk Film & TV A/S v. Denmark*¹¹⁷, the Court observed that the magazine's informant had not been motivated by the desire to provide information which the public were entitled to know. On the contrary, the informant had been claiming responsibility for crimes which he had himself committed; his purpose in seeking publicity through the magazine had been “to don the veil of anonymity with a view to evading his own criminal accountability”. For this reason, the Court found that the informant was not, in principle, entitled to the same protection as the “sources” in the above-mentioned cases. The Court thus concluded that “source protection” was not in issue. Having established that point, the Court went on to find that the search had complied with the requirements of Article 10.

113. *Goodwin v. the United Kingdom*, 27 March 1996, *Reports of Judgments and Decisions* 1996-II.

114. *Financial Times Ltd and Others v. the United Kingdom*, no. 821/03, 15 December 2009.

115. *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, 14 September 2010.

116. *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*, no. 39315/06, 22 November 2012.

117. *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02, ECHR 2005-XIII.

Freedom of assembly and association (Article 11)

Article 11 read in the light of Article 9

The *Magyar Keresztény Mennonita Egyház and Others v. Hungary*¹¹⁸ judgment, concerned the question of the allocation of State funds to Churches. A new law was enacted in 2011 in order to address problems relating to the exploitation of State funds by certain Churches. A number of Churches were automatically considered by virtue of the law to be incorporated and, as such, entitled to continue to enjoy certain monetary and fiscal advantages from the State for the performance of faith-related activities. The applicants, who had prior to the adoption of the new law been registered as Churches and were in receipt of State funding, were not included among the Churches automatically treated as incorporated. Following a ruling of the Constitutional Court, religious associations or communities such as the applicants could continue to function as Churches and to refer to themselves as Churches. However, the new law continued to apply in so far as it required Churches such as the applicants, which had lost their previous status through deregistration, to apply to Parliament to be registered as incorporated Churches if they wished to regain access to the above-mentioned advantages and benefits. Whether or not a particular Church could be incorporated depended on how many members it had and how long it had been in existence as well as proof that it did not represent a danger to democracy.

The applicants alleged that the loss of their status as registered Churches and the requirement to apply to Parliament to be registered as incorporated Churches amounted to a breach of their rights under Article 11 of the Convention read together with Articles 9 and 14. The Court considered the applicants' grievances from the standpoint of Article 11 of the Convention read in the light of Article 9, giving due weight in its reasoning to the complaint regarding the alleged discriminatory treatment.

The Court accepted that the deregistration of the applicant Churches had a basis in the new law and that the measure applied to them pursued a legitimate aim, namely to prevent bodies claiming to be involved in religious activities from fraudulently obtaining financial benefits from the State. However, the Government had not demonstrated that less

118. *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, nos. 70945/11 et al., ECHR 2014 (extracts).

drastic solutions to the problem perceived by the authorities – such as the judicial control or dissolution of Churches found to have abused the system of funding – were not available. In the event, the result of the application of the legislation to the applicants was to strip them of the legal framework which they had previously enjoyed, with negative consequences for their material situation as well as their reputation. On the latter point, the Court noted, among other things, that the adherent of a religion may feel no more than tolerated – but not welcome – if the State refuses to recognise and support his or her religious organisation, whilst extending the same to other denominations. For the Court, such a situation of perceived inferiority was linked to the right to manifest one's religion.

On the question of the applicants' right to reapply for recognition as an incorporated Church, the Court noted that the decision whether or not to grant recognition lay with Parliament, an eminently political body. It observed that a situation in which religious communities were reduced to courting political parties for their votes was irreconcilable with the State's duty of neutrality in this field.

Regarding the loss of material benefits, the Court noted that this had had a negative impact on the applicants' ability to conduct various faith-related activities. Given the availability of such benefits to incorporated Churches, it found that such difference in treatment was not justified on any objective grounds and was inconsistent with the requirement of State neutrality.

The judgment is noteworthy in that the Court accepts that the impugned legislation did not result in the dissolution of the applicant Churches or interfere with their internal administration or leadership, and that their members were at all times able to continue to manifest their religion. In its judgment, the Court emphasises the importance of the State's duty of neutrality and impartiality when it comes to matters such as the allocation of State funding to Churches and the granting of preferential status or treatment to certain Churches. The Court has recently confirmed that the granting of additional funding from the State budget to a State Church does not of itself violate the Convention (see the decision in *Ásatrúarfélagið v. Iceland*¹¹⁹). In the instant case, it added that the funding of Churches and the granting of other material or financial benefits to them, while not incompatible with the Convention, must not be disproportionate to those received

119. *Ásatrúarfélagið v. Iceland* (dec.), no. 22897/08, § 34, 18 September 2012.

by other organisations for the carrying out of comparable activities. It further stated that whenever a State, in conformity with Articles 9 and 11 of the Convention, decides to retain a system where the State is constitutionally mandated to adhere to a particular religion, as is the case in some European countries, and provides benefits only to some religious entities and not to others in the furtherance of legally prescribed public-interest objectives, this must be done on the basis of reasonable criteria related to the pursuit of such objectives.

Freedom of association

Does the right to strike include a right to take secondary industrial action against an employer not party to a labour dispute? That was the question raised by the case of *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*¹²⁰. In the United Kingdom there has been a statutory ban on recourse by trade unions to secondary industrial action since 1980. The applicant union was thus unable to call upon its members employed in Company J. to take strike action in furtherance of industrial action taken by its members against Company H. Company J. was a separate entity, not involved in the dispute.

