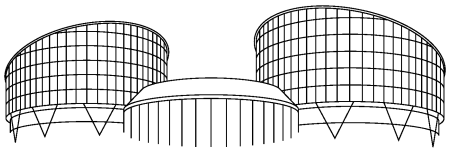

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Overview of the Court's case-law from 1 January to 15 June 2017

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Overview of the Court's case-law from 1 January to 15 June 2017[1]

1. This Overview contains a selection by the Jurisconsult of cases of interest from a legal perspective. It has been drafted by the Jurisconsult's Department and is not binding on the Court.
This provisional version will be superseded by the final version covering the whole of 2017.

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"Core" rights

Right to life (Article 2)

Obligation to protect life

In the *Tagayeva and Others v. Russia*[1] judgment the Court considered the obligations of the State, as regards a large-scale hostage-taking by terrorists, before, during and after the event.

The case concerned the hostage-taking in a school in Beslan, North Ossetia, from 1 to 3 September 2004, the organisation of the rescue operation, the storming of the school by State forces and the subsequent proceedings. There were hundreds of dead and injured and the applicants (over 400) were next of kin and survivors. They complained under Article 2 alone and in conjunction with Article 13 of the Convention.

In its judgment on the merits, the Court found that there had been a violation of several aspects of Article 2: a failure to protect against a known and foreseeable threat to life from a terrorist act; a failure to plan and control the use of lethal force so as to minimise the risk to life; excessive use of lethal force; and a breach of the State's obligation to investigate. The Court also concluded that there had been no violation of Article 13 of the Convention.

The judgment is of contemporary relevance as it concerns a comprehensive review of the principles concerning, and the application of, Articles 2 and 13 to a large-scale hostage-taking by terrorists, including to the State's actions before, during and after the event.

(i) The following points are worth noting, in particular as regards Article 2 of the Convention.

Firstly, this is the first time the Court has found that, given the intelligence information available to it, the State had failed to take adequate measures to protect against a terrorist attack (see, applying the *Osman v. the United Kingdom*[2] test to situations concerning the obligation to afford general protection to society, *Mastromatteo v. Italy*[3]). However, the pre-attack intelligence available to the authorities in the present case was very specific and relevant: a hostage-taking by terrorists in an educational establishment on the day of the opening of the academic year (1 September 2004) near the North Ossetian border near to Beslan. Similar attacks had already been carried out on several occasions by Chechen separatists. The threat was therefore considered by the Court to amount to an immediate risk to the lives of an identified target population, including vulnerable children, and measures should have been taken which, when judged reasonably, could have prevented or minimised the known risk. While some had been taken, the Court considered those steps to have been inadequate: in the end, a sizeable illegal armed group was able to gather, prepare, travel to and seize the school without encountering any preventative security arrangements. The Court also specifically criticised the lack of any "single sufficiently high-level structure" responsible for evaluating and managing the threat with field teams.

Secondly and similarly, the main issue with which the Court took issue as regards the planning and control of the rescue operation was the lack of central control: in particular, the inability of the command structure of the operation to "maintain clear lines of command and accountability, coordinate and communicate important details relevant to the rescue operation to the key structures involved and plan in advance for the necessary equipment and logistics".

1. *Tagayeva and Others v. Russia*, nos. 26562/07 and 8 others, 13 April 2017 (not final). See also under Article 13 (Right to an effective remedy) below.
2. *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports of Judgments and Decisions* 1998-VIII.
3. *Mastromatteo v. Italy* [GC], no. 37703/97, § 69, ECHR 2002-VIII.

Thirdly, the Court found that the investigation into the events had been in breach of Article 2, in particular in so far as it had failed to examine adequately the use of lethal force by the State agents during the operation on 3 September 2004.

Finally, and as to the use of lethal force, it was undisputed that the decision to use some degree of lethal force as such was justified. However, the force used included indiscriminate weapons such as grenade launchers, flame throwers and a tank gun. While there was indeed a difference between "large-scale anti-terrorist" and "routine police" operations, it remained a policing operation the primary aim of which was to protect the lives of those in danger from unlawful violence (approximately a thousand persons including hundreds of children) and the use of lethal force was governed by the strict rule of "absolute necessity". The "massive" use of explosive and indiscriminate weapons, with the attendant risk for human life, could not be regarded as absolutely necessary in the circumstances.

The weakness of the legal framework governing the use of force contributed to this violation. In particular, the Court was of the view that the failure to incorporate the main Convention principles and constraints on the use of force (primary aim to protect victims and the absolute-necessity test), coupled with a widespread immunity as regards harm caused during terrorist operations, had resulted in a "dangerous gap" in the regulatory framework of such life-threatening situations.

(ii) The Court distinguished the procedural obligation to investigate under Article 2 and the requirement to make available other effective domestic remedies under Article 13 of the Convention. The Court identified two elements, compensation and access to information, which were of special importance under Article 13 and, since the applicants had obtained both, this was sufficient for the purposes of Article 13 of the Convention.

Effective investigation[4]

The *Güzelyurtlu and Others v. Cyprus and Turkey*[5] concerned the failure of States to cooperate in the investigation of a killing.

The applicants' relatives were shot dead in the Republic of Cyprus. The killers fled back to the "Turkish Republic of Northern Cyprus" (the "TRNC"), which comes within Turkey's jurisdiction within the meaning of Article 1 of the Convention (*Cyprus v. Turkey*[6]). Parallel investigations into the murders were conducted by the Cypriot and Turkish authorities, including those of the "TRNC". On the strength of the evidence gathered during their investigation, the authorities of the Republic of Cyprus sought the extradition of the suspects who were within Turkey's jurisdiction (either in the "TRNC" or in mainland Turkey) with a view to their trial. The Turkish authorities insisted that the case file containing the evidence against the suspects be handed over so that they could try them. The authorities of the Republic of Cyprus refused. The refusal of both authorities to cooperate resulted in a situation in which their respective investigations remained open and nothing was done for more than eight years to bring to a close what the Court described as "an ultimately straightforward case."

The Court accepted the applicants' arguments that this state of affairs gave rise to a breach by both Cyprus and Turkey of their procedural obligations under Article 2.

The Court's judgment is noteworthy in view of the application in the above-mentioned context of its case-law principles on cross-border cooperation. The scope of such cooperation was defined in the inadmissibility decisions adopted in the cases of *O'Loughlin and Others v. the United Kingdom*[7] and

4. See also, under Article 2 (Obligation to protect life) above, *Tagayeva and Others v. Russia*, nos. 26562/07 and 8 others, 13 April 2017 (not final).
5. *Güzelyurtlu and Others v. Cyprus and Turkey*, no. 36925/07, 4 April 2017 (not final).
6. *Cyprus v. Turkey* [GC], no. 25781/94, § 77, ECHR 2001-IV.
7. *O'Loughlin and Others v. the United Kingdom* (dec.), no. 23274/04, 25 August 2005.

Cummins and Others v. the United Kingdom[8]. In the instant case, the Court observed (paragraph 186):

> "… generally the procedural obligation under Article 2 falls on the respondent State under whose jurisdiction the victim was at the time of death (see … *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 243-44, ECHR 2010). Nonetheless, as the Court explained in *Rantsev*, special elements in a case will justify departure from the general approach (ibid.). Where there are cross-border elements to an incident of unlawful violence leading to loss of life, the fundamental importance of Article 2 requires that the authorities of the State to which the suspected perpetrators have fled and in which evidence of the offence could be located, of their own motion, take effective measures in that regard (see *O'Loughlin and Others v. the United Kingdom* (dec.), no. 23274/04, 25 August 2005, and *Cummins and Others v. the United Kingdom* (dec.), no. 27306/05, 13 December 2005). Otherwise, those indulging in cross-border attacks will be able to operate with impunity and the authorities of the Contracting State where the unlawful attacks have taken place will be foiled in their own efforts to protect the fundamental rights of their citizens and, indeed, of any individuals within their jurisdiction."

The Court found on the facts of the case that both authorities had carried out Article 2 compliant investigations prior to the impasse. The Court addressed that development from the standpoint of the respondent States' procedural obligations under Article 2, observing (paragraph 285):

> "In circumstances such as those of the present case, where the investigation of the unlawful killing unavoidably implicates more than one State, the Court finds that this entails an obligation on the part of the respondent States concerned to cooperate effectively and take all reasonable steps necessary to this end in order to facilitate and realise an effective investigation into the case overall."

In view of the respondent States' refusal to find a compromise solution or to consider various options put forward for hearing the evidence of the suspects and trying them – which refusal arose from political considerations reflecting the long-standing and intense political dispute between the Republic of Cyprus and Turkey – the Court concluded that there had been a violation of Article 2 under its procedural aspect by virtue of the failure of the respondent Governments to cooperate.

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

Inhuman or degrading punishment

The *Hutchinson v. the United Kingdom*[9] judgment sets out the current case-law on the *de facto* and *de jure* reducibility of whole life sentences.

In 1984 the applicant was given a mandatory life sentence for murder. The Secretary of State later imposed a whole life order, which was later confirmed by the High Court. Further to the Court's judgment in *Kafkaris v. Cyprus*[10] (a whole life order had to be *de facto* and *de jure* reducible), the Court clarified in *Vinter and Others v. the United Kingdom*[11] that this meant that there had to be a prospect of release *and* a possibility of review, which review should extend to assessing whether there were legitimate penological grounds (including rehabilitation) for continued incarceration. While the Grand Chamber in *Vinter and Others* indicated that domestic law could, by virtue of section 6 of the Human Rights Act[12], be read as imposing a duty on the Secretary of State to release a life prisoner where detention was no longer compatible with Article 3 on legitimate penological grounds, it also found that the life policy set out in the Lifer Manual was too restrictive to comply with the *Kafkaris* principles and gave prisoners only a partial picture of the conditions in which the

8. *Cummins and Others v. the United Kingdom* (dec.), no. 27306/05, 13 December 2005.
9. *Hutchinson v. the United Kingdom* [GC], no. 57592/08, ECHR 2017.
10. *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008.
11. *Vinter and* Others *v. the United Kingdom* [GC], nos. 66069/09 and 2 others, ECHR 2013 (extracts).
12. "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

power of release might be exercised. The discrepancy between domestic case-law and the Lifer Manual gave rise to such a lack of clarity in domestic law that a whole life sentence could not be regarded as reducible and as such there had been a violation of Article 3 of the Convention. In its later *McLoughlin* judgment of 2014, the Court of Appeal addressed the Court's findings in *Vinter and Others*, indicating that the restrictive Lifer Manual, as a matter of domestic law, did not fetter the exercise by the Secretary of State of his discretion to review which, it considered, resolved the issue identified in *Vinter and Others*.

The applicant complained under Article 3 of his whole life sentence. The Grand Chamber found that there had been no violation of the Convention.

