

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

## 2015



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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

Among the matters the Court was called upon to examine in 2015 were the absence of an adequate legal framework to ensure the accountability of members of the security forces guilty of torture and other ill-treatment (*Cestaro*), the point in time when applications for conditional release had to be considered by a judge (*Magee and Others*), and problems relating to the execution of court judgments concerning rehousing (*Tchokontio Happi*) and concerning a parent's right to contact with his child (*Kuppinger*).

The Court also looked at the right to commercial speech in the context of the right to private life (*Bohlen*), the conditions imposed on an applicant seeking gender reassignment surgery (*Y.Y. v. Turkey*), the rights of the defence and the protection of victims' interests (*Y. v. Slovenia*), the protection of medical data on the admission of an HIV-positive patient to hospital (*Y v. Turkey*), the refusal to recognise marriage to a minor (*Z.H. and R.H. v. Switzerland*) and the question of protection against discriminatory attacks (*Identoba and Others*).

Further issues considered by the Court during the course of the year included protection against domestic violence (*M. and M. v. Croatia*), the notion of "equivalent protection" afforded by an international organisation (*Klausecker*), the prevention of terrorism (*Sher and Others*), the protection of reputation/private life (*Perinçek, Kharlamov and Haldimann and Others*), the right to receive and impart information (*Delfi AS, Guseva and Cengiz and Others*), the right to strike (*Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.)*) and the expulsion of aliens (*Z.H. and R.H. v. Switzerland*).

More specifically, the Court developed its case-law on subparagraph (f) of Article 5 § 1 in the case of an extradition request concerning a person facing charges in the requesting state (*Gallardo Sanchez*), and under Article 6 § 1 in a case where the domestic law made the right to bring a civil action dependent on a prior attempt to settle the claim (*Momčilović*). The Court also gave some indication as regards measures a member State may be required to take in certain situations in order to ensure creditors are able to participate in insolvency proceedings (*Zavodnik*).

For the first time the Court had to consider the annulment of an adoption order in a context where the adoptive parent was dead and the adoptee had long since reached adulthood (*Zaiet*). In addition, and also for the first time, the Court addressed the use by journalists of a hidden camera to record a private individual's conduct with a view to drawing attention to a matter of public interest (*Haldimann and Others*). Procedural rules on appeal which directly affected the right to liberty was another novel issue examined by the Court (*Ruslan Yakovenko*).

Other important cases concerned the armed forces (*Mustafa Tunç and Fecire Tunç, Lyalyakin and Chitos*), prisons (*Khoroshenko and Szafranski*), religion (*Karaahmed and Ebrahimian*), nationality (*Petropavlovskis*) and the banking (*Adorisio and Others and M.N. and Others v. San Marino*), social welfare (*Fazia Ali*), medical (*Lambert and Others, Parrillo, Bataliny, Elberte, Constancia and Y v. Turkey*), education (*Memlika*) and electoral (*Dicle and Sadak and Riza and Others*) sectors. The Court also examined cases involving a lack of legal recognition for homosexual couples (*Oliari and Others*) and the limits of freedom of artistic expression (*M'Bala M'Bala*).

A number of cases during the year concerned the role of lawyers. Among the issues considered were the question of assistance at a preliminary stage of the proceedings (*Dvorski and A.T. v. Luxembourg*), restrictions on a lawyer's ability to provide effective legal representation (*M.S. v. Croatia (no. 2)* and *Vamvakas (no. 2)*), as well as the limits of acceptable criticism by lawyers of judges (*Morice*) and sworn experts (*Fuchs*). The Court also gave judgment in a case concerning the covert surveillance of consultations between a lawyer and a suspect at a police station (*R.E. v. the United Kingdom*).

The Court reaffirmed the need to respect the best interests of the child (*Penchevi, Zaiet and Nazarenko*) and considered issues relating to the hearing of a child's views in custody proceedings (*M. and M. v. Croatia*) and the protection of a child's proprietary interests (*S.L. and J.L. v. Croatia*).

The Grand Chamber delivered twenty-two judgments and one decision in 2015. It considered the notion of "jurisdiction" within the meaning of Article 1 of the Convention in cases concerning the control of Nagorno-Karabakh and surrounding territories (*Chiragov and Others and Sargsyan*). It considered the State's positive obligation to protect life, read in the light of the individual's right to respect for his or her private life and the notion of personal autonomy which that right encompassed (*Lambert and Others*). It clarified its case-law on the

difference between the requirement of independence applicable to investigations under Article 2 of the Convention and to tribunals within the meaning of Article 6 § 1 (*Mustafa Tunç and Fecire Tunç*). It developed its case-law on the protection afforded by Article 3 of the Convention and the notion of degrading treatment in custody (*Bouyid*).

The Grand Chamber refined its case-law governing the applicability of Article 6 § 1 to extraordinary-appeal procedures (*Bochan (no. 2)*). It confirmed the different tests to be applied to a refusal of legal assistance of one's own choosing for a first interrogation with the police and to the absence of any lawyer from the first interview (*Dvorski*). It also clarified the conditions applicable for the admission in evidence at trial of the untested statements of prosecution witnesses to be Convention compliant (*Schatschaschwili*).

The Grand Chamber explained the requirement of impartiality as regards courts of last instance (*Morice*) and gave judgment in cases under Article 7 (*Rohlena* and *Vasiliauskas*). It examined restrictions on prison visits by family members (*Khoroshenko*) and a system of covert interception of mobile-telephone communications (*Roman Zakharov*).

For the first time the Court examined the prohibition on the donation of embryos to scientific research following *in vitro* fertilisation (*Parrillo*). It was also the first time it considered the duties and responsibilities of an Internet news portal providing, for financial gain, a platform for user comments, made anonymously and without preregistration (*Delfi AS*).

The Grand Chamber also clarified the principles applicable when weighing freedom of expression against the right to respect for private life (*Couderc and Hachette Filipacchi Associés*). It developed its case-law on the extent of the protection afforded by Article 10 to journalists covering demonstrations and on the journalists' obligations (*Pentikäinen*). It clarified the limits of the protection afforded by Article 11 to persons who voluntarily and seriously disrupt the course of the daily life of others to draw attention to a particular issue (*Kudrevičius and Others*). It also examined the scope and applicability of Article 16 (*Perinçek*) and the question of the applicability of Article 17 (*Perinçek*).

With respect to Article 34 of the Convention, the Court examined an applicant's standing to complain in the name and on behalf of a close relative who was in a state of total dependence (*Lambert and Others*), as well as the victim status of journalists (*Dilipak*) and of persons subject to covert surveillance (*Roman Zakharov*).

The case-law also explores the interaction between the Convention and European Union law, for example, as regards the exhaustion of domestic remedies following a judgment of the Court of Justice of the European Union (*Laurus Invest Hungary KFT and Others*). It also demonstrates the interaction between the Convention and international law, for example, regarding genocide (*Vasiliauskas*), and includes a number of references to international instruments and decisions of international courts and Council of Europe norms (*Perinçek* and *Khoroshenko*, for example).

The Court has given further guidance on the width of the margin of appreciation (*Morice, Parrillo* and *Kudrevičius and Others*, among others) to be given to the member States and on their positive obligations (*Lambert and Others, M. Özel and Others, Vamvakas (no. 2)* and *M. and M. v. Croatia*) under the Convention.

With respect to the execution of judgments the Court reiterated the importance of providing procedures at national level enabling a case to be reopened following a finding of a violation by the Court of the right to a fair trial guaranteed by Article 6 of the Convention (*Bochan (no. 2)*).

# JURISDICTION AND ADMISSIBILITY

## Jurisdiction of States (Article 1)

The case of *Chiragov and Others v. Armenia*<sup>1</sup> concerned the jurisdiction of Armenia as regards Nagorno-Karabakh and the adjacent occupied territories and the consequent Convention responsibility for the violations alleged by Azerbaijani Kurds displaced therefrom.

The six applicants were Azerbaijani Kurds who had been unable to return to their homes and property in the district of Lachin in Azerbaijan since fleeing the Armenian-Azerbaijani conflict over Nagorno-Karabakh in 1992.

This was the first time the Court decided on whether Armenia could be considered to exercise effective control of Nagorno-Karabakh and the occupied surrounding regions.

The Court found that Armenia exercised effective control over Nagorno-Karabakh and the seven adjacent occupied territories and thus had jurisdiction over the district of Lachin from where the applicants had fled.

In order to determine whether Armenia had such “effective control”, the Court applied its case-law concerning the exercise of extraterritorial jurisdiction, notably, by the Russian Federation in Transdniestria and by the United Kingdom in Iraq (*Ilaşcu and Others v. Moldova and Russia*<sup>2</sup>; *Catan and Others v. the Republic of Moldova and Russia*<sup>3</sup>; and *Al-Skeini and Others v. the United Kingdom*<sup>4</sup>). That case-law provides that effective control depends primarily on military involvement, but also on other indicators (including economic and political). Not only did Armenia deny any military presence in the relevant areas (whether in 1992 or thereafter), but the Court accepted that there was no direct conclusive evidence before it of such presence. The Court rather relied

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1. *Chiragov and Others v. Armenia* [GC], no. 13216/05, ECHR 2015. See also *Sargsyan v. Azerbaijan* [GC], no. 40167/06, ECHR 2015.

2. *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII.

3. *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and others, ECHR 2012.

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

on certain assumptions: for example, that a defence force drawn from the population of Nagorno-Karabakh could not have occupied that region and the surrounding territories without outside support; and the Agreement on Military Cooperation between the Governments of the Republic of Armenia and the Republic of Nagorno-Karabakh of 1994. The Court also took into account other reports and statements (notably, of senior Armenian public officials which went against the Government's official denial). These elements allowed it to find that the Republic of Armenia, "through its military presence and the provision of military equipment and expertise, had been significantly involved in the Nagorno-Karabakh conflict from an early date" and, further, that Armenia's military support was "decisive for the conquest of and continued control over" the relevant territories. Certain other factors of Armenian support allowed the Court to conclude that the "Nagorno-Karabakh Republic" and its administration survived by virtue of the military, political, financial and other support of Armenia, which State thus exercised "effective control" and jurisdiction over Nagorno-Karabakh and the seven surrounding territories occupied by it, rendering it responsible for the violations alleged by the applicants displaced therefrom.

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The case of *Sargsyan*<sup>5</sup>, cited above, concerned the jurisdiction of Azerbaijan as regards a village near Nagorno-Karabakh on the territory of Azerbaijan but which remained a disputed area, and its consequent Convention responsibility for the violations alleged by Armenians displaced therefrom.

The applicant was an ethnic Armenian who fled from his village of Gulistan during the Armenian-Azerbaijani conflict over Nagorno-Karabakh in 1992.

The Court found that the impugned facts fell within the jurisdiction of Azerbaijan.

The location of the applicant's property gave rise to a unique jurisdiction issue. The applicant's village was not in Nagorno-Karabakh but on the north bank of the river forming the border with Nagorno-Karabakh on the Azerbaijani side. The village was on the front line between Azerbaijani and "Nagorno-Karabakh Republic" forces and remained disputed territory.

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5. *Sargsyan*, *supra* note 1.

This case did not, therefore, concern the jurisdiction and responsibility of a State when it exercised effective control extraterritorially (such as Turkey in Northern Cyprus and the Russian Federation in Transdniestria). Nor did it concern the jurisdiction of a State over part of its territory which was under the effective control of another State (Moldovan responsibility for Transdniestria). Rather it concerned the jurisdiction of a State over its own territory when that territory was “disputed” and had been “rendered inaccessible” by conflict. The Court considered the case to be, in some respects, akin to the situation in the *Assanidze v. Georgia*<sup>6</sup> case, which concerned the jurisdiction of Georgia as regards the Ajarian Autonomous Republic. Since Azerbaijan was the territorial State, it was presumed to have jurisdiction and there were no exceptional circumstances (such as the exercise of effective control by another State) to rebut that presumption. The Court therefore found that the impugned facts fell within the jurisdiction of Azerbaijan. The Court acknowledged the difficulties which would inevitably be encountered by Azerbaijan at a practical level in exercising authority over such disputed territory: however, those were matters to be taken into account on the merits of each complaint.

Consequently, this was the first time the Court had to rule on the merits of Convention complaints against a State which had legal jurisdiction, but which had practical control problems over a part of its territory which was “disputed”.

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The *Belozorov v. Russia and Ukraine*<sup>7</sup> case concerned, *inter alia*, the arrest of a Ukrainian national in Ukraine followed by his detention and forcible transfer to Russia. Two Russian police officers arrived in Ukraine with a warrant issued by a Russian prosecutor to carry out a search of the applicant’s home. They requested assistance from the Ukrainian authorities. The warrant had been issued in connection with a Russian murder investigation. The applicant was arrested at home in Ukraine by one Ukrainian and two Russian police officers. He was handcuffed and his apartment was searched. According to the applicant, he then remained in the custody of the Ukrainian and Russian police, who on the next day escorted him to a local airport, where the Russian officers accompanied him on the next flight to Moscow. He was formally arrested on arrival.

6. *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II.

7. *Belozorov v. Russia and Ukraine*, no. 43611/02, 15 October 2015.

Before the Court, the applicant relied in particular on Articles 5 and 8 of the Convention. His application was lodged against both Ukraine and Russia.

The point of interest in the case is the question of “jurisdiction”, within the meaning of Article 1 of the Convention, in relation to Russia. The Court found that the events up until the applicant boarded the plane to Russia fell within the exclusive “jurisdiction” of Ukraine.

A number of points were relevant to the Court's finding. The Ukrainian officials were aware that the Russian request for assistance was informal, unlawful under Ukrainian law and beyond the scope of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (“the Minsk Convention”). Moreover, although they could have refused to carry out the operation, the Ukrainian authorities had seen it through to the end while remaining in control throughout, from the moment of the applicant's arrest right through to his passage through airport security. In these circumstances, Russia's responsibility under the Convention was not engaged.

## **Admissibility conditions<sup>8</sup>**

### **Exhaustion of domestic remedies (Article 35 § 1)**

In its decision in *Laurus Invest Hungary KFT and Others v. Hungary*<sup>9</sup> the Court examined the effect of a decision of the Court of Justice of the European Union (CJEU) on the Convention requirement to exhaust domestic remedies.

The applicant companies operated slot machine and other gaming arcades. In 2012 the Hungarian Parliament adopted a law which restricted the activities of arcades and put an end, generally, to the operation of slot-machine terminals. Certain applicants sued the State for compensation for the loss of business they had sustained, relying on the law of the European Union. In those proceedings, the domestic court hearing the civil claim requested a preliminary ruling from the CJEU regarding the compatibility of the Hungarian law and the

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8. With regard to victim status see, under Article 2, the judgment in *Lambert and Others v. France* [GC], no. 46043/14, ECHR 2015 (extracts); under Article 8, the judgment in *Roman Zakharov v. Russia* [GC], no. 47143/06, ECHR 2015; and under Article 10, the judgments in *Dilipak v. Turkey*, no. 29680/05, 15 September 2015 (not final), and *Cengiz and Others v. Turkey*, nos. 48226/10 and 14027/11, ECHR 2015 (not final).

9. *Laurus Invest Hungary KFT and Others v. Hungary* (dec.), nos. 23265/13 and others, ECHR 2015.



manner of its implementation with the freedom to provide services guaranteed by Article 56 of the Treaty on the Functioning of the European Union and whether EU law conferred on individuals a right to claim compensation for damage suffered as a result of the infringement of the relevant EU law. The CJEU replied, among other things, that Article 56, if infringed, including by legislation, gives rise to a right for individuals to obtain from the member State concerned compensation for the damage suffered as a result, provided that the infringement was sufficiently serious and there was a direct causal link between the infringement and the damage sustained, a matter to be determined by the national court. The CJEU also noted that a national law which is restrictive from the point of view of Article 56 is also capable of limiting the right to property guaranteed by Article 17 of the Charter of Fundamental Rights of the European Union. At the date of the Court's judgment the case was pending before the requesting court in Hungary.

In the Convention proceedings, the applicants claimed that the new legislation had effectively wiped out their businesses and amounted to an unjustified deprivation of their property, in breach of Article 1 of Protocol No. 1, taken alone and in conjunction with Article 14 of the Convention.

The decision is noteworthy in that the Court dismissed the applicants' complaints either as being premature (those applicants who initiated the above-mentioned civil proceedings) or for non-exhaustion of domestic remedies (those applicants who had not yet brought a civil claim). The Court studied closely the terms of the CJEU's ruling in this case, in particular the manner in which it had addressed the compatibility of restrictions on property rights with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union as well as its conclusion on the question of compensation. It observed that the ruling had provided the Hungarian courts with guidance as to the criteria to be applied in the case pending before them, which bore close resemblance to the Court's own inquiry into whether there has been a breach of Article 1 of Protocol No. 1 in a particular case. For the Court, to substitute its own assessment for that of the national courts as oriented by the CJEU, without awaiting the outcome of those proceedings, would be tantamount to ignoring its subsidiary role.



# “CORE” RIGHTS

## Right to life (Article 2)

### Positive obligations

The case of *Lambert and Others*<sup>10</sup>, cited above, concerned the decision by a treating doctor, after consultation, to withdraw life-sustaining treatment from a patient who had not left clear instructions in advance.

Vincent Lambert was a victim of a road-traffic accident in 2008. He was, according to expert medical reports, in a vegetative state. He received life-sustaining nutrition and hydration. Following the consultation procedure provided for by the relevant Act, on 11 January 2014 the treating doctor decided for the second time to discontinue nutrition and hydration. Although the Administrative Court suspended the implementation of the doctor’s decision, on 24 June 2014 the *Conseil d’État* found that decision lawful.

The applicants were Vincent Lambert’s parents, half-brother and sister. The numerous third parties included Vincent Lambert’s wife and two other family members who supported the treating doctor’s decision. The applicants’ principal complaint was that the withdrawal of nutrition and hydration would be in breach of Article 2. The Court concluded that there would be no violation of the Convention should the judgment of the *Conseil d’État* be implemented.

Two factors are worth highlighting.

In the first place, the Court found that the applicants lacked standing to complain in the name and on behalf of Vincent Lambert. In so finding, the Court applied principles drawn from its case-law to a novel context. The Court considered that none of its previous cases in which it had accepted that an individual could act on behalf of another was comparable to the present case (distinguishing, notably, *Nencheva and Others v. Bulgaria*<sup>11</sup>, and *Centre for Legal Resources on behalf of*

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10. *Lambert and Others*, *supra* note 8.

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

*Valentin Câmpeanu v. Romania*<sup>12</sup>). Vincent Lambert was not dead, although he was in a vulnerable situation; he had not given formal instructions as regards the proposed withdrawal of life-sustaining treatment; and several members of his family had different views in that regard, some of whom wished to make complaints to the Court on his behalf contesting the proposed withdrawal of treatment. The Court clarified the two main criteria to be fulfilled before such complaints could be accepted. In the first place, was there a risk that the direct victim would otherwise be deprived of effective protection of his or her rights? There was no such risk in the present case as the applicants could invoke the right to life of Vincent Lambert on their own behalf. Secondly, was there a conflict of interests between the patient and the applicants? The *Conseil d'État* had found on the evidence that the doctor's decision, challenged by the applicants, could not be regarded as inconsistent with Vincent Lambert's wishes: the Court concluded that it had not therefore been established that there was a "convergence of interests" between the applicants' assertions and Vincent Lambert's wishes.

Secondly, while the application concerned the withdrawal of life-sustaining treatment, it is important to note that the applicants' complaint, on their own behalf under Article 2, was a narrow one. In particular, the applicants did not suggest that this was a case of assisted suicide or euthanasia and, moreover, they did not challenge, as such, the option of withdrawing life-sustaining treatment which was considered to have become unreasonable.

Rather, the applicants argued that the relevant Act lacked clarity and precision, and they took issue with the process which led to the doctor's decision (consultation was required but the final decision was made by the treating doctor).

The Court examined those issues from the point of view of the State's positive obligation to protect life, read in light of the individual's right to respect for his or her private life and the notion of personal autonomy which that encompassed (*Pretty v. the United Kingdom*<sup>13</sup>). Further factors were taken into account: the existence in domestic law of a regulatory framework compatible with Article 2 requirements; the extent to which account had been taken of the wishes of the patient, of his family and of the medical personnel; and the possibility of

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

13. *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III.

consulting the courts for a decision in the patient’s interests. The Court concluded that the law (including the notion of “unreasonable obstinacy”) did not lack clarity or precision as alleged. It also found compatible with Article 2 the legislative framework (“sufficiently clear” and “apt to ensure the protection of patients’ lives”) and the consequent consultation process (“meticulous”). In so finding, the Court emphasised the particular quality and breadth of both the consultation process and of the review by the *Conseil d’État*.

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The judgment in *M. Özel and Others v. Turkey*<sup>14</sup> (not final) concerned loss of life resulting from an earthquake.

The applicants’ relatives were killed when their homes collapsed under the force of the earthquake which struck their region in Turkey in August 1999 with deadly consequences for the local population. They complained in the Convention proceedings that the circumstances of their case gave rise to a breach of (among other provisions of the Convention) Article 2 under both its substantive and procedural heads. They denounced the decisions of the local authority to issue building permits to property developers for the construction of five (or even more) floor buildings in an earthquake-sensitive zone, as well as the failure of the local authority to check whether construction in the area complied with planning regulations.

The Court has already found in previous cases that the State can be held accountable for the deadly consequences of natural disasters (see *Budayeva and Others v. Russia*<sup>15</sup> – a mudslide entailing considerable loss of life – and *Murillo Saldias and Others v. Spain*<sup>16</sup> – flooding entailing considerable loss of life). The instant case was noteworthy in that it represented the first occasion on which the Court found Article 2 to be applicable to the loss of life resulting from an earthquake. The Court accepted that the authorities have no control over the occurrence of earthquakes. It observed, however, that where an area is prone to earthquakes Article 2 requires the authorities to adopt preventive measures so as to reduce the scale of the disaster created by an earthquake and to strengthen their capacity to deal with it. Planning and construction controls in a seismic-risk area were essential anticipatory measures. The Court noted that the domestic courts in

14. *M. Özel and Others v. Turkey*, nos. 14350/05 and others, 17 November 2015.

15. *Budayeva and Others v. Russia*, nos. 15339/02 and others, ECHR 2008 (extracts).

16. *Murillo Saldias and Others v. Spain* (dec.), no. 76973/01, 28 November 2006.

the applicants' case had found that the buildings which collapsed during the earthquake had been constructed in disregard of the planning and safety regulations drawn up for a known risk area. Moreover, the authorities had failed to supervise compliance with the regulations.

In the event, the Court was unable to deal with the merits of the applicants' complaints under the substantive limb of Article 2 on account of their failure to comply with certain admissibility requirements. It found, however, that there had been a breach of the procedural limb in view of the defects in the criminal proceedings instituted against property developers and builders.

### **Effective investigation**

The *Mustafa Tunç and Fecire Tunç v. Turkey*<sup>17</sup> judgment concerned the death of the applicants' son while on military service. He had been assigned to a site belonging to a private oil company, for which the national gendarmerie provided security services. There were two stages to the investigation into the young man's death: the investigation proper by the military prosecutor, and a review by a military court. Following a decision by the prosecutor that there were no grounds for bringing criminal proceedings, the applicants complained and the military court ordered an additional investigation, which the prosecutor conducted before concluding that the death was accidental. The military court dismissed the applicants' appeal. In the Convention proceedings, the applicants complained that the authorities had not carried out an effective investigation into their son's death.

In its judgment the Grand Chamber held that there had been no violation of the procedural aspect of Article 2 of the Convention, as the investigation had been sufficiently thorough and independent and the applicants had been involved to a degree sufficient to protect their interests and to enable them to exercise their rights.

Although the judgment merely reiterates and duly follows the Court's established case-law on the procedural requirements of Article 2, it is nevertheless important because of the clarification it provides on the difference between the requirement of an independent investigation under Article 2 and the requirement of an independent tribunal under Article 6 (which provision was not applicable in the applicants' case). The Grand Chamber observed that while the requirements of a fair hearing could entail the examination of procedural issues under

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17. *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, 14 April 2015.

Article 2, the safeguards provided were not necessarily to be assessed in the same manner.

Article 6 requires that the court called upon to determine the merits of a charge be independent of the legislature and the executive, and also of the parties. Compliance with this requirement is assessed, in particular, on the basis of statutory criteria, such as the manner of appointment of the tribunal’s members and the duration of their term of office, or the existence of sufficient safeguards against the risk of outside pressures. However, the requirements of Article 2 call for a concrete examination of the independence of the investigation in its entirety, rather than an abstract assessment. Article 2 does not require that the persons and bodies responsible for the investigation enjoy absolute independence, but rather that they are sufficiently independent of the persons and structures whose responsibility is likely to be engaged. The adequacy of the degree of independence is assessed in the light of all the circumstances, which are necessarily specific to each case. Where an issue arises concerning the independence and impartiality of an investigation, the correct approach consists in examining whether and to what extent the disputed circumstance has compromised the investigation’s effectiveness and its ability to shed light on the circumstances of the death and to punish those responsible. The Court specified that compliance with the procedural requirement of Article 2 is assessed on the basis of several essential parameters: the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person’s family and the independence of the investigation. These elements are interrelated and each of them, taken separately, does not amount to an end in itself, unlike the position in respect of the independence requirement of Article 6. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed.

## **Prohibition of torture and inhuman and degrading treatment and punishment (Article 3)<sup>18</sup>**

### **Prohibition of torture**

The judgment in *Cestaro v. Italy*<sup>19</sup> concerned the absence of an adequate legal framework to ensure members of the security forces

18. See also, under Article 8, *Szafrański v. Poland*, no. 17249/12, 15 December 2015 (not final).

19. *Cestaro v. Italy*, no. 6884/11, 7 April 2015.

responsible for acts of torture and other ill-treatment were brought to justice.

The applicant, together with many other individuals, received very serious injuries during a police operation at a school where he had been spending the night following his participation in the protest demonstrations during the G8 Summit in Genoa in July 2001. The Summit had been marked by extremely violent confrontations between police and demonstrators and large-scale damage to property. In the criminal proceedings brought against police officers and officials in connection with the incident at the school, one of the courts which heard the case referred to the behaviour of the police as cruel and sadistic. However, no police officer was ever convicted of causing grievous bodily harm since the relevant charges became time-barred in the course of the appeal proceedings. The only convictions related to, among other things, attempts to conceal the truth of what had happened at the school and the unlawful arrest of the occupants. Those convicted received relatively modest sanctions.

The applicant maintained in the Convention proceedings that the respondent State had breached the substantive and procedural limbs of Article 3 of the Convention.