In the proceedings before the Court the applicant argued that the ban on secondary industrial action breached its rights under Article 11.

This was the first occasion on which the Court had to address the question whether the right to secondary action falls within the scope of Article 11. Both the Committee of Experts of the International Labour Organization (ILO) and the European Committee of Social Rights (the supervisory body of the European Social Charter) had already taken issue with the United Kingdom on its failure to recognise the right of trade unions to engage in industrial action against an employer who is not a party to a labour dispute.

The Court ruled that the applicant could rely on Article 11. Its reasoning was informed by the following considerations: firstly, secondary action was protected under the relevant ILO Convention and the European Social Charter, and it would be inconsistent with the position under those treaties as interpreted by their supervisory bodies to take a narrower view of the freedom of association. It observed that the Grand Chamber had recently confirmed in its *Demir and Baykara*

120. *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10, ECHR 2014.

*v. Turkey*¹²¹ judgment that the Court must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. Secondly, and with regard to the situation in other Contracting States, the Court observed that many of them had a long-established practice of accepting secondary strikes as a lawful form of trade-union action. The Court's conclusion is noteworthy in that it once again confirms its willingness to ensure comity between the interpretation of the scope of Convention rights and relevant international law, and to have regard to trends in Europe as a whole on the level of protection to be guaranteed to a particular substantive right.

The Court accepted that the statutory ban on secondary action interfered with the applicant's right to freedom of association on the facts relied on, and that the ban was prescribed by law and pursued a legitimate aim. On the latter point, it observed that the ban was aimed at protecting the rights and freedoms of others, which included not only the employer directly involved in the industrial dispute but also the interests of the persons, including members of the public, potentially affected by the disruption caused by secondary industrial action, which could be on a scale greater than primary strike action.

Turning to the existence or not of a "pressing social need" for enacting and preserving an outright ban on secondary action, the Court had to address the scope of the margin of appreciation afforded to the respondent State. It is noteworthy that the Court considered that it did not have to decide whether the right to strike itself should be viewed as an essential element of freedom of association, such that any restriction on the exercise of that right would impinge on the very essence of that freedom. What was important for the Court was the extent to which the applicant was able in the circumstances to vindicate the interests of its members notwithstanding the ban on taking industrial action against Company J. On the facts the applicant was able to exercise its labour rights with respect to Company H., the employer party to the dispute. The Court rejected the applicant's contention that Contracting States should only be accorded a very narrow margin of appreciation in this area. This was not a case in which the restriction imposed went to the very core of trade-union freedom, as would be the case with the dissolution of a union. The Court stressed that the breadth of the margin

121. *Demir and Baykara v. Turkey* [GC], no. 34503/97, ECHR 2008.

in cases such as the applicant's had to be assessed in the light of relevant factors such as the nature and extent of the impugned restriction, the aim pursued and the competing rights and interests of other individuals who were liable to suffer as a result of the unrestricted exercise of that right. The degree of common ground among the member States was also pertinent, likewise the existence of an international consensus as reflected in the relevant international instruments. This was the language of the above-mentioned case of *Demir and Baykara*. The margin was thus wide, notwithstanding that the United Kingdom was one of a small group of member States to hold out against the recognition of a right of secondary action in the field of industrial relations. The Court considered that its conclusion was not affected by the criticism levelled against the United Kingdom by the treaty bodies operating under the European Social Charter and the ILO Convention since their starting point for impugning the ban on secondary action was different. The Court's task was to determine whether on the facts of the applicant's case there had been a disproportionate restriction of their Article 11 right. The circumstances of the applicant's case showed that this had not been demonstrated. The applicant was able to represent its members, negotiate with Company H. on their behalf and organise a strike at their place of work.

The case illustrates the use which the Court makes of international and comparative law materials in assessing the scope of a substantive right and in defining the extent of a State's margin of appreciation when it comes to restricting the exercise of that right. It is interesting to note that the judgment makes varying use of the international and comparative materials. For example, the Court draws on them in order to conclude that Article 11 is applicable, but does not make the same use of the materials when it comes to the interpretation of the matter of a "pressing social need".

The Court concluded that the United Kingdom's margin of appreciation in relation to regulating the exercise of trade-union freedom should be a wide one, given that a country's industrial-relations policy formed part of its overall economic and social policy, the sensitive nature of these issues being generally accepted. The Court therefore considered that the choice of the legislature should be respected unless it manifestly lacked reasonable foundation. The Court held that there had been no violation of Article 11.

Right to form and join trade unions

The judgment in *Matelly v. France*¹²² concerned the prohibition on forming or joining professional associations imposed on members of the armed forces, including gendarmes. The applicant in the instant case, an officer attached to the gendarmerie, was required to resign his membership of an association which was considered by his superiors to be of a trade-union nature since it was intended to serve the professional interests of the gendarmerie. The applicant contended in the Convention proceedings that there had been an interference with his right to freedom of association guaranteed by Article 11. The Court found for the applicant.

This was the first time that the Court had had to address squarely the scope of the protection afforded by Article 11 to members of the armed forces. The Government drew attention, among other things, to the fact that Article 5 of the European Social Charter as interpreted by the European Committee of Social Rights authorised States to implement a ban on the formation of trade unions within the armed forces.