(i) One aspect of the judgment is rather State specific. The Grand Chamber found that the *McLoughlin* judgment of the Court of Appeal had brought clarity to the content of domestic law and resolved the discrepancy which had provided the basis for a finding of a violation of Article 3 in the *Vinter and Others* judgment. It then went on to determine whether the Article 3 review requirements were now met in the applicant's case.

(ii) Of more general relevance and interest is the summary provided, in the course of this determination by the Grand Chamber, of the *Kafkaris* principles as clarified in *Vinter and Others* and *Murray v. the Netherlands*[13], and as illustrated by the Court's post *Vinter and Others* Chamber judgments on the subject[14]. These principles were summarised as follows.

> "42. The relevant principles, and the conclusions to be drawn from them, are set out at length in *Vinter and Others* (cited above, §§ 103-22; recently summarised in *Murray v. the Netherlands* [GC], no. 10511/10, §§ 99-100, ECHR 2016). The Convention does not prohibit the imposition of a life sentence on those convicted of especially serious crimes, such as murder. Yet to be compatible with Article 3 such a sentence must be reducible *de jure* and *de facto*, meaning that there must be both a prospect of release for the prisoner and a possibility of review. The basis of such review must extend to assessing whether there are legitimate penological grounds for the continuing incarceration of the prisoner. These grounds include punishment, deterrence, public protection and rehabilitation. The balance between them is not necessarily static and may shift in the course of a sentence, so that the primary justification for detention at the outset may not be so after a lengthy period of service of sentence. The importance of the ground of rehabilitation is underlined, since it is here that the emphasis of European penal policy now lies, as reflected in the practice of the Contracting States, in the relevant standards adopted by the Council of Europe, and in the relevant international materials (see *Vinter and Others*, cited above, §§ 59-81).
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> 43. As recently stated by the Court, in the context of Article 8 of the Convention, "emphasis on rehabilitation and reintegration has become a mandatory factor that the member States need to take into account in designing their penal policies" (*Khoroshenko v. Russia* [GC], no. 41418/04, § 121, ECHR 2015; see also the cases referred to in *Murray*, cited above, § 102). Similar considerations apply under Article 3, given that respect for human dignity requires prison authorities to strive towards a life sentenced prisoner's rehabilitation (see *Murray*, cited above, §§ 103-04). It follows that the requisite review must take account of the progress that the prisoner has made towards rehabilitation, assessing whether such progress has been so significant that continued detention can no longer be justified on legitimate penological grounds (*Vinter and Others,* cited above, §§ 113-16). A review limited to compassionate grounds is therefore insufficient (ibid. § 127).
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> 44. The criteria and conditions laid down in domestic law that pertain to the review must have a sufficient degree of clarity and certainty, and also reflect the relevant case-law of the Court. Certainty in this area is not only a general requirement of the rule of law but also underpins the process of rehabilitation which risks being impeded if the procedure of sentence review and the prospects of

13. *Murray v. the Netherlands* [GC], no. 10511/10, ECHR 2016.
14. *Inter alia, Öcalan v. Turkey (no. 2)*, nos. 24069/03 and 3 others, 18 March 2014; *László Magyar v. Hungary*, no. 73593/10, 20 May 2014; *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, ECHR 2014 (extracts); *Čačko v. Slovakia*, no. 49905/08, 22 July 2014; *Trabelsi v. Belgium*, no. 140/10, ECHR 2014 (extracts); and *Bodein v. France*, no. 40014/10, 13 November 2014.

> release are unclear or uncertain. Therefore prisoners who receive a whole life sentence are entitled to know from the outset what they must do in order to be considered for release and under what conditions. This includes when a review of sentence will take place or may be sought (*Vinter and Others*, cited above, § 122). In this respect the Court has noted clear support in the relevant comparative and international materials for a review taking place no later than twenty-five years after the imposition of sentence, with periodic reviews thereafter (ibid., §§ 68, 118-20). It has however also indicated that this is an issue coming within the margin of appreciation that must be accorded to Contracting States in the matters of criminal justice and sentencing (ibid., §§ 104-05 and 120).
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> 45. As for the nature of the review, the Court has emphasised that it is not its task to prescribe whether it should be judicial or executive, having regard to the margin of appreciation that must be accorded to Contracting States (*Vinter and Others*, cited above, § 120). It is therefore for each State to determine whether the review of sentence is conducted by the executive or the judiciary."

In applying those principles and finding no violation in the applicant's case, the Grand Chamber examined: *the nature of the review* (confirming that a review by the executive was not of itself contrary to Article 3); *the scope of the review* (confirming that the review must consider whether in light of significant change in a whole life prisoner and progress towards rehabilitation, continued detention could still be justified on legitimate penological grounds); *the criteria and conditions for the review* (confirming that the relevant question was whether whole lifers could know what they must do to be considered for release and under what conditions the review would take place); and the *time frame for review* (reiterating the reference in *Vinter and Others* and *Murray* to the clear support in the comparative material for a review no later than twenty-five years after the imposition of the sentence).

The Grand Chamber found that whole life sentences could now be considered reducible and thus in keeping with Article 3 of the Convention.

Prohibition of slavery and forced labour (Article 4)

Positive obligations

In the *J. and Others v. Austria*[15] judgment, the Court examined the scope of the procedural obligation (if any) to investigate alleged human-trafficking offences committed outside the territory of a Contracting Party.

The applicants, Filipino nationals, alleged that they were victims of human trafficking and forced labour. According to the applicants, they had been trafficked from the Philippines and then employed by nationals of the United Arab Emirates. They had escaped from their employers' control in Vienna when accompanying them during their short three-day visit to Austria. They had later lodged a complaint with the authorities, which had initiated inquiries into their allegations. The investigation was eventually discontinued because, among other reasons, the offences alleged by the applicants had been committed outside Austria and neither the applicants nor their employers were Austrian nationals. On that account the authorities concluded that Austria did not have jurisdiction to deal with the applicants' complaint. Furthermore, the applicants' statements to the police did not indicate that during the applicants' stay in Austria a criminal offence had been committed on the territory of Austria by their employers, as alleged.

In the Convention proceedings the applicants contended, among other things, that the investigation conducted by the Austrian authorities should have been extended so as to cover the circumstances at the origin of their trafficking and forced labour, even though those events had occurred outside

15. *J. and Others v. Austria*, no. 58216/12, ECHR 2017 (extracts).

Austria. They relied essentially on Article 4 of the Convention as interpreted by the Court in its judgment in *Rantsev v. Cyprus and Russia*[16].

The Court found that there had been no breach of the Convention. It found on the facts that from the moment the applicants had contacted the police the Austrian authorities had complied with their duty to identify, protect and support the applicants as (potential) victims of human trafficking. As regards compliance with the duty to investigate the applicants' allegations, the judgment is noteworthy as regards the Court's response to the applicants' contention that Austria should have been required to investigate the crimes which they alleged had been committed abroad. In the Court's view (paragraph 114):

> "Concerning the alleged events in the United Arab Emirates, the Court considers that Article 4 of the Convention, under its procedural limb, does not require States to provide for universal jurisdiction over trafficking offences committed abroad … The Palermo Protocol is silent on the matter of jurisdiction, and the Anti-Trafficking Convention only requires States Parties to provide for jurisdiction over any trafficking offence committed on their own territory, or by or against one of their nationals … The Court therefore cannot but conclude that, in the present case, under the Convention, there was no obligation incumbent on Austria to investigate the applicants' recruitment in the Philippines or their alleged exploitation in the United Arab Emirates."

Interestingly the Court was prepared to examine the applicants' argument that the events in the Philippines, the United Arab Emirates and Austria could not be viewed in isolation. Even assuming this to be the case, it observed that there was no indication that the authorities had failed to comply with their duty of investigation. It accepted in this connection that the authorities could not have had any reasonable expectation of even being able to confront the applicants' employers with the allegations made against them, given that no mutual legal assistance agreement existed between Austria and the United Arab Emirates. Moreover, past experience had shown that simple requests sent to the United Arab Emirates had not produced any response.

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The *Chowdury and Others v. Greece*[17] judgment concerned the State's positive and procedural obligations in respect of human trafficking, exploitation and forced labour.

The applicants were forty-two Bangladeshi nationals. After arriving illegally in Greece, they were hired to work in the strawberry-picking industry in a particular region of the respondent State. They worked long hours under the supervision of armed guards and had to put up with miserable living conditions. Wages, if indeed paid, were extremely poor. A considerable number of workers, including twenty-one of the applicants, were wounded when a guard opened fire on them when they confronted their employers about the non-payment of wages. The incident led to the bringing of criminal charges against four individuals based on offences of human trafficking and unlawful wounding. Those applicants who were not wounded were not covered by the proceedings since the prosecutor took the view that their complaints that they had been victims of trafficking and forced labour had been lodged belatedly. All four accused were acquitted of the human-trafficking charges. The domestic court considered that the workers had not been forced into accepting employment or tricked into doing so, and it had not been demonstrated that they had been vulnerable to exploitation. They had been informed of the terms and conditions of their employment and had consented to them. They had been free to leave at any time.

In the Convention proceedings the applicants alleged that they had been victims of trafficking in human beings and had been required to perform forced labour in breach of Article 4 § 2 of the Convention. Moreover, the State had failed to comply with its positive and procedural obligations flowing from that provision. The Court agreed. Its judgment is noteworthy for the following reasons.

16. *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010 (extracts).
17. *Chowdury and Others v. Greece*, no. 21884/15, ECHR 2017 (not final).

Firstly, the Court situated its examination of the applicants' complaints within the framework of the principles described in paragraphs 283 to 289 of the *Rantsev v. Cyprus and Russia* judgment[18], which concerned trafficking for the purposes of sexual exploitation. The Court considered that those principles were of equal relevance when it came to human trafficking and the exploitation of individuals through work. Interestingly the Court had regard to Article 4 (a) of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) to reinforce its view that trafficking in human beings covers the recruitment of persons for the purposes of exploitation and that exploitation includes forced labour. Article 4 § 2 of the Convention implied a positive obligation on States to address this category of trafficking in the form of a legal and regulatory framework enabling the prevention of trafficking in human beings and their exploitation through work, the protection of victims, the investigation of arguable instances of trafficking of this nature, and the criminalisation and effective prosecution of any act aimed at maintaining a person in such a situation.

Secondly, the Court noted that the question whether an individual had willingly offered his services to an employer was a factual one. The fact that an individual had consented to work for an employer was not of itself conclusive (see also the Court's reference to Article 4 of the above-mentioned Council of Europe Convention on the matter of consent). It observed that in the instant case the facts clearly pointed to a conclusion that there had been trafficking in human beings and forced labour.

Thirdly, it noted that the respondent State had a legal and regulatory framework in place for combating trafficking in human beings and had ratified the above-mentioned Council of Europe Convention. However, it had failed to comply with its other positive and procedural obligations in the circumstances of the applicants' case. For example:

(i) The authorities had known through official reports and the media of the situation in which migrant workers found themselves well before the shooting incident involving the applicants. However, they had failed to take adequate measures to prevent trafficking and to protect the applicants.