The case is interesting in that the Court qualified the assault on the applicant as torture, thus confirming that that notion can attach to the conduct and behaviour of State agents outside the context of interrogation in custody (see also *Vladimir Romanov v. Russia*<sup>20</sup>, and *Dedovskiy and Others v. Russia*<sup>21</sup>). In reaching its conclusion, the Court laid emphasis on, among other things, the following factors:

(i) those in the school were beaten indiscriminately and systematically; the applicant had sustained very serious injuries in the course of a terrifying experience;

(ii) everything suggested that the operation and the attacks which followed were a premeditated and intentional response to the attacks to which the police had been subjected by demonstrators during the Summit, and thus motivated by revenge;

(iii) the individuals sheltering in the school had never offered any resistance when the police arrived;

(iv) the domestic courts had roundly condemned the behaviour of the police as well as their efforts to shift the blame for the violence at the school to the applicant and the other persons there.

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20. *Vladimir Romanov v. Russia*, no. 41461/02, 24 July 2008.

21. *Dedovskiy and Others v. Russia*, no. 7178/03, ECHR 2008 (extracts).



The Court went on to find a procedural breach of Article 3 as well. Although the prosecuting authorities and the courts could not be blamed for the fact that the charges relating to the assault of the applicant were eventually discontinued at the appeal stage of the proceedings as they had become time-barred, the real problem lay in the fact that the domestic law had allowed that situation to materialise. In the first place, acts of torture were not specifically criminalised. Secondly, offences against the person involving lesser forms of ill-treatment were subject to the statute of limitations. For the Court, there was a structural problem in the domestic legal system which enabled State agents to escape punishment for conduct proscribed by Article 3. It is noteworthy that the Court went on to address this problem specifically under Article 46 of the Convention, indicating to the respondent State that it should ensure that the domestic law was capable of imposing sanctions on persons who have committed acts of torture or ill-treatment.

### **Inhuman and degrading treatment<sup>22</sup>**

The *Zayev v. Russia*<sup>23</sup> judgment concerned the importance of having in place safeguards against ill-treatment from the moment a person is taken into police custody.

The applicant was arrested by police officers at midnight on suspicion of burglary and taken to the police station. However, his name was not entered in the official custody record. He alleged that he was beaten by police officers and subjected to treatment proscribed by Article 3 of the Convention. It was not until 10 o'clock the following morning that his arrest was officially recognised and his detention recorded in accordance with the law.

The Court's reasoning under the substantive aspect of Article 3 is particularly instructive. The Court noted that during the ten hours before the arrest was recorded a number of investigative measures were taken, such as the holding of an identification parade before the victim, and the questioning of the applicant in connection with the offence without his being able to exercise any of his rights as a suspect, his right to a lawyer and his right to a medical examination. Yet it was precisely during this period that the ill-treatment was alleged to have taken place. The Court observed that this situation can only have

22. See also, under Article 14 in conjunction with Article 3, *Identoba and Others v. Georgia*, no. 73235/12, 12 May 2015.

23. *Zayev v. Russia*, no. 36552/05, 16 April 2015.

served to increase the applicant's vulnerability thus making his ill-treatment more likely. In finding that the applicant had been subjected to inhuman and degrading treatment, the Court considered it important to note that the impugned ill-treatment had been made possible by the vulnerability of the applicant who, while in police custody, was deprived over a period of several hours of the procedural safeguards to which a person in that situation was normally entitled. The Court also reaffirmed the need to record without delay all information relating to a person's arrest in the relevant custody record (see *Timurtaş v. Turkey*<sup>24</sup>).

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The case of *Bataliny v. Russia*<sup>25</sup> concerned the applicant's compulsory admission to a psychiatric hospital and the treatment he received there. After receiving emergency treatment following a suicide attempt, the applicant was transferred to a psychiatric unit after being diagnosed with various illnesses. He was not permitted to leave. He alleged that during his two-week compulsory confinement he was submitted to scientific tests entailing treatment with a new antipsychotic medication and was not allowed any contact with the outside world.

In the course of the investigation into the facts, the head of the psychiatric hospital admitted that the applicant had been used for scientific research into the effects of new medication prior to its launch on the market.

In the Convention proceedings, the applicant complained that he had been subjected to forced psychiatric treatment for the purposes of scientific research without any established medical need and to beatings during his stay in hospital. He also complained that the authorities had failed to conduct an effective investigation.

The legal interest in this judgment lies in the finding that the testing of a new drug on a patient without his or her consent amounts to inhuman and degrading treatment, in breach of Article 3.

The Court considered that the applicant's forced psychiatric treatment in the absence of an established medical need and his inclusion without his consent in scientific research into a new antipsychotic drug was such as to arouse in him feelings of fear, anguish and inferiority capable of humiliating and debasing him. This amounted to inhuman and degrading treatment within the meaning of Article 3. It will be

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24. *Timurtaş v. Turkey*, no. 23531/94, § 105, ECHR 2000-VI.

25. *Bataliny v. Russia*, no. 10060/07, 23 July 2015.

noted in this connection that the Court referred to various international norms concerning experimental treatment for the purposes of scientific research.

The *Bataliny* judgment can be compared to the case of *Gorobet v. Moldova*<sup>26</sup>, in which the Court found that the injection, during the course of unlawful and arbitrary psychiatric treatment, of substances that were authorised but not justified by the applicant’s state of health amounted to, at least, “degrading treatment” within the meaning of Article 3.

### Degrading treatment

In the *Bouyid v. Belgium*<sup>27</sup> judgment “a slap” administered by police officers to each of the applicants was found to constitute degrading treatment and a violation of Article 3 of the Convention.

The applicants claimed that each had been slapped on the face, on separate occasions, by police officers whilst in their local police station (for an identity check and an interview respectively). The first applicant was a minor at the time. Each applicant obtained a medical certificate on the same day, which attested to traces of blows on their faces including redness and bruising.

They complained principally under Article 3 that the slaps amounted to degrading treatment (a substantive violation) and that the subsequent investigations into their complaints had been ineffective (procedural violation).

The Grand Chamber found that the slaps amounted to degrading treatment within the meaning of Article 3 of the Convention. This is the most noteworthy aspect of the judgment.

This issue turned on the Grand Chamber’s application of the established tenet that, when an individual is confronted by law-enforcement officers, any recourse to physical force not strictly necessitated by the applicant’s conduct diminishes human dignity and is “in principle” an infringement of the right set forth in Article 3 of the Convention (citing, *inter alia*, *El-Masri v. the former Yugoslav Republic of Macedonia*<sup>28</sup>).

The Court found that the words “in principle” should not be interpreted as allowing exceptions if, for example, the force used did

26. *Gorobet v. Moldova*, no. 30951/10, 11 October 2011.

27. *Bouyid v. Belgium* [GC], no. 23380/09, ECHR 2015.

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

not meet the threshold of severity. This was because “any interference with human dignity strikes at the very essence of the Convention”. This was a reference back to the Grand Chamber’s earlier statements in paragraphs 81 and 89-90 of the judgment on the centrality of respect for human dignity to the Convention and, in particular, to the protection accorded by Article 3, there being a particularly “strong link” between the concepts of “degrading” treatment and “respect for human dignity” (citing *East African Asians v. the United Kingdom*<sup>29</sup>; *Tyrer v. the United Kingdom*<sup>30</sup>; and, more recently, *Kudła v. Poland*<sup>31</sup>; *Valašinas v. Lithuania*<sup>32</sup>; *Yankov v. Bulgaria*<sup>33</sup>; and *Svinarenko and Slyadnev v. Russia*<sup>34</sup>).

Accordingly, the Grand Chamber was able to conclude that “any conduct by law-enforcement officers *vis-à-vis* an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention”. This was particularly the case where the officer used physical force against an individual which was not strictly necessitated by the individual’s conduct and this was true whatever the impact on the individual in question. Since the applicants’ disrespectful conduct could not have rendered such force necessary, there had been a violation of Article 3 of the Convention.

It is also interesting to note that the Grand Chamber went on to emphasise that the slaps amounted to degrading treatment following a more classical analysis of the circumstances of the case. The factors highlighted included: the particular significance of a slap to the face; the humiliation the applicants would undoubtedly have felt in their own eyes; the slaps would have highlighted the applicants’ inferiority *vis-à-vis* the police officers; the feelings of arbitrary treatment, injustice and powerlessness which would be aroused by being subjected to unlawful treatment by police officers; the obligation of police officers to protect those under their control, and by definition in a situation of vulnerability, which obligation was flouted by slapping the applicants; and, although a “secondary consideration”, the first applicant was a minor so that the treatment would have had a greater impact on him

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29. *East African Asians v. the United Kingdom*, nos. 4403/70 and others, Commission’s report of 14 December 1973, Decisions and Reports 78-A, p. 56, § 192.

30. *Tyrer v. the United Kingdom*, 25 April 1978, § 32, Series A no. 26.

31. *Kudła v. Poland* [GC], no. 30210/96, ECHR 2000-XI.

32. *Valašinas v. Lithuania*, no. 44558/98, ECHR 2001-VIII.

33. *Yankov v. Bulgaria*, no. 39084/97, ECHR 2003-XII (extracts).

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

and, more broadly, account had to be taken of the fact that minors were a particularly vulnerable group.

Having thus concluded as to a violation of the substantive aspect of Article 3, the Grand Chamber went on to find that the investigation had been ineffective in that it had failed to devote the requisite attention to the applicants’ allegations or to the nature of the act (a slap) and because the investigation had been unjustifiably long.

### **Effective investigation**

In its judgment in *M. and M. v. Croatia*<sup>35</sup> the Court looked at the nature of the State’s obligations in cases of alleged domestic violence involving children.

The applicants, a mother (the second applicant) and her daughter (the first applicant), complained that the authorities had failed to take steps to protect the first applicant from the physical and psychological ill-treatment to which she had been subjected by her father, the second applicant’s former husband. The father had custody of the first applicant at the relevant time. The applicants notified the police that the first applicant had sustained an injury to her eye, alleging that it had been caused by her father. They reported on the same occasion other instances of abuse. The father was subsequently prosecuted. The criminal proceedings were still pending at first instance at the time of the Court’s consideration of the case, more than four and a half years after they were initiated. The first applicant continued to live with her father against her wishes. During this time her parents were engaged in a dispute over her custody.

The judgment is interesting in that the Court reaffirmed the particular vulnerability of victims of domestic violence, in the instant case a child, and the need for active State involvement in their protection. The obligations under Article 3 are two-fold: (a) to prevent ill-treatment of which the authorities knew or ought to have known, and (b) to conduct an effective official investigation where an individual raises an arguable claim of ill-treatment.

The Court found that the respondent State had failed to comply with its procedural obligations under Article 3. The applicants had made out an arguable case that the first applicant had been subjected to what the Court considered to be “degrading treatment”. An effective investigation into their allegations was required. However, given the length of time taken so far to establish the guilt or innocence of the

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35. *M. and M. v. Croatia*, no. 10161/13, ECHR 2015.

first applicant's father, it could only be concluded that the investigation had not fulfilled the requirements of promptness and reasonable expedition inherent in the notion of an effective investigation.

On the other hand, the Court found that the authorities had taken reasonable steps to assess and weigh the risk of possible further ill-treatment. The decision to allow the father to continue to look after the first applicant in his home after the police had been notified about the injury sustained by her, and notwithstanding the criminal proceedings pending against him, did not give rise to a breach of the Article 3 positive obligation. The Court's conclusion is based on a careful assessment of the evidence before it and on the manner in which the authorities monitored the second applicant's situation during the custody proceedings.

### **Emotional suffering of close relatives**

The *Elberte v. Latvia*<sup>36</sup> judgment concerned the removal of tissue from the body of the applicant's deceased husband without her knowledge or consent and consequential emotional suffering.

The applicant's husband had been killed in a car accident. Unknown to the applicant, pursuant to a State-approved agreement, tissue was removed from her husband's body at the time of the autopsy and sent to a pharmaceutical company in Germany for the creation of bio-implants. The end product was subsequently sent back to Latvia for use in transplantation surgery. The applicant only learned about the course of events two years after her husband's death when a criminal investigation was launched in Latvia into allegations of wide-scale illegal removal of organs and tissues from cadavers. In the event, no prosecutions were ever brought as prosecution of the offence had become time-barred.

In the Convention proceedings the applicant complained, among other things, that tissue had been taken from her dead husband's body without her consent or knowledge in breach of her right to respect for her private life guaranteed by Article 8 of the Convention, and that the circumstances of the case gave rise to a violation of Article 3 in her respect. The applicant highlighted the fact that, following the launch of the above-mentioned general criminal investigation, she was left in a state of uncertainty regarding the circumstances of the removal of tissue from her husband. She drew attention to the fact that her

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36. *Elberte v. Latvia*, no. 61243/08, ECHR 2015.

husband’s body had been returned to her after completion of the autopsy with his legs tied together.

The Court found that Article 8 had been violated on account of the lack of clarity in the relevant domestic law regarding the operation of the consent requirement and the absence of legal safeguards against arbitrariness. Although the domestic law provided that the relatives of a deceased person, including spouses, had the right to express their wishes regarding the removal of tissue, the manner in which this right was to be exercised and the scope of the obligation to obtain consent were uncertain and indeed the subject of disagreement among the domestic authorities themselves.

The judgment is of particular note as regards the Court’s finding of a breach of Article 3 of the Convention with respect to the applicant. The Court has not hesitated in finding a breach of Article 3 in cases brought by family members of the victims of “disappearances” or in cases of extrajudicial killings where the corpse of the victim had been mutilated (see *Khadzhialiyev and Others v. Russia*<sup>37</sup>). The circumstances of the applicant’s case were of a different nature. The Court nevertheless found a breach of Article 3 with respect to the applicant. It observed among other things that:

(i) the applicant only discovered upon receiving the Government’s observations the nature and amount of the tissue removed from her deceased husband’s body;

(ii) following the initiation of the general criminal investigation, the applicant had been left for a considerable period of time to anguish over the reason why her husband’s legs had been tied together when his body was returned to her for burial;

(iii) the lack of clarity in the regulatory framework as regards the consent requirement could only have heightened the applicant’s distress, having regard to the intrusive nature of the acts carried out on her deceased husband’s body and the failure of the authorities themselves during the criminal investigation to agree on whether or not they had acted within the law in removing tissue and organs from cadavers; and

(iv) in the event, no prosecutions were ever brought as a result both of the time-bar and uncertainty over whether or not the acts of the authorities could be considered illegal in terms of the domestic-law requirements at the time, thus denying the applicant redress for a breach of her personal rights relating to a very sensitive aspect of her

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37. *Khadzhialiyev and Others v. Russia*, no. 3013/04, §§ 120-22, 6 November 2008.

private life, namely consenting or objecting to the removal of tissue from her dead husband's body.

It is significant that the Court stressed in its reasoning the relevance of the principle of respect for human dignity in the circumstances of the applicant's case, a principle which forms part of the very essence of the Convention. It noted in this connection that in the special field of organ and tissue transplantation it has been recognised that the human body must still be treated with respect even after death. It observed that international treaties, including the Convention on Human Rights and Biomedicine and its Additional Protocol, have been drafted in order to safeguard the rights of organ and tissue donors, living or deceased. The object of these treaties is to protect the dignity, identity and integrity of "everyone" who has been born, whether now living or dead.

For the Court, in these specific circumstances, the emotional suffering endured by the applicant amounted to degrading treatment contrary to Article 3.

### **Armed forces**

The *Lyalyakin v. Russia* judgment<sup>38</sup> concerned treatment inflicted by the army on a 19-year-old soldier who, after being caught trying to escape, was given a reprimand on a parade ground dressed only in his military briefs.

For the first time, the Court considered whether the fact that an applicant had been forced to undress and to line up in front of his unit wearing only his military briefs had reached the threshold of severity to bring the case within Article 3. It reiterated that the State has a duty to ensure that soldiers perform their military service in conditions which are compatible with respect for their human dignity (*Chember v. Russia*<sup>39</sup>). While accepting the need to maintain discipline in a military setting, the Court noted that the respondent State had not explained why the undressing and exposure of the applicant during the lining up of the battalion had been necessary to prevent his or other soldiers' escape.

The applicant had been humiliated as a result of this treatment and his young age had to be seen as an aggravating factor. The threshold of severity had thus been reached. The Court therefore found that the applicant had been subjected to degrading treatment, in breach of Article 3.

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38. *Lyalyakin v. Russia*, no. 31305/09, 12 March 2015.

39. *Chember v. Russia*, no. 7188/03, ECHR 2008, see Annual Report 2008.



## Prohibition of slavery and forced labour (Article 4)

### Forced or compulsory labour

The *Chitos v. Greece*<sup>40</sup> judgment concerned the obligation imposed on an army officer to pay the State a substantial sum of money to allow him to leave the military before the end of his contracted service period.

By joining the army’s officers school, the applicant was able to study medicine, specialising in anaesthetics, at university while receiving a salary from the army as well as social benefits. In return the applicant was required under Greek law to serve in the army for a set period.

The applicant was 37 years of age when he decided to resign. He was informed that he had to serve another nine years or pay the sum of 106,960 euros (EUR) to the State in compensation. He challenged the payment order before the Court of Auditors, which suspended the execution of the payment order pending its decision. Nevertheless, the tax authority requested immediate payment of the sum, which had been increased to EUR 112,115 given the accrued interest. The Court of Auditors subsequently found that the period of required service of seventeen years was lawful, but reduced the sum to be paid to EUR 49,978. The difference between the latter sum and the sum already paid was then reimbursed to the applicant.

The applicant complained that the obligation to serve in the army for a very long period or to pay the State an excessive sum of money breached the prohibition against forced labour in Article 4 § 2.

The Court first examined the limitation under Article 4 § 3 which excluded from the scope of the term “forced labour” any service of a military character. It found that that limitation was aimed at military service by conscription only and did not apply to career servicemen: in so finding, the Court departed from the broad interpretation of the Commission in 1968 in the case of *W., X., Y. and Z. v. the United Kingdom*<sup>41</sup>. The Court found support for this interpretation in International Labour Organization (ILO) Convention No. 29 as well as in the view taken both by the European Committee of Social Rights in the context of the European Social Charter and by the Committee of Ministers (see Recommendation CM/Rec(2010)4 to member States

40. *Chitos v. Greece*, no. 51637/12, ECHR 2015.

41. *W., X., Y. and Z. v. the United Kingdom*, nos. 3435/67 and others, Commission decision of 19 July 1968, Collection of Decisions 28.

on human rights of members of the armed forces). This is the first case in which the Court has ruled on this issue.

The Court went on to accept that it was legitimate for States to provide for obligatory periods of service for army officers after their studies, as well as for payment of compensation if they retire early, in order to recover the costs associated with their education. However, there had to be a balance between the different interests involved. While the amount the applicant had been required to pay in the end was not unreasonable (it was lower than the sums invested in his education by the State), the demand of the tax authorities for immediate payment of the sum, increased by 12 or 13% interest and despite judicial decisions suspending payment, had placed a disproportionate burden on the applicant and made him act under pressure, in breach of Article 4 § 2.

## **Right to liberty and security (Article 5)**

### **Confinement in psychiatric hospital without consent (Article 5 § 1 (e))**

The judgment in *M.S. v. Croatia (no. 2)*<sup>42</sup> concerned the lack of effective legal representation in proceedings concerning the applicant's involuntary confinement in a psychiatric hospital.

In the judicial proceedings concerning the prolongation of the applicant's confinement, the court appointed a legal-aid lawyer to represent her interests. However, the lawyer did not visit the applicant during the proceedings to hear her arguments concerning the involuntary confinement. At no stage was she advised of the procedure and the most appropriate course of action to follow. The lawyer, although present in court, did not make any submissions on the applicant's behalf. Although aware of the lawyer's lack of involvement, the court, without hearing the applicant, ordered her continued confinement.

The applicant contended, among other things, that she had been unlawfully and unjustifiably confined to the hospital, and that the judicial decision ordering her confinement had not been accompanied by adequate procedural safeguards.

The Court found a breach of Article 5 § 1 of the Convention. Its reasoning on the applicant's complaint is noteworthy as regards the quality of the legal representation of a person who risks involuntary confinement for reasons of mental health. The Court stressed that the

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42. *M.S. v. Croatia (no. 2)*, no. 75450/12, 19 February 2015.

mere appointment of a lawyer, without that lawyer actually providing legal assistance in the proceedings, could not satisfy the requirements of necessary “legal assistance” under Article 5 § 1 (e) for persons confined as being of “unsound mind”. It held that “an effective legal representation of persons with disabilities requires an enhanced duty of supervision of their legal representatives by the competent domestic courts”.

Although the domestic authorities were well aware of the professional failings of the lawyer, they had failed to react to the applicant’s complaints and to take the necessary action to address the matter. The applicant had therefore been deprived of effective legal assistance in the proceedings concerning her involuntary confinement in the hospital. This, combined with the applicant’s exclusion from the hearing, fell short of the procedural requirements of Article 5 § 1 (e).

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In the case of *Constancia v. the Netherlands*<sup>43</sup>, the applicant was detained as a person of “unsound mind” in the absence of a precise diagnosis of his mental state. He was convicted of a violent homicide. In the ensuing criminal proceedings he refused to cooperate in any examination of his mental state, so that no diagnosis was possible. The trial court nonetheless found him to be severely disturbed and imposed a prison sentence followed by detention as a person of “unsound mind”.

In this admissibility decision, the Court noted that the trial court had had recourse to a plurality of existing reports by psychiatrists and psychologists, as well as a report based on the criminal file and the audio and audio-visual recordings of interrogations. Although the various psychiatrists and psychologists were unable to establish a precise diagnosis, they did express the view that the applicant was severely disturbed, which view the trial court found reinforced by its own investigation of the case file. Faced as it was with the applicant’s complete refusal to cooperate in any examination of his mental state at any relevant time, the trial court was entitled to conclude from the information thus obtained that the applicant was suffering from a genuine mental disorder which, whatever its precise nature, was of a kind or degree warranting compulsory confinement. Article 5 § 1 (e) was thus satisfied.

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43. *Constancia v. the Netherlands* (dec.), no. 73560/12, 3 March 2015.

It was suggested in *Varbanov v. Bulgaria*<sup>44</sup> that “[w]here no other possibility exists, for instance because of a refusal of the person concerned to appear for an examination, at least an assessment by a medical expert on the basis of the file must be sought, failing which it cannot be maintained that the person has reliably been shown to be of unsound mind”.

This is the first Chamber case in which the Court has allowed other existing information to be thus substituted for a medical examination of the applicant's mental state.

### **Proceedings for extradition with a view to prosecution in the requesting State (Article 5 § 1 (f))**

In its judgment in *Gallardo Sanchez v. Italy*<sup>45</sup>, the Court indicated that increased diligence is required when an extradition request concerns a person facing criminal charges in the requesting State. The applicant complained that he had been kept in detention for a period of approximately one year and six months pending his extradition to Greece where he was wanted on a charge of arson. The Court found a breach of Article 5 § 1. Its reasons for doing so are noteworthy as they represent a development in the case-law under sub-paragraph (f) of that provision.

The Court observed that the extradition request filed by Greece under the Council of Europe's Convention on Extradition (as amended) had not been directed at an individual who had been sentenced by a Greek court and whose return had been sought with a view to executing a sentence. On the contrary, the applicant's extradition had been sought by the Greek authorities so that he could be tried in respect of charges pending against him in Greece.

In assessing the reasonableness of the time spent in detention awaiting extradition, the Court made a distinction between these two situations from the standpoint of the degree of diligence to be shown by the extraditing State when processing a request for extradition. For the Court, the extraditing State was required to act with greater diligence in order to secure the defence rights of a person against whom criminal proceedings were pending in the requesting State.

On the facts of the case, and having in mind the reasons for Greece's extradition request and the periods of delay in complying with that

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44. *Varbanov v. Bulgaria*, no. 31365/96, ECHR 2000-X.

45. *Gallardo Sanchez v. Italy*, no. 11620/07, ECHR 2015.

request – which were attributable to the Italian authorities – the Court concluded that there had been a breach of Article 5 § 1.

### **Conditional release on bail (Article 5 § 3)**

The case of *Magee and Others v. the United Kingdom*<sup>46</sup> raised the question whether the judge referred to in Article 5 § 3 is required to address the issue of conditional release in the early stages of detention.

The applicants were arrested on suspicion of involvement in the murder of a police officer. They were brought, forty-eight hours later, before a County Court judge in Northern Ireland who reviewed the lawfulness of their detention and granted an extension for another five days (for further questioning and forensic examinations). Later, their pre-trial detention was further extended, but the applicants were ultimately released without charge after twelve days. Under Schedule 8 of the Terrorism Act 2000, a detainee could be kept in detention for up to twenty-eight days without charge. The lawfulness of that detention had to be reviewed by the competent judge within forty-eight hours and every seven days thereafter. While that judge had the power to release the detainee if that arrest/early detention was unlawful, he or she had no power to release on bail.

The case is interesting in that it contains an in-depth overview of the Court’s case-law as regards both limbs of Article 5 § 3: the initial stage immediately following arrest (first limb) and the second period pending trial (second limb).

Moreover, as regards the first limb, the Court reiterated that Article 5 § 3 requires that a detainee be brought promptly and automatically before a judge or other officer able to review the lawfulness of the arrest and detention, to review whether there was a reasonable suspicion that the accused had committed a criminal offence, and to order release if the detention fell foul of either requirement. The Court found that the County Court judge had those powers. However, and more interestingly, the Court clarified that nothing in its previous case-law (including in the oft-cited extract from the judgment in *Schiesser v. Switzerland*<sup>47</sup>) suggested that this initial review (first limb) should also include an examination of any release on bail. While the lawfulness of the applicants’ detention and the existence of a reasonable suspicion against them had been reviewed twice by a County Court judge during the twelve days of initial detention, the applicants were never brought

46. *Magee and Others v. the United Kingdom*, nos. 26289/12 and others, ECHR 2015.

47. *Schiesser v. Switzerland*, 4 December 1979, § 31, Series A no. 34.

before a judge who had the power to examine or order release on bail pending trial. However, the Court found that the accused were still in the “early stages” of their deprivation of liberty during those twelve days (first limb) so that an examination of release on bail was not required by Article 5 § 3.

### **Review of lawfulness of detention (Article 5 § 4)**

The judgment in *Sher and Others v. the United Kingdom*<sup>48</sup> concerned the reconciliation of the fight against terrorism with the restriction of the procedural and defence rights of arrested suspects.

The applicants, Pakistani nationals, were arrested and detained for thirteen days in connection with an anti-terrorism operation. They were ultimately released without charge.

In the Convention proceedings, they complained, among other things, that they were denied an adversarial procedure during the hearings on requests for prolongation of their detention because certain evidence in favour of their continued detention was withheld from them and that one such hearing was held in closed session. They relied on Article 5 § 4 of the Convention.

The Court found that there had been no breach of that provision.

The judgment is of interest in that the Court was once again called upon to rule on the balance which has to be struck between the fight against terrorism and respect for the Convention rights of individuals suspected of involvement in acts of terrorism. The Court accepted that, in the instant case, the authorities had suspected an imminent terrorist attack and had launched an extremely complex investigation aimed at thwarting it.