In line with its previous case-law (see, for example, *Demir and Baykara*¹²³, and *Sindicatul "Păstorul cel Bun"*¹²⁴, both cited above), the Court noted that lawful restrictions could be imposed on the exercise of trade-union rights by members of the armed forces, of the police or of the administration of the State. However, restrictions imposed on the three groups mentioned in Article 11 were to be construed strictly and should therefore be confined to the "exercise" of the rights in question. These restrictions could not impair the very essence of the right to organise, which included the right to form and join a trade union (see *Demir and Baykara*, §§ 97 and 144-45).

The Court accepted that the prohibition in the instant case had a basis in law and pursued a legitimate aim (the preservation of order and discipline within the armed forces). It acknowledged that restrictions – even major ones – could be imposed on the manner in which members of the armed forces exercise their right to form professional associations and protect their professional interests through such bodies. However, it considered that a total ban on the creation of professional associations, as in the instant case, could not be considered to be Article 11 compliant.

122. *Matelly v. France*, no. 10609/10, 2 October 2014.

123. *Demir and Baykara*, *supra* note 121.

124. *Sindicatul "Păstorul cel Bun"*, *supra* note 87.

Prohibition of discrimination (Article 14)¹²⁵

Article 14 in conjunction with Article 8

In *Hämäläinen*¹²⁶, cited above, the applicant's complaint under Article 14 related to her request for a female identity number and to the problems she had experienced in obtaining one. She compared her situation to that of cissexuals who had obtained legal gender recognition automatically at birth and whose marriages did not run the risk of "forced" divorce in the way that hers did. The Grand Chamber agreed with the Chamber that the applicant's situation and the situation of cissexuals were not sufficiently similar to be compared with each other. It therefore found no violation of Article 14 taken in conjunction with Articles 8 and 12.

The *Cusan and Fazzo v. Italy*¹²⁷ judgment concerned the inability of a mother to pass on her surname to her child. The applicants, a married couple, had requested unsuccessfully on the birth of their daughter that she be given her mother's surname only. The rule, to which no exceptions were allowed, provided that "legitimate children" were automatically given only their father's surname at birth, even where the parents had expressed a joint wish to the contrary.

In the applicants' view, the law should have allowed them to choose their child's surname. In the Convention proceedings they alleged a breach of Article 8, taken alone or in conjunction with Article 14.

The judgment dealt with the impossibility of having a newborn child entered in the civil register under the mother's surname, even with the agreement of her husband.

The Court noted that persons in similar situations, namely the child's father and her mother, had been treated differently. The choice of the surname of "legitimate children" was determined solely on the basis of discrimination on the ground of the parents' sex.

In its reasoning the Court stressed the importance of eliminating all discrimination on the ground of sex in the choice of surname (see, in particular, *Ünal Tekeli v. Turkey*¹²⁸). While the rule that the husband's surname was to be handed down to "legitimate children" could be

125. See also *Emel Boyraz*, *supra* note 83.

126. *Hämäläinen*, *supra* note 96.

127. *Cusan and Fazzo v. Italy*, no. 77107, 7 January 2014.

128. *Ünal Tekeli v. Turkey*, no. 29865/96, ECHR 2004-X (extracts).

necessary in practice and was not necessarily incompatible with the Convention, the fact that it was impossible to derogate from it when registering a child's birth was excessively rigid and discriminatory towards women. Accordingly, the Court found a breach of Article 14 taken in conjunction with Article 8.

Article 14 in conjunction with Article 9

The judgment in *The Church of Jesus Christ of Latter-Day Saints v. the United Kingdom*¹²⁹ dealt with the refusal of a request by a religious organisation for exemption from local rates.

In 2001 the Church applied to have one of its two Mormon temples in the United Kingdom removed from a list of premises liable to pay business rates, on the grounds that it was a “place of public religious worship” which was eligible for exemption. Its application for exemption was refused on the ground that the temple did not qualify as a “place of public religious worship”, since access was restricted to a select group of the most devout followers holding a special authorisation.

The applicant complained that the refusal to exempt the temple from business rates amounted to discrimination on religious grounds, in breach of Article 14 taken in conjunction with Article 9.

The judgment is noteworthy in that it deals with an aspect of fiscal policy regarding religious organisations, and in particular the use of tax exemptions to promote public access to religious centres.

The Court observed that while States had a wide margin of appreciation in this sphere it was still necessary to ensure that the measure was not disproportionate, given the importance of maintaining religious pluralism.

The applicant Church's places of worship that were open to the public, such as its chapels, were exempted from payment of the rates in question. Hence, the refusal of exemption related only to the temple itself, which nevertheless benefited from an 80% reduction. Furthermore, the legislation was neutral, being the same for all religious groups with regard to the manifestation of religious beliefs in private, and producing exactly the same negative consequences for all the religious bodies concerned. Lastly, the amount at stake was relatively low and the impact of the measure was not comparable to the detriment suffered by applicants in other cases.

129. *The Church of Jesus Christ of Latter-Day Saints v. the United Kingdom*, no. 7552/09, 4 March 2014.

The Court concluded that the national authorities had acted within the margin of appreciation available to them in such situations. Accordingly, there had been no violation of Article 14 read in conjunction with Article 9.

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

Enjoyment of possessions

The judgment in *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*¹³⁰ concerned the inability of the three applicants, all nationals of Bosnia and Herzegovina, to withdraw “old” foreign-currency savings, deposited before the dissolution of the former Socialist Federal Republic of Yugoslavia (“the SFRY”) in what is now Bosnia and Herzegovina, with Ljubljanska Banka Sarajevo and the Tuzla branch of Investbanka.