(ii) The prosecutor had refused to bring proceedings in respect of the applicants who had not been wounded on the ground that they had lodged their complaints belatedly after the shooting incident. The prosecutor, by concentrating on whether or not these applicants had been present on the day in question and had been wounded, had failed to have regard to the wider issues of trafficking and forced labour of which they complained.

(iii) The domestic courts had taken a very narrow view of the applicants' situation, analysing it from the standpoint of whether it amounted to one of servitude, with the consequence that none of the accused was convicted of trafficking in human beings and the appropriate penalties were not therefore applied.

Right to liberty and security (Article 5)[19]

Deprivation of liberty (Article 5 § 1)

The *De Tommaso v. Italy*[20] judgment concerned the imposition of preventive measures on an individual considered to be a danger to society.

18. *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010 (extracts).
19. See also, under Article 14 taken in conjunction with Article 5 below, *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, ECHR 2017.
20. *De Tommaso v. Italy* [GC], no. 43395/09, ECHR 2017. See also under Article 6 (Right to a fair hearing in civil proceedings) below, Article 2 of Protocol No. 4 (Freedom of movement) below and Article 37 (Striking out) below.

In 2008 the District Court, considering that the applicant represented a danger to society, imposed special police supervision orders for two years, which included obligations on the applicant to report to the police once a week; to remain at home at night (from 10 p.m. to 6 a.m.), unless otherwise authorised; not to attend public meetings; and not to use mobile phone or radio communication devices. The decision was overturned on appeal seven months later, the court having found that the applicant had not been a danger to society when the measures were imposed.

The applicant complained, *inter alia*, under Article 5 and Article 2 of Protocol No. 4 of the preventive measures. The Grand Chamber found, *inter alia*, that Article 5 did not apply and that Article 2 of Protocol No. 4 had been violated.

One of the aspects of the judgment that is worth noting concerns the nature and control of the preventive measures in question imposed under Act no. 1423/1956, as interpreted in the light of the judgments of the Italian Constitutional Court. The Grand Chamber found that the measures imposed did not amount to a deprivation of liberty within the meaning of Article 5, thereby confirming the principles set out in *Guzzardi v. Italy*[21] (and applied in several later cases: *Raimondo v. Italy*[22], *Labita v. Italy*[23], *Vito Sante Santoro v. Italy*[24] and, *mutatis mutandis*, *Villa v. Italy*[25] and *Monno v. Italy*[26]), and distinguishing the *Guzzardi* and later cases on the facts.

The Grand Chamber highlighted, in particular, that there had been no restrictions on the applicant's freedom to leave home during the day and that he had been able to have a social life and maintain relations with the outside world. Since Article 5 was inapplicable, the applicant's complaint was examined under Article 2 of Protocol No. 4.

Procedural rights

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

Applicability

The *De Tommaso*[27] judgment, as noted above, concerned the imposition of preventive measures on an individual considered to be a danger to society.

In 2008 the District Court, considering that the applicant represented a danger to society, imposed special police supervision orders for two years. The decision was overturned on appeal seven months later, the court having found that the applicant had not been a danger to society when the measures were imposed. The applicant did not have a public hearing at which to contest the measure.

The applicant complained, *inter alia*, under Article 6 of a lack of fair and public hearing. The Government submitted a unilateral declaration accepting a violation of Article 6 as regards the lack of a public hearing. The Grand Chamber found that Article 6 applied and had been violated.

In this connection, the following aspects of the judgment warrant mention.

(i) This was the first time that the Court found the civil limb of Article 6 applicable to proceedings imposing such preventive measures. Relying on prior cases where the Court had found that

21. *Guzzardi v. Italy*, 6 November 1980, Series A no. 39.
22. *Raimondo v. Italy*, 22 February 1994, § 39, Series A no. 281-A.
23. *Labita v. Italy* [GC], no. 26772/95, § 193, ECHR 2000-IV.
24. *Vito Sante Santoro v. Italy*, no. 36681/97, § 37, ECHR 2004-VI.
25. *Villa v. Italy*, no. 19675/06, §§ 43-44, 20 April 2010.
26. *Monno v. Italy* (dec.), no. 18675/09, §§ 22-23, 8 October 2013.
27. *De Tommaso v. Italy* [GC], no. 43395/09, ECHR 2017. See also under Article 5 (Right to liberty and security) above, Article 2 of Protocol No. 4 (Freedom of movement) below and Article 37 (Striking out) below.

restrictions on detainees' rights, and the possible repercussions of such restrictions, fell within the sphere of "civil rights" (*Gülmez v. Turkey*[28], *Ganci v. Italy*[29], *Musumeci v. Italy*[30], *Enea v. Italy*[31] and *Stegarescu and Bahrin v. Portugal*[32]), the Grand Chamber found that there had been "a shift in its … case-law towards applying the civil limb of Article 6 to cases which might not initially appear to concern a civil right but which may have direct and significant repercussions on a private right belonging to an individual". Finding that the restrictions examined in those detainee cases resembled the preventive measures at issue in the present case, the Grand Chamber concluded that such measures fell within the sphere of personal rights and were civil in nature so that Article 6 applied to the proceedings imposing those restrictions.

(ii) The Grand Chamber went on to find a violation of Article 6 as regards the lack of a public hearing. It emphasised that the domestic courts had been called upon to assess aspects such as the applicant's character, behaviour and dangerousness, all of which were decisive for the imposition of the preventive measures in question.

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The judgment in *Selmani and Others v. the former Yugoslav Republic of Macedonia*[33] concerned the forcible removal of the applicant journalists from the press gallery of Parliament and the absence of an oral hearing in their legal challenge to the removal.

The applicants, journalists, were covering a parliamentary debate on the adoption of the State budget when a commotion provoked by a group of members of parliament broke out on the floor of Parliament, thereby triggering the intervention of security staff. The applicants were forcibly removed since the security staff felt that they were at risk. The applicants complained to the Constitutional Court of the circumstances of their removal. The Constitutional Court, without holding an oral hearing, rejected the applicants' Article 10 based arguments.

In the Convention proceedings the applicants complained under Article 6 of the Convention that the proceedings before the Constitutional Court had been unfair on account of the rejection of their request for an oral hearing. This part of the judgment is of interest in that the Court raised as a preliminary matter – and of its own motion – the issue of the applicability of Article 6. The issue was: did the domestic court determine the applicants' "civil rights"? The Court found that the domestic law recognised the right of accredited journalists to report from Parliament in the exercise of their right to freedom of expression. That right was of a civil-law nature, since reporting from the press gallery was necessary for the applicants as accredited journalists to exercise their profession and to inform the public about events in Parliament. Article 6 was therefore applicable (see similarly *Shapovalov v. Ukraine*[34], *RTBF v. Belgium*[35] and *Kenedi v. Hungary*[36]).

The Court found on the merits that there had been a breach of Article 6 § 1, noting among other matters that the Constitutional Court had acted as a court of first and only instance in the applicants' case and had been required to address issues of both fact and law. Moreover, it had failed to provide reasons for deciding that an oral hearing was not necessary.

28. *Gülmez v. Turkey*, no. 16330/02, 20 May 2008.
29. *Ganci v. Italy*, no. 41576/98, ECHR 2003-XI.
30. *Musmeci v. Italy*, no. 33695/96, 11 January 2005.
31. *Enea v. Italy* [GC], no. 74912/01, ECHR 2009.
32. *Stegarescu and Bahrin v. Portugal*, no. 46194/06, 6 April 2010.
33. *Selmani and Others v. the former Yugoslav Republic of Macedonia*, no. 67259/14, 9 February 2017. See also under Article 10 (Freedom of the press) below.
34. *Shapovalov v. Ukraine*, no. 45835/05, § 49, 31 July 2012.
35. *RTBF v. Belgium*, no. 50084/06, § 65, ECHR 2011 (extracts).
36. *Kenedi v. Hungary*, no. 31475/05, § 33, 26 May 2009.

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

Applicability

The *Simeonovi v. Bulgaria*[37] judgment concerned the right to a lawyer from the moment of arrest and the right to be informed of that defence right.

The applicant was convicted of armed robbery and two murders. He was sentenced to life imprisonment. He complained under Article 6 §§ 1 and 3 (c) that he had not been given access to a lawyer during the first three days of his police custody.

The Grand Chamber found no violation of Article 6 §§ 1 and 3 (c) of the Convention.

There was a particular factual context to the case. On the one hand, the applicant had been detained in police custody for three days after his arrest ("the relevant period") during which time he was neither informed of his right to be represented by a lawyer of his own choosing nor provided with a lawyer. On the other, during that period no statement was taken from him, no evidence capable of being used against him was obtained or included in the case file, and there was no evidence that he had been involved in any investigative measures.

It was necessary to clarify whether the right to a lawyer was triggered from the moment of *arrest* or from the moment of *interrogation*. The Grand Chamber reiterated its established case-law (see *Ibrahim and Others v. the United Kingdom*[38]) that a "criminal charge" existed from the moment an individual was officially notified by the competent authority of an allegation that he had committed a criminal offence, or from the point at which his situation had been substantially affected by actions taken by the authorities as a result of a suspicion against him. It followed that the right to legal assistance became applicable from the moment of the applicant's *arrest* and, thus, it applied whether or not the applicant had been interrogated or subjected to any investigative act during the relevant period.

Fairness of the proceedings[39]

The *Cerovšek and Božičnik v. Slovenia*[40] judgment concerned a case in which the reasons for finding the applicants guilty were given by judges who had not participated in their trial.

The applicants were tried and convicted of theft by a single judge. The judge retired from the bench after pronouncing her verdict without however giving written reasons for the applicants' guilt and sentence. Some three years later, two judges, who had not participated in the trial, drew up written judgments using a reconstitution of the case files as their basis. The applicants' convictions were upheld on appeal without any direct rehearing of evidence.

In the Convention proceedings the applicants alleged that these facts gave rise to a breach of their right to a fair trial. The Court agreed that there had been a breach of Article 6.

The judgment is noteworthy for the Court's reiteration in the above context of the importance of a reasoned judgment at the close of a trial and of the principle of immediacy. It stressed that the duty to give reasons, among other things, ensured the proper administration of justice, prevented arbitrariness, contributed to the confidence of the public and the accused in the decision reached, and allowed for possible bias on the part of a judge to be discerned and redressed. These objectives could not be satisfied in the circumstances of the applicants' case, since the judge who had conducted the trial did not explain her verdict in terms of her assessment of the evidence adduced

37. *Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017. See also, under Article 6 § 3 (c) (Defence through legal assistance) below.
38. *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 249, ECHR 2016.
39. See also *Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017.
40. *Cerovšek and Božičnik v. Slovenia*, nos. 68939/12 and 68949/12, 7 March 2017.

before her including the credibility of the oral testimony given by the applicants and witnesses. In answer to the Government's argument that there were exceptional circumstances which warranted a departure from the standard domestic procedure, namely the trial judge's retirement, the Court observed (paragraph 44):

> "… the date of her retirement must have been known to [the judge] in advance. It should therefore in principle have been possible to take measures either for her to finish the applicants' cases alone or to involve another judge at an early stage in the proceedings."