In finding no breach of Article 5 § 4, the Court reiterated that terrorism falls into a special category, and that that provision cannot preclude the use of a closed hearing wherein confidential sources of information supporting the authorities' line of investigation are submitted to a court in the absence of the detainee or his lawyer. What is important is that the authorities disclose adequate information to enable a detainee to know the nature of the allegations against him and to have the opportunity to refute them, and to participate effectively in proceedings concerning his continued detention.

In the applicants' case, the Court accepted that the threat of an imminent terrorist attack justified restrictions on the applicants' Article 5 § 4 rights. The applicants and their legal advisers were given

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48. *Sher and Others v. the United Kingdom*, no. 5201/11, ECHR 2015.

reasons for the withholding of certain information. The information to be withheld was limited to the further inquiries to be conducted, and was submitted to a judge who, in closed session, was able to ensure that no material was unnecessarily withheld from the applicants and to determine, in their interests, whether there were reasonable grounds for believing that their further detention was necessary.

The Court further stressed that, even in the absence of express provision in the relevant law, the judge had the power to appoint a special advocate if he considered such appointment necessary to secure the fairness of the proceedings. Significantly, the applicants had not requested the appointment of a special advocate.

### **Speedy review of the lawfulness of detention (Article 5 § 4)**

The *Kuttner v. Austria*<sup>49</sup> judgment concerned the applicability of Article 5 § 4 to proceedings which could not result in the applicant’s freedom but led instead to another form of detention. The case raises the following question: must Article 5 § 4 proceedings lead inevitably to freedom, or are the provisions of that Article complied with if an applicant can exchange a contested form of deprivation of liberty for another form of detention?

In the instant case, the applicant was sentenced to a term of imprisonment. Since he suffered from a grave mental disorder and represented a danger to the public, the domestic court ordered that he be detained in a psychiatric institution. While detained there, the applicant instituted proceedings available to him under domestic law to request his release from the psychiatric institution. He contended that he had been cured of the mental illness which had led to his confinement and wished to serve his sentence in an ordinary prison. His application was dismissed. On the evidence available to them, the courts considered that the applicant was still in need of psychiatric treatment. Had the applicant’s argument prevailed, he could have been expected to be released from prison after approximately two years. In the event, he continued to be detained indefinitely in the psychiatric institution pending a favorable report on his mental condition.

The applicant essentially complained in the Convention proceedings of the delay in dealing with his application for release from the psychiatric institution. The Court found a breach of Article 5 § 4 with reference to its well-established case-law on the “speediness” requirement

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49. *Kuttner v. Austria*, no. 7997/08, 16 July 2015.

(see *Oldham v. the United Kingdom*<sup>50</sup>, and *Rehbock v. Slovenia*<sup>51</sup>). However, the Court had first to reply to the respondent Government's argument that Article 5 § 4 was not applicable, given that the proceedings brought by the applicant, had they been successful, could not have led to his release since he would have been transferred to a prison to serve the remainder of his prison sentence. In other words, he would continue to be deprived of his liberty.

The Court noted that the applicant's detention was covered by both subsections (a) and (e) of Article 5 § 1. In its view, it would be contrary to the object and purpose of Article 5 to interpret paragraph 4 of that provision as making confinement in a mental institution immune from review of its lawfulness merely because the initial decision ordering detention was taken by a court under Article 5 § 1 (a) of the Convention. It stressed that the reasons for guaranteeing a review under Article 5 § 4 are equally valid in respect of a person detained in a mental institution regardless of whether he or she is serving, in parallel, a prison sentence. In the applicant's case, it was of little consequence for the applicability of Article 5 § 4 that a successful outcome of the proceedings would only have resulted in a different form of confinement and not freedom.

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50. *Oldham v. the United Kingdom*, no. 36273/97, § 31, ECHR 2000-X.

51. *Rehbock v. Slovenia*, no. 29462/95, § 84, ECHR 2000-XII.



# PROCEDURAL RIGHTS IN CIVIL PROCEEDINGS

## Right to a fair hearing (Article 6 § 1)

### Applicability

The judgment in *Bochan v. Ukraine (no. 2)*<sup>52</sup> concerned the reopening of terminated civil proceedings following a finding of a violation by the Court in a judgment of 3 May 2007<sup>53</sup> that the domestic courts' decisions had been reached in proceedings which failed to respect the fair-trial guarantees existing under Article 6 § 1. Relying principally on the Court's judgment, the applicant lodged an exceptional appeal with the Ukrainian Supreme Court challenging those decisions. However, the Supreme Court rejected her appeal, holding that the domestic decisions were correct and well-founded.

The judgment is interesting in that the Court first addressed whether it was prevented by Article 46 of the Convention from examining the applicant's complaints. Those complaints which concerned an alleged lack of proper execution of the judgment of 3 May 2007 were declared incompatible *ratione materiae* as encroaching on the prerogatives of Ukraine and the Committee of Ministers under Article 46. However, the complaint as to the conduct and fairness of the exceptional-appeal proceedings contained relevant new information relating to issues undecided by the initial judgment, and therefore fell within the scope of the Court's jurisdiction.

The Grand Chamber reaffirmed and clarified its case-law to the effect that, while Article 6 § 1 does not normally apply to extraordinary appeals, the nature, scope and specific features of the procedure in question could bring it within the ambit of that provision, which was the case for the exceptional-appeal proceedings in Ukraine. The Court reiterated that it was for the member States to decide how best to implement its judgments and that there was no uniform approach among them as to the possibility of seeking the reopening of terminated civil proceedings following a finding of a violation by the Court, or as

52. *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, ECHR 2015.

53. *Bochan v. Ukraine*, no. 7577/02, 3 May 2007.

to the modalities of implementation of existing reopening mechanisms. The decision is noteworthy in that the Court emphasised that the best way to achieve restoration of the applicant's original situation was through the availability of procedures allowing a case to be revisited when a violation of Article 6 had been found.

Finally, turning to the fairness of the exceptional-appeal proceedings, the Grand Chamber noted that the Ukrainian Supreme Court had grossly misrepresented the findings set out in the Court's judgment of 3 May 2007. Accordingly, the Supreme Court's reasoning was construed as "grossly arbitrary" and entailed a "denial of justice", in breach of Article 6 § 1. The judgment in *Bochan (no. 2)* is therefore an example of a case in which the Court is exceptionally required to intervene and scrutinise the domestic court's adjudication under Article 6 § 1.

### **Access to a court**

In the case of *Momčilović v. Croatia*<sup>54</sup>, access to the civil courts was made dependent on a prior attempt to settle the claim. The applicants complained that the domestic courts had refused to examine the merits of their compensation claim against the State for the death of their daughter because they had not attempted to settle the claim with the relevant authorities before introducing the contentious proceedings. According to the terms of the Civil Procedure Act, a claimant intending to bring a civil claim against the Republic of Croatia must first submit a request for settlement to the competent State Attorney's Office.

The applicants maintained in the Convention proceedings that the condition imposed by the Civil Procedure Act amounted to a disproportionate restriction on their right of access to a court, contrary to Article 6. The Court ruled against the applicants. It found that the limitation was provided by law (the Civil Procedure Act) and pursued the legitimate aim of avoiding a multiplication of claims and proceedings against the State in the domestic courts, thus promoting the interests of judicial economy and efficiency. As to the requirement of proportionality, the Court observed that, notwithstanding the domestic court's refusal to try the applicants' civil claim, it still remained open to them to comply with the friendly-settlement requirement and, in the event of a failure to reach a settlement, to file a fresh claim with a domestic court within the time-limit provided by

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54. *Momčilović v. Croatia*, no. 11239/11, 26 March 2015.

domestic law. The applicants had failed to avail themselves of this possibility.

The case is interesting in that the Court accepts that a domestic-law requirement to attempt to settle a civil claim as a necessary prelude to contentious proceedings is not of itself incompatible with the Article 6 guarantee of access to a court or tribunal. It is interesting to observe that the judgment refers to Council of Europe statements on the desirability of encouraging alternative dispute-resolution procedures. The Court's judgment can be said to be in line with these statements.

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The *Zavodnik v. Slovenia*<sup>55</sup> judgment concerned the lack of proper notification of insolvency proceedings. The applicant mainly complained of an impairment of his right of access to a court in respect of the insolvency proceedings involving his former employer, a company, in which he was a creditor. A hearing took place in the applicant's absence, confirming the receiver's distribution proposal. The applicant had not seen the notification of the hearing posted on the court's notice board beforehand, nor had he read the notification in the Official Gazette. He was also unable to appeal the decision as he had missed the relevant deadline.

The Court examined, as an issue of access to a court, the applicant's complaint regarding his inability to participate in a hearing in insolvency proceedings or to lodge a timely appeal. While recognising that Article 6 § 1 does not provide for a specific form of service of documents, the Court balanced the interests of the effective administration of justice, on the one hand, with the interests of the applicant, on the other.

The Court found that the applicant did not have a "fair opportunity" to know about the relevant hearing and that, therefore, there had been a violation of Article 6 § 1. In so finding, the Court placed emphasis on a number of factors: the time-limit for lodging the appeal against the relevant decision was relatively short (eight days); the proceedings themselves had lasted more than eight years; there were only nineteen remaining creditors; the applicant had been specifically assured by the receiver that he would be informed of any progress; and the authorities had not published the notification of the hearing in the mass media (an additional option which was provided for by law). The Court found that it would have been unrealistic to expect the applicant to

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55. *Zavodnik v. Slovenia*, no. 53723/13, 21 May 2015.

consult the notice board of a court located in a different town from his place of residence or to study every issue of the Official Gazette over a period of eight years.

The judgment is noteworthy in that it gives some indication as regards the measures which a member State may have to take in certain situations in order to ensure that a party to civil insolvency proceedings has a “fair opportunity” to participate in court hearings, bearing in mind that the applicant's case is to be seen on its particular facts (notably, the applicant had been given the assurance that he would be informed and there were relatively few creditors). It is also interesting to note that the Court took into account the fact that the applicant was elderly, was allegedly not computer literate and had no access to the Internet.

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In *Klausecker v. Germany*<sup>56</sup> the applicant complained of his inability to obtain an examination on the merits of a complaint he had lodged against an international organisation. Although successful in examinations for a position in the European Patent Office (EPO), the applicant was ultimately refused employment on account of his physical disability. His appeals within the EPO system and his complaint to the Administrative Tribunal of the ILO were unsuccessful given that candidates for employment lacked standing to complain. The applicant's appeal to the Federal Constitutional Court was rejected on the ground that it lacked jurisdiction since the EPO, which had taken the impugned decision, enjoyed immunity from the jurisdiction of the German courts.

In the Convention proceedings, the applicant complained, firstly, that the Federal Constitutional Court's decision had denied him access to the national courts and thereby prevented him from asserting his civil right not to be discriminated against on the ground of his disability. Secondly, he argued that in view of the deficiencies in the internal system of the EPO and the ILO, which had resulted in a failure to consider his grievance, the respondent State should also be held accountable under the Convention for the lack of redress. As regards both complaints, the applicant relied on Article 6.

The Court dismissed the complaints in so far as they concerned his unsuccessful action before the domestic courts in the respondent State. It accepted that the applicant fell within the jurisdiction of the

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56. *Klausecker v. Germany* (dec.), no. 415/07, 6 January 2015.

respondent State, given that the Federal Constitutional Court had ruled against him by declining to examine the decision given by the EPO. On that account, the respondent State had to justify the refusal to entertain the applicant's action based on an alleged civil right not to be discriminated against on the ground of physical disability when applying for employment. In addressing this complaint, the Court observed that it did not have to determine whether Article 6 was applicable and that it was prepared to assume that the applicant had a civil right since this part of the application was in any event manifestly ill-founded. The Court's reasoning on inadmissibility is essentially based on the approach taken in the earlier cases of *Waite and Kennedy v. Germany*<sup>57</sup>, and *Beer and Regan v. Germany*<sup>58</sup>. On the question of proportionality, the Court gave weight to the fact that the EPO had offered the applicant the possibility of submitting his case to an arbitration procedure, an offer which he had declined.

The Court next considered the applicant's contention that the respondent State was responsible for his inability to have a ruling on the merits of his complaint by the EPO and the Administrative Tribunal of the ILO. Its treatment of this issue is interesting in that it took as its point of departure the "equivalent protection" doctrine first developed in the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*<sup>59</sup> and later applied in the context of its examination of complaints relating to acts of international organisations and tribunals in labour disputes, most notably *Gasparini v. Italy and Belgium*<sup>60</sup>. The *Gasparini* case concerned the compliance with the Convention of internal procedures on labour disputes within NATO without the respondent State having intervened in that procedure as such. On the facts of the applicant's case, the Court saw no reason to consider that since the transfer by Germany of its sovereign powers to the EPO, the rights guaranteed by the Convention would generally not receive within the EPO an "equivalent protection" to that secured by the Convention system. Consequently, Germany's responsibility under the Convention could only be engaged if the protection of fundamental rights offered by the EPO in the present case was "manifestly deficient".

57. *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I.

58. *Beer and Regan v. Germany* [GC], no. 28934/95, 18 February 1999.

59. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

60. *Gasparini v. Italy and Belgium* (dec.), no. 10750/03, 12 May 2009.

Against that background it framed the question to be resolved in the following terms: did the fact that a candidate for a job was denied access to the procedures for review of the decision of the EPO not to recruit him before the EPO itself and before the Administrative Tribunal of the ILO, which was what was in issue in the present case, disclose a manifest deficiency in the protection of human rights within the EPO? The Court found no manifest deficiency. In the first place, and in response to the applicant's argument that his complaint was never examined on the merits, the Court observed that the Convention itself permits restrictions on the right of access to a tribunal in the context of disputes concerning recruitment to the civil service. Secondly, the very essence of the applicant's right of access to a court was not impaired since the EPO had offered him an arbitration procedure, thus allowing him to have a reasonable alternative means to have his complaint regarding the decision not to recruit him examined on the merits.

### **Fairness of the proceedings<sup>61</sup>**

The *Adorisio and Others v. the Netherlands*<sup>62</sup> decision related to restrictions on the applicants' Article 6 rights in the context of their legal challenge to emergency economic measures adopted in the banking sector.

The Netherlands Government had expropriated shares and subordinated bonds issued by a banking and insurance conglomerate, SNS Reaal, in early 2013 after it ran into trouble as a result of the financial crisis of 2008. SNS Reaal's banking arm was the fourth biggest high-street bank in the Netherlands and could not be allowed to fail. Legal remedies for the expropriated shareholders and bondholders were divided into two: firstly, an accelerated administrative procedure in which the lawfulness of the expropriation could be contested; and, secondly, proceedings in the civil courts for compensation. The Court's decision concerned only the accelerated administrative procedure; the compensation proceedings were still pending in the civil courts.

The applicants – all of whom were foreign nationals or entities – complained under Article 6 § 1 of the Convention that the time-limit for lodging an appeal (only ten days) was too short; that there was

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61. See also *Bochan (no. 2)*, *supra* note 52.

62. *Adorisio and Others v. the Netherlands* (dec.), nos. 47315/13 and others, 17 March 2015.

insufficient time to study the Minister of Finance's statement of defence (they received the statement late in the afternoon on the day before the hearing); and that they were given access to incomplete versions of financial reports drawn up by a firm of accountants and a firm of real-estate valuers.

As regards the ten-day time-limit for appealing, short though it was, it was not too short: none of the applicants was prevented from bringing an effective appeal. Moreover, once their appeals were pending they could submit further documents and materials until the day before the hearing. At the hearing, they could submit further arguments, including arguments not relied on before.

As to the time available for responding to the Minister's statement of defence, clearly the applicants (or their lawyers) had been able to study the document overnight: it is reflected in the decision of the Administrative Jurisdiction Division that the appellants raised "all possible relevant aspects of the case" between them. In any case, even with the benefit of hindsight not one of the applicants had suggested that they would have argued their case any differently at the hearing.

Lastly, regarding the redacting of the financial reports, the need for restricting access to the full reports was assessed by the administrative tribunal (in a different composition) and it was determined in the eventual decision that the information withheld was not relevant to the matters in issue. In the circumstances, the applicants' disadvantaged situation was adequately counterbalanced. Additionally, the European Commission was given access to at least one of the reports, which it needed to decide whether the expropriation was "State aid" which was forbidden under European Union law. The European Commission made available to the public a version of its decision, also with detailed financial information left out, which supports the view that a real need existed to restrict access to this information.

The decision is noteworthy in that it establishes that very weighty economic interests can justify restricting the individual's Article 6 rights as an emergency measure.

### **Independent tribunal**

In the *Fazia Ali v. the United Kingdom*<sup>63</sup> judgment the Court examined the adequacy for the purposes of Article 6 § 1 of the Convention of the domestic court's review of facts as found by a body lacking independence.

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63. *Fazia Ali v. the United Kingdom*, no. 40378/10, 20 October 2015.

The applicant, a homeless person, was informed by a local authority that it had discharged its statutory duty to provide her with accommodation since she had refused to accept an offer of accommodation sent to her in writing. The applicant disputed that decision on the basis that she had not received a written offer. A local-authority official, reviewing her case, rejected the applicant's argument, finding that she had received a written offer. Her challenge to that decision by way of judicial review proceedings was dismissed as the court had no jurisdiction to determine a "purely factual issue".

In her application to the Court, the applicant complained under Article 6 that her dispute over her civil right to accommodation had not been determined by an independent tribunal, given that the court hearing her judicial review action had no jurisdiction to inquire into the findings of facts made by an official lacking independence. The applicant relied on Article 6 of the Convention.

The Court accepted that the official, as an employee of the local authority, was not an "independent tribunal". The essential issue was whether the court in the judicial review proceedings had exercised "sufficient jurisdiction" or provided "sufficient review" so as to compensate for the official's lack of independence, bearing in mind the domestic court's lack of jurisdiction to inquire into the facts as found by the official and to hear witnesses in support of the applicant's argument.

The judgment is of interest in that the Court sought to ascertain whether the adjudicatory process by which the applicant's civil right was determined, taken as a whole, provided a due inquiry into the facts. It was relevant in this connection that the official had no personal interest in the matter and that the decision-making procedure leading to her decision was accompanied by procedural safeguards so as to protect the applicant's interests. It was also of significance that the reviewing court, although not competent to conduct a full rehearing of the facts, was empowered, within the limits of judicial review, to have regard to the substantive and procedural regularity of the impugned decision.

Bearing in mind the above considerations, it is noteworthy that the Court placed particular emphasis on the nature and purpose of the legislative scheme in issue when assessing whether, seen as a whole, the applicant had had a fair procedure in the determination of her civil right. It highlighted that the scheme under which the applicant derived her civil right was of a social-welfare nature, intended to bring as great a benefit as possible to needy persons in an economical and fair



manner. Article 6 did not require in such a context that a court in judicial review proceedings had to revisit the findings of primary fact made at the adjudicatory administrative stage of proceedings. Against that background the scope of review exercised by the domestic court could be considered compliant with the Article 6 requirements.

### **Execution of a final judgment**

*Tchokontio Happe v. France*<sup>64</sup> is the first case against France concerning a continuing failure to execute a final judgment requiring the authorities to rehouse an individual. The applicant had obtained such a judgment under a law of 2007 (known as the “DALO Law”). The DALO Law recognised the right to decent and independent housing and provided that failure by the authorities to comply with an order to rehouse would lead to the payment of a penalty charge into a special State fund. The Court found a violation under Article 6 § 1 given that the applicant had still not been rehoused, observing, *inter alia*, that it was not open to a State authority to cite lack of funds or other resources as an excuse for not honouring a judgment debt.

### **Right to an effective remedy (Article 13)**

The judgment in *Kuppinger v. Germany*<sup>65</sup> concerns the notion of an effective remedy for delay in parent-child contact proceedings. In normal circumstances an Article 13 compliant remedy for length of proceedings may take two forms: a remedy allowing the victim to claim damages or a remedy enabling the victim to request the acceleration of the proceedings. Ideally, according to the Court’s case-law, both remedies should be available in the domestic legal system.

This case is significant in that it highlights that in litigation concerning the enforcement of a parent’s contact rights to his or her child, domestic law must provide a remedy which enables the requesting party to speed up the implementation of the decision awarding contact rights. In the case in issue, the applicant complained, among other things, that the domestic proceedings which he had taken to enforce a court decision awarding him contact rights to his child had lasted an unreasonable length of time and that he had no effective remedy to expedite the implementation of that decision. He alleged a

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64. *Tchokontio Happe v. France*, no. 65829/12, 9 April 2015.

65. *Kuppinger v. Germany*, no. 62198/11, 15 January 2015.

breach of Article 13 of the Convention taken in conjunction with Article 8.

The respondent State contended that the applicant could have sued for compensation for the alleged unreasonable length of the proceedings, relying on the terms of the Remedy Act 2011.

The Court replied that in proceedings in which the length of proceedings has a clear impact on an applicant's family life, a more rigorous approach is called for, and the remedy available in domestic law should be both preventive and compensatory. It observed that a State's positive obligation to take appropriate measures in this connection risked becoming illusory if an applicant only had at his or her disposal an *a posteriori* remedy in damages. It was not persuaded that the Remedy Act relied on by the respondent Government could be regarded as having a sufficient expediting effect on pending proceedings in cases, such as the applicant's, which concerned access rights to young children. In particular, it found that the invocation of the Remedy Act could not lead to an order to expedite the contact proceedings.

In reaching its conclusion, the Court had regard to two earlier judgments in which it had made similar findings, namely *Macready v. the Czech Republic*<sup>66</sup>, and *Bergmann v. the Czech Republic*<sup>67</sup>. In the circumstances, the Court found that there had been a breach of Article 13 taken in conjunction with Article 8.

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66. *Macready v. the Czech Republic*, nos. 4824/06 and 15512/08, 22 April 2010.

67. *Bergmann v. the Czech Republic*, no. 8857/08, 27 October 2011.

# PROCEDURAL RIGHTS IN CRIMINAL PROCEEDINGS

## Right to a fair trial (Article 6)

### Procedural fairness

The *Schatschaschwili v. Germany*<sup>68</sup> judgment concerned the issue of the fairness of proceedings following the admission in evidence of the statements of absent witnesses.

The applicant was convicted by a regional court in Germany of aggravated burglary and extortion as regards two similar incidents. Two Latvian women, O. and P., were the victims and direct witnesses of the second incident. O. and P. made statements, and then returned to Latvia. They did not appear at the applicant's trial and their statements were admitted in evidence.

The applicant complained to the Court under Article 6 of the trial court's reliance on the statements of O. and P. when he had been unable to cross-examine them prior to or during the trial. The Grand Chamber found a violation of Article 6 of the Convention.

The judgment is noteworthy because the Grand Chamber accepted that the case-law subsequent to *Al-Khawaja and Tahery v. the United Kingdom*<sup>69</sup> disclosed a need to clarify the relationship between the three steps of the *Al-Khawaja* test by which it examines the compatibility with Article 6 of proceedings in which statements made by absent witnesses were used in evidence. The Court must examine:

- (i) whether there was good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence;
- (ii) whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction; and
- (iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused

68. *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015.

69. *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011.

to the defence given the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair.

While it was clear that all three steps had to be examined if the answers to the first two questions were in the affirmative, it remained to be clarified whether all three steps needed to be examined when the question in either the first or second step was answered in the negative. The order of examination of those steps also required clarification. In these respects, the Grand Chamber found as follows.

(i) The absence of good reason for the non-attendance of a witness could not, of itself, be conclusive of the unfairness of the trial, although it would be a “very important factor to be weighed in the balance when assessing the overall fairness of a trial and one which may tip the balance in favour of a breach”.

(ii) The Court had to review the existence of sufficient counterbalancing factors, not only in cases in which the evidence given by an absent witness was the sole or decisive basis for a conviction, but also in those cases where the Court considered that the relevant evidence “carried significant weight and that its admission may have handicapped the defence”. The extent of the counterbalancing factors necessary for a trial to be considered fair would depend on the weight of the evidence of the absent witness.

(iii) As a rule it would be necessary to examine the three steps of the *Al-Khawaja* test in the order defined in that judgment. However, since those steps are interrelated and taken together serve to establish whether proceedings as a whole are fair, the Grand Chamber accepted that it might be appropriate, in a particular case, to examine the steps in a different order, in particular if one of the steps proved to be particularly conclusive to the fairness or unfairness of the proceedings.

The Grand Chamber's judgment goes on to set out in some detail the principles relating to each of the three steps in the *Al-Khawaja* test. It noted, in particular, certain elements relevant to the question, such as the sufficiency of any counterbalancing factors; the trial court's approach to the untested evidence; the availability and strength of further incriminating evidence; and the procedural measures taken to compensate for the lack of opportunity to cross-examine the witnesses at trial.

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The *Dvorski v. Croatia*<sup>70</sup> judgment concerned the admission in evidence of the applicant's confession, made during a first police

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70. *Dvorski v. Croatia* [GC], no. 25703/11, ECHR 2015.

interrogation in the presence of a lawyer, but not the lawyer of his choice, since he had been denied the opportunity to appoint one.

The applicant was arrested following, *inter alia*, a number of murders. His parents appointed a lawyer, G.M., to act for him (as permitted under domestic law). The police prevented G.M. from having access to the applicant and did not inform the applicant of G.M.'s appointment (or of G.M.'s presence at the police station). Being unaware of these matters, the applicant agreed to be represented by another lawyer. The applicant made an incriminating statement to the police during his first interrogation which was one of the elements, although not a central one, in his conviction (of, *inter alia*, several counts of murder).

The Grand Chamber found that the applicant's defence rights had been irretrievably prejudiced by the denial of the opportunity to appoint a lawyer of his choice and that there had therefore been a violation of Article 6.

The case is noteworthy in that the Grand Chamber confirmed the different tests to be applied to, on the one hand, a refusal of legal assistance of one's own choosing for a first interrogation with the police (the present case) and, on the other, the absence of any lawyer from that first interview (*Salduz v. Turkey*<sup>71</sup>). Both cases concerned an incriminating statement made during the first police interrogation which was later relied upon for the conviction of each accused.

In the *Salduz* judgment, the test established was that a lawyer should be present during the first interrogation unless there are "compelling reasons" to restrict this right and provided that that restriction would not unduly prejudice the rights of an accused, although in principle this prejudice is established when an accused's statement made during that police interrogation in the absence of his lawyer is later used for a conviction.

The scenario in the present case – presence of a lawyer when the confession was made but denial of a lawyer of one's own choosing – was considered by the Grand Chamber to be less serious, so that the test applied by it was more lenient than the *Salduz* test in two respects. In the first place, "relevant and sufficient" reasons (as opposed to "compelling" reasons) can suffice to justify the denial of a choice of lawyer. Secondly, even if there are no such reasons, the Court will go on to assess the fairness of the proceedings as a whole on the basis of a broad variety of factors. Accordingly, relying on a statement made by an accused – in the presence of a lawyer but in the absence of his

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71. *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008.

chosen lawyer – is not considered, as a matter of principle, to irretrievably prejudice the rights of the defence: that latter conclusion requires an analysis of the overall fairness of the proceedings. The Grand Chamber added that, when an accused alleges during criminal proceedings that the denial of choice of legal representation led to the making of an incriminating statement, “careful scrutiny” by, notably, the national courts is called for.