With the 1989-90 banking reforms, Ljubljanska Banka Sarajevo became a branch of Ljubljanska Banka Ljubljana (a Slovenian-based bank) and Investbanka became an independent bank with its headquarters in Serbia and a number of branches, including the above-mentioned Tuzla branch. Massive withdrawals of foreign currency from commercial banks prompted the SFRY to take emergency measures to restrict such withdrawals.

After the dissolution of the SFRY in 1991-92, the successor States took over the former State’s liability for “old” foreign-currency savings in varying degrees but the applicants’ savings remained frozen. The situation in Bosnia and Herzegovina was for some time unclear. The successor States failed to reach an agreement on this matter despite four rounds of negotiations on succession issues.

Against this complex factual and legal background raising civil-law and public international-law issues, the Court found, under the first rule contained in Article 1 of Protocol No. 1, that it was not disputed that the applicants’ inability to withdraw their savings, at least since the dissolution of the SFRY, had a legal basis in domestic law. Moreover, following the dissolution of the SFRY and the subsequent armed conflicts, the aim initially pursued by the respondent Governments had been legitimate, as they had to take measures to protect their banking systems.

130. *Ališić and Others*, *supra* note 2.

As to whether the authorities had struck a fair balance between the general interest of the community and the protection of the applicants' property rights, the Court noted that domestic courts in Slovenia and Serbia continued to consider Ljubljanska Banka Ljubljana and Investbanka liable for the "old" foreign-currency savings in all their branches, including those in Bosnia and Herzegovina. Both banks were State-owned and controlled by State agencies. Slovenia had transferred most of Ljubljanska Banka Ljubljana's assets to a new bank in 1994 by virtue of a legislative amendment. There was also evidence indicating that most of the funds of the Sarajevo branch of Ljubljanska Banka Ljubljana had ended up in Slovenia. For its part, Investbanka had been required by a 2001 law to write off considerable claims against State-owned and socially-owned companies. The Court therefore considered that there had been sufficient grounds to deem Slovenia and Serbia respectively responsible for the applicants' debts. It emphasised that its conclusions were limited to the circumstances of the present case, related to the dissolution of the SFRY and to the State or social ownership of the banks, and did not imply that no State would ever be able to rehabilitate a failed bank without incurring direct responsibility for the bank's debt under Article 1 of Protocol No. 1. Nor did that provision require that foreign branches of domestic banks always be included in domestic deposit-guarantee schemes.

The Court finally examined whether there had been any good reason for the failure of the Slovenian and Serbian Governments to repay the applicants for so many years. The Governments' explanation for the delay was essentially that the international law on State succession required only negotiation in good faith, without imposing any time-limits for a settlement. They also argued, on the basis of the territoriality principle, that liability for the debts lay with Bosnia and Herzegovina. In the Court's view, however, the governing principle of the international law on State succession so far as State debts were concerned was that of "equitable proportion" since the applicants' savings did not belong to the category of local debts to which the territoriality principle applied. Accordingly, in the absence of an agreement between the successor States, the State debts should have been divided equitably. However, that would require a global assessment of the property and debts of the former State and the size of the portions thus far attributed to each of the successor States. That went far beyond the scope of the instant case and was outside the Court's competence.

Nevertheless, the succession negotiations had not prevented the States from adopting measures at national level to protect the interests

of savers. Indeed, solutions had been found in Slovenia and Serbia as regards some categories of “old” foreign-currency savers. Whereas some delays might be justified in exceptional circumstances, the applicants had been kept waiting too long and, notwithstanding the Governments’ wide margin of appreciation, Slovenia and Serbia had not struck a fair balance between the general interest of the community and the property rights of the applicants, who had borne a disproportionate burden. The Court therefore found a violation of Article 1 of Protocol No. 1 by both Slovenia and Serbia, but no violation by the other respondent States.

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

The judgment in *Velyo Velev v. Bulgaria*¹³¹ raised the issue as to whether a prison school falls within the scope of Article 2 of Protocol No. 1. The applicant was a remand prisoner. His requests to be allowed to attend the prison school in order to complete his secondary education were refused, first by the prison authorities and ultimately by the Supreme Administrative Court.

The Court reiterated that Article 2 of Protocol No. 1 did not place an obligation on Contracting States to organise educational facilities for prisoners where such facilities were not already in place (see, for example, *Epistatu v. Romania*¹³²). However, the applicant’s complaint concerned the refusal to grant him access to a pre-existing educational institution, namely the prison school. Since this was a pre-existing educational institution within the meaning of the Court’s case-law (see *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”*¹³³ and, more recently, *Catan and Others v. the Republic of Moldova and Russia*¹³⁴), the right asserted by the applicant fell within the scope of Article 2 of Protocol No. 1.

The Court examined whether the impugned restriction was compatible with Article 2 of Protocol No. 1, having regard among other things to the relevant legal instruments adopted by the Committee of Ministers of the Council of Europe in this area. In the circumstances,

131. *Velyo Velev v. Bulgaria*, no. 16032/07, ECHR 2014 (extracts).

132. *Epistatu v. Romania*, no. 29343/10, § 63, 24 September 2013.

133. *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”* (merits), 23 July 1968, pp. 30-31, §§ 3-4, Series A no. 6.

