

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

2016



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# CONTENTS

FOREWORD TO THE 2015 EDITION .....	7
INTRODUCTION .....	9
JURISDICTION AND ADMISSIBILITY .....	13
Jurisdiction of States (Article 1) .....	13
Admissibility (Articles 34 and 35) .....	14
<i>Locus standi</i> (Article 34) .....	14
No significant disadvantage (Article 35 § 3 (b)) .....	16
“CORE” RIGHTS .....	17
Right to life (Article 2) .....	17
Effective investigation .....	17
Expulsion .....	20
Prohibition of torture and inhuman or degrading treatment and punishment (Article 3) .....	22
Inhuman or degrading treatment .....	22
Degrading treatment .....	23
Inhuman or degrading punishment .....	24
Effective investigation .....	26
Expulsion .....	27
Detention .....	32
Prohibition of slavery and forced labour (Article 4) .....	38
Work required of detainees (Article 4 § 3 (a)) .....	38
Right to liberty and security (Article 5) .....	39
Lawful arrest or detention (Article 5 § 1) .....	39
Minors (Article 5 § 1 (d)) .....	41
Reasonableness of pre-trial detention (Article 5 § 3) .....	43
Review of lawfulness of detention (Article 5 § 4) .....	44
PROCEDURAL RIGHTS .....	47
Right to a fair hearing in civil proceedings (Article 6 § 1) .....	47
Applicability .....	47

Access to a court.....	48
Fairness of the proceedings.....	54
Right to a fair hearing in criminal proceedings (Article 6 § 1).....	57
Access to a court.....	57
Fairness of the proceedings.....	59
Presumption of innocence (Article 6 § 2).....	60
Defence rights (Article 6 § 3).....	62
Defence through legal assistance (Article 6 § 3 (c)).....	66
Other rights in criminal proceedings.....	68
No punishment without law (Article 7).....	68
Right not to be tried or punished twice (Article 4 of Protocol No. 7).....	73
Prohibition of collective expulsion of aliens (Article 4 of Protocol No. 4).....	75
Right to an effective remedy (Article 13).....	77
OTHER RIGHTS AND FREEDOMS.....	81
Right to respect for one's private and family life, home and correspondence (Article 8).....	81
Private life.....	81
Private and family life.....	92
Family life.....	94
Home.....	96
Correspondence.....	99
Freedom of thought, conscience and religion (Article 9).....	100
Freedom of religion.....	100
Manifest one's religion or belief.....	102
Positive obligations.....	103
Freedom of expression (Article 10).....	104
Applicability.....	104
Freedom of expression.....	105
Freedom of the press.....	111
Freedom to receive and impart information.....	113
Freedom of assembly and association (Article 11).....	120
Freedom of peaceful assembly.....	120
Freedom of association.....	123
Prohibition of discrimination (Article 14).....	128
Article 14 taken in conjunction with Article 8.....	128

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Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 .....	136
Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1 .....	137
Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 .....	139
Protection of property (Article 1 of Protocol No. 1) .....	140
Applicability .....	140
Enjoyment of possessions .....	142
Control of the use of property .....	143
Right to free elections (Article 3 of Protocol No. 1) .....	144
OTHER CONVENTION PROVISIONS .....	147
Limitation on use of restrictions on rights (Article 18) .....	147
Striking out (Article 37) .....	149
LIST OF CITED CASES .....	155



## FOREWORD TO THE 2015 EDITION

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

There were significant developments to the case-law in 2016<sup>1</sup>. The Grand Chamber delivered twenty-seven judgments. It examined the concept of “jurisdiction” within the meaning of Article 1 of the Convention (*Mozer*) and, under Article 2, clarified the extent of the procedural obligation to carry out an investigation into the use of lethal force by State agents (*Armani Da Silva*). Several judgments dealt with immigration cases. In two of these, the Grand Chamber elucidated the State’s procedural obligations under Articles 2 and 3 when examining asylum requests (*F.G. v. Sweden*) and the distribution of the burden of proving a “real risk” of treatment proscribed by Article 3 in the event of expulsion (*J.K. and Others v. Sweden*). The *Paposhvili* judgment made an important contribution to the case-law governing the compatibility of the deportation of a seriously ill foreigner with Articles 3 and 8 of the Convention. The *Khlaifia and Others* judgment was delivered against the backdrop of a major migration and humanitarian crisis. It examines the rights of migrants in this context under Articles 3, 5 and 13 of the Convention and under Article 4 of Protocol No. 4.

The Grand Chamber set down specific standards for the protection of the health of juvenile detainees under Article 3 (*Blokhin*), and established the principles and standards regarding minimum personal space per detainee in multi-occupancy cells (*Muršić*). It further refined its case-law on irreducible life sentences (*Murray*).

Under Article 5 § 1, the Grand Chamber examined the lawfulness of orders made by the courts of an unrecognised entity (*Mozer*), and the placement of a minor below the age of criminal responsibility in a juvenile detention centre (*Blokhin*). It developed the case-law under Article 5 § 3 with a view to reinforcing the protection against unreasonably long periods of pre-trial detention (*Buzadji*).

With respect to Article 6 § 1, it confirmed that the *Vilho Eskelinen* criteria apply to disputes concerning judges and emphasised the growing importance of procedural fairness in cases involving the removal of judges (*Baka*). A number of cases concerned the proportionality of restrictions imposed on the right of access to a

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1. The Overview has been drafted by the Directorate of the Jurisconsult. It is not binding on the Court.

court (*Al-Dulimi and Montana Management Inc., Baka and Lupeni Greek Catholic Parish and Others*). The Grand Chamber examined issues relating to legal certainty and the right to a hearing within a reasonable time in the case of *Lupeni Greek Catholic Parish and Others*; the recognition and enforcement of foreign judgments in civil cases in *Avotiņš*; and, in *Lhermitte*, the reasons given by an assize-court jury for convicting a defendant. The *Blokhin* judgment comprehensively addressed, and in some respects developed, the procedural rights of juveniles under Article 6. As regards the right of access to a lawyer during police questioning, the Grand Chamber clarified the two stages of the *Salduz* test and the relationship between them in the *Ibrahim and Others* judgment, which concerned measures taken by the police in response to a terrorist attack. The judgment in *A and B v. Norway* developed the Court's case-law on the interpretation of Article 4 of Protocol No. 7 (*ne bis in idem*).

In the case of *Dubská and Krejzová* the Grand Chamber considered the question of home births under Article 8, and in *İzzettin Doğan and Others* the State's obligation of impartiality and neutrality regarding religious beliefs under Articles 9 and 14. For the first time, the Court examined the extent to which a parliament is entitled to regulate autonomously its own internal affairs and, in particular, to restrict the expression rights of members of parliament in session (*Karácsony and Others*). It emphasised the importance of the independence and irremovability of judges in a case concerning the freedom of expression of judges (*Baka*). The Grand Chamber developed its case-law regarding publication by the press of information protected by the secrecy of criminal investigations (*Bédat*), and clarified the extent to which Article 10 guarantees a right of access to State-held information (*Magyar Helsinki Bizottság*).

In another case, it found that a domestic immigration measure, regulating family reunification, had an indirect discriminatory impact (*Biao*). It examined the impact of a reform of a disability pension scheme on rights protected by Article 1 of Protocol No. 1 and provided further guidance on the scope of that provision (*Bélané Nagy*).

Another issue examined by the Grand Chamber was the respondent State's continuing obligation to investigate even after an application has been struck out (*Jeronovičs*). The Grand Chamber considered whether or not to strike out the application in three expulsion cases (*F.G. v. Sweden, Khan and Paposhvili*). It struck out an application because the representative in the Grand Chamber proceedings no longer had any contact with the applicants (*V.M. and Others*).

For the first time the Court examined the obligation for prisoners to perform work in prison after reaching retirement age (*Meier*). Also for the first time the Court addressed the implications for the presumption of innocence of the parallel conduct of an official inquiry and criminal proceedings dealing with the same matters (*Rywin*). It applied the *Schatschaschwili* principles in a case concerning the admission and use of the incriminating conclusions of an absent expert (*Constantinides*) and considered a case involving the imminent execution of a demolition order (*Ivanova and Cherkezov*). It was also the first time that the Court examined the compatibility of house arrest with the exercise of the right to manifest one's religion in community with others (*Süveges*). Among other novel issues before the Court were the confinement of an accused in a glass cabin during his trial (*Yaroslav Belousov*), and the revocation of an applicant's acquired citizenship (*Ramadan*).

The Court was critical of the delayed enforcement of a prison sentence imposed on an accused who had been found guilty of a serious assault (*Kitanovska Stanojkovic and Others*), of a failure by the criminal-justice system to respond adequately to incidents of racism (*Sakir and R.B. v. Hungary*), and of a lack of appropriate medical care for a young child staying with her mother in prison (*Korneykova and Korneykov*).

Other important cases concerned the right of lawyers to exercise their professional duties without being subjected to ill-treatment (*Cazan*), the rights of minors who have been deprived of their liberty (*Blokhin, A.B. and Others v. France and D.L. v. Bulgaria*), the procedural rights of persons suffering from psychiatric disorders (*Marc Brauer*), the protection of personality rights (*Kahn*), the right to protect one's reputation (*Sousa Goucha*) and to be heard (*Pinto Coelho*), prisoners' rights (*Mozer, Muršić, Meier, Biržietis, Shabanov and Palfreeman and Kalda*), including the right to medical treatment (*Blokhin, Murray, Cătălin Eugen Micu, and Wenner*), and the rights of asylum-seekers (*F.G. v. Sweden, J.K. and Others v. Sweden, Khlaifia and Others and B.A.C. v. Greece*), of the disabled (*Kocherov and Sergejeva, Guberina and Çam*) and of homosexual couples (*Pajić, Aldeguer Tomás and Taddeucci and McCall*).

The Court also considered cases concerning a search of the applicants' home (*K.S. and M.S. v. Germany*), the right to demonstrate (*Novikova and Others, Frumkin and Gülcü*), the use of satire in the press (*Ziemiński*) and unlawful conduct by journalists (*Brambilla and Others*), the rights of political parties (*Cumhuriyet Halk Partisi, Partei Die Friesen and Paunović and Milivojević*), freedom of association

(*Geotech Kancev GmbH*), trade-union rights (*Unite the Union*) and welfare benefits and pensions (*Bélané Nagy, Di Trizio and Philippou*).

Also of jurisprudential interest were cases on international arbitration (*Tabbane*), expert medical evidence (*Vasileva*), an insured person's surveillance by her insurers (*Vukota-Bojić*) and conscientious objection to military service (*Papavasilikis*).

There were developments too in the case-law on Article 5 § 4 (*A.M. v. France*), Article 7 (*Bergmann, Dallas and Ruban*), on the applicability of Article 10 (*Semir Güzel*), Article 13 (*Mozzer and Kiril Zlatkov Nikolov*) and Article 18 (*Navalnyy and Ofitserov and Rasul Jafarov*).

The Court explored the interaction between the Convention and European Union law. In particular, the Grand Chamber developed the case-law concerning the presumption of equivalent protection of fundamental rights in the European Union (*Avotiņš*), relying on the case-law of the Luxembourg Court. References were made to the EU Charter of Fundamental Rights (*Karácsony and Others* and *Magyar Helsinki Bizottság*) and to EU law on the mutual recognition of judicial decisions (*Avotiņš*), on procedural rights in criminal proceedings (*Ibrahim and Others*), on asylum proceedings (*J.K. and Others v. Sweden*) and on family reunification (*Biao*). The Court also examined a case involving the alleged defamatory content of a television programme broadcast from another European country (*Arlewin*).

In a similar vein, the Court analysed the interaction between the Convention and international law, interpreting the obligations arising out of the Charter of the United Nations in the light of the Convention obligations (*Al-Dulimi and Montana Management Inc.*). It used international-law and Council of Europe norms as an aid for applying and interpreting the Convention (in, for example, *Mozzer, Blokhin, Biao, Baka, J.K. and Others v. Sweden*, and *Magyar Helsinki Bizottság*) and referred to decisions of international courts (in, for example, *Baka, Ibrahim and Others*, and *Magyar Helsinki Bizottság*).

Lastly, the Court further developed its case-law on the width of the States' margin of appreciation (in, among others, *Armani Da Silva, Karácsony and Others* and *Dubská and Krejzová*), and on the extent of their positive obligations under the Convention (in, for example, *Mozzer* and *Murray*).

# JURISDICTION AND ADMISSIBILITY

## Jurisdiction of States (Article 1)

The *Mozer v. the Republic of Moldova and Russia*<sup>2</sup> judgment concerned the lawfulness of detention ordered by courts of the “Moldavian Republic of Transdniestria” (“MRT”). The Grand Chamber examined the issue of “jurisdiction” within the meaning of Article 1 of the Convention with regard to the two respondent States.

Having been detained since 2008, the applicant was convicted in 2010 of defrauding two companies and sentenced to seven years’ imprisonment, five of which were suspended. He complained under Article 5 that his detention by the “MRT courts” had been unlawful. He also complained of his treatment in detention under, *inter alia*, Articles 3, 8 and 9 of the Convention, read alone and in conjunction with Article 13.

The Grand Chamber found that Russia had violated Articles 3, 5, 8, 9 and 13 of the Convention and that there had been no violation of those provisions by the Republic of Moldova.<sup>3</sup>

In reaching that conclusion, it maintained its previous findings on the jurisdiction of both respondent States as regards the “MRT” (*Ilaşcu and Others v. Moldova and Russia*<sup>4</sup>, *Ivanţoc and Others v. Moldova and Russia*<sup>5</sup> and *Catan and Others v. the Republic of Moldova and Russia*<sup>6</sup>).

As regards Russia, the Court confirmed that the “high level of dependency on Russian support provided a strong indication that Russia continued to exercise effective control and a decisive influence over the ‘MRT’ authorities”. The applicant therefore fell within Russia’s jurisdiction within the meaning of Article 1 of the Convention.

As to the Republic of Moldova, the Court reiterated that, while it had no effective control over the acts of the “MRT”, public international

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2. *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, ECHR 2016.

3. See further under [Article 5](#) and [Article 13](#) below.

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

5. *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, 15 November 2011.

6. *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, ECHR 2012 (extracts).

law recognised Transnistria as part of the Republic of Moldova's territory. This gave rise to positive obligations on it, under Article 1 of the Convention, "to use all the legal and diplomatic means available to it to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention to those living there".<sup>7</sup>

## **Admissibility (Articles 34 and 35)**

### ***Locus standi* (Article 34)**

The case of *Bulgarian Helsinki Committee v. Bulgaria*<sup>8</sup> concerned the applicant organisation's standing to introduce applications on behalf of deceased minors.

The applicant organisation, acting without a power of attorney, introduced applications on behalf of two adolescents who died in October 2006 and October 2007 in homes for mentally disabled children. It learned about the conditions in the homes and the deaths of the adolescents from a documentary broadcast on television in 2007. The applicant organisation subsequently requested the authorities to initiate criminal proceedings into the conditions in the homes and the circumstances surrounding the deaths.

In the Convention proceedings, the applicant organisation alleged a breach of, among other things, Articles 2 and 3 of the Convention, contending that the lack of medical and other care in the homes had contributed to the deaths of the children.

The applicant organisation was neither a direct nor indirect victim of the alleged violation. The issue before the Court was whether it had *locus standi* to bring the applications. The Court's inquiry was directed at establishing whether the applicant's situation could be considered to be comparable to that of the applicant organisation in the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*<sup>9</sup>. In that case the Court had stressed that it was only in "exceptional circumstances" that it would accept the standing of a party who was neither the direct nor indirect victim of the violation(s) alleged. The Court accepted the applicant organisation's standing to bring proceedings without a power of attorney for the

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7. See also under [Article 5](#) below.

8. *Bulgarian Helsinki Committee v. Bulgaria* (dec.), nos. 35653/12 and 66172/12, 28 June 2016.

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

following reasons (see §§ 104-11 of the judgment): the vulnerability of Valentin Câmpeanu, who suffered from a serious mental disability; the seriousness of the allegations made under Articles 2 and 3 of the Convention; the absence of heirs or legal representatives to bring Convention proceedings on his behalf; the contact which the applicant organisation had with Valentin Câmpeanu and its involvement in the domestic proceedings following his death, during which it had not been contested that it had standing to act on his behalf.

In the instant case the Court was of the view that these factors were decisive for its examination of the question of the Bulgarian Helsinki Committee's standing.

The Court had no difficulty in accepting that the deceased minors, both mentally disabled and abandoned by their mothers at birth, had not been in a position to complain of the conditions in the care homes. The allegations made on their behalf were serious. Moreover, it found on the facts that, even if the minors' mothers remained under domestic law their legal representatives, there had never existed any link between them. In essence, there was no one who could look after their interests, and thus no one who could bring Convention proceedings on their behalf. To that extent, their situation was comparable to that of Valentin Câmpeanu. However, it differed in the following two respects. Firstly, the applicant organisation had never had any contact with the minors prior to their deaths. It only became involved in the domestic investigation four to five years later, and at a time when the prosecutor had already taken decisions to discontinue the criminal proceedings. Its role was limited to lodging requests with the prosecutor's office to reopen the investigations. Leaving aside the issue of *locus standi*, it is noteworthy that the Court also alluded in this connection to the difficulties which the acceptance of the application would have for the operation of the six-month rule. Secondly, the applicant lacked formal standing in the domestic proceedings, and had no right to challenge in the courts the prosecutor's discontinuation orders. The Court accordingly concluded that the applications, unlike that lodged on behalf of Valentin Câmpeanu, were incompatible *ratione personae* with the Convention and therefore inadmissible.

The decision is noteworthy in that it illustrates the difficulties which confront an applicant non-governmental organisation in persuading the Court that "exceptional circumstances" exist such as to justify allowing it to act on behalf of a deceased victim in the absence of a power of attorney.

### **No significant disadvantage (Article 35 § 3 (b))**

The *Kiril Zlatkov Nikolov v. France*<sup>10</sup> case concerned the application of the “no significant disadvantage” criterion to an applicant’s allegation of discrimination with respect to fair-trial rights.

The applicant, a Bulgarian national, was charged with offences relating to international prostitution. Given the nature of the offences, the applicant’s interview before the investigating judge was not recorded on video. According to the relevant provisions of the Code of Criminal Procedure at the material time, interviews automatically had to be recorded regardless of the offence unless it fell within the following categories: organised crime (the applicant’s case); terrorism; and threats to fundamental national interests. The applicant succeeded in having this provision declared unconstitutional with reference to the principle of equality. However, the ruling of the Constitutional Court had no impact on his case given that, as found by the Court of Cassation, the ruling only benefited persons who were in the applicant’s situation after the date of the publication of the ruling.

In the Convention proceedings, the applicant complained among many other things that he had been discriminated against in the enjoyment of his right to a fair trial, contrary to Article 14 of the Convention read in conjunction with Article 6 and, under Article 13, that he had no effective remedy to contest the discriminatory application of the law to his own situation.

Having regard to the fact that the Constitutional Court had upheld the applicant’s challenge to the constitutionality of the impugned provision, the Court’s decision declaring the complaint under Article 14 combined with Article 6 inadmissible pursuant to Article 35 § 3 (b) of the Convention is of interest. For the Court, there was nothing to indicate that the fact that the applicant’s interview had not been recorded had had any significant consequences either for the fairness of his trial or for his own personal situation. Moreover, respect for human rights did not require it to examine the complaint since the issue raised by the applicant was of historical interest only, in view of the aforementioned ruling of the Constitutional Court. This conclusion is noteworthy since it illustrates the Court’s willingness to give weight to the consideration that the circumstances giving rise to the complaint submitted to it will not be repeated at the domestic level, notwithstanding that the underlying issue has never been addressed in its case-law. Finally, it noted that the applicant’s complaint had been duly examined in the domestic proceedings.

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10. *Kiril Zlatkov Nikolov v. France*, nos. 70474/11 and 68038/12, 10 November 2016.



# “CORE” RIGHTS

## Right to life (Article 2)

### Effective investigation

The *Armani Da Silva v. the United Kingdom*<sup>11</sup> judgment concerned the criminal conviction of the police force, but not the individual police officers, following a fatal shooting incident.

The applicant’s cousin was shot dead, in error, by Special Firearms Officers while on the underground in London in the wake of a series of bombs on the city’s transport network. An extensive investigation was conducted and detailed investigation reports were published. The decisions of the Crown Prosecution Service not to prosecute were detailed and the inquest was comprehensive: both were the subject of judicial review. While no individual officer was disciplined or prosecuted, the Office of the Commissioner of Police of the Metropolis (“the OCPM”) was found guilty of criminal charges under health and safety legislation.

Before the Court, the applicant complained under Article 2 of the Convention of the failure to prosecute any individuals for her cousin’s death. The Grand Chamber found no violation of the procedural limb of that provision.

(i) It is worth noting that the judgment contains a comprehensive outline of the procedural investigative requirements in cases concerning the use of lethal force by State agents.

(ii) The judgment is interesting in that it clarifies precisely what the Court meant in *McCann and Others v. the United Kingdom*<sup>12</sup> by an “honest belief [that the use of force was justified] which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken”.

The Court did not adopt the stance of a detached observer (objectively reasonable) but rather considered it should put itself in

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11. *Armani Da Silva v. the United Kingdom*, no. 5878/08, ECHR 2016.

12. *McCann and Others v. the United Kingdom* [GC], 27 September 1995, § 200, Series A no. 324.

the position of the officer, in determining both whether force was necessary and the degree needed. It found that the principal question was whether the person had an “honest and genuine” belief and, in this regard, the Court took into account whether the belief was “subjectively reasonable” (the existence of subjective good reasons for it). The Court did also indicate that, if the use of force was found not to be subjectively reasonable, it would have difficulty accepting that the belief was honestly and genuinely held. It went on to conclude, contrary to the applicant’s submission, that this Convention test was not significantly different from the test of self-defence in England and Wales.

(iii) One of the more novel aspects of the case concerns the prosecutorial decision not to prosecute any individual police officer in addition to prosecuting the police force (the OCPM), a decision made on the basis of the “threshold evidential test”. The test is “whether there was sufficient evidence to provide a realistic prospect of conviction”: it is not an arithmetical “51% rule” but asks whether a conviction is “more likely than not”. The prosecution found that there was insufficient evidence against any individual officer to meet that test in respect of any criminal offence. However, it identified institutional and operational failings which resulted in the police force being prosecuted and convicted on health and safety charges. The Court found that this did not breach the procedural requirement of Article 2 of the Convention.

In so finding, the Court clarified that an aspect of its case-law had evolved. While it had initially stated that an investigation should be capable of leading to the “identification and punishment of those responsible”, the case-law now recognised that the obligation to punish would apply only “if appropriate” (see, for example, *Giuliani and Gaggio v. Italy*<sup>13</sup>). As to whether it was “appropriate” or not to punish the individual police officers, the Court noted that it had never found to be at fault a prosecutorial decision following an Article 2 compliant investigation (and the present one had so complied) but that “institutional deficiencies” in the systems of criminal justice and prosecution had led to such findings. The present applicant had alleged one such deficiency: the threshold evidential test (whether there was a “realistic prospect of conviction”) applied when deciding whether or not to prosecute. The Court did not dispute the need for such a test and, further, considered that the State should be accorded a certain

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13. *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, ECHR 2011 (extracts).

margin of appreciation in setting the threshold (it required balancing competing interests and there was no relevant European consensus). Having regard to other related domestic-law factors, it could not be said that the threshold evidential test for bringing a prosecution was so high as to fall outside the State’s margin of appreciation. The authorities were entitled to take the view that public confidence in the prosecutorial system was best maintained by prosecuting where the evidence justified it and not prosecuting where it did not. The applicant had not therefore demonstrated any “institutional deficiencies” which gave rise – or were capable of giving rise – to a procedural breach of Article 2 concerning the decision not to prosecute the individual officers.

In concluding on this question of individual or institutional prosecutions, the Court reviewed the State’s overall response to the shooting incident to find that it could not be said that any question of the authorities’ responsibility was left in abeyance (unlike the position in *Öneryildiz v. Turkey*<sup>14</sup>). In particular, it noted that during the extensive investigations both individual and institutional responsibility had been considered, the prosecution deciding to prosecute the OCPM for the detailed reasons given (including the accepted threshold evidential test). The institutional changes recommended by the Independent Police Complaints Commission had been made and it could not be said that the fine imposed on the OCPM following its conviction was manifestly disproportionate (that is, it was not too low). The next of kin had been adequately involved and the Court noted the prompt *ex gratia* payments to them and the settlement of the civil proceedings.

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The judgment in *Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*<sup>15</sup> concerned the delayed enforcement of a sentence imposed on an accused who had been found guilty of the serious assault of the applicant.

The (first) applicant was very seriously injured during a robbery of her home. Her husband, who was also attacked during the same incident, later died from his injuries. The assailants were later convicted of aggravated robbery and received prison sentences. However, one of the assailants continued to live in the vicinity of the applicant’s

14. *Öneryildiz v. Turkey* [GC], no. 48939/99, ECHR 2004-XII.

15. *Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*, no. 2319/14, 13 October 2016.

neighbourhood for a period of eighteen months before starting to serve his sentence.

In the Convention proceedings the applicant complained that the delayed enforcement of the prison sentence gave rise to a breach of Article 2 of the Convention.

The Court agreed. It noted that the Article 2 procedural requirements were satisfied as regards the establishment of the circumstances of the incident and the identification and punishment of the perpetrators. However, it considered that these requirements had been undermined on account of the delayed enforcement of the custodial sentence, which was entirely attributable to the competent authorities. It noted that the notion of an effective investigation under Article 2 can also be interpreted as imposing a duty on States to execute their final judgments without undue delay. For the Court, “the enforcement of a sentence imposed in the context of the right to life must be regarded as an integral part of the procedural obligation of the State under this Article”.

## **Expulsion**

The judgment in *FG. v. Sweden*<sup>16</sup> concerned the duty of an expelling State to investigate an individual risk factor not relied upon by an applicant in his or her asylum application.

The applicant applied for asylum in Sweden citing his activities as an opponent of the regime in Iran. While he had mentioned his conversion (in Sweden) to Christianity during his asylum proceedings, he had expressly refused to rely on this ground. His asylum claim was rejected. His later request for a stay on deportation, this time relying on his conversion, was refused as this was not “a new circumstance” justifying a re-examination of his case.

The Grand Chamber considered that his expulsion to Iran would give rise to a violation of Articles 2 and 3, not on account of risks associated with his political past, but rather if his expulsion took place without an assessment of the risks associated with his religious conversion.

(i) The first issue worth noting concerned the fact that the deportation order expired after the Chamber judgment was delivered. The Government therefore argued before the Grand Chamber that the case should be struck out (Article 37 § 1 (c) of the Convention) or that the applicant could no longer claim to be a victim (Article 34). While

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16. *FG. v. Sweden* [GC], no. 43611/11, ECHR 2016.

the Grand Chamber was not convinced that the applicant had lost his victim status, it observed that, in principle, it might not be justified to continue its examination as it was clear the applicant could not be expelled for a considerable time to come (Article 37 § 1 (c)). However, “special circumstances concerning respect for human rights” required the continued examination of the application: the case had been referred to the Grand Chamber under Article 43 (a serious question of interpretation) and it concerned important issues regarding the duties of parties to asylum proceedings which would have an impact beyond the applicant’s situation. The request to strike out the case was dismissed.

(ii) The main issue on the merits concerned the existence/extent of any duty on the Contracting State to assess an individual risk factor which had not been relied upon by the individual in his or her asylum claim. The Grand Chamber reiterated that it was, in principle, for the individual to submit, as soon as possible, his or her asylum claim together with the reasons and evidence in support of that claim. It went on to outline two clarifications of that principle.

In the first place, when an asylum claim was based on a “well-known general risk, when information about such a risk is freely ascertainable from a wide number of sources”, the Article 2 and 3 obligations on the State were such that the authorities were required to carry out an assessment of that general risk of their own motion.

Secondly, as regards asylum claims based on individual risk, Articles 2 and 3 could not require a State to discover a risk factor to which an asylum applicant had not even referred. However, if the State had been “made aware of facts relating to a specific individual” that could expose him or her to a relevant risk of ill-treatment on expulsion, the authorities were required to carry out an assessment of that risk of their own motion.

It is worth noting that, in the present case, the Court concluded that there would be a violation of Articles 2 and 3 if the applicant were to be returned to Iran without an *ex nunc* assessment by the Swedish authorities of the consequences of his religious conversion, despite the fact that on several occasions the applicant had been given the opportunity to plead his conversion during the asylum claim, that he had refused to do so during those initial proceedings and that he had been legally represented throughout.

## **Prohibition of torture and inhuman or degrading treatment and punishment (Article 3)<sup>17</sup>**

### **Inhuman or degrading treatment**

The *Khlaifia and Others v. Italy*<sup>18</sup> case concerned the arrival of the applicants, three Tunisian economic migrants, on the island of Lampedusa, their initial placement in a reception centre and subsequent confinement on board two ships moored in Palermo harbour, followed by their removal to Tunisia in accordance with a simplified procedure under an agreement between Italy and Tunisia of April 2011. The applicants complained under Articles 3, 5 and 13 of the Convention and Article 4 of Protocol No. 4.

The Grand Chamber found a violation of Article 5 §§ 1, 2 and 4 and of Article 13 in conjunction with Article 3, and no violation of the other Articles relied upon.

The judgment explores in some detail the Convention rights of immigrants against the background of the migration and humanitarian crisis that unfolded in 2011, when events related to the “Arab Spring” led to a mass influx of immigrants into certain States (here, the island of Lampedusa) leading to significant pressures on the receiving State.

As regards Article 3 of the Convention, the judgment provides a comprehensive overview of the case-law under Article 3 relative to the treatment of migrants (including conditions of their detention and, in particular, overcrowding).

In response to the Article 3 complaint, the Government argued that due account should be taken of the exceptional humanitarian emergency. On the one hand, the Grand Chamber referred to the *M.S.S. v. Belgium and Greece*<sup>19</sup> judgment, where the Court had confirmed that the absolute character of Article 3 meant that the significant migration challenges in issue could not absolve a State of its obligations under Article 3 and should not therefore be taken into account. On the other hand, the Grand Chamber went on to affirm in the present case as follows.

“While the constraints inherent in such a crisis cannot, in themselves, be used to justify a breach of Article 3, the Court is of the view that it would certainly be

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17. See also under Article 1 above, *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, ECHR 2016; under Article 2 (Expulsion) above, *F.G. v. Sweden* [GC], no. 43611/11, ECHR 2016; and, under Article 8 (Private Life) below, *R.B. v. Hungary*, no. 64602/12, 12 April 2016.

18. *Khlaifia and Others v. Italy* [GC], no. 16483/12, ECHR 2016.

19. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 223-24, ECHR 2011.

artificial to examine the facts of the case without considering the general context in which those facts arose. In its assessment, the Court will thus bear in mind, together with other factors, that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time.”

### Degrading treatment

The *Cazan v. Romania*<sup>20</sup> judgment concerned ill-treatment inflicted on the applicant, a lawyer, when representing a client at police headquarters. He had gone to the police station of his own accord with a view to obtaining information about a criminal case against his client.

In the Convention proceedings, the applicant complained of a sprained finger, allegedly caused by the police, which had required several days’ medical care. The Government denied that any ill-treatment had been inflicted by State agents.

The judgment is of interest in that it applies to Article 3 of the Convention the general principles of case-law relating to the protection of a lawyer (see, as a recent example, *Morice v. France*<sup>21</sup>). The judgment refers, in particular, to Recommendation Rec(2001)10 of the Committee of Ministers of the Council of Europe on the European Code of Police Ethics, adopted on 19 September 2001. The Court emphasised the right of lawyers to exercise their professional duties without being subjected to ill-treatment. It was thus incumbent “on the police to respect [their] role, not to interfere unduly with their work, or to subject them to any form of intimidation or petty annoyance ... or, therefore, to any ill-treatment”. The Court, applying the principles laid down in the *Bouyid v. Belgium*<sup>22</sup> judgment in the different context of persons taken by the police to the station for questioning or an identity check, also ruled that the burden of proof regarding the treatment of a lawyer representing a client at a police station lay with the State.

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The judgment in *Yaroslav Belousov v. Russia*<sup>23</sup> concerned the applicant’s confinement in a glass cabin during his trial.

During the first two months of hearings, the applicant, who had been charged with public-order offences, and nine other accused were

20. *Cazan v. Romania*, no. 30050/12, 5 April 2016.

21. *Morice v. France* [GC], no. 29369/10, 23 April 2015.

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

23. *Yaroslav Belousov v. Russia*, nos. 2653/13 and 60980/14, 4 October 2016, see also under [Article 6 \(Defence rights\)](#) below.

confined in a very cramped glass cabin. In the ensuing three-month period, the hearings were held in a different courtroom equipped with two glass cabins, allowing the applicant and the other accused more space.

In the Convention proceedings the applicant complained, among other things, that his confinement as described amounted to degrading treatment and had impaired his effective participation in the trial, including contact with his counsel. He relied on Articles 3 and 6 of the Convention.

The Court has condemned the confinement of accused persons in metal cages during trial, having regard to its objectively degrading nature (see *Svinarenko and Slyadnev v. Russia*<sup>24</sup>). The judgment is noteworthy in that this is the first time that the Court has had to address this particular form of security arrangement in a courtroom for compliance with Article 3. It is not without interest that glass installations are used, mostly for security purposes, in courtrooms in other Contracting States. The Court observed that, generally speaking, the placement of defendants behind glass partitions or in glass cabins did not of itself involve an element of humiliation sufficient to meet the minimum level of severity, as is the case with metal cages. As to compliance with Article 3, the main question for the Court was to determine whether the overall circumstances of the applicant's confinement attained, on the whole, the minimum level of severity to enable it to fall within the ambit of this provision. This required a factual assessment to be made. It found a breach of Article 3 with respect to the first two months during which the applicant and nine other defendants were kept for several hours, three days a week, in a glass cabin measuring 5.4 sq. m, and at all times exposed to the public. This amounted to degrading treatment. The Court reached a different conclusion as regards the subsequent period of the applicant's confinement. It observed that the two-cabin arrangement allowed the applicant at least 1.2 sq. m of personal space, thus avoiding the inconvenience and humiliation of overcrowding. The conditions of confinement did not therefore attain the minimum level of severity prohibited by Article 3.

### **Inhuman or degrading punishment**

The judgment in *Murray v. the Netherlands*<sup>25</sup> concerned the *de facto* irreducibility of a life sentence. In 1980 the applicant was convicted of

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24. *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, §§ 135-38, ECHR 2014 (extracts).

25. *Murray v. the Netherlands* [GC], no. 10511/10, ECHR 2016.



murder. Given the psychiatric evidence, the risk of reoffending and the absence of a more suitable confinement solution, he was sentenced to life imprisonment. His requests for a pardon were refused. A procedure to review life sentences was introduced in 2011: his first review in 2012 was unsuccessful (owing to a continued risk of reoffending). In March 2014 he was pardoned on the ground of ill-health and released. The applicant later passed away and the application was continued by his son and sister.

He complained under Article 3 of the *de facto* irreducibility of his life sentence and of the lack of a regime better suited to his mental condition. Holding that his life sentence was *de facto* irreducible, the Grand Chamber found a violation of Article 3 and that it was not necessary to rule on his remaining Article 3 complaints.

This Grand Chamber judgment develops the Court’s case-law concerning the need for life sentences to be, notably, *de facto* reducible (*Kafkaris v. Cyprus*<sup>26</sup>; *Vinter and Others v. the United Kingdom*<sup>27</sup>; and, notably, *Harakchiev and Tolumov v. Bulgaria*<sup>28</sup>).