In applying that more lenient test in the present case, the Grand Chamber, nevertheless found a violation of Article 6.

The Grand Chamber found that there were no “relevant and sufficient” reasons for the denial to the applicant of the opportunity to appoint a lawyer of his choice (indeed, practically none were offered by the respondent State). As to the overall fairness of the proceedings, it was true that the applicant’s confession had not been central to the prosecution’s case and that there was no allegation of incompetence on the part of the lawyer who assisted him (apart from the brevity of his pre-interrogation meeting with the applicant). However, two particular factors swung the case in favour of a violation. The domestic courts had not addressed (let alone applied “strict scrutiny” to) the applicant’s complaint regarding being denied the opportunity to appoint a lawyer of his choice and making an incriminating statement as a result: they had failed, therefore, to take adequate remedial measures to ensure fairness. In addition, the Grand Chamber considered that it could be presumed that the applicant had made the confession as a consequence of the police conduct in denying the applicant the opportunity to appoint a lawyer of his choice, which confession had a “significant likely impact” on the later development of the criminal case: the objective consequence of that denial had undermined the fairness of the subsequent criminal proceedings in so far as the incriminating statement was admitted in evidence against him. These factors were found cumulatively to have irretrievably prejudiced the applicant’s defence rights and undermined the fairness of the proceedings as a whole.

### **Impartial tribunal (Article 6 § 1)**

The judgment in *Morice v. France*<sup>72</sup> raises the question of the objective impartiality of a higher court in a case involving, on the one hand, members of the judiciary and, on the other, a lawyer (the applicant in the instant case). The applicant had complained about the judges’ conduct in a letter which was printed in the French press. The judges

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72. *Morice v. France* [GC], no. 29369/10, ECHR 2015.

lodged a complaint for public defamation of a civil servant. The applicant was convicted by the trial court of complicity in defamation. His appeal on points of law was dismissed by the Criminal Division of the Court of Cassation, which therefore upheld the conviction.

One of the judges sitting on the bench of the Court of Cassation that dismissed the appeal had, a few years earlier in judicial proceedings in which the applicant was acting as a lawyer, expressed support for one of the judges referred to in the applicant's letter. That support had been expressed publicly through official channels.

The applicant argued that the presence of that judge on the bench justified his fears that the Court of Cassation – the final appellate court in his case – was not impartial.

The Court found a violation of Article 6 § 1. Its judgment, which reiterates the case-law on the judicial-impartiality requirement (see, for example, *Kyprianou v. Cyprus*<sup>73</sup>, and *Micallef v. Malta*<sup>74</sup>), is noteworthy for a number of reasons.

Firstly, it reiterates the importance of the specific context when verifying whether an applicant's fears can be regarded as objectively justified for the purposes of Article 6 § 1. The applicant's case concerned two professionals, a lawyer and a judge, both of whom were involved in very high-profile cases. Secondly, the Court considered that the public support that had been expressed nine years earlier by a judge for a colleague who later brought proceedings against the applicant could raise doubts as to that judge's impartiality. Thirdly, the applicant had not been informed of that judge's presence on the bench. He had thus had no opportunity to challenge the judge's presence or to raise the issue of impartiality.

More generally, two aspects of the case were highlighted by the Grand Chamber:

(i) the crucial role of cassation proceedings, which form a special stage of the criminal proceedings with, as in the instant case, potentially decisive consequences for the accused because if the case had been quashed it could have been remitted to a different court of appeal for a fresh examination of both the facts and the law; and

(ii) the fact that the judge whose impartiality was questioned was sitting on a bench comprising ten judges was not decisive for the objective-impartiality issue as, in view of the secrecy of the deliberations, it was impossible to ascertain his actual influence on the deliberations.

73. *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII.

74. *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009.

## **Presumption of innocence (Article 6 § 2)**

The *Dicle and Sadak v. Turkey*<sup>75</sup> judgment concerned the consequences of the reopening of domestic criminal proceedings following a finding of a violation of Article 6 by the Court.

The applicants, who were former members of the Turkish National Assembly and of a political party that had been dissolved by the Constitutional Court, were sentenced in a final judgment in 1995 to fifteen years' imprisonment for belonging to an illegal organisation. Subsequently, in the *Sadak and Others v. Turkey (no. 1)*<sup>76</sup> judgment, the Court found violations of Article 6 of the Convention (right to a fair trial) in connection with those proceedings. Following that judgment the domestic proceedings were reopened by virtue of Article 327 of the Turkish Code of Criminal Procedure through a fresh set of criminal proceedings, independent from the original proceedings. In March 2007 the Assize Court confirmed the initial conviction, but reduced the prison sentence from fifteen to seven and a half years. In its judgment it referred to the applicants as "the accused/convicted persons".

The applicants then sought to stand as candidates in parliamentary elections in July 2007, but their candidatures were rejected by the National Electoral Commission on the ground that their original criminal convictions made them ineligible. However, by that time, the proceedings in which they were originally convicted had been reopened and were pending. It was only subsequently, with the judgment of the Court of Cassation in 2008 upholding the Assize Court's judgment in the reopened proceedings, that the applicants' guilt was legally established.

The applicants complained of a breach of Article 6 § 2 of the Convention, notably on account of the terms the Assize Court had used to refer to them in its 2007 judgment. They also complained under Article 3 of Protocol No. 1 of a violation of their right to stand for election.

The case raises some interesting questions. Firstly, the Court had to determine whether, by using the term "accused/convicted persons" rather than simply "accused" when referring to the applicants in the retrial, the Assize Court could be regarded as having branded them as guilty before their guilt was legally established. Secondly, the Court had to decide whether the fact that the original conviction appeared on

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75. *Dicle and Sadak v. Turkey*, no. 48621/07, 16 June 2015.

76. *Sadak and Others v. Turkey (no. 1)*, nos. 29900/96 and others, ECHR 2001-VIII.



their criminal records even after the proceedings had been reopened had violated the applicants' right to be presumed innocent. The Court answered both these questions in the affirmative.

(i) As regards the first point, under the domestic law the reopened proceedings were entirely independent from the original proceedings so that the case had to be treated as if the applicants were being tried for the first time. The Assize Court had nevertheless continued to use the term "the accused/convicted persons" when referring to the applicants even though it had not yet determined, in the light of the evidence and the defence submissions, whether they were guilty (the applicants' guilt was not legally established in the reopened proceedings until later, when the Court of Cassation upheld the Assize Court's decision).

(ii) As regards the second point, the fact that the applicants' original conviction had remained on their criminal records, thus designating them as guilty when, with the reopening of the proceedings, they should in principle have been regarded as "suspected of the offences", poses a problem regarding their right under Article 6 § 2 to be presumed innocent. In the Court's view, the continued inclusion of the offence on the applicants' criminal records amounted to an unequivocal affirmation, without a final conviction, that the applicants had committed the alleged offence. That constituted a violation of Article 6 § 2.

It was in the light of this reasoning that the Court examined the second complaint, which alleged a violation of Article 3 of Protocol No. 1. The applicants should, in principle, have been regarded as "suspected of the offences". The rejection of their candidatures for the legislative elections was, however, based on their *original* criminal convictions, which remained on their criminal records. The Court accordingly found that the rejection of the applicants' candidatures could not be considered to have been "prescribed by law" within the meaning of the Convention. There had thus been a violation on that account also.

### **Defence rights (Article 6 § 3)**

The judgment in *Vamvakas v. Greece (no. 2)*<sup>77</sup> concerned the failure of an appellate court to inquire into the absence of a legal-aid lawyer at a cassation hearing.

A legal-aid lawyer was appointed for the applicant for the purposes of his appeal to the Court of Cassation against his conviction. The lawyer did not appear at the appeal hearing. No advance warning or

77. *Vamvakas v. Greece (no. 2)*, no. 2870/11, 9 April 2015.

explanation was given for the non-appearance, and no request for an adjournment was ever made to the court, at least in the manner prescribed in domestic law. The applicant's appeal was dismissed on the ground that he had failed to pursue it.

In the Convention proceedings, the applicant complained that he had been denied a fair hearing in breach of Article 6.

The Court found for the applicant. The case is interesting since it illustrates the Court's attachment to the principle that Article 6 rights must be effective in practice and in reality, and that positive steps may be required in order to ensure respect for that principle. That principle of course must be applied with reference to the particular facts of the case before it.

The guiding considerations for complaints such as the applicant's were articulated in *Daud v. Portugal*<sup>78</sup>. In that case, the Court stated:

“... It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed ... [T]he competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way’ (*Kamasinski v. Austria*, 19 December 1989, § 65, Series A no. 168).”

On the facts of the applicant's case, the Court found that the Court of Cassation should have inquired further into the reasons for the unexplained absence of the applicant's lawyer at the hearing, given that the circumstances suggested that there had been a manifest professional failing on the part of the lawyer to comply with the terms of his appointment. The absence of any justification for the lawyer's non-appearance – he had been appointed seven weeks before the date of the hearing – should have prompted the Court of Cassation to adjourn the hearing on the applicant's appeal in order to clarify the situation, the more so since the decision to reject the applicant's cassation appeal was final.

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The *A.T. v. Luxembourg*<sup>79</sup> judgment concerned the questioning of the applicant in custody in the absence of a lawyer and the refusal to grant the lawyer access to the case file in advance of the first hearing before an investigating judge.

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78. *Daud v. Portugal*, 21 April 1998, § 38, *Reports of Judgments and Decisions* 1998-II.

79. *A.T. v. Luxembourg*, no. 30460/13, 9 April 2015.

The applicant was arrested in the United Kingdom on the basis of a European Arrest Warrant issued in respect of a rape allegation. He was handed over to the authorities in Luxembourg. The applicant was interviewed by the police shortly after his arrival in the presence of an interpreter. He asked for a lawyer but in the end agreed to give his version of events to the police without one being present. The next day he was interviewed by an investigating judge, at which stage he was officially charged with the offence and informed of his right to choose a lawyer. He was then questioned in the presence of his recently appointed lawyer and an interpreter. The applicant was found guilty and sentenced. His appeal was rejected.

The applicant made two complaints under Article 6 § 3 (c) in conjunction with Article 6 § 1. Firstly, he complained of the absence of a lawyer during his first questioning by the police. Having regard to the fact that domestic law made no provision at the time for the presence of a lawyer at that stage, which meant that the applicant was automatically deprived of the right to assistance by a lawyer, the Court found a violation. The Court's approach is entirely in line with the earlier cases of *Salduz*<sup>80</sup>, cited above, *Dayanan v. Turkey*<sup>81</sup>, *Panovits v. Cyprus*<sup>82</sup>, and *Navone and Others v. Monaco*<sup>83</sup>. Even if the applicant did not make any incriminating statements when questioned by the police, the trial court nevertheless compared and contrasted his declarations at that stage with later versions.

Secondly, he complained of the lack of effective assistance of a lawyer during his first questioning before the investigating judge. The Court distinguished between, on the one hand, the lawyer's access to the case file and, on the other, the communication between the applicant and the lawyer.

(i) Concerning access to the case file, the case is noteworthy in that the Court found that, where the national authorities considered that the interests of justice were best served in a particular case by not allowing an accused access to the case file in advance of questioning before an investigating judge, Article 6 cannot be relied upon in order to require full access at that stage of the procedure. It observed that, according to the domestic law of the respondent State, it was open to an accused to remain silent before the investigating judge, to consult the case file if officially charged and then to offer a defence at

80. *Salduz*, *supra* note 71.

81. *Dayanan v. Turkey*, no. 7377/03, 13 October 2009.

82. *Panovits v. Cyprus*, no. 4268/04, § 64, 11 December 2008.

83. *Navone and Others v. Monaco*, nos. 62880/11 and others, 24 October 2013.

subsequent hearings in light of the information obtained from the study of the case file. Hence, the Court found no violation under Article 6 § 3 (c) in conjunction with Article 6 § 1 in respect of this aspect of the applicant's complaint.

(ii) As to the question of effective communication with the lawyer, the Court found that the practice in Luxembourg, confirmed by a 2010 report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), revealed that individuals brought before an investigating judge did not have any opportunity to communicate confidentially with their lawyer before questioning. In the instant case, the applicant's lawyer was appointed on the very morning of his questioning and there was no firm evidence that he had had any opportunity to communicate with him effectively. On that account, the Court found a violation of Article 6 § 3 (c) in conjunction with Article 6 § 1.

## **No punishment without law (Article 7)**

The judgment in *Roblena v. the Czech Republic*<sup>84</sup> clarifies the Court's case-law under Article 7 of the Convention concerning application of the notion of a "continuous" criminal offence, which was examined by the Czech courts under the law in force at the time the last offence was committed. The applicant complained, in particular, that his conviction of a domestic-violence offence had encompassed his conduct even before the offence concerned was criminalised in 2004. The judgment of the Grand Chamber is of interest for the way in which it deals with the specific case of continuous criminal offences.

Having analysed the relevant domestic law, the Court found that, since the applicant's earlier conduct had amounted to punishable criminal offences under the Criminal Code in force at the time and comprised the constituent elements of the offence that had been introduced into the amended Code, there had been no retroactive application of the law in breach of the Convention.

In addition, the offence of which the applicant was convicted had a basis in the national law at the time it was committed and was sufficiently clearly defined in the law to meet the requirement of foreseeability for the purposes of Article 7 of the Convention.

It is noteworthy that the Court also referred to the law of other member States and noted in that connection that the notion of a

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84. *Roblena v. the Czech Republic* [GC], no. 59552/08, ECHR 2015.

continuous criminal offence as interpreted by the Czech courts was, as shown by a comparative-law study, in line with the European tradition in this area. This type of criminal offence had been developed in the vast majority of the Contracting States, either in legislation, or in legal theory and case-law.

Lastly, as to the question whether the applicant had faced a more severe punishment as a result of his conviction of a continuous offence, the Court found that had he been convicted of several separate offences he could have received a heavier sentence than that which was in fact imposed as the existence of multiple offences was likely to be deemed an aggravating circumstance. For these reasons there had been no violation of Article 7 in the applicant's case.

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The issue raised in the *Vasiliauskas v. Lithuania*<sup>85</sup> judgment was whether the applicant's conviction for genocide for his participation in the killing of two Lithuanian partisans in 1953 had been foreseeable.

In 2004 the applicant was convicted of genocide in relation to his participation in the killing of two Lithuanian partisans during a military operation in 1953, which operation was part of the suppression of the partisan movement by the Soviet authorities. The applicant complained under Article 7 that his conviction had no basis in law in 1953, so that it amounted to a retroactive application of the law against him.

The Grand Chamber found that the applicant's conviction, whether on the basis of an interpretation of the crime of genocide as protecting political groups or on the basis of the partisans being considered part of a protected national group, had no basis in law in 1953 so that there had been a violation of Article 7 of the Convention.

The judgment is significant in that Grand Chamber was required to rule for the first time on whether the persecution, following the Second World War, of Baltic partisans by the Soviet authorities constituted genocide. More specifically, it was required to determine whether the Lithuanian partisans were a group, or were part of a group, protected by the crime of genocide as understood in international law (conventional or customary) in 1953.

In the first place, the Court considered that there was no reason to find that the crime of genocide, as defined in Article II of the Convention on the Prevention and Punishment of the Crime of

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85. *Vasiliauskas v. Lithuania* [GC], no. 35343/05, ECHR 2015.

Genocide 1948, included “political” groups in its protection. In so finding, the Court relied on the text of the Genocide Convention 1948, its drafting history, the 2007 judgment of the International Court of Justice in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*<sup>86</sup>, as well as the definitions similar to the Genocide Convention 1948 adopted in subsequent relevant international-law instruments.

Secondly, while genocide was clearly a crime under customary international law in 1953, opinions were divided on whether that customary-law crime was more broadly defined than in Article II of the 1948 Convention so that there was no sufficiently strong basis for finding that that customary international law crime protected political groups in 1953.

Thirdly, the applicant could not have foreseen that the killing of the two partisans would have constituted the offence of genocide of Lithuanian “nationals” or of “ethnic” Lithuanians (both being protected groups). Even if that international customary law crime in 1953 could be considered to have protected the partisans as a significant part of a “national” group (which the Court did not accept), the domestic courts had not indicated in their judgments how the Lithuanian partisans could constitute such a part of a national group. The Court also accepted as “not without weight” the applicant’s argument that the Soviet authorities’ intent was to exterminate the partisan group as a clearly identifiable separate group characterised by its armed resistance to Soviet power (and, implicitly, not as part of another protected group).

Fourthly, the Court considered the gravity of genocide to be reflected in the stringent requirements to be satisfied before a conviction is imposed.

The Court concluded that it was not persuaded that the applicant’s conviction for genocide could be regarded as consistent with the essence of that offence as defined in international law at the material time (1953) and thus could reasonably have been foreseen by him.

The Court also rejected the application of Article 7 § 2, the Grand Chamber making it clear that the protection of Article 7 is to be found in its first paragraph, the second paragraph being of historical significance.

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86. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 26 February 2007, *ICJ Reports* 2007.

In particular, the Court noted that it had applied Article 7 § 2 in the context of a post-Second World War crime in the *Penart v. Estonia*<sup>87</sup> and *Kolk and Kislyiy v. Estonia*<sup>88</sup> decisions. However, the Grand Chamber confirmed its later restrictive interpretation of Article 7 § 2, begun in *Kononov v. Latvia*<sup>89</sup> and confirmed in *Maktouf and Damjanovic v. Bosnia and Herzegovina*<sup>90</sup>, to the effect that Article 7 § 1 contains the general rule of non-retroactivity and Article 7 § 2 is merely a contextual clarification designed to ensure that there was no doubt about the validity of the convictions following the Second World War for crimes committed during that war. It followed that, since the applicant's conviction was not justified under Article 7 § 1, it could not be justified under Article 7 § 2 of the Convention.

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

The *Ruslan Yakovenko v. Ukraine*<sup>91</sup> judgment concerned impediments to the exercise of the right of appeal in criminal matters. This case deals with a procedure under domestic law for appealing against a judgment in criminal proceedings, which has a direct impact on the right to liberty.

The applicant, who was being held in pre-trial detention on charges of causing grievous bodily harm, was sentenced to a term of imprisonment by the trial court. His sentence was due to expire three days after sentencing, since he had already spent a long period in pre-trial detention. However, the trial court decided to keep the applicant in detention, as a preventive measure, pending the trial court's judgment becoming final, even after his prison sentence had expired. If the applicant did not appeal, this "preventative detention" would last twelve days until the trial court's judgment became final. If the applicant did appeal, he would have delayed the trial court's judgment becoming final for an unspecified period of time thereby prolonging this "preventative detention" indefinitely.

87. *Penart v. Estonia* (dec.), no. 14685/04, 24 January 2006.

88. *Kolk and Kislyiy v. Estonia* (dec.), nos. 23052/04 and 24018/04, ECHR 2006-I.

89. *Kononov v. Latvia* [GC], no. 36376/04, ECHR 2010.

90. *Maktouf and Damjanovic v. Bosnia-Herzegovina* [GC], nos. 2312/08 and 34179/08, ECHR 2013 (extracts).

91. *Ruslan Yakovenko v. Ukraine*, no. 5425/11, ECHR 2015.

Before the Court, the applicant complained essentially of a violation of the right to appeal in criminal matters under Article 2 of Protocol No. 7.

For the first time, the Court was confronted with procedural rules for appeals which impact directly on the right to liberty. According to the constant case-law of the Court, the Contracting Parties are entitled to a wide margin of appreciation in determining how the right secured by Article 2 of Protocol No. 7 is to be exercised. However, the very essence of this right of appeal should not be infringed and, in the particular circumstances of this case, the Court concluded that that right had indeed been violated. The applicant had the right to lodge an appeal but was, in practice, dissuaded from doing so since any appeal would have delayed the trial court's judgment becoming final and, in turn, his release. The Court found that this ran counter to Article 2 of Protocol No. 7 since the exercise of the applicant's right of appeal would have been at the cost of his liberty for an unspecified period of time.



## CIVIL AND POLITICAL RIGHTS

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

#### Private life<sup>92</sup>

In the case of *Parrillo v. Italy*<sup>93</sup> the applicant complained of a statutory prohibition on the donation to research of cryopreserved embryos which had been created following the applicant's *in vitro* fertilisation (IVF) treatment.

The applicant, who was born in 1954, had recourse in 2002 to IVF treatment with her partner. The resulting five embryos were cryopreserved. Her partner died in 2003. The applicant did not wish to proceed with a pregnancy and requested the release of the embryos so she could donate them to stem-cell research. Citing the prohibition in Law no. 40 adopted in 2004, the clinic refused to release them. The embryos remained in the cryogenic storage bank.

The applicant mainly complained to the Court under Article 8 of the Convention and Article 1 of Protocol No. 1 of the statutory prohibition. The Court found that, whilst Article 8 of the Convention applied, it had not been violated. It declared the complaint under Article 1 of Protocol No. 1 to be incompatible *ratione materiae*<sup>94</sup>.

This was the first time that the Court had to pronounce on whether the notion of "private life" in Article 8 applies to an applicant's wish to obtain the embryos resulting from her IVF treatment, which are not destined to be implanted (unlike the position in *Evans v. the United Kingdom*<sup>95</sup>, *Costa and Pavan v. Italy*<sup>96</sup>, and *Knecht v. Romania*<sup>97</sup>) but to be donated to research.

With regard to the application of Article 8 of the Convention, the Grand Chamber noted that, in previous cases concerning the fate of

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92. See also *Elberte*, *supra* note 36.

93. *Parrillo v. Italy* [GC], no. 46470/11, ECHR 2015.

94. See Article 1 of Protocol No. 1.

95. *Evans v. the United Kingdom* [GC], no. 6339/05, ECHR 2007-I.

96. *Costa and Pavan v. Italy*, no. 54270/10, 28 August 2012.

97. *Knecht v. Romania*, no. 10048/10, 2 October 2012.

embryos from assisted reproduction, both the Court and the domestic courts had had regard to the freedom of choice of the parties to that treatment. The Court also relied on the link between the applicant who had undergone IVF and the embryos thus conceived. It concluded that the applicant's ability to exercise a conscious and considered choice regarding the fate of her embryos concerned an intimate aspect of her personal life, of her right to self-determination, and thus of her "private life" within the meaning of Article 8 of the Convention.

The Court accepted that the "protection of the embryo's potential for life", invoked by the respondent Government, may be linked to the legitimate aims of protecting morals and of protecting the rights and freedoms of others. It pointed out that it was not thereby taking a position on whether the word "others" extends to human embryos (consistently with, for example, *A, B and C v. Ireland*<sup>98</sup> and *Vo v. France*<sup>99</sup>).

The margin of appreciation accorded to the respondent State under Article 8 was wide, not least having regard to the matter in issue and the lack of a European consensus. While a margin of appreciation can be restricted when a particularly important facet of an individual's existence or identity is at stake, the Grand Chamber considered that the particular right invoked by the applicant – to donate the embryos for research rather than to implant them for pregnancy – was not one of the core rights attracting the protection of Article 8. The margin therefore remained wide.

The Court found that the prohibition was "necessary in a democratic society" within the meaning of Article 8, highlighting a number of factors, two of which are worth noting.

(i) The main element relied upon by the Court was the depth of the parliamentary discussion and scrutiny of the relevant legislative restriction, which factor has already been accorded some importance in prior Grand Chamber cases (for example, *Hirst v. the United Kingdom (no. 2)*<sup>100</sup>, and *Animal Defenders International v. the United Kingdom*<sup>101</sup>).

(ii) One of the applicant's main arguments was that the prohibition was incoherent since it was, at the same time, lawful for Italian researchers to use cell lines obtained from embryos which had been

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98. *A, B and C v. Ireland* [GC], no. 25579/05, § 228, ECHR 2010.

99. *Vo v. France* [GC], no. 53924/00, § 85, ECHR 2004-VIII.

100. *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX.

101. *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013 (extracts).

destroyed abroad. The Court did not consider that this was a circumstance directly affecting the applicant. However, it went on to note that the embryonic cell lines had never been produced at the request of the Italian authorities and that that situation differed from the deliberate and active destruction of a human embryo.

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The *Bohlen v. Germany*<sup>102</sup> judgment concerned the non-consensual use of the applicant's first name for the purposes of a cigarette advertising campaign.

The applicant enjoyed celebrity status as a pop singer. He published a book. Certain passages in the book had to be deleted as a result of legal proceedings. A tobacco company, as part of its advertising campaign for a brand of cigarettes, used the applicant's first name and linked it in a humorous/satirical manner to the problems which the applicant had faced following the publication of his book. The applicant claimed compensation for the unlawful use of his name and the resultant unjust enrichment of the tobacco company. The applicant's civil action was ultimately dismissed by the Federal Court of Justice. In the Convention proceedings, the applicant alleged that the respondent State had failed to protect his right to respect for his private life. The Court held that there had been no breach of Article 8.

The case is noteworthy in that the Court found on the facts of the case that the right to commercial speech took precedence over the applicant's Article 8 arguments.

The Court confirmed at the outset that an individual's first name is part of his or her private (and family) life. In the instant case, even if the applicant's first name was not uncommon, the fact that the advertising campaign had linked it to the controversy surrounding the publication of his book made it possible to identify him. On that account, Article 8 was engaged. The Court inquired into whether the applicant's unsuccessful civil action meant that the respondent State had failed to protect the applicant's right to respect for his private life. It did so with reference to the various criteria which it had established in its judgment in *Axel Springer AG v. Germany*<sup>103</sup>, in order to gauge whether a fair balance had been struck between the competing interests

102. *Bohlen v. Germany*, no. 53495/09, 19 February 2015. See also *Ernst August von Hannover v. Germany*, no. 53649/09, 19 February 2015.

103. *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 90-95, 7 February 2012, see Annual Report 2012.

of free speech and privacy in a particular set of circumstances. The Court reached the following conclusions.

(i) The background to the advertising campaign was the media interest generated by the publication of the applicant's book and the litigation which ensued. The advertising campaign alluded in a satirical and humorous style to the discussion surrounding the appearance of the book at the time, satire and humour being forms of expression protected by Article 10 of the Convention. The advertising campaign could thus be considered to be a contribution to a debate on a matter of general interest.

(ii) The applicant was a well-known personality and for that reason he enjoyed a lesser degree of protection of his private life.

(iii) The advertising never revealed any details of the applicant's private life and never relied on the revelations disclosed by the applicant in his book about his private life. For the Court, the applicant, by publishing a book about himself, had intentionally courted publicity.

(iv) The advertising campaign did not give any reason to believe that the applicant, a non-smoker, in any way associated himself with the promotion of the brand of cigarettes in question.

(v) Only those persons familiar with the applicant's post-publication litigation would have connected the applicant to the advertising.