134. *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, § 137, ECHR 2012 (extracts).

it concluded that the Government had provided neither practical reasons, for example based on lack of resources at the school, nor a clear explanation as to the legal grounds for the restriction. On the evidence before it, the Court did not find that the refusal to enrol the applicant in the prison school was sufficiently foreseeable, nor that it pursued a legitimate aim and was proportionate to that aim. There had therefore been a violation of Article 2 of Protocol No. 1.

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

The decision in *Mihaela Mihai Neagu v. Romania*¹³⁵ concerned the refusal of a candidature for the European Parliament elections. In June 2009 the applicant, an independent candidate, was unable to participate in the European elections in Romania because she had not obtained the 100,000 signatures of support required by Romanian law. Having obtained 15,000 signatures, she appealed against the refusal, arguing that the number of signatures was excessively high for an independent candidate and had prevented her from standing for election. Her appeal was dismissed.

This decision is noteworthy since it relates to the conditions governing the right to stand for election to the European Parliament and refers to the relevant legal materials of the European Union and the European Commission for Democracy through Law of the Council of Europe (the Venice Commission).

The Court noted that the impugned electoral legislation transposed into domestic law provisions of European Union law on the election of members of the European Parliament. European Union law left considerable latitude to the member States in establishing the criteria governing eligibility to stand for election to the European Parliament. The number of signatures required under Romanian law in relation to the number of registered voters did not exceed the maximum recommended by the Venice Commission. The impugned requirement could not, therefore, be considered excessive. The applicant had had an effective remedy in domestic law. Lastly, the decisions of the domestic courts, which had been given at final instance before the elections were held, had not been arbitrary. The Court concluded that the eligibility requirement concerning the number of signatures needed

135. *Mihaela Mihai Neagu v. Romania* (dec.), no. 66345/09, 6 March 2014.

had not infringed the applicant's right to stand as a candidate in the European elections.

The applicant in *Karimov v. Azerbaijan*¹³⁶, a candidate defeated in the 2005 parliamentary elections, complained about the manner in which the domestic authorities had rejected his challenge to the creation of special polling stations in his constituency for military personnel. Under the Electoral Code, military personnel were required to vote in ordinary polling stations. By way of exception to the general rule, arrangements could be made to enable them to cast their votes in military polling stations provided that the military unit was located outside a populated area, the travel time by public transport to the nearest ordinary polling station exceeded one hour and the total number of servicemen concerned exceeded fifty. Before the domestic courts, the applicant contended that these conditions had not been met since the units were located in a populated area within a short walking distance of the ordinary polling stations established in his constituency. In rejecting his complaint the domestic court observed that the applicant had failed to adduce reliable evidence of any irregularity. Before the Court, the applicant relied on Article 3 of Protocol No. 1 to the Convention.

The case is noteworthy in that the Court analysed the scope of its jurisdiction to review domestic authorities' compliance with their electoral law. It observed that in cases where it was alleged that the breach of the domestic legal rules was such that it seriously undermined the legitimacy of the election as a whole, Article 3 of Protocol No. 1 required it to assess whether there had been a breach resulting in a failure to hold free and fair elections. If this matter had been assessed by the domestic courts, the Court could confine its own review to whether or not the domestic courts' finding was arbitrary.

In the instant case, the Court noted that the conditions for the establishment of the military polling stations in the applicant's constituency had clearly not been met and voting in those polling stations had therefore been unlawful. The fact that the results from those polling stations were taken into account by the electoral authorities and aggregated with the legitimate votes cast in other polling stations, with a significant impact on the overall election result, was in breach of the integrity of the entire election process in the applicant's constituency.

136. *Karimov v. Azerbaijan*, no. 12535/06, 25 September 2014.

As to the assessment made by the domestic court, the Court found it impossible to see what other “reliable evidence” the applicant could have been expected to submit to show that there were no lawful grounds for creating special polling stations for military voting. It observed that the conduct of the electoral commissions and courts in the present case and their respective decisions revealed an apparent lack of genuine concern for upholding the rule of law and protecting the integrity of the election.

Freedom of movement (Article 2 of Protocol No. 4)

In the *Battista v. Italy*¹³⁷ judgment, the applicant was denied a passport and an identity document on account of his failure to comply with domestic-court decisions ordering him to pay maintenance to his children. The restrictions imposed on his freedom to leave Italy were based on the risk that, if he were to move to another country, he would avoid payment. The measures had been in force since 2008.

In the Convention proceedings, the applicant complained that the circumstances of his case gave rise to a breach of Article 2 of Protocol No. 4 to the Convention. The essential issue before the Court concerned the proportionality of the measure.

The Court had not previously addressed the operation of Article 2 of Protocol No. 4 in such circumstances. The case therefore raised a novel point. The judgment was noteworthy as regards both the Court's response to the applicant's specific grievance and its more or less exhaustive overview of the existing case-law under that provision.

In applying the doctrine of proportionality to the complaint, the Court gave weight to the fact that the decision to refuse the applicant a passport and an identity document was an automatic response to his failure to discharge his civil obligations. The restriction was without limit in time and absolute in its reach. No consideration had been given to the competing interests at stake, and how they should be balanced. The Court noted that the domestic authorities had failed to have regard to the existence of several international instruments which were specifically designed to enable arrears of child maintenance to be recovered from individuals who had fled the jurisdiction concerned. It was of particular significance for the Court that the domestic courts in the respondent State had never scrutinised the continuing justification for the measure, which had been in place since 2008.