It is interesting to note that the Court took the view that the only way to compensate for the inability of the trial judge to produce reasons justifying the applicants' conviction would have been to order a retrial.

Defence rights (Article 6 § 3)

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

The *Simeonovi*[41] judgment, cited above, concerned the right to a lawyer from the moment of arrest and the right to be informed of that defence right.

The applicant was convicted of armed robbery and two murders. He was sentenced to life imprisonment. He complained under Article 6 §§ 1 and 3 (c) that he had not been given access to a lawyer during the first three days of his police custody. During this period, no evidence capable of being used against him had been obtained from him and he did not make a statement. His conviction was based on a later confession (made in the presence of a lawyer of his own choosing) and on additional evidence. He also complained under Article 3 of the conditions of his detention and of the particular prison regime applicable to him as a life prisoner.

The Grand Chamber found a violation of Article 3 and that there had been no violation of Article 6 §§ 1 and 3 (c) of the Convention. A number of points as regards the latter finding are worth noting.

(i) The particular factual context of the present case allowed the Grand Chamber to confirm the scope and application of its judgments in *Salduz v. Turkey*[42] and *Ibrahim and Others v. the United Kingdom*[43]. On the one hand, the applicant had been detained in police custody for three days after his arrest ("the relevant period") during which time he was neither informed of his right to be represented by a lawyer of his own choosing nor provided with a lawyer. On the other, during that period no statement was taken from him, no evidence capable of being used against him was obtained or included in the case file, and there was no evidence that he had been involved in any investigative measures.

(ii) The Grand Chamber considered that the right to legal assistance became applicable from the moment of the applicant's *arrest* and thus applied whether or not the applicant had been interrogated or subjected to any investigative act during the relevant period.

(iii) The Grand Chamber confirmed the link between the requirement to notify an accused of his rights and the establishment of any "voluntary, knowing and intelligent" waiver of those rights (*Dvorski v. Croatia*[44] and *Ibrahim and Others*[45]). In the present case, the Grand Chamber found that, even supposing that the applicant did not expressly request the assistance of a lawyer during the relevant period (there was a factual dispute), he could not be deemed to have implicitly waived his right to legal assistance, since he had not received, promptly after his arrest, information regarding

41. *Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017. See also under Article 6 § 1 (Right to a fair hearing in criminal proceedings – Applicability) above.
42. *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008.
43. *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, ECHR 2016.
44. *Dvorski v. Croatia* [GC], no. 25703/11, ECHR 2015.
45. *Ibrahim and Others*, cited above, §§ 272-73.

his right to be represented by a lawyer of his own choosing. The Court could therefore conclude that the applicant's right to legal assistance had been restricted during the relevant period.

(iv) Consequently, in the instant case, the Grand Chamber had to determine whether, despite this restriction on the applicant's right to legal assistance, the proceedings complied with Article 6 and, in so doing, the Grand Chamber applied the principles developed by it in its *Ibrahim and Others* judgment.

Finding that there were no "compelling reasons" for restricting his access to a lawyer during the relevant period (the restriction resulted rather from a general practice of the authorities), the Court had to conduct a "very strict scrutiny" of whether the restriction had "irretrievably prejudice[ed] the overall fairness" of the criminal proceedings against the applicant, the Government being required to demonstrate convincingly that he had nonetheless had a fair trial.

In that connection, the Grand Chamber attached decisive importance to the fact that, during the relevant period, no evidence capable of being used against the applicant had been obtained and included in the case file. No statement was taken from him. No evidence indicated that he was involved in any other investigative measures during that period (such as an identification parade) and he did not personally allege before the Court that the domestic courts had possessed evidence obtained during the relevant period and used it against him at the trial. Domestic law excluded evidence obtained in a manner incompatible with the Code of Criminal Procedure and the lack of legal assistance during questioning would have rendered any resulting statement inadmissible. No adverse inferences would have been drawn from the applicant's silence and there was no causal link even posited between his later confession and the prior absence of a lawyer. He had actively participated in all stages of the criminal proceedings. His conviction was not based exclusively on his later confession but also on a "whole body of consistent evidence". The case was examined at three instances, all courts giving due consideration to the evidence available.

Given these elements, the Court considered that the Government had provided relevant and sufficient reasons to demonstrate that the overall fairness of the criminal proceedings against the applicant had not been irretrievably prejudiced by the absence of legal assistance for the first three days of his police custody. There had, therefore, been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

Other rights in criminal proceedings

No punishment without law (Article 7)

In *Koprivnikar v. Slovenia*[46] the Court examined whether the domestic courts had complied with the principle of legality when fixing a combined sentence for multiple offences.

The applicant was convicted (in three separate judgments) of three separate offences including murder, the latter offence attracting at the time a maximum sentence of thirty years' imprisonment. On the basis of its interpretation of the provisions of the 2008 Criminal Code, a sentencing court subsequently imposed an overall or combined sentence of thirty years' imprisonment on the applicant in respect of all three offences. In the Convention proceedings, the applicant maintained that the overall sentence imposed breached Article 7 of the Convention given that the 2008 Criminal Code provided for the imposition of a maximum overall penalty of twenty years in a situation such as the applicant's, and not thirty years as found by the sentencing court.

The Court ruled in favour of the applicant. The judgment is noteworthy in the following respects.

Firstly, the Court observed that the legal provision relied on by the sentencing court provided a deficient legal basis for the determination of the combined sentence in the applicant's case and

46. *Koprivnikar v. Slovenia*, no. 67503/13, 24 January 2017.

allowed for contradictory conclusions to be drawn. This situation contravened the principle of legality and in particular the requirement that a penalty be clearly defined in domestic law. It noted (paragraph 55):

> "While, according to the terms of this provision, the applicant should not have had an overall sentence of more than twenty years imposed on him, the overall sentence should exceed each individual sentence, which in the applicant's case included a term of imprisonment of thirty years … The Court notes that this deficiency resulted from the legislature's failure to regulate an overall sentence for a situation such as the applicant's in the 2008 Criminal Code. It moreover notes that the resultant lacuna in the legislation pertained for three years … and that no special reasons have been adduced by the Government to justify it (see, by contrast, *Ruban v. Ukraine*, no. 8927/11, § 45, 12 July 2016)."

Secondly, the Court considered that the sentencing court should have proceeded on the basis of the interpretation which most favoured the applicant, namely a maximum sentence of twenty years' imprisonment "which, most importantly, would have complied with the explicitly provided maximum limit on the overall sentence". The sentencing court had in effect applied a heavier penalty to the applicant's detriment.

Thirdly, this was the first time the Court found Article 7 – both the notion of "penalty" and the principle of *lex mitior* – to be applicable to a procedure for the calculation of an overall sentence to replace multiple sentences.

Right to an effective remedy (Article 13)

In the *Tagayeva and Others*[47] judgment, cited above, the Court considered the obligations of the State, as regards a large-scale hostage-taking by terrorists, before, during and after the event.

The case concerned the hostage-taking in a school in Beslan, North Ossetia, from 1 to 3 September 2004, the organisation of the rescue operation, the storming of the school by State forces and the subsequent proceedings. There were hundreds of dead and injured and the applicants (over 400) are next of kin and survivors. They complained under Article 2 alone and in conjunction with Article 13 of the Convention.

In its judgment on the merits, the Court found that there had been a violation of several aspects of Article 2. It found no violation of Article 13.

The judgment is of contemporary relevance as it concerns a comprehensive review of the principles concerning, and the application of, Articles 2 and 13 to a large-scale hostage-taking by terrorists, including to the State's actions before, during and after the event.

In finding no violation of Article 13, the Court distinguished the procedural obligation to investigate under Article 2 and the requirement to make available other effective domestic remedies under Article 13. The Court identified two elements, compensation and access to information, which were of special importance under Article 13 and, since the applicants had obtained both, this was sufficient for the purposes of Article 13.

Firstly, Article 13 required a compensation mechanism. In the present case, all of the applicants had obtained State and local compensation based on damage suffered regardless of the outcome of the criminal proceedings: this being a "victim based" solution, it was considered justified by the Court. The Court also noted with approval in this context additional commemorative actions benefitting all affected by the events at Beslan (see, in a comparable context, *Zuban and Hamidović v. Bosnia and Herzegovina*[48]). The awards later made by the Court under Article 41 took into account the compensation awarded at the national level. Secondly, while the facts underlying the violations of

47. *Tagayeva and Others v. Russia*, nos. 26562/07 and 8 others, 13 April 2017 (not final). See also under Article 2 (Obligation to protect life) above.
48. *Zuban and Hamidović v. Bosnia and Herzegovina* (dec.), nos. 7175/06 and 8710/06, 2 September 2014.

Article 2 by the State had not been elucidated in the main and ongoing criminal investigation, the criminal prosecutions of individuals (the surviving terrorist and two police officers) as well as the detailed investigative work of parliamentary commissions, ensured access by the victims and the public to detailed knowledge concerning aspects of the serious human rights violations that would otherwise have remained inaccessible. In that sense, these could be considered relevant aspects of effective remedies to which Article 13 referred, which were aimed at establishing the knowledge necessary to elucidate the facts and which were distinct from the State's obligations under Article 2 of the Convention.

Others rights and freedoms

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

Private life

The *A.-M.V. v. Finland*[49] judgment concerned restrictions on the right to self-determination of an intellectually disabled person.

In the instant case the issue arose as to whether the applicant, an intellectually disabled young man, should be allowed to move from his home town in the south of Finland to a remote area in the north of the country to live with an elderly couple who were his former foster parents. That was his wish. However, the applicant's court-appointed mentor or guardian considered that the move was not in his best interests. The applicant brought proceedings aimed at a partial change in his mentor arrangements so as to allow him to make his own decision on the matter. The Finnish courts, having heard the applicant, several witnesses and expert evidence on the applicant's cognitive ability, and taking all relevant circumstances into account, concluded that the applicant was clearly unable to understand the significance of his project. The courts upheld the mentor's assessment and refused the applicant's request to have the mentor arrangements modified.

In the Convention proceedings the applicant contended that the refusal of the domestic courts to respect his choice of where and with whom to live had breached Article 8 of the Convention. The Court accepted that there had been an interference with the applicant's right to self-determination as an aspect of his right to respect for his private life. However, the decision to give precedence to the mentor's assessment over the applicant's own wish was not a disproportionate restriction of his right, having regard to the aim pursued – the protection of the applicant's health in the broader sense of his well-being.