(i) The Grand Chamber found that a prisoner’s rehabilitation must be programmed and facilitated from the outset for any review of a life sentence to be considered useful and for that life sentence to be considered *de facto* reducible. In particular:

- The Grand Chamber’s reasoning reflects the importance attached to the rehabilitation of prisoners. Having noted rehabilitation as a legitimate penological ground for imprisonment (*Vinter and Others*, cited above), the Grand Chamber highlighted the increasing importance of rehabilitation in the Court’s case-law outside of the *Vinter and Others* context (for example, *Dickson v. the United Kingdom*<sup>29</sup>; *James, Wells and Lee v. the United Kingdom*<sup>30</sup>; and *Khoroshenko v. Russia*<sup>31</sup>). While there is no right to rehabilitation as such, prisoners should be allowed to rehabilitate themselves. A prisoner sentenced to life had to have, in particular, a real opportunity to make progress towards

26. *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008.

27. *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and 2 others, ECHR 2103 (extracts).

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

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

30. *James, Wells and Lee v. the United Kingdom*, nos. 25119/09 and 2 others, 18 September 2012.

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

rehabilitation, such that he or she had hope of one day being eligible for release.

Significantly, the Grand Chamber indicated that this could be achieved by setting up and periodically reviewing an “individualised programme” that would encourage the prisoner to rehabilitate himself or herself with the aim of living a responsible life. Were the State not to provide a life prisoner with such a real opportunity to rehabilitate himself or herself, any review of his or her progress towards rehabilitation would be undermined as would, consequently, the *de facto* reducibility of the life sentence. The Grand Chamber found that there is, therefore, a positive obligation on the State, drawn from Article 3, to provide “prison regimes” to life prisoners which are compatible with the aim of rehabilitation and which enable them to progress towards rehabilitation.

– This “individualised programmed” approach had a particular application in the particular context of the present case. The applicant was criminally responsible for his crime but had, nevertheless, certain mental-health problems which meant that he risked reoffending. In those circumstances, the State had to assess the treatment needs of prisoners to facilitate their rehabilitation and reduce the risk of reoffending. If prisoners are amenable to treatment, they should receive that treatment (whether or not they ask for it), particularly when it amounts to, in effect, a precondition for their possible future eligibility for release.

In short, life prisoners must be detained under such conditions, and be provided with such treatment, as would give them a realistic opportunity to rehabilitate themselves in order to have a hope of release. A failure to do so could render the life sentence *de facto* irreducible.

(ii) As to the present case, the Grand Chamber found that the treatment of the applicant’s mental-health problems constituted, in practice, a precondition for him to have the possibility of progressing to rehabilitation and reducing the risk of reoffending. The lack of any treatment, and indeed the lack of any assessment of his treatment needs, meant therefore that neither the pardon nor later review processes were, in practice, capable of leading to a conclusion that he had made such significant progress that his continued detention would no longer serve any penological purpose. His sentence was therefore not *de facto* reducible and there had therefore been a violation of Article 3.

**Effective investigation<sup>32</sup>**

The judgment in *Sakir v. Greece*<sup>33</sup> concerned a physical assault on the applicant, an Afghan national, in the centre of Athens in 2009. The applicant had left his country of origin for fear of persecution on account of his political convictions and entered Greece without a residence permit. He was attacked by an armed gang in the centre of Athens and admitted to hospital with injuries inflicted by a sharp pointed object. After his discharge from hospital he was detained pending expulsion because he did not have a residence permit.

In the Convention proceedings, the applicant complained, among other things, that the Greek authorities had failed to comply with their obligation to carry out an effective investigation into the attack. The Court found a violation of the procedural aspect of Article 3 of the Convention.

The case is noteworthy because of the importance, in the Court’s analysis, of the general context within which the attack on the applicant took place. The Court took into account reports from various international non-governmental organisations (NGOs) and from Greek institutions which referred to a phenomenon of racist violence in the centre of Athens since 2009, in particular in the district where the applicant was attacked. These reports noted a recurring pattern of assaults on foreigners by groups of extremists. In the instant case, the Court found that the national authorities had been at fault as, even though the assault had taken place in that district and bore the hallmark of a racist attack, the police had failed to consider it in the light of the reports but had instead treated it as an isolated incident. There was no indication in the case file that any steps had been taken by the police or the judicial bodies to identify possible links between the incidents described in the reports and the assault on the applicant.

The criminal investigation had been inadequate in a number of respects in terms of both establishing the circumstances in which the assault had taken place and of identifying the attackers. The Court reiterated that where there is suspicion that racist attitudes induced a violent act it is particularly important for the official investigation to be pursued with vigour and impartiality, having regard to the need to reassert continuously society’s condemnation of racism and ethnic hatred and to prevent any appearance of collusion in or tolerance of unlawful acts.

32. See also *Jeronovičs v. Latvia* [GC], no. 44898/10, 5 July 2016, under Article 37 below.

33. *Sakir v. Greece*, no. 48475/09, 24 March 2016.

## Expulsion<sup>34</sup>

The judgment in *J.K. and Others v. Sweden*<sup>35</sup> concerned the distribution of the burden of proving a “real risk” that asylum-seekers would be ill-treated in their country of origin.

The three applicants, a mother, father and their son, were Iraqi nationals. The first applicant (the father) worked with American clients and operated out of a US armed forces base in Iraq. He and his family were the subject of serious threats and violence from al-Qaeda from 2004 to 2008: their daughter was murdered, the brother of the first applicant was kidnapped and the first applicant was the subject of several murder attempts, and was badly injured during one assault. The first applicant left Iraq in 2010, and the second and third in 2011. They applied for asylum in Sweden. Asylum was refused, after the domestic courts found that the family had not been the subject of personal threats since 2008 when the first applicant stopped working for American clients so that the threat from al-Qaeda was not so present and concrete as to justify the granting of asylum.

The applicants complained to the Court that their removal to Iraq would entail a violation of Article 3 of the Convention. The Grand Chamber found that substantial grounds had been shown for believing that the applicants would run a real risk of treatment contrary to Article 3 if returned to Iraq.

The Court's analysis begins with a comprehensive and up-to-date outline of the Court's case-law in expulsion cases concerning an alleged risk of ill-treatment in the country of origin including as regards: ill-treatment by private groups; the principle of *ex nunc* evaluation of the circumstances; the application of the principle of subsidiarity in expulsion cases; membership of a targeted group (since the first applicant belonged to a group of persons systematically targeted for their relationship with the US armed forces); and the assessment of the existence of real risk (*inter alia*, *M.S.S. v. Belgium and Greece*<sup>36</sup>, cited above, *Saadi v. Italy*<sup>37</sup>, *Sufi and Elmi v. the United Kingdom*<sup>38</sup>, *Hirsi Jamaa and Others v. Italy*<sup>39</sup>, and *F.G. v. Sweden*<sup>40</sup>, cited above).

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34. See also *F.G. v. Sweden* [GC], no. 43611/11, ECHR 2016 under [Article 2 \(Expulsion\)](#) above.

35. *J.K. and Others v. Sweden* [GC], no. 59166/12, ECHR 2016.

36. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011.

37. *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008.

38. *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, 28 June 2011.

39. *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.

40. *F.G. v. Sweden* [GC], no. 43611/11, ECHR 2016.

It is as regards the distribution – between the asylum-seeker and the immigration authorities in domestic asylum proceedings – of the burden of proving a real risk of ill-treatment in the country of origin that the case-law has been clarified. As a general rule, “an asylum-seeker cannot be seen as having discharged the burden of proof until he or she provides a substantiated account of an individual, and thus a real, risk of ill-treatment upon deportation that is capable of distinguishing his or her situation from the general perils in the country of destination”.

The Court clarified two matters in that regard, referring to relevant materials of the United Nations High Commissioner for Refugees (UNHCR)<sup>41</sup> and to the EU Qualification Directive<sup>42</sup>.

In the first place, it is the “shared duty” of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts in asylum proceedings. On the one hand, the burden remains on asylum-seekers as regards their own personal circumstances, although the Court recognised that it was important to take into account all of the difficulties which an asylum-seeker may encounter in collecting evidence. On the other hand, the general situation in another State, including the ability of its public authorities to provide protection, had to be established *proprio motu* by the competent domestic immigration authorities.

Secondly, and as to the significance of established past ill-treatment contrary to Article 3 in the receiving State, the Court reviewed its case-law (*R.C. v. Sweden*<sup>43</sup>; *R.J. v. France*<sup>44</sup>; and *D.N.W. v. Sweden*<sup>45</sup>) in the light of the Qualification Directive and UNHCR standards. It considered that established past ill-treatment contrary to Article 3 would provide a “strong indication” of a future, real risk of ill-treatment, although the Court conditioned that principle on the applicant having made “a generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the country in issue”. In such circumstances, the burden shifted to the Government “to dispel any doubts about that risk”.

41. The UNHCR *Note on Burden and Standard of Proof in Refugee Claims* and the UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*.

42. Council Directive 2004/83/EC of 29 April 2004 as recast by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011.

43. *R.C. v. Sweden*, no. 41827/07, 9 March 2010.

44. *R.J. v. France*, no. 10466/11, 19 September 2013.

45. *D.N.W. v. Sweden*, no. 29946/10, 6 December 2012.

In the present case, the Court considered that such a “strong indication” of future real risk did arise and that it was for the Government to dispel any doubts about that risk. Finding the domestic asylum decisions to be lacking in that respect and noting reports evidencing the continued targeting of those who had collaborated with the occupying powers in Iraq, the Court found that the applicants faced a real risk of continued persecution on return to Iraq from which the Iraqi authorities could not protect them and concluded that their deportation would therefore give rise to a violation of Article 3 of the Convention.

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The judgment in *Paposhvili v. Belgium*<sup>46</sup>, which concerned the deportation of a seriously ill foreigner, clarified the *N. v. the United Kingdom*<sup>47</sup> case-law.

The applicant, a Georgian national, faced deportation and a ban on re-entering Belgium for ten years on public-interest grounds (he had several criminal convictions). While in prison, he was diagnosed and treated for serious illnesses (chronic lymphocytic leukaemia, hepatitis C and tuberculosis). Since the domestic proceedings he brought to challenge his removal on medical grounds were unsuccessful, he complained to the Court of his proposed removal under Article 3 on the ground that the necessary medical treatment either did not exist or was not accessible in Georgia. The applicant died in June 2016.

The Grand Chamber found a violation of Article 3.

The case is important because it provides guidance as to when humanitarian considerations will or will not outweigh other interests when considering the expulsion of seriously ill individuals.

In particular, other than the imminent-death situation in *D. v. the United Kingdom*<sup>48</sup>, the later *N. v. the United Kingdom* judgment referred to “other very exceptional cases” which could give rise to an issue under Article 3 in such contexts. The Grand Chamber has now indicated (in paragraph 183 of the *Paposhvili* judgment) how “other very exceptional cases” is to be understood. It refers to

“situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate

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46. *Paposhvili v. Belgium* [GC], no. 41738/10, ECHR 2016, see also under [Article 8 \(Family life\)](#) below.

47. *N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008.

48. *D. v. the United Kingdom*, 2 May 1997, *Reports of Judgments and Decisions* 1997-III.

treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.”

The Grand Chamber also clarified that that obligation to protect was to be fulfilled primarily through appropriate domestic procedures reflecting the following elements.

(i) The applicants should adduce evidence “capable of proving that there are substantial grounds for believing” that they would be exposed to a real risk of treatment contrary to Article 3 (*FG. v. Sweden*<sup>49</sup>, cited above), it being noted that a certain degree of speculation is inherent in the preventive purpose of Article 3 and that applicants are not required to provide clear proof of their claim.

(ii) Where such evidence is adduced, it is for the authorities of the returning State “to dispel any doubts raised by it” (*ibid.*). The impact of removal on the persons concerned is to be assessed by comparing his or her state of health prior to removal and how it would evolve after removal.

In this respect, the State had to consider, *inter alia* (a) whether the care generally available in the receiving State “is sufficient and appropriate in practice for the treatment of the applicant’s illness so as to prevent him or her being exposed to treatment contrary to Article 3” (in this connection, the Grand Chamber specified that the benchmark is not the level of care existing in the returning State); and (b) the extent to which the individual would actually have access to such care in the receiving State (the associated costs, the existence of a social and family network, and the distance to be travelled to access the required care all being relevant in this respect).

(iii) If “serious doubts” persist as to the impact of removal on the person concerned, the authorities had to obtain “individual and sufficient assurances” from the receiving State, as a precondition to removal, that appropriate treatment will be available and accessible to the person concerned (*Tarakhel v. Switzerland*<sup>50</sup>).

Since that domestic assessment had not taken place in the present case, the applicant’s removal to Georgia would have given rise to a violation of Article 3 of the Convention. It is worth noting that this is

49. *FG. v. Sweden* [GC], no. 43611/11, § 113, ECHR 2016, see under [Article 2 \(Expulsion\)](#) above.

50. *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014 (extracts).

the first case, since *D. v. the United Kingdom* (cited above), where the proposed expulsion of a seriously ill applicant has led to a finding of a violation of Article 3 of the Convention.<sup>51</sup>

It is also interesting that the Grand Chamber left open the question of whether the applicant's heirs had a legitimate interest in pursuing the application which the applicant had introduced before he died, favouring rather the continuation of the proceedings on the basis that respect for human rights so required (Article 37 § 1 of the Convention).

### **Detention**

The case of *Blokhin v. Russia*<sup>52</sup> concerned the placement of the applicant, a minor, in a juvenile detention centre. He was suspected of having extorted money from another minor. As he was only 12 years of age at the material time, he was below the age of criminal responsibility and so was not prosecuted. He was brought before a court, which ordered his placement in a temporary detention centre for minor offenders for a period of thirty days in order to “correct his behaviour” and to prevent his committing any further acts of delinquency.

The Grand Chamber found, *inter alia*, a violation of Article 3 (on the ground of inadequate medical treatment).<sup>53</sup>

In so doing, it set down specific standards for the protection of the health of juvenile detainees, drawing inspiration from European and international standards<sup>54</sup> and providing, in particular, that a child should, it appears systematically, be medically assessed for suitability prior to placement in a juvenile detention centre.

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51. See the review of the case-law at §§ 178-81 of the judgment. The case of *Aswat v. the United Kingdom*, (no. 17299/12, 16 April 2013) referred to in the judgment, appears to have been distinguished since the applicant in that case, who was suffering from mental-health issues, was being extradited to a maximum-security prison in the United States of America on charges of terrorist offences.

52. *Blokhin v. Russia* [GC], no. 47152/06, ECHR 2016.

53. See also [Article 5](#) and [Article 6](#) below.

54. Including the 1989 [United Nations Convention on the Rights of the Child](#), the UN [Standard Minimum Rules for the Administration of Juvenile Justice](#) of 1985 (“the Beijing Rules”) and the 1990 UN [Rules for the Protection of Juveniles Deprived of their Liberty](#) (“the Havana Rules”), as well as the 2008 [European Rules for juvenile offenders subject to sanctions or measures](#) and the 2010 [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#).



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The *Muršić v. Croatia*<sup>55</sup> judgment sets down principles and standards under Article 3 of the Convention regarding minimum personal space per detainee in a multi-occupancy cell.

During the applicant’s incarceration for one year and five months, he was placed in four different cells where he had between 3 and 6.76 sq. m of personal space. During certain non-consecutive short periods, including one period of twenty-seven days, his personal space fell slightly below 3 sq. m. He complained under Article 3 essentially of the lack of personal space in prison. The Grand Chamber found a violation of that provision as regards one period of detention (twenty-seven days) during which the applicant had less than 3 sq. m of personal space.

This is the first Grand Chamber case which centrally concerns minimum personal space per detainee in a multi-occupancy setting<sup>56</sup>. It set down clear principles and standards for the assessment of overcrowding and, in so doing, comprehensively reviewed and clarified certain aspects of the Court’s case-law to date. The principles to be applied are as follows.

(i) The Grand Chamber confirmed the relevant minimum standard of personal space to be 3 sq. m. In so doing, it explained that, while it remained attentive to the [Committee for the Prevention of Torture and Inhuman and Degrading Treatment of the Council of Europe](#) (CPT) minimum standard (of 4 sq. m), it did not consider the CPT standard to be decisive mainly because of the different roles of the CPT (standard setting aimed at future prevention) and of the Court (judicial application of the absolute prohibition of torture and inhuman treatment in an individual case, taking account of all of the circumstances). The Court also clarified how to calculate the 3 sq. m (excluding in-cell sanitary facilities and including furniture) and confirmed that the minimum 3 sq. m of personal space applied equally to detainees on remand and prisoners.

55. *Muršić v. Croatia* [GC], no. 7334/13, ECHR 2016.

56. Overcrowding was only one of the issues examined by the Grand Chamber in *Idalov v. Russia* [GC], no. 5826/03, 22 May 2012, and in the other leading and pilot cases examined by Chambers in *Orchowski v. Poland*, no. 17885/04, 22 October 2009; and *Norbert Sikorski v. Poland*, no. 17599/05, 22 October 2009; *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10 January 2012; *Torreggiani and Others v. Italy*, nos. 43517/09 and 6 others, 8 January 2013; *Neshkov and Others v. Bulgaria*, nos. 36925/10 and 5 others, 27 January 2015; and *Varga and Others v. Hungary*, nos. 14097/12 and 5 others, 10 March 2015.

(ii) Personal space below 3 sq. m gave rise to a “strong presumption” of a violation of Article 3, which was rebuttable should the Government demonstrate “factors capable of adequately compensating” for the lack of personal space. In so finding, the Grand Chamber resolved a divergence in its case-law by rejecting an approach suggesting that personal space of less than 3 sq. m constituted an automatic violation of Article 3 of the Convention.

(iii) This strong presumption could only be rebutted if three factors were cumulatively met:

- the reductions in personal space to under 3 sq. m were “short, occasional and minor”;
- such reductions were accompanied by sufficient freedom of movement and adequate activities outside of the cell; and
- the detainee was confined in an “appropriate detention facility” and there were no other aggravating aspects of the conditions of his or her detention.

(iv) Finally, the Grand Chamber clarified the position as regards personal space greater than 3 sq. m. Personal space between 3 and 4 sq. m would amount to “a weighty factor” in the Court’s assessment of the adequacy of detention conditions, whereas personal space of more than 4 sq. m would not give rise, of itself, to an issue under Article 3 of the Convention.

In the present case, one period of detention (twenty-seven consecutive days) in less than 3 sq. m was considered not to be “short” and “minor”, so that the presumption of a violation of Article 3 was not rebutted by the Government. However, the presumption of a violation was rebutted as regards the other shorter periods of detention in less than 3 sq. m: those periods were considered “short, occasional and minor” and the Government had demonstrated appropriate out-of-cell activities in an adequate detention facility (so the three cumulative factors had been met).

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The judgment in *Cătălin Eugen Micu v. Romania*<sup>57</sup> concerned transmissible diseases contracted in prison.

The applicant alleged, among other things, that he had caught hepatitis C while in prison and that the competent authorities had not fulfilled their obligation to provide him with appropriate medical treatment. He relied on Article 3 of the Convention.

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57. *Cătălin Eugen Micu v. Romania*, no. 55104/13, 5 January 2016.

The Court found that there had been no violation of the Convention as regards those specific complaints.

The judgment is noteworthy in that the Court examined the question of the duties of the prison authorities in relation to prisoners suffering from transmissible diseases, especially tuberculosis, hepatitis and HIV/Aids. It noted that the spread of transmissible diseases should be a major public-health concern, especially in prisons. For the Court it would be desirable if, with their consent, prisoners could benefit, within a reasonable time after being committed to prison, from free screening for hepatitis or HIV/AIDS. The existence of such a possibility in the present case would have facilitated the examination of the applicant’s allegations as to whether or not he had contracted the disease in prison. Although the disease in question was diagnosed when the applicant was under the responsibility of the prison authorities, it was not possible for the Court, in the light of the evidence, to conclude that this was the result of a failure by the State to fulfil its positive obligations.

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The judgment in *Korneykova and Korneykov v. Ukraine*<sup>58</sup> concerned the case of a pregnant mother who gave birth and breastfed her baby in prison. In addition to examining the mother’s conditions of detention and the fairness of her trial, the Court also considered the adequacy of the medical care provided for her child, who spent nearly six months in prison with her from the age of four days.

In her application to the Court the applicant complained that she had been shackled to her bed during her stay in the maternity hospital, that her conditions of detention and the food she received as a breastfeeding mother were inadequate, and that she had been held in a metal cage during the six court hearings she had attended both before and after giving birth. She also complained that her son had not received proper medical care.

The Court found a number of violations of Article 3, including on account of the inadequate medical care provided for such a young child.

The judgment thus concerned the situation of a newborn child forced, by his very young age, to accompany his mother in prison during her pre-trial detention. The Court referred to the relevant international standards. It noted that even though the child was particularly vulnerable and required close medical monitoring by

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58. *Korneykova and Korneykov v. Ukraine*, no. 56660/12, 24 March 2016.

a specialist there were a number of inaccuracies and contradictions in his medical file, particularly regarding the dates of his medical examinations. The Court found it established that, as his mother had alleged, the child had gone without any monitoring by a paediatrician for almost three months. That in itself was sufficient to find a violation of Article 3 of the Convention.

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The judgment in *A.B. and Others v. France*<sup>59</sup> concerned the placement of a young accompanied child in administrative detention pending removal.

The applicants, a couple and their four-year-old child, were held in administrative detention pending their removal to Armenia after their request for asylum was refused. They alleged in the Convention proceedings that the detention of their child gave rise to a breach of Article 3 of the Convention. The Court agreed with the applicants. Its judgment in this part is noteworthy for the following reasons.

The Court noted that the material conditions of the detention centre were not problematic from the point of view of Article 3, even taking into account the young age and hence vulnerability of the child (contrast *Popov v. France*<sup>60</sup>). At the same time, it could not overlook the fact that the centre was a source of anxiety for the child. It was close to a runway with the result that children wishing to play outside were exposed to excessive levels of noise. Moreover, the centre itself was stressful for the child given the overall coercive atmosphere including the presence of armed police officers and constant loudspeaker announcements. On top of this, he also had to endure the moral and psychological distress of his parents in a place of detention. It is of significance that the Court found that these considerations were not of themselves sufficient for concluding that a level of suffering had been reached amounting to a breach of Article 3 in respect of the child. For the Court, the key factor was the length of time the child was subjected to such conditions. A brief period may be tolerated, but beyond that a young child would in its view necessarily suffer from the harmful consequences of the coercive environment around it. It is interesting to note that the Court did not define the meaning of a “brief period”. It found that the eighteen-day period which the child had spent in the centre breached his rights under Article 3 (see also *R.M. and Others v.*

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59. *A.B. and Others v. France*, no. 11593/12, 12 July 2016.

60. *Popov v. France*, nos. 39472/07 and 39474/07, 19 January 2012.

*France*<sup>61</sup> where a violation was also found under Article 3 in respect of a seven-month-old baby kept in administrative detention pending removal with his parents for seven days).

The Court also found a breach of Article 5 §§ 1 and 4 with respect to the child, and of Article 8 with respect to all three applicants. On these points the reasoning follows in general the conclusions in the above-mentioned *Popov* judgment.

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According to the *Wenner v. Germany*<sup>62</sup> judgment, prison authorities are under a procedural obligation to seek independent medical advice on the appropriate treatment for drug-addicted prisoners.

The applicant prisoner was a long-term heroin addict. He complained in the Convention proceedings of the refusal of the prison authorities to provide him with drug-substitution treatment, which he claimed was the only adequate response to his medical condition. He suffered considerable pain and damage to his health as a result of having to undergo abstinence-oriented drug therapy. The applicant criticised the authorities’ failure to allow a doctor from outside the prison to examine the necessity of treating him with drug-substitution medication, which had proved successful when offered to him over the course of a seventeen-year period prior to his imprisonment. The applicant relied on Article 3 of the Convention.

The Court found that there had been a violation of Article 3. The judgment is noteworthy for its comprehensive review of the Convention case-law on prisoners’ health, in particular the scope of the State’s positive obligations in this area. Its task was to determine whether the respondent State had provided credible and convincing evidence proving that an adequate assessment had been made of the type of treatment appropriate to the applicant’s state of health and that the applicant subsequently received comprehensive and adequate medical care in detention. It noted, among other things, that: prior to his detention, the applicant’s heroin addiction had been treated with medically prescribed and supervised drug-substitution therapy from 1991 until 2008; the Federal Medical Association’s Guidelines for the Substitution Treatment of Opiate Addicts clarified that substitution treatment was a scientifically tested therapy for manifest opiate addiction; and drug-substitution therapy was, in principle, available

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61. *R.M. and Others v. France*, no. 33201/11, 12 July 2016.

62. *Wenner v. Germany*, no. 62303/13, 1 September 2016.

outside and in prisons in Germany (as in the majority of member States of the Council of Europe), and was actually provided in practice in prisons in several *Länder* other than Bavaria where the applicant was detained.

It was significant for the Court that it was not only the doctors who had prescribed the applicant drug-substitution therapy prior to his detention who considered that treatment to have been necessary in the applicant's case. An external doctor commissioned by the prison authorities, who had examined the applicant in person, had suggested that the prison medical service reconsider granting the applicant drug-substitution treatment. This view was confirmed by another external doctor. There was therefore a strong indication that drug-substitution treatment could be regarded as the required medical treatment for the applicant, a long-term drug addict without any realistic chance of overcoming his addiction and who had been receiving substitution treatment for many years. This meant that the domestic authorities were under an obligation to examine "with particular scrutiny" whether the continuation of the abstinence-oriented therapy was to be considered the appropriate medical response. For the Court, the respondent State had failed to comply with that obligation. In paragraph 77, it noted as follows.

"In these circumstances, the Court considers that in order to ensure that the applicant received the necessary medical treatment in prison the domestic authorities, and in particular the courts, were required to verify, in a timely manner and with the help of an independent doctor skilled in drug-addiction treatment, whether the applicant's condition was still adequately treated without such therapy. However, there is no indication that the domestic authorities, with the help of expert medical advice, examined the necessity of drug-substitution treatment with regard to the criteria set by the relevant domestic legislation and medical guidelines. Despite the applicant's previous medical treatment with drug-substitution therapy for seventeen years, no follow-up was given to the opinions expressed by external doctors ... on the necessity to consider providing the applicant again with drug-substitution treatment."

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

### **Work required of detainees (Article 4 § 3 (a))**

The judgment in *Meier v. Switzerland*<sup>63</sup> concerned the obligation for prisoners to perform work in prison after they have reached retirement age.

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63. *Meier v. Switzerland*, no. 10109/14, 9 February 2016.

The applicant, a prisoner, complained that he had reached the age of retirement in Switzerland but was still required by law to perform work in prison. He was sanctioned for his refusal to work. The applicant relied in the Convention proceedings on Article 4 of the Convention.

The Court found that Article 4 had not been breached. This was the first time that the Court had had to address a complaint of this nature. In reaching its conclusion it had particular regard to whether or not there existed a trend in the Contracting Parties in favour of the acknowledgment of the applicant’s claim. Its reasoning was also based on the acceptability of the response given to the applicant’s complaint by the domestic courts. Furthermore, as in earlier cases concerning Article 4 (see *Stummer v. Austria*<sup>64</sup>, and the cases cited therein), the Court drew on the definition given by the [International Labour Organization \(ILO\) Convention No. 29](#) as regards the notion of forced or compulsory labour, namely “work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.

A key consideration for the Court was to ascertain whether the work which the applicant had to perform was in effect “work required to be done in the ordinary course of detention” within the meaning of paragraph 3 (a) of Article 4 of the Convention, in which case it could not be considered to be “forced or compulsory labour” within the meaning of paragraph 2 of that Article.

The Court noted among other things that

- (i) the aim of the obligation was to offset the harmful effects of long-term imprisonment by providing a structure to a prisoner’s daily life;
- (ii) the nature of the work to be performed was adapted to the age and health of the prisoner, and the work required of the applicant duly took account of his age and physical capacity to perform it;
- (iii) the applicant was paid for the work;
- (iv) a wide margin of appreciation should be accorded to the respondent State in this area, notwithstanding the fact that the [European Prison Rules](#) could be interpreted in the sense that prisoners of retirement age should be exempted from the obligation to work.

For the above principal reasons the Court found that the work requirement was covered by Article 4 § 3 (a) and could not be considered “forced or compulsory labour”.

64. *Stummer v. Austria* [GC], no. 37452/02, ECHR 2011.

## Right to liberty and security (Article 5)

### Lawful arrest or detention (Article 5 § 1)

The judgment in *Mozer*<sup>65</sup>, cited above, concerned the lawfulness of detention ordered by courts of the “Moldavian Republic of Transdnistria” (“MRT”).

Having been detained since 2008, the applicant was convicted in 2010 of defrauding two companies and sentenced to seven years’ imprisonment, five of which were suspended. He complained under Article 5 that his detention by the “MRT courts” had been unlawful.

The Grand Chamber found that Russia had violated Article 5 and that there had been no violation of that provision by the Republic of Moldova.

The principal issue for the Grand Chamber was whether the applicant’s detention ordered by the “MRT courts” could be considered “lawful” within the meaning of Article 5 § 1 (c). In particular, the Court was required to reconcile its recognition of the legal basis of the courts of the “Turkish Republic of Northern Cyprus”<sup>66</sup>, on the one hand, with its finding that there was no legal basis for decisions of the “MRT courts”, on the other (*Ilaşcu and Others*<sup>67</sup>, cited above, and *Ivanțoc and Others*<sup>68</sup>, cited above).

The Court applied the test as expressed in *Ilaşcu and Others* (§§ 436 and 460). It noted that it had already been found in that case that the relevant “MRT court” did not form part of a judicial system operating “on a constitutional and legal basis reflecting a judicial tradition compatible with the Convention”. It remained to verify whether this continued to be valid in the present case. The Russian Government, which had effective control over the “MRT”, had failed to submit information on the “MRT court” system. There was, moreover, no basis for assuming that that system reflected a judicial tradition compatible with the Convention and similar to the one in the remainder of the Republic of Moldova (the Court compared and contrasted the position

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65. *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, ECHR 2016.

66. *Loizidou v. Turkey* (merits), 18 December 1996, *Reports of Judgments and Decisions* 1996-VI; *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, ECHR 2010; *Foka v. Turkey*, no. 28940/95, 24 June 2008; *Protopapa v. Turkey*, no. 16084/90, 24 February 2009; *Asprofiat v. Turkey*, no. 16079/90, 27 May 2010; *Petrakidou v. Turkey*, no. 16081/90, 27 May 2010; and *Union Européenne Des Droits de L’Homme and Josephides v. Turkey* (dec.), no. 7116/10, 2 April 2013.

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

68. *Ivanțoc and Others v. Moldova and Russia*, no. 23687/05, 15 November 2011.



in Northern Cyprus in that regard, see *Cyprus v. Turkey*, cited above<sup>69</sup>). The Grand Chamber concluded that its findings in *Ilaşcu and Others* were still valid so that the “MRT courts” could not have ordered the applicant’s lawful arrest or detention. His detention was therefore “unlawful” within the meaning of Article 5 § 1 (c) of the Convention.

Having established that the Republic of Moldova had fulfilled its positive obligation to take appropriate and sufficient measures to secure the applicant’s Article 5 rights (by attempting to re-establish control over the “MRT” and to ensure respect for the present applicant’s rights), it was found not responsible for this unlawful detention. Given Russia’s effective control of the “MRT”, its Convention responsibility was engaged so that there had been a violation of Article 5 § 1 (c) of the Convention by Russia.

### **Minors (Article 5 § 1 (d))**

The case of *Blokhin*<sup>70</sup>, cited above, concerned the placement of the applicant, a minor who had not reached the age of criminal responsibility, in a juvenile detention centre.

The applicant, who was twelve years of age at the material time, was arrested and taken to a police station on suspicion of having extorted money from another minor. The authorities found that he had committed offences punishable under the Criminal Code. However, no criminal proceedings were initiated since he was below the statutory age of criminal responsibility. He was brought before a court, which ordered that he be placed in a temporary detention centre for minor offenders for a period of thirty days in order to “correct his behaviour” and to prevent his committing any further acts of delinquency.

The Grand Chamber found, *inter alia*, a violation of Article 5 § 1.<sup>71</sup>

The Court found that the applicant’s detention was not for the purpose of “educational supervision”, that it was not therefore within the ambit of Article 5 § 1 (d) and, being otherwise not justified, was unlawful and a violation of Article 5 § 1.

This finding is interesting in that the Court appears to have clarified the meaning of “educational supervision”. Previous case-law indicated that the notion of “educational supervision” was not to be “equated rigidly with notions of classroom teaching” so that, in the context of a young person in local-authority care, educational supervision

69. *Cyprus v. Turkey* [GC], no. 25781/94, § 237, ECHR 2001-IV.

70. *Blokhin v. Russia* [GC], no. 47152/06, ECHR 2016.

71. See also [Article 3](#) above and [Article 6](#) below.

had to “embrace many aspects of the exercise ... of parental rights for the benefit and protection of the person concerned” (*Bouamar v. Belgium*<sup>72</sup>; *Koniarska v. the United Kingdom*<sup>73</sup>; *D.G. v. Ireland*<sup>74</sup>; and *P. and S. v. Poland*<sup>75</sup>). Relying on European and international standards in this field<sup>76</sup>, the Grand Chamber clarified that “educational supervision” must nevertheless contain an important core schooling aspect so that “schooling in line with the normal school curriculum should be standard practice” for all detained minors “even when they are placed in a temporary detention centre for a limited period of time, in order to avoid gaps in their education”.

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The judgment in *D.L. v. Bulgaria*<sup>77</sup> concerned safeguards governing detention for the purposes of educational supervision. The applicant, who was a minor, was placed in a closed educational institution on account of, among other things, her antisocial behaviour and the risk that she would become further involved in prostitution. The placement was ordered by a court following a hearing at which she was represented.

In the Convention proceedings, the applicant alleged, among other things, that her placement was not in conformity with Article 5 § 1 (d) of the Convention.

The judgment can be seen as an important contribution to the Court's case-law on juvenile justice (see also in this respect the recent Grand Chamber judgment in *Blokhin*<sup>78</sup>, cited above) and on the rights of juveniles deprived of their liberty in circumstances foreseen by Article 5 § 1 (d) of the Convention. The following points are worthy of note.

The judgment confirms the Court's concern to ensure that the placement of a minor in a closed educational institution is a proportionate measure of last resort taken in his or her best interests

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72. *Bouamar v. Belgium*, 29 February 1988, Series A no. 129.

73. *Koniarska v. the United Kingdom* (dec.), no. 33670/96, 12 October 2000.

74. *D.G. v. Ireland*, no. 39474/98, § 80, ECHR 2002-III.

75. *P. and S. v. Poland*, no. 57375/08, § 147, 30 October 2012.

76. Including the 1989 United Nations Convention on the Rights of the Child, the Beijing Rules and the Havana Rules, as well as the 2008 European Rules for juvenile offenders subject to sanctions or measures and the 2010 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

77. *D.L. v. Bulgaria*, no. 7472/14, 19 May 2016.

78. *Blokhin v. Russia* [GC], no. 47152/06, ECHR 2016.

and that the nature of the regime complies with the aim of the placement, namely to provide education. Its inquiry into these matters was focused on the specific facts of the case, given that there was some dispute over the nature of the relevant legislation in force at the material time and the nature of the education on offer in the institution. It highlighted the following factors: the applicant was able to follow a school curriculum, had help with her difficulties in the classroom and obtained a professional qualification. It concluded that the aim of the placement was to provide for her education and protection, and not, as claimed by the applicant, punitive in nature. It further noted that the placement was ordered following an adversarial hearing during which all possible options for dealing with the applicant’s behaviour and the risks to which she was exposed were considered, having regard to what was in her best interests. The Court concluded that there had been no breach of Article 5 § 1.