The Court's findings and conclusion are also of interest in that it had close regard to the manner in which the Federal Court of Justice had answered the applicant's civil claim, in particular its balancing of the interests at stake. One of the applicant's arguments in the Convention proceedings had been to the effect that the Federal Court of Justice had given priority to the tobacco company's constitutional right to freedom of expression because the applicant had only asserted a right to the financial protection of the use of his name. The Court did not agree with this argument, being of the view that the Federal Court of Justice had addressed all relevant considerations when balancing the rights at stake.

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The applicant in *Y.Y. v. Turkey*<sup>104</sup> sought authorisation to undergo gender reassignment surgery, but this was refused on the ground that she was not definitively unable to procreate. The domestic courts relied on Article 40 of the Civil Code in this connection. It was not disputed

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104. *Y.Y. v. Turkey*, no. 14793/08, ECHR 2015.

that the applicant complied with the other conditions for undergoing surgery. The applicant was eventually allowed to have surgery in 2013, five years and seven months after the earlier refusal of her application. The domestic court decided the applicant's request without considering whether she was able to procreate. The applicant maintained in the Convention proceedings that there had been a breach of her right under Article 8 to respect for her private life.

The case raises a new issue in that, unlike earlier transsexual cases, the Court was called upon to address the compatibility with Article 8 of conditions imposed on an applicant seeking to change sex. In previous cases, the Court's concern had been to assess the justification for restrictions imposed on a post-operative transsexual's enjoyment of their Article 8 rights (see, for example, *Christine Goodwin v. the United Kingdom*<sup>105</sup>, *Van Kück v. Germany*<sup>106</sup>, and *Hämäläinen v. Finland*<sup>107</sup>).

The judgment is interesting in that the Court examined the applicant's case from the standpoint of an interference with her Article 8 rights, rather than ascertaining whether in the circumstances the initial refusal to allow her to undergo gender reassignment surgery amounted to a failure to secure the right guaranteed by that Article. The Court found that the refusal had interfered with the applicant's right to respect for her private life, in particular her right to her own sexual identity and personal development within the sex of her own choosing.

The Court accepted that gender reassignment surgery could be subject to regulation by the State for reasons related to the protection of health. However, it left open the question as to whether the infertility requirement contained in the domestic law could be said to pursue a similar aim.

The Court's focus was on the necessity of the interference, having regard in particular to the margin of appreciation afforded to the authorities when legislating for the conditions governing access to gender reassignment surgery and the legal recognition of a new gender, the scope of the margin being defined by the nature of the right in issue as well as by emerging national and European trends in this area. The Court observed, among other things, that in many member States of the Council of Europe gender reassignment surgery was available to

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105. *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI.

106. *Van Kück v. Germany*, no. 35968/97, § 69, ECHR 2003-VII.

107. *Hämäläinen v. Finland* [GC], no. 37359/09, § 67, ECHR 2014, see Annual Report 2014.

transsexuals, and the new post-operative gender was recognised in law. Some States made legal recognition of a new gender conditional on the person undergoing surgery and/or on his or her inability to procreate. Certain States had recently abolished the inability-to-procreate requirement as a precondition of legal recognition of a new gender. Moreover, in those countries where the requirement existed, fertility only became an issue after surgery. In the instant case, and having regard to the initial decision of the domestic court, it would appear that this requirement had to be fulfilled before gender reassignment surgery could be authorised. For the Court, even assuming that relevant arguments had been advanced for the refusal of the applicant's request, they could not be considered sufficient. For that reason there had been a breach of Article 8.

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The *Y. v. Slovenia*<sup>108</sup> judgment concerned the cross-examination at trial of a rape victim by the accused and the question of the protection of her personal integrity at the trial.

The Court's case-law abounds with examples of circumstances in which it was required to assess whether the domestic courts had struck a fair balance between the rights of the defence and the protection of other imperatives, for example, security considerations or the interests of victims and witnesses. The case of *Y. v. Slovenia* offers a new angle to this process of reconciliation of competing rights and interests. The applicant alleged that her right to respect for her private life, seen in terms of her personal integrity, had been breached on account of the failure of the trial court to protect her from what she alleged was a distressing and improper line of questioning by the accused. In the typical case examined by the Court, by contrast, it is the accused who complains that his defence rights have been impaired on account of his inability to put questions directly to witnesses.

The applicant alleged that X had raped her. She was a minor at the time of the offence and X had been a family friend. Her testimony was the only direct evidence in the case. The other evidence heard by the trial court was contradictory. The accused was personally permitted to cross-examine the applicant at two of the court hearings held in the case.

In assessing whether the trial court had struck a proper balance between the applicant's Article 8 interests and the exercise by the accused of his defence rights guaranteed by Article 6, the Court took

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108. *Y. v. Slovenia*, no. 41107/10, ECHR 2015 (extracts).

as its point of departure the distress which a direct confrontation between the victim of a sexual offence and the accused person may entail for the victim. For the Court such confrontation involves a risk of further traumatising for the victim, which requires the domestic court to subject the accused's personal cross-examination of the victim to a close assessment, the more so when the questions put to the victim are of an intimate nature.

The Court found in the circumstances of the applicant's case that the trial court had failed to strike a proper balance between the rights at stake. It observed among other things that the accused was permitted to put extremely personal questions to the applicant, some of which had been calculated not to attack her credibility but to disparage her character, and at times his questions amounted to offensive insinuations. While accepting that the defence had to be allowed some latitude to challenge the reliability and credibility of the applicant, it considered that cross-examination should not be used as a means of intimidating or humiliating witnesses. In the Court's view, given that the applicant was being questioned directly, in detail and at length by the man she accused of having sexually assaulted her, it fell to the presiding judge to ensure that her personal integrity was adequately protected. Overall, by not intervening to curtail particular lines of questioning, he had failed to discharge that responsibility. It is also noteworthy that the Court found fault with the manner in which an expert in gynaecology was permitted to put questions to the applicant at the trial. The expert had been appointed by the investigating judge to establish whether the applicant had had sexual intercourse with the accused. At the trial the expert was able to question the applicant in an accusatory manner on matters which were unrelated to the scope of his appointment and which were properly within the remit of the prosecuting and judicial authorities. This had unnecessarily added to the applicant's stress. The Court observed that the judicial authorities are required to ensure that other participants in the proceedings called to assist them in the investigation or the decision-making process treat victims and other witnesses with dignity and do not cause them unnecessary distress.

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In *Y v. Turkey*<sup>109</sup> the applicant complained that information that he was HIV-positive had been disclosed to staff at a hospital to which he had been admitted after collapsing. He was unconscious on arrival and

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109. *Y v. Turkey* (dec.), no. 648/10, 17 February 2015.

so had been unable to reveal that he was HIV-positive himself. His relatives had given the information to the ambulance crew they had called. The applicant complained that the ambulance crew had passed the information on to both medical and administrative staff at the hospital, in breach of his right to respect for his private life under Article 8.

The main legal interest in this decision concerns the protection of medical data on the admission of an HIV-positive patient to hospital. The protection of the confidentiality of data relating to persons with HIV was examined by the Court in the context of unauthorised access to a medical file (*I. v. Finland*<sup>110</sup>) and in relation to court proceedings (*Z v. Finland*<sup>111</sup>, and *C.C. v. Spain*<sup>112</sup>). The Court reiterated that people living with HIV were a vulnerable group (see *Kiyutin v. Russia*<sup>113</sup>) and stressed the importance of keeping medical information relating to them confidential (*Z v. Finland*, cited above). Interestingly, the Court observed that the passing-on to hospital staff of information relating to the conditions of an HIV-positive patient may, in certain circumstances, be relevant and necessary, in the interests both of the patient and of the medical staff and other patients at the hospital. In such cases it was important to ensure that the recipient of the information was bound by the rules of confidentiality applicable to members of the medical profession or by comparable rules of confidentiality.

In the instant case the Court did not find the complaint well-founded. In reaching that conclusion it referred to:

(i) the protection afforded by national law in the sphere of respect for private life and the confidentiality of medical data, which protection extended to anyone who, as result of his or her position or profession, held information relating to a patient's health (this covered everyone concerned in the applicant's case, on pain of disciplinary or criminal proceedings);

(ii) the fact that the disclosure in the applicant's case was made strictly in his own interests; and

(iii) the need to ensure the safety of hospital staff and to protect public health.

The Court stressed that as a matter of principle any passing on of information as sensitive as that concerned in the applicant's case had

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110. *I. v. Finland*, no. 20511/03, 17 July 2008.

111. *Z v. Finland*, 25 February 1997, *Reports of Judgments and Decisions* 1997-I.

112. *C.C. v. Spain*, no. 1425/06, 6 October 2009.

113. *Kiyutin v. Russia*, no. 2700/10, ECHR 2011, see Annual Report 2011.



to avoid any form of stigmatisation of the patient and afford sufficient guarantees in that respect.

Having carefully weighed up all relevant matters, the Court considered that the fact that information relating to the applicant's HIV-positive status was shared with the various members of the medical staff involved in his care (to the exclusion of those not so involved) had not violated his right to respect for his private life.

It also reached the same conclusion with regard to the inclusion of the applicant's name and the fact that he was HIV-positive in a judicial decision that was neither published nor accessible to the public and was adopted in a written administrative procedure without a hearing that had been brought by the applicant against hospital staff (compare with the position in *C.C. v. Spain*, cited above<sup>114</sup>).

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In *R.E. v. the United Kingdom*<sup>115</sup> the applicant complained that his consultations with his lawyer in a police station had been subject to covert surveillance, in breach of Article 8 of the Convention.

The judgment is noteworthy in that the Court had to decide whether the stringent safeguards which it has prescribed when it comes to the interception of communications (see *Weber and Saravia v. Germany*<sup>116</sup>) apply with equal force to the use of devices placed in a police station enabling the authorities to listen in on an interview between an accused and his or her lawyer. The Government had argued that the level of safeguards should be less strict in the applicant's case since it concerned covert surveillance and not the interception of communications.

The Court rejected that argument. It stressed that the applicant's case concerned the surveillance of his consultations with his lawyer in a police station. For that reason the case should be considered from the standpoint of the principles which the Court has established in the area of interception of lawyer-client telephone calls, given the need to ensure an enhanced degree of protection for that relationship and in particular for the confidentiality of the exchanges which characterise it. On that account, the applicant's case could not be compared to cases such as *Uzun v. Germany*<sup>117</sup> in which the Court had found that the

114. *C.C. v. Spain*, *supra* note 112.

115. *R.E. v. the United Kingdom*, no. 62498/11, 27 October 2015.

116. *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 95, ECHR 2006-XI.

117. *Uzun v. Germany*, no. 35623/05, ECHR 2010 (extracts).

principles developed in the context of surveillance of telecommunications were not directly applicable in a case concerning surveillance of movements in public places via GPS because such a measure “must be considered to interfere less with the private life of the person concerned than the interception of his or her telephone conversations”.

In the applicant's case, the Court was not satisfied that the relevant domestic-law provisions concerning the examination, use and storage of the material obtained, the precautions to be taken when communicating the material to other parties, and the circumstances in which recordings may or must be erased or the material destroyed provided sufficient safeguards for the protection of the material obtained by covert surveillance. It found a breach of Article 8 in that respect.

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The *Szafrański*<sup>118</sup> judgment (not final), cited above, was concerned with the question of ensuring privacy for prisoners when using sanitary facilities situated in their cell.

The applicant, a prisoner, complained that the toilet facilities in the various cells where he was detained during his incarceration were arranged in a way that subjected him to degrading treatment and amounted to a denial of privacy, in contravention of Articles 3 and 8 of the Convention. It was accepted in the domestic and Convention proceedings that the toilet in these cells was situated in the corner of the (multi-occupancy) cell close to the entrance and was divided from the rest of the cell by a 1.2 metre high partition. There was no door to the toilet.

The Court found that there had been no breach of Article 3 in the circumstances of the applicant's case. It noted that in some cases it had found that a lack of privacy in the use of the toilet facilities in a prisoner's cell had given rise to a breach of Article 3, but such findings had to be seen in the light of the presence of other aggravating factors such as a lack of heating, natural light, ventilation or restricted cell space (see, in particular, *Peers v. Greece*<sup>119</sup>, and *Canali v. France*<sup>120</sup>). There were no such factors in the applicant's case.

The Court next examined the applicant's complaint under Article 8.

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118. *Szafrański*, *supra* note 18.

119. *Peers v. Greece*, no. 28524/95, § 73, ECHR 2001-III.

120. *Canali v. France*, no. 40119/09, §§ 52-53, 25 April 2013.

The judgment is noteworthy in that the Court found for the first time that there had been a breach of Article 8 notwithstanding the absence of further aggravating factors of the type described above. In the Court's opinion, the failure alone of the prison authorities to secure to the applicant a minimum level of privacy when using the toilet in his cell in the presence of other inmates amounted to a breach of his right to respect for his private life. In the opinion of the Court, "the domestic authorities have a positive obligation to provide access to sanitary facilities which are separated from the rest of the prison cell in a way which ensures a minimum of privacy for the inmates". It noted in this respect that according to the CPT, a sanitary facility which is only partially separated off is not acceptable in a cell occupied by more than one detainee (CPT/Inf (2012) 13, § 78). It also placed emphasis on the fact that the applicant had to endure this lack of privacy for a considerable period. It noted that between 31 March 2010 and 6 December 2011 the applicant was placed in ten different cells, seven of which had sanitary facilities which had not been sufficiently separated off.

### **Private and family life**

The case of *Khoroshenko v. Russia*<sup>121</sup> concerned long-term imprisonment and the right to family visits. The applicant was a Russian national. He was convicted of murder and sentenced to death in 1995. In 1999 his sentence was commuted to life imprisonment and he was transferred to a special-regime correctional colony. For the first ten years of his life sentence (1999-2009), the applicant was subjected to the "strict regime". He was therefore entitled to two family visits per year: each lasted four hours and involved no more than two family members, the prisoner and his family were separated by a glass partition, and the visit was supervised by a prison guard within hearing distance. A prisoner could write letters but could not telephone (unless in an emergency).

Before the Court, the applicant complained that the various restrictions on family visits violated Article 8 alone and in conjunction with Article 14. The Court found a violation of Article 8, no separate examination of the same facts being necessary under Article 14.

As regards rights to visits from family members, the judgment provides an interesting recapitulation of the Convention case-law on prison visits, a useful review of the relevant standards of the Council of Europe (including the CPT), of the United Nations (including the

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121. *Khoroshenko v. Russia* [GC], no. 41418/04, ECHR 2015.

International Covenant on Civil and Political Rights) and of the Inter-American Commission on Human Rights, as well as a summary of the Court's comparative-research findings as regards prison visits for life sentenced prisoners.

The judgment also provides a useful summary of the Court's position on the importance to be accorded by States in its penal policy to the rehabilitative and reintegration aim of imprisonment. The Court relied on certain prior cases (notably *Dickson v. the United Kingdom*<sup>122</sup>; *Vinter and Others v. the United Kingdom*<sup>123</sup>; and *Harakchiev and Tolumov v. Bulgaria*<sup>124</sup>) and on relevant international instruments. Interestingly, while the *Dickson* case underlined the particular importance of rehabilitation at the end of a long sentence and while the *Vinter and Others* case underlined its particular importance for release, in the present case the Court imposed a clear obligation on States to be proactive in that regard independently of such end-of-sentence or release contexts and with specific reference to prison visits. In particular, the Court attached "considerable importance" to the recommendations of the CPT to the effect that long-term prison regimes should seek to compensate for the desocialising effects of imprisonment in a positive and proactive way.

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The *Oliari and Others v. Italy*<sup>125</sup> judgment concerned a failure to secure legal recognition for same-sex unions.

The applicants are same-sex couples, living in stable and committed relationships. In the Convention proceedings, they complained, among other things, that in Italy it is impossible for them to enter into a civil union or to benefit from some other means of legal recognition of their partnerships.

The Court framed the applicants' grievance in the following terms: have the Italian authorities at the date of the Court's examination of the case – 2015 – failed to comply with a positive obligation to ensure respect for the applicants' private and family life, in particular through the provision of a legal framework allowing them to have their relationship recognised and protected under domestic law?

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122. *Dickson v. the United Kingdom* [GC], no. 44362/04, § 75, ECHR 2007-V.

123. *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and others, §§ 111-16, ECHR 2013 (extracts).

124. *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, §§ 243-46 and 265, ECHR 2014 (extracts).

125. *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, 21 July 2015.

Interestingly, the Court had observed earlier in the case of *Schalk and Kopf v. Austria*<sup>126</sup> with reference to the state of play in 2010, that this area was one of evolving rights with no established consensus, and where States enjoyed a margin of appreciation in the timing of the introduction of legislative changes. The Court concluded in *Schalk and Kopf* that Austria could not be reproached for not having enacted legislation allowing for the registration of same-sex partners any earlier than 2010.

The Court found for the applicants. The judgment is of particular importance in that the violation relates to Article 8 of the Convention taken alone. The Court did not consider it necessary to examine the discrimination complaints of those applicants who had also relied on Article 14. It will be recalled that in the case of *Vallianatos and Others v. Greece*<sup>127</sup> the Grand Chamber's inquiry was directed at the existence, or not, of weighty and convincing reasons to justify the exclusion of same-sex couples from a civil partnership regime. The Court's primary focus in that case was on Article 14 of the Convention and discrimination in the enjoyment of the Article 8 right (see also the approach in *Schalk and Kopf*, cited above).

The Court had regard to the following factors in finding Italy to be in breach of Article 8.

(i) Proof of a continuing international movement towards legal recognition of same-sex unions, "to which the Court cannot but attach some importance". Significantly, the Court did not attach decisive importance (at least not at this stage) to the fast-moving developments in this area at the regional and global levels.

(ii) The inability of the Italian authorities to point to any countervailing community interest.

(iii) Evidence of popular support among the Italian population for the recognition and protection of same-sex unions.

(iv) An obligation to provide for the recognition and protection of same-sex unions would not create a burden for the respondent State, and would serve to bring the law into line with social realities

(v) Crucially, both the Italian Constitutional Court (in particular) and the Court of Cassation had repeatedly called for the introduction of legal recognition of the relevant rights and duties of same-sex

126. *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010.

127. *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 49, ECHR 2013 (extracts).

unions; notwithstanding that call, the Italian legislator has not yet enacted the relevant legislation.

For the Court, Italy had overstepped their margin of appreciation in this area. The Court's conclusion is of interest in that the Court clarifies that its decision is focused essentially on the situation prevailing in Italy, and that a different solution might be reached in a different domestic context, absent the above factors and notwithstanding the trends in this area at the regional and international level as identified in 2015:

“To find otherwise today, the Court would have to be unwilling to take note of the changing conditions in Italy and be reluctant to apply the Convention in a way which is practical and effective.”<sup>128</sup>

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In the *M. and M. v. Croatia*<sup>129</sup> judgment, cited above, the Court considered the issue of whether a child's views should be heard in custody proceedings.

The judgment is of particular interest in that the Court found that the right of a divorced couple's daughter to respect for private and family life had been violated as regards the length of the custody proceedings – they were still pending after more than four years – and the failure of the domestic courts to allow her an opportunity to express her views on which parent should take care of her.

On the latter point, the Court stressed with reference to Article 12 of the United Nations Convention on the Rights of the Child 1989 that in any judicial or administrative proceedings affecting children's rights under Article 8 of the European Convention “it cannot be said that children capable of forming their own views were sufficiently involved in the decision-making process if they were not provided with the opportunity to be heard and thus express their views”.

The Court noted that the daughter was nine and a half years old at the time of the institution of the custody proceedings and was now thirteen and a half. It would thus be difficult to argue that, given her age and maturity, she was not capable of forming her own views and expressing them freely. Experts had already established that the first applicant had expressed a strong wish to live with her mother. For the Court, not respecting her wishes would, in the specific circumstances

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128. *Oliari and Others*, § 186, *supra* note 125.

129. *M. and M. v. Croatia*, *supra* note 35.

of the case, constitute an infringement of her right to respect for private and family life.

### **Private life and home**

The judgment in *Sher and Others*<sup>130</sup>, cited above, concerned the reconciliation of the fight against terrorism with the rights to respect for private life and the home guaranteed by Article 8 of the Convention.

The applicants, Pakistani nationals, were arrested and detained for thirteen days in connection with an anti-terrorism operation. They were ultimately released without charge.

In the Convention proceedings, they complained, among other things, that their homes had been searched pursuant to warrants which were unjustifiably broad in their scope. They relied on Article 8 of the Convention.

The Court held that there had been no violation of that provision. The judgment is of interest in that the Court was once again called upon to rule on the balance which has to be struck between the fight against terrorism and respect for the Convention rights of individuals suspected of involvement in acts of terrorism. The Court accepted that, in the instant case, the authorities had suspected an imminent terrorist attack and had launched an extremely complex investigation aimed at thwarting it.

The Court acknowledged that the search warrant was couched in relatively broad terms, authorising the search and seizure of correspondence, books, electronic equipment and numerous other items. However, in the Court's view, the fight against terrorism and the urgency of the situation may justify a search based on terms that are wider than would otherwise be permissible. According to the Court, in cases of this nature, the authorities must be permitted some flexibility to assess, on the basis of what is found during a search, which items might be linked to terrorist activities and to seize them for further examination.

As to the existence of safeguards against the risk of arbitrariness, it noted that the warrant had been issued by a judge and that the applicants had not argued that there were no reasonable grounds for granting the warrant. Moreover, it was open to the applicants to lodge an *ex post facto* judicial review action or to claim damages in respect of any specific item seized during the search.

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130. *Sher and Others*, *supra* note 48.

## Private life and correspondence

The judgment in *Roman Zakharov*<sup>131</sup>, cited above, concerned the question of the compliance with Article 8 of the Convention of a system of covert interception of communications.

The applicant was a publisher and the chairman of a branch of a non-governmental organisation concerned with media freedom. He unsuccessfully brought domestic proceedings challenging the domestic system of interception of mobile-telephone communications and, notably, the provisions of domestic law which required mobile-network operators to install equipment that permitted the Federal Security Service to intercept all mobile-telephone communications. He complained to the Court that the system of covert interception of mobile-telephone communications in Russia did not comply with Article 8. The Grand Chamber found a violation of that Article.

The Grand Chamber reviewed the system of covert interception of mobile-telephone communications in Russia for compliance with Article 8. Two aspects should be highlighted.

(i) The Grand Chamber acknowledged that, following *Klass and Others v. Germany*<sup>132</sup>, two lines of case-law on victim status in secret-surveillance cases had developed. One line considered that it was sufficient for an individual to show the existence of practices permitting secret surveillance and that there was a reasonable likelihood that the security services had compiled and retained information concerning that individual's private life (for example, *Halford v. the United Kingdom*<sup>133</sup>, and *Iliya Stefanov v. Bulgaria*<sup>134</sup>). The other line reiterated the *Klass and Others* approach, since the very threat itself of surveillance was considered to affect freedom of communication (for example, *Liberty and Others v. the United Kingdom*<sup>135</sup>, and *Iordachi and Others v. Moldova*<sup>136</sup>). The Grand Chamber decided to follow the approach adopted in the recent *Kennedy v. the United Kingdom*<sup>137</sup> case. Accordingly, an applicant can claim to be a victim of a violation of the Convention if he or she is covered by the scope of legislation permitting secret surveillance measures (is part of a group targeted by that law or

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131. *Roman Zakharov*, *supra* note 8.

132. *Klass and Others v. Germany*, 6 September 1978, Series A no. 28.

133. *Halford v. the United Kingdom*, 25 June 1997, *Reports of Judgments and Decisions* 1997-III.

134. *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008.

135. *Liberty and Others v. the United Kingdom*, no. 58243/00, 1 July 2008.

136. *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009.

137. *Kennedy v. the United Kingdom*, no. 26839/05, 18 May 2010.



the law applies to everyone) and if the applicant has no remedies to challenge such covert surveillance. Moreover, even if remedies exist, an applicant can still claim to be a victim of the mere existence of secret measures or legislation permitting such measures if he or she can show that, due to his or her personal situation, he or she is potentially at risk of being subjected to such measures.

In the present case, the impugned secret-surveillance legislation applied to all mobile-telephone users of Russian providers and Russian law was found not to provide effective remedies for someone suspecting that he or she had been subjected to secret surveillance (see below). Accordingly, the Grand Chamber considered that an examination of the legislation *in abstracto* was justified so that the applicant could claim to be a victim of a violation of his rights under Article 8 of the Convention and that the legislation could be considered to amount to an interference with his rights under that Article.

(ii) In concluding that Russian legal provisions governing the interception of communications did not provide adequate and effective guarantees against arbitrariness, the Grand Chamber provided an extensive and useful compilation of the Court's case-law under Article 8 as regards the lawfulness and necessity of secret-interception legislation. Certain aspects should be mentioned.

– The judgment examines together the “lawfulness” (“quality of law”) and the “necessity” (adequacy and effectiveness of safeguards) of the interference, as was the case in *Kennedy*, cited above, where the Court noted that these issues were “closely related”. When framing the relevant law, the Grand Chamber noted, the authorities must also ensure that it will only be applied when “necessary” and they do that by ensuring that the law contains adequate and effective safeguards. This joint approach may be seen to be appropriate in cases where, as in the applicant's case, the complaints challenged the domestic law in general as opposed to a particular incident.

– The secret-surveillance system in issue had one particularity: mobile-network operators were required by law to install equipment which provided the authorities with the possibility of direct access to all mobile-telephone communications without judicial involvement or trace. While this rendered the risk of abuse particularly high, a risk of abuse was considered inherent in any system of secret surveillance and the judgment does not suggest that its findings – that the system safeguards were inadequate and ineffective – depended on this particularity of the Russian system.

– The Court found that the question of any need to notify an individual that he or she had been subjected to an interception was inextricably linked to the effectiveness of domestic remedies. Accordingly, in *Kennedy*, for example, the absence of a requirement in domestic law to notify the suspect of an interception was compatible with the Convention: in the United Kingdom any person who suspected that his or her communications were being or had been intercepted could apply to the Interceptions Powers Tribunal, whose jurisdiction did not depend on the subject having particular information about an interception. However, in Russia, persons subject to interceptions are not notified and the remedies invoked by the Government were found to be available only to those in possession of information about an interception of their communications. Accordingly, unless there had been criminal proceedings (in which an interception had been invoked) or unless there had been a leak, the remedies invoked were not available to an individual.

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The judgment in *M.N. and Others v. San Marino*<sup>138</sup> concerned banking data and the scope of private life and correspondence.

A decision ordering the search and seizure of banking documents was adopted and implemented by the authorities of the respondent State in response to letters rogatory received from the Italian authorities who were engaged in an ongoing criminal investigation into, among other matters, money laundering. All banks, fiduciary institutes and trust companies in San Marino were covered by the decision. Banking data relating to the applicant were seized and copied in the course of the operation. The applicant was only notified about the measure applied to him one year after the adoption of the decision.

The Court examined the applicant's complaint solely from the angle of Article 8 of the Convention, although the applicant had also pleaded his case under Articles 6 and 13.