137. *Battista v. Italy*, no. 43978/09, 2 December 2014.

OTHER CONVENTION PROVISIONS

Just satisfaction (Article 41)

The judgment in the case of *Cyprus v. Turkey*¹³⁸ concerned the situation in northern Cyprus since Turkey carried out military operations there in July and August 1974, and the continuing division of the territory of Cyprus since that time.

In its Grand Chamber judgment delivered on 10 May 2001 the Court found numerous violations of the Convention by Turkey arising out of the military operations it had conducted in northern Cyprus in July and August 1974, the continuing division of the territory of Cyprus and the activities of the “Turkish Republic of Northern Cyprus”. Regarding the issue of just satisfaction, the Court held unanimously that it was not ready for decision and adjourned its consideration *sine die*. The procedure for execution of the principal judgment is still pending before the Committee of Ministers.

In 2007 the Cypriot Government informed the Court that they intended to submit a request to the Grand Chamber for it to resume consideration of the possible application of Article 41. In 2010 the Cypriot Government submitted to the Court their claims for just satisfaction concerning the missing persons in respect of whom the Court had found a violation of Articles 2, 3 and 5 of the Convention. Later, they made slight changes to their claims under Article 41 concerning the missing persons, and raised claims in respect of the violations committed against the enclaved Greek-Cypriot residents of the Karpas peninsula.

The Court’s judgment of 12 May 2014 is interesting in several respects. Firstly, the Court had to respond to the plea of inadmissibility raised by the Turkish Government, who argued that the claims submitted by Cyprus approximately nine years after the judgment on the merits should be declared inadmissible as being out of time. In that connection the Court reiterated that the provisions of the Convention could not be interpreted and applied in a vacuum, and that it was an

138. *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, ECHR 2014.

international treaty to be interpreted in accordance with the relevant norms and principles of public international law. Referring to the judgment of the International Court of Justice in the case of *Certain Phosphate Lands in Nauru (Nauru v. Australia)*¹³⁹, the Court acknowledged that general international law did, in principle, recognise the obligation of the applicant Government to act without undue delay in order to uphold legal certainty and not to cause disproportionate harm to the legitimate interests of the respondent State. Hence, even though the Convention itself was silent on this point, it was not ruled out that a just-satisfaction claim of this nature might be dismissed as being out of time. Nevertheless, in the specific circumstances of the case, the Court took the view that the attitude of the Cypriot Government during the period in question did not justify dismissing the claims.

Secondly, the Court was called upon for the first time to answer the question whether Article 41 of the Convention was applicable to inter-State cases. Basing its findings on the *travaux préparatoires* to the Convention, it considered that the overall logic of Article 41 was not substantially different from the logic of reparations in public international law. The Court therefore held that Article 41 did indeed apply, as such, to inter-State cases. However, the question whether granting just satisfaction to an applicant State was justified had to be assessed and decided by the Court on a case-by-case basis.

In that connection the Court drew a distinction between two types of complaint that might be raised in an inter-State application. The first type was where a State complained of general issues (such as systemic problems and shortcomings, or administrative practices) in another Contracting Party. In such cases the primary goal of the applicant Government was that of vindicating the public order of Europe, and it might not be appropriate in such circumstances to make an award of just satisfaction under Article 41. In the second category of complaint, a State denounced violations by another Contracting Party of the basic rights of its nationals or certain identified or identifiable individuals. This type of complaint was akin to the filing of claims in the context of diplomatic protection under international law, and an award of just satisfaction might be appropriate provided it was done for the benefit of individual victims and not for the benefit of the applicant Government.

139. *Nauru v. Australia (Certain Phosphate Lands in Nauru)*, 26 June 1992.

In the present case the Court considered that the Cypriot Government's claims fell into the second category defined above, and decided to award aggregate amounts of thirty million euros in respect of the non-pecuniary damage suffered by the surviving relatives of the missing persons, and sixty million euros in respect of the non-pecuniary damage suffered by the enclaved residents of the Karpas peninsula. The Court also specified that the amounts in question were to be distributed by the applicant Government to the individual victims of the violations in question. It considered that it should be left to the Cypriot Government, under the supervision of the Committee of Ministers, to set up an effective mechanism to distribute the above-mentioned sums. Lastly, it held that distribution was to take place within eighteen months from the date of the payment or within any other period considered appropriate by the Committee of Ministers.

Pecuniary damage

In its judgment in the case of *Vistiņš and Perepjolkins v. Latvia*¹⁴⁰, the Court ruled on the question of just satisfaction following a principal judgment in which it had found a violation of Article 1 of Protocol No. 1¹⁴¹. In the principal judgment the Court considered that the compensation awarded to the applicants for the expropriation of their land had been disproportionately low, and that Latvia had overstepped its margin of appreciation and upset the fair balance to be struck between the protection of property and the demands of the general interest.

The interest of the Grand Chamber judgment lies in the method of calculating the amount to be awarded to the applicants in respect of pecuniary damage, and especially in the recourse to equitable considerations.

Unlike the case of *Guiso-Gallisay v. Italy*¹⁴², which concerned expropriations that were intrinsically unlawful, the violation found in the present case concerned an unjustified lack of proportion between the official cadastral value of the properties and the compensation awarded. The Court concluded that the amount to be awarded to the applicants in respect of pecuniary damage did not have to reflect the idea of a

140. *Vistiņš and Perepjolkins v. Latvia* (just satisfaction) [GC], no. 71243/01, ECHR 2014.