The Court did not find fault with the legislative framework governing the appointment of a mentor in respect of a person such as the applicant, nor with the manner of its application in his case (see above). It was important for the Court (paragraph 89)

> "… that the impugned decision was taken in the context of a mentor arrangement that had been based on, and tailored to, the specific individual circumstances of the applicant, and that the impugned decision was reached on the basis of a concrete and careful consideration of all the relevant aspects of the particular situation. In essence, the decision was not based on a qualification of the applicant as a person with a disability. Instead, the decision was based on the finding that, in this particular case, the disability was of a kind that, in terms of its effects on the applicant's cognitive skills, rendered the applicant unable to adequately understand the significance and the implications of the specific decision he wished to take, and that therefore the applicant's well-being and interests required that the mentor arrangement be maintained."

49. *A.-M.V. v. Finland*, no. 53251/13, 23 March 2017.

The Court concluded that a proper balance had been struck in the instant case. It observed among other matters that there were effective safeguards in the domestic proceedings to prevent abuse, as required by the standards of international human rights law, ensuring that the applicant's rights, will and preferences were taken into account. The applicant was involved at all stages of the proceedings; he was heard in person and had been able to put forward his wishes.

The judgment is an important contribution to the Court's case-law on disability. It is also of interest to note that according to the Committee established under the United Nations Convention on the Rights of Persons with Disabilities, which has been ratified by forty-four of the forty-seven Council of Europe member States, including Finland, States Parties must "review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences"[50].

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The *A.P., Garçon and Nicot v. France*[51] judgment concerned the making of a change of gender in civil-status documents conditional on completion of sterilisation surgery or treatment entailing a very high probability of sterility.

The three applicants were transgender persons. They claimed that the refusal of their request to have a change of gender recorded on their birth certificates amounted to a violation of Article 8, since persons wishing to do so had to demonstrate in support of such a request that the change in their appearance was irreversible (second and third applicants) and that they actually suffered from the gender-identity disorder in question (second applicant). Lastly, the first applicant contested the requirement that he undergo a medical examination in order to establish the change in his appearance.

The Court had previously found Article 8 to apply to legal recognition of the gender identity of transgender persons having undergone reassignment surgery (*Hämäläinen v. Finland*[52]), and to the conditions of eligibility for such surgery (*Schlumpf v. Switzerland*[53] and *Y.Y. v. Turkey*[54]). In the present case it found, with regard to legal recognition of the gender identity of transgender persons who had not undergone gender reassignment surgery or did not wish to do so, that gender identity, as a component of personal identity, came within the scope of the right to respect for private life. The "private life" aspect of Article 8 was therefore applicable.

Following similar reasoning to that adopted in *Hämäläinen,* cited above, the Court examined the applicants' complaints through the lens of the State's positive obligation to ensure respect for their right to private life. In order to ascertain whether that obligation had been complied with, the Court sought to establish whether the State, in imposing the conditions complained of on the applicants and in view of the margin of appreciation left to it, had struck a fair balance between the general interest in ensuring consistency in civil-status records and the interests of the applicants.

As to the first condition complained of, the Court considered that the requirement for transgender persons wishing to have their gender identity recognised to demonstrate "the irreversible nature of the change in appearance" meant that the applicants had been required to undergo sterilisation surgery or a course of treatment which, owing to its nature and intensity, would in all likelihood result in sterility.

50. General Comment No. 1 concerning Article 12, which proclaims the principle of equal recognition before the law.
51. *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, 6 April 2017 (not final).
52. *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014.
53. *Schlumpf v. Switzerland*, no. 29002/06, 8 January 2009.
54. *Y.Y. v. Turkey*, no. 14793/08, ECHR 2015 (extracts).

Referring to the comparative law materials provided by the third-party interveners, the Court noted that the Contracting States held differing views on the sterilisation requirement and that no consensus had emerged on the subject. In principle, this finding thus entailed a wider margin of appreciation, especially since a public interest (civil status) was involved. Nevertheless, in view of the particularly fundamental nature of an individual's identity, which was of necessity affected by possible sterilisation, the State's margin of appreciation was narrow. The Court also highlighted the trend in the Contracting States' legal systems towards abolishing the sterilisation requirement, with eleven States having abolished it between 2009 and 2016.

On the basis of these findings the Court proceeded to examine the balance that had been struck between the general interest and the interests of the applicants. It observed that the medical treatment and surgery in question went to individuals' physical integrity, which was protected by Article 3 of the Convention (relied on by the first applicant) and by Article 8. Accordingly, making recognition of transgender persons' gender identity conditional on sterilisation surgery or treatment they did not wish to undergo was "tantamount to making the full exercise of their right to respect for private life under Article 8 of the Convention conditional on their relinquishing full exercise of their right to respect for their physical integrity as guaranteed not just by that provision but also by Article 3 of the Convention".

Consequently, while the Court accepted that the aims of upholding the principle that a person's civil status was inalienable and ensuring the reliability and consistency of civil-status records were in the general interest, it considered that in the present case a fair balance had not been struck between the general interest and the interests of the individuals concerned. It therefore held that the respondent State had failed in its positive obligation to secure the applicants' right to respect for their private life, and found a violation of Article 8 of the Convention. However, with regard to the first applicant's complaint concerning the requirement to undergo a medical examination to ascertain that the surgery in question had been performed, the Court noted that the applicant had opted to undergo gender reassignment surgery abroad, with the result that the medical examination in question had been aimed solely at establishing the accuracy of his claims. The complaint therefore related to the role of the courts in the context of the taking of evidence, a sphere in which the Court allowed the Contracting Parties a broad margin of appreciation, except where the decisions taken were arbitrary. In the present case the Court found no violation of Article 8 on this account.

The second condition, which made legal recognition of the gender identity of transgender individuals subject to proof that they "actually suffered from the gender-identity disorder [in question]", was also contested by the second applicant.

After noting that a prior psychiatric diagnosis was among the prerequisites for legal recognition of transgender persons' gender identity in the vast majority of Contracting Parties which allowed such recognition (and which were thus virtually unanimous on the subject), the Court observed that, unlike the sterility requirement, the obligation to obtain a prior psychiatric diagnosis did not directly affect individuals' physical integrity.

The Court concluded from this that, although an important aspect of transgender persons' identity was in issue, the Contracting Parties retained a wide margin of appreciation. Moreover, this condition appeared justified in so far as it was designed to ensure that individuals did not embark in an ill-advised manner on the process of legally changing their identity. In view of the wide margin of appreciation, the Court found no violation of Article 8 on this account.

While this judgment will not have a direct impact on the applicable legislation in France, which since 12 October 2016 has dropped the requirement concerning the irreversible change in appearance, it is of major significance for those Contracting Parties which continue to make sterilisation a prerequisite for recording a change of gender in civil-status documents. In that regard, the judgment

is in line with the cases of *Y.Y. v. Turkey*, cited above, and *Soares de Melo v. Portugal*[55]. In these two judgments, the Court criticised sterilisation, whether as a prerequisite for authorisation to undergo gender reassignment surgery or in order to continue to exercise parental rights.

Private and family life

The *Paradiso and Campanelli v. Italy*[56] judgment concerned the separation and placement for adoption of a child conceived abroad through surrogacy and brought back to Italy in violation of Italian adoption laws.

The applicants, Italian nationals and a married couple, entered into a surrogacy arrangement in Russia, following which a child was born in Moscow. A birth certificate was issued in Moscow recording the applicants as parents, without mention of the surrogacy. The first applicant brought the child back to Italy. The applicants requested the municipality to register the birth certificate. Criminal proceedings, which appeared still to be pending, were opened against the applicants. The Italian courts ordered the child's removal from the applicants (the order was implemented when the child was about eight months old) and placement for adoption. The authorities also refused to accept the birth certificate and to register the applicants as parents of the child. DNA tests established that there was biological link between the child and the second applicant. In ordering the removal of the child, the courts gave weight to the illegality of the applicants' conduct under Italian law (concluding a surrogacy agreement contrary to assisted reproduction laws and bringing the child to Italy in breach of adoption laws) and to the urgency of the situation (the child was considered to have been "abandoned").

The Grand Chamber found no violation of Article 8 of the Convention: no "family life" existed and there had been no breach of the applicants' right to respect for their "private life".

(i) It is worth noting that the scope of the case before the Grand Chamber was quite circumscribed. It did not concern the registration of a foreign birth certificate or the recognition of a legal parent-child relationship in respect of a child born from a gestational surrogacy arrangement, the Chamber having dismissed this complaint on grounds of non-exhaustion. It did not concern separate complaints of an applicant child, the Chamber having dismissed the complaints raised on his behalf by the applicants (contrast *Mennesson v. France*[57], and *Labassee v. France*[58]).

The matter in issue was rather the compliance with Article 8 of the measures taken by the Italian authorities to separate permanently the applicants and the child. Three factors weighed particularly heavily against the applicants throughout the Court's analysis: the unlawful nature of their acts, the lack of a biological link with the child and, finally, the relatively short duration of the cohabitation due to the rapid reaction of the Italian authorities.

(ii) The Grand Chamber concluded that the applicants' relationship with the child did not come within the sphere of family life because their "genuine personal ties" did not amount to *de facto* "family life". In particular, drawing on the Court's approach in earlier cases (*Wagner and J.M.W.L. v. Luxembourg*[59], *Moretti and Benedetti v. Italy*[60] and *Kopf and Liberda v. Austria*[61]), the Grand Chamber assessed the quality of the ties, the role played by the applicants and the duration of cohabitation, the latter criteria being a key factor. However, while it was accepted that the applicants had developed "a parental project" and close emotional bonds with the child, there was

55. *Soares de Melo v. Portugal*, no. 72850/14, 16 February 2016.
56. *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, ECHR 2017.
57. *Mennesson v. France*, no. 65192/11, §§ 96-102, ECHR 2014 (extracts).
58. *Labassee v. France*, no. 65941/11, §§ 75-81, 26 June 2014.
59. *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, 28 June 2007.
60. *Moretti and Benedetti v. Italy*, no. 16318/07, 27 April 2010.
61. *Kopf and Liberda v. Austria*, no. 1598/06, 17 January 2012.

no biological tie with the child, the relationship was of short duration and the ties with the child had always been uncertain from a legal perspective (the birth certificate's compatibility with Russian law was uncertain and the applicants had acted contrary to Italian reproductive and adoption laws).

(iii) However, concerning as it did the applicants' decision to become parents (*S.H. and Others v. Austria*[62]), the case fell within the scope of their right to respect for their "private life". Since certain domestic proceedings concerned the second applicant's biological link to the child, "the establishment of the genetic facts" also had an impact on his identity and the applicants' relationship.

(iv) The main issue was whether the impugned measures were proportionate to the interference with the applicants' right to respect for their private life, the Grand Chamber finding that the Italian courts had struck a fair balance between the competing public and private interests at stake having regard to the wide margin of appreciation available to them. The focus of the Court's assessment was on the difficult choice of the Italian authorities between, on the one hand, "allowing the applicants to continue their relationship with the child, thereby legalising the unlawful situation created by them as a *fait accompli*" or, on the other hand, "taking measures with a view to providing the child with a family in accordance with the legislation on adoption".

