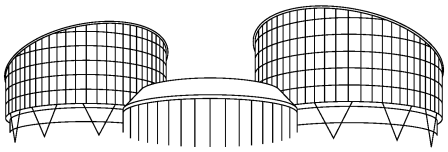

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

OVERVIEW OF THE COURT'S CASE-LAW
JANUARY TO JUNE 2015

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

OVERVIEW OF THE COURT'S CASE-LAW
JANUARY TO JUNE 2015[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 is a provisional version covering the first six months of 2015. It will be replaced by the final version covering the whole year.

TABLE OF CONTENTS

Jurisdiction and admissibility

Jurisdiction of States (Article 1)

The case of *Chiragov and Others v. Armenia*[2] concerned the jurisdiction of Armenia as regards Nagorno-Karabakh and the adjacent occupied territories and the consequent Convention responsibility for the violations alleged by Azerbaijani Kurds displaced therefrom.

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

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

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

In order to determine whether Armenia had such "effective control", the Court applied its case-law concerning the exercise of extraterritorial jurisdiction, notably, by the Russian Federation in Transdniestria and by the United Kingdom in Iraq (*Ilascu and Others v. Moldova and Russia*[3]; *Catan and Others v. Moldova and Russia*[4]; and *Al-Skeini and Others v. the United Kingdom*[5]). That case-law provides that effective control depends primarily on military involvement, but also on other indicators (including economic and political). Not only did Armenia deny any military presence in the relevant areas (whether in 1992 or thereafter), but the Court accepted that there was no direct conclusive evidence before it of such presence. The Court rather relied on certain assumptions: for example, that a defence force drawn from the population of Nagorno-Karabakh could not have occupied that region and the surrounding territories without outside support; and the Agreement on Military Cooperation between the Governments of the Republic of Armenia and the Republic of Nagorno-Karabakh of 1994. The Court also took into account other reports and statements (notably, of senior Armenian public officials which went against the Government's official denial). These elements allowed it to find that the Republic of Armenia, "through its military presence and the provision of military equipment and expertise, had been significantly involved in the Nagorno-Karabakh conflict from an early date" and, further, that Armenia's military support was "decisive for the conquest of and continued control over" the relevant territories. Certain other factors of Armenian support allowed the Court to conclude that the "Nagorno-Karabakh Republic" and its administration survived by virtue of the military, political, financial and other support of Armenia, which State thus exercised "effective control" and jurisdiction over Nagorno-Karabakh and the seven surrounding territories occupied by it, rendering it responsible for the violations alleged by the applicants displaced therefrom.

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The case of *Sargsyan v. Azerbaijan*[6] concerned the jurisdiction of Azerbaijan as regards a village near Nagorno-Karabakh on the territory of Azerbaijan but which remained a disputed area, and its consequent Convention responsibility for the violations alleged by Armenians displaced therefrom.

2. *Chiragov and Others v. Armenia* [GC], no. 13216/05, ECHR 2015. See also the judgment of the same date in *Sargsyan v. Azerbaijan* [GC], no. 40167/06, ECHR 2015, referred to below.
3. *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII.
4. *Catan and Others v. Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012.
5. *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011.
6. *Sargsyan*, *supra* note 2.

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

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

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

This case did not, therefore, concern the jurisdiction and responsibility of a State when it exercised effective control extraterritorially (such as Turkey in Northern Cyprus and the Russian Federation in Transdniestria). Nor did it concern the jurisdiction of a State over part of its territory which was under the effective control of another State (Moldovan responsibility for Transdniestria). Rather it concerned the jurisdiction of a State over its own territory when that territory was "disputed" and had been "rendered inaccessible" by conflict. The Court considered the case to be, in some respects, akin to the situation in the *Assanidze v. Georgia*[7] case, which concerned the jurisdiction of Georgia as regards the Ajarian Autonomous Republic. Since Azerbaijan was the territorial State, it was presumed to have jurisdiction and there were no exceptional circumstances (such as the exercise of effective control by another State) to rebut that presumption. The Court therefore found that the impugned facts fell within the jurisdiction of Azerbaijan. The Court acknowledged the difficulties which would inevitably be encountered by Azerbaijan at a practical level in exercising authority over such disputed territory: however, those were matters to be taken into account on the merits of each complaint.