### **Reasonableness of pre-trial detention (Article 5 § 3)**

In the *Buzadji v. the Republic of Moldova*<sup>79</sup> case, the Court established the point from which the authorities are required to show, in addition to “reasonable suspicion”, other “relevant and sufficient” reasons to justify pre-trial detention.

On 2 May 2007 the applicant was arrested and on 5 May 2007 he was charged with attempted large-scale misappropriation of goods. On the same day, a district court approved his pre-trial detention, which was renewed until 20 July 2007 when he was placed under house arrest. He was later acquitted of the charges to which the pre-trial detention related.

The Grand Chamber found a violation of Article 5 § 3 given the absence of “relevant and sufficient reasons” justifying the ordering or prolonging of the applicant’s detention pending trial.

The case is interesting since the Grand Chamber has expressly developed the Court’s case-law on the second limb of Article 5 § 3 (the right to “trial within a reasonable time or to release pending trial”) given its overlap with the first-limb guarantees (to “be brought promptly before a judge or other officer authorised by law to exercise judicial power”).

Under the first limb of Article 5 § 3, an accused has the right to be brought “promptly” before a judicial authority who will examine the

79. *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, ECHR 2016.

lawfulness of the detention and whether there is a reasonable suspicion of guilt (namely, compliance with Article 5 § 1 (c)).

Under the second limb of Article 5 § 3, the case-law provides that the “persistence of reasonable suspicion ... is a condition *sine qua non* for the validity of the continued detention” but after a “certain lapse of time” this no longer suffices so that other “relevant and sufficient” reasons to detain a suspect are required (see *Letellier v. France*<sup>80</sup>, which case-law was reaffirmed by the Grand Chamber in, for example, *Labita v. Italy*<sup>81</sup> and *Idalov v. Russia*<sup>82</sup>). The Court had never, however, defined the length of a “certain lapse of time” although it had recognised that that period could be as short as a few days.

While the Grand Chamber confirmed that these limbs provided two distinct legal guarantees, there were certain overlaps: the period started to run for both from the moment of arrest; both required a judicial authority to determine whether there were reasons justifying detention and to order release if not; and in practice the application of both limbs often overlapped, typically where the same judicial authority which authorises detention under the first limb (“reasonable suspicion”) orders at the same time detention on remand under the second limb (other “relevant and sufficient” reasons). This first appearance before a judge constituted therefore a “crossroads” between both limbs.

Yet the moment from which the additional second-limb guarantees are considered to apply remained vague, governed as it was by the undefined “certain lapse of time”. Moreover, a comparative study indicated that in the great majority of the thirty-one States surveyed the relevant judicial authority was required to give relevant and sufficient reasons either immediately or within days after arrest.

In order therefore to simplify and bring more clarity and certainty to the case-law and thereby enhance protection against an unreasonably long deprivation of liberty, the Grand Chamber considered there were compelling arguments for synchronising the second-limb guarantees with the first limb. Accordingly, it decided that the requirement on the judge or other officer to give relevant and sufficient reasons for the detention in addition to the persistence of reasonable suspicion should already apply “at the time of the first decision ordering detention on remand, that is to say, ‘promptly’ after the arrest”.

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80. *Letellier v. France*, 26 June 1991, § 35, Series A no. 207.

81. *Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV.

82. *Idalov v. Russia* [GC], no. 5826/03, § 140, 22 May 2012.

Applying this principle, the Grand Chamber went on to review the initial detention order of 5 May 2007, as well as the subsequent renewals, and concluded that there had been no relevant and sufficient reasons to order and prolong the applicant’s pre-trial detention.

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

The judgment in *A.M. v. France*<sup>83</sup> concerned the review of the lawfulness of a short period of administrative detention and the scope of such review.

The applicant was arrested on 7 October 2011 and placed in administrative detention pending his removal to Tunisia. On 9 October he introduced proceedings before the Administrative Court to challenge the lawfulness of his detention. The hearing in his case was scheduled for 1 p.m. on 11 October. However, at 4 a.m. that day he was removed to Tunisia, before his case could be heard. The applicant’s lawyer, in his absence, pursued the proceedings. The *Conseil d’État* ultimately rejected his case.

The applicant complained in the Convention proceedings that Article 5 § 4 had been breached: firstly, because his deportation should have been suspended in order to allow his challenge to his deportation to be determined; secondly, because of the failure of the domestic courts to pronounce on the merits of his claim that his placement in detention had been unlawful.

The Court found that Article 5 § 4 had been violated. The judgment is of interest for the following reasons.

(i) The Court confirmed that the bringing of proceedings under Article 5 § 4 to challenge the lawfulness under Article 5 § 1 (f) of administrative detention pending deportation did not have a suspensive effect on the implementation of the deportation order.

(ii) The Court noted that in previous cases it had ruled that it was unnecessary to examine a complaint under Article 5 § 4 where the impugned detention was of a short duration (see *Slivenko v. Latvia*<sup>84</sup>); however it observed that the applicant’s detention had lasted from 7 October, 2011 the date of his arrest, to 11 October 2011, the date of his expulsion; the complaint under Article 5 § 4 of the Convention had therefore to be examined.

(iii) Having regard to the requirements which Article 5 § 4 imposes when it comes to a review of the lawfulness of detention mandated by

83. *A.M. v. France*, no. 56324/13, 12 July 2016.

84. *Slivenko v. Latvia* [GC], no. 48321/99, §§ 158-59, ECHR 2003-X.

Article 5 § 1 (f) (*Chahal v. the United Kingdom*<sup>85</sup>), the Court found that the Administrative Court's power of review was restricted in that it could only check whether the authority which ordered the applicant's placement in detention had the competence to do so and had given reasons for its decision, in particular as regards the necessity of the measure. It was, however, unable under domestic law at the material time to review the lawfulness of the arrest stage and whether in the applicant's case his arrest leading to his placement in detention had been in accordance with the requirements of domestic law as well as with the aim of Article 5, namely to prevent arbitrariness.

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85. *Chahal v. the United Kingdom*, 15 November 1996, § 127, *Reports of Judgments and Decisions* 1996-V.

# PROCEDURAL RIGHTS

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

### Applicability

The *Baka v. Hungary*<sup>86</sup> judgment concerned access to a court by a judge to challenge the termination of his mandate.

The applicant, a former judge of the European Court of Human Rights, publicly criticised, in his capacity as President of the Hungarian Supreme Court, proposed legislative reforms of the judiciary. Subsequent constitutional and legislative changes resulted in the premature termination of his mandate as President and excluded the possibility of judicial review of that termination.

In the Convention proceedings he mainly complained under Article 6 of a lack of access to a court and under Article 10 of a disproportionate interference with his freedom of expression<sup>87</sup>. The Grand Chamber found a violation of both Articles.

The judgment is interesting for its comprehensive review of the relevant Convention case-law, as well as of pertinent European and international standards on the independence and irremovability of judges.

The Court confirmed the application to disputes concerning judges of the *Vilho Eskelinen*<sup>88</sup> criteria, according to which a State can exclude the application of Article 6. Those criteria are: (a) the State's national law must have expressly excluded access to a court for a relevant post or category of staff; and (b) that exclusion must be justified on objective grounds in the State's interest. (The judgment provided a useful review of the cases concerning the application of those criteria to disputes concerning judges.) As to the first *Eskelinen* criterion, the Court found that, prior to the impugned legislative changes,

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86. *Baka v. Hungary* [GC], no. 20261/12, ECHR 2016.

87. See under [Article 10 \(Freedom of expression\)](#) below.

88. *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-II.

the law had expressly provided a court president with the right to have any dismissal reviewed by a court, which judicial protection was in line with the various international and Council of Europe standards on the independence of the judiciary and on the procedural safeguards necessary on the removal of judges. That the applicant's access to a court had been impeded by the transitional provisions of the new legislation did not amount to compliance with the first *Eskelinen* criterion: the impugned measure itself could not exclude the protection of Article 6. The Court also emphasised, in this regard, that any such exclusion would have to comply with the rule of law. To so comply, the exclusionary legal provision would have to be of general application whereas that provision was individualised in the present case. Accordingly, the Court found that the first of the *Eskelinen* criteria had not been satisfied and, since both criteria had to be fulfilled to legitimately exclude the protection of Article 6, it concluded that Article 6 § 1 applied to the dispute over the applicant's mandate.

The Court was then able to deal briefly with the question of compliance with Article 6 § 1. Since it was doubtful that the exclusion of judicial review complied with the rule of law (see above) and given the growing importance (in international and Council of Europe instruments, as well as for international courts and bodies) of procedural fairness in cases involving the removal of judges, the Court concluded that the exclusion of the applicant from any judicial review of the premature termination of his mandate had violated his right of access to a court.

### **Access to a court<sup>89</sup>**

The judgment in *Al-Dulimi and Montana Management Inc. v. Switzerland*<sup>90</sup> concerned access to a court to challenge the confiscation of assets pursuant to UN Security Council Resolution 1483 (2003).

The first applicant was (according to the UN Security Council (UNSC)) Head of Finance for the Iraqi secret service under the regime of Saddam Hussein. He was also the managing director of the second applicant company. Following the invasion of Kuwait by Iraq in 1990, the UNSC put in place a sanctions regime including Resolution 1483 (2003), pursuant to which the applicants were "listed" (2004) and their assets confiscated (2006) for later transfer to the Development Fund

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89. See also above *Baka v. Hungary* [GC], no. 20261/12, ECHR 2016.

90. *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, ECHR 2016.



for Iraq. The applicants unsuccessfully challenged the confiscation orders before the Swiss courts, which considered that they were bound only to verify that the applicants' names were on the Sanctions Committee's list and that the assets belonged to them. The applicants complained under Article 6 that this amounted to a disproportionate restriction on their right of access to a court.

The Grand Chamber found that there had been a violation of the applicants' right of access to a court guaranteed by Article 6. There being no causal connection between that finding and any damage, no award was made under Article 41 of the Convention.

The judgment turned on the assessment of the proportionality of the limitation on the applicants' access to a court.

In the first place, the Court rejected the applicants' argument that the procedural rights contained in Article 6 of the Convention constituted a norm of *jus cogens* so that Resolution 1483 (2003) lost the binding character it derived from Article 103 of the UN Charter. While the right to submit a civil claim to a judge was "one of the universally recognised fundamental principles of law", it was not a norm of *jus cogens* as defined by the Vienna Convention on the Law of Treaties. Article 103 of the UN Charter had not therefore been displaced by Article 6 of the Convention.

The next question was therefore whether there was a conflict between Resolution 1483 (2003) and Article 6 of the Convention, in which case it would have been relevant to determine the hierarchy of Convention and UN Charter obligations having regard to Article 103 of the UN Charter. The Government argued that the UNSC Resolution had left them with no latitude so that there was a clear conflict of norms.

The novelty of this judgment is to be found in the Court's response to this argument. The Court considered that, since Article 24 § 2 of the UN Charter required the UNSC to act in accordance with the purpose and principles of the United Nations (including that of international cooperation in promoting respect for human rights), there was a presumption that the UNSC did not wish to impose any obligation on States in breach of fundamental principles of human rights (the Court cited, *mutatis mutandis*, *Al-Jedda v. the United Kingdom*<sup>91</sup>). Unless therefore there was clear and explicit language in a resolution of the UNSC that it intended States to act contrary to international human-rights law, the Court had to presume, "in a spirit of systemic harmonisation", that there was no conflict of obligations capable of

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91. *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011.

engaging Article 103 of the Charter. Consequently, if the UNSC Resolution in question was ambiguous, the Court had, if possible, to interpret it in harmony with the Convention so as to avoid any such conflict of obligations.

In the present case, and similarly to *Al-Jedda*, the Court considered that nothing in Resolution 1483 (2003) explicitly prevented the Swiss courts from reviewing, in terms of human-rights protection, the measures taken at the national level pursuant to the Resolution. Where not explicitly excluded, the Resolution had to be understood as authorising judicial review to avoid any arbitrariness in its implementation, that standard of review being considered to strike a fair balance between the competing interests involved. Any implementation of the UNSC Resolution without allowing judicial review of arbitrariness would engage the State's responsibility under Article 6 of the Convention. There being no conflict between the UN Charter and Convention obligations, it was unnecessary to consider the hierarchy of legal obligations to which Article 103 gave rise or, indeed, whether the equivalent-protection test (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*<sup>92</sup>) should be applied.

The Court concluded by finding that the applicants had had no opportunity to submit any evidence to the effect that their inclusion in the Sanctions Committee list was arbitrary. That it was impossible for them to challenge confiscation measures, pending for ten years, was "hardly conceivable in a democratic society". Neither could the delisting procedures before the UN Sanctions Committee replace, or compensate for, the lack of appropriate national judicial scrutiny having regard to the "serious, reiterated and consistent" criticisms of those procedures in many international quarters. There had therefore been a violation of Article 6 of the Convention.

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In its judgment in *Lupeni Greek Catholic Parish and Others v. Romania*<sup>93</sup> the Court considered whether a substantive-law criterion could, even when the interested parties have formal access to a court, amount to a limitation on access to a court to which Article 6 would apply.

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

93. *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, ECHR 2016.

By legislative Decree no. 126/1990, Romania decided that the legal situation of assets, which had been transferred from the Greek Catholic Church to the Orthodox Church in 1948, would be determined by joint committees made up of representatives of both Churches and those committees would take into account “the wishes of the worshippers in the communities in possession of [the] properties” (“worshippers’ wishes”). That Decree was amended in 2004 and 2005 to clarify, in case of disagreement in the joint committee, that the party seeking possession (the Greek Catholic Church) could bring judicial proceedings in the courts under the ordinary law.

The applicant parish was dissolved and its property was transferred to the Orthodox Church in 1948. The Greek Catholic applicants (parish, diocese and Archpriesthood) brought restitution proceedings. The first-instance court reviewed the title deeds and found in their favour. The Court of Appeal and the High Court, reversing that finding, took into account the worshippers’ wishes (that is, those of the Orthodox Church).

The applicants complained under Article 6, both alone and in conjunction with Article 14, of a breach of their right of access to a court, a breach of the principle of legal certainty and of the length of the proceedings. The Grand Chamber found violations of Article 6 as regards the reasonable-time requirement and the principle of legal certainty, and no violation as regards the other complaints.

(i) The case is interesting from the point of view of Romania and, notably, its legislative provisions concerning the sensitive socio-religious and historical question of the restitution of Greek Catholic property following the re-establishment of that Church in 1990. In particular, following on from the 2010 case of *Sâmbata Bihor Greek Catholic Parish v. Romania*<sup>94</sup>, the Grand Chamber reviewed the application of the 2004 and 2005 amendments for compliance with Article 6. It found that the reliance by the civil courts on the criterion of the worshippers’ wishes (from Decree no. 126/1990) did not breach the applicants’ right of access to a court (but did breach the principle of legal certainty, see under “Fair trial” below).

(ii) The complaint concerning the right of access to a court is noteworthy. The Grand Chamber had to consider whether an applicable substantive-law criterion (the worshippers’ wishes) could, even when the parties had formal access to a court, amount to a limitation on access to which Article 6 applied, the argument being

94. *Sâmbata Bihor Greek Catholic Parish v. Romania*, no. 48107/99, 12 January 2010.

that reliance on this criterion rendered inevitable the outcome of the proceedings (in favour of the Orthodox Church).

The Grand Chamber reaffirmed its case-law (notably, *Z and Others v. the United Kingdom*<sup>95</sup>, and *Roche v. the United Kingdom*<sup>96</sup>) that Article 6 had no application to substantive limitations on a right existing under domestic law.

In particular, it was clear that the applicants had had full access to a court: detailed examinations and reasoned decisions at three levels of jurisdiction took place without any procedural bar being invoked against them. It was equally clear that what was at stake (the worshippers'-wishes criterion) was a qualifying substantive right. The Grand Chamber reaffirmed that it could not create substantive rights through the interpretation of Article 6 of the Convention. The Grand Chamber thereby reaffirmed that the distinction between the procedural and the substantive, fine as that might be, continued to define the applicability of Article 6. The difficulties encountered by the applicants in securing the return of the property, concerning as they did the application of substantive law (worshippers' wishes) unrelated to any procedural limitation on their right of access to a court, led to a finding of no violation of this aspect of Article 6 of the Convention.

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The judgment in *Arlewin v. Sweden*<sup>97</sup> related to a decision of the national courts to decline jurisdiction in respect of the alleged defamatory content of a transfrontier programme service.

The applicant attempted to bring a private prosecution and a claim for damages for gross defamation against X, following the live broadcast in Sweden of a programme in which he was accused of, among other things, involvement in organised crime in the media and advertising sectors. The Swedish courts declined jurisdiction. In their view, and with reference to the relevant Swedish law, the programme had not originated in Sweden. It had been sent from Sweden by satellite to a British company which was responsible for the content of the programme and thereafter uplinked to a satellite, which had in turn transmitted the programme to viewers in Sweden. The court of appeal found that the applicant had not established that the

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95. *Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 87 and 98, ECHR 2001-V.

96. *Roche v. the United Kingdom* [GC], no. 32555/96, § 117, ECHR 2005-X.

97. *Arlewin v. Sweden*, no. 22302/10, 1 March 2016.

decisions concerning the content of the programme had been taken in Sweden, and that the material before it indicated that it would be possible for the applicant to bring proceedings before a court in the United Kingdom.

In the Convention proceedings, the applicant essentially claimed that he had been denied access to a court in Sweden for a determination on the merits of his defamation action against X, in breach of Article 6 of the Convention.

The Court found for the applicant. Its judgment is of interest in that the Court had to address the relevance to its consideration of the applicant's complaint of two instruments adopted within the framework of the European Union, namely the [European Union Audiovisual Media Services Directive](#) (Directive 2010/13/EU) and the [Brussels I Regulation](#) (Council Regulation (EC) No. 44/2001). The Court was not convinced by the Government's argument that the Swedish courts' jurisdiction was barred under the terms of the Directive. It considered that the Directive did not regulate the matter of jurisdiction when it came to defamation proceedings arising out of the content of a transborder programme service. Rather, jurisdiction under EU law was regulated by the Brussels I Regulation, and having regard to the facts, it would appear that both the United Kingdom and Sweden had jurisdiction over the subject matter of the applicant's case.

That being said, the circumstances of the case suggested that there were strong connections between Sweden, on the one hand, and, on the other, the television programme and the British company responsible for the programme's content and transmission to Sweden. The strength of those circumstances made it possible to conclude that there was a *prima facie* obligation on Sweden to secure to the applicant his right of access to a court. The Court had regard, among other considerations, to the following factors: the programme was produced in Sweden in the Swedish language, was backed by Swedish advertisers and was to be shown live to an exclusively Swedish audience. The alleged harm to the applicant occurred in Sweden. For the Court, except for the technical detail that the broadcast was routed via the United Kingdom, the programme and its broadcast were entirely Swedish in nature. Even though it was possible under the Brussels I Regulation, to require the applicant to bring proceedings before a court in the United Kingdom could not be said in the circumstances to have been a reasonable and practical alternative for him.

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The decision in *Tabbane v. Switzerland*<sup>98</sup> concerned the resolution of a dispute by an international arbitration tribunal in Geneva with no right of appeal to the courts.

The applicant, a Tunisian businessman domiciled in Tunisia, entered into a contract with a French company based in France. The contract included a clause requiring any disputes between the parties to be referred to arbitration. By entering into the contract the applicant expressly and freely waived any right to appeal to the ordinary courts against the decision of the arbitration tribunal in the event of a dispute.

The French company subsequently lodged a request for arbitration with the International Court of Arbitration of the International Chamber of Commerce (ICC) in Paris. In accordance with the [ICC Rules](#), the applicant was able to appoint an arbitrator of his choice. That arbitrator then agreed with the other two arbitrators that the arbitration would take place in Geneva, with the result that Swiss law became applicable to the arbitration proceedings. The arbitration tribunal found against the applicant, who lodged an application for review with the Swiss Federal Court. The Federal Court refused to examine the arbitration award, considering that the parties had validly waived their right to appeal against any decision issued by the arbitration tribunal in accordance with the Federal Law on private international law.

The case concerned the right of access to a court for the purposes of Article 6 § 1 of the Convention in the context of international arbitration. The decision develops the case-law relating to voluntary waivers of the right to appeal against an arbitration award. The Court found that, having regard to the legitimate aim pursued and the applicant's contractual freedom, the restriction had not impaired the very essence of his right of access to a court.

### **Fairness of the proceedings**

The judgment in *Avotiņš v. Latvia*<sup>99</sup> developed the case-law in two areas:

– the recognition and enforcement of a foreign judgment in a civil case delivered in the country of origin without duly summoning the defendant to appear and without securing his defence rights;

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98. *Tabbane v. Switzerland* (dec.), no. 41069/12, 1 March 2016.

99. *Avotiņš v. Latvia* [GC], no. 17502/07, ECHR 2016.

– with regard to EU law, the presumption of equivalent protection (see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi*, cited above<sup>100</sup>, and *Michaud v. France*<sup>101</sup>) and the principle of mutual recognition of judgments within the European Union.

By a judgment given in default of appearance, a Cypriot court ordered the applicant, a Latvian national, to pay a contractual debt to a Cypriot company. According to the applicant, he had not been duly informed of the proceedings in Cyprus. The claimant then sought recognition and enforcement of the Cypriot judgment in Latvia under the *Brussels I Regulation*. Before the Latvian courts, the applicant tried to prevent the judgment from being enforced, relying on Article 34 § 2 of the above-mentioned Regulation, according to which a judgment given in default in another member State could not be recognised if the defendant had not been served with the document instituting the proceedings in sufficient time and in such a way as to enable him to arrange for his defence. However, the Latvian Supreme Court dismissed this argument, stating that, since the applicant had not appealed against the judgment in Cyprus, his objections lacked relevance.

The applicant alleged a violation of his right to a fair hearing guaranteed by Article 6 § 1 of the Convention. The Grand Chamber found no violation of Article 6 § 1. It considered that there had indeed been a regrettable shortcoming because of the way in which the Supreme Court had dealt with the *prima facie* serious issue raised by the applicant. However, this shortcoming did not entail a violation of Article 6 § 1 as the applicant had had a real opportunity to appeal against the impugned judgment in Cyprus.

(i) The Grand Chamber judgment develops the Court’s case-law concerning the presumption of equivalent protection of fundamental rights by European Union law (known as the “*Bosphorus* presumption”, first defined by the Court in *Bosphorus* and then clarified in *Michaud*). It maintains the two conditions set forth in *Michaud*, that is, the “absence of any margin of manoeuvre” on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by EU law. With regard to the first condition, the judgment gives a valuable indication as to how to interpret the “absence of any margin of manoeuvre” in the case of an EU regulation

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

101. *Michaud v. France*, no. 12323/11, ECHR 2012.

which, unlike a directive, is directly applicable in the member States. In order to know whether the State authorities have a “margin of manoeuvre” in applying the specific provision at stake, regard must be had first and foremost to the interpretation of this provision given by the Court of Justice of the European Union (CJEU). As regards the second condition of the *Bosphorus* presumption, namely the deployment of the full potential of the supervisory mechanism provided for by EU law in the specific case, the judgment emphasises that this condition must be applied in a flexible way and without excessive formalism. More precisely, it cannot be understood as requiring the domestic court to request a preliminary ruling from the CJEU in all cases without exception, including those cases where no genuine and serious issue arises with regard to the protection of fundamental rights by EU law, or those in which the CJEU has already stated precisely how the applicable provisions of EU law should be interpreted in a manner compatible with fundamental rights.

(ii) This is the first Grand Chamber judgment on the application of the *Bosphorus* presumption to the mutual-recognition mechanisms which are founded on the principle of mutual trust between the member States of the European Union and are designed to be implemented with a high degree of automaticity.

On the one hand, the judgment reasserts the legitimacy of these mechanisms. On the other hand, it notes that their application in practice can endanger the respect of fundamental rights. As the CJEU itself has recently stated in Opinion 2/13 (paragraph 192, 18 December 2014, “when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that ..., save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU”. This could run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin. Therefore, the Court must satisfy itself that the mutual-recognition mechanisms do not leave any gap or particular situation which would render the protection of the human rights guaranteed by the Convention manifestly deficient. In doing so it must verify, in a spirit of complementarity, that the principle of mutual recognition is not applied automatically and mechanically to the detriment of fundamental rights.



The Grand Chamber judgment explains the action that must be taken by the domestic court in this context, namely, if a serious and substantiated complaint is raised before the court to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by EU law, then it cannot simply refrain from examining that complaint on the sole ground that it has to apply EU law.

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In its judgment in *Lupeni Greek Catholic Parish and Others*<sup>102</sup>, cited above, the Grand Chamber also considered, *inter alia*, whether there had been a breach of the principle of legal certainty in view of the conflicting decisions of the High Court regarding the interpretation of the provisions of a legislative decree governing the legal situation of assets which had been transferred from the Greek Catholic Church to the Orthodox Church in 1948.

The Grand Chamber reviewed the criteria which guide the Court in this respect (see, in particular, *Nejdet Şahin and Perihan Şahin v. Turkey*<sup>103</sup>): the Court must determine whether in the case-law of the national courts “profound and long-standing differences exist”, whether domestic law provides for a mechanism to overcome these inconsistencies, and whether that mechanism has been applied and, if appropriate, to what extent. In the present case, the Grand Chamber found that the relevant legislative decrees were not clear as to whether the worshippers’-wishes criterion could be applied during the proceedings before the civil courts, that, until 2012, the High Court had delivered judgments which were “diametrically opposed”, and that there had been a failure to use promptly the mechanism foreseen under domestic law. There had therefore been a breach of the principle of legal certainty guaranteed by Article 6 of the Convention.

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

### Access to a court

The case of *Marc Brauer v. Germany*<sup>104</sup> concerned the refusal to consider an appeal against an order placing the applicant in a psychiatric

102. *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, ECHR 2016.

103. *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, 20 October 2011.

104. *Marc Brauer v. Germany*, no. 24062/13, 1 September 2016.

hospital, on account of a failure to comply with the one-week deadline prescribed by law.

The applicant's confinement in a psychiatric hospital had been ordered at first instance on the grounds that he could not be held criminally responsible for the offences with which he was charged and that he was mentally ill. While the judgment was being delivered, the applicant became very agitated. He stated that he wished to change his lawyer and to appeal against the decision himself. The presiding judge gave him express instructions on when and how to lodge an appeal. A few days later, the applicant's lawyer sent him written instructions on the procedure to be followed. The applicant drew up and signed a notice of appeal. The court dismissed the appeal as out of time and reiterated the oral instructions given by the presiding judge. The applicant challenged that rejection, indicating that he had misunderstood the instructions with regard to the appeal procedure. He was unsuccessful. The Federal Court of Justice placed decisive weight on the instructions given by the judge. It found no evidence that the applicant had not understood them on account of his mental illness. He was therefore responsible for the situation in question.

In the Convention proceedings, the applicant argued that he had not understood the instructions given by the judge on account of his mental state, and that he had been misled by the lawyer's instructions.

The Court held that there had been a violation of Article 6 § 1 of the Convention for the following reasons.

(i) The applicant, who had been deprived of his liberty and was confined in a psychiatric hospital on account of his mental health, had been particularly vulnerable.

(ii) In spite of this, his lawyer had taken no steps to verify whether he was indeed capable of lodging an appeal alone, his intention of doing which he had clearly stated.

(iii) The written instructions from the lawyer were potentially misleading, so that a lay person could have understood them in the same way as the applicant.

(iv) The applicant had been diligent in sending off the notice of appeal, which was posted five days prior to the expiry of the statutory time-limit; the subsequent delay was attributable to the postal service (whose resources were strained over the Christmas period) and to the courts.

This judgment is interesting with regard both to the specific situation of litigants or defendants suffering from psychiatric problems and,

more generally, to the practical circumstances that are likely to delay the registration of an appeal by any person involved in court proceedings.

As a general rule, legal certainty and the proper administration of justice required compliance with procedural time-limits. Nonetheless, it was necessary to envisage exceptional cases and be flexible in order to ensure that the right of access to a court was not unduly restricted. It was for the national courts to assess the situation as a whole and to take into account the exceptional factors that had affected the lodging of the appeal in due form. There could be an accumulation of adverse factors which, in practice, explained the delay and consequently the degree of negligence attributable to the appellant.

### **Fairness of the proceedings**

In its judgment in *Lhermitte v. Belgium*<sup>105</sup> the Grand Chamber developed the principles established in *Taxquet v. Belgium*<sup>106</sup> concerning the reasons given by an assize-court jury for convicting a defendant.

While experts had initially considered the applicant to be criminally responsible for her acts (she had killed her five children), new evidence came to light at the trial which led the experts to unanimously conclude that she was not criminally responsible. The assize-court jury (twelve lay members) concluded to the contrary, finding – through “yes” or “no” responses to three of the five short questions put to it – that she was criminally responsible and guilty.

She complained under Article 6 that she could not understand the reasons why the jury had so decided. The Grand Chamber found that there had been no violation of Article 6 of that provision.

The Grand Chamber applied the *Taxquet* principles (as summarised in *Agnelet v. France*<sup>107</sup>) to the particular facts of the case. The judgment is noteworthy in that the Grand Chamber accepted that the reasons for the jury’s decision can be gleaned from sources other than the jury itself and, in this case, from the later sentencing decision of the assize court and the judgment of the Court of Cassation.

Since the applicant did not deny that she had carried out the killings, the main issue at the trial was whether she was criminally responsible and this was the very point on which the jury had, without giving reasons, not followed the unanimous view of the experts. The issue to be determined, following *Taxquet*, was whether the applicant had,

105. *Lhermitte v. Belgium* [GC], no. 34238/09, ECHR 2016.

106. *Taxquet v. Belgium* [GC], no. 926/05, ECHR 2010.

107. *Agnelet v. France*, no. 61198/08, 10 January 2013.

nevertheless, been able to understand the reasons why the jury had concluded as it did. Noting that compliance with Article 6 was to be established on the basis of the trial as a whole, the Grand Chamber considered that certain factors should have dispelled the applicant's doubts as to the jury's belief of her criminal responsibility. Her criminal responsibility was the central focus of the investigation and trial. Certain relevant reasons were contained in the sentencing judgment, which had been adopted by twelve members of the jury with three professional judges the following day: while those sentencing judges were not part of the jury, they had been able to obtain the observations of the jury members who sat with them while deliberating on the sentence and who signed the sentencing judgment, and the three professional judges had been present throughout the trial. The experts themselves had acknowledged that their view was an "informed opinion" and not a "scientific truth". In such circumstances, the Court concluded that the fact that the jury had not indicated the reasons which prompted them to adopt a view on criminal responsibility contrary to the unanimous expert opinions on the subject had not been capable of preventing the applicant from understanding the decision of the jury against her.

It is worth comparing and contrasting a series of judgments in similar cases against France adopted since *Taxquet* (including *Agnelet*, cited above; *Oulahcene v. France*<sup>108</sup>; and *Fraumens v. France*<sup>109</sup>) in which the Court, in finding a violation as the applicants could not have understood the reasons for the jury decisions against them, took note of later legislative reform (after the relevant facts of those cases) introducing a "statement of reasons" form for assize-court juries. The later *Matis v. France*<sup>110</sup> decision indicated that this "statement of reasons" form was capable of meeting the requirements of Article 6 of the Convention.

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

The judgment in *Rywin v. Poland*<sup>111</sup> concerned the impact of a parliamentary commission of inquiry on the conduct of parallel criminal proceedings relating to the same matters.

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108. *Oulahcene v. France*, no. 44446/10, 10 January 2013.

109. *Fraumens v. France*, no. 30010/10, 10 January 2013.

110. *Matis v. France* (dec.), no. 43699/13, 6 October 2015.

111. *Rywin v. Poland*, nos. 6091/06 and 2 others, 18 February 2016.

The applicant, a film director, became embroiled in a scandal arising out of allegations that persons in power had engaged in corrupt practices during parliamentary proceedings on the reform of Poland's audio-visual legislation. Criminal charges were brought against the applicant in this connection. At the same time, Parliament set up a commission of inquiry tasked with investigating the accuracy of the allegations made against several politicians and senior officials. The applicant was convicted in the criminal proceedings. While his appeal was pending, the commission of inquiry, whose proceedings were conducted in public, published its findings. The report identified by name certain key figures who had sought to exploit their position of influence for financial and political gain. The applicant was cited in the report as someone who had assisted their corrupt endeavour. His appeal was dismissed and his conviction became final.

In the Convention proceedings, the applicant complained among other things that the publication of the parliamentary commission's report at a time when his conviction was not yet final had infringed his right to be presumed innocent guaranteed by Article 6 § 2. The Court found that that provision had not been breached.

The judgment is noteworthy in that this was the first time the Court had had to address the implications for the presumption of innocence of the parallel conduct of an official inquiry and criminal proceedings dealing with the same background facts and circumstances. In previous judgments, the Court had laid down the relevant principles governing the making of statements by public officials which may be seen as a premature expression of a defendant's guilt (see, for example, *Daktaras v. Lithuania*<sup>112</sup>; *Butkevičius v. Lithuania*<sup>113</sup>; and *Gutsanovi v. Bulgaria*<sup>114</sup>). In the applicant's case the Court found that parliamentary commissions of inquiry were also required to respect the guarantee contained in Article 6 § 2 as regards the wording of their terms of reference, the discharge of their mandate and their published conclusions. It is interesting to note that the Court did not at any stage take issue with the decision to allow a parliamentary investigation to run in parallel with a criminal trial dealing with a related matter.

The Court had regard in the applicant's case to the public-interest considerations which had led to the creation of the commission of inquiry

112. *Daktaras v. Lithuania*, no. 42095/98, § 41, ECHR 2000-X.

113. *Butkevičius v. Lithuania*, no. 48297/99, §§ 49, 50 and 53, ECHR 2002-II (extracts).

114. *Gutsanovi v. Bulgaria*, no. 34529/10, §§ 191 et seq., ECHR 2013 (extracts).

and the need for it to ensure transparency for its work and findings. Its role was distinct from that of the criminal court, which had to determine the applicant's guilt or innocence. The applicant's criminal liability was not a matter for the commission of inquiry. As in many cases raising issues under Article 6 § 2, much depended on the Court's view of the impugned expressions. In the applicant's case, it found that even though the final report referred to the applicant by name in connection with the corrupt conduct of senior officials he had not been directly targeted by the authors who, moreover, had not adverted in their report to the criminal proceedings pending against the applicant or offered any view on his possible criminal liability for aiding and abetting corruption.

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

The case of *Blokhin*<sup>115</sup>, cited above, concerned the placement of the applicant, a minor who had not reached the age of criminal responsibility, in a juvenile detention centre.

The applicant, who was twelve years of age at the material time, was arrested and taken to a police station on suspicion of having extorted money from another minor. On the strength of the applicant's confession (which he later contested) and the statements of the alleged victim and the latter's mother, the authorities found that he had committed offences punishable under the Criminal Code. However, no criminal proceedings were initiated since he was below the statutory age of criminal responsibility. He was brought before a court, which ordered his placement in a temporary detention centre for minor offenders for a period of thirty days in order to "correct his behaviour" and to prevent his committing any further acts of delinquency.

The Grand Chamber found, *inter alia*, a violation of Articles 6 §§ 1 and 3 (on the ground that the applicant had been entitled to, but did not benefit from, the procedural guarantees of Article 6 of the Convention).