In the event, the Court found that there had been a breach of Article 8 on account of the absence of procedural safeguards. Given that the applicant had not been charged with or indeed suspected of any financial wrongdoing, he had no standing under the law of San Marino to contest the seizure and copying for storage purposes of his banking data. On that account the applicant, not being an "interested person" within the meaning of the domestic law, was denied the

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138. *M.N. and Others v. San Marino*, no. 28005/12, 7 July 2015.

“effective control to which citizens are entitled under the rule of law and which would have been capable of restricting the interference in question to what was ‘necessary in a democratic society’”.

The judgment is interesting in that the Court had to reply to the respondent Government’s contention that Article 8 was not applicable in the circumstances of the case since, in their view, the case-law to date did not appear to protect the confidentiality of materials relating to banking and fiduciary relationships. The Court dismissed that argument. It observed that banking documents undoubtedly amount to personal data concerning an individual, irrespective of whether or not they contain sensitive information. It added that such information may also concern professional dealings and there was no reason of principle to justify excluding activities of a professional or business nature from the notion of “private life”. In addition, the right to respect for one’s correspondence was also engaged since the seizure order also covered letters and emails exchanged between the applicant and third parties, which had been entrusted to the custody of the bank.

Referring to *Michaud v. France*<sup>139</sup>, the Court observed that Article 8 protected the confidentiality of all exchanges in which individuals may engage for the purposes of communication. Moreover, it was of no consequence that the original documents remained with the bank. The copying and subsequent storage of information retrieved from bank statements, cheques, emails, etc., amounted to an interference with both the applicant’s “private life” and “correspondence”.

### **Family life**<sup>140</sup>

The *Penchevi v. Bulgaria*<sup>141</sup> judgment concerned a refusal to allow a child to travel abroad to join his mother. The cassation court, contrary to the approach that had been taken by the courts below, refused the applicant permission to allow her child to leave Bulgaria and to stay with her in Germany while she was completing a postgraduate course of studies there. It relied on the provisions of the domestic legislation which required the consent of both parents before their child could leave the jurisdiction. The father had withheld his consent. The domestic proceedings lasted almost two years and three months. The domestic courts eventually authorised the child to join his mother in Germany. The applicants (mother and child) complained that the

139. *Michaud v. France*, no. 12323/11, § 90, ECHR 2012.

140. See also *Kuppinger*, *supra* note 65.

141. *Penchevi v. Bulgaria*, no. 77818/12, 10 February 2015.

refusal to allow the child to leave Bulgaria amounted to an interference with their right to respect for their family life.

The Court held that there had been a breach of Article 8 in the circumstances. The judgment is interesting in that the facts of the case did not concern a taking into care or a dispute over custody or an issue under the Hague Convention. The Court's inquiry was directed at ascertaining whether a refusal to allow a child to accompany her mother to another country for the purposes of the latter's postgraduate education gave rise to a breach of the applicants' right to respect for their family life. In this connection, the Court had to determine to what extent the child's best interests were a paramount consideration in this context.

The Court found that the separation of the mother and child during the period of the court proceedings had interfered with both applicants' right to respect for their family life. The interference had a lawful basis given that the consent of both parents was required under domestic law before a child could travel abroad. It had pursued, moreover, a legitimate aim, namely the protection of the rights of the child's father. The key issue was the necessity of the interference in the circumstances of the case. As to that issue, the Court observed as follows.

(i) The cassation court had not taken into account the circumstances of the case, but had applied a formalistic and mechanical approach to the applicants' situation basing itself exclusively on the parental-consent requirement laid down in the domestic law. At no stage had it examined whether the interests of the child would in fact be prejudiced by allowing him to join his mother in Germany. It had not given any consideration to the realities of the applicants' situation, such as the fact that the child was not being looked after in Bulgaria by his father.

(ii) The cassation court had based its refusal also on the fact that the applicant had committed a technical error in not specifying in her application that Germany was the country of intended destination.

(iii) The time taken to reach a decision in the domestic proceedings had a serious and negative impact on the applicants' ability to live together and the prolonged separation had to be seen as incompatible with their Article 8 rights.

The Court found that it was not necessary in view of the above finding to examine whether the facts of the case gave rise to a breach of Article 2 of Protocol No. 4 to the Convention.

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The judgment in *Zaiet v. Romania*<sup>142</sup> concerned the annulment of an adoption order several decades after it was issued. The applicant was adopted at the age of seventeen. She also had a sister who had been adopted by the same adoptive mother. After the death of their adoptive mother, it transpired that the latter was entitled to a parcel of forest land which had been unlawfully expropriated from her family. The applicant was in principle entitled to inherit a half share. However, the applicant's sister successfully sought the annulment of the applicant's adoption. The domestic court which heard the action found that the adoption had only been intended to serve the economic interests of the adoptive mother and the applicant, and not to provide a better life for the applicant. This decision annulling the applicant's adoption was taken thirty-one years after the act of adoption and eighteen years after the death of the applicant's adoptive mother. The applicant's complaints in the Convention proceedings were examined under Article 8 of the Convention and Article 1 of Protocol No. 1.

The Court found Article 8 to be applicable since the annulment of the adoption, thirty-one years after it had been acknowledged in law, affected the applicant's right to respect for her family life. The domestic-court decision annulling the adoption constituted an interference with the applicant's Article 8 right, given that the relationship between an adoptive parent and an adopted child engages the protection afforded by that Article.

The Court expressed doubts as to whether the interference was "in accordance with the law", having regard to the doubtful standing of the applicant's sister to file an application for annulment of the adoption order under the law at the material time. It also questioned the legitimacy of the aim pursued by the annulment in view of the reasons which had led the applicant's sister to bring the proceedings, namely to secure the adoptive mother's entire estate for herself. The Court nevertheless preferred to consider the case from the standpoint of the "necessity" doctrine, and whether the domestic court's decision to annul the applicant's adoption had been justified by relevant and sufficient reasons. It found that that test had not been satisfied since the impugned decision was vague and lacking in justification for the taking of such a radical measure.

This is the first occasion on which the Court had to consider the annulment of an adoption order in a context where the adoptive

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142. *Zaiet v. Romania*, no. 44958/05, 24 March 2015.

parent was dead and the adoptee had long since reached adulthood. The judgment is interesting in that the Court stressed in its reasoning that:

(i) the splitting-up of a family is an interference of a very serious nature and any such measure requires to be supported by sufficiently sound and weighty reasons not only in the interests of the child but also in respect of legal certainty;

(ii) the annulment of an adoption is not envisaged as a measure taken against the adopted child and, as a general rule, legal provisions governing adoption are designed primarily for the benefit and protection of children; and

(iii) if subsequent evidence reveals that a final adoption order was based on fraudulent or misleading evidence, the interests of the child should remain paramount in establishing a process to deal with any damage caused to the adoptive parent as a result of the wrongful order.

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In the case of *Nazarenko v. Russia*<sup>143</sup> the applicant was excluded completely and automatically from his child's life following termination of his paternity.

During their marriage, the applicant and his wife had a daughter. The couple later divorced and the applicant enjoyed shared custody of the child. It was later accepted that he had raised and cared for the child over a period of five years. Following a challenge to the applicant's paternity of the child, it was established that the applicant was not the child's biological father. As a result, the applicant lost all parental rights in respect of the child, including the right to maintain contact with her. His name was removed from the child's birth certificate and the child's family name had to be changed. The domestic law did not provide for any exceptions which would have allowed the applicant, not having any biological links with the child, to maintain any form of relationship with her.

In the Convention proceedings, the applicant argued that the authorities had failed to respect his right to family life, contrary to Article 8.

The Court had first to determine whether, in the absence of a biological link, the relationship between the applicant and the child amounted to family life. In finding Article 8 applicable the Court noted that the child had been born during the applicant's marriage and

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143. *Nazarenko v. Russia*, no. 39438/13, ECHR 2015.

had been registered as his daughter. The applicant had cared for her for many years and they had developed a close emotional bond, believing themselves to be father and daughter. In this respect, the Court confirmed that the absence of biological links with a child does not negate the existence of family life for the purposes of Article 8 of the Convention (see, as regards foster parents, *Kopf and Liberda v. Austria*<sup>144</sup>). The circumstances are decisive in this connection.

In examining whether there had been a failure to respect the applicant's right to respect for his family life, the Court expressed concern about the inflexibility of the domestic law, which prevented persons like the applicant from obtaining contact rights and made no provision for weighing in the balance the child's best interests in a particular set of circumstances. For the Court, Article 8 should be interpreted as imposing on States an obligation to examine on a case-by-case basis whether it is in the child's best interests to maintain contact with a person, whether biologically related or not, who has taken care of him or her for a relatively long time.

On the facts of the applicant's case, the Court found that the authorities had failed to provide a possibility for the family ties between the applicant and the child to be maintained. The complete and automatic exclusion of the applicant from the child's life after the termination of his paternity without any possibility to have regard to the child's best interests – the consequence of the inflexibility of the domestic law – had therefore amounted to a failure to respect the applicant's family life, in breach of Article 8.

The case is interesting in that it deals with a novel issue under Article 8 and enriches the case-law concerning family life between persons who are not biologically related. It also confirms the Court's willingness to subject automatic prohibitions on the exercise of the right to respect for family life to close scrutiny when the best interests of a child are concerned.

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The *Z.H. and R.H. v. Switzerland*<sup>145</sup> judgment (not final) concerned a refusal to recognise the applicants' religious marriage on public-policy grounds and the impact of that refusal on their right to family life

The applicants, Afghan nationals, requested asylum in Switzerland. They had previously been registered in Italy as asylum-seekers. They

144. *Kopf and Liberda v. Austria*, no. 1598/06, § 37, 17 January 2012.

145. *Z.H. and R.H. v. Switzerland*, no. 60119/12, 8 December 2015.

presented themselves to the Swiss asylum authorities as a married couple. According to the applicants they had married in a religious ceremony in Iran. The first applicant at the time of the marriage was 14 years old, the second applicant 18 years old. They did not produce a certificate of their marriage to the Swiss asylum authorities. Their request for asylum was rejected. The second applicant was removed to Italy. In the appeal proceedings against the refusal, the domestic courts found, among other things, that the applicants' marriage was incompatible on grounds of public policy given that sexual intercourse with a child under the age of 16 was a criminal offence under Swiss law. The applicants could not therefore claim any right to family life under Article 8 of the Convention.

In the Convention proceedings the applicants claimed that the removal of the second applicant was in breach of their right to respect for family life.

The Court's judgment is noteworthy as regards its answer to the applicants' challenge to the refusal of the Swiss courts to recognise their religious marriage on public-policy grounds. In the view of the Court, Article 8 of the Convention cannot be interpreted as imposing on a Contracting Party an obligation to recognise a marriage, religious or otherwise, contracted by a 14-year-old child. It noted in this connection that Article 12 of the Convention expressly provided for regulation of marriage by national law. Given the sensitivity of the moral choices which the Swiss courts had to rule on and to the importance attached to the protection of children and the fostering of secure family environments, the Court considered that the national courts were better placed to address and rule on the issues raised by the applicants' case.

## **Freedom of thought, conscience and religion (Article 9)**

### **Freedom of religion**

The judgment in *Karaahmed v. Bulgaria*<sup>146</sup> concerned a demonstration outside a mosque during regular Friday prayers and an official investigation into clashes that erupted in the grounds of the mosque. There were some 100 to 150 demonstrators, all members and supporters of a political party who were protesting against what they referred to as "howling" emanating during the calls to prayer from the loudspeakers installed on the capital's only mosque. The demonstration

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146. *Karaahmed v. Bulgaria*, no. 30587/13, 24 February 2015.



got out of hand. Muslim worshippers, including the applicant, were insulted and this was followed by acts of violence and the throwing of objects. The police intervened to stop the violence.

Two initial investigations into the incidents were suspended without any charges being brought. A third investigation resulted in seven people being charged, but it is not known whether they were prosecuted. A further investigation, which was opened in relation to the prohibition on hate speech motivated by religion, was pending but had not led to any charges.

The applicant complained that the authorities had not afforded him proper protection against the demonstrators when he was worshipping inside the mosque and that they had not carried out a proper investigation. He alleged a breach of Article 9 of the Convention.

The interesting feature of this judgment is the importance it attaches to reconciling the various rights and liberties at stake, which were guaranteed by Articles 9, 10 and 11 of the Convention. The Court observed that, in principle, these fundamental rights and freedoms merit equal respect. Their importance in a society based on pluralism, tolerance and broad-mindedness must be recognised when they are weighed against each other. The police had therefore been under a positive obligation to guarantee both the right of citizens to demonstrate and the right of worshippers to practise their religion, although that obligation should not create an excessive burden.

Applying these principles to the facts of the case, the Court found a violation of Article 9. The authorities had been aware of the tensions that existed and the risks to which the planned demonstration gave rise. However, they had not taken any measures to ensure that the rights of the demonstrators and of the worshippers received equal protection. The police actions were confined to simply limiting the violence. Ultimately, the right to demonstrate had been accorded precedence to the detriment of the right to practise one's religion peacefully. The subsequent investigations had not produced any effective response to the impugned events either.

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The judgment in *Ebrahimian v. France*<sup>147</sup> (not final) concerned the question of reconciling a hospital employee's freedom of religion with the duty of neutrality owed by health professionals in public hospitals.

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147. *Ebrahimian v. France*, no. 64846/11, ECHR 2015.

The applicant, of the Muslim faith, was employed as a social assistant in the psychiatric department of a public hospital. The authorities refused to renew her contract when she refused, after receiving a warning, to remove her veil (covering her hair, ears and neck) at her place of work. The domestic courts upheld the decision, which they considered justified by the need to ensure respect for the constitutional principles of secularism and equality before the law, and the derived duty of civil servants to display neutrality when it came to the manifestation of their religious beliefs in their dealings with the users of public services.

In the Convention proceedings, the applicant claimed that the decision had breached her Article 9 right to freedom of religion. The Court found otherwise. It accepted that there had been an interference with that right. As to its lawfulness, the domestic courts had clarified six months prior to the applicant's dismissal that the duty of officials employed by the State to act in a neutral and impartial manner in matters of religious belief applied to all State officials, regardless of their functions. Regarding the legitimacy of the aim pursued, the Court observed that the decision not to renew the applicant's contract was motivated by the need to give concrete effect to the applicant's duty of neutrality in the hospital setting in order to ensure respect for the religious beliefs of the patients with whom she came into contact and to provide them with an assurance that they, as users of a public service, would be treated equally by the State regardless of their own religious convictions. The impugned decision was therefore intended to protect the rights and freedoms of others.

Turning to the necessity of the interference, the Court observed that it had already had occasion to rule that a Contracting Party could rely on the principles of secularism and neutrality to justify a prohibition on civil servants wearing religious symbols, in particular teachers working in the public sector (*Dahlab v. Switzerland*<sup>148</sup>, *Kurtulmuş v. Turkey*<sup>149</sup>, and *Ahmet Arslan and Others v. Turkey*<sup>150</sup>). Civil servants had a particular status which distinguished them from other categories of employees. In the applicant's case, the Court could accept that the State could require the applicant, given the nature of her functions, to refrain from making known her religious beliefs in order to ensure that patients would not doubt the impartiality of those responsible for

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148. *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V

149. *Kurtulmuş v. Turkey* (dec.), no. 65500/01, ECHR 2006-II.

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

treating them. Such obligation was consistent with the overarching values of secularism and neutrality which defined the respondent State's relationship with religion. The Court went on to examine the proportionality of the interference in the applicant's case, bearing in mind the context in which the dispute arose. It noted among other matters that:

(i) the hospital authorities had given careful consideration to the applicant's refusal to comply with the decision requiring her to remove her veil and assessed their response to the applicant's continuing objections against the need to ensure respect for the principle of neutrality; and

(ii) the applicant had been able to challenge the sanction imposed on her before the domestic courts and to rely at all times in the proceedings on her right to freedom of religion.

The judgment is noteworthy in view of the Court's analysis of the weight to be given to the principles of secularism, equality and neutrality when examining whether the interference pursued a legitimate aim and was necessary.

## **Freedom of expression (Article 10)<sup>151</sup>**

### **Applicability**

The *Petropavlovskis v. Latvia*<sup>152</sup> judgment concerned a refusal, on account of criticism by the applicant of the government's language policy in the education sector, to grant an application for citizenship. The applicant alleged violations of Articles 10, 11 and 13 of the Convention.

The applicant was a "permanently resident non-citizen" of the Republic of Latvia. He had been active in protests against the respondent State's policies with regard to the use of Russian as the language of instruction in primary and State schools. His request to become a naturalised citizen of Latvia was rejected by the Cabinet of Ministers on the ground that his actions had not demonstrated allegiance to the Republic of Latvia, as required under the Citizenship Law. His challenge before the domestic courts as to the rejection of his application was unsuccessful. In the view of the domestic courts, the contested decision was "a political decision" and thus not amenable to judicial review.

151. See also *Bohlen*, *supra* note 102.

152. *Petropavlovskis v. Latvia*, no. 44230/06, ECHR 2015.

In the Convention proceedings the applicant argued that he had been arbitrarily denied citizenship of the respondent State because he had exercised his rights under Articles 10 and 11 of the Convention. In sum, he had been the victim of a punitive measure because of his criticism of the respondent State's reform of the education sector and, in particular, of its language policy. The judgment is of note in two respects, which are interrelated.

Firstly, the Court considered that the applicant had at no stage been prevented from expressing his disagreement with the respondent State's language policy in the sphere of education, either in deed or in word. It noted that he had continued without hindrance to express his views, both on the language issue and on other matters of public interest, after his application for citizenship was refused. For the Court, the applicant could not maintain in these circumstances that the government policy regarding the grant of citizenship had generated a chilling effect on the exercise of his rights under Articles 10 and 11 of the Convention.

Secondly, and related to the previous finding, the Court found that the authorities' decision to refuse the applicant's application for citizenship could not be considered to have been a punitive measure. It had regard to the position under international law regarding the existence, or not, of a duty to grant citizenship. While observing that both the Universal Declaration of Human Rights and the American Convention on Human Rights both explicitly provided for a right to nationality, the Court stressed that such obligation was absent in the Convention system. It accepted that arbitrary or discriminatory decisions in the field of nationality may raise an issue under the Convention (see, for example, *Genovese v. Malta*<sup>153</sup>). However, that did not mean that the Convention provided for a right to acquire a specific nationality. In the view of the Court, the issue was to be determined at the domestic level, having regard to the citizenship rules in the Contracting State in question and the criteria used for granting citizenship. The Court noted that the choice of criteria for the purposes of granting citizenship through naturalisation in accordance with domestic law was linked to the nature of the bond between the State and the individual concerned, a bond that each society deemed necessary to ensure. With reference to the facts of the applicant's case, the Court observed that a democratic State was entitled to require persons who wished to acquire its citizenship to be loyal to the State

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153. *Genovese v. Malta*, no. 53124/09, 11 October 2011.

and, in particular, to the constitutional principles on which it was founded. It noted that the requirement of loyalty to the State and its Constitution could not be considered a punitive measure capable of interfering with the freedom of expression and assembly. Rather, it was a criterion which had to be fulfilled by any person seeking to obtain Latvian citizenship through naturalisation.

In view of the above findings, the Court concluded that Articles 10 and 11 were not applicable on the facts of the case.

### **Freedom of expression**

The *Morice*<sup>154</sup> judgment, cited above, concerned a lawyer's conviction for defamation in respect of remarks he had made about members of the judiciary. The impugned remarks were published in an Article in a national newspaper which quoted the terms of a letter the applicant and one of his colleagues had written to the Minister of Justice requesting an administrative investigation into the conduct of two judges and comments that had been made to the journalist who had written the article.

The case raises the interesting question of the extent of a lawyer's freedom of expression and the limits of acceptable criticism of the conduct of members of the judiciary when carrying out their official duties.

The applicant's comments were made in connection with a judicial investigation that had been opened following the death of a judge and from the outset the case attracted considerable attention from the media. The comments concerned investigating judges who were subsequently taken off the case. Another judge, who was not the subject of criticism, took over the investigation.

In convicting the applicant, the court of appeal took the view that to say that an investigating judge had shown "conduct which [was] completely at odds with the principles of impartiality and fairness" was in itself a particularly defamatory accusation. The use of the term "connivance" merely confirmed the defamatory nature of the accusation.

The Court's judgment, which contains an exhaustive recapitulation of the case-law on lawyers' freedom of expression, emphasises the need to distinguish between two situations: cases in which the lawyer makes remarks inside the courtroom; and cases in which he makes them outside the courtroom. The Court observed that lawyers have a special role as independent professionals in the administration of justice, and cannot be equated with journalists. It also underscored the importance

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154. *Morice*, *supra* note 72.

of examining the nature of the impugned remarks – including the tone used – in the general context in which they were made. This the domestic courts had not done.

A high level of protection of freedom of expression is required in respect of remarks on matters of public interest related to the functioning of the judiciary. The margin of appreciation afforded the authorities in such cases is particularly narrow. Indeed, the Court recognised that a lawyer should be able to draw the public's attention to potential shortcomings in the justice system and that the judiciary could benefit from constructive criticism.

Another interesting feature of the judgment is that it highlights the difference between the speech of judges (who are subject to a duty of discretion), of lawyers and of journalists. As the Court notes, “the proper functioning of the courts would not be possible without relations based on consideration and mutual respect between the various protagonists in the justice system, at the forefront of which are judges and lawyers”.

The facts were case-specific in a number of respects. Thus, for instance, the criminal investigation was withdrawn from the two investigating judges concerned by the criticism, so that the applicant's remarks were not capable of undermining the proper conduct of the judicial proceedings.

The sanction imposed on the applicant was of some significance and his status as a lawyer was even relied upon to justify greater severity. As the Court noted, imposing sanctions on a lawyer was liable to have a “chilling effect” on his liberty of expression.

The Court found a violation of Article 10 as a result of the applicant's conviction of defamation. His impugned remarks did not constitute gravely damaging and essentially unfounded attacks on the action of the courts, but criticisms levelled at the judges as part of a debate on a matter of public interest concerning the functioning of the justice system, and in the context of a case which had received wide media coverage from the outset. While those remarks could admittedly be regarded as harsh, they nevertheless constituted value judgments with a sufficient “factual basis”.

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The *Perinçek v. Switzerland*<sup>155</sup> judgment concerned a criminal conviction for statements made about the massacre and deportation of

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155. *Perinçek v. Switzerland* [GC], no. 27510/08, ECHR 2015.

Armenians by the Ottoman Empire in 1915 and in subsequent years. In 2005 the applicant, a Turkish national, travelled to Switzerland where he made three statements at public gatherings about these events, including, for example, that “the allegations of the ‘Armenian genocide’ are an international lie”. He was convicted of an offence in Switzerland and he complained to the Court under Article 10.

The Grand Chamber found a violation of Article 10.

Before reviewing the main issue of the “necessity” of the interference under Article 10 § 2, a number of preceding aspects of the judgment are worth noting.

(i) The application of Article 17, which has been almost exclusively relied on in Article 10 cases, was rejected by the Grand Chamber. The former Commission’s approach, when dealing with cases of those denying the Holocaust, was to find their complaints under Article 10 manifestly ill-founded, taking Article 17 into account in so doing. The new Court continued along these lines (*Lehideux and Isorni v. France*<sup>156</sup>, and *Witzsch v. Germany (no. 1)*<sup>157</sup>). Two later Chamber cases (*Garaudy v. France*<sup>158</sup>, and *Witzsch v. Germany (no. 2)*<sup>159</sup>) applied Article 17 to statements denying the Holocaust, before the Court used in 2011 (*Gollnisch v. France*<sup>160</sup>) the earlier approach of taking Article 17 into account in the Article 10 analysis. The Grand Chamber in *Perinçek*, relying on the statement in *Paksas v. Lithuania*<sup>161</sup> that Article 17 should only apply on an exceptional basis and in extreme cases, appears to reflect this earlier approach. It found that the key issues under Articles 17 and 10 § 2 – whether the impugned statements sought to stir up hatred or violence and whether by making them the applicant sought to rely on the Convention to destroy other Convention rights – overlapped, so that the Article 17 issue had to be joined to the merits of those under Article 10. Since the Court went on to find a violation of Article 10, there were no grounds to apply Article 17 of the Convention.

(ii) Only the *Piermont v. France*<sup>162</sup> and present judgments contain any serious consideration of the scope and application of Article 16, an

156. *Lehideux and Isorni v. France*, 23 September 1998, *Reports of Judgments and Decisions* 1998-VII.

157. *Witzsch v. Germany (no. 1)* (dec.), no. 41448/98, 20 April 1999.

158. *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX (extracts).

159. *Witzsch v. Germany (no. 2)* (dec.), no. 7485/03, 13 December 2005.

160. *Gollnisch v. France* (dec.), no. 48135/08, 7 June 2011.

161. *Paksas v. Lithuania* [GC], no. 34932/04, ECHR 2011 (extracts).

162. *Piermont v. France*, 27 April 1995, Series A no. 314.

Article which has never been applied by the former Commission or by the Court. The Grand Chamber specifically recorded certain hesitations about Article 16 expressed by the former Commission (its report in the *Piermont* case, describing Article 16 as reflecting “an outdated understanding of international law”) and by the Council of Europe (which had called for its repeal in 1977). It considered that unbridled reliance on Article 16 would run counter to its existing case-law stating that aliens could rely on their right to freedom of expression. The Grand Chamber concluded by significantly limiting the scope of Article 16: that Article was only capable of authorising restrictions on activities that directly affected the “political process” proper, which was not the case here so that Article 16 was found not to be applicable.

(iii) This is one of the few cases where the Court has not accepted a “legitimate aim” on which a respondent State relied. The Grand Chamber rejected the aim of “the prevention of disorder” advanced by the Government. Highlighting the different meanings of the English and French text (“*la défense de l'ordre*”) and underlining that any restrictions on Convention rights were to be interpreted narrowly, the narrower English meaning was retained. Since it had not been shown that the applicant's statements had led, or were capable of leading, to disorder in the sense of public disturbances, the Court was not satisfied that the interference with his expression pursued the “prevention of disorder”. The interference was found to pursue the aim of the protection of the “rights of others” (the identity and dignity of the descendants of the victims of the events of 1915 and subsequent years).

As to the main question, the necessity of the interference to protect the rights of others:

(i) The case is interesting for the clear boundaries the Grand Chamber placed on its assessment. Its role was not to examine whether the criminalisation of genocide denial was, in principle, justified. It was not its role to establish the facts regarding the persecution of Armenians by the Ottoman Empire, to determine whether those events should attract the legal qualification of genocide or whether the applicant's statements constituted genocide denial.

Rather, the salient question was whether the applicant's statements, read as a whole and in their context, could be seen to amount to a call to violence, hatred or intolerance.