141. *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, 25 October 2012.

142. *Guiso-Gallisay v. Italy* (just satisfaction) [GC], no. 58858/00, 22 December 2009.

total elimination of the consequences of the impugned interference, or the full value of the property. The Court deemed it appropriate to fix sums that were “reasonably related” to the market value of the plots of land at the time the applicants lost their property. It added that, in the light of the specific circumstances of the case, it should have recourse to equitable considerations in calculating the relevant sums. The Court recalled its findings in the principal judgment to the effect that the Latvian authorities had been justified in deciding not to compensate the applicants for the full market value of the expropriated property and that much lower amounts could suffice to fulfil the requirements of Article 1 of Protocol No. 1, for various reasons related to the specific characteristics of the situation in issue. The Court thus considered it equitable to reduce by 75% the figure corresponding to the value per square metre of land. The resulting sum to be taken as the basis for calculating the award in respect of pecuniary damage was reduced by the amounts already paid to the applicants by way of compensation at domestic level. The Court then adjusted the sums to offset the effects of inflation, and added statutory interest.

Binding force and execution of judgments (Article 46)

Execution of judgments

In its judgment in *Kurić and Others v. Slovenia*¹⁴³, the Court ruled on the question of just satisfaction following the principal judgement delivered in 2012 in which it found a violation of Article 8, Article 13 taken in conjunction with Article 8, and Article 14 taken in conjunction with Article 8¹⁴⁴. The case concerned the situation of persons who had been “erased” from the register of permanent residents following Slovenian independence.

The judgment is interesting in that it relates to the measures adopted by the respondent State in the wake of a pilot judgment, and in particular to the respective roles of the Court, the State in question and the Committee of Ministers of the Council of Europe.

In its principal judgment the Court decided to apply the pilot-judgment procedure and indicated to the respondent State that it

143. *Kurić and Others*, *supra* note 1.

144. *Kurić and Others v. Slovenia* [GC], no. 26828/06, ECHR 2012 (extracts).

should set up an *ad hoc* domestic compensation scheme within one year of delivery of the judgment, in order to afford adequate redress to the individuals whose names had been removed unlawfully from the register of permanent residents.

The Grand Chamber noted that the Government had not set up such a scheme by the date on which the one-year period referred to in the judgment on the merits expired. However, it stressed that the Government had not disputed that general measures at domestic level were required in order to take into account the interests of other “erased” persons in addition to the applicants in the case. In that context the Court had due regard to the fact that an Act on the setting up of an *ad hoc* compensation scheme had been passed and had come into force. That statute provided for compensation on the basis of a lump sum for each month of a person’s “erasure” as well as a possibility of claiming additional compensation under the general provisions of the Code of Obligations. The Court considered in the exceptional circumstances of the case that the solution of simply awarding compensation to the “erased” persons on the basis of a lump sum in respect of pecuniary and non-pecuniary damage – which was the approach it had adopted in respect of pecuniary damage in the present judgment and in respect of non-pecuniary damage in the principal judgment – appeared to be appropriate.

According to the principle of subsidiarity and the margin of appreciation which goes with it, the amounts of compensation awarded at national level to other adversely affected persons in the context of general measures under Article 46 of the Convention are at the discretion of the respondent State, provided that they are compatible with the Court’s judgment ordering those measures. By virtue of Article 46, it is for the Committee of Ministers to evaluate the general measures adopted by the Republic of Slovenia and their implementation as far as the supervision of the execution of the Court’s principal judgment is concerned.

General measures¹⁴⁵

In *Cusan and Fazzo*¹⁴⁶, cited above, the Court found a violation of Article 14 taken in conjunction with Article 8 on account of a flaw in the domestic legal system that required every “legitimate child” to be

145. See also *Kim v. Russia*, no. 44260/13, 17 July 2014.

146. *Cusan and Fazzo*, *supra* note 127.

entered in the register of births, marriages and deaths with the father's surname, without the option of derogation even where the parents had agreed to use the mother's surname. It is the Court's practice when it finds a shortcoming in a national legal system to identify its source in order to assist the Contracting State in finding the appropriate solution and the Committee of Ministers in supervising execution of the judgment.

In the present case the Court considered that the State should reform the domestic legislation and/or practice in order to ensure their compatibility with its findings in the judgment and secure compliance with the requirements of Articles 8 and 14 of the Convention.

Individual measures

In *Grande Stevens and Others v. Italy*¹⁴⁷, an independent stock-exchange supervisory body imposed a fine on the applicants which was classified as an administrative penalty in domestic law. The applicants were accused of market manipulation in connection with a financial operation. The order imposing the fines became final. In view of the level of the fines that were or could have been imposed, the Court considered that the sanctions were of a criminal nature for the purposes of Article 6 § 1 of the Convention. Proceedings were also brought in the Italian criminal courts concerning the same persons and the same facts as had already been the subject of a final conviction. The Court therefore found a violation of Article 4 of Protocol No. 7 to the Convention, which enshrined the *ne bis in idem* principle¹⁴⁸.

The interest of the judgment lies in the individual measure indicated to the respondent State by the Court with a view to remedying the violation of Article 4 of Protocol No. 7. The Court indicated, both in its reasoning and in the operative provisions, that the respondent State should ensure that the fresh criminal proceedings brought against the applicants in violation of that Convention provision, and which according to the most recent information received were still pending, were closed as rapidly as possible and without adverse consequences for the applicants.