The judgment is noteworthy because it comprehensively addresses, and in some respects develops, the procedural rights of detained juveniles (under the age of criminal responsibility). It also lists relevant international and regional juvenile justice standards on which, in certain respects, the judgment directly relied.<sup>116</sup>

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115. *Blokhin v. Russia* [GC], no. 47152/06, ECHR 2016, see also under [Article 3](#) and [Article 5](#) above.

116. These included the 1989 UN Convention on the Rights of the Child and the the Beijing Rules, as well as the 2008 European Rules for juvenile offenders subject to sanctions or measures and the 2010 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

It is interesting to note that the Grand Chamber, like the Chamber, applied the procedural guarantees of Article 6 to the proceedings which led to the applicant's detention. The Grand Chamber adopted the reasoning of the Chamber and, stressing the need to look beyond appearances and at the realities of the situation, found that the "more far-reaching procedural guarantees" of Article 6 should have applied to those proceedings: even though no criminal proceedings had been initiated against the applicant, the nature of the offence, together with the nature and severity of the penalty, were such as to engage the applicability of the criminal limb of that provision. The Court rejected the Government's contention that these procedural complaints should be examined under Article 5 § 4 (see, in this connection, *Bouamar*, cited above<sup>117</sup>).

The Grand Chamber went on to find, on the merits, that there had been a violation of Article 6 on account of the absence of legal assistance during the applicant's interview with the police and the denial of an opportunity during the special procedure before the judge making the detention order to cross-examine the decisive witnesses against him. Paragraphs 196 and 218 of the judgment elaborate on the Court's reasoning in this respect, addressing as they do the notion of "status crimes". In particular, the Court explained that a child should not be deprived of procedural guarantees simply because the process that might result in his or her detention is deemed to be protective: rather those guarantees should be triggered by the acts a child is alleged to have committed and not by the child's status as a juvenile delinquent.

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The judgment in *Yaroslav Belousov*<sup>118</sup>, cited above, concerned the confinement of the applicant in a glass cabin during the court hearings in his case. During the first two months of the hearings, the applicant, who had been charged with public-order offences, and nine other accused were confined in a very cramped glass cabin. In the ensuing three-month period, the hearings were held in a different courtroom equipped with two glass cabins allowing the applicant and the other accused more space.

In the Convention proceedings the applicant complained, among other things, that his confinement as described amounted to degrading

117. *Bouamar v. Belgium*, 29 February 1988, Series A no. 129.

118. *Yaroslav Belousov v. Russia*, nos. 2653/13 and 60980/14, 4 October 2016, see also under [Article 3 \(Degrading treatment\)](#) above.

treatment and had impaired his effective participation in the trial, including contact with his counsel. He relied on Articles 3 and 6 of the Convention. The judgment is noteworthy in that this is the first time that the Court has had to address this particular form of security arrangement in a courtroom for compliance with Article 6.

The Court reviewed the extent to which the above-described security arrangements infringed Article 6 fairness guarantees. Significantly, and as regards the proceedings during the first two months of the trial, it found that a breach of Article 6 flowed almost inevitably from the conclusion that the applicant's confinement in the cramped and overcrowded glass cabin amounted to degrading treatment, it being difficult to reconcile the degrading treatment of the applicant during the judicial proceedings with the notion of a fair hearing. Concerning the second period of confinement, which was found to be Article 3 compliant, the Court's inquiry was focused on whether the placement of the applicant in a glass cabin was a necessary and proportionate restriction on his right to a fair hearing, having regard to the security risks relied on by way of justification for the application of the measure. The Court found in favour of the applicant.

Referring in particular to its case-law on the importance of an accused's right to communicate with his lawyer without the risk of being overheard by a third party (see *Svinarenko and Slyadnev*<sup>119</sup>, cited above, and *Sakhnovskiy v. Russia*<sup>120</sup>, with further references), it noted that the glass cabin constituted a physical barrier between him (and the other accused) and the rest of the courtroom, which to some extent reduced his direct involvement in the hearing. This arrangement also made it impossible for the applicant to have confidential exchanges with his legal counsel, to whom he could only speak through a microphone and in close proximity to the police guards. It was also of relevance that the cabin was not equipped to enable the applicant to handle documents or take notes. Moreover, the Court found that the use of the glass cabin was not warranted by any specific security risks or by a need to maintain order in the courtroom, but was deployed as a matter of routine. The Court noted that the trial court had no discretion to order that the applicant and the other defendants be placed outside the cabin, did not seem to appreciate the impact of the arrangements on the applicant's defence rights, and did not take any

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119. *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 127, ECHR 2014 (extracts).

120. *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 97, 2 November 2010.



measures to compensate for the limitations. It concluded that there had been a breach of Article 6 §§ 1 and 3 (b) and (c).

The Court's judgment is a further illustration of its concern to ensure that the need to take account of security considerations surrounding a trial, which it acknowledged to be a legitimate reason for restricting the rights of the defence, are warranted in the circumstances of a particular case and, where justified, are applied in a proportionate manner (for a recent example, but not involving the use of a glass cabin, see *Simon Price v. the United Kingdom*<sup>121</sup>).

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The *Constantinides v. Greece*<sup>122</sup> judgment concerned the admission and use of the incriminating conclusions of an absent expert.

The applicant was convicted of fraud on the strength of, among other factors, the evidence of a handwriting expert commissioned by the prosecutor at the charge stage. The expert, although summoned, failed to appear and testify at the trial. No explanation was given for his absence. The expert's report had been included in the file and was read out during the trial. The applicant's own expert attended the trial and provided written and oral evidence contradicting the findings of the prosecution's expert.

In the Convention proceedings the applicant submitted that there had been a breach of Article 6 §§ 1 and 3 of the Convention, since he had been convicted solely or to a decisive extent on the evidence of an absent witness.

The Court found that the applicant's right to a fair trial had not been breached as alleged. The judgment is noteworthy in that the Court applied the principles concerning the use of evidence of absent witnesses as set out in the Grand Chamber's judgment in *Schatschaschwili v. Germany*<sup>123</sup> to the circumstances of the applicant's case. These principles were recently summarised in *Seton v. the United Kingdom*<sup>124</sup>. For the Court, they apply, *mutatis mutandis*, to the admission and use of evidence given by an expert whom the accused has not had the opportunity to cross-examine. On the facts of the applicant's case, the Court observed as follows.

121. *Simon Price v. the United Kingdom*, no. 15602/07, §§ 87-94, 15 September 2016.

122. *Constantinides v. Greece*, no. 76438/12, 6 October 2016.

123. *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 111-31, ECHR 2015.

124. *Seton v. the United Kingdom*, no. 55287/10, § 59, 31 March 2016.

(i) The domestic courts had not made all reasonable efforts to secure the attendance of the expert;

(ii) Although the expert report was considered by the domestic courts to be of significant evidential value, it was not the sole or decisive basis for the applicant's conviction; it served in effect to corroborate witness and documentary evidence adduced at the trial as proof of the applicant's guilt;

(iii) There were sufficient safeguards in place to compensate for the applicant's inability to question the expert directly, in particular the active participation at the trial of the applicant's own expert witness.

It is of interest that the Court found that it was relevant for the purposes of its assessment that the report of the absent expert did not concern matters which the latter had seen or heard about in relation to the charges against the applicant. The report was technical in nature and its author was an independent expert who had been commissioned by the judicial authorities at the investigation stage to help clarify certain issues in the file. The applicant's own expert had had every opportunity at the trial to cast doubt on the findings.

### **Defence through legal assistance (Article 6 § 3 (c))**

The *Ibrahim and Others v. the United Kingdom*<sup>125</sup> concerned delays in access to a lawyer during police questioning.

The applicants were suspected of attempted suicide bombings in London on 21 July 2005, two weeks after fifty-two people had been killed also in suicide bombings in London.

The first three applicants were arrested and temporarily refused legal assistance during police "safety interviews". Their statements, denying any involvement in the events, were made without legal assistance and were admitted at their trials (at trial, they acknowledged involvement but claimed that the bombs had been a hoax since they were never intended to explode). The fourth applicant was interviewed as a witness. Unlike the other applicants, he started to incriminate himself. Rather than arrest him at that point as a suspect and advise him of his right to silence and to legal assistance, the police allowed him to continue to answer their questions as a witness and make a written statement. He adopted the statement after receiving legal advice but argued at trial that it should not be admitted since it had been made without legal advice.

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125. *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, ECHR 2016.

The applicants complained under Article 6 §§ 1 and 3 (c) of their lack of access to lawyers during police questioning and the admission at trial of their statements. The Grand Chamber found that there had been no violation as regards the first three applicants and a violation of the Convention as regards the fourth applicant.

The Grand Chamber judgment is noteworthy in that it clarifies the two stages of the *Salduz v. Turkey*<sup>126</sup> test and the relationship between them. It described those two stages as follows: the Court must assess, in the first place, whether there were “compelling reasons” to restrict the right of access to a lawyer and, secondly, the impact of that restriction on the overall fairness of the proceedings.

(i) As to the meaning and import of “compelling reasons”, the Grand Chamber emphasised the “stringent” nature of this criterion so that restrictions on access to legal advice “[were] permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case”. It was relevant that the restriction had a basis in law which sufficiently circumscribed the scope and content of any restriction so as to guide operational decision-making. The compelling nature of the reasons had to be assessed on a case-by-case basis on the basis of these principles.

(ii) As to the relationship between “compelling reasons” and fairness, the Grand Chamber confirmed, relying on *Salduz*, cited above, and *Dvorski v. Croatia*<sup>127</sup>, that there was no bright-line rule to the effect that the absence of compelling reasons was sufficient of itself to find a violation. Where there were compelling reasons for the restriction, a holistic assessment of the entirety of the proceedings had to be conducted to determine fairness. Where there were no compelling reasons, the Court had to apply “a very strict scrutiny” to its fairness assessment: a lack of compelling reasons weighed heavily in the balance when assessing overall fairness and might tip the balance in favour of a violation (the Grand Chamber referenced a similar approach in *Schatschaschwili*<sup>128</sup>, cited above, as regards the absence of good reason for the non-attendance of a witness at a trial). In the absence of compelling reasons, a presumption of unfairness arose and the onus was on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the

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

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

128. *Schatschaschwili v. Germany* [GC], no. 9154/10, § 113, ECHR 2015.

overall fairness of the trial had not been irretrievably prejudiced by the restriction.

(iii) The Grand Chamber went on to provide a non-exhaustive list of factors, drawn from the Court's case-law, to be taken into account as appropriate when assessing the impact of the restriction on access to a lawyer on the fairness of the proceedings including: the vulnerability of the applicant; the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with; the safeguards available including whether the applicant could challenge the evidence and oppose its use; the quality of the impugned evidence and the degree and nature of any compulsion; the probative value of that evidence and of the other evidence; and the weight of the public interest in the investigation and punishment of the particular offence.

Applying these principles, the Grand Chamber came to different conclusions as regards the first three applicants, on the one hand, and the fourth applicant, on the other.

As to the first three applicants, the Grand Chamber accepted that the Government had convincingly demonstrated a compelling reason for the restriction – the existence of an “urgent need to avert serious adverse consequences for the life and physical integrity of the public” – and found that the proceedings were, as a whole, fair. In contrast, the Court did not find the existence of compelling reasons demonstrated in the fourth applicant's case given, *inter alia*, the complete absence of any legal framework enabling the police to act as they did and the deliberate decision by the police not to arrest and caution him. The onus thereby shifted to the Government. Taking into account the high threshold which applied where the presumption of unfairness arose and having regard to the cumulative effect of the procedural shortcomings in the fourth applicant's case, the Government were found to have failed to demonstrate why the overall fairness of the trial was not irretrievably prejudiced by the decision not to caution the fourth applicant and to restrict his access to legal advice.

## **Other rights in criminal proceedings**

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

The *Bergmann v. Germany*<sup>129</sup> judgment concerned the retrospective prolongation of preventive detention ordered by a criminal court and the notion of a “penalty”.

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129. *Bergmann v. Germany*, no. 23279/14, 7 January 2016.

The applicant was convicted in 1986 of serious violent sexual offences and sentenced to a term of imprisonment. The sentencing court also ordered that the applicant be placed in preventive detention on account of his dangerousness. On the expiry of his prison sentence the applicant was placed in preventive detention. According to the law applicable at the time of the commission of the offences, preventive detention could not exceed ten years. However, at the end of the ten-year period, the measure was prolonged in the applicant's case. The courts responsible for the execution of sentences relied in this connection on legislation enacted in 1998, and thus after the applicant's conviction, which authorised the imposition of preventive detention without a maximum duration and, where such measure was already in place, its prolongation with retrospective effect. In addition, the same courts, on the basis of new legislation which came into force in June 2013, concluded that the applicant was suffering from a mental disorder (sexual sadism) which necessitated medical treatment and therapy, and thus the prolongation of his preventive detention. The courts were satisfied that there was a high risk that, if released, the applicant would reoffend as a result of that disorder.

In the Convention proceedings, the applicant complained, among other things, that the retrospective extension of his preventive detention beyond the former ten-year maximum duration had resulted in the imposition of a heavier penalty, in breach of the second sentence of Article 7 § 1 of the Convention. However, the Court did not agree.

The judgment is noteworthy in that the Court ruled, contrary to the Government's contention, that preventive detention imposed pursuant to the 1998 legislation, or its retroactive prolongation as in the applicant's case, constituted in principle a "penalty" for the purposes of Article 7 § 1. It noted that the measure entailed a deprivation of liberty of indefinite duration and was imposed by the criminal courts following conviction for a criminal offence. The Court thus confirmed that the domestic classification of a measure was not decisive and that the notion of "penalty" must be given an autonomous meaning.

The Court had no difficulty in accepting that the prolongation of the applicant's preventive detention constituted a heavier measure than the one applicable at the time the applicant committed the offences of which he was convicted.

That said, it is of further note that the Court concluded that the prolongation of the applicant's preventive detention could not in the circumstances of his case be classified as a penalty. It had regard, among other things, to the following considerations:

(i) The retrospective prolongation of the measure was based on the conclusion that the applicant was suffering from a mental disorder, a factor which had not been of relevance when the measure was first ordered by the sentencing court back in 1986.

(ii) The applicant was prescribed individualised therapeutic care in a less coercive environment than an ordinary prison in order to reduce his dangerousness resulting from his mental disorder.

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The judgment in *Dallas v. the United Kingdom*<sup>130</sup> concerned the allegedly unforeseeable application of the law on contempt for breach of a judge's direction to jurors prohibiting them from researching on the Internet the case being tried before them.

The applicant was selected to serve on a jury in a criminal trial. The jury retired to consider their verdict at the end of the trial. After the court had risen, one of the jurors notified the court that the applicant, contrary to the judge's direction to the jury at the time of its empanelment, had researched on the Internet the defendant's previous convictions and had informed the other jurors of her findings. The trial judge subsequently discharged the jury and the trial was aborted. The applicant was later convicted of contempt of court. The domestic court found that the applicant had deliberately disobeyed a clear direction by the trial judge to the members of the jury and had not merely risked causing prejudice to the administration of justice through her Internet research but had caused such prejudice by disclosing her findings to her fellow jurors.

In the Convention proceedings, the applicant alleged that she had been found guilty of a criminal offence on account of an act which did not constitute a criminal offence at the time it was committed, in breach of Article 7 of the Convention. She contested in particular the fact that the court had not inquired as to the existence of a "*real risk*" of prejudice to the administration of justice and whether she had had an *intention* to create such risk. For the applicant, these were essential aspects of the offence of contempt as defined in domestic law. However, the domestic court had confined itself to ascertaining whether she had breached a court order which, moreover, had not carried a warning that non-compliance would entail the imposition of a criminal sanction.

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130. *Dallas v. the United Kingdom*, no. 38395/12, 11 February 2016.

The Court disagreed with the applicant. In so doing, it referred to the accessibility and foreseeability requirements which the notion of “law” must satisfy and noted also that the process of judicial interpretation may lead to the gradual clarification of the rules of criminal liability on a case-by-case basis (*Del Río Prada v. Spain*<sup>131</sup>).

For the Court, in having regard to the *actual* prejudice caused by the applicant’s conduct, the domestic court could not be said to have applied a lower threshold than the “real risk” test contained in the common law. As to the matter of *intent*, it found that the domestic court had not reached an unforeseeable conclusion in stating that intent could be demonstrated by the foreseeability of the consequences of one’s actions, in the instant case the breach by the applicant of the trial judge’s direction to the jury. The domestic court had not introduced a new test but clarified as a matter of judicial interpretation the relevant domestic law on the manner in which intent could be proved. Finally, the fact that no specific warning was set out in the trial judge’s direction had not undermined the clarity of that direction. The consequences of contempt of court on account of Internet research had also been made clear in notices in the jury room and it had in any event been open to the applicant to clarify the matter of possible sanctions with the trial judge.

The judgment is of interest for several reasons.

Firstly, the Court, like the domestic court, accepted that disobedience of a judge’s direction to a jury may give rise to criminal sanctions. Whether or not an issue arises under Article 7 will depend on the extent to which the relevant domestic law fulfils the necessary qualitative requirements.

Secondly, the case highlights the importance which the Court attaches to the nature of a judge’s directions to a jury as a means of framing its decision-making and securing the fairness of proceedings; it complements previous case-law on this point (see, for example, *Beggs v. the United Kingdom*<sup>132</sup>, and *Abdulla Ali v. the United Kingdom*<sup>133</sup>, in the context of a common-law system, and, in the context of a civil-law system, *Taxquet*<sup>134</sup>, cited above).

131. *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 77-80 and 91-93, ECHR 2013.

132. *Beggs v. the United Kingdom* (dec.), no. 15499/10, §§ 128, 131 and 158, 16 October 2012.

133. *Abdulla Ali v. the United Kingdom*, no. 30971/12, § 96, 30 June 2015.

134. *Taxquet v. Belgium* [GC], no. 926/05, § 92, ECHR 2010.

Thirdly, the case is another illustration of the fact that Article 7 of the Convention will not be breached where judicial development of the law in a particular case is consistent with the essence of the offence and could be reasonably foreseen (see *Del Río Prada*, cited above, §§ 92-93).

Finally, the case illustrates once again the relevance of the Internet when it comes to the protection of Convention rights, in the instant case the need to secure the Article 6 guarantee to a fair trial before an impartial tribunal against the risks which the Internet creates for the introduction of extraneous material into the jury room.

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The issue before the Court in *Ruban v. Ukraine*<sup>135</sup> was whether a gap in the legislation could give rise to a more lenient sentence.

The applicant was convicted in 2010 of offences committed in 1996, including aggravated murder. At the time of the commission of the offences, the 1960 Criminal Code provided for the death penalty for an offence of aggravated murder. On 29 December 1999 the Constitutional Court found the death penalty to be unconstitutional with immediate effect. Three months later, on 29 March 2000, Parliament amended the Criminal Code so as to abolish the death penalty by replacing it with life imprisonment for the offence of aggravated murder. The applicant contended in the Convention proceedings that the *lex mitior* principle required that he benefit from the more lenient sentence – fifteen years' imprisonment – applicable to an offence of aggravated murder during the three-month period between the ruling of the Constitutional Court and the amendment of the Criminal Code.

The Court found that there had been no breach of Article 7. It reiterated that

“Article 7 § 1 guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, implicitly, the principle of retrospectiveness of the more lenient criminal law; in other words, where there are differences between the criminal law in force at the time of the commission of an offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 109, 17 September 2009)”.

The judgment is of interest in view of the context in which the applicant claimed entitlement to a more favourable sentence, namely

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135. *Ruban v. Ukraine*, no. 8927/11, 12 July 2016.



a gap in the legislation. In the Court's view the creation of the above-mentioned three-month gap had not been intentional and there was nothing in the materials before it which indicated "any intention of the legislator in particular, and of the State in general, to mitigate the law to the extent claimed by the applicant". It is noteworthy that the Court stressed in this connection that "the intention of the legislator to humanise the criminal law and to give retrospective effect to more lenient law is an important factor" (see also *Gouarré Patte v. Andorra*<sup>136</sup>). It concluded that at the time when the applicant committed his crime in 1996, it was punishable by the death penalty. Parliament then replaced that penalty with a life sentence, which it considered proportionate, and the courts had in fact applied the more lenient form of punishment.

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

The judgment in *A and B v. Norway*<sup>137</sup> concerned parallel or dual administrative and criminal sanctions for the same conduct.

Tax surcharges were imposed on the applicants following administrative proceedings because they had omitted to declare certain income in tax returns. In parallel criminal proceedings they were also subsequently convicted and sentenced for tax fraud for the same omissions. They complained under Article 4 of Protocol No. 7 that they had been prosecuted and punished twice in respect of the same offence.

The judgment is important because it clarifies the Court's case-law concerning the compliance with Article 4 of Protocol No. 7 (*ne bis in idem*) of parallel or dual administrative and criminal sanctions for the same conduct, and provides a framework for the examination of such compliance.

(i) The Grand Chamber firstly reviewed the continuing relevance of *Sergey Zolotukhin v. Russia*.<sup>138</sup>

– Whether the administrative proceedings were "criminal" for the purposes of Article 4 of Protocol No. 7 was to be assessed, as in the *Sergey Zolotukhin* judgment, on the basis of the three *Engel*<sup>139</sup> criteria developed for the purposes of Article 6: the *ne bis in idem* principle was

136. *Gouarré Patte v. Andorra*, no. 33427/10, § 35, 12 January 2016.

137. *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, ECHR 2016.

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

139. *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.

mainly concerned with due process which was the object of Article 6. That said, once the *ne bis in idem* principle was to apply, there was an evident need for a “calibrated approach” to the manner in which that principle was to be applied to proceedings combining administrative and criminal penalties.

– The *Sergey Zolotukhin* judgment clarified that, whether the offences dealt with in separate proceedings were the same (*idem*) required a facts-based assessment (a prosecution or trial of a second “offence” was prohibited in so far as the latter arose from facts which were identical or substantially the same), rather than a formal assessment comparing the “essential elements” of the offences.

– That judgment also confirmed that Article 4 of Protocol No. 7 provided that, for the same offence, no one should be (i) liable to be tried; (ii) tried; or (iii) punished.

Otherwise, the *Sergey Zolotukhin* judgment was found to offer little guidance to situations such as in the present case where the proceedings had not in reality been duplicated (*bis*) but combined rather in an integrated manner so as to form a coherent whole (what the Grand Chamber called “dual” proceedings).

(ii) The Grand Chamber therefore reviewed the Court's case-law (which pre- and post-dated the *Sergey Zolotukhin* judgment) on the application of the *ne bis in idem* principle to such dual proceedings.

That case-law was found to confirm that a State should be able to choose complementary legal responses to socially offensive conduct (such as in a traffic or tax context). This legal response would not amount to a duplication of proceedings proscribed by Article 4 of Protocol No. 7 if it was convincingly demonstrated that the dual proceedings were “sufficiently closely connected in substance and in time” in that they were “combined in an integrated manner so as to form a coherent whole” enabling the different aspects of the wrongdoing to be addressed in a foreseeable and proportionate manner so that the individual concerned was not subjected to injustice (a test largely drawn from, *inter alia*, *R.T. v. Switzerland*<sup>140</sup>, *Nilsson v. Sweden*<sup>141</sup>, as well as *Nykänen v. Finland*<sup>142</sup>).

As to what the Grand Chamber meant by “sufficiently connected in substance”, certain conditions would be determinative including whether: the different proceedings pursued complementary purposes

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140. *R.T. v. Switzerland* (dec.), no. 31982/96, 30 May 2000.

141. *Nilsson v. Sweden* (dec.), no. 73661/01, 13 December 2005.

142. *Nykänen v. Finland*, no. 11828/11, 20 May 2014.

addressing different aspects of the impugned conduct; the conduct of dual proceedings was foreseeable; the proceedings avoided duplication in the collection and assessment of evidence; and, importantly, whether the second sanction imposed took account of the first. It was also relevant that the administrative proceedings concerned a matter (such as traffic or tax offences) which differed from the hard-core of criminal law since the “criminal-head guarantees [of Article 6] will not necessarily apply with their full stringency”<sup>143</sup>.

As to “sufficiently connected in time”, the Grand Chamber clarified that that connection had to be sufficiently close to protect the individual from being subjected to uncertainty and delay and from proceedings becoming protracted over time.

(iii) Applying these principles to the facts of the present applications, the Grand Chamber was satisfied that, whilst different sanctions had been imposed on the applicants by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, both in substance and in time, “to consider them as forming part of an integral scheme of sanctions under Norwegian law” for failure to provide information for their tax returns. The dual proceedings did not constitute, therefore, a proscribed duplication of proceedings so there had been no violation of Article 4 of Protocol No. 7 to the Convention.

(iv) It remains to be seen to what extent these principles will apply to consecutive proceedings for the same conduct.

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

The backdrop to the judgment in *Khlaifia and Others*, cited above<sup>144</sup>, was the 2011 migration crisis and the consequent challenges confronting the receiving State.

The judgment explores in some detail the Convention rights of immigrants against the background of the migration and humanitarian crisis that unfolded in 2011, when events related to the “Arab Spring” led to a mass influx of immigrants into certain States (here, the island of Lampedusa) leading to significant pressures on the receiving State.

143. *Jussila v. Finland* [GC], no. 73053/01, § 43, ECHR 2006-XIV.

144. *Khlaifia and Others v. Italy* [GC], no. 16483/12, ECHR 2016, see also under Article 3 (Inhuman or degrading treatment) above.

The case concerned the arrival of the applicants, three Tunisian economic migrants, on the island of Lampedusa, their initial placement in a reception centre and their subsequent confinement on board two ships moored in Palermo harbour, followed by their removal to Tunisia in accordance with a simplified procedure under an agreement between Italy and Tunisia of April 2011. The applicants complained, *inter alia*, under Article 4 of Protocol No. 4.

The Grand Chamber found no violation of that provision.

The Court's examination of the complaint under Article 4 of Protocol No. 4 is informed by a useful review of its case-law (notably, *Čonka v. Belgium*<sup>145</sup>; *Hirsi Jamaa and Others*, cited above<sup>146</sup>; *Georgia v. Russia (I)*<sup>147</sup>; and *Sharifi and Others v. Italy and Greece*<sup>148</sup>) which requires a sufficiently individualised examination of the particular case of each individual alien.

The Grand Chamber specifically addressed the impact of the migration crisis. It reiterated that problems with the management of migratory flows or with the reception of asylum-seekers could not justify recourse to practices which were not compatible with the Convention or the Protocols thereto (citing *Hirsi Jamaa and Others*, § 179). The Grand Chamber went on, nevertheless, to confirm that it had “taken note of the ‘new challenges’ facing European States in terms of immigration control as a result of the economic crisis, recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East, and the fact that migratory flows are increasingly arriving by sea”.

The basis upon which the Grand Chamber concluded as to no violation of Article 4 of Protocol No. 4 is also novel, focusing as it did on the individual review which *could have taken place*. In particular, the Grand Chamber pointed out that Article 4 of Protocol No. 4 did not guarantee the right to an individual interview in all circumstances: “the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State.” Since the applicants had undergone identification on two occasions; since their nationality had been established; and, most importantly,

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145. *Čonka v. Belgium*, no. 51564/99, ECHR 2002-I.

146. *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.

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

148. *Sharifi and Others v. Italy and Greece*, no. 16643/09, 21 October 2014.

since they had at all times had a genuine and effective possibility of submitting arguments against their expulsion had they wished to do so, the Grand Chamber considered that their expulsion (which was virtually simultaneous) could not be described as a collective one.

As regards Article 13 of the Convention in conjunction with Article 4 of Protocol No. 4, it is important to note that the Grand Chamber clarified when Article 13 requires a suspensive remedy to challenge an expulsion as a collective one.

In particular, and clarifying the case of *De Souza Ribeiro v. France*<sup>149</sup> where this question was addressed in 2012, the Grand Chamber confirmed that, when an applicant alleges that an expulsion procedure was “collective” in nature but does not claim at the same time that it had exposed him or her to a risk of irreversible harm in the form of a violation of Articles 2 or 3 of the Convention, then the Convention does not impose an absolute obligation on a State to guarantee an automatically suspensive remedy, but merely requires that the person concerned should have an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum. The lack of suspensive effect, without therefore a claim of a risk of treatment contrary to Articles 2 or 3, was found to not in itself constitute a violation of Article 13 of the Convention.

### **Right to an effective remedy (Article 13)**<sup>150</sup>

In *Mozer*<sup>151</sup>, cited above, the applicant, who had been detained since 2008, was convicted in 2010 of defrauding two companies and sentenced to seven years’ imprisonment, five of which were suspended. He was released on the basis of an undertaking not to leave the city of Tiraspol. On an unspecified date after July 2010, he went to Chişinău for medical treatment and, in 2011, to Switzerland, where he applied for asylum. He complained under Article 5 that his detention by the “MRT courts” had been unlawful. He also complained of his treatment in detention under, *inter alia*, Articles 3, 8 and 9 of the Convention, read alone and in conjunction with Article 13.

149. *De Souza Ribeiro v. France* [GC], no. 22689/07, §§ 82-83, ECHR 2012.

150. See also below *Paunović and Milivojević v. Serbia*, no. 41683/06, 24 May 2016, and *Khlaifia and Others v. Italy* [GC], no. 16483/12, ECHR 2016, under Article 4 of Protocol No. 4 (Prohibition of collective expulsion of aliens) above.

151. *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, 23 February 2016.

The Grand Chamber found that Russia had violated Articles 3, 5, 8, 9 and 13<sup>152</sup> of the Convention and that there had been no violation of those Articles by the Republic of Moldova.

The Grand Chamber found that Russia had violated Article 3 (the applicant's treatment in detention), Article 8 (restrictions on prison visits by the applicants' relatives) and Article 9 of the Convention (refusal to allow prison visits from a pastor). It went on to find a rather pragmatic solution to the associated Article 13 complaint. The applicant was found not to have had an effective remedy in the "MRT". However, the Grand Chamber found that the Republic of Moldova had fulfilled its positive obligations by providing a parallel system of remedies which, although not effective in Transdniestria itself, served to bring individual issues before the Moldovan authorities which could then be the subject of relevant diplomatic and legal steps by them. However, again by virtue of its effective control over the "MRT", the Russian Government's responsibility was engaged as regards the lack of effective domestic remedies available to the applicant in the "MRT".

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The judgment in *Kiril Zlatkov Nikolov*<sup>153</sup>, cited above, concerned the applicant's inability to benefit from a Constitutional Court ruling – which would have afforded him a remedy for alleged discrimination in the enjoyment of his fair-trial rights – as it did not apply with retrospective effect.

The applicant, a Bulgarian national, was charged with offences relating to international prostitution. Given the nature of the offences, his interview before the investigating judge was not recorded on video. According to the relevant provisions of the Code of Criminal Procedure at the material time, interviews automatically had to be recorded regardless of the offence unless it fell within the following categories: organised crime (the applicant's case); terrorism; and threats to fundamental national interests. The applicant succeeded in having this provision declared unconstitutional with reference to the principle of equality. However, the ruling of the Constitutional Court had no impact on his case given that, as found by the Court of Cassation, the ruling only benefited persons who were in the applicant's situation after the date of the publication of the ruling. In the Convention proceedings, the applicant complained among many other things that

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152. See also [Article 1](#) and [Article 5](#) above.

153. *Kiril Zlatkov Nikolov v. France*, nos. 70474/11 and 68038/12, 10 November 2016.

he had been discriminated against in the enjoyment of his right to a fair trial, contrary to Article 14 of the Convention read in conjunction with Article 6 and, under Article 13, that he had no effective remedy to contest the discriminatory application of the law to his own situation.

The Court's decision on this latter complaint is noteworthy in that it had to address the applicant's grievance that he was unable to benefit from the favourable ruling of the Constitutional Court, and was thus denied an effective remedy in breach of Article 13. Interestingly, the Court observed that the applicant's complaint might appear to not be manifestly ill-founded in view of the Constitutional Court's ruling. It noted, however, that a complaint which is declared inadmissible in application of the criteria laid down in Article 35 § 3 (b) could not be considered "arguable" for the purposes of Article 13 (see *Kudlička v. the Czech Republic*<sup>154</sup>). The complaint was therefore manifestly ill-founded.

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154. *Kudlička v. the Czech Republic* (dec.), no. 21588/12, 3 March 2015.





## OTHER RIGHTS AND FREEDOMS

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

#### **Private life<sup>155</sup>**

The judgment in *Dubská and Krejzová v. the Czech Republic*<sup>156</sup> concerned domestic law which allowed the applicants to have home births but rendered it unlawful for health professionals to assist.

The applicants wished to give birth at home assisted by midwives. Giving birth at home was not unlawful but midwives could have been sanctioned for assisting. The first applicant considered that the hospital had not respected her wishes when she gave birth to her first child so she gave birth to her second child at home; given the risk of sanctions, she could not find any medical assistance. The Constitutional Court rejected her complaint on procedural grounds (the majority expressed doubts as to the compliance of domestic law with Article 8 of the Convention and encouraged debate about the need for new legislation on this topic). The second applicant gave birth to her first two children at home with the assistance of a midwife. She had her third child in hospital: given the then existing risk of sanctions, she could not find a medical professional willing to assist a home birth. She considered that that hospital did not respect certain of her wishes.

Both applicants complained under Article 8 that Czech law did not allow health professionals to assist home births. The Grand Chamber held that there had been no violation of that provision.

The case is interesting because it addresses the proportionality of domestic law which allows home births but which prevents (through sanctions) health professionals from assisting. It is to be distinguished from *Ternovszky v. Hungary*<sup>157</sup> where health professionals were dissuaded from assisting home births due to ambiguous legislation

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155. See also under Article 14 below, *Di Trizio v. Switzerland*, no. 7186/09, 2 February 2016.

156. *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, ECHR 2016.

157. *Ternovszky v. Hungary*, no. 67545/09, 14 December 2010.

and where the violation was therefore limited to a finding that the impugned interference was not “in accordance with the law”. Two points are worth noting.

(i) The Grand Chamber acknowledged that “giving birth is a unique and delicate moment in a woman’s life”. It confirmed, in line with *Ternovszky*, that giving birth (encompassing as it does issues of physical and moral integrity, medical care, reproductive health and protection of health-related information) and the choice of birth place, are fundamentally linked to a woman’s private life and fall within the scope of Article 8 of the Convention.

(ii) The Grand Chamber found that the interference with the applicants’ right to respect for their private lives was not disproportionate to the legitimate aim of protecting the health and safety of mother and child during and after delivery.

A key element in this balancing exercise was the finding that the margin of appreciation accorded to the State was wide. The case concerned an important public interest in the area of public health (the laying down of rules for the functioning of a health-care system incorporating both public and private institutions) and, further, a complex subject of health-care policy requiring an assessment of scientific and expert data concerning the respective risks of home and hospital births. Social and economic policy was also relevant as a home-birth framework would have budgetary implications. Moreover, there was no European consensus capable of narrowing the State’s margin of appreciation.

A further element in this assessment was the Court’s acceptance that the risks for mother and baby, even with a health professional attending, were higher in a home-birth context.

Finally, while the applicants’ concerns about the conditions in which they would give birth in hospital could not be disregarded, the Grand Chamber referred to certain domestic initiatives which had been taken to seek to improve matters and invited, as the Chamber had done, the authorities to “make further progress by keeping the relevant legal provisions under constant review so as to ensure that they reflect medical and scientific developments whilst fully respecting women’s rights in the field of reproductive health, notably by ensuring adequate conditions for both patients and medical staff in maternity hospitals across the country”.

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The issue in *Kahn v. Germany*<sup>158</sup> was whether an award of damages was an inevitable consequence of an infringement of an applicant's personality rights.