As to the public interest, the authorities were primarily putting an end to an illegal situation which, moreover, concerned laws on sensitive ethical issues (including laws on descent, adoption, surrogacy, protection of minors and recourse to surrogacy abroad). As to the interests of the child, the domestic courts had concluded that the child would not suffer grave or irreparable harm from the separation. As to the applicants' interests, the Court did not underestimate the impact of the separation on their private life and, more generally, it could not ignore the "emotional hardship suffered by those whose desire to become parents has not been or cannot be fulfilled". However, the public interests at stake weighed heavily in the balance and comparatively less weight was attached to the applicants' interests, the Grand Chamber concluding that "agreeing to let the child stay with the applicants, possibly with a view to becoming his adoptive parents, would have been tantamount to legalising the situation created by them in breach of important rules of Italian law".

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In the *K2 v. the United Kingdom*[63] decision the Court considered the test for assessing arbitrariness in the context of deprivation of citizenship.

The applicant, a naturalised British citizen, left the United Kingdom in breach of his bail conditions. While he was out of the country, the Secretary of State for the Home Department ordered that the applicant be deprived of his citizenship on the ground that such measure was conducive to the public good. The applicant was also excluded from the United Kingdom on the ground that he was involved in terrorism-related activities and had links to a number of Islamic extremists. He unsuccessfully challenged both decisions.

In the Convention proceedings, the applicant contended among other things that the measures applied to him had breached his right to respect for his family and private life. He further complained that there had been inadequate procedural safeguards to ensure effective respect for his Article 8 rights, as there had been very limited disclosure of the national-security case against him and the exclusion order meant that he was unable to participate effectively in the legal proceedings. The Court declared the applicant's complaints inadmissible as being manifestly ill-founded. The following points are noteworthy.

62. *S.H. and Others v. Austria* [GC], no. 57813/00, § 82, ECHR 2011.
63. *K2 v. the United Kingdom* (dec.), no. 42387/13, 7 February 2017.

Firstly, the Court confirmed that an arbitrary denial (*Genovese v. Malta*[64]) or revocation (*Ramadan v. Malta*[65]) 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. In determining whether a revocation of citizenship was in breach of Article 8, two separate issues had to be addressed: whether the revocation was arbitrary; and what the consequences of revocation were for the applicant.

Secondly, it confirmed in line with the approach taken in the above-mentioned *Ramadan* judgment (§§ 86-89), that, in determining arbitrariness, it will have regard to whether the revocation was in accordance with the law; whether it was accompanied by the necessary procedural safeguards, including whether the person deprived of citizenship was allowed the opportunity to challenge the decision before courts affording the relevant guarantees; and whether the authorities acted diligently and swiftly.

Thirdly, the Court observed that in assessing the decision to deprive an individual of citizenship, it must apply a standard of "arbitrariness", which is a stricter standard than that of proportionality.

Applying these principles to the facts of the applicant's case the Court found that the revocation of citizenship had not been arbitrary. It had particular regard to the applicant's argument that he was denied procedural safeguards in the domestic proceedings: firstly on account of the limited disclosure of the national-security case against him and, secondly, because his exclusion from the United Kingdom had prevented him from participating effectively in his appeal against the decision to deprive him of citizenship. Reviewing the fairness of the domestic proceedings, the Court observed among other matters that they had been conducted in a manner compatible with Article 8 requirements and that it did not consider itself in a position to call into question the domestic courts' findings that there was no clear, objective evidence that the applicant was unable to instruct lawyers while outside the jurisdiction.

As regards the consequences of the revocation, the Court noted that the applicant had obtained Sudanese nationality and had not thereby been rendered stateless. Moreover, the applicant had not substantiated his claim that his wife and child were resident in the United Kingdom. In any event, they were free to join him in Sudan and even to relocate there.

The decision is significant in view of the fact that the Court had to address for the first time an issue of revocation in the context of terrorism and national-security considerations.

Freedom of thought, conscience and religion (Article 9)

Manifest one's religion or belief

The judgment in *Osmanoğlu and Kocabaş v. Switzerland*[66] concerned a refusal by the applicant parents on religious grounds to allow their daughters to attend compulsory mixed swimming lessons organised by the school.

The applicants were devout Muslims. They were fined on account of their refusal to comply with a requirement that their children take part in swimming classes organised by the primary school. The applicants' opposition was based on the fact that their children were girls and would have to share the swimming pool with boys, which was not in accordance with their religious beliefs. Pursuant to local-education regulations, attendance at swimming classes was a compulsory part of the physical-education component of the primary-school curriculum, which obligation applied until children reached the age of puberty. The applicants contested the refusal of the local authority to grant their

64. *Genovese v. Malta*, no. 53124/09, § 30, 11 October 2011.
65. *Ramadan v. Malta*, no. 76136/12, § 85, ECHR 2016 (extracts).
66. *Osmanoğlu and Kocabaş v. Switzerland*, no. 29086/12, ECHR 2017.

children a dispensation from the obligation as well as the decision to fine them for their failure to ensure their children's presence at the classes. Their case was ultimately rejected by the Federal Tribunal, which reasoned that the local-education policy, as reflected in the impugned regulations, was designed to secure the integration of children, regardless of their or their parents' religious or cultural background, and that the authorities had made provision for particular religious or cultural sensitivities by installing separate changing and showering rooms for boys and girls and by allowing girls to wear burkinis in the swimming pool. It also observed that the mixed swimming requirement only applied to children who had not reached the age of puberty.

In the Convention proceedings the applicants renewed their complaint that their right to freedom of religion guaranteed by Article 9 of the Convention had been infringed. The Court ruled against the applicants.

The Court's reasoning is noteworthy as regards its findings, firstly, that there had been an interference with the applicants' Article 9 rights and, secondly, the manner in which it applied the margin of appreciation doctrine to the facts of the case, having regard to the principles which it has previously established in this area as well as in the context of the right to education.

As to the question of interference, the Court reiterated its previous case-law in concluding that, even if the Koran prescribed that the bodies of female children should only be covered as from the age of puberty, the applicants' belief that their children should be prepared in advance to adhere to this tenet of the applicants' faith was an expression of their religious belief (see, in this connection, *Eweida and Others v. the United Kingdom*[67]). Article 9 was applicable and the refusal to dispense the applicants from the requirement to ensure their children's attendance at the school's swimming lessons amounted to an interference with the applicants' right to manifest their religion. It is important to note that Switzerland has not ratified Protocol No. 1 to the Convention, which in its Article 2 guarantees the right to education. That Article is usually regarded as *lex specialis* when it comes to disputes in the education sector involving the religious beliefs of parents.

In the instant case, the Court drew on the case-law principles which have informed its approach under Article 2 of Protocol No. 1 (see in particular, *Folgerø and Others v. Norway*[68] and *Lautsi and Others v. Italy*[69]) in order to determine, among other things, the scope of the authorities' margin of appreciation – wide in the Court's view – and whether a fair balance had been struck between the applicants' Article 9 rights and the aims which the impugned restriction sought to achieve (for which see the view of the Federal Tribunal, set out above).

As to the question of the proportionality of the refusal, the Court, in line with the Federal Tribunal's views, noted the importance of schools for the promotion of social integration. It could accept that compulsory education was an essential part of a child's development and that a dispensation from attending particular courses should only be envisaged in very exceptional cases and on a non-discriminatory basis. For the Court, the importance attached to ensuring that the applicants' children received the whole of the educational programme on offer at their school so as to further the local authority's vision of social integration outweighed the applicants' wish to have the children exempted from attending swimming lessons. It is of interest that the Court stressed that the aim of the lessons was not solely to provide children with physical exercise. The classes also enabled them to learn to swim together and to share an activity collectively. In finding the restriction proportionate in the applicants' case, the Court also had regard among other things to the manner in which the school had sought to make arrangements at the time of the swimming classes in order to accommodate the applicants' belief (see above), the proportionate nature of the fine imposed on them following a series of warnings and the availability of an effective procedure to allow the applicants to assert their right to freedom of religion.

67. *Eweida and Others v. the United Kingdom*, nos. 48420/10 and 3 others, § 82, ECHR 2013 (extracts).
68. *Folgerø and Others v. Norway* [GC], no. 15472/02, § 84, ECHR 2007-VIII.
69. *Lautsi and Others v. Italy* [GC], no. 30814/06, §§ 59-62, ECHR 2011 (extracts).

Freedom of expression (Article 10)

Freedom of expression

Article 10 of the Convention: freedom of expression and the fight against terrorism

In *Döner and Others v. Turkey*[70] the Court considered the balance to be struck between freedom of expression and the fight against terrorism.

In the exercise of their constitutional rights, and at a time when this issue was a matter of public discussion, the applicants filed petitions with the competent national authorities requesting that provision be made for their children to be educated in the Kurdish language in the public elementary schools they attended. The applicants' houses were subsequently searched on suspicion that their action had been instigated by an illegal armed organisation. Although no incriminating materials were found, the applicants were arrested and detained – all of them for four days and some were remanded in custody for almost one month. All the applicants were charged and tried before a State Security Court with aiding and abetting an illegal armed organisation. They were eventually acquitted.

The Court examined the applicants' situation from the standpoint of an interference with their right to freedom of expression. It found a breach.

The Court's judgment is of interest as regards the following issues.

Firstly, the Court ruled that, regardless of whether the applicants had been ultimately acquitted of the charges brought against them, the various measures to which they had been subjected for having exercised their rights on a matter of public interest amounted to an interference with their Article 10 rights. The Court reasoned that the applicants could still be considered to be "victims" of an alleged breach of their rights under that Article since the State Security Court when acquitting them had neither acknowledged nor afforded redress for the measures to which they had been subjected after lodging their petition to the national authorities.

Secondly, and as regards the question whether the interference was "necessary in a democratic society", the Court drew on its established case-law on the reconciliation of free speech and the fight against terrorism. It observed (paragraph 102):

> "While the Court does not underestimate the difficulties to which the fight against terrorism gives rise, it considers that that fact alone does not absolve the national authorities of their obligations under Article 10 of the Convention. Accordingly, although freedom of expression may be legitimately curtailed in the interests of national security, territorial integrity and public safety, those restrictions must still be justified by relevant and sufficient reasons and respond to a pressing social need in a proportionate manner …"

Against that background, the Court noted, among other things, as follows.

(i) The applicants' petition concerned a matter of public interest, having regard to the public debate at the material time on the social and cultural rights of Turkish citizens of Kurdish ethnicity, including their right to education in the Kurdish language.

(ii) The authorities did not display the necessary restraint when dealing with the applicants' petitions, since they had used the legal arsenal at their disposal "in an almost repressive manner against them".