147. *Grande Stevens and Others v. Italy*, nos. 18640/10 et al., 4 March 2014.

148. *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, ECHR 2009.

In the case of *Kim*, cited above, the applicant, a stateless person, was arrested for not being in possession of an identity document. He was found guilty of an administrative offence and placed in a detention centre for aliens pending his expulsion. Various attempts were made to have the applicant removed to Uzbekistan. However, the Uzbek authorities failed to respond to inquiries about the issuance of a travel document to the applicant. The applicant was eventually released from the detention centre following the expiry of the maximum two-year period. The Court found a breach of Article 3 (conditions in the detention centre) and Article 5 § 1 (lack of any realistic prospect of securing the applicant's removal and failure to conduct the proceedings with the required diligence) and Article 5 § 4 (no procedure for judicial review of the continuing lawfulness of the applicant's detention).

The judgment is noteworthy for the Court's use of Article 46 of the Convention with regard to a stateless person. The Court was concerned that the applicant, a stateless person with no identity documents and no fixed abode, might possibly be exposed to the same ordeal following his release from detention. It observed that the respondent Government should avail itself of the necessary tools and procedures in order to prevent the applicant from being rearrested and put in detention for the offences resulting from his status as a stateless person. It noted that it was for the Committee of Ministers to supervise, on the basis of the information provided by the respondent State and with due regard to the applicant's evolving situation, the adoption of such measures that were feasible, timely, adequate and sufficient to ensure the maximum possible reparation for the violations found by the Court (with reference to the judgment in *Savridin Dzhurayev v. Russia*¹⁴⁹). The Court also indicated the nature of the general measures which were to be adopted in order to address the shortcomings identified under Article 3 and Article 5 §§ 1 and 4 of the Convention.

The judgment in *Ataykaya v. Turkey*¹⁵⁰ concerned a death in the course of a demonstration as a result of a tear-gas canister being fired (Article 2 of the Convention). The Court held that there had been a violation of

149. *Savridin Dzhurayev v. Russia*, no. 71386/10, § 255, ECHR 2013 (extracts).

150. *Ataykaya v. Turkey*, no. 50275/08, 22 July 2014.

the right to life¹⁵¹. It also found that that no meaningful investigation had been carried out into the incident. In particular, it noted that the police practice of wearing balaclavas with no distinguishing mark had made it impossible to identify the officers suspected of firing the tear-gas canisters improperly with the direct result that they had received immunity from prosecution. As regards execution of its judgment, the Court noted that the investigation was still open at domestic level and indicated that new investigative measures should be taken under the supervision of the Committee of Ministers. In particular, the domestic authorities were required to take measures to combat impunity, including an effective criminal investigation aimed at the identification and, if appropriate, punishment of those responsible for the death in question.

The application in the case of *Amirov v. Russia*¹⁵² was lodged by a prisoner who was paralysed and had other serious health problems. The Court had issued an interim measure under Rule 39 of the Rules of Court requiring the Russian Government to arrange for the applicant to be examined by independent medical experts to determine whether the medical treatment he was receiving in the detention facility was adequate and whether his condition was compatible with detention or required his admission to hospital. It found however that, in breach of Article 34 of the Convention, the State had failed to comply with this measure as instead of an independent medical assessment the Government had provided its own assessment of the applicant's condition. The Court went on to find a breach of Article 3 on account of the inadequate medical treatment the applicant had received in prison. The point to note in the judgment is the indication of an individual measure to remedy the consequences of the violation of the applicant's rights. The domestic authorities were required to take special measures to ensure the applicant receives the requisite level of medical supervision and care and to regularly reassess the applicant with the assistance of independent medical experts.

Obligation to furnish all necessary facilities (Article 38)

In the case of *Georgia v. Russia (no. 1)*¹⁵³, cited above, the Russian Government had refused to provide the Court with copies of two

151. See also *Abdullah Yaşa and Others v. Turkey*, no. 44827/08, 16 July 2013.

152. *Amirov v. Russia*, no. 51857/13, 27 November 2014.

153. *Georgia v. Russia (no. 1)*, *supra* note 13.

circulars issued by the authorities at the end of September 2006 on the ground that they were classified materials whose disclosure was forbidden under Russian law. The Court had already found in a series of previous cases relating to documents classified “State secret” that respondent Governments could not rely on provisions of national law to justify a refusal to comply with a request of the Court to provide evidence. In any event, the Russian Government had failed to give a specific explanation for the secrecy of the circulars and, even assuming that there were legitimate security interests for not disclosing the circulars, possibilities existed under Rule 33 § 2 of the Rules of Court to limit public access to disclosed documents, for example through assurances of confidentiality. The Court therefore found that Russia had fallen short of its obligation to furnish all necessary facilities to assist the Court in its task of establishing the facts of the case¹⁵⁴.

154. See also the *Al-Nashiri* judgment, *supra* note 6, in which the Court dismissed the Government’s argument that it was for the Court itself to request permission from the relevant domestic authorities to obtain the documents it sought, subject to the procedures provided for in domestic law.

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Cases are listed alphabetically by applicant. By default, all references are to Chamber judgments. Grand Chamber cases, whether judgments or decisions, are indicated by “[GC]”. Decisions are indicated by “(dec.)”. Chamber judgments that are not yet “final” within the meaning of Article 44 of the Convention are marked “(not final)”.

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