The applicant minors were the children of a famous national sports personality. They successfully obtained a court order against a publisher requiring it to refrain from publishing photographs of them on pain of payment of a fine. The publisher repeatedly breached the injunction and on three occasions was made to pay a fine, although in a lesser amount than requested by the applicants. The fines were paid to the State. The applicants meanwhile sought compensation for breach of their personality rights. Their civil action was dismissed. Ultimately the Constitutional Court accepted the view of the civil courts that, given the nature of the breach of the applicants' personality rights, their recourse to the fines procedure and the imposition of fines on the publisher was in the circumstances a sufficient and preventive form of just satisfaction.

In the Convention proceedings, the applicants contended that the circumstances of the case disclosed a failure on the part of the respondent State to respect their right to respect for their private life, in breach of Article 8. They criticised in particular the domestic courts' rejection of their compensation claim. The Court ruled against them.

The judgment is noteworthy in that the Court had to decide whether an award of damages should inevitably follow from a breach of Article 8 in the circumstances alleged by the applicants, namely the unauthorised publication of photographs of minors notwithstanding the publisher's repeated disobedience of court orders not to publish. On that point, the Court stressed the importance of the margin of appreciation available to States when determining their response to such circumstances. On the facts of the applicants' case, it observed, among other things, that the domestic courts had on each occasion considerably increased the amount of the fine to be paid by the publisher and that the applicants had not availed themselves of the possibility to appeal against the level of the fine in order to have it increased. It also had regard to the domestic courts' findings that the infringement of the applicants' right was not so serious as to warrant the payment of damages to them, stressing that domestic law did not exclude the payment of damages in all circumstances. In this connection, it observed that the applicants' faces had been obscured in the photographs, or were not visible in

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158. *Kahn v. Germany*, no. 16313/10, 17 March 2016.

them, and the purpose of publishing them was to draw attention to their parents' troubled relationship. Finally, the fines procedure offered the advantages of speed and simplicity, being triggered by the mere fact of the publication of the photos.

The Court's conclusion is of interest. It noted that Article 8 of the Convention could not be construed as requiring in all circumstances the payment of monetary compensation to a victim of a breach of personality rights. It was open to States to envisage other redress mechanisms to secure the protection of such rights, such as a prohibition-on-publishing order backed up by a fines procedure. The fact that the fines were paid to the State and not to the victim could not be seen to be a disproportionate limitation on the efficacy of such mechanism.

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The *Vasileva v. Bulgaria*<sup>159</sup> judgment concerned a claim for damages by a patient against a surgeon and hospital following an operation. Various expert medical reports were produced in the proceedings. After examining the reports (with the exception of a report that had been prepared by a surgeon employed by the defendant hospital), the domestic courts found no evidence of negligence by the surgeon.

In the Convention proceedings, the applicant complained, *inter alia*, of a lack of impartiality on the part of the medical experts in the malpractice proceedings and, in particular, of the experts' lack of objectivity regarding surgical procedures carried out by a fellow practitioner. The complaint was examined under Article 8.

The Court found, in the first place, that the Convention does not require a special mechanism to be put in place to facilitate the bringing of medical malpractice claims or a reversal of the burden of proof when the burden is borne by the claimants. In that connection, the Court observed that unjustifiably exposing medical practitioners to liability was detrimental to both practitioners and patients.

Secondly, recourse to medical experts in cases of this type was consistent with the Convention, which does not require medical evidence to be obtained from specialised institutions.

The interest of the case lies in the Court's examination of the safeguards in place under the domestic law to ensure the reliability of evidence produced by medical experts.

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159. *Vasileva v. Bulgaria*, no. 23796/10, 17 March 2016.

The Court considered in detail both the domestic rules governing the experts' objectivity and the domestic courts' role and powers with respect to medical experts and their reports.

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The *Sousa Goucha v. Portugal*<sup>160</sup> judgment concerned a well-known celebrity who alleged that he had been defamed during a television comedy show shortly after making a public announcement concerning his sexual orientation.

The late-night show was intended to be humorous and included a quiz in which guests were asked to choose the best female television host from a list of names including the applicant's. The applicant's name was deemed to be the right answer. The applicant lodged a criminal complaint against the television company for defamation and insult, arguing that it had damaged his reputation by creating confusion between his gender and sexual orientation.

The domestic courts found that a reasonable person would not have perceived the joke as defamatory because, even if it was in bad taste, it was not intended to criticise the sexual orientation of the applicant, a public figure. The joke referred to certain visible characteristics of the applicant which could be attributed to the female gender, and had been made in the context of a comedy show known for its playful and irreverent style. The criminal proceedings were therefore discontinued.

The Court examined the application under Article 8 of the Convention, the main issue being whether, in the context of its positive obligations, the State had achieved a fair balance between the right to protection of reputation and the right to freedom of expression. Endorsing the approach adopted by the domestic authorities' in the instant case, the Court noted that in *Nikowitz and Verlagsgruppe News GmbH v. Austria*<sup>161</sup> it had introduced the criterion of the reasonable reader in cases involving satire.

The Court clarified the scope of its examination in cases relating to comedy shows, observing that the States enjoy a wide margin of appreciation when dealing with parody.

Unlike the position in other cases concerning satirical forms of expression (see, for example, *Alves da Silva v. Portugal*<sup>162</sup>, and *Welsh and*

160. *Sousa Goucha v. Portugal*, no. 70434/12, 22 March 2016.

161. *Nikowitz and Verlagsgruppe News GmbH v. Austria*, no. 5266/03, 22 February 2007.

162. *Alves da Silva v. Portugal*, no. 41665/07, 20 October 2009.

*Silva Canha v. Portugal*<sup>163</sup>), the joke in the applicant's case had not been made in the context of a debate of public interest. The Court stated that in such circumstances an obligation could arise under Article 8 for the State to protect a person's reputation where the statement went beyond the limits of what was considered acceptable under Article 10.

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The judgment in *R.B. v. Hungary*<sup>164</sup> concerned the procedural obligation to investigate racial abuse and threats directed at an individual of Roma origin.

The applicant, who is of Roma origin, complained to the authorities that she had been subjected to racial and threatening abuse by a person taking part in police-supervised anti-Roma marches organised in her neighbourhood over a period of several days. The prosecuting authorities ultimately discontinued their investigation into the applicant's complaint because they were unable to establish whether the accused's act had given rise to the domestic-law offences of harassment or violence against a member of a group.

In the Convention proceedings, the applicant alleged, among other things, breaches of Articles 3, 8 and 14 of the Convention. The Court found a violation of Article 8 on account of the inadequacy of the investigation into the applicant's allegations of racially motivated abuse. The judgment is noteworthy for the following reasons.

In the first place, the Court found that the accused's utterances and acts, although overtly discriminatory and to be seen in the light of the anti-Roma rally in the applicant's locality, were not so severe as to cause the kind of fear, anguish or feelings of inferiority needed to engage Article 3 (compare and contrast cases in which sectarian and homophobic abuse were accompanied by physical violence: *P.F. and E.F. v. the United Kingdom*<sup>165</sup>; *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*<sup>166</sup>; and *Identoba and Others v. Georgia*<sup>167</sup>). The complaint under Article 3 was therefore manifestly ill-founded.

Secondly, the Court's finding of a procedural breach of Article 8 represents a new development in the case-law in this area. For the

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163. *Welsh and Silva Canha v. Portugal*, no. 16812/11, 17 September 2013.

164. *R.B. v. Hungary*, no. 64602/12, 12 April 2016.

165. *P.F. and E.F. v. the United Kingdom* (dec.), no. 28326/09, 23 November 2010.

166. *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, 3 May 2007.

167. *Identoba and Others v. Georgia*, no. 73235/12, 12 May 2015.

Court, the applicant was racially abused and threatened because she belonged to the Roma community. Her ethnic identity was an aspect of her private life and the abuse and threats to which she had been subjected, bearing in mind the overall anti-Roma hostility deliberately generated by the marchers in her neighbourhood, necessarily interfered with her right to respect for her private life. In the Court's view, the authorities were required to take all reasonable steps to unmask any racist motive in the incident complained of and to establish whether or not ethnic hatred or prejudice may have played a role in it. They had failed to do so in the applicant's case since the investigation carried out into alleged violence of a member of an ethnic group was too narrow in its scope (the police limited themselves to assessing whether the accused's threats had been directed against the applicant or uttered "in general") and was confined by the terms of the relevant criminal law (the provision of the Criminal Code on harassment did not contain any element alluding to racist motives).

Thirdly, the judgment is another illustration of the Court's condemnation of racism. It emphasised in the judgment that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies ... Moreover, ... in situations where there is evidence of patterns of violence and intolerance against an ethnic minority ..., the positive obligations incumbent require a higher standard of States to respond to alleged bias-motivated incidents".

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The judgment in *Biržietis v. Lithuania*<sup>168</sup> concerned the absolute prohibition on growing a beard in prison.

The applicant, who was a prisoner at the time, complained of the absolute prohibition on growing a beard irrespective of its length or tidiness, as contained in the internal rules of the prison where he served his sentence. His objection to the prohibition was ultimately rejected by the Supreme Administrative Court on the ground that the wish of a prisoner to grow a beard could not be considered a matter of fundamental rights unless linked to the exercise of a relevant right such as the freedom of religion (which was not in issue in the applicant's case). It further held that the impugned prohibition could be justified

168. *Biržietis v. Lithuania*, no. 49304/09, 14 June 2016.

as a necessary and proportionate measure in view of the prison authorities' need to be able to identify prisoners quickly.

The Court found that Article 8 had been breached. The following points are worthy of note.

In the first place, the Court, disagreeing with the domestic court, observed that the choice to grow a beard should be seen as part of one's personal identity and therefore fell within the scope of private life. Article 8 was therefore applicable. In its conclusion on the violation of Article 8, it further observed that the applicant's decision on whether or not to grow a beard "was related to the expression of his personality and individual identity [which was] protected by Article 8 of the Convention".

Secondly, on the question of the necessity of the absolute prohibition, the Court noted that the ban did not appear to cover other types of facial hair, for example moustaches, thus raising concerns about the arbitrariness of its application. It was of particular importance for the Court's finding of a breach that the Government had failed to demonstrate the existence of a pressing social need to justify the prohibition. Significantly, it noted that the Parliamentary Ombudsman had concluded in a case similar to the applicant's that the prohibition could not be justified by considerations of hygiene or by the need to identify prisoners.

The Court's judgment is a further illustration of the flexibility of the notion of "private life" and a confirmation of the established case-law that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention, save for the right to liberty. There is no question that a prisoner forfeits his or her Convention rights merely because of his or her status as a person detained following conviction. The circumstances of imprisonment, in particular considerations of security and the prevention of crime and disorder, may justify restrictions on those rights; nonetheless, any restriction must be justified in each individual case (see, for example, *Dickson v. the United Kingdom*<sup>169</sup>).

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The judgment in *B.A.C. v. Greece*<sup>170</sup> concerned an asylum-seeker's prolonged state of uncertainty over his asylum status and the precarious personal situation caused by it.

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

170. *B.A.C. v. Greece*, no. 11981/15, 13 October 2016.



The applicant, a Turkish national, arrived in Greece in 2002. His asylum request – based on his alleged torture in Turkey on account of his political views – was rejected. He appealed to the competent minister. In January 2003 the Consultative Commission on Asylum gave a positive opinion on his request. However the minister had not at the date of the Court’s judgment taken a position on the request. No reasons had been given for this. Meanwhile, Turkey had requested the applicant’s extradition. The request was ultimately rejected by the Greek Court of Cassation in 2013 with reference to the risk of ill-treatment which the applicant would face if returned to Turkey.

In the Convention proceedings the applicant alleged among other things that there had been a breach of his right to respect for his private life having regard to the lengthy period of uncertainty he had had to endure coupled with the precariousness of his personal situation. The Court agreed with the applicant. The judgment is noteworthy in that it is unusual for the Court to find a breach of Article 8 on account of the length of time taken to process an asylum request to its conclusion. In *Jeunesse v. the Netherlands*<sup>171</sup>, it stressed that, where a Contracting State tolerates the presence of an alien in its territory thereby allowing him or her to await a decision on an application for a residence permit, an appeal against such a decision or a fresh application for a residence permit, such a Contracting State enables the alien to take part in the host country’s society, to form relationships and to create a family there. However, this did not automatically entail that the authorities of the Contracting State concerned were, as a result, under an obligation pursuant to Article 8 of the Convention to allow him or her to settle in their country.

The Court’s finding in the instant case must be seen in context. As to the question of uncertainty, it drew attention to the following considerations: the lengthy silence of the minister on the applicant’s request; the above-mentioned favourable opinion issued by the Consultative Commission on Asylum on the applicant’s request; the rejection of Turkey’s extradition request. The uncertainty which the applicant had experienced and continued to experience over his status was of a different dimension to that felt by an applicant awaiting the outcome of his or her asylum proceedings, it being understood, the Court stressed, that such proceedings must be concluded within a reasonable time (see paragraph 39 of the judgment in this connection

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171. *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 103, 3 October 2014.

and the support found in *M.S.S. v. Belgium and Greece*<sup>172</sup>, cited above). As to the precariousness of the applicant's situation, it further observed among other things that owing to his unresolved status the applicant faced restrictions in obtaining access to the job market, opening a bank account, acquiring a tax number and pursuing university studies.

For the Court, the authorities had failed to secure the applicant's right to respect for his private life by not putting in place an effective and accessible procedure which would have allowed the applicant's asylum request to be examined within a reasonable time, thus reducing as much as possible the precariousness of his situation.

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The judgment in *Vukota-Bojić v. Switzerland*<sup>173</sup> concerned the use in social-insurance proceedings of data compiled by private investigators on the applicant's movements.

The applicant was injured in a road accident. The accident gave rise to various disputes regarding her capacity to work, the causal link between the alleged extent of her disability and the accident, and the amount of benefits to which she was entitled. The insurance company handling the applicant's case, acting within the framework of powers conferred on it under the State insurance scheme, decided to place her under surveillance. Private investigators commissioned by the insurance company monitored the applicant's movements on four different dates over a period of twenty-three days. The insurance company sought to use the detailed surveillance reports in court proceedings in order to contest the level of disability alleged by the applicant and the accuracy of the medical reports she relied on. As to the lawfulness of the monitoring of the applicant's movements by private investigators, the Federal Court ultimately ruled that the measure had been lawful and the evidence so obtained could be admitted in evidence in the insurance proceedings.

In the Convention proceedings the applicant alleged among other things that the legal provisions which had served as the basis of her surveillance lacked clarity and precision, which meant that the interference with her right to respect for her private life had been unlawful and therefore in breach of Article 8 of the Convention.

The Court ruled in favour of the applicant, finding that the interference was not "in accordance with the law". The judgment is

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172. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 262, ECHR 2011.

173. *Vukota-Bojić v. Switzerland*, no. 61838/10, 18 October 2016.

of interest in that the Court concluded that the acts of surveillance and hence the interference with the applicant's Article 8 right were attributable to the State. It noted that the insurance company, although a private body, was implementing the State insurance scheme under delegated powers and was regarded in domestic law as a public authority. On that account the applicant's case was to be distinguished from the earlier case of *De La Flor Cabrera v. Spain*<sup>174</sup>, where the Court was called upon to decide whether Spain had discharged its positive obligations to secure the right to respect for private life in the context of surveillance measures ordered by a private insurance company with no link to the State.

The judgment is also noteworthy as regards the Court's approach to the issue of "interference" given that the monitoring of her activities was limited to the video-recording and photographing of her behaviour in public when going about her business. On that point the Court noted (paragraph 58):

"... the applicant was systematically and intentionally watched and filmed by professionals acting on the instructions of her insurance company on four different dates over a period of twenty-three days. The material obtained was stored and selected and the captured images were used as a basis for an expert opinion and, ultimately, for a reassessment of her insurance benefits."

Finally, the Court's assessment of the legal basis for the surveillance is of significance given the circumstances of the case, and in particular its acceptance that the surveillance must be seen to have interfered less with her private life than, for instance, telephone tapping.

The Court was critical of the following shortcomings in the level of safeguards in place to prevent abuse: the legislative framework had failed to indicate any procedures to be followed for the authorisation or supervision of the implementation of secret surveillance measures in the specific context of insurance disputes; in the absence of any details as regards the maximum duration of the surveillance measures or the possibility of their judicial challenge, insurance companies (acting as public authorities) were granted a wide discretion in deciding on the circumstances which justified surveillance measures and their duration; the legal provisions were silent on the procedures to be followed for storing, accessing, examining, using, communicating or destroying the data collected by means of secret surveillance. The Court also attached weight to the fact that in the applicant's case a number of matters remained unclear: (i) the place and length of storage of the report

174. *De La Flor Cabrera v. Spain*, no. 10764/09, 27 May 2014.

containing the impugned footage and photographs, (ii) the persons who could access it, and (iii) the existence of legal means of contesting the handling of said report.

### **Private and family life**

The *Ramadan v. Malta*<sup>175</sup> judgment concerned the issue of revocation of acquired citizenship.

The applicant, an Egyptian national at the time, acquired Maltese citizenship by reason of his marriage to a Maltese national in 1993. A child was born of the marriage. The marriage was annulled in 1998. The applicant subsequently remarried in Malta, this time to a Russian national with whom he had two children, both of whom were Maltese nationals. The authorities revoked the applicant's citizenship in 2007 on the ground that his marriage to the Maltese citizen had been simulated since the only reason he had married her had been to acquire Maltese citizenship. The applicant, who was represented by a lawyer, was heard by the authorities before they came to their decision and he later unsuccessfully mounted a constitutional challenge to that decision.

The applicant contended that the decision to deprive him of his Maltese citizenship breached his rights under Article 8 of the Convention, asserting among other things that he was now stateless since he had had to renounce his Egyptian citizenship in order to become a citizen of Malta and was now at risk of removal. The Court found otherwise.

In previous cases, the Court had observed that, although the right to citizenship is not as such guaranteed by the Convention or its Protocols, it could not be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of its impact on the private life of the individual (see *Karassev v. Finland*<sup>176</sup>, *Slivenko and Others v. Latvia*<sup>177</sup>, *Savoia and Bounegru v. Italy*<sup>178</sup> and *Genovese v. Malta*<sup>179</sup>). Although most of the cases concerning citizenship brought before the Court had concerned applicants claiming the right to acquire citizenship and the denial of

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175. *Ramadan v. Malta*, no. 76136/12, ECHR 2016 (extracts).

176. *Karassev v. Finland* (dec.), no. 31414/96, ECHR 1999-II.

177. *Slivenko and Others v. Latvia* (dec.) [GC], no. 48321/99, § 77, ECHR 2002-II (extracts).

178. *Savoia and Bounegru v. Italy* (dec.), no. 8407/05, 11 July 2006.

179. *Genovese v. Malta*, no. 53124/09, § 30, 11 October 2011.

recognition of such citizenship, this was the first case in which the Court had had to address the revocation of citizenship. Significantly, the Court observed that the loss of citizenship already acquired or born into can have the same (and possibly a bigger) impact on a person's private and family life. On that account there was no reason to distinguish between the two situations and the same test should therefore apply. Thus, an arbitrary revocation of citizenship might in certain circumstances raise an issue under Article 8 because of its impact on the private life of the individual.

The Court's analysis of whether or not the decision to revoke the applicant's Maltese citizenship complied with Article 8 was based on two considerations: firstly, whether the decision to withdraw the applicant's citizenship was arbitrary and, secondly, the impact of the decision on the applicant's situation.

As to the former, it noted that there was a clear legal basis for revoking the applicant's citizenship and the applicant had been afforded hearings and remedies consistent with procedural fairness. It is noteworthy that the Court addressed the delay in adopting the decision given the time that had elapsed between the annulment of the applicant's marriage and the adoption of the revocation decision. On that point it noted among other things that any delay had not disadvantaged the applicant, who had continued to benefit from the situation complained of (compare *Kaftailova v. Latvia*<sup>180</sup>), bearing in mind also that that situation had come about as a result of the applicant's fraudulent behaviour and any consequences complained of were to a large extent a result of his own choices and actions (compare *Shevanova v. Latvia*<sup>181</sup>).

As regards the consequences of the withdrawal of citizenship, it observed among other things that the applicant was not currently at risk of removal from Malta (and therefore not a victim of a breach of Article 8 in so far as the removal order was concerned); he had been able to pursue his business activities and to reside in Malta and it was still open to him to apply for a work permit and a residence permit in Malta, which could eventually make him eligible for citizenship; he had not substantiated his claim that he had relinquished his Egyptian nationality nor demonstrated that he would not be able to reacquire it if he had done so.

180. *Kaftailova v. Latvia* (striking out) [GC], no. 59643/00, § 53, 7 December 2007.

181. *Shevanova v. Latvia* (striking out) [GC], no. 58822/00, § 49, 7 December 2007.

## Family life<sup>182</sup>

The judgment in *Paposhvili*<sup>183</sup>, cited above, concerned the deportation of a seriously ill foreigner who risked being separated from his wife and three children.

The applicant, a Georgian national, faced deportation and a ban on re-entering Belgium for ten years on public-interest grounds (he had several criminal convictions). While in prison, he was diagnosed and treated for serious illnesses. Since the domestic proceedings he brought to challenge his removal on medical grounds were unsuccessful, he complained to the Court, *inter alia* under Article 8 of being separated from his wife and three children who had been granted indefinite leave to remain in Belgium. The applicant died in June 2016.

The Grand Chamber found that his removal would have violated Article 8.

The Grand Chamber reiterated the procedural obligation under that provision to assess the impact of the applicant's removal on his family life given his state of health and, notably, clarified that the authorities should have examined whether, in the light of the applicant's specific situation at the time of removal, the family could reasonably have been expected to follow him to Georgia or, if not, whether observance of the applicant's right to respect for his family life required that he be granted leave to remain in Belgium for the time he had left to live. His removal without an assessment of these factors would have given rise to a violation of Article 8 of the Convention.

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The *Kocherov and Sergeeva v. Russia*<sup>184</sup> judgment concerned the obligations of national courts when restricting the parental rights of parents with disabilities.

The first applicant, who had a mild intellectual disability, lived for twenty-nine years in a neuropsychological care home. He married a fellow resident of the home who had been deprived of her legal

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182. See also, under [Article 1](#), [Article 5](#) and [Article 13](#), *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, ECHR 2016, under [Article 3](#), *A.B. and Others v. France*, no. 11593/12, 12 July 2016, and *Paposhvili v. Belgium* [GC], no. 41738/10, 13 December 2016, and, under [Article 8](#) and [Article 14](#), *Di Trizio v. Switzerland*, no. 7186/09, 2 February 2016, and *Pajić v. Croatia*, no. 68453/13, 23 February 2016.

183. *Paposhvili v. Belgium* [GC], no. 41738/10, ECHR 2016, see also under [Article 3](#) above.

184. *Kocherov and Sergeeva v. Russia*, no. 16899/13, 29 March 2016.

capacity on mental-health grounds. The couple had a daughter (the second applicant) who was placed in a children's home as a child without parental care. The first applicant was registered as her father. He consented to her staying at the children's home until it became possible for him to take care of her. Throughout the second applicant's stay there, he maintained regular contact with her. His marriage to the second applicant's mother was declared void shortly afterwards because of her legal incapacity.

The first applicant left the care home to move into social housing and expressed his intention to have the second applicant live with him under his care. However, the children's home applied for a court order restricting his parental authority, arguing that the second applicant had difficulties in communicating with her parents and that she felt anxiety and stress in their presence. The first applicant produced an expert report on his discharge from the care home which concluded that his state of health enabled him to exercise fully his parental authority. He also produced a report by the custody and guardianship authority which described the living conditions in his accommodation as appropriate for his daughter.

The district court decided to restrict for the time being the first applicant's parental authority over his daughter. Relying in particular on statements by the representatives of the children's home, it found that the first applicant was not yet ready to look after his daughter, who therefore had to remain in public-authority care. The district court's decision was upheld on appeal. The first applicant then lodged an application with the Court.

A year later, after the commencement of the Convention proceedings and after the first applicant's wife had recovered her legal capacity and the couple had remarried, the restriction on the first applicant's parental authority was finally lifted.

The Court examined the case under Article 8. It is of interest that, while it found the reasons relied on by the domestic courts to be relevant, it considered them insufficient to justify such an interference with the applicant's family life. The Court closely examined the reasoning of the domestic courts in order to determine whether the interference was proportionate to the pursued legitimate aim of child protection.

It found that the first applicant's prolonged residence in a specialist institution could not by itself be regarded as a sufficient ground to prevent him from recovering his parental authority. Domestic courts had to take into account and analyse, in the light of the adduced

evidence, parents' emotional and mental maturity and their ability to take care of their children. In the instant case, the first applicant's evidence had never been challenged by his adversary, who had not produced other evidence calling it into question. A mere reference to the first applicant's diagnosis, without taking into account his aptitude to be a parent and his actual living conditions, was not a "sufficient" reason to justify a restriction on his parental authority. Likewise, the mother's legal incapacity could not by itself justify the refusal of the first applicant's request. The domestic courts should have decided the case by reference to the first applicant's behaviour and given valid and sufficient reasons for rejecting his request.

The judgment thus highlights the obligation Article 8 imposes on national courts to have regard to the interests of disabled parents and to fully examine their arguments when their parental rights are challenged by official child-protection authorities.

## Home

The *Ivanova and Cherkezev v. Bulgaria*<sup>185</sup> judgment concerned the imminent execution of a demolition order and the scope of the protection afforded to a home with no planning permission.

The applicants built a house without planning permission. The local authority served a demolition order on them. The first applicant brought judicial review proceedings to challenge the lawfulness of the order arguing, among other things, that the execution of the order would entail for her the loss of her only home. The domestic courts ruled against her, finding that the house had been built unlawfully and its construction could not be legalised under the transitional amnesty provisions of the governing legislation.

The Court found that the circumstances of the case gave rise to a breach of Article 8 of the Convention but no breach of Article 1 of Protocol No. 1. Its reasoning for so doing is interesting in that it illustrates the difference in the interests protected by the respective provisions and hence the scope of protection afforded by them, especially when it comes to the application of the proportionality requirement to the facts of a particular case.

As to the Article 8 complaint, the Court essentially focused on whether the demolition would be "necessary in a democratic society". Its approach to that question was informed by its judgments in

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185. *Ivanova and Cherkezev v. Bulgaria*, no. 46577/15, 21 April 2016. See also under Article 1 of Protocol No. 1 below.



previous cases in which it had read into domestic procedures to evict tenants from public-sector housing (see, for example, *McCann v. the United Kingdom*<sup>186</sup>; *Paulić v. Croatia*<sup>187</sup>; and *Kay and Others v. the United Kingdom*<sup>188</sup>) or occupiers from publicly owned land (see, for example, *Chapman v. the United Kingdom*<sup>189</sup>) a requirement to afford due respect to the interests protected by Article 8, given that the loss of one's home is an extreme form of interference with the right to respect for one's home (see, for example, *McCann*, § 49), regardless of whether the person concerned belongs to a vulnerable group.

This is the first case in which the Court has applied that requirement – essentially an individualised proportionality assessment – to the imminent loss of one's home consequent to a decision to demolish it on the ground that it had been knowingly constructed in breach of planning regulations.

The Court's finding of a breach of Article 8 was based on the fact that the domestic courts were only required to have regard to the matter of illegality, and they confined themselves to that issue to the exclusion of any consideration of the possible disproportionate effect of the implementation of the demolition order on the applicants' personal situation.

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The judgment in *K.S. and M.S. v. Germany*<sup>190</sup> concerned a search of the applicants' home on the basis of a warrant issued on the strength of evidence allegedly obtained in breach of domestic and international law.

The German tax authorities instigated proceedings against the applicants for suspected tax evasion. The proceedings were triggered following receipt of information about the applicants' assets held in a Liechtenstein bank. The information (together with data relating to many other account holders domiciled in Germany for tax purposes) had been illegally copied by an employee of the bank and purchased by the German secret service before finding its way to the tax authorities. Relying on this information, a prosecutor obtained a warrant from a court for a search of the applicants' home. The

186. *McCann v. the United Kingdom*, no. 19009/04, § 46, ECHR 2008.

187. *Paulić v. Croatia*, no. 3572/06, 22 October 2009.

188. *Kay and Others v. the United Kingdom*, no. 37341/06, 21 September 2010.

189. *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I.

190. *K.S. and M.S. v. Germany*, no. 33696/11, 6 October 2016.

applicants' challenge to the lawfulness of the search was ultimately dismissed by the Federal Constitutional Court, which found it to be settled case-law that there was no absolute rule that evidence which had been acquired in violation of procedural rules could not be used in criminal proceedings. The Federal Constitutional Court did not find it necessary to decide whether the data had been obtained in breach of international and domestic law, as the lower court was prepared to assume that the evidence might in fact have been acquired unlawfully. In the Convention proceedings the applicants invoked Article 8 of the Convention.

The Court found that the Convention had not been breached. The judgment is of interest in that the Court had to address the question whether an interference with the right to respect for one's home could be considered lawful ("in accordance with the law") notwithstanding that the interference had its origin in information which had been (allegedly) obtained in breach of domestic and international law.

In the context of Article 6 of the Convention the Court has repeatedly found that the admission and use of evidence obtained in breach of domestic law did not automatically give rise to unfairness (see, for example, *Bykov v. Russia*<sup>191</sup>). This would appear to be the first occasion on which the Court has had to determine whether such evidence undermined the lawfulness requirement of Article 8.

It held that in view of the answer provided by the Constitutional Court to the applicants' complaint (see above), the interference had a basis in domestic law (the relevant provisions of the Code of Criminal Procedure) and that the applicants had been able to foresee – if necessary with the aid of legal advice – that the domestic authorities would consider that the search warrant could be based on the Liechtenstein data despite the fact that they may have been acquired in breach of domestic or international law.

The Court returned to this issue when examining the necessity test, in particular the existence of safeguards to avoid arbitrariness and to ensure respect for the proportionality principle in the issue and execution of the warrant (see, for example, *Société Colas Est and Others v. France*<sup>192</sup> and *Buck v. Germany*<sup>193</sup>). It observed among other things that the search had been ordered by a judge; the evidence relied on had not been the result of a serious deliberate or arbitrary breach of procedural

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191. *Bykov v. Russia* [GC], no. 4378/02, §§ 89-91, 10 March 2009.

192. *Société Colas Est and Others v. France*, no. 37971/97, § 48, ECHR 2002-III.

193. *Buck v. Germany*, no. 41604/98, § 45, ECHR 2005-IV.

rules which systematically ignored constitutional safeguards; and the lawfulness of the warrant was the subject of *ex post facto* judicial review. On the proportionality issue, it was noted, *inter alia*, that the Liechtenstein data were the only evidence available at the relevant time that suggested that the applicants might have evaded paying tax, and the search warrant appeared to have been the only means of establishing whether the applicants were in fact liable for tax evasion, a serious offence. There was no indication that the tax authorities at the relevant time had deliberately and systematically breached domestic and international law in order to obtain information relevant to the prosecution of tax crimes or were purposely acting in the light of any established domestic case-law confirming that unlawfully obtained tax data could be used to justify a search warrant. Furthermore, the German authorities, in issuing the search warrant, had not relied on real evidence obtained as a direct result of a breach of one of the core rights of the Convention. In view of these and other considerations, the Court concluded that the impugned evidence, even accepting that it was tainted with illegality, had not undermined the arguments in favour of the necessity of its use. Article 8 of the Convention had not been breached.

### Correspondence

The judgment in *D.L. v. Bulgaria*<sup>194</sup>, cited above, concerned, *inter alia*, the right of minors detained in a closed educational institution to communicate with the outside world. The applicant, a minor, was placed in a closed educational institution on account of, among other things, her antisocial behaviour and the risk that she would become further involved in prostitution.

In the Convention proceedings, the applicant alleged that her correspondence and telephone conversations with third parties were automatically and systematically monitored or supervised, in breach of Article 8. The Court found a breach of that provision.

The Court emphasised the distinction to be drawn between minors placed under educational supervision and prisoners when it comes to the application of restrictions on correspondence and telephone communications. The margin of appreciation enjoyed by the authorities is more restricted in the case of the former.

The Court observed that the monitoring of the applicant's correspondence with the outside world was automatically and

194. *D.L. v. Bulgaria*, no. 7472/14, 19 May 2016. See also [Article 5 § 1 \(d\)](#) above.

systematically enforced with no regard being had to the status of the addressee. While such a blanket control was of itself problematic when applied to a prisoner, the Court stressed the specific needs of young people placed in closed educational institutions who have not been convicted of criminal offences. The purpose of their confinement was to ensure that they are provided with education and assisted with their preparation for their return to society. The authorities were thus obliged to see to it that minors had sufficient contact with the outside world, including by means of written correspondence. In the instant case the restrictions imposed on the applicant were indiscriminate with the result that letters she might wish to send to or receive from her lawyer or an interested non-governmental organisation would not be treated as confidential. In addition, monitoring of correspondence was without limitation in time and the authorities were not required to justify the decisions they had taken.

The Court was equally critical of the restrictions placed on the applicant's use of the telephone. The telephone conversations of all minors in the institution were supervised with no assessment made of whether, for example, the correspondent was a family member or if a phone call could pose a possible risk to the security of the institution.

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

### **Freedom of religion<sup>195</sup>**

*İzzettin Doğan and Others v. Turkey*<sup>196</sup> concerned the State's obligation of impartiality and neutrality as regards religious beliefs.

The applicants are followers of the Alevi faith to whom the State authorities had refused to provide the same religious public service accorded to the majority of citizens who are of the Sunni branch of Islam. They complained under Article 9 that this implied an assessment of the Alevi faith by the national authorities in breach of the State's obligation of neutrality and impartiality, and under Article 14 that they had therefore received less favourable treatment than followers of the Sunni branch of Islam in a comparable situation.

The Grand Chamber found a violation of Article 9 taken alone and in conjunction with Article 14.

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195. See also, under [Article 5 § 1](#) above, *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, ECHR 2016.

196. *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, ECHR 2016.

The Grand Chamber did not confine itself to the discrimination complaint (Article 14 in conjunction with Article 9), but also found a separate violation of Article 9 alone (the negative obligation). In so doing, it found that the authorities' failure to recognise the religious nature of the Alevi faith (and of maintaining it within the banned Sufi orders) amounted to denying the Alevi community the recognition that would allow its members to "effectively enjoy" their right to freedom of religion in accordance with domestic legislation. In particular, it was found that the impugned refusal denied the autonomous existence of the Alevi community and made it impossible for its members to use their places of worship and the titles of their religious leaders.

In examining the Article 9 complaint, the Grand Chamber noted, at the outset, that it was not for the Court to express an opinion on the theological debate opened before it (concerning the Alevi faith and the Muslim religion) so that its references to the Alevi faith, and the community founded on that faith, were limited to finding that Article 9 applied.

In finding a violation of Article 9, the Grand Chamber reiterated a number of principles previously cited mainly in Chamber cases and, notably, highlighted two aspects of the State's obligation of neutrality and impartiality.

(i) While the role of the State as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs might allow it to assess certain objective elements (such as the "level of cogency, seriousness, cohesion and importance" of a belief), that role excluded "any discretion on [the State's] part to determine whether religious beliefs or the means used to express such beliefs are legitimate" (see *Manoussakis and Others v. Greece*<sup>197</sup>; *Hasan and Chaush v. Bulgaria*<sup>198</sup>; and *Fernández Martínez v. Spain*<sup>199</sup>). The right enshrined in Article 9 "would be highly theoretical and illusory if the degree of discretion granted to States allowed them to interpret the notion of religious denomination so restrictively as to deprive a non-traditional and minority form of religion, such as the Alevi faith, of legal protection (see, *inter alia*, *Kimlya and Others v. Russia*<sup>200</sup> and *Magyar Keresztény Mennonita Egyház and Others v. Hungary*<sup>201</sup>).