The analysis of this issue was guided by a number of identified factors. The Grand Chamber found that the applicant's statements bore on a matter of public interest and did not amount to a call to hatred or intolerance and that the context in which they had been



made was not marked by heightened tensions or special historical overtones in Switzerland. The statements could not be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal-law response in Switzerland and there was no international-law obligation for Switzerland to criminalise such statements. The Swiss courts appeared to have censured the applicant for voicing an opinion that diverged from the established ones in Switzerland. The interference took the serious form of a criminal conviction. In the circumstances, it was not therefore necessary, in a democratic society, to subject the applicant to a criminal penalty to protect the rights of the Armenian community at stake.

(ii) Three aspects of the reasoning on this main question are worth noting separately.

– The judgment contains useful reviews of particular aspects of its case-law: Article 8 and “group identity and the reputation of ancestors”; Article 10 and “calls to violence and hate speech”; Articles 10 and 17 and “Holocaust denial and other statements relating to Nazi crimes”; Article 10 and “historical debates”; and Article 10 and “prior cases against Turkey concerning statements relating to the events of 1915 and thereafter”.

– In reviewing its own case-law concerning Holocaust denial, the Court clarified that the justification for making its denial a criminal offence lay not so much in that the Holocaust is a clearly established historical truth, but in that, given the historical context of the respondent States concerned, its denial must invariably be seen as connoting an anti-democratic ideology and anti-Semitism. In short, it was less the denial of established historical fact that was central in such cases but rather the impact those statements inevitably had in the particular country-context.

– The Court made two interesting findings as regards the responses of legal systems to the issue of denial of historical facts and crimes. There was no consensus in that regard, there was a broad spectrum of national positions and Switzerland was at one end of that spectrum. In addition, the judgment reviews in some detail the relevant international-law sources and finds (as noted above) that the legislative response of the respondent State (criminalising the impugned statements) was not required by its international-law obligations (as suggested by certain third parties in their submissions to the Court).

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In the case of *Müdür Duman v. Turkey*<sup>163</sup> the applicant had denied responsibility for the materials which had led to his prosecution and conviction. The Court considered how this denial of responsibility affected its examination of his Convention complaint.

The applicant was the director of a district branch of a political party. A search was conducted of the premises. Publications, flags and symbols of the Workers' Party of Kurdistan (PKK) were found, together with pictures, articles and books relating to the leader of the PKK. The applicant denied responsibility for the materials and distanced himself from them. The applicant was convicted of praising and condoning acts proscribed by law.

In the Convention proceedings the applicant maintained among other things that his conviction amounted to a breach of his right to freedom of expression and information, contrary to Article 10. The Court upheld the applicant's complaint, being of the opinion that the domestic courts had not provided relevant and sufficient reasons for the applicant's conviction and sentence.

The judgment is interesting in that the Court had to rule at the outset on whether there had indeed been an interference with the applicant's Article 10 right. In the domestic proceedings he had denied any knowledge of the pictures, symbols and other materials found at his branch office. The applicant had at no stage referred to Article 10 in his defence. The Court did not consider that this prevented it from examining the merits of the complaint. In its view, the offences imputed to the applicant, of which he was ultimately convicted, were unquestionably connected with activities falling within the scope of the right to freedom of expression, even though the applicant had denied any knowledge of or responsibility for the presence of the various items found at the branch office. It noted in this connection the relevance of the right not to incriminate oneself, a crucial aspect of the right to a fair trial guaranteed by Article 6 of the Convention. In the applicant's case, to have required him to have relied on Article 10 in his defence to the charges brought against him would have had the effect of compelling him to acknowledge the acts of which he was accused. There had thus been an interference with the applicant's Article 10 right.

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163. *Müdür Duman v. Turkey*, no. 15450/03, 6 October 2015.

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The *Kharlamov v. Russia*<sup>164</sup> case concerned a civil action by a university against a professor who had criticised the procedure for electing the university's governing body.

The applicant's comments were made during a university-wide conference for the election of the academic senate. In seeking to draw his colleagues' attention to shortcomings in the election process, the applicant had alleged among other matters a lack of transparency on the part of the governing bodies during the senate election procedure. The university brought an action in defamation alleging that the applicant's remarks had damaged the professional reputations of the university and its academic senate. The domestic courts found the applicant liable after noting that he had described the senate as illegitimate even though the elections had taken place in full compliance with the applicable rules.

In the Convention proceedings, the applicant complained that he had been found civilly liable in defamation proceedings for remarks he had made in the context of his professional activities. The Court found a violation of Article 10.

Two aspects of the case are worthy of note.

Firstly, the judgment extends the case-law principles on the right to freedom of expression of an employee (*Palomo Sánchez and Others v. Spain*<sup>165</sup>) in an academic context (*Mustafa Erdoğan and Others v. Turkey*<sup>166</sup>) to cases where the comments, without being excessive, contain a degree of exaggeration. The Court found that the applicant had expressed his views during a debate into the organisation of academic life, an issue that concerned a matter of general interest. He had thus been entitled to bring it to the attention of his colleagues. When engaging in debates of this nature, employees are entitled to have recourse to exaggerations as long as they do not overstep the limits of admissible criticism. In the instant case, the applicant had not resorted to offensive and intemperate language.

Secondly, the judgment draws a distinction between the reputation of an individual and the reputation of a university as an institution. On this point, it adds to the *Uj v. Hungary*<sup>167</sup> line of case-law. In the

164. *Kharlamov v. Russia*, no. 27447/07, 8 October 2015.

165. *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and others, ECHR 2011.

166. *Mustafa Erdoğan and Others v. Turkey*, nos. 346/04 and 39779/04, 27 May 2014.

167. *Uj v. Hungary*, no. 23954/10, 19 July 2011.

Court's view, the specific features of academic relations have to be taken into account. The protection of the "dignity" of a university under the Convention cannot be equated to that of an individual. More specifically, the protection of the university's authority is a mere institutional interest, that is, a consideration that is not necessarily of the same strength as "the protection of the reputation or rights of others", within the meaning of Article 10 § 2 of the Convention. A fair balance had to be struck between the need to protect, on the one hand, the reputation of the university and, on the other, the freedom of one of its professors to express his opinion on the institution and the academic system. That balance had not been struck.

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The decision in *Fuchs v. Germany*<sup>168</sup> concerned criminal and disciplinary sanctions imposed on the applicant lawyer for having made defamatory statements against an expert for the prosecution. While representing a client accused of downloading child pornography on his computer, the applicant alleged in writing before a domestic court that the private expert engaged by the prosecution to decrypt the data files had manipulated them in order to obtain the result sought by the prosecution and had a personal interest in falsifying evidence. The expert had been sworn in before presenting his results to the court. The expert lodged a criminal complaint against the applicant. The applicant was ultimately convicted of, among other offences, defamation and was fined. In subsequent disciplinary proceedings he received a reprimand and a fine for having breached his duty to exercise his professional duties in a conscientious manner and to be worthy of the trust owed to his profession.

In the Convention proceedings, the applicant complained that the measures taken against him had breached his rights under Article 10.

The Court declared the complaint inadmissible, being persuaded that the measures had been necessary in a democratic society. It had regard to the relevance and sufficiency of the reasons given by the domestic courts. In the first place, it agreed with the domestic criminal court that the defence of his client's interests did not allow the applicant to imply, generally, that the expert would falsify evidence. Secondly, agreeing with the court in the disciplinary proceedings, the Court considered that the offensive statements did not contain any objective criticism of the expert's work in his client's case, but were aimed at

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168. *Fuchs v. Germany* (dec.), nos. 29222/11 and 64345/11, 27 January 2015.

deprecating his work generally and declaring his findings to be unusable. It accepted the domestic courts' conclusions that the statements which formed the subject matter of the criminal and disciplinary proceedings were not justified by the legitimate pursuit of the client's interests. As to the question of proportionality, the Court noted that the criminal court, in determining the sanction to be imposed on the applicant, had taken into account the fact that his statements had not been made publicly and that the fines imposed in the criminal and disciplinary proceedings did not appear to be disproportionate.

The case is noteworthy in that this would appear to be the first occasion on which the Court has addressed the extent to which lawyers may impugn the integrity of sworn-in experts. It observed that sworn-in experts must be able to perform their duties in conditions "free of undue perturbation if they are to be successful in performing their tasks. It may therefore be necessary to protect them from offensive and abusive verbal attacks on duty". The Court's decision may be seen as a development of the principles set out in its earlier judgments regarding the central role played by lawyers in ensuring public confidence in the administration of justice (see *Nikula v. Finland*<sup>169</sup>, and *Steur v. the Netherlands*<sup>170</sup>).

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In its decision in *M'Bala M'Bala v. France*<sup>171</sup> the Court examined the use of artistic expression as a vehicle for anti-Semitism. The applicant, a well-known comedian, was convicted and fined for having insulted the Jewish community following a public performance during which he had engaged in anti-Semitic remarks, acts and gestures.

In the Convention proceedings the applicant relied on Article 10 of the Convention. The Government invited the Court to reject the applicant's case with reference to Article 17 of the Convention, given that his behaviour had been intentionally racist and he had abused his Article 10 right in a manner which was in contradiction with the fundamental values underpinning the Convention.

The case is noteworthy in that the Court found that the applicant could not rely on the protection afforded by Article 10 and his application was therefore inadmissible. It accepted that artistic

169. *Nikula v. Finland*, no. 31611/96, §§ 45-50, ECHR 2002-II.

170. *Steur v. the Netherlands*, no. 39657/98, § 36, ECHR 2003-XI.

171. *M'bala M'bala v. France* (dec.), no. 25239/13, ECHR 2015.

expression in the form of satire, humour and provocative speech was covered by that Article. However, the applicant's show had descended into a public display of hatred and anti-Semitism and was a pretext for questioning the reality of the Holocaust. The Court, like the domestic courts, had particular regard to the appearance on stage alongside the applicant of a convicted negationist and to what it called an outrageously grotesque scene in which a prize was bestowed on the latter. The portrayal in such manner of an ideology which ran counter to the fundamental values of justice and peace on which the Convention was based could not claim the protection of Article 10. Significantly, the Court added that using a public performance as a vehicle for the dissemination of hate speech and anti-Semitism can be just as insidious in its impact as more direct and explicit forms of intolerance.

The case is also interesting in that the Court did not first analyse the State's justification for sanctioning the applicant's conduct from the standpoint of Article 10 § 2 using Article 17 as an aid to its interpretation, but examined straight away whether the content of his performance was such as to fall outside the protection of Article 10. Both approaches find support in the case-law (compare and contrast *Lehideux and Isorni*<sup>172</sup> and *Perinçek*<sup>173</sup>, both cited above).

### **Freedom to impart information**

The case of *Delfi AS v. Estonia*<sup>174</sup> concerned the duties and responsibilities of an Internet news portal as regards comments made by users on material published on the portal.

Delfi AS was one of the largest Internet news portals in Estonia. It allowed users of its website to make comments on articles it published. The comments were automatically uploaded but would be automatically deleted if they contained certain defined (obscene) words. A notice-and-take-down system was also in place.

In 2006 the applicant company published an Article indicating that a ferry company, by changing its routes, had postponed the opening of the ice roads (a cheaper and faster connection). The Article attracted a relatively high number of comments, many of which the Grand Chamber later found to incite hatred of, or violence against, the majority shareholder in the ferry company. Once notified by the victim some weeks later, the applicant company immediately removed the

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172. *Lehideux and Isorni*, *supra* note 156.

173. *Perinçek*, *supra* note 155.

174. *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 2015.

comments. The victim's civil action against the applicant company was successful. The damages awarded were low (EUR 320).

The Grand Chamber found no violation of Article 10 of the Convention.

The case is noteworthy because it is the first time that the Court has been squarely confronted with the question of the duties and responsibilities of an Internet news portal which provides, for financial gain, a platform for user comments, made anonymously and without preregistration.

(i) The Grand Chamber considered foreseeable the Supreme Court's finding that the applicant company's news portal was not a passive Internet intermediary but rather a publisher, mainly because of its financial interest in publishing the user comments. Consequently, the relevant European Union Directive (EU Directive 2000/31/EC on electronic commerce), which exempted Internet service providers from an obligation to monitor third-party comments, did not apply to the applicant company. However, the Grand Chamber acknowledged that there was, nevertheless, a legitimate distinction to be made between the duties and responsibilities of a portal operator – even one which, like the applicant company, was an active intermediary promoting user-generated expression for financial reasons – and a traditional news publisher (the Grand Chamber relied, in particular, on paragraph 7 of the Appendix to Recommendation CM/Rec(2011)7 of the Committee of Ministers to member States on a new notion of media).

(ii) The Grand Chamber also adopted the same four criteria applied by the Chamber to assess whether, on the facts of the case, the applicant news portal had fulfilled its duties and responsibilities as a publisher under Article 10, before concluding that the interference with the applicant's Article 10 rights had been based on relevant and sufficient reasons and was not disproportionate. Firstly, and as to the context of the comments, the Court highlighted, in particular, the professional management of the portal and the fact that the portal had invited comments for financial gain. Secondly, was establishing the liability of the authors of the comments a real alternative? The Grand Chamber found that it was not, mainly because the applicant company had failed to take steps open to it which would have facilitated the identification of the authors for such proceedings. Thirdly, the measures taken by the news portal after publication were found to have been insufficient. The Court noted in this connection that a large commercial news portal had a monitoring capacity that a victim of user comments would not have. Fourthly, the impact on the applicant news portal of the

interference was found not to have been significant: the sanction was small and the news portal had continued to operate successfully thereafter without fundamental changes to its business model.

In sum, the Court accepted that a State could require a news portal to monitor user comments so as to be able to remove clearly unlawful comments without delay, even without notice from an alleged victim or third party. Consequently, a notice-and-take-down system may not amount to adequate *post facto* control of user comments when the comments are clearly unlawful.

### **Freedom of the press**

In the *Couderc and Hachette Filipacchi Associés v. France*<sup>175</sup> judgment the Grand Chamber clarified the principles to be applied when balancing freedom of expression and the right to respect for private life.

The case concerned the publication in a magazine of an interview with a woman who claimed that Albert Grimaldi (Prince Albert of Monaco) was the father of her son (this was later confirmed by the Prince himself). The latter took proceedings under, *inter alia*, Article 8 of the Convention. The Nanterre *Tribunal de Grande Instance* found against the applicant publishers and awarded damages of EUR 50,000 as well as the publication of its judgment by the magazine. The applicants' appeals were unsuccessful.

The Grand Chamber concluded, unanimously, that there had been a violation of Article 10, finding that, in a number of respects, the domestic courts had not given due consideration to the Convention principles to be applied when balancing the expression and private-life rights involved in such cases.

The judgment is noteworthy for its comprehensive recap of the relevant Convention principles and criteria to be applied when balancing Article 10 (expression by the press) and Article 8 (private life) rights and, notably, when assessing the proportionality of a restriction on a press publication for privacy reasons (principally, *Von Hannover v. Germany (no. 2)*<sup>176</sup>, and *Axel Springer AG v. Germany*<sup>177</sup>).

In applying those principles, the Grand Chamber reformulated and clarified them in certain respects.

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175. *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, ECHR 2015.

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

177. *Axel Springer AG*, *supra* note 103.



(i) For some time the Court has indicated that, if the sole purpose of an Article was “to satisfy the curiosity of a particular readership” about an applicant’s private life, this could not be deemed to contribute to a debate of general interest to society, even if the applicant was well known (citing *Von Hannover v. Germany*<sup>178</sup>). The Grand Chamber reformulated and arguably reinforced this principle by pointing out that the public interest cannot be reduced to the “public’s thirst for information about the private life of others, or to the reader’s wish for sensationalism or even voyeurism”.

(ii) While acknowledging the role of the press to publish on existing public-interest debates (“a vector for disseminating debates on matters of public interest”), the Grand Chamber distinguished and underlined the importance of the more proactive role of the press, namely, to reveal and bring to the public’s attention information capable of eliciting such interest and of giving rise to such a debate within society.

(iii) The Grand Chamber emphasised that the “duties and responsibilities” of journalists meant that they should review the impact of a proposed publication and, in particular, should exercise “prudence and caution” when covering certain events which enjoy “particularly attentive protection” under Article 8 of the Convention (the judgment cites *Société Prisma Presse v. France*<sup>179</sup>, and *Hachette Filipacchi Associés (ICI PARIS) v. France*<sup>180</sup>).

(iv) The Government argued that the Article had been given a sensationalist spin and the Grand Chamber accepted that the narrative setting, as well as the accompanying graphic effects and headlines, were clearly intended to attract attention and provoke a reaction. However, the Grand Chamber pointed out that this was a matter of “editorial discretion” on which it was not, in principle, for the domestic courts to comment, as long as the choice of presentation did not “distort or deform” the information or mislead the reader.

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The *Pentikäinen v. Finland*<sup>181</sup> judgment concerned the arrest, detention and conviction of a journalist who disobeyed police orders to disperse during a demonstration.

178. *Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI.

179. *Société Prisma Presse v. France* (dec.), no. 66910/01, 1 July 2003.

180. *Hachette Filipacchi Associés (ICI PARIS) v. France*, no. 12268/03, 23 July 2009.

181. *Pentikäinen v. Finland* [GC], no. 11882/10, ECHR 2015.

Having covered, as a journalist/photographer, a high-profile demonstration during the Asia-Europe meeting in Helsinki, the applicant did not obey police orders to disperse once the demonstration became violent. He was arrested, detained for seventeen and a half hours and convicted of failing to obey police orders. Since his conduct was “excusable”, no penalty was imposed.

The Grand Chamber found no violation of Article 10.

The case is interesting in that it traces the parameters of the protection and obligations under Article 10 of journalists covering a street demonstration and the Grand Chamber made certain noteworthy statements when examining the necessity of the relevant interference. It is worth emphasising that the impugned sanction did not concern the substance of the applicant's journalistic activity as such, but rather his disobedience of a lawful and reasonable police order (rioting and threat to public safety).

In the first place, the Grand Chamber addressed two central, and potentially conflicting, general principles.

On the one hand, it referred to a novel but important aspect of the watchdog role of journalists, namely, to provide information to the public on the authorities' handling of public demonstrations to ensure accountability, so that any interference with that role had to be subjected to “strict scrutiny”. On the other hand, it confirmed that the “duties and responsibilities” of journalists, and the consequent obligation of responsible journalism, were such that, if a journalist broke the law when exercising his functions in a context such as the present, this would be “a most relevant, albeit not decisive, consideration” in assessing the necessity of an interference with that journalist's Article 10 rights: journalists could not, in principle, be released from their duty to obey the criminal law on the basis that Article 10 afforded them a cast-iron defence.

In examining the applicant's arrest for disobeying a police order, the Grand Chamber addressed three points:

- (i) the police assessment leading to the dispersal orders (found to be reasonable on the facts);
- (ii) the extent to which the applicant had been able to report on the demonstration (he had been able to cover most of the event); and
- (iii) the applicant's conduct.

This latter point is interesting and two matters were held against the applicant. The Grand Chamber pointed out that the applicant had not, either by his clothes, by wearing his press badge visibly at all times, or otherwise, made himself readily identifiable as a journalist. In

addition, the applicant had been aware of the police dispersal order and knowingly took the risk not to comply, there had been a number of police warnings, he was the only journalist not to obey and nothing in the file suggested that he could not have continued usefully reporting on the demonstration from outside the cordoned-off area where he was arrested.

Whilst a criminal conviction of a journalist carrying out an important public-watchdog role could, on the face of it, be considered to be a strong interference, a number of factors countered its severity.

(i) the sanction did not concern his journalistic activity as such but his disobedience of a lawful and justified police order;

(ii) opportunities were accorded to him to cover properly the event without breaking the law;

(iii) the applicant was not entitled, because he was a journalist, to special treatment as regards compliance with the criminal law in such contexts (as confirmed by the legislation of the majority of Council of Europe members States); and

(iv) the conviction was not retained in his criminal record and no penalty was imposed because his act was considered “excusable”.

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The judgment in the case of *Haldimann and Others v. Switzerland*<sup>182</sup> concerned an audio-visual recording of a private individual’s professional conduct without his knowledge and consent, and the subsequent broadcasting of part of that interview for public-interest purposes. The applicant journalists wished to expose malpractice in the insurance sector, in particular the giving of bad advice to potential clients so as to encourage them to take out life-assurance policies. They arranged for an insurance agent working for an insurance company to interview a potential client in a private apartment and secretly filmed the interview. The agent was unaware of the situation and the potential client was in fact one of the journalists. Part of the recorded interview was subsequently broadcast on television. Steps were taken to ensure that the insurance agent’s face and voice could not be recognised by viewers. Only the colour of his hair and skin was visible. The journalists were subsequently convicted and fined under the Penal Code for having recorded and broadcast the insurance agent’s conversation without having obtained his prior consent.

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182. *Haldimann and Others v. Switzerland*, no. 21830/09, ECHR 2015.

The applicants complained before the Court that their conviction and sentence gave rise to a breach of Article 10 of the Convention. The Court found for the applicants.

The judgment is noteworthy in that the Court had to address for the first time the use by journalists of a hidden camera in order to record the conduct of a private individual with a view to drawing attention to a matter of public interest. The judgment is also interesting in view of the decision of the Court to rely on the balancing criteria which it has worked out in the context of press interferences with the privacy rights of personalities.

In the first place, the Court accepted that there was a basis in domestic law for the applicants' conviction and fine and that the measures taken against them were aimed at protecting the insurance agent's right to protection of, among other things, his reputation. It further accepted that Article 8 was engaged on the facts given that the infringement of the insurance agent's right to protection of his reputation had been such as to cause prejudice to his private life (see *A. v. Norway*<sup>183</sup>). The key issue was whether the interference was necessary in a democratic society.

It is interesting to observe that the Court drew on the criteria which it had established in the case of *Axel Springer AG v. Germany*<sup>184</sup> in its assessment of whether a fair balance had been struck at the domestic level between media freedom and private life. Unlike the position in that case, the injured party in the instant case was not a person in the public eye but a private individual. The aim of the journalists was not to expose details of the insurance agent's own private life but to criticise and draw attention to the practices of the industry which employed him.

The Court gave prominence to the following factors. Firstly, the journalists' actions had been guided by public-interest considerations, namely the protection of consumers. Secondly, the insurance agent was not the direct target of the journalists' actions, notwithstanding the fact that he could reasonably have expected that his interview would not have been secretly filmed. Thirdly, the use of a hidden camera was not the subject of an absolute prohibition in domestic law. Recourse to such devices could be permitted under strict conditions. Moreover, the journalists had believed that they were acting within the framework of their own professional rules of conduct. For these reasons, the Court

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183. *A. v. Norway*, no. 28070/06, § 64, 9 April 2009.

184. *Axel Springer AG*, §§ 90-95, *supra* note 103.

was prepared to find that the applicants had acted in good faith in order to protect consumers from the misinformation being supplied by insurance companies. Fourthly, it was never disputed that the facts revealed by the journalists reflected the reality of the practices engaged in the insurance industry. Fifthly, measures had been taken to prevent the identification of the insurance agent when the interview was broadcast. Lastly, although the fines imposed on the journalists were modest, the sanction was nevertheless capable of dissuading media professionals from drawing attention to matters of public concern.

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The *Dilipak*<sup>185</sup> judgment (not final), cited above, concerned criminal proceedings against a journalist which were discontinued after six and a half years as being time-barred, and the issue of the journalist's victim status.

The applicant was prosecuted following the publication of an Article in which he alleged that high-ranking military officers had unduly attempted to influence the political life of Turkey. Six and a half years later, the criminal proceedings were discontinued because the offences with which the applicant had been charged were found to be time-barred.

In the Convention proceedings, the applicant alleged breaches of Articles 6 (the unreasonable length of the proceedings) and 10 of the Convention. The Court ruled in favour of the applicant on both counts.

The Court's finding of a breach of Article 10 is of particular interest. The applicant was never convicted, which prompted the respondent Government to plead that he could not claim victim status. The Court joined the plea to the merits and rejected it. The Court has previously accepted – and it confirmed its position in the instant case – that an applicant who complains under Article 6 of the Convention of the unfairness (as opposed to the length) of criminal proceedings brought against him which ended in an acquittal or, of relevance to the applicant's case, were abandoned or discontinued, can no longer maintain that he is a victim of a breach of Article 6. However, different considerations apply when Article 10 comes into play. For the Court, the applicant could still rely on Article 10 notwithstanding the fact that his prosecution never resulted in his conviction. It had regard to the following considerations:

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185. *Dilipak*, *supra* note 8.

(i) The criminal proceedings against the applicant had remained pending for an unreasonable period of time, and during that time he had been at risk of further prosecution if he published other articles alleging that the military hierarchy was attempting to dictate political developments in Turkey.

(ii) The applicant faced a heavy prison sentence if convicted of the charges.

The Court's reasoning is further reinforced at the stage of the "necessity" test under the second paragraph of Article 10. Analysing the content of the impugned publication, the Court held that the applicant's publication had addressed a matter of public interest and that the ensuing criminal proceedings, with the risk of a possible heavy sanction being imposed, were capable of dissuading the applicant and other journalists from commenting critically on the relationship between the military and the political life of Turkey.

### **Right to receive and impart information**

The *Guseva v. Bulgaria*<sup>186</sup> judgment concerned the refusal by a municipal authority to give the applicant access to official information in accordance with final court judgments in the applicant's favour. The applicant, a member of an association active in the area of animal rights protection, had obtained three separate and final court rulings requiring the mayor of a town to provide her with information relating to the treatment of stray animals found on the streets of the town. The mayor did not comply with the requests. The applicant complained under Article 10 of the Convention that the mayor's conduct was in breach of her right to receive and impart information.

The Court found that there had been a breach of the Convention. It confirmed its growing line of authority to the effect that Article 10 can be relied on to contest a refusal to grant a journalist or a non-governmental organisation official information on a matter of public interest (see, for example, *Kenedi v. Hungary*<sup>187</sup>, *Youth Initiative for Human Rights v. Serbia*<sup>188</sup>, and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*<sup>189</sup>). The Court had given prominence

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186. *Guseva v. Bulgaria*, no. 6987/07, 17 February 2015.

187. *Kenedi v. Hungary*, no. 31475/05, 26 May 2009, see Annual Report 2009.

188. *Youth Initiative for Human Rights v. Serbia*, no. 48135/06, § 20, 25 June 2013, see Annual Report 2013.

189. *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, no. 39534/07, § 34, 28 November 2013, see Annual Report 2013.

in the relevant judgments to the public-watchdog role performed by the media and non-governmental organisations.

In the instant case, it noted that the applicant was involved in the legitimate gathering of information of public interest for the purpose of contributing to a public debate. The mayor's refusal to provide the information interfered with the preparatory stage of the process of informing the public, and therefore impaired her right to impart information. The Court did not have to examine the justification for the interference since there was no lawful basis for the mayor's refusal. The mayor had chosen not to comply with the domestic-court judgments, although the information was in his exclusive possession and readily available. Interestingly, the Court observed also that domestic law did not provide for any clear time frame for the enforcement of court judgments. Enforcement was therefore left to the good will of the authority responsible for implementation of a judgment. The applicable domestic legislation therefore failed the foreseeability test inherent in the notion of lawfulness.