(iii) The applicants had used their constitutional right to file a petition regarding the education of their children in Kurdish and, significantly, after the applicants' arrest and while they were still on trial the relevant law had been amended to provide for such, at least initially on a private basis.

70. *Döner and Others v. Turkey,* no. 29994/02, 7 March 2017.

It is noteworthy that the Court also observed when concluding that the applicants' Article 10 rights had been violated that the fact that the applicants' peaceful request may have coincided with the aims or instructions of an illegal armed organisation did not remove that request from the scope of protection of Article 10.

Freedom of the press

The judgment in *Selmani and Others v. the former Yugoslav Republic of Macedonia*[71] concerned the forcible removal of the applicant journalists from the press gallery of Parliament and the absence of an oral hearing in their legal challenge to the removal.

The applicants, who were journalists, were covering a parliamentary debate on the adoption of the State budget when a commotion provoked by a group of members of parliament broke out on the floor of Parliament, thereby triggering the intervention of security staff. The applicants refused to comply with an order to vacate the gallery believing that the public had the right to be informed of the disturbance. They were forcibly removed since the security staff felt that they were at risk. The applicants complained to the Constitutional Court of the circumstances of their removal. The Constitutional Court, without holding an oral hearing, rejected the applicants' Article 10 based arguments. It found that "the Parliament security service considered that, in order to protect the integrity and lives of the journalists in the gallery, the latter should be moved to a safer place where they would not be in danger".

The Court upheld the applicants' Article 10 complaint on the basis that the above-mentioned reasons given by the Constitutional Court were not sufficient to justify the applicants' removal from the press gallery. The following points are noteworthy in this connection.

Firstly, the Court reiterated that any attempt to remove journalists from the scene of demonstrations must be subject to strict scrutiny (see *Pentikäinen v. Finland*[72]), and stressed that this principle applies even more so when journalists exercise their right to impart information to the public concerning the behaviour of elected representatives in Parliament and the manner in which the authorities handle disorder that occurs during parliamentary sessions, these being matters of public interest. At the same time, the Court had recently stressed in its *Karácsony and Others v. Hungary* judgment[73] that Parliaments are entitled to react when their members engage in disorderly conduct disrupting the normal functioning of the legislature. Secondly, on the basis of its analysis of all the relevant facts, the Court found that the applicants had not posed any threat to order in Parliament and, contrary to the risk assessment made by the security staff, there was no indication that the disturbances created by members of parliament had endangered the applicants' own personal safety in the gallery. Thirdly, as to the argument that the applicants could have followed the live broadcast of the debate, for example in premises adjacent to the press gallery, the Court observed in paragraph 84 of the judgment that "the applicants' removal entailed immediate adverse effects that instantaneously prevented them from obtaining first-hand and direct knowledge based on their personal experience of the events unfolding in the chamber … Those were important elements in the exercise of the applicants' journalistic functions, which the public should not have been deprived of in the circumstances of the present case."

71. *Selmani and Others v. the former Yugoslav Republic of Macedonia*, no. 67259/14, 9 February 2017. See also under Article 6 § 1 (Right to a fair hearing in civil proceedings) above.
72. *Pentikäinen v. Finland* [GC], no. 11882/10, §§ 89 and 107, ECHR 2015.
73. *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, §§ 139 and 141, ECHR 2016 (extracts).

Prohibition of discrimination (Article 14)

Article 14 taken in conjunction with Article 3

The question examined in *Škorjanec v. Croatia*[74] was the scope of the duty to investigate a racially motivated act of violence.

The applicant's partner was of Roma origin. In 2013 the couple were assaulted by two individuals who were later convicted of the attack on the applicant's partner. It was established that there was also proof of an element of a hate-related crime in view of the anti-Roma insults uttered by the two individuals immediately preceding and during the attack. The applicant was treated as a witness in the criminal case and not as a victim alongside her partner. In the meantime, the applicant herself tried to bring criminal proceedings against her attackers. The competent State Attorney's Office, while not disputing that the applicant had been injured in the attack, concluded that there was no proof that she had been the victim of a racially motivated assault as she was not of Roma origin. The applicant's partner, and not the applicant, had been singled out on account of his Roma origin and for that reason her criminal complaint was dismissed.

In the Convention proceedings the Court decided to examine the applicant's complaint regarding the authorities' failure to discharge their positive obligations in relation to a racially motivated act of violence against her under Article 14 of the Convention read in conjunction with Article 3. The Court found a breach of these provisions.

The following points are worthy of attention.

Firstly, the judgment contains a comprehensive survey of the principles which the Court has developed regarding the scope of a State's duty to have adequate legal mechanisms in place to protect individuals from racially motivated violence and to investigate violent incidents triggered by suspicions of racism.

Secondly, the Court, in what would appear to be a development of its earlier case-law in this area, reasoned (paragraph 56) that the obligation under Article 14 taken in conjunction with Article 3 to take all reasonable measures to investigate possible racist overtones to an act of violence

> "… concerns not only acts of violence based on a victim's actual or perceived personal status or characteristics but also acts of violence based on a victim's actual or presumed association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic".

The Court elaborated further on this principle at paragraph 66, stating:

> "Indeed, some hate-crime victims are chosen not because they hold a particular characteristic but because of their association with another person who actually or presumably possesses the relevant characteristic. This connection may take the form of the victim's membership of or association with a particular group, or the victim's actual or perceived affiliation with a member of a particular group through, for instance, a personal relationship, friendship or marriage …"

On the facts of the case, the Court found that the prosecuting authorities had concentrated their investigation and analysis only on the hate-crime element related to the violent attack on the applicant's partner. It noted among other things that the prosecuting authorities' insistence on the fact that the applicant herself was not of Roma origin and their failure to identify whether she was perceived by the attackers as being of Roma origin herself, as well as their failure to take into account and establish the link between the racist motive for the attack and the applicant's association with her partner, had resulted in a deficient assessment of the circumstances of the case.

74. *Škorjanec v. Croatia*, no. 25536/14, ECHR 2017.

Article 14 taken in conjunction with Article 5

The *Khamtokhu and Aksenchik v. Russia*[75] judgment concerned a difference in treatment in sentencing of, on the one hand, adult men and, on the other, female, juvenile and senior offenders.

The applicants were adult men serving life sentences for, *inter alia*, attempted murder and murder. They complained under Article 14 in conjunction with Article 5 that they had been treated less favourably than female, juvenile and senior offenders found guilty of the same crimes because the latter cannot be given a life sentence by virtue of Article 57 of the Russian Criminal Code.

The Grand Chamber found that there had been no violation of Article 14 of the Convention in conjunction with Article 5. Two aspects of this judgment are worth noting.

(i) The first concerns the applicability of Article 14 taken in conjunction with Article 5, the Court again finding that matters which might not normally fall within the scope of Article 5 can fall within its ambit for the purposes of the applicability of Article 14 of the Convention.

In particular, matters of appropriate sentencing fall, in principle, outside the scope of the Convention. However, a sentencing measure differentiating between offenders by age and gender had already been found by the former Commission to give rise to an issue under Article 14 in conjunction with Article 5 (*Nelson v. the United Kingdom*[76] and *A.P. v. the United Kingdom*[77]). The Court had also viewed measures relating to execution of a sentence and impacting on the length of a sentence as falling within the scope of Article 5, and matters concerning eligibility for parole as giving give rise to an issue under Article 14 in conjunction with Article 5 (*Gerger v. Turkey*[78] and *Clift v. the United Kingdom*[79]). Moreover, Article 14 extends to additional rights, falling within the scope of the Convention, which a State volunteers to provide (*Stec and Others v. the United Kingdom*[80]). Accordingly, national legislation exempting certain categories of offender from life imprisonment fell within the scope of Article 5 for the purposes of the applicability of Article 14. The applicants having been treated differently on the basis of "sex" and "age", Article 14 in conjunction with Article 5 was applicable.

(ii) The second aspect concerns the justification for the difference in treatment of the applicant adult men, which the Grand Chamber found did not amount to discrimination in breach of Article 14.

The Grand Chamber established that the applicants were in an analogous situation to other offenders convicted of the same or comparable offences and, importantly, that the purpose of the impugned sentencing policy was to ensure, for reasons of justice and humanity, that account was taken of the age and physiological characteristics of certain categories of offender.

As to whether this difference in treatment was justifiable, the Grand Chamber's analysis drew on the Court's case-law regarding the compatibility of life sentences with Article 3 of the Convention. While life sentences were not, as such, incompatible with Article 3, the case-law had established certain minimum requirements in that regard: a life sentence had to be reducible, so there had to be a prospect of release and a possibility of review, both of which had to exist at the time of the imposition of the sentence (*Vinter and Others v. the United Kingdom*[81] and *Murray v. the*

75. *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, ECHR 2017.
76. *Nelson v. the United Kingdom*, no. 11077/84, Commission decision of 13 October 1986, Decisions and Reports 49.
77. *A.P. v. the United Kingdom*, no. 15397/89, Commission decision of 8 January 1992, unreported.
78. *Gerger v. Turkey* [GC], no. 24919/94, 8 July 1999.
79. *Clift v. the United Kingdom*, no. 7205/07, 13 July 2010.
80. *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, ECHR 2006-VI.
81. *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and 2 others, ECHR 2013 (extracts).

Netherlands[82]). Accordingly the fact that a State took measures aimed at complying with such minimum requirements would weigh heavily in favour of the State in the Article 14 assessment.

Turning then to the respective differences in treatment, the Grand Chamber considered the exception in favour of juvenile offenders to be justified given that it was in line with the clear European consensus and with other international standards. Nor did the Grand Chamber have much difficulty with the exclusion of senior offenders, as this was in line with the Court's case-law, since reducibility clearly carried even greater weight for elderly offenders: setting the age after which a life sentence could not be imposed was consistent with this. The justification for the exclusion of adult female offenders appeared to be more complex for the Grand Chamber. While it would not assess the various instruments and data submitted by the parties regarding the needs of women in prisons, it accepted that there was a "sufficient basis for the Court to conclude that there was a public interest" underlying the exemption of female offenders from life imprisonment.

The margin of appreciation was central to the Court's findings. There were two conflicting interests: on the one hand, particularly serious reasons were required to justify a difference in treatment on grounds of sex and, on the other, it was not the role of the Court to decide on an appropriate term of imprisonment. In the end, the Grand Chamber accepted that a wide margin of appreciation had to be left to the authorities. In the first place, they had to enjoy a broad discretion when asked to make rulings on sensitive matters such as penal policy. In addition, the case concerned evolving rights, the law appearing to be in a "transitional stage": while there was no discernible international trend for or against life sentences, such sentences had been limited in Europe given the Convention requirement of the reducibility of life sentences. Finally, juveniles and the *Vinter and Others* requirement for reducibility apart, there was little other common ground on life sentences between the domestic legal systems, and so no established consensus. In such circumstances, it was difficult to criticise the State for establishing, in a way which reflected the evolution of society in that sphere, the exemption of certain groups of offenders which represented social progress in penological matters.