197. *Manoussakis and Others v. Greece*, 26 September 1996, § 47, *Reports of Judgments and Decisions* 1996-IV.

198. *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000-XI.

199. *Fernández Martínez v. Spain* [GC], no. 56030/07, § 129, ECHR 2014 (extracts).

200. *Kimlya and Others v. Russia*, nos. 76836/01 and 32782/03, § 86, ECHR 2009.

201. *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, nos. 70945/11 and 7 others, § 88, ECHR 2014 (extracts).

(ii) The corollary of that obligation of neutrality and impartiality was the principle of autonomy of religious communities, according to which it was the task of the highest spiritual authorities of a religious community to determine to which faith that community belonged. Only the most serious and compelling reasons could justify State intervention. The Court found that the respondent State's attitude towards the Alevi faith breached the right of the Alevi community to an autonomous existence, which was at the very heart of the guarantees in Article 9 (see, *mutatis mutandis*, *Miroļubovs and Others v. Latvia*<sup>202</sup>, and *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*<sup>203</sup>).

Moreover, in describing the requirements and value of a pluralist society, the Court opined that “[r]espect for religious diversity undoubtedly represents one of the most important challenges to be faced today; for that reason, the authorities must perceive religious diversity not as a threat but as a source of enrichment” (see, *mutatis mutandis*, *Nachova and Others v. Bulgaria*<sup>204</sup>).

### **Manifest one's religion or belief**

The judgment in *Süveges v. Hungary*<sup>205</sup> concerned house arrest and its consequences for the applicant's right to manifest his religion in community with others.

The applicant, who had previously been in custody while awaiting trial, was ordered to be placed under house arrest. In the Convention proceedings, he alleged, among other things, that the restrictions accompanying his house arrest prevented him from attending Sunday Mass and thus infringed his right to manifest his religion. He relied on Article 9 of the Convention.

This was the first occasion on which the Court had to address the compatibility of house arrest with the exercise of Article 9 rights.

The Court noted that had the applicant remained in pre-trial detention, rather than being placed under house arrest, he would in all likelihood have been able to take advantage of religious services at his place of detention. His inability to attend Mass, and thus the interference with his right to manifest his religion in community with others, had resulted from the decision to release him from

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202. *Miroļubovs and Others v. Latvia*, no. 798/05, §§ 86 (g) and 90, 15 September 2009.

203. *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, no. 40825/98, § 79, 31 July 2008.

204. *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII.

205. *Süveges v. Hungary*, no. 50255/12, 5 January 2016.

custody and to impose a less coercive form of deprivation of liberty in order to secure his presence during the criminal proceedings. In the circumstances, the Court found that there had been no violation of Article 9. In examining the proportionality of the impugned restriction, it noted, firstly, and without further elaboration, that the very essence of the applicant's right to manifest his religion had not been impaired and, secondly, when requesting leave to attend Sunday Mass the applicant had failed to specify the time and place of worship. The latter consideration had weighed heavily in the domestic authorities' decision to refuse leave. Having regard to the margin of appreciation available to the authorities, the Court saw no reason to question that finding.

### **Positive obligations**

The judgment in *Papavasylakis v. Greece*<sup>206</sup> concerned the procedural requirements applicable to the assessment of the genuineness of an objection to military service.

The applicant objected on ideological grounds to performing military service. He sought an exemption, being willing to undertake alternative civil duties. His application was considered by a commission which was empowered, following interview, to advise the Ministry of Defence on whether an exemption should be granted. On the day the applicant was interviewed, and due to absences of civil members, the commission comprised only two senior military officers and a member of the State Legal Service (who presided over the proceedings). The applicant's request for exemption was ultimately rejected by the Ministry of Defence. The Court of Cassation rejected his legal challenge. The applicant alleged in the Convention proceedings that there had been a breach of Article 9 having regard to the composition of the commission which examined his request for exemption.

The Court found a breach of Article 9. The judgment is interesting in that it addresses the scope of the State's positive obligation in the area of conscientious objection. The case-law has already established that a procedure must be in place which allows a conscientious objector the possibility of explaining the reasons for his opposition to military service in terms of his religious or philosophical beliefs and an assessment to be made of whether or not those beliefs are genuinely

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206. *Papavasylakis v. Greece*, no. 66899/14, 15 September 2016.

held (see, for example, *Bayatyan v. Armenia*<sup>207</sup> and *Savda v. Turkey*<sup>208</sup>). Greece did have such a procedure. However, the Court found it to be deficient in the applicant's case since military officers outnumbered civilians on the occasion of the applicant's interview because of the failure to replace the absent civilian members. On that account, the applicant could legitimately fear that it would be impossible for him to obtain the understanding of the military officers for his ideological-based opposition to military service and thus a positive recommendation from the commission on his request for exemption.

## **Freedom of expression (Article 10)**

### **Applicability**

In its judgment in *Semir Güzel v. Turkey*<sup>209</sup> the Court examined the question of conduct as a form of expression protected by Article 10.

The applicant was prosecuted for allowing participants at a general congress of a political party to speak in Kurdish during their interventions. The applicant, who was the Vice-President of the party, chaired the congress. At the relevant time, it was a criminal offence for a political party to use any language other than Turkish at congresses and meetings.

The Court found a breach of Article 10 since the interference was not "prescribed by law". The case is interesting as regards the applicability of that provision. It had not been alleged that the applicant had taken the floor at the meeting in Kurdish, nor that he had encouraged those present to do so. The criminal charge against him related to his failure, as chairman, to intervene to prevent delegates from expressing themselves in Kurdish, despite warnings from a government official present at the meeting. The Court found that the applicant could rely on the protection of Article 10. It had regard to previous cases in which it had concluded that an individual's acts or conduct could amount to a form of expression. In deciding whether an act or conduct fell within the ambit of Article 10, an assessment had to be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or engaging in the conduct in question (*Murat Vural v. Turkey*<sup>210</sup>).

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207. *Bayatyan v. Armenia* [GC], no. 23459/03, ECHR 2011.

208. *Savda v. Turkey*, no. 42730/05, 12 June 2012.

209. *Semir Güzel v. Turkey*, no. 29483/09, 13 September 2016.

210. *Murat Vural v. Turkey*, no. 9540/07, § 54, 21 October 2014.



In the circumstances of the applicant's case, the Court observed that his conduct, viewed from an objective point of view, could be seen as an expressive act of defiance towards an authority representing the State. Furthermore, the Court noted that in the course of the criminal proceedings against him the applicant made it very clear that he had not used his power as chairman to intervene when certain delegates spoke in Kurdish because of his view that Kurdish should be used in all areas of life; that those who spoke Kurdish were speaking in their mother tongue; and that he believed that it was neither legal nor ethical for him to intervene and to force people to speak in a language other than their mother tongue. For the Court, the applicant had exercised his right to freedom of expression within the meaning of Article 10, which provision applied in the case.

### Freedom of expression

The *Karácsony and Others v. Hungary*<sup>211</sup> judgment related to procedural safeguards in disciplinary procedures against parliamentarians considered to have acted in a manner gravely offensive to parliamentary order.

The applicants, who were opposition members of parliament (MPs), were disciplined and fined for their conduct during a parliamentary session (they displayed banners during the session and one used a megaphone). They complained under Article 10 of the Convention alone and in conjunction with Article 13. The Grand Chamber found that there had been a violation of Article 10 (lack of effective and adequate safeguards) and that no separate issue existed under Article 13.

This was the first case where the Court was required to examine the extent to which a Parliament is entitled to autonomously regulate its own internal affairs and, in particular, to restrict the expression rights of MPs in Parliament. The judgment begins by setting out comprehensively the Court's case-law concerning the various elements to be balanced in the Convention review of the interference with MPs' expression rights.

(i) On the one hand, the procedural guarantees of Article 10 were to be taken into account when assessing the proportionality of such an interference (see, in particular, *Association Ekin v. France*<sup>212</sup>; *Lombardi*

211. *Karácsony and Others v. Hungary* [GC], no. 42461/13, ECHR 2016.

212. *Association Ekin v. France*, no. 39288/98, § 61, ECHR 2001-VIII.

*Vallauri v. Italy*<sup>213</sup>; and *Cumhuriyet Halk Partisi v. Turkey*<sup>214</sup>), as was the Court's case-law concerning the freedom of expression of MPs, especially in Parliament. In this latter respect, the Court made a novel distinction between restrictions on the substance of an MP's expression – in respect of which Parliaments had very limited latitude – and controlling the means (“time, place and manner”) of such expression (which was in issue in the present case), which was to be independently regulated by Parliament and to which a broad margin of appreciation applied.

(ii) On the other hand, the Court detailed its understanding of the widely recognised principle of the autonomy of Parliament to, *inter alia*, regulate its own internal affairs which evidently extended to Parliament's power to enforce rules aimed at ensuring the orderly conduct of parliamentary business, essential for a democratic society. This being the aim, the margin of appreciation accorded was a wide one. It was not, however, unfettered: the Grand Chamber clarified that parliamentary autonomy should not be used to suppress expression by minority MPs or as a basis for the majority to abuse its dominant position, so that the Court would examine with particular care any measure which appeared to operate solely or principally to the disadvantage of the opposition; nor could parliamentary autonomy be relied upon to justify imposing a sanction which was clearly in excess of Parliament's powers, arbitrary or *mala fide*.

Secondly, as to the proportionality of the interference, the Grand Chamber concentrated its analysis on whether that restriction had been accompanied by “effective and adequate safeguards against abuse”, noting that it was dealing with an *ex post facto* penalty (imposed sometime after the conduct in question) and not a sanction required immediately.

It is noteworthy that, despite the above-noted broad margin of appreciation given the principle of parliamentary autonomy, the Grand Chamber found that certain procedural safeguards should, as a minimum, be available during such a parliamentary disciplinary process. The first was the “right for [an] MP to be heard in a parliamentary procedure” before any sanction was imposed. The Court noted, as a source supplemental to its own case-law, that the right to be heard increasingly appeared as a basic procedural rule in democratic States, over and above judicial procedures, as demonstrated, *inter*

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213. *Lombardi Vallauri v. Italy*, no. 39128/05, § 46, 20 October 2009.

214. *Cumhuriyet Halk Partisi v. Turkey*, no. 19920/13, § 59, ECHR 2016.

*alia*, by Article 41 § 2 (a) of the [Charter of Fundamental Rights of the European Union](#). The implementation of that right to be heard had to be adapted to the parliamentary context to ensure the fair and proper treatment of the parliamentary minority and to avoid abuse by the dominant party so that, *inter alia*, the Speaker of Parliament had to act “in a manner that is free of personal prejudice or political bias”. The second procedural safeguard required was that the decision imposing a sanction on the MP should “state basic reasons” so the MP could understand the justification for the measure and so there could be public scrutiny of it.

Thirdly, worth mentioning also is the comprehensive comparative-law survey carried out by the Court as regards disciplinary measures applicable to MPs for disorderly conduct in Parliaments in the law of forty-four of the forty-seven member States of the Council of Europe, to which survey the Grand Chamber extensively referred in its judgment.

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The *Baka*<sup>215</sup> judgment, cited above, concerned the termination of a judge’s mandate as a result of comments he had made in public.

The applicant, a former judge of the European Court of Human Rights, publicly criticised, in his capacity as President of the Hungarian Supreme Court, proposed legislative reforms of the judiciary. Subsequent constitutional and legislative changes resulted in the premature termination of his mandate as President and excluded the possibility of judicial review of that termination.

In the Convention proceedings, he complained, *inter alia*, under Article 10 of a disproportionate interference with his freedom of expression. The Grand Chamber found a violation of that provision.

One of the most interesting aspects of the complaint under Article 10 was the assessment of whether the termination of the applicant’s mandate amounted to an interference with his Article 10 rights or whether it merely affected his holding a public office (a right not guaranteed by the Convention). To answer this question the Court had to determine “the scope of the measure ... by putting it in the context of the facts of the case and of the relevant legislation”. In addition, the Court had to decide on the standard of proof to be applied to this assessment which, based on its case-law, was to be the standard of “beyond reasonable doubt” as interpreted and applied by

215. *Baka v. Hungary* [GC], no. 20261/12, ECHR 2016. See also under [Article 6](#) above.

this Court. While the Court's principles as to this standard of proof had most usually been applied in Article 2, 3 and 5 contexts, those principles were considered particularly relevant where, as in the present case, no domestic court had been able to examine the facts. Turning to those facts, the Court studied the sequence of events, found that there was a *prima facie* case in favour of the applicant's version of events, considered that the burden of proof shifted to the Government (not least as the reasons behind the termination lay within the knowledge of the Government and had never been reviewed by a domestic court) and decided that the Government had not discharged that onus of proof (either through the reasons provided at the time domestically or to the Court) to explain why the termination of the applicant's mandate had been necessary. The Court concluded that that termination was indeed prompted by his expressed views and criticisms so that it constituted an interference with his freedom of expression.

In addition, it is noteworthy that, while the Court had already expressed doubts as to the compliance of the impugned legislation with the rule of law, the Court was prepared to assume that it was nevertheless "prescribed by law" so as to allow it to proceed to the next stages of its analysis. In addition, while the Court considered that the termination of the applicant's mandate was incompatible with the "legitimate aim" invoked by the Government, the Court considered it important nevertheless to go on to examine the necessity of the interference.

Finally, that necessity assessment is preceded by the Court's confirmation of its previous case-law concerning the freedom of expression of judges. The Court was able to deal relatively briefly with the necessity of the interference, with certain evidently important factors being emphasised, such as the particular importance of the applicant's office, the functions and duties of which included expressing his views on legislative reforms likely to have an impact on the judiciary and its independence. The applicant had stayed within this strictly professional perspective so his expression clearly concerned a debate on a matter of "great public interest". This meant that the applicant's "position and statements" called for a "high degree of protection", for "strict scrutiny" of any interference therewith as well as for a "correspondingly narrow margin of appreciation". Emphasising the importance of the independence and irremovability of judges, noting the chilling effect of the premature termination of the applicant's mandate on other judges and given the lack of effective and

adequate safeguards against abuse (see the violation of Article 6 § 1<sup>216</sup>) which are required by the procedural aspect of Article 10, the Court concluded that it had not been shown that the premature termination of the applicant's mandate was necessary in a democratic society and found that there had been a violation of Article 10.

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The judgment in *Novikova and Others v. Russia*<sup>217</sup> concerned persons who staged solo demonstrations in the street on subjects of public interest, holding up placards. The actions of each applicant were peaceful and did not impede the movement of pedestrians or road traffic.

The applicants complained that the authorities had regarded their individual actions as a collective public event under the law on public assembly and thus subject to prior notice. The police had therefore put a stop to their actions and taken them to the police station, where they were detained. Some of them were found guilty of an administrative offence and fined. For the applicants, it was, on the contrary, a static solo demonstration not subject to an obligation under domestic law to give prior notice.

This judgment, which concerned a very specific situation in matters of freedom of expression, is of some interest.

The Court viewed the applicants' actions as a form of political expression (compare with *Tatár and Fáber v. Hungary*<sup>218</sup>) and examined the case under Article 10 taking account of case-law principles related to Article 11.

Particular attention was given to the question of the "legitimate aim" pursued in the cases of the applicants who had not been charged after being taken to the police station, because no judicial decision had been taken as to whether an offence had been committed so the justification for the measure could not be assessed. The Court was not persuaded that the impugned measures pursued the aim of the "prevention of disorder", pointing out that the burden of proof was on the Government (*Perinçek v. Switzerland*<sup>219</sup>). It also had some doubt as to whether any legitimate aim, among those provided for by Article 10 § 2 permitting restrictions on freedom of expression, had been pursued

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216. See under [Article 6 \(Right to a fair hearing in civil proceedings\)](#) above.

217. *Novikova and Others v. Russia*, nos. 25501/07 and 4 others, 26 April 2016.

218. *Tatár and Fáber v. Hungary*, nos. 26005/08 and 26160/08, 12 June 2012.

219. *Perinçek v. Switzerland* [GC], no. 27510/08, ECHR 2015 (extracts).

by the measures in question and it was only with some reservation that it took into consideration the “prevention of crime”.

The Court also clarified the notion of “assembly” within the meaning of Article 11 of the Convention and its position concerning the requirement of prior notice in the event of a public demonstration by one or two people involving some interaction with passers-by.

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The *Shabanov and Palfreeman v. Bulgaria*<sup>220</sup> judgment concerned disciplinary punishments imposed on prisoners who had complained in writing of misconduct by prison officers.

The applicants alleged that disciplinary punishments imposed on them by the prison authorities in response to written complaints they had made, through the proper channels, regarding misconduct on the part of prison officers had unjustifiably interfered with the exercise of their right to freedom of expression.

In studying the proportionality of the interference, the Court reiterated its earlier case-law to the effect that in the context of prison discipline, regard must be had to the particular vulnerability of persons in custody, which means that the authorities must provide particularly solid justification when punishing prisoners for making allegedly false accusations against the prison authorities (see *Marin Kostov v. Bulgaria*, cited above<sup>221</sup>, with further references).

In finding that the applicants' Article 10 rights had been violated, the Court had regard to the following considerations: while the allegations were quite serious, the language used was not strong, vexatious or immoderate; the statements had not been made publicly; and the statements were made by the applicants in the exercise of the possibility in a democratic society governed by the rule of law for a private person to report an alleged irregularity in the conduct of a public official to an authority competent to deal with such an issue. On that last point, the judgment is of interest in that the Court noted that the possibility to report alleged irregularities and to make complaints against public officials takes on an added importance in the case of persons under the control of the authorities, such as prisoners. For the

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220. *Shabanov and Palfreeman v. Bulgaria*, nos. 35365/12 and 69125/12, 21 July 2016.

221. *Marin Kostov v. Bulgaria*, no. 13801/07, § 44, 24 July 2012.

Court, prisoners should be able to avail themselves of that opportunity without having to fear that they will suffer negative consequences for doing so (see *Marin Kostov*, § 47). It placed emphasis on the fact that the courts which heard the applicants' appeals did not touch upon, let alone substantively discuss, the question whether the disciplinary punishments interfered with the applicants' right to freedom of expression and, in this respect, the right to make complaints.

### **Freedom of the press**

One of the issues in the *Bédat v. Switzerland*<sup>222</sup> judgment concerned the balancing of a journalist's interest in publishing against the competing (private and public) interests protected by the secrecy of criminal investigations.

The applicant, who was a journalist, was convicted and fined for publishing information obtained by a third party and passed to the applicant that was covered by the secrecy of criminal investigations in pending proceedings. His domestic appeals were unsuccessful. The Grand Chamber found no violation of Article 10 of the Convention.

(i) Whether an applicant is the journalist or the victim of impugned press coverage, the Court has consistently accorded equal respect to the competing Article 10 rights (the right to inform the public and the public's right to be informed) and Article 8 rights (private life), and it has applied the same margin of appreciation to the relevant balancing exercise.

For the first time, the Court stated that the same approach is to be applied in cases, such as the present one, where the Article 10 rights of an applicant journalist are to be balanced against the competing Article 6 rights of the accused (including the right to an impartial tribunal and to be presumed innocent) in the pending criminal proceedings about which information, covered by the secrecy of criminal investigations, had been disclosed.

(ii) The judgment also notes several additional and parallel public interests, also served by the secrecy of criminal investigations, to be taken into account in the overall balancing exercise: the confidence of the public in the role of the courts in the administration of justice and maintaining "the authority and impartiality of the judiciary" including its decision-forming and decision-making processes; the effectiveness of criminal investigations; and the administration of justice (avoiding, for example, witness collusion and evidence being tampered with).

<sup>222</sup>. *Bédat v. Switzerland* [GC], no. 56925/08, ECHR 2016.

(iii) Just as it did in the cases of *Axel Springer AG v. Germany*<sup>223</sup> and *Stoll v. Switzerland*<sup>224</sup>, the Court listed the criteria to be applied when carrying out this balancing exercise between Article 10, on the one hand, and the public and private interests protected by the principle of the secrecy of criminal investigations, on the other. Those criteria were drawn from the Court's jurisprudence and from the legislation of thirty Contracting States surveyed (for the purposes of the present case) and they were as follows: how the applicant journalist came into possession of the secret documents; the content of the impugned article; the contribution of the article to a public debate; the influence of the article on the criminal proceedings; any infringement of an accused's private life; and the proportionality of the penalty imposed.

(iv) In commenting on the fourth criterion, the Court found that the article was clearly slanted against the accused. It is interesting to note that the Court considered that, published as it was during the investigation, the article risked influencing the outcome of the proceedings including the work of the investigating judges and of the trial court, irrespective of the composition of that court (professional judges or not).

Moreover, the Court went on to make clear that the Government did not have to prove *ex post facto* actual influence on the proceedings: rather the risk of such influence could justify *per se* the adoption of protective measures such as rules preserving the secrecy of investigations. The Court concluded by approving the Federal Court's view that secret case-file elements had been discussed in the public sphere during the investigation and before the trial, out of context and in a manner liable to influence the investigating and trial judges.

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The *Ziemiński v. Poland (no. 2)*<sup>225</sup> judgment concerned a journalist's use of satire and irony when commenting on a matter of public interest.

The applicant, a journalist, published a satirical article in which he mocked the district mayor and two of his officials for their endorsement of a quail-farming project intended to tackle local unemployment. He referred to the district mayor and one official (without using their names) as "dull bosses". He characterised another official as "a numbskull", "a dim-witted official" and "a poser". The

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

224. *Stoll v. Switzerland* [GC], no. 69698/01, ECHR 2007-V.

225. *Ziemiński v. Poland (no. 2)*, no. 1799/07, 5 July 2016.



mayor and the two officials brought private prosecution proceedings and the applicant was ultimately convicted of the offence of insult. The domestic courts found that the applicant had exceeded the limits of fair criticism and had resorted to language which was disrespectful and offensive and harmful to the claimants' human dignity.

The applicant contended that there had been a violation of Article 10. The Court agreed with him. Its judgment is of interest for the following reasons.

In the first place, the judgment afforded the Court another opportunity to observe that satire is a form of artistic expression and social commentary which, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with the right to use this means of expression should be examined with particular care (see *Vereinigung Bildender Künstler v. Austria*<sup>226</sup>; *Alves da Silva v. Portugal*<sup>227</sup>; and *Eon v. France*<sup>228</sup>). It noted that the domestic courts had not taken sufficient account of the satirical nature of the text and the underlying irony when analysing the applicant's article (see *Sokolowski v. Poland*<sup>229</sup>).

Secondly, it is interesting to observe that the Court did not dwell on each specific term used by the applicant in order to determine its acceptability. It had no doubt that the applicant's remarks, as used in the article, remained within the limits of acceptable exaggeration.

Thirdly, the judgment illustrates the importance of the context in which words are used. The instant case concerns press freedom and recourse to satire to impugn the conduct of elected or public officials. The case can be distinguished from that in *Janowski v. Poland*<sup>230</sup> in which the Court found no breach of Article 10. In *Janowski*, the applicant was convicted of insulting municipal guards by calling them "oafs" and "dumb" during an incident which took place in a square in the presence of members of the public. The need to protect the interests of the municipal guards did not have to be weighed in relation to the interests of the freedom of the press or of open discussion of matters of public concern since the applicant's remarks were not uttered in such a context.

226. *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, § 33, 25 January 2007.

227. *Alves da Silva v. Portugal*, no. 41665/07, § 27, 20 October 2009.

228. *Eon v. France*, no. 26118/10, § 60, 14 March 2013.

229. *Sokolowski v. Poland*, no. 75955/01, § 46 *in fine*, 29 March 2005.

230. *Janowski v. Poland* [GC], no. 25716/94, ECHR 1999-I.

## Freedom to receive and impart information

The judgment in *Magyar Helsinki Bizottság v. Hungary*<sup>231</sup> raised the issue of the extent to which Article 10 guarantees a right of access to State-held information.

The applicant NGO requested access to police-department files containing information on the appointment and names of public defenders, in order to complete a survey in support of proposals for the reform of the public defenders' scheme. While most police departments complied, two did not and the ensuing domestic proceedings by the NGO for access to those files were unsuccessful. The applicant NGO complained that that denial of access was a violation of its rights guaranteed by Article 10 of the Convention.

(i) This judgment is noteworthy for its detailed review and clarification of the Court's case-law on the extent to which Article 10 guarantees a right of access to State-held information. While the Court did not recognise a separate right of access as such, it clarified the *Leander v. Sweden*<sup>232</sup> principles accepting that, in certain circumstances, such a right could be drawn from the right to freedom of expression and it set out the criteria by which this assessment could be made on a case-by-case basis.

In particular, the "standard jurisprudential position", set out in *Leander* and confirmed in, *inter alia*, *Guerra and Others v. Italy*<sup>233</sup>, *Gaskin v. the United Kingdom*<sup>234</sup> and *Roche*<sup>235</sup>, cited above, was that Article 10 neither conferred a right of access to State-held information nor embodied a corresponding obligation on the authorities to provide it. That did not, the Grand Chamber found, exclude the existence of such a right or obligation in other circumstances. That was already the case in cases such as *Gillberg v. Sweden*<sup>236</sup>, where one arm of State had recognised a right to receive information but another arm had frustrated or failed to give effect to that right.

The Grand Chamber therefore examined whether a right of access could be gleaned from Article 10 in the present set of circumstances. To so do it reviewed the *travaux préparatoires* concerning Article 10

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231. *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, ECHR 2016.

232. *Leander v. Sweden*, 26 March 1987, Series A no. 116.

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

234. *Gaskin v. the United Kingdom*, 7 July 1989, Series A no. 160.

235. *Roche v. the United Kingdom* [GC], no. 32555/96, ECHR 2005-X.

236. *Gillberg v. Sweden* [GC], no. 41723/06, 3 April 2012.

and the opinions of the Court and Commission on draft Protocol No. 6, which allowed it to find that there might be weighty arguments in favour of reading into Article 10 an individual right of access to State-held information and a corresponding obligation on the State to provide it. The comparative review of thirty-one Contracting States, the emerging consensus at the international level, the [EU Charter of Fundamental Rights](#) and other EU provisions as well as various Council of Europe instruments, also led the Grand Chamber to find that there was now a “broad consensus, in Europe (and beyond), on the need to recognise an individual right of access to State-held information in order to assist the public in forming an opinion on matters of general interest” (paragraph 148 of the judgment). The Court was not therefore “prevented from interpreting Article 10 § 1 ... as including a right of access to information”.

Having regard to the Court’s case-law (which had evolved in favour of the recognition, under certain conditions, of a right to freedom of information, not as a separate right, but as an inherent element of the freedom to receive and impart information enshrined in Article 10), as well as to the European and international trends noted above, the Court considered that the time had come to clarify the *Leander* principles. The Grand Chamber did so as follows. A right of access to State-held information and the corresponding obligation might arise, firstly, where disclosure of the information had been imposed by judicial order (as had happened in *Gillberg*, although not in the instant case) and, secondly, where “access to the information is instrumental for the individual’s exercise of his or her right to freedom of expression and, in particular ‘the freedom to receive and impart information’ and where its denial constitutes an interference with that right” (this situation was relevant to the instant case).

The Grand Chamber then set down the criteria to be applied to determine, on a case-by-case basis, whether a particular denial of access would amount to an interference with freedom of expression rights: the purpose of the information requested; the nature of the information sought; the role of the applicant; and whether the information was ready and available. Applying those criteria, the Grand Chamber found that the failure to provide the information sought by the applicant NGO constituted an interference with its rights protected by Article 10 of the Convention.

(ii) In determining whether that interference had been necessary in a democratic society, the Grand Chamber was required to balance

the applicant NGO's expression rights against the protection to be accorded to the data sought by it.

The Grand Chamber found (having referred to the Council of Europe's [Data Protection Convention](#)<sup>237</sup> and the Court's case-law) that the Article 8 interests invoked were "not of such a nature and degree" as could warrant bringing Article 8 into play in the balancing exercise. In so finding, it had regard to the context (the data related to the conduct of professional activities in public proceedings did not concern the substance of that work and did not, therefore, affect their private lives) and to the fact that disclosure of this information could be considered to have been foreseeable.

Although Article 8 did not therefore come into play, the protection of the data remained a legitimate aim permitting only a proportionate restriction on expression. Finding that the public interest involved outweighed the need to protect data "not outside the public domain", the Grand Chamber concluded that there had been a violation of Article 10 of the Convention.

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The *Kalda v. Estonia*<sup>238</sup> judgment concerned restrictions placed on the applicant prisoner's access to certain Internet sites containing legal information.

The applicant, a prisoner, complained that he was refused access to several Internet sites and was thereby prevented from carrying out legal research. The sites included the website of the local information office of the Council of Europe and certain, but not all, State-run databases containing legislation and judicial decisions. In the appeal proceedings brought by the applicant, the Supreme Court concluded that granting access to Internet sites beyond those authorised by the prison authorities could increase the risk of prisoners engaging in prohibited communication, thus giving rise to a need for increased levels of monitoring of their use of computers.

The applicant relied on Article 10 of the Convention. The Court agreed with him that the prohibition on access to the sites in question interfered with his right to receive information which was freely available in the public domain. On that particular point, it is interesting to observe that the Court viewed the interference not in

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237. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108.

238. *Kalda v. Estonia*, no. 17429/10, 19 January 2016.

terms of the authorities' refusal to release the information requested by the applicant, but in terms of a prohibition on granting him access by means of the Internet to information which others were willing to communicate, including the State via its official legal-information websites.

It reiterated in this connection that the Internet played an important role in enhancing the dissemination of information in general (see in this connection, *Delfi AS v. Estonia*<sup>239</sup>, and *Ahmet Yıldırım v. Turkey*<sup>240</sup>) and, of relevance to prisoners, that an increasing amount of services and information is only available on the Internet. This included the Court's judgments and translations of them into the official languages of Contracting States including, as regards the applicant, in Estonian.

That said, it is noteworthy that the Court stressed that Article 10 cannot be interpreted as imposing a general obligation on States to provide access to the Internet, or to specific Internet sites, for prisoners. The facts of the particular case submitted to its examination would appear to be decisive in this connection.

In the instant case, in finding that the State had breached the applicant's right under Article 10 of the Convention, the Court laid emphasis on the fact that the law of the respondent State did not prevent prisoners from having access to all legal-information sites. As to the sites to which access was denied, it observed that they essentially stored information relating to fundamental rights, including the rights of prisoners. Such information was used by the courts of the respondent State and was of relevance to the applicant when it came to asserting and defending his rights before the domestic courts. It is of interest that the Court gave prominence to the fact that, when the applicant lodged his complaint with the domestic courts, translations of the Court's judgments against the respondent State into Estonian were only available on the website of the local Council of Europe Office, to which he was denied access.

The Court had to address the Government's argument that there were security and cost implications in allowing prisoners extended access to Internet sites of the type denied to the applicant. Its response was that their authorities had already made security arrangements for the use of the Internet by prisoners and had borne the related costs. In examining the applicant's case, it found that the domestic courts had not given due consideration to any possible security risks attendant on the

239. *Delfi AS v. Estonia* [GC], no. 64569/09, § 133, ECHR 2015.

240. *Ahmet Yıldırım v. Turkey*, no. 3111/10, § 48, ECHR 2012.

applicant's use of the websites, bearing in mind that they were run by the Council of Europe and by the State itself. The reasons given by the domestic courts, albeit relevant, were not sufficient for the purposes of the second paragraph of Article 10.

The judgment is noteworthy in that the Court, while affirming that Contracting States are not obliged to grant prisoners access to the Internet, may be in breach of Article 10 of the Convention where they are willing to allow prisoners access to the Internet, but not to specific sites. It would appear from the judgment that it is for the domestic courts to provide relevant and sufficient reasons for any restrictions imposed on access to such sites, having regard to their nature and purpose.

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The judgment in *Pinto Coelho v. Portugal (no. 2)*<sup>241</sup> concerned the unauthorised broadcasting of a report containing audio extracts from a court recording of a hearing. In the retransmission, the voices of the three judges sitting on the bench and of the witnesses were digitally altered. These extracts were followed by comments by the applicant, a journalist specialising in court cases, referring to a miscarriage of justice. Following the broadcast, the president of the chamber which had tried the case submitted a complaint to the prosecutor's office. The persons whose voices had been broadcast did not, however, complain to the courts of an infringement of their right to be heard. The applicant was convicted of breaching the statutory prohibition on broadcasting audio-recordings of a hearing without permission from the court and ordered to pay a fine.

The applicant complained of a breach of her right to freedom of expression.

The interest of the case lies in the fact that it pitches competing interests against each other: on the one hand, the rights of the press to inform the public and of the public to be informed and, on the other, the right of trial witnesses to be heard and the need to ensure the proper administration of justice.

The Court had regard to the determination of the superior courts of the member States of the Council of Europe to respond forcefully to the harmful pressure the media could put on civil parties and defendants and which was liable to undermine the presumption of innocence. Nevertheless, a number of factors swayed the balance in favour of finding a violation of Article 10 of the Convention.

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241. *Pinto Coelho v. Portugal (no. 2)*, no. 48718/11, 22 March 2016.

- (i) The trial was already over when the report was broadcast.
- (ii) The hearing had been public and none of those concerned had used the remedy available to them for an infringement of their right to be heard. For the Court, the onus had primarily been on them to ensure respect for that right.
- (iii) Additionally, the voices of those taking part in the hearing had been distorted to prevent them from being identified. In this connection, it is noteworthy that the Court found that Article 10 § 2 of the Convention did not provide for restrictions on freedom of expression based on the right to be heard, as that right was not afforded the same protection as the right to reputation. It was unclear why the right to be heard ought to prevent the broadcasting of sound clips from a hearing held in public. In sum, the Government had not given sufficient reasons to justify the fine imposed on the applicant.

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The *Brambilla and Others v. Italy*<sup>242</sup> judgment concerned the conviction of journalists following their interception of confidential police radio communications.

With a view to arriving speedily at crime scenes the applicants, all journalists, intercepted police radio communications. Reaching a crime scene quickly meant that they could file promptly their reports on the incident with the local newspaper which employed them. They were eventually convicted of a criminal offence since domestic law treated such communications as confidential. They received prison sentences of one year and three months (first two applicants) and six months (third applicant), which were later suspended.

The Court did not accept their submission that there had been a breach of their right to impart information to the public, as guaranteed by Article 10 of the Convention.

The following points may be highlighted.

In the first place, the Court left open the question whether Article 10 applied on the facts of the case. It preferred to assume applicability of Article 10 and concentrated on the necessity of the interference.

Secondly, it applied to the applicants' case the principles which the Grand Chamber recently set out in *Pentikäinen v. Finland*<sup>243</sup>, namely:

“In particular, and notwithstanding the vital role played by the media in a democratic society, journalists cannot, in principle, be released from their duty to

242. *Brambilla and Others v. Italy*, no. 22567/09, 23 June 2016.

243. *Pentikäinen v. Finland* [GC], no. 11882/10, §§ 91 and 110, ECHR 2015.

obey the ordinary criminal law on the basis that, as journalists, Article 10 affords them a cast-iron defence (see, among other authorities, *mutatis mutandis*, *Stoll v. Switzerland* [GC], no. 69698/01, § 102[, ECHR 2007-V]; *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93], § 65 [, ECHR 1999-III]; and *Monnat v. Switzerland*, no. 73604/01, § 66, ECHR 2006-X). In other words, a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions.”

and

“ ... , it has to be emphasised that the concept of responsible journalism requires that whenever a journalist – as well as his or her employer – has to make a choice between the two duties and if he or she makes this choice to the detriment of the duty to abide by ordinary criminal law, such journalist has to be aware that he or she runs the risk of being subject to legal sanctions, including those of a criminal character, by not obeying the lawful orders of, *inter alia*, the police.”