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The *Cengiz and Others*<sup>190</sup> judgment, cited above, concerned wholesale blocking of users' access to YouTube and the question of victim status.

The applicants were law professors. They were active users of YouTube and held accounts allowing them to access, download, and share video material for professional purposes. Certain applicants also published on YouTube videos relating to their academic work. They all denounced a decision of the domestic courts ordering the wholesale blocking of access to YouTube. The court's ruling was based on the finding that certain video material available on the YouTube Internet site was offensive to the memory of Atatürk, and thus in breach of domestic law.

The judgment is noteworthy in that the Court found that the applicants could, in the circumstances of the case as presented, be considered victims of the alleged breach of Article 10. In its reasoning the Court was careful to stress the particular characteristics of the applicants' situation. In its view, the applicants' situation could not be compared to that of an ordinary Internet user complaining of restrictions on access to particular websites (see in this connection *Akdeniz v. Turkey*<sup>191</sup>), or that of a reader of a newspaper contesting a prohibition on its circulation (see in this connection *Tanrikulu and*

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190. *Cengiz and Others*, *supra* note 8.

191. *Akdeniz v. Turkey*, no. 20877/10, §§ 25-26, 11 March 2014.

*Others v. Turkey*<sup>192</sup>). The applicants all had YouTube accounts and made substantial use of its services for professional purposes. The impugned decision, although not aimed directly at them, nevertheless impacted negatively for a long period of time on their right to receive and communicate information and ideas. In line with earlier pronouncements on the significance of the Internet for enhancing the exercise of Article 10 rights (see in particular, *Delfi AS*<sup>193</sup>, cited above, and *Ahmet Yıldırım v. Turkey*<sup>194</sup>), the Court highlighted the importance of YouTube as a tool for receiving and disseminating information and ideas, including on matters which are not catered for by the traditional media. It observed that the impugned decision meant that the applicants had no equivalent means at their disposal for accessing, sharing and communicating video material of relevance to their academic and teaching activities. For these reasons, the applicants' complaint could not be seen as an abstract challenge to the lawfulness of the decision.

On the merits, the Court concluded that the domestic court had no competence to order a wholesale blocking of access to YouTube. The legal provisions relied on only allowed for restrictions to be imposed on access to specific material published on the Internet which was considered to give rise to a criminal offence. Accordingly, the interference with the applicants' Article 10 rights had no basis in law. The Court had reached a similar conclusion with respect to the application of the same provisions in the above-cited case of *Ahmet Yıldırım*.

## **Freedom of assembly and association (Article 11)**<sup>195</sup>

### **Freedom of peaceful assembly**

The *Kudrevičius and Others v. Lithuania*<sup>196</sup> judgment concerned criminal sanctions against farmers for blocking traffic on major roads.

The applicant farmers obtained authority to stage a peaceful protest to draw attention to agricultural-sector problems. Those demonstrations were initially held peacefully as per the authorisations. However, negotiations with the government stagnated. In order to put pressure

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192. *Tanrikulu and Others v. Turkey* (dec.), nos. 40150/98 and others, 6 November 2001.

193. *Delfi AS*, § 110, *supra* note 174.

194. *Ahmet Yıldırım v. Turkey*, no. 3111/10, §§ 66 et seq., ECHR 2012.

195. See also *Petropavlovskis*, *supra* note 152.

196. *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, ECHR 2015.



on the government, the applicants went beyond the authorisations and blocked three major roads for two days causing significant disruption. They were convicted of “rioting”. The blockage ended when their demands were met. They mainly complained under Article 11 of a breach of their right to freedom of assembly.

The Grand Chamber concluded, unanimously, that there had been no violation of Article 11.

This judgment clarifies the limits of the Convention’s protection of persons who voluntarily and seriously disrupt the course of life of others to draw attention to a particular issue. Two items are worth flagging separately.

(i) While the impugned blocking activities were not of a “nature and degree” as to remove participation therein from the scope of Article 11, such disruptive activities were “not at the core of the freedom” protected by Article 11. This impacted on the assessment of the necessity of the interference and meant that the State was entitled to a wide margin of appreciation.

(ii) Three factors were central to the main question of the necessity of the interference.

– The conduct of the applicants and demonstrators. The Grand Chamber noted that blocking the roads had not been an immediate response to an urgent need (distinguishing, *inter alia*, *Bukta and Others v. Hungary*<sup>197</sup>). It was not a measure of last resort as the applicants had other options to pursue the government. The impugned blocking activities were the result of a deliberate decision to cause serious obstruction to put pressure on the government and which disrupted road users who were extraneous to the dispute: in this respect, the present applicants were in a weaker position to those in prior cases (inadmissible) and, notably, in prior cases (inadmissible/no violation) where, as here, the blocking activities did not directly concern the disputed activities (*Lucas v. the United Kingdom*<sup>198</sup>, and *Barraco v. France*<sup>199</sup>).

– The reasonable conduct of the authorities during the road blockage. The police had confined themselves to ordering the demonstrators to stop and warning them of their possible liability, thereby demonstrating a “high degree of tolerance” and satisfying any positive obligations on the State to the demonstrators.

197. *Bukta and Others v. Hungary*, no. 25691/04, ECHR 2007-III.

198. *Lucas v. the United Kingdom* (dec.), no. 39013/02, 18 March 2003.

199. *Barraco v. France*, no. 31684/05, 5 March 2009.

– The criminal sanction. It was considered lenient and, since there was no uniform approach among member States on the legal characterisation (criminal or administrative) to be given to such disruptive activities, a broad margin of appreciation had to be accorded to the State for this reason also.

### **Right to strike**

The judgment in *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain*<sup>200</sup> concerned the lack of a right to strike for members of the State security forces. Relying in particular on Article 11 of the Convention, the applicant trade union complained of a statutory ban on the exercise of the right to strike by public servants in this category.

It will be recalled that Article 11 expressly includes the armed forces and the police among those on whom, at most, “lawful restrictions” may be imposed without their members’ trade-union freedom being called into question. Such restrictions must not impair the very essence of the right to organise (see *Matelly v. France*<sup>201</sup>).

The judgment is interesting for the way in which it takes into account in the assessment of compliance with Article 11 the specific responsibilities borne by public law-enforcement officers. The Court held that there had been no violation of Article 11. Although the facts complained of in the applicant trade union’s specific circumstances amounted to an interference with its right to freedom of association, that interference was not unjustified as the union had been able to exercise the essential content of that right. Unlike the position in the case of *Enerji Yapı-Yol Sen v. Turkey*<sup>202</sup>, the restriction laid down by the legislation did not apply to all public servants but was imposed exclusively on members of the State security forces, as guarantors of public safety. That legislation gave those forces greater responsibility, requiring them to act at any time and in any place to uphold the law, both during and outside working hours. The Court noted in particular:

“38. ... [T]his need to provide a continuous service and the fact that these ‘law-enforcement agents’ were armed distinguished this group from other civil servants such as members of the national legal service and doctors and justified the restriction of their right to organise. The more stringent requirements imposed on them did not exceed what was necessary in a democratic society, in so far as those requirements

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200. *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain*, no. 45892/09, 21 April 2015.

201. *Matelly v. France*, no. 10609/10, § 75, 2 October 2014.

202. *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, § 32, 21 April 2009.

served to protect the State's general interests and in particular to ensure national security, public safety and the prevention of disorder, principles set forth in Article 11 § 2 of the Convention.

39. The specific nature of those agents' activities warranted granting the State a sufficiently wide margin of appreciation to develop its legislative policy and to thus enable it to regulate, in the public interest, certain aspects of a trade union's activities, without depriving it of the essential content of its rights under Article 11 ...”

## **Prohibition of discrimination (Article 14)**

### **Article 14 in conjunction with Article 3**

The case of *Identoba and Others*<sup>203</sup>, cited above, concerned an incident in Georgia that occurred during a peaceful demonstration organised by a non-governmental organisation for the protection of the rights of lesbian, gay, bisexual and transgender people. In order to mark International Day against Homophobia, thirty people took part in a march in the capital, having notified the authorities beforehand. They were encircled by a larger group of counter-demonstrators from religious groups who insulted, threatened and physically assaulted them. All thirteen applicants were subjected to hate speech and aggressive behaviour. Two of the counter-demonstrators were subsequently ordered to pay an administrative fine. Investigations into the injuries sustained by two of the applicants were still pending when the Court delivered its judgment.

The applicants complained that the national authorities had not protected them against discriminatory attacks by the counter-demonstrators. The Court's judgment reiterated the fundamental principles applicable to the prevention and punishment of discriminatory attacks by private individuals.

The main legal interest in this case lies in the Court's reasoning under Articles 3 and 14 of the Convention in relation to discriminatory attacks on demonstrators on the grounds of their sexual orientation and gender identity.

Firstly, in reaching its conclusion that there was a discriminatory motive to the attacks, the Court referred to reports by the Council of Europe Commissioner for Human Rights and also by the International Lesbian and Gay Association. Secondly, the Court explained that the feelings of fear and insecurity which the verbal and physical assaults

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203. *Identoba and Others*, *supra* note 22.

had necessarily aroused in the applicants had been exacerbated by the fact that the police protection which had been promised to them in advance of the demonstration had been inadequate. The Court considered this to constitute an affront to human dignity which, in the circumstances, had reached the threshold of severity required under Article 3. The Court found, thirdly, that the authorities had known, or ought to have known, of the risk of homophobic and transphobic reactions and had thus been under an obligation to provide increased protection from attacks from third parties. However, the police had not done enough to contain the counter-demonstrators' attacks, which had prevented the peaceful march from continuing.

In addition, the authorities' inquiries into the incidents were not comprehensive or meaningful and did not satisfy the procedural obligations imposed by Article 3. The demonstrators had been the subject of discriminatory attacks on account of their sexual orientation and gender identity. Failure to uphold the law in this type of situation could be seen as tantamount to official indifference or even connivance on the part of law-enforcement authorities in hate crimes. The Court therefore held that there had been a violation of Article 3 in conjunction with Article 14.

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

### **Applicability**

In *Parrillo*<sup>204</sup>, cited above, the applicant complained of a statutory prohibition on the donation to research of cryopreserved embryos which had been created following the applicant's IVF treatment. She alleged that the prohibition violated Article 1 of Protocol No. 1.

The Court noted that the parties had "diametrically opposed" views on whether Article 1 of Protocol No. 1 was applicable. The Court had, in similar contexts, recharacterised complaints under another Article (under, for example, Article 8 in *Guerra and Others v. Italy*<sup>205</sup>, and, most recently, *Zammit and Attard Cassar v. Malta*<sup>206</sup>). However, it is interesting to observe that the Grand Chamber directly answered the present applicant's complaint under Article 1 of Protocol No. 1, finding that that Article did not apply and stating simply that "[h]aving

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204. *Parrillo*, *supra* note 93.

205. *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I.

206. *Zammit and Attard Cassar v. Malta*, no. 1046/12, § 28, 30 July 2015.

regard to the economic and pecuniary scope of [Article 1 of Protocol No. 1], human embryos cannot be reduced to ‘possessions’ within the meaning of that provision”. The Court therefore declared this complaint inadmissible *ratione materiae*.

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The *Tchokontio Happi*<sup>207</sup> judgment, cited above, concerned the continuing failure to execute a final judgment requiring the authorities to rehouse an individual. The applicant had obtained such a judgment under a law which recognised the right to decent and independent housing and provided that failure by the authorities to comply with an order to rehouse would lead to the payment of a penalty charge into a special State fund.

The judgment is noteworthy in that the Court distinguished the facts of the present case from the cases of *Teteriny v. Russia*<sup>208</sup> and *Olaru and Others v. Moldova*<sup>209</sup>. In the instant case the final judgment did not require the authorities to confer ownership of an apartment on the applicant, but rather to make one available to her. It was true that the applicant could acquire ownership of the apartment under certain conditions. However, there was no legal obligation on the authorities to sell it. Accordingly, she had no legitimate expectation to acquire a pecuniary asset and her complaint under this Article was for that reason dismissed as incompatible *ratione materiae*.

### Enjoyment of possessions

Judgments in the cases of *adorisio and Others* and *Sargsyan*<sup>210</sup>, cited above, were both delivered on the same day and concerned those States’ jurisdiction and Convention responsibilities as regards Nagorno-Karabakh and certain surrounding territories.

The case of *Chiragov and Others* concerned the jurisdiction of Armenia as regards Nagorno-Karabakh and the adjacent occupied territories, and the consequent Convention responsibility (notably under Article 1 of Protocol No. 1) for the violations alleged by Azerbaijani Kurds displaced therefrom. The six applicants were Azerbaijani Kurds who have been unable to return to their homes and property in the district of Lachin in Azerbaijan since they fled the

207. *Tchokontio Happi*, *supra* note 64.

208. *Teteriny v. Russia*, no. 11931/03, 30 June 2005.

209. *Olaru and Others v. Moldova*, nos. 476/07 and others, 28 July 2009.

210. *Chiragov and Others* and *Sargsyan*, *supra* note 1.

Armenian-Azerbaijani conflict over Nagorno-Karabakh in 1992. The Court found that Armenia exercised effective control over Nagorno-Karabakh and the seven adjacent occupied territories and thus had jurisdiction over the district of Lachin<sup>211</sup>.

The case of *Sargsyan* concerned the jurisdiction of Azerbaijan as regards a village near Nagorno-Karabakh on the territory of Azerbaijan, and its consequent Convention responsibility (notably under Article 1 of Protocol No. 1) for the violations alleged by an Armenian displaced therefrom. The applicant is an ethnic Armenian and has been unable to return to his property and home in the village of Gulistan since he fled the conflict in 1992. His village is not in Nagorno-Karabakh proper but is in a disputed area on the north and Azerbaijani bank of a river, which river constitutes the border with Nagorno-Karabakh. The Court found that the impugned facts fell within the jurisdiction of Azerbaijan<sup>212</sup>.

Since the Court had recognised each respondent State's jurisdiction in both cases, it went on to examine their consequent obligations under Article 1 of Protocol No. 1 to persons in the applicants' position who fled the conflict in 1992. In both cases the Court found, *inter alia*, that the applicants' exclusion from their property and homes was not justified and thus a violation of Article 1 of Protocol No. 1. It is worth noting that the *Sargsyan* case was the first in which the Court had to rule on the merits of Convention complaints against a State with legal jurisdiction over, but with practical control problems in accessing and controlling, "disputed territory". The Court acknowledged this difficulty: it accepted that the fact that the disputed territory remained a zone of military activity and was dangerous (the surrounding area was mined and there were frequent ceasefire violations) meant that providing access thereto was not feasible. However, the Court considered that Azerbaijan should have taken alternative measures to secure property rights.

In addition, the Grand Chamber adopted similar reasoning in both cases under Article 1 of Protocol No. 1 as regards the justification for the applicants' lack of access to their property. It underlined that the mere fact of participating in ongoing peace negotiations did not absolve the respondent State from taking other measures especially when negotiations had been pending for a long time (*Cyprus v. Turkey*<sup>213</sup>). Guidance as to the necessary measures could be found in

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211. See Jurisdiction of States (Article 1) above.

212. *Ibid.*

213. *Cyprus v. Turkey* [GC], no. 25781/94, § 188, ECHR 2001-IV.

the UN “Pinheiro Principles” (“Principles on Housing and Property Restitution for Refugees and Displaced Persons”) and in the Parliamentary Assembly of the Council of Europe’s Resolution 1708 (2010) on solving property issues of refugees and displaced persons. A particularly important step would have been the establishment of a property-claims mechanism, which would be easily accessible and allow the applicants and others in their situation to have property rights restored and to obtain compensation. That each respondent State had to deal with large influxes of refugees and/or internally displaced persons (who had fled the conflict in 1992) was an important factor to be weighed in the balance, but it did not exempt the respondent State entirely from its obligations to another group comprised of persons such as the applicants. The lack of access, combined with the lack of measures to restore the applicants’ property rights or to compensate them, amounted to a violation of Article 1 of Protocol No. 1.

Certain other interesting issues arose in both cases in the context of Article 1 of Protocol No. 1.

(i) The judgment contains an analysis of the Court’s case-law as to the evidence to be presented by applicants to prove identity, residence and ownership of property when they have been forcibly displaced and lost property as a result of an armed conflict. Reference was made to cases concerning Northern Cyprus, south-east Turkey and Chechnya, as well as to the above-cited UN “Pinheiro Principles”. The Court summarised its approach as “flexible”. Regard being had to the circumstances in which the applicants had had to leave (under military attack), their properties’ “technical passport” as well as statements of the applicants backed up by others sufficed as proof that the applicants had houses and property when they fled the conflict in 1992.

(ii) According to the domestic law applicable when the applicants fled, the applicants could only have had a *right to use* the land (as opposed to full ownership) from which they fled, which right the Court considered to be a “strong and protected right which represented a substantive economic interest”, whether the applicants right to use the land had been indefinite or temporary.

### **Positive obligations**

The case of *S.L. and J.L. v. Croatia*<sup>214</sup> concerned the conditions in which a villa belonging to two minor children was transferred. The

214. *S.L. and J.L. v. Croatia*, no. 13712/11, 7 May 2015.

Court's judgment underlines the extent to which State authorities are required to protect children's proprietary interests.

The children's mother and her husband (who was the father of one of the two girls) decided to sell the villa. For this they required the permission of the Social Welfare Centre. In the meantime, the husband was prosecuted and detained. His lawyer took over the property transaction and opted to proceed by way of a swap agreement with his mother-in-law in exchange for a lower value property, rather than a sale. After interviewing the mother, the Social Welfare Centre authorised the swap. Subsequently, the husband, acting as the children's legal guardian, made an unsuccessful attempt to have the unfavourable swap agreement declared null and void. The domestic courts dismissed his action without having regard to the relevant issues, such as the fact that the owners were both minors whose guardian was in detention and whose mother was under severe financial and personal pressure and that a lawyer with a conflict of interest had interfered in the transfer process.

In the Convention proceedings the two sisters complained that the national authorities had failed to protect them against the exchange of their villa for a flat of significantly less value.

The Court found a violation of Article 1 of Protocol No. 1. The legal interest in the case lies in the positive obligations it imposes on the State when the financial interests of children are at stake. The Court had previously stressed the overriding importance of protecting children's best interests in any decision affecting them (see, among other authorities, *X v. Latvia*<sup>215</sup>, and *Jeunesse v. the Netherlands*<sup>216</sup>). The instant judgment applies this principle to Article 1 of Protocol No. 1. The Court considered that both the Social Welfare Office and the judicial authorities were under the obligation to afford concrete protection for the children's proprietary interests, including against dishonesty by third parties.

In the instant case, however, the decisions taken by the competent authorities involved in the transaction had revealed a number of shortcomings, in particular:

(i) the Social Welfare Office had not exercised the necessary diligence in terms of assessing the possible adverse effects of the swap agreement on the interests of the children; and

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215. *X v. Latvia* [GC], no. 27853/09, ECHR 2013.

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



(ii) the civil courts had failed to appreciate the particular circumstances in which those concerned by the property transfer found themselves.

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

The *Memlika v. Greece*<sup>217</sup> judgment concerned access to primary-school education. The applicants were two children aged seven and eleven at the material time and their parents. After the family was diagnosed with a contagious disease, the children were excluded from school by a decision of the regional public health service. A few weeks later a specialist hospital found that the original diagnosis was wrong. A request was made for the children to be allowed to return to school, but the regional health service replied that they could not do so until authorisation had been received from a statutory panel. The panel was not set up until two months after the school year had begun and only later examined the members of the family and found them to be free of disease. The children's mother took them to school the following day, but the head teacher refused to admit them until he had received a copy of the panel's decision.

The applicants complained under Article 2 of Protocol No. 1 of the conditions in which the children had been excluded from their primary school.

The interesting feature of this case is the exclusion of children from a primary school on public-health grounds. The judgment examines the procedure set up by the authorities to enable the children to return to school and the time it took for their return to become effective. The main issue was the question of proportionality between the protection of the applicants' interests and those of the teachers and other pupils. Noting the potentially serious consequences for the children, the Court stated that the competent national authorities had to deal with such situations diligently and promptly. The Court explained the applicable principles, noting in particular that "measures of a particularly restrictive and onerous nature must be kept in place only for the time strictly required in order to achieve the desired aim and must be lifted as soon as the grounds for imposing them cease to apply". Noting that the applicant children had been deprived of their schooling for more than three months after the start of the school year as a result of a manifest lack of diligence in the arrangements for their

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217. *Memlika v. Greece*, no. 37991/12, 6 October 2015.

return to school, the Court found a violation of their right to education, in particular as regards their access to school.

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

The *Riza and Others v. Bulgaria*<sup>218</sup> judgment concerned the invalidation of elections and a failure to give weight to the fact that it was impossible to order new elections.

The first applicant was a member of a political party and parliamentary candidate in the 2009 legislative elections. The second applicant was the applicant's political party. The remaining applicants are 101 voters who voted in the elections.

All the applicants complained in the Convention proceedings that the decision of the Constitutional Court to invalidate the votes cast in 23 of the 123 polling stations in Turkey (Bulgarian citizens living in Turkey have the right to vote in Bulgarian elections using polling stations set up in Turkey) infringed the guarantees contained in Article 3 of Protocol No. 1 in their passive (the first two applicants) and active (the applicant voters) aspects. According to the applicants, the effect of the Constitutional Court's ruling was to reduce the applicant party's overall electoral result and thus the size of its parliamentary representation, with the result that the applicant candidate lost his seat.

The Court found that there had been a breach of the Convention. It noted that the Constitutional Court's decision had been taken in response to allegations made by a political party that there had been irregularities in the procedures used in the conduct of the vote in the 123 polling stations in Turkey. However, the irregularities in most cases were either technical or formal (for example, the absence of official signatures on the electoral lists) and were not of such a nature as to warrant the invalidation of the outcome of the vote. That of itself amounted to a breach.

The Court accepted that, as regards the voting at 1 of the 23 polling stations, there may have been grounds to suspect fraudulent behaviour since no mention was made of the number of voters on the first page of the official minutes. While that suspicion may have provided grounds for the invalidation of the vote, it is noteworthy that the Court criticised the Constitutional Court's failure to give weight to the fact that it was not possible under domestic law at the time to order

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218. *Riza and Others v. Bulgaria*, nos. 48555/10 and 48377/10, 13 October 2015.

the holding of new elections. This factor should have been seen as a relevant consideration when determining whether the invalidation of the elections was a proportionate response to the irregularity identified in the voting procedure at the polling station. The Court accepted that the holding of new elections for voters in Turkey would not have been an easy option. However, in its view, and given the consequences which the invalidation of the results had had for the applicants, this would have been one way of reconciling the need to uphold the lawfulness of the electoral process with the rights of candidates and voters.



## OTHER CONVENTION PROVISIONS

### Binding force and execution of judgments (Article 46)

#### Pilot judgments

The judgment in *Rutkowski and Others v. Poland*<sup>219</sup> is a noteworthy example of the flexibility afforded by the pilot-judgment procedure.

The Court found in a series of cases decided in 2005 (see *Charzyński v. Poland*<sup>220</sup>; *Ratajczyk v. Poland*<sup>221</sup>; and *Krasuski v. Poland*<sup>222</sup>) that the remedies introduced by Poland for length of proceedings in the wake of the Grand Chamber's judgment in *Kudła*<sup>223</sup>, cited above, were effective for the purposes of Articles 35 § 1 and 13 of the Convention. While many such cases were subsequently rejected on grounds of non-exhaustion, it became apparent with time that, in practice, the remedies were proving to be inadequate, resulting in the Court having to deal with the merits of a large number of applications. It found in those cases that the criteria for calculating and assessing the reasonable-time requirement provided for in Article 6 and the effective remedy foreseen in Article 13 had not been complied with. Two problem areas were identified. In the first place, the domestic courts had failed to assess in an Article 6 compliant manner the length of a particular set of proceedings (what the Court terms a "fragmented" as opposed to an overall approach). Secondly, when finding that proceedings had lasted an unreasonable time, the domestic courts made awards for non-pecuniary damage which were markedly out of line with the Court's own awards of compensation for non-pecuniary damage in analogous cases. At the date of adoption of the Court's judgment, there were approximately 525 cases pending execution before the Committee of Ministers, and approximately 650 cases pending before the Court.

In response to this development, the Court adopted a pilot judgment in the *Rutkowski and Others* cases concerning the length of court

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219. *Rutkowski and Others v. Poland*, nos. 72287/10 and others, 7 July 2015.

220. *Charzyński v. Poland* (dec.), no. 15212/03, §§ 36-43, ECHR 2005-V.

221. *Ratajczyk v. Poland* (dec.), no. 11215/02, ECHR 2005-VIII.

222. *Krasuski v. Poland*, no. 61444/00, §§ 68-73, ECHR 2005-V (extracts).

223. *Kudła*, *supra* note 31.

proceedings. It found a breach of the reasonable-time requirement in all three cases (civil or criminal), and a breach of Poland's obligation to provide the applicants with an effective remedy. In each case, the Court was at pains to define clearly for the benefit of the domestic courts the approach which should have been followed when calculating the length of the proceedings in question and assessing the proper amount of compensation.

The judgment is interesting on the issue of the disposal of other such cases, whether currently on the Court's docket or forthcoming. The Court found in effect that the situation complained of in the cases before it must be qualified as a practice incompatible with the Convention. In keeping with the pilot-judgment procedure, the Court adverted to the causes of the systemic problem of delay in the administration of justice in Poland and of the reluctance of the domestic courts to afford appropriate just satisfaction in line with its own approach to Article 41 awards. As to the treatment of cases on its docket at the date of delivery of the pilot judgment, and where the primary complaint concerns length of proceedings, it decided that the most efficient procedural solution was:

(i) to give notice of such cases to the respondent Government within the framework of the present pilot-judgment procedure;

(ii) to allow the respondent Government a two-year time-limit for processing the cases and affording redress to all victims (by way of, for example, friendly settlements);

(iii) to adjourn, pending the adoption of measures ensuring redress, adversarial proceedings in all those cases for two years from the date on which the judgment becomes final;

(iv) to adjourn adversarial proceedings in all future cases that may be lodged after the delivery of the judgment for one year following the delivery;

(v) after the expiry of that term the Court would decide on a further procedure, in the light of subsequent developments and, in particular, any measures that may have been taken by the respondent State in execution of the present judgment.

This would appear to be the first occasion on which the Court has communicated to a respondent Government, within the framework of a pilot judgment, all the repetitive cases pending before it at the date of delivery.

### **Execution of judgments**<sup>224</sup>

In *Bochan (no. 2)*<sup>225</sup>, cited above, the Court stressed the importance of ensuring that domestic procedures are in place which allow a case to be revisited following a finding that the fair-trial guarantees of Article 6 have been violated. As the Committee of Ministers of the Council of Europe had indicated, the existence of a procedure to allow the reopening of proceedings at domestic level following a finding of a violation of the Convention is an important aspect of the execution process for the Court's judgments.

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224. See also *Cestaro*, *supra* note 19.

225. *Bochan (no. 2)*, *supra* note 52.





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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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