Finally, it would appear that the evolving nature of the subject matter also meant that the option of exempting *all* offenders from life sentences was not a solution which could be imposed on the respondent State: given the current position in the Convention case-law, that option was not required "under the Convention as currently interpreted by the Court".

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

Right to free elections

The *Davydov and Others v. Russia*[83] judgment concerned the extent of the Court's scrutiny in respect of alleged irregularities during the counting and tabulation of votes.

The applicants, eleven in all, alleged that the organisation and conduct of elections for two legislative bodies (the regional Legislative Assembly of St Petersburg and the national State Duma) in several polling stations in St Petersburg in December 2011had breached Article 3 of Protocol No. 1. They had taken part in the elections in different capacities: all of them were registered voters; some of them were candidates; others were members of electoral commissions or observers. In the Convention proceedings they contended (as in their various unsuccessful challenges before various national authorities) that there had been serious irregularities in the procedure in which votes had been recounted, which resulted in more votes being assigned following the recounts to the ruling party and its candidates to the detriment of the opposition parties and their candidates. They alleged that the domestic authorities had failed to ensure an effective review of their complaints.

82. *Murray v. the Netherlands* [GC], no. 10511/10, ECHR 2016.
83. *Davydov and Others v. Russia,* no. 75947/11, 30 May 2017.

The Court found that there had been a breach of Article 3 of Protocol No. 1 on account of the failure to provide the applicants with an effective review of their arguable claim that there had been serious irregularities in the processing and tabulation of votes. It focused on what it considered to be the thrust of their grievance, namely that for many constituencies there existed a difference between the results obtained by the political parties, as recorded initially after counting by the Precinct Electoral Commissions, and the official results published by the City Electoral Commission.

The judgment is noteworthy for the following reasons.

Firstly, the Court observed that the guarantees of Article 3 of Protocol No. 1, as interpreted in its case-law, also impose, as an aspect of the right to free elections, positive obligations on the State to regulate carefully the procedures by which the results of voting are ascertained, processed and recorded. It highlighted in this connection the emphasis placed by the Venice Commission in its Code of Good Practice in Electoral Matters on the importance of the post-voting stage in the election process and its advocacy of clear procedural guarantees surrounding matters such as the counting and recording of election results.

Secondly, the Court addressed the extent of its scrutiny of this technical post-voting stage of the electoral process, having regard to the scope of its review in respect of restrictions on the right to vote and the right to stand for elections. Interestingly, the Court observed that a less stringent scrutiny would apply to this stage. A mere mistake or irregularity would not, *per se*, signify unfairness of the elections, if the general principles of equality, transparency, impartiality and independence of the electoral administration are complied with. For the Court, the concept of free elections would be put at risk only if there was evidence of procedural breaches that would be capable of thwarting the free expression of the opinion of the people, for instance through gross distortion of the voters' intent, and where such complaints receive no effective examination at the domestic level.

Thirdly, the Court inquired into whether the applicants had made out a claim of serious irregularities. It found that they had presented to the domestic authorities an arguable claim that the fairness of the elections both to the St Petersburg Legislative Assembly and the State Duma in the precincts concerned had been seriously compromised by the procedure in which the votes had been recounted. The Court stressed its awareness of the limits of its fact-finding role in this type of case, and focused on those matters which were not disputed by the parties. Thus, it noted, among other things, the scale of the recounting; the unclear reasons for ordering a recount; the systematic absence of the opposition parties' nominees during the recounting; and the ruling party's overwhelming gain from the recounts.

Fourthly, the Court noted that the applicants had tried to avail themselves of all the domestic remedies available to them under domestic law (complaints to electoral commissions, criminal remedies and judicial review proceedings). On the facts it found that none of the avenues employed by the applicants afforded them a review which would have provided sufficient guarantees against arbitrariness. It stressed in this connection (paragraph 335 of the judgment) that

> "… where serious irregularities in the process of counting and tabulation of votes can lead to gross distortion of the voters' intent, such complaints should be effectively examined by the domestic authorities. Failure to ensure effective examination of such complaints would constitute violations of individuals' right to free elections guaranteed under Article 3 of Protocol No. 1, in its active and passive aspects."

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

Freedom of movement

The *De Tommaso v. Italy*[84] judgment concerned the imposition of preventive measures on an individual considered to be a danger to society.

In 2008 the District Court, considering that the applicant represented a danger to society, imposed special police supervision orders for two years, which included obligations on the applicant to report to the police once a week; to remain at home at night (from 10 p.m. to 6 a.m.), unless otherwise authorised; not to attend public meetings; and not to use mobile phone or radio communication devices. The decision was overturned on appeal seven months later, the court having found that the applicant had not been a danger to society when the measures were imposed.

In the Convention proceedings the applicant complained, *inter alia*, under Article 5 and Article 2 of Protocol No. 4 of the preventive measures. The Grand Chamber found, *inter alia*, that Article 5 did not apply, but that Article 2 of Protocol No. 4 did apply and had been violated.

Notwithstanding judgments of the Constitutional Court clarifying the criteria by which to assess the need for preventive measures under the Act in question, the Act was found to be couched in vague and excessively broad terms. Neither the individuals to whom the measures were applicable (for example, those "who, on account of their behaviour and lifestyle and on the basis of factual evidence may be regarded as habitually living, even in part, on the proceeds of crime") nor the content of certain measures (requiring, for example, one "to lead an honest and law-abiding life" and not to give "cause for suspicion") were defined by law with sufficient precision and clarity to comply with the foreseeability requirements of Article 2 of Protocol No. 4 to the Convention.

Other Convention provisions

Striking out (Article 37)

The *De Tommaso v. Italy*[85] judgment concerned the imposition of preventive measures on an individual considered to be a danger to society.

In 2008 the District Court, considering that the applicant represented a danger to society, imposed special police supervision orders for two years. The decision was overturned on appeal seven months later, the court having found that the applicant had not been a danger to society when the measures were imposed. The applicant did not have a public hearing at which to contest the measure.

The applicant complained, *inter alia*, under Article 6 of a lack of fair and public hearing. The Government submitted a unilateral declaration accepting a violation of Article 6 as regards the lack of a public hearing. The Grand Chamber found that Article 6 applied and had been violated.

Although Chambers had done so previously on several occasions, this was the first time the Grand Chamber had examined a request to strike out an application or part thereof on the basis of a unilateral declaration, so the judgment contains a comprehensive review of the relevant principles. The Grand Chamber concluded that, there being no previous decisions relating to the applicability of Article 6 to proceedings for the application of preventive measures (leaving aside the restrictions on the use of property), the conditions for striking out that part of the application had not been met.

84. *De Tommaso v. Italy* [GC], no. 43395/09, ECHR 2017. See also under Article 5 (Right to liberty and security) above, Article 6 (Right to a fair hearing in civil proceedings) above and Article 37 (Striking out) below.
85. *De Tommaso v. Italy* [GC], no. 43395/09, ECHR 2017. See also under Article 5 (Right to liberty and security) above, Article 6 (Right to a fair hearing in civil proceedings) above and Article 2 of Protocol No. 4 (Freedom of movement) above.

Just satisfaction (Article 41)

The issue in *Nagmetov v. Russia*[86] was whether the Court was competent to make an award for non-pecuniary damage in the absence of a properly submitted claim.

The applicant's complaint concerned his son's death, caused by a tear-gas grenade fired during a demonstration against corruption of public officials. In 2015, the Chamber found violations of the substantive and procedural limbs of Article 2 of the Convention. In his application form, the applicant claimed "compensation for the related violations of the Convention". The Court's Registry later requested, according to its normal procedure, his just-satisfaction claims, reiterating the consequences of failing to comply with Rule 60 of the Rules of Court (no just-satisfaction award or a partial award, even if the applicant had previously indicated his wishes in that regard). No claim was submitted. The applicant's representative requested more time (pleading a postal mix-up) and this was accorded. Again, no claim was submitted. The Chamber made a just-satisfaction award in the sum of EUR 50,000 for non-pecuniary damage. Since no claim in respect of costs and expenses had been made, the Chamber made no award in that respect.

The Grand Chamber confirmed the Chamber's findings as regards Article 2 of the Convention. It also awarded EUR 50,000 in respect of non-pecuniary damage. Since no other claim had been made under Article 41, no other award was made.

(i) The case essentially concerns the circumstances in which the Court will award compensation for non-pecuniary damage in the absence of a properly submitted claim.

The Grand Chamber noted, in the first instance, that Article 41 itself did not impose any particular procedural obligations, non-compliance with which would circumscribe an award. However, Rule 60 and the Practice Direction on just-satisfaction claims established a procedural framework for this judicial function. The Court's prevailing practice was to reject claims not detailed at the communication stage in accordance with the Rules, even if mentioned in the earlier application form. The claim in respect of non-pecuniary damage had not been properly made in the present case: neither the original request in the application form, nor reliance by the applicant on the Chamber judgment before the Grand Chamber, could amount to a "claim" within the meaning of Rule 60 (read together with Rule 71 § 1 of the Rules of Court).

As to whether the Court was, nevertheless, competent to make a just satisfaction award, the Grand Chamber reviewed in some detail the relevant guiding principles, rules and approaches, from which it confirmed that no Convention provision precluded it from exercising some discretion. It stated (paragraph 76) that the Court

> "remains empowered to afford, in a reasonable and restrained manner, just satisfaction on account of non-pecuniary damage arising in the exceptional circumstances of a given case, where a 'claim' has not been properly made in compliance with the Rules of Court".

Were the Court to envisage exercising this discretion, the parties' submissions should be sought and the following two-part test should be applied, so that an award could be considered if:

– a number of "prerequisites" had been met: whether there were unequivocal indications that the applicant wished to obtain monetary compensation, that that interest had been expressed in relation to the same facts underlying the Court's finding of a violation and that there was a causal link between the violation and the non-pecuniary damage in respect of which the applicant claimed compensation; and

– there were "compelling considerations" in favour of making such an award: the particular gravity and impact of the violation and, if relevant, the overall context in which the breach occurred, as well

86. *Nagmetov v. Russia* [GC], no. 35589/08, 30 March 2017.

as whether there were reasonable prospects of obtaining adequate "reparation" (within the meaning of Article 41) at the national level.

Applying that test to the particular circumstances of the case, the Grand Chamber found that the case disclosed exceptional circumstances which called for an award of just satisfaction in respect of non-pecuniary damage despite the absence of a properly made claim. In so finding, it found the prerequisites to be present. It emphasised the gravity of, in particular, a lengthy and defective investigation of a death inflicted by an agent of the State and the fact that there was no reasonable prospect of his obtaining adequate reparation.

(ii) As to whether these principles apply to improperly made claims for compensation for pecuniary damage or for costs and expenses, the Grand Chamber confined its remarks to a brief statement that, since no such claims had been made, no award would be made.