With those principles in mind, the Court found that the applicants had not been sanctioned for publishing scene-of-crime reports in their newspaper nor for imparting information on crime to the public. They had breached the law by being in possession of and using a device to listen in to communications deemed to be confidential under Italian law and justified by the domestic courts with reference to, among other things, the prevention of crime. As to the severity of the sentences imposed, it observed that they had been suspended.

This is the third case in which the Court has of late applied the *Pentikäinen* principles to a situation in which applicant journalists have sought to justify their breach of domestic criminal-law provisions with reference to the pursuit of their journalistic activities (see *Erdtmann v. Germany*<sup>244</sup>, and *Salihu and Others v. Sweden*<sup>245</sup>). It is of interest that this is the first case in which the Court has left open the applicability of Article 10.

## Freedom of assembly and association (Article 11)

### Freedom of peaceful assembly<sup>246</sup>

The *Frumkin v. Russia*<sup>247</sup> judgment related to the State authorities' positive obligation to communicate with the leaders of a protest demonstration in order to ensure its peaceful conduct.

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244. *Erdtmann v. Germany* (dec.), no. 56328/10, 5 January 2016.

245. *Salihu and Others v. Sweden* (dec.), no. 33628/15, 10 May 2016.

246. See also under Article 10 above, *Novikova and Others v. Russia*, nos. 25501/07 and 57569/11, 26 April 2011.

247. *Frumkin v. Russia*, no. 74568/12, ECHR 2016.



The applicant was arrested during the dispersal of a political rally in Moscow. He was detained for a period of thirty-six hours and eventually sentenced to fifteen days' administrative detention for obstructing traffic and disobeying police orders to refrain from doing so. In the Convention proceedings, he alleged among other things a breach of Article 11. The Court found for the applicant.

The judgment is noteworthy in that the Court had regard to the broader context in which the demonstration had been planned and in particular to the manner in which the police, during a stand-off with demonstrators which subsequently degenerated into violence, had responded to the wishes of the organisers to be authorised to hold the rally at what they believed to be a venue previously approved by the authorities. Using a cordon, the police sought to prevent the protestors from proceeding to the venue and tried to redirect them to an adjacent area. It was a matter of dispute between the parties as to whether approval had been given for the venue. The Court found on the facts that tacit, if not express, agreement had been given.

It is of interest that the Court examined the policing of the demonstration and the decision to disperse it from the standpoint of the authorities' duty to communicate with the leaders of the assembly, which it considered to be an essential aspect of their positive obligation under Article 11 of the Convention to ensure the peaceful conduct of the assembly, to prevent disorder and to secure the safety of all involved. A number of points may be highlighted in this connection.

(i) As to the authorities' fear that the protestors would set up a campsite on the venue, which justified the decision to deny them access to it, the Court observed that, although Article 11 did not guarantee a right to set up a campsite at a location of one's choice, such temporary installations may in certain circumstances constitute a form of political expression, restrictions on which must comply with the requirements of the second paragraph of Article 10.

(ii) Whatever course of action the police deemed correct, it was incumbent on them to engage with the leaders in order to communicate their position openly, clearly and promptly.

(iii) The police authorities had not provided for a reliable channel of communication with the organisers before the rally and had failed to respond to developments in a constructive manner and to resolve the tension caused by the confusion over the venue.

(iv) The failure to take simple and obvious steps at the first signs of conflict had allowed it to escalate, leading to the disruption of what had previously been a peaceful assembly and ultimately its dispersal.

The Court went on to find a further breach of Article 11 having regard to the absence of any pressing social need which would have justified the applicant's arrest and detention, and certainly not his imprisonment.

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The *Gülcü v. Turkey*<sup>248</sup> judgment concerned the compatibility with Article 11 of the Convention of the sentence imposed on a minor for participating in an illegal demonstration and engaging in acts of violence against police officers.

The applicant, who was fifteen at the time, was remanded in custody and subsequently convicted of membership of a proscribed organisation, promoting the aims of that organisation and resisting the police. The charges arose out of his participation in an illegal demonstration during which he had thrown stones at members of the security forces. The applicant, who had spent three months and twenty days in custody before being convicted, was given a prison sentence of seven years and five months in respect of all of the charges. He served part of that sentence before being released. In all, he was deprived of his liberty for a period of almost two years.

The Court examined the applicant's arguments from the standpoint of an alleged interference with his right to freedom of assembly, as guaranteed by Article 11 of the Convention. It found that the Convention had been breached. The judgment is of interest for the following reasons.

In the first place, the Court noted that, even if the applicant had been convicted of an act of violence against police officers, there was nothing to suggest that when joining the demonstration he had had any violent intentions; nor had the organisers of the demonstration intended anything other than a peaceful assembly. On that account, and notwithstanding his acts of violence directed at the police officers present at the demonstration, the applicant could rely on Article 11 of the Convention.

Secondly, the Court took issue with the domestic court's finding that the applicant's participation in the illegal demonstration was proof of his membership of the proscribed organisation and of his intention to disseminate propaganda in support of it. It observed that the domestic court had failed to provide relevant and sufficient reasons for these conclusions, in breach of the procedural safeguards inherent in Article 11.

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248. *Gülcü v. Turkey*, no. 17526/10, 19 January 2016.

Thirdly, the Court noted the extreme severity of the penalty imposed. The applicant was fifteen years old at the time of the incident. However, the domestic courts failed to have regard to his young age both when remanding him in custody and when passing sentence. It is interesting to observe that the Court had regard in this connection to Article 37 of the [UN Convention on the Rights of the Child](#) and [General Comment No. 10 \(2007\)](#), according to which the arrest, detention or imprisonment of a child can be used only as a measure of last resort and for the shortest appropriate period of time.

As to the part of the sentence imposed for the stone-throwing incident (two years, nine months and ten days), the Court could accept that the authorities enjoyed a wider margin of appreciation when examining the need for an interference with the Article 11 rights of those involved in such reprehensible acts. However, given the applicant's age the punishment could not be considered proportionate to the legitimate aims pursued.

### **Freedom of association**

*Cumhuriyet Halk Partisi*<sup>249</sup>, cited above, concerned the issue of the compatibility of the imposition of financial sanctions on a political party on account of irregularities in its expenditure discovered during inspection of its accounts.

The applicant, the main opposition party in Turkey, complained in the Convention proceedings that the Constitutional Court had ordered the confiscation of a substantial part of its assets following an inspection of its accounts which, according to the court's findings, revealed that over the course of a number of financial years the applicant party had incurred expenses which could not be considered lawful expenditure in terms of the "objectives of a political party". The amount covered by the confiscation orders represented the amount deemed to be unlawful expenditure. The applicant party's case was essentially based on the authorities' alleged failure to provide at the relevant time for a clear, foreseeable and predictable basis in law making it possible, firstly, to determine in advance the kinds of expenditure which fell within the scope of "unlawful expenditure" and, secondly, to anticipate the circumstances in which the Constitutional Court in response to an identified financial irregularity would have recourse to the making of a confiscation order rather than issuing a warning.

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249. *Cumhuriyet Halk Partisi v. Turkey*, no. 19920/13, ECHR 2016.

The Court agreed with the applicant party. The interference had not been “prescribed by law” and Article 11 of the Convention had thereby been breached. The judgment is noteworthy for a number of reasons.

In the first place, the Court observed that requiring political parties to subject their finances to official inspection does not of itself raise an issue under Article 11. Such requirement serves the goals of transparency and accountability, thus ensuring public confidence in the political process. Member States enjoy a relatively wide margin of appreciation when it comes to the supervision of the finances of political parties and the choice of sanctions to be imposed in the event of the discovery of irregular financial transactions.

Secondly, the Court noted that the confiscation orders obliged the applicant party to curtail a significant number of its political activities, including at local branch level. There had therefore been an interference with its right to freedom of association, political parties being a form of association essential to the proper functioning of democracy.

Thirdly, before examining compliance with the “prescribed by law” component of Article 11, the Court underscored that the financial inspection of political parties should never be used as a political tool to exercise political control over them, especially on the pretext that the political party (like the applicant party) is publicly financed. It continued (paragraph 88 of the judgment):

“In order to prevent the abuse of the financial-inspection mechanism for political purposes, a high standard of ‘foreseeability’ must be applied with regard to laws that govern the inspection of the finances of political parties, in terms of both the specific requirements imposed and the sanctions that the breach of those requirements entails.”

Fourthly, the Court returned to this issue in its concluding remarks on the case. It accepted that the broad spectrum of activities undertaken by political parties in modern societies made it difficult to provide for comprehensive criteria to determine those activities which may be considered to be in line with the objectives of a political party and which relate genuinely to party work. However, in paragraph 106 of the judgment it stressed that, having regard to the important role played by political parties in democratic societies

“any legal regulations which may have the effect of interfering with their freedom of association, such as the inspection of their expenditure, must be couched in terms that provide a reasonable indication as to how those provisions will be interpreted and applied”.

On the facts of the applicant party's case, the Court found that the relevant legal provisions in force at the time lacked precision as regards

the scope of the notion of unlawful expenditure. The decisions of the Constitutional Court had failed to bring clarity to the matter, resulting in an inconsistent and unpredictable interpretation and application of the applicable law to the detriment of the applicant party's need to be able to regulate its expenditure in order to avoid falling foul of the law. The lack of foreseeability was also compounded by the absence of guidance on whether and when an item of unlawful expenditure would be sanctioned by means of a warning or a confiscation order.

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*Geotech Kancev GmbH v. Germany*<sup>250</sup> concerned the alleged breach of the applicant company's right not to be forced to join an association (negative right to freedom of association).

The applicant company was engaged in the building industry. It objected to having to pay additional contributions to the Social Welfare Fund established in that sector. Such obligation was based on the fact that a collective agreement concluded between the relevant employers' associations and the trade union was declared by the Federal Ministry for Labour and Social Affairs to be of general application in the building industry, which meant that all employers in the industry, even if they were not members of an employer's association, were required to make additional contributions to the Fund. The applicant company is not a member of an employers' association, and therefore did not take part in the negotiation of the collective agreement, and does not wish to join one.

In the Convention proceedings, the applicant company complained that the obligation to participate financially in the Fund violated its right to freedom of association, essentially because, not being a member of an employers' association, it had no say in the running of the Fund and no means to protect its own interests. In its view, these factors put it under pressure to join an employers' association so as to enable it to defend its interests.

The Court examined the applicant company's complaint from the standpoint of the negative aspect of the right to freedom of association, namely the right not to be forced to join an association. Its inquiry was directed at establishing whether the circumstances of the case were such as to constitute an interference with the applicant company's Article 11 right and in particular whether the alleged pressure to

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250. *Geotech Kancev GmbH v. Germany*, no. 23646/09, 2 June 2016.

become a member of an employers' association could be said to have struck at the very substance of that right.

The Court ruled against the applicant company. The judgment is of interest in that it was required to distinguish the facts of the applicant company's case from those in previous cases in which it found that an obligation to contribute financially to an association can resemble an important feature in common with that of joining an association and can constitute an interference with the negative aspect of the right to freedom of association (see, in particular, *Vörður Ólafsson v. Iceland*<sup>251</sup>). The Court highlighted the following points which undermined the applicant company's view that the scheme was tantamount to compulsory membership of an employers' association. In so doing it had close regard to the social purpose underpinning the creation of the scheme.

In the first place, the applicant company's contributions to the Fund could only be used to implement and administer the Fund and to pay out benefits to employees in the building industry. For that reason, the contributions which the applicant company was required to pay could not be considered to be a membership contribution to an employers' association.

Secondly, all contributing companies, whether members of an employers' association or not, received full information about the use to which their contributions were put. There was a high level of transparency surrounding the operation of the Fund.

Thirdly, unlike in the case of *Vörður Ólafsson*, there was a significant degree of involvement in and control of the scheme by public authorities.

In view of the above considerations, the Court concluded that any *de facto* incentive for the applicant company to join an employers' association was too remote to strike at the very substance of its Article 11 right.

The judgment confirms the established case-law regarding the negative right to freedom of association and the importance of conducting a fact-specific inquiry into whether or not the facts of a particular case disclose a violation of Article 11 in cases of alleged compulsion to join an association.

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The *Unite the Union v. the United Kingdom*<sup>252</sup> decision examined the question whether a State has a positive obligation to provide for a mandatory system of collective bargaining.

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251. *Vörður Ólafsson v. Iceland*, no. 20161/06, § 48, ECHR 2010.

252. *Unite the Union v. the United Kingdom* (dec.), no. 65397/13, 3 May 2016.

The applicant trade union represented around 18,000 employees in the agricultural sector. Following a series of consultations with interested parties, including the applicant trade union, the British Government succeeded in having adopted new legal provisions abolishing the Agricultural Wages Board for England and Wales, a statutory body which for many years had set minimum wages and conditions in the agricultural sector. The Board comprised among its members representatives of employers and employees, the latter being nominated most recently by the applicant trade union.

In the Convention proceedings, the applicant trade union argued that the abolition of the Board was contrary to Article 11 of the Convention in that it infringed its right to engage in collective bargaining in the interests of its members, that being an essential element of the right to form and join a trade union. The Court found the complaint to be manifestly ill-founded. The decision is of interest for the following reasons.

In the first place, the Court noted that the abolition of the Board did not prevent the applicant trade union from engaging in collective bargaining. Employers and trade unions were not prevented from entering into voluntary collective agreements and the enforceability of such agreements was provided for in domestic law. For that reason the abolition of the Board could not be seen as an interference with the applicant trade union's Article 11 rights.

Secondly, the Government could not be said to have failed to comply with any possible positive obligation which may be derived from Article 11 to have in place a mandatory statutory forum for collective bargaining in the agricultural sector. The respondent State enjoyed a wide margin of appreciation in determining whether a fair balance had been struck between the protection of the public interest in the abolition of the Board and the applicant trade union's competing rights under Article 11 of the Convention. It is of interest that the Court had regard to the [European Social Charter](#), the [Charter of Fundamental Rights of the European Union](#) and several ILO Conventions concerning the right to bargain collectively, particularly in the agricultural sector, in order to show that there did not exist an international consensus in favour of the applicant trade union's position.

Thirdly, the Court pointed out the extent of the consultation on the Government's proposal to abolish the Board as well as its assessment of the impact, including financial, of the abolition on workers in the agricultural sector. It is noteworthy that the Court found that the fact that the government had considered the human-rights implications of

the proposal, including the extent of their positive obligations in the area of collective bargaining, was “a factor which carries some weight for [its] assessment as to the fair balance to be struck between the competing interests at stake in the light of the principle of subsidiarity”.

Fourthly, in examining compliance with the fair-balance requirement, the Court reiterated that the applicant trade union was not prevented from negotiating voluntary collective and legally enforceable agreements. Even accepting its submission that voluntary collective bargaining in the agricultural sector was virtually non-existent and impractical, this was not, in the Court's view, sufficient to lead to the conclusion that a mandatory mechanism should be recognised as a positive obligation.

## **Prohibition of discrimination (Article 14)<sup>253</sup>**

### **Article 14 taken in conjunction with Article 8**

The judgment in *Biao v. Denmark*<sup>254</sup> related to a restriction on family reunification, which indirectly discriminated against persons such as the applicant on the grounds of ethnic origin and nationality.

The first applicant, who was born in Togo, lived much of his formative years in Ghana before entering Denmark in 1993 and acquiring Danish nationality in 2002. He then married the second applicant in Ghana. A residence permit, to allow the second applicant to join him in Denmark, was refused since the applicants' aggregate ties to Denmark were not stronger than their attachment to any other country, Ghana in their case (“the attachment requirement”).

They complained under Article 8 alone, and in conjunction with Article 14, that a legislative amendment which provided an exception to the attachment requirement for those who had been Danish nationals for twenty-eight years (“the twenty-eight-year rule”), resulted in a discriminatory difference in treatment against those, such as the first applicant, who had acquired Danish nationality later in life. The Grand Chamber found a violation of Article 14 in conjunction with Article 8 and that no separate issue arose under Article 8 of the Convention alone.

(i) The case is noteworthy for the finding that a domestic immigration measure, regulating family reunification, had an indirect discriminatory impact in breach of Article 14 on grounds of ethnicity and nationality.

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253. See also under [Article 9](#) above, *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, ECHR 2016.

254. *Biao v. Denmark* [GC], no. 38590/10, ECHR 2016.



In particular, the question was whether the twenty-eight-year rule, creating as it did an exception to the attachment requirement, had disproportionately prejudicial effects on persons such as the first applicant who had acquired Danish nationality later in life and was of ethnic origin other than Danish, compared to Danish-born nationals of Danish ethnic origin, so as to amount to indirect discrimination on the basis of ethnic origin or nationality in violation of Article 14. In finding a violation, the Grand Chamber

- confirmed that, while Article 8 does not impose general family-reunification obligations (*Jeunesse*<sup>255</sup>, cited above), an immigration-control measure compatible with Article 8 could amount to discrimination and a breach of Article 14 (see, for example, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*<sup>256</sup>);

- confirmed that the Court will look behind the text and aim of a measure and examine whether it has disproportionately prejudicial effects on a particular group and will find it discriminatory if it has no “objective and reasonable justification”, even if the policy or measure was not aimed at that group and even if there was no discriminatory intent (see, for example, *Hugh Jordan v. the United Kingdom*<sup>257</sup>, and *D.H. and Others v. the Czech Republic*<sup>258</sup>);

- identified that the relevant comparator in the applicants’ case was “Danish nationals of Danish ethnic origin” and reiterated that no difference in treatment based exclusively or to a decisive extent on a person’s ethnic origin was capable of being justified in a contemporary society and that a difference of treatment based on nationality was only allowed for “compelling or very weighty reasons”; and

- concluded that the Government had failed to show that there were such “compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the twenty-eight-year rule”.

(ii) It is not clear whether this judgment has any impact on the Court’s finding in 1985 in *Abdulaziz, Cabales and Balkandali*. While the Grand Chamber did note that the majority of the Danish Supreme Court had relied on *Abdulaziz, Cabales and Balkandali*, it clarified that the Supreme Court had assessed this case as a difference of treatment based on length of citizenship whereas this Court assessed it as an

255. *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 107, 3 October 2014.

256. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, §§ 70-80, Series A no. 94.

257. *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001.

258. *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 175 and 184-85, ECHR 2007-IV.

indirect discrimination based on nationality and ethnic origin, so that the Grand Chamber's proportionality test was stricter than that applied by the Supreme Court. Hence the Grand Chamber appears to have distinguished the *Abdulaziz, Cabales and Balkandali* case from the present one.

(iii) It is also worth noting that the Court gathered information on, and took into account, other international trends and views. In assessing justification for the twenty-eight-year rule, the Grand Chamber referred to Article 5 § 2 of the [European Convention on Nationality](#) of the Council of Europe (ETS No. 166), a declaration of intent to eliminate discrimination between those who are nationals at birth and other nationals (including naturalised). The Court considered it demonstrated a trend towards a European standard which was relevant for the present case. The relevant EU provisions and case-law on family reunification also indicated that no distinction should be made between those who acquired citizenship by birth or otherwise. Moreover, the Grand Chamber judgment reflects the fact that various independent bodies had specifically condemned the twenty-eight-year rule: the European Commission against Racism and Intolerance (Council of Europe), the Committee on the Elimination of Racial Discrimination (United Nations) and the Commissioner for Human Rights (Council of Europe). The Court's own comparative law survey (covering twenty-nine member States) on the basic requirements for family reunification of nationals with third-country nationals indicated that none of those States distinguished between different groups of their own nationals in laying down conditions for family reunification.

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The *Di Trizio v. Switzerland*<sup>259</sup> judgment concerned social allowances and their relevance for family and private life.

Before giving birth to twins, the applicant had been forced to give up her full-time job on account of back problems and was thereby entitled to an invalidity allowance. Following the birth, she informed the relevant authorities that she wished to go back to work on a part-time basis for financial reasons. The applicant expected that the amount of invalidity allowance she received would be reduced by 50%. However, she did not receive an allowance at all. In their assessment the authorities relied on the applicant's declaration that she only wanted to work part-time. The special method used to assess the applicant's entitlement, which was only applied in cases of

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259. *Di Trizio v. Switzerland*, no. 7186/09, 2 February 2016.

individuals engaged in part-time work, resulted in a decision to refuse the applicant any allowance since she did not satisfy the minimum 40% level of disability.

In the Convention proceedings, the applicant complained that the special method of assessment applied to her case by the domestic authorities discriminated against her in the enjoyment of her right to respect for her private and family life. She maintained that, even if the same method of calculation was applied to both men and women, it operated to the disadvantage of women since it overlooked the fact that in the vast majority of cases women, rather than men, often worked part-time after the birth of children. In other words, the method was based on the view that the male member of a couple went out to work while the female member looked after the house and children.

The judgment is of interest in that the Court had first to decide whether the facts of the case fell within the ambit of family and private life (Switzerland not having ratified Protocol No. 1). It concluded that they did.

As to family life, it noted that the application of the method of calculation criticised by the applicant was capable of having an impact on the manner in which she and her husband organised their family and working life and divided up their time within the family.

As to private life, the Court observed that Article 8 guaranteed the right to personal autonomy and development. Given that the method used to calculate entitlement to an invalidity allowance placed individuals wishing to work part-time at a disadvantage, it could not be excluded that its application restricted such individuals in their choice of the means to reconcile their private life with work, household duties and bringing up children.

Article 14 of the Convention was therefore applicable.

As to the merits, the Court found for the applicant: the method of calculation indirectly discriminated against women since it was almost exclusively women who were affected by it (in 97% of cases) and the Government had failed to adduce any reasonable justification for the difference in treatment. It observed that the applicant would likely have obtained an allowance had she declared to the authorities that it was her intention to work full-time or not to work at all.

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The *Pajić v. Croatia*<sup>260</sup> judgment concerned the recognition of a homosexual couple in an immigration context.

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260. *Pajić v. Croatia*, no. 68453/13, 23 February 2016.

The applicant, a national of Bosnia and Herzegovina, was in a stable same-sex relationship with a woman living in Croatia. They travelled regularly to see each other. After two years the applicant lodged a request with the Croatian authorities for a residence permit with a view to family reunification. She stated that she had lived in Croatia for a number of years and had been in a relationship with her Croatian partner, with whom she wanted to establish a household and start a business. In a decision that was upheld by the Croatian courts, the immigration authorities refused her request on the ground that the Aliens Act expressly restricted the right to a temporary residence permit to heterosexual couples and made no mention of same-sex couples.

In the Convention proceedings, the applicant complained of discrimination on the basis of her sexual orientation. The Court found a violation of Article 14 read in conjunction with Article 8. The judgment is of interest for the following reasons.

(i) It extends the *Vallianatos and Others v. Greece*<sup>261</sup> case-law on non-cohabiting same-sex couples living in the same country to couples of different nationalities who are prevented from cohabiting on a permanent basis by immigration restrictions. In principle, the fact of not cohabiting does not deprive same-sex couples living in different countries of the stability required to bring them within the scope of “family life” within the meaning of Article 8. The case thus fell within the notion of “family life” as well as “private life” as the couple had been in a stable relationship for several years and met up regularly.

(ii) It confirms that member States must show that differences in treatment under the immigration rules based solely on sexual orientation – such as a rule providing that only different-sex couples and not same-sex couples may apply for a residence permit with a view to family reunification – must be shown to be justified in accordance with the Court's case-law. This applied even though the member States enjoy a wide margin of appreciation on matters relating to immigration.

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The judgment in *Aldeguer Tomás v. Spain*<sup>262</sup> raised the question whether same-sex and different-sex couples were in an analogous situation as regards the differing legislative choices previously made in their regard.

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

262. *Aldeguer Tomás v. Spain*, no. 35214/09, 14 June 2016.

Spain introduced divorce legislation in 1981, allowing a person or both persons in a different-sex union to remarry where one or both had previously been legally married to a third person. The legislation also entitled the surviving partner of a different-sex couple to obtain a survivor's pension where the other partner had died before the entry into force of the 1981 law.

Spain recognised same-sex marriage in 2005. However, no provision was made for the retroactive payment of a survivor's pension in a situation where one member of the same-sex couple had died before the entry into force of the 2005 law.

The applicant was the surviving partner of a stable same-sex union who was not entitled to a survivor's pension. He complained under Article 14 read in conjunction with Article 8 that heterosexual unmarried couples were treated more favourably on account of the operation of the retroactive survivor's pension clause provided for in the 1981 divorce law.

The Court found against the applicant. Its reasons for doing so are noteworthy.

The Court accepted that the applicant's relationship with his late partner fell within the notions of "private life" and "family life", thus confirming earlier case-law on this point (*Schalk and Kopf v. Austria*<sup>263</sup>, and *Vallianatos and Others*<sup>264</sup>, cited above).

However, the central question was whether the applicant had been treated less favourably in the enjoyment of his rights under Article 8 and Article 1 of Protocol No. 1 by reason of the fact that the domestic authorities had not extended to him the same advantage given to the surviving partner of a heterosexual couple on the introduction of the divorce law. The answer to that question depended on whether the applicant's situation was comparable "to the situation that had arisen in Spain a quarter of a century earlier, of a surviving partner of a different-sex cohabiting couple, in which one or both partners were unable to remarry because they were still married to another person whom they were prevented from divorcing under the legislation in force at the material time" (paragraph 85 of the judgment). The Court replied in the negative: same-sex couples were unable to marry before 2005 since the institution of marriage was restricted to different-sex couples; different-sex couples in which one or both partners were

263. *Schalk and Kopf v. Austria*, no. 30141/04, § 94, ECHR 2010.

264. *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 73, ECHR 2013 (extracts).

legally married to a third party could not remarry before 1981 on account of the absence of divorce legislation. The legal impediments confronting the applicant and the comparator relied on by him were therefore fundamentally different. For that reason there had been no discrimination. The Court also noted that Spain could not be faulted for not having legislated for the recognition of the right to a survivor's pension for same-sex couples at an earlier stage, for example before the death of the applicant's partner. The timing for the introduction of such laws fell within the State's margin of appreciation (see *Schalk and Kopf*, cited above, §§ 105 and 108, and, more recently, *Oliari and Others v. Italy*<sup>265</sup>).

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The *Taddeucci and McCall v. Italy*<sup>266</sup> judgment concerned the application of the same restriction to unmarried homosexual and heterosexual couples and an alleged failure to treat the former differently.

The applicants, a same-sex couple, complained that they were prevented from living together in Italy as a family because the Italian authorities had refused as from 2004 to grant the second applicant, a New Zealand national, a residence authorisation for family purposes. The first applicant was an Italian national and the couple had lived together there for ten months prior to the refusal. The refusal was based on the fact that the applicants were not married, which, at the material time, was a precondition for the grant of authorisation irrespective of whether or not the couple was in a same-sex or a different-sex union. The applicants eventually left Italy in 2009 to live in the Netherlands, where they married in 2010.

The applicants maintained in the Convention proceedings that they had been discriminated against in the enjoyment of their right to respect for their family life since they were treated on a par with unmarried different-sex couples.

The Court found for the applicants. The judgment is noteworthy for the following reasons.

The applicants had been in a stable same-sex relationship since 1999 and had been living together in Italy for ten months. In line with its established case-law (*Schalk and Kopf*<sup>267</sup>, cited above, and *X and*

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265. *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, § 163, 21 July 2015.

266. *Taddeucci and McCall v. Italy*, no. 51362/09, 30 June 2016.

267. *Schalk and Kopf v. Austria*, no. 30141/04, § 94, ECHR 2010.

*Others v. Austria*<sup>268</sup>), the Court had no difficulty in accepting that the applicants enjoyed family life within the meaning of Article 8, with the consequence that they could challenge under Article 14 the impact which the refusal to grant the second applicant a residence permit had had on the enjoyment of their Article 8 right.

The central issue for the Court was the determination of the comparator given that the applicants' situation was on the face of it similar to that of an unmarried heterosexual couple, one of whom was a non-EU national. Italian law at the time treated both situations alike since the grant of a residence permit for family purposes was dependent on the foreign-national partner being a "family member", which in turn required him or her to be married to the Italian-national partner.

Interestingly, the Court found that the applicants were in fact in a different situation to that of an unmarried heterosexual couple in the sense that under domestic law it was impossible for the second applicant to become the spouse of the first applicant on account of the prohibition on same-sex marriage and the absence of any form of legal recognition of their union. Unmarried heterosexual couples, on the other hand, were not faced with these obstacles since the foreign-national partner could qualify as a family member through marriage to the Italian-national partner. The manner in which the Court analysed the issue reflects the principle first laid down in the judgment in *Thlimmenos v. Greece*<sup>269</sup>, namely, "[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different".

It is of further interest that the Court declined to examine whether Italy had been obliged at the time of the first refusal to grant the second applicant a residence permit (2004) or by the date of the couple's departure from Italy (2009) to have legislated for the legal recognition of same-sex couples. It did not pronounce on whether the failure to do so could be justified with reference to the State's margin of appreciation during this period. It confined its inquiry to establishing whether there was reasonable and objective justification for limiting the notion of family members to heterosexual spouses. It was important for the Court that an unmarried heterosexual couple had the possibility to regularise their situation through marriage and

268. *X and Others v. Austria* [GC], no. 19010/07, § 95, ECHR 2013.

269. *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV.

thus fulfil the family-member condition for the grant of a residence permit to the foreign-national partner. Same-sex couples had no such possibility under domestic law at the material time and it was precisely this factor which distinguished the applicants' situation from that of an unmarried heterosexual couple and required the authorities to treat them differently from heterosexual couples who had not regularised their situation. For the Court, there was no reasonable and objective justification for not treating the applicants differently.

**Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1**<sup>270</sup>

The judgment in *Guberina v. Croatia*<sup>271</sup> related to a failure to take account of the needs of a disabled child when determining a father's eligibility for tax relief on the purchase of property adapted to those needs.

The applicant is the father of a severely disabled child who required constant attention. He sold the family's third-floor flat in a building without a lift, and purchased a house so as to provide the child with facilities which were better suited to his and the family's needs. The applicant sought tax relief on the purchase of the house under the relevant legislation but his request was refused on the ground that the flat he had sold met the needs of the family, since it was sufficiently large and equipped with the necessary infrastructure such as electricity and heating. No consideration was given to the plight of the child and the absence of a lift in the building.

The applicant essentially complained in the Convention proceedings that the manner of application of the tax legislation to his situation amounted to discrimination, having regard to his child's disability. The Court found a breach of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1. The judgment is noteworthy for the following reasons.

In the first place, the Court held that the applicant could complain of discriminatory treatment on account of his child's disability. In its view, Article 14 also covered situations in which an individual is treated less favourably on the basis of another's status within the meaning of the case-law under that provision. As the father of a disabled child for whom he provided care, the applicant could rely on Article 14.

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270. See also under [Article 14 taken in conjunction with Article 8](#) above, *Aldeguer Tomás v. Spain*, no. 35214/09, 14 June 2016.

271. *Guberina v. Croatia*, no. 23682/13, ECHR 2016.



Secondly, the Court considered that the authorities had treated the applicant like any other person who purchased property and sought tax relief on the ground that their previous property failed to meet basic infrastructure requirements of the type mentioned above. For the Court, the essential question was to determine whether there was objective and reasonable justification for not treating the applicant's situation differently, having regard to the factual inequality between his situation and that of other claimants of tax relief on purchased property (see in this connection, *Thlimmenos*<sup>272</sup>, cited above). In its view, even if the relevant tax legislation did not on the face of it appear to allow the decision-maker to find a solution for the applicant's situation, it was noteworthy that other provisions of domestic law did address the problems facing disabled persons in having access to buildings. The availability of a lift was seen in domestic law as a basic requirement in this connection. Furthermore, the Court observed that the authorities had not taken into account Croatia's relevant obligations under the [UN Convention on the Rights of Persons with Disabilities](#). The failure to have regard to these wider disability-based considerations and obligations had resulted in the application of an overly restrictive and mechanical approach to the interpretation of the tax legislation as regards the meaning of basic infrastructure requirements. It is of interest that the Court was not prepared to accept by way of objective and reasonable justification for the failure to take account of the applicant's specific situation the Government's plea that the tax law was intended to assist financially disadvantaged purchasers of property. Its response was that this argument had never been invoked by the authorities as a reason for rejecting the applicant's claim for tax relief and for that reason it could not speculate on its relevance.

Finally, the judgment can be viewed as a significant contribution to the Court's existing case-law on disability and is illustrative of the Court's readiness to have regard to a State's obligations under other international instruments when deciding on compliance with Convention obligations in the area of discrimination.

#### **Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1**

The case of *Çam v. Turkey*<sup>273</sup> concerned a visually impaired child who was denied access to music studies.

272. *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV.

273. *Çam v. Turkey*, no. 51500/08, 23 February 2016.

The applicant was refused admission to the music section of a Turkish academy. She had satisfied the academy that she had the technical ability to pursue her education in her chosen instrument. However, she was refused a place because she was unable to produce a medical certificate drawn up in compliance with the necessary administrative requirements and confirming to the academy's satisfaction her physical ability to follow its courses.

In the Convention proceedings, the applicant alleged that, because of her disability, she had been discriminated against in her right to education, contrary to Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1.

The Court agreed with the applicant that she was refused access to the academy solely on account of her visual disability. It was persuaded that the academy was not in a position to provide education to disabled persons regardless of the nature of their particular disability. The academy's insistence on a medical certificate compliant with its own internal regulations could not disguise this fact.

The judgment is noteworthy for the following reasons.

In the first place, the Court ruled that the right guaranteed by Article 2 of Protocol No. 1 was engaged on the facts of the case even though the primary focus of the education provided by the academy was on the development of the applicant's musical talent.

Secondly, in finding that Article 14 had been breached, the Court drew on the provisions of the [UN Convention on the Rights of Persons with Disabilities](#) (which Turkey had ratified) and, in particular, the provisions of its Article 2 on the requirement of "reasonable accommodation", meaning the adoption of "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

Significantly, the Court reasoned, with reference to the particular vulnerability of disabled children such as the applicant, that discrimination based on an individual's disability also arises when the authorities refuse to examine the possibility of introducing measures which could bring about a "reasonable accommodation".

In finding that there had been a breach of the Convention, the Court noted that the academy had neither sought to identify how the applicant's visual impairment could have impeded her ability to follow music lessons nor examined the sort of measures which could be taken in order to accommodate her disability.

The judgment reflects the importance which the Court attaches to international-law developments when it comes to issues submitted to its consideration and its willingness to interpret the scope of Convention rights in the light of such developments.

### **Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1**

The issue in *Partei Die Friesen v. Germany*<sup>274</sup> was alleged discrimination against a political party representing the interests of a minority group.

The applicant was a political party. It claimed to represent the interests of the Frisian minority in Germany and was particularly active in the *Land* of Lower Saxony. It failed to attain the 5% threshold for the 2008 parliamentary elections in Lower Saxony, obtaining only 0.3% of the votes cast. In the Convention proceedings, the applicant party argued that the imposition of the 5% threshold requirement amounted to an interference with its right to participate in elections without being discriminated against, as guaranteed by Article 14 of the Convention read in conjunction with Article 3 of Protocol No. 1.

The Court found that these provisions had not been violated. The judgment may be seen as a noteworthy contribution to the case-law on the scope of a Contracting Party's obligations with regard to the protection of minorities in the electoral sphere and the role of the margin of appreciation in this connection.

The Court observed that the forming of an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights (see *Gorzelik and Others v. Poland*<sup>275</sup>). The applicant party was formed to represent the interests of a national minority. The Court accepted its argument that the number of Frisians in Lower Saxony was not high enough to reach the statutory electoral threshold for obtaining a mandate.

Should it be treated differently on that account to other special-interest parties representing the interests of a small part of the population? On that point, the Court had regard to the Council of Europe's [Framework Convention for the Protection of National Minorities](#), Article 15 of which emphasised the participation of national minorities in public affairs. It observed, however, that the possibility of exemption from minimum electoral threshold requirements was presented as one of many options to attain this aim, and no clear and binding

274. *Partei Die Friesen v. Germany*, no. 65480/10, 28 January 2016.

275. *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 93, ECHR 2004-I.

obligation could be derived from that Convention to exempt national minorities from electoral thresholds. States Parties to the Framework Convention enjoyed a wide margin of appreciation as regards the implementation of its Article 15. Accordingly, even if certain of the *Länder* in Germany exempted national minorities from the threshold requirement, and even if the Convention were to be interpreted in the light of the Framework Convention, it could not be concluded that the Convention required different treatment in favour of minority parties in this context.

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

### Applicability

In its judgment in *Bélané Nagy v. Hungary*<sup>276</sup> the Grand Chamber examined how the notion of “legitimate expectation” had evolved since its judgment in *Kopecký v. Slovakia*<sup>277</sup> and decision in *Stec and Others v. the United Kingdom*<sup>278</sup>.

The applicant contributed to the social security scheme for over twenty years. From 2001 she received a disability pension (corresponding to a 67% loss in working capacity). Following a change in the assessment methodology, her disability score fell below the requisite minimum percentage and her pension was withdrawn. On reapplying she was again found to have a health impairment exceeding the relevant threshold. However, a new law in 2012 introduced a new eligibility criterion (a required number of days of social security cover in a given period) which she could not meet, with the result that she was no longer eligible for a disability pension.

The applicant complained that the 2012 law meant that she was no longer entitled to a disability pension due to conditions she could not possibly fulfil although her health had not changed.

The Grand Chamber found a violation of Article 1 of Protocol No. 1.

(i) The background to the case is therefore the balance to be found between the State's freedom to change the modalities of social welfare benefits, given budgetary and other constraints, and the need for an individual reliant on social security benefits to have some certainty and security as regards continuing eligibility. The key case-law issue is the

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276. *Bélané Nagy v. Hungary* [GC], no. 53080/13, ECHR 2016.

277. *Kopecký v. Slovakia* [GC], no. 44912/98, ECHR 2004-IX.

278. *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-X.

applicability of Article 1 of Protocol No. 1 and, notably, the applicant's "legitimate expectation" to continue to receive a social welfare benefit notwithstanding legislative changes in eligibility criteria. The judgment therefore comprises the first comprehensive review by the Grand Chamber of the case-law on the subject since the principles were recapitulated in *Kopecký*, cited above (see also *Stec and Others*, cited above, and *Carson and Others v. the United Kingdom*<sup>279</sup>).

(ii) For a legitimate expectation to constitute a possession, the Grand Chamber clarified that, notwithstanding the diversity of the expressions in the case-law referring to the requirement of a domestic legal basis generating a proprietary interest, the general tenor of the case-law was that the person had to have "an assertable right" which, applying the *Kopecký* principle of "a sufficient basis in national law", may not fall short of "a sufficiently established, substantive proprietary interest under the national law".

(iii) Applying that "legitimate expectation" case-law in the social welfare context, the Court distinguished a situation where the person concerned did not, or ceased to, satisfy the qualifying conditions from the situation where the domestic legal conditions for the grant of any particular benefit had changed so that the person no longer fully satisfied them.

In the latter context, that of the present case, the Grand Chamber accepted that there could be some limitation on the State's freedom to legislate. It found that "a careful consideration of the individual circumstances of the case – in particular, the nature of the change in the requirement – may be warranted in order to verify the existence of a sufficiently established, substantive proprietary interest under the national law". Such were, the Court stated, the demands of legal certainty and the rule of law, which belong to the core values imbuing the Convention.

(iv) On the facts of the case, the applicant was found to have had a possession from 2001 when, having fulfilled all the eligibility conditions, she was granted a disability pension, on the basis of which grant she had a "legitimate expectation" that it would continue as long as she continued to fulfil them. On the particular facts of the case, that legitimate expectation continued to exist until the entry into force of the 2012 law. The enactment of that law did not, of itself, undermine the existence of her "legitimate expectation", but rather was found to constitute an interference with that legitimate expectation.

279. *Carson and Others v. the United Kingdom* [GC], no. 42184/05, ECHR 2010.

(v) The aim of the interference being the legitimate one of “protecting the public purse by overhauling and rationalising the scheme of disability benefits”, the Grand Chamber assessed the proportionality of the interference and gleaned from the existing case-law those elements relevant to that assessment including: the level of reduction in benefits; the discriminatory nature of any loss of entitlement; the use of transitional measures; any arbitrariness of the new condition; the applicant’s good faith; and, importantly, any impairment of the essence of the pension rights. Applying these criteria, the Grand Chamber found, notwithstanding the wide margin of appreciation afforded to States in this field, that the applicant had had to bear an excessive individual burden and that there had been a violation of Article 1 of Protocol No. 1.

### **Enjoyment of possessions**

In the *Bélané Nagy* judgment, cited above, the Grand Chamber assessed the proportionality of an interference by the authorities in the right to enjoyment of possessions in the form of social-security benefits (see “[Applicability](#)” above).

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In issue in the judgment in *Philippou v. Cyprus*<sup>280</sup> was the automatic loss of the applicant’s civil-service pension entitlements following disciplinary proceedings resulting in his dismissal.

The applicant, a civil servant of thirty-three years’ standing, was convicted, among other serious offences, of dishonesty, obtaining money by false pretences and forging cheques. In subsequent disciplinary proceedings, and following a hearing at which the applicant was legally represented, the Public Service Commission imposed on the applicant the most severe of the range of penalties available to it, namely dismissal, which automatically entailed the forfeiture of the applicant’s civil-service pension.

In the Convention proceedings, the applicant complained that the forfeiture of his pension breached Article 1 of Protocol No. 1.

The Court ruled against the applicant. Its finding that there had been no breach of Article 1 was based on its assessment of the concrete impact of the forfeiture on the applicant, having regard to the circumstances of the case. The issue of proportionality was therefore central to the outcome of the case. The Court had previously observed in general (see *Da Silva Carvalho Rico v. Portugal*<sup>281</sup> and *Stefanetti and Others v.*

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280. *Philippou v. Cyprus*, no. 71148/10, 14 June 2016.

281. *Da Silva Carvalho Rico v. Portugal* (dec.), no. 13341/14, 1 September 2015.

*Italy*<sup>282</sup>) that the deprivation of the entirety of a pension was likely to breach Article 1 of Protocol No. 1 (see, for example, *Apostolakis v. Greece*<sup>283</sup>) and that, conversely, the imposition of a reduction which it considers to be reasonable and commensurate would not (see, among many other authorities, *Da Silva Carvalho Rico*, cited above; *Arras and Others v. Italy*<sup>284</sup>, and *Poulain v. France*<sup>285</sup>).

Among other factors, the Court gave weight to the following:

(i) The applicant had benefited from extensive procedural guarantees in the disciplinary proceedings, his personal situation was considered in depth in those proceedings and he was able to challenge the forfeiture decision before the Supreme Court at two levels of jurisdiction.

(ii) The disciplinary proceedings followed and were separate from the criminal proceedings.

(iii) The applicant was not left without any means of subsistence since he remained entitled to receive a social-security pension to which he and his employer had contributed.

(iv) A widow's pension was paid to the applicant's wife on the assumption that he had died rather than been dismissed.

Weighing the seriousness of the offences committed by the applicant against the effect of the disciplinary measures, the Court found that the applicant had not been made to bear an individual and excessive burden by reason of the forfeiture of his civil-service pension.

### **Control of the use of property**

The judgment in *Ivanova and Cherkezov*<sup>286</sup>, cited above, concerned the imminent execution of a demolition order and the scope of the protection afforded to the peaceful enjoyment of one's possessions in that context.

The applicants built a house without planning permission. The local authority served a demolition order on them. The first applicant brought judicial-review proceedings to challenge the lawfulness of the order arguing, among other things, that the execution of the order would entail for her the loss of her only home. The domestic courts ruled against her, finding that the house had been built unlawfully and

282. *Stefanetti and Others v. Italy*, nos. 21838/10 and 7 others, 15 April 2014.

283. *Apostolakis v. Greece*, no. 39574/07, 22 October 2009.

284. *Arras and Others v. Italy*, no. 17972/07, 14 February 2012.

285. *Poulain v. France* (dec.), no. 52273/08, 8 February 2011.

286. *Ivanova and Cherkezov v. Bulgaria*, no. 46577/15, 21 April 2016. See also under [Article 8 \(Home\)](#) above.

its construction could not be legalised under the transitional amnesty provisions of the governing legislation.

The Court found that the circumstances of the case gave rise to a breach of Article 8 of the Convention but not to a breach of Article 1 of Protocol No. 1. Its reasoning for so doing is interesting in that it illustrates the difference between the interests protected by both provisions and hence the particular nature of the protection afforded by each of those Articles.

As to the complaint under Article 1 of Protocol No. 1, the Court's primary concern was to determine whether the implementation of the demolition order would strike a fair balance between the first applicant's interest in keeping her possessions intact and the general interest in ensuring the effective implementation of the prohibition against building without a permit. This was an area in which States enjoyed a wide margin of appreciation. For the Court, unlike Article 8 of the Convention, Article 1 of Protocol No. 1 did not inevitably require a proportionality-sensitive assessment to be made in each individual case of the necessity of enforcement measures in the planning field. The Court found support for this proposition in *James and Others v. the United Kingdom*<sup>287</sup> and in its decision in *Allen and Others v. the United Kingdom*<sup>288</sup>, where it had made similar rulings, albeit in somewhat different contexts. It noted that the intensity of the interests protected under the two Articles, and the resultant margin of appreciation left to the domestic authorities, were not necessarily coextensive. On that understanding, the Court concluded that the demolition order was intended "to put things back in the position in which they would have been if the first applicant had not disregarded the requirements of the law". The first applicant's proprietary interest in the house could not outweigh the authorities' decision to order its demolition. Significantly, the Court also observed that the order and its enforcement would also serve to deter other potential lawbreakers, which was a relevant consideration in view of the apparent pervasiveness of the problem of illegal construction in Bulgaria.

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

The case of *Paunović and Milivojević v. Serbia*<sup>289</sup> concerned the controlling of parliamentary seats by political parties.

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287. *James and Others v. the United Kingdom*, 21 February 1986, § 68, Series A no. 98.

288. *Allen and Others v. the United Kingdom* (dec.), no. 5591/07, § 66, 6 October 2009.

289. *Paunović and Milivojević v. Serbia*, no. 41683/06, 24 May 2016.



In 2003 the applicants were elected to Parliament for their political party in the general election organised under the proportional representation system, in which votes are for a political party rather than for individual candidates. Before the election all the candidates, including the applicants, had been required by their party to sign undated resignation letters to be entrusted to the party. Those documents also authorised the party to appoint other candidates to replace them if necessary. In early 2006, following political disagreements within the party, the applicants expressly declared, in a signed and authenticated statement of early May, their wish to retain their seats in the National Assembly. In spite of that declaration, ten days later the leader of the party dated the applicants' resignation letters and remitted them to the President of the Assembly. On the same day, Mr Paunović, producing his authenticated statement from early May, personally informed the parliamentary committee on administrative affairs that he had no intention of resigning and that he considered null and void the resignation letter remitted by the leader of the party. The committee concluded, however, that the two applicants had genuinely resigned and that they were no longer in office. The applicants were replaced by other candidates from the same party.

Mr Paunović took the view that the termination of their office was illegal and that there was no effective remedy by which to complain of the breach of their rights.

For the first time the Court examined the lawfulness under domestic law of the termination of parliamentary office in a context of party control of seats. There are two aspects to be highlighted.

(i) The Court confirmed its long-standing case-law to the effect that Article 3 of Protocol No. 1, in addition to the right to stand for election, also guarantees the right to sit as MP once elected.

(ii) Even though Article 3 of Protocol No. 1 did not expressly require a legal basis for the impugned measure, unlike other Convention Articles, the Court inferred from the principle of the rule of law inherent in the Convention as a whole that there was an obligation for States to introduce a legislative framework and, if need be, an intra-legislative framework, to comply with their Convention obligations.

In the present case, although there was a legal framework, the impugned measure was taken outside it. Under domestic law a resignation had to be handed in personally by the MP. Resignation letters presented by the party were thus illegal. Consequently, there had been a breach of Article 3 of Protocol No. 1.

The Court also found a violation of Article 13 of the Convention taken together with Article 3 of Protocol No. 1.



## OTHER CONVENTION PROVISIONS

### **Limitation on use of restrictions on rights (Article 18)**

The *Navalnyy and Ofitserov v. Russia*<sup>290</sup> judgment concerned the applicability of Article 18 of the Convention when relied on in conjunction with Articles 6 and 7.

The applicants relied on Article 18 in conjunction with Articles 6 and 7. In their view, they had been charged, prosecuted and convicted of conspiracy to steal assets for reasons other than determining their guilt. The first applicant was an anti-corruption campaigner, who had unsuccessfully stood for election as mayor of Moscow in 2011. The applicants contended that the first applicant's prosecution and conviction were intended to curtail his political activities. The Court found that Article 6 of the Convention had been violated on account of the unfairness of the proceedings, and that this conclusion dispensed it from having to examine separately the complaint under Article 7 of the Convention.

The judgment is of interest in that the Court had to address the applicability of Article 18 in relation to the other Articles relied on. Article 18 states:

“The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

The Court has in previous cases found a breach of Article 18 in combination with Article 5, the latter provision setting out clear and exhaustive circumstances in which the liberty of the individual may be restricted with justification (see, for example, *Gusinskiy v. Russia*<sup>291</sup>; *Cebotari v. Moldova*<sup>292</sup>; *Lutsenko v. Ukraine*<sup>293</sup>; *Tymoshenko v. Ukraine*<sup>294</sup>; and *Ilgar Mammadov v. Azerbaijan*<sup>295</sup>).

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290. *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, 23 February 2016.

291. *Gusinskiy v. Russia*, no. 70276/01, ECHR 2004-IV.

292. *Cebotari v. Moldova*, no. 35615/06, 13 November 2007.

293. *Lutsenko v. Ukraine*, no. 6492/11, 3 July 2012.

294. *Tymoshenko v. Ukraine*, no. 49872/11, § 299, 30 April 2013.

295. *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014.

The structure of Article 6 (and Article 7) is different, as confirmed by the Court in the instant case. In finding that the applicants' complaint was incompatible *ratione materiae* with the provisions of the Convention relied on, it observed that Articles 6 and 7 did not contain any express or implied restrictions that could form the subject of the Court's examination under Article 18. At the same time, the Court added the caveat that this conclusion was to be seen as relevant to the applicants' case. It is noteworthy in this connection that, in finding a breach of Article 6, the Court highlighted the failure of the domestic courts to address the obvious link between the first applicant's public activities and the decision to prosecute him and the second applicant.

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The *Rasul Jafarov v. Azerbaijan*<sup>296</sup> judgment is interesting as regards the factual elements which can lead to a conclusion that a restriction under domestic law was applied for reasons other than those prescribed by the Convention.

The applicant, a prominent human rights activist in Azerbaijan, was arrested in 2014 on various financial charges. He was detained until his conviction and imprisonment in January 2015.

He mainly alleged, relying on Article 18 in conjunction with Article 5, that he had been arrested and detained to punish his criticism of the government, to silence him as an NGO activist and human rights defender and to discourage civil-society activity in Azerbaijan. His arrest came a few months after the delivery of the *Ilgar Mammadov*<sup>297</sup> judgment, cited above, in which the Court had found that the NGO activist in that case had been arrested and charged in order to silence or punish him, in violation of Article 18 of the Convention.

In the present case, the Court found, *inter alia*, that the charges against the applicant were not based on a "reasonable suspicion" (violation of Article 5 § 1) and that he had been arrested and detained for reasons other than those prescribed by the Convention (violation of Article 18 in conjunction with Article 5).

The judgment is of interest as regards the elements relied upon by the Court for finding, under Article 18, that the restrictions had been applied for reasons not prescribed by the Convention.

In previous cases, the Court was able to rely on a particular fact of the individual case to reach this conclusion: for example, the plea bargain

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296. *Rasul Jafarov v. Azerbaijan*, no. 69981/14, 17 March 2016.

297. *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014.

concluded in *Gusinskiy*<sup>298</sup>; the application to this Court in *Cebotari*<sup>299</sup>; particular features of the cases retained against the applicants in *Lutsenko*<sup>300</sup> and *Tymoshenko*<sup>301</sup>; and the applicant's blog entries in *Ilgar Mammadov*, all cited above.

In the present case, the Court relied on broader contextual factors (as well as on the absence of “reasonable suspicion”) to find that the applicant had been arrested and detained for reasons other than those prescribed by the Convention. These factors were the “increasingly harsh and restrictive legislative regulation of NGO activity and funding”; the narrative of high-ranking officials and pro-government media to the effect that NGOs and their leaders (including the applicant) were foreign agents and traitors; and the fact that several notable human-rights activists, who had also cooperated with international organisations protecting human rights, had been similarly arrested. The Court considered that these factors supported the applicant's and the third-party interveners' argument to the effect that the applicant's arrest and detention were part of a larger campaign to “crack down on human rights defenders in Azerbaijan, which had intensified over the summer of 2014”. The Court concluded, therefore, that the applicant had been arrested and detained “in order to silence and punish [him] for his activities in the area of human rights” and found a violation of Article 18 in conjunction with Article 5 of the Convention.

### Striking out (Article 37)<sup>302</sup>

The issue before the Grand Chamber in *Khan v. Germany*<sup>303</sup> was whether an application should be struck out since the applicant faced no risk of expulsion in the foreseeable future.

In 1991 the applicant (a Pakistani national) arrived in Germany with her husband. The couple had a son in 1995. The applicant received a permanent residence permit in 2001. In 2005 she was convicted of manslaughter. Given her mental incapacity, she was ordered to stay in a psychiatric hospital. In 2011 the domestic courts confirmed

298. *Gusinskiy v. Russia*, no. 70276/01, ECHR 2004-IV.

299. *Cebotari v. Moldova*, no. 35615/06, 13 November 2007.

300. *Lutsenko v. Ukraine*, no. 6492/11, 3 July 2012.

301. *Tymoshenko v. Ukraine*, no. 49872/11, 30 April 2013.

302. See also, under Article 2 and Article 3, *F.G. v. Sweden* [GC], no. 43611/11, ECHR 2016, and, under Article 3, *Paposhvili v. Belgium* [GC], no. 41738/10, 13 December 2016.

303. *Khan v. Germany* [GC], no. 38030/12, 21 September 2016.

an expulsion order against her (*inter alia*, on the grounds that she constituted a danger to the public, had not integrated, had limited contact with her son and could receive medical treatment in Pakistan). Later that year, she was released from hospital as she was considered no longer to be a risk. No attempt to expel the applicant was made.

Before the Grand Chamber the Government submitted certain assurances (which the Court found to be binding): a new order would be required before any future expulsion; all domestic remedies would be available against it; a medical examination would precede any expulsion; and the applicant had been granted “tolerated residence”. The Grand Chamber struck out the application under Article 37 § 1 (c) of the Convention.

(i) The Grand Chamber distinguished two situations which lead to the striking out of expulsion cases.

– When a residence permit has been granted and there is no risk of expulsion, the Court considers the case to have been resolved within the meaning of Article 37 § 1 (b).

– When a residence permit has not been granted but the circumstances are such that there is no risk of expulsion for a considerable time and any new expulsion order could be challenged, the Court considers it is no longer justified to continue to examine the case within the meaning of Article 37 § 1 (c). The present case fell within this second group.

(ii) As to whether, nevertheless, there were “any special circumstances regarding respect for human rights” warranting the Court’s examination of the case, the Grand Chamber distinguished the present case from that in its recent judgment in *F.G. v. Sweden*<sup>304</sup>, cited above. That case concerned “major issues under Articles 2 and 3” whereas the present case did not go beyond the applicant’s specific situation.

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The *Jeronovičs v. Latvia*<sup>305</sup> judgment concerned the respondent State’s continuing obligation to investigate even following a decision striking out the complaint on the basis of a unilateral declaration.

By a decision of 10 February 2009, the Court struck out several of the applicant’s complaints following the Government’s unilateral declaration acknowledging, *inter alia*, a violation of Articles 3 and 13 of the Convention having regard to the applicant’s ill-treatment by the

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304. *F.G. v. Sweden* [GC], no. 43611/11, ECHR 2016, cited under [Article 2 \(Expulsion\)](#) above.

305. *Jeronovičs v. Latvia* [GC], no. 44898/10, ECHR 2016.

police, the ineffectiveness of the ensuing investigation and the lack of an effective remedy. The decision did not state that the Government were obliged to continue to investigate the circumstances surrounding the applicant's ill-treatment (contrast with the position in *Žarković and Others v. Croatia*<sup>306</sup>).

Given the terms of the unilateral declaration, the applicant requested the Latvian authorities to reopen the criminal proceedings concerning his allegations of ill-treatment by the police. The prosecuting authorities refused to do so. The applicant introduced a new application complaining under Articles 3 and 13 of this refusal. The Grand Chamber found a procedural violation of Article 3, with no separate issue arising under Article 13 of the Convention.

This case is noteworthy because the Grand Chamber found that the obligation to investigate alleged ill-treatment by State agents subsisted, even after a striking-out decision on the basis of a unilateral declaration, the applicant's complaints regarding the ill-treatment and related investigation.

Although the Court acknowledged that it might be called upon to supervise the implementation of an undertaking in a unilateral declaration and to examine whether there were any "exceptional circumstances" justifying the restoration of an application to the list of cases (Rule 43 § 5 of the Rules of Court), in the present case it considered that there were no such exceptional circumstances because the text of the prior decision provided a sufficient basis to establish a continuing obligation on the part of the Government to investigate.

The source of this obligation was the Court's statement in the striking-out decision according to which the "decision is without prejudice to the possibility for the applicant to exercise any other available remedies in order to obtain redress". The case-law in respect of ill-treatment by State agents required an applicant to avail himself of remedies to obtain redress but also imposed a corresponding obligation on the authorities to provide that remedy in the form of an investigation of ill-treatment. Compensation alone could not therefore fulfil the procedural obligation (see *Gäffgen v. Germany*<sup>307</sup>) and the Court could not, consequently, accept the Government's argument that compensation, for which the unilateral declaration provided, sufficed. Since the authorities had refused to reopen the criminal proceedings, there had been a violation of Article 3 of the Convention under its procedural limb.

306. *Žarković and Others v. Croatia* (dec.), no. 75187/12, 9 June 2015.

307. *Gäffgen v. Germany* [GC], no. 22978/05, §§ 116 and 119, ECHR 2010.

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The judgment in *V.M. and Others v. Belgium*<sup>308</sup> concerned the striking out of an application pending before the Grand Chamber because the applicants' representative had no contact with them.

The applicants were a Roma family (parents and five children) of Serbian nationality. The oldest child was severely disabled. They sought asylum in Belgium. Pending their appeal against their removal to France (pursuant to the *Dublin II Regulation*), they had accommodation. On the expiry of the time-limit in the order to leave Belgium, they had to leave that accommodation. The family spent several days sleeping outside. When again offered accommodation, it would appear that they failed to turn up. They spent two weeks living in a railway station in Brussels before accepting a voluntary-return programme to Serbia. Two months later their eldest child died of a lung infection. Further to their application to the Court (for which they were legally represented), the Chamber found a violation of Article 3 as regards their living conditions in Belgium, no violation of Article 2 as regards the death of their child, and a violation of Article 13 (in conjunction with Articles 2 and 3) as regards their appeal against the removal order.

A Panel of the Grand Chamber subsequently accepted the Government's request to refer the case to the Grand Chamber. In her written and oral submissions to the Grand Chamber, the applicants' lawyer confirmed that she had had no contact with the applicant family since before the delivery of the Chamber judgment. For this reason, the Grand Chamber struck out the application pursuant to Article 37 § 1 (a) of the Convention (on the grounds that the applicants did "not intend to pursue an application").

Three points are worth noting in this striking-out judgment.

(i) The judgment confirms that a form of authority is insufficient of itself to justify the continuation of an application: contact between the applicant and the representative had to be maintained throughout the proceedings. Since there had been no contact since before the Chamber judgment, the representative could not meaningfully continue the present application before the Grand Chamber.

(ii) The judgment also confirms that, further to Article 44 § 2 of the Convention, the referral and later striking-out of the application mean that the Chamber judgment will never become final. Although the applicants were therefore deprived of the benefit of the Chamber judgment, the Grand Chamber considered that that was a situation created by their failure to maintain contact with their representative.

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308. *V.M. and Others v. Belgium* [GC], no. 60125/11, 17 November 2016.



(iii) Finally, the Grand Chamber judgment found that “respect for the rights guaranteed by the Convention” did not require the continued examination of the case (see *M.S.S. v. Belgium and Greece*<sup>309</sup>, and *Tarakhel*<sup>310</sup>, both cited above; compare and contrast *F.G. v. Sweden*<sup>311</sup>; and *Khan*<sup>312</sup>, both cited above).

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309. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011.

310. *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014 (extracts).

311. *F.G. v. Sweden* [GC], no. 43611/11, §§ 81-82, ECHR 2016.

312. *Khan v. Germany* [GC], no. 38030/12, 21 September 2016.



# LIST OF CITED CASES

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)”.

## A

<i>A and B v. Norway</i> [GC], nos. 24130/11 and 29758/11, ECHR 2016 .....	10, 73
<i>A.B. and Others v. France</i> , no. 11593/12, 12 July 2016 .....	11, 36, 94
<i>Aldeguer Tomás v. Spain</i> , no. 35214/09, 14 June 2016 .....	11, 132, 136
<i>Al-Dulimi and Montana Management Inc. v. Switzerland</i> [GC], no. 5809/08, ECHR 2016 .....	10, 12, 48
<i>A.M. v. France</i> , no. 56324/13, 12 July 2016 .....	12, 45
<i>Arlewin v. Sweden</i> , no. 22302/10, 1 March 2016 .....	12, 52
<i>Armani Da Silva v. the United Kingdom</i> , no. 5878/08, ECHR 2016 .....	9, 12, 17
<i>Avotiņš v. Latvia</i> [GC], no. 17502/07, ECHR 2016 .....	10, 12, 54

## B

<i>B.A.C. v. Greece</i> , no. 11981/15, 13 October 2016 .....	11, 88
<i>Baka v. Hungary</i> [GC], no. 20261/12, ECHR 2016 .....	9, 10, 12, 47, 107
<i>Bédat v. Switzerland</i> [GC], no. 56925/08, ECHR 2016 .....	10, 111
<i>Bélláné Nagy v. Hungary</i> [GC], no. 53080/13, ECHR 2016 .....	10, 12, 140, 142
<i>Bergmann v. Germany</i> , no. 23279/14, 7 January 2016 .....	12, 68
<i>Biao v. Denmark</i> [GC], no. 38590/10, ECHR 2016 .....	10, 12, 128
<i>Biržietis v. Lithuania</i> , no. 49304/09, 14 June 2016 .....	11, 87
<i>Blokhin v. Russia</i> [GC], no. 47152/06, ECHR 2016 .....	9, 10, 11, 12, 32, 41, 42, 62
<i>Brambilla and Others v. Italy</i> , no. 22567/09, 23 June 2016 .....	11, 119
<i>Bulgarian Helsinki Committee v. Bulgaria</i> (dec.), nos. 35653/12 and 66172/12, 28 June 2016 .....	14, 15
<i>Buzadji v. the Republic of Moldova</i> [GC], no. 23755/07, ECHR 2016 .....	9, 43

## C

<i>Çam v. Turkey</i> , no. 51500/08, 23 February 2016 .....	11, 137
<i>Cătălin Eugen Micu v. Romania</i> , no. 55104/13, 5 January 2016 .....	11, 34
<i>Cazan v. Romania</i> , no. 30050/12, 5 April 2016 .....	11, 23
<i>Constantinides v. Greece</i> , no. 76438/12, 6 October 2016 .....	11, 65
<i>Cumhuriyet Halk Partisi v. Turkey</i> , no. 19920/13, ECHR 2016 .....	11, 106, 123

## D

<i>Dallas v. the United Kingdom</i> , no. 38395/12, 11 February 2016 .....	12, 70
<i>Di Trizio v. Switzerland</i> , no. 7186/09, 2 February 2016 .....	12, 81, 94, 130
<i>D.L. v. Bulgaria</i> , no. 7472/14, 19 May 2016 .....	11, 42, 99
<i>Dubská and Krejzová v. the Czech Republic</i> [GC], nos. 28859/11 and 28473/12, ECHR 2016 .....	10, 12, 81

## E

<i>Erdtmann v. Germany</i> (dec.), no. 56328/10, 5 January 2016 .....	120
---	-----

## F

<i>FG. v. Sweden</i> [GC], no. 43611/11, ECHR 2016 .....	9, 10, 20, 22, 28, 31, 149, 150, 153
<i>Frumkin v. Russia</i> , no. 74568/12, ECHR 2016 .....	11, 120

## G

<i>Geotech Kancev GmbH v. Germany</i> , no. 23646/09, 2 June 2016 .....	12, 125
<i>Gouarré Patte v. Andorra</i> , no. 33427/10, 12 January 2016 .....	73
<i>Guberina v. Croatia</i> , no. 23682/13, ECHR 2016 .....	11, 136
<i>Gülcü v. Turkey</i> , no. 17526/10, 19 January 2016 .....	11, 122

## I

<i>Ibrahim and Others v. the United Kingdom</i> [GC], nos. 50541/08 and 3 others, ECHR 2016 .....	10, 12, 66
<i>Ivanova and Cherkezov v. Bulgaria</i> , no. 46577/15, 21 April 2016 .....	11, 96, 143
<i>İzzettin Doğan and Others v. Turkey</i> [GC], no. 62649/10, ECHR 2016 .....	10, 100, 128

## J

<i>Jeronovičs v. Latvia</i> [GC], no. 44898/10, 5 July 2016 .....	10, 27, 150
<i>J.K. and Others v. Sweden</i> [GC], no. 59166/12, ECHR 2016 .....	9, 11, 12, 28

## K

<i>Kahn v. Germany</i> , no. 16313/10, 17 March 2016 .....	11, 83
<i>Kalda v. Estonia</i> , no. 17429/10, 19 January 2016 .....	11, 116
<i>Karácsony and Others v. Hungary</i> [GC], no. 42461/13, ECHR 2016 .....	10, 12, 105
<i>Khan v. Germany</i> [GC], no. 38030/12, 21 September 2016 .....	10, 149, 153
<i>Khlaiifia and Others v. Italy</i> [GC], no. 16483/12, ECHR 2016 .....	9, 11, 22, 75, 77
<i>Kiril Zlatkov Nikolov v. France</i> , nos. 70474/11 and 68038/12, 10 November 2016 ...	12, 16, 78
<i>Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia</i> , no. 2319/14, 13 October 2016 .....	11, 19
<i>Kocherov and Sergejeva v. Russia</i> , no. 16899/13, 29 March 2016 .....	11, 94
<i>Korneykova and Korneykov v. Ukraine</i> , no. 56660/12, 24 March 2016 .....	11, 35
<i>K.S. and M.S. v. Germany</i> , no. 33696/11, 6 October 2016 .....	11, 97

## L

- Lhermitte v. Belgium* [GC], no. 34238/09, ECHR 2016 .....10, 59  
*Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, ECHR 2016 .....10, 50, 57

## M

- Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, ECHR 2016 10, 12, 114  
*Marc Brauer v. Germany*, no. 24062/13, 1 September 2016 .....11, 57  
*Meier v. Switzerland*, no. 10109/14, 9 February 2016 .....11, 38  
*Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, ECHR 2016 .....9, 11, 12, 13, 22, 40, 77, 94, 100  
*Murray v. the Netherlands* [GC], no. 10511/10, ECHR 2016 .....9, 11, 12, 24  
*Mursić v. Croatia* [GC], no. 7334/13, ECHR 2016 .....9, 11, 33

## N

- Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, 23 February 2016 ... 12, 147  
*Novikova and Others v. Russia*, nos. 25501/07 and 4 others, 26 April 2016 .....11, 109, 120

## P

- Pajić v. Croatia*, no. 68453/13, 23 February 2016 .....11, 94, 131  
*Papavasylakis v. Greece*, no. 66899/14, 15 September 2016 .....12, 103  
*Paposhvili v. Belgium* [GC], no. 41738/10, ECHR 2016 ..... 9, 10, 30, 94, 149  
*Partei Die Friesen v. Germany*, no. 65480/10, 28 January 2016 .....11, 139  
*Paunović and Milivojević v. Serbia*, no. 41683/06, 24 May 2016 .....11, 144  
*Philippou v. Cyprus*, no. 71148/10, 14 June 2016 .....12, 142  
*Pinto Coelho v. Portugal (no. 2)*, no. 48718/11, 22 March 2016 .....11, 118

## R

- Ramadan v. Malta*, no. 76136/12, ECHR 2016 .....11, 92  
*Rasul Jafarov v. Azerbaijan*, no. 69981/14, 17 March 2016 .....12, 148  
*R.B. v. Hungary*, no. 64602/12, 12 April 2016 .....11, 22, 86  
*R.M. and Others v. France*, no. 33201/11, 12 July 2016 .....36, 37  
*Ruban v. Ukraine*, no. 8927/11, 12 July 2016 .....12, 72  
*Rywin v. Poland*, nos. 6091/06 and 2 others, 18 February 2016 .....11, 60

## S

- Sakir v. Greece*, no. 48475/09, 24 March 2016 .....11, 27  
*Salihu and Others v. Sweden* (dec.), no. 33628/15, 10 May 2016 .....120  
*Semir Güzel v. Turkey*, no. 29483/09, 13 September 2016 .....12, 104  
*Seton v. the United Kingdom*, no. 55287/10, 31 March 2016 .....65  
*Shabanov and Palfreeman v. Bulgaria*, nos. 35365/12 and 69125/12, 21 July 2016 .... 11, 110

*Simon Price v. the United Kingdom*, no. 15602/07, 15 September 2016 .....65  
*Sousa Goucha v. Portugal*, no. 70434/12, 22 March 2016 .....11, 85  
*Süveges v. Hungary*, no. 50255/12, 5 January 2016 ..... 11, 102

## T

*Tabbane v. Switzerland* (dec.), no. 41069/12, 1 March 2016 .....12, 54  
*Taddeucci and McCall v. Italy*, no. 51362/09, 30 June 2016 .....11, 134

## U

*Unite the Union v. the United Kingdom* (dec.), no. 65397/13, 3 May 2016 ....12, 126

## V

*Vasileva v. Bulgaria*, no. 23796/10, 17 March 2016 .....12, 84  
*V.M. and Others v. Belgium* [GC], no. 60125/11, 17 November 2016 .....10, 152  
*Vukota-Bojić v. Switzerland*, no. 61838/10, 18 October 2016 .....12, 90

## W

*Wenner v. Germany*, no. 62303/13, 1 September 2016 .....11, 37

## Y

*Yaroslav Belousov v. Russia*, nos. 2653/13 and 60980/14, 4 October 2016 .11, 23, 63

## Z

*Ziemiński v. Poland* (no. 2), no. 1799/07, 5 July 2016 .....11, 112