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

"Core" rights

Right to life (Article 2)

Obligation to protect life

The case of *Lambert and Others v. France*[8] concerned the decision by a treating doctor, after consultation, to withdraw life-sustaining treatment from a patient who had not left clear instructions in advance.

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

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

Two factors are worth highlighting.

7. *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II.
8. *Lambert and Others v. France* [GC], no. 46043/14, ECHR 2015 (extracts).

In the first place, the Court found that the applicants lacked standing to complain *in the name and on behalf of* Vincent Lambert. In so finding, the Court applied principles drawn from its case-law to a novel context. The Court considered that none of its previous cases in which it had accepted that an individual could act on behalf of another was comparable to the present case (distinguishing, notably, *Nencheva and Others v. Bulgaria*[9], and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*[10]). Vincent Lambert was not dead although he was in a vulnerable situation; he had not given formal instructions as regards the proposed withdrawal of life-sustaining treatment; and several members of his family had different views in that regard, some of whom wished to make complaints to the Court on his behalf contesting the proposed withdrawal of treatment. The Court clarified the two main criteria to be fulfilled before such complaints could be accepted. In the first place, was there a risk that the direct victim would otherwise be deprived of effective protection of his or her rights? There was no such risk in the present case as the applicants could invoke the right to life of Vincent Lambert on their own behalf. Secondly, was there a conflict of interests between the patient and the applicants? The *Conseil d'État* had found on the evidence that the doctor's decision, challenged by the applicants, could not be regarded as inconsistent with Vincent Lambert's wishes: the Court concluded that it had not therefore been established that there was a "convergence of interests" between the applicants' assertions and Vincent Lambert's wishes.

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

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

The Court examined those issues from the point of view of the State's positive obligation to protect life, read in light of the individual's right to respect for his or her private life and the notion of personal autonomy which that encompassed (*Pretty v. the United Kingdom*[11]). Further factors were taken into account: the existence in domestic law of a regulatory framework compatible with Article 2 requirements; the extent to which account had been taken of the wishes of the patient, of his family and of the medical personnel; and the possibility of consulting the courts for a decision in the patient's interests. The Court concluded that the law (including the notion of "unreasonable obstinacy") did not lack clarity or precision as alleged. It also found compatible with Article 2 the legislative framework ("sufficiently clear" and "apt to ensure the protection of patients' lives") and the consequent consultation process ("meticulous"). In so finding, the Court emphasised the particular quality and breadth of both the consultation process and of the review by the *Conseil d'État*.

Effective investigation

The *Mustafa Tunç and Fecire Tunç v. Turkey*[12] judgment concerned the death of the applicants' son while on military service. He had been assigned to a site belonging to a private oil company, for which the national gendarmerie provided security services. There were two stages to the investigation into the young man's death: the investigation proper by the military prosecutor, and a review by a military court. Following a decision by the prosecutor that there were no grounds for bringing criminal proceedings, the applicants complained and the military court ordered an additional investigation, which the prosecutor conducted before concluding that the death was accidental. The military court dismissed the applicants'

9. *Nencheva and Others v. Bulgaria*, no. 48609/06, 18 June 2013.
10. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, ECHR 2014.
11. *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III.
12. *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, 14 April 2015.

appeal. In the Convention proceedings, the applicants complained that the authorities had not carried out an effective investigation into their son's death.

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

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

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

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

Prohibition of torture

The judgment in *Cestaro v. Italy*[13] concerned the absence of an adequate legal framework to ensure members of the security forces responsible for acts of torture and other ill-treatment were brought to justice.

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

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

among other things, attempts to conceal the truth of what had happened at the school and the unlawful arrest of the occupants. Those convicted received relatively modest sanctions.

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

The case is interesting in that the Court qualified the assault on the applicant as torture, thus confirming that that notion can attach to the conduct and behaviour of State agents outside the context of interrogation in custody (see also *Vladimir Romanov v. Russia*[14], and *Dedovskiy and Others v. Russia*[15]). In reaching its conclusion, the Court laid emphasis on, among other things, the following factors:

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

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

– the individuals sheltering in the school had never offered any resistance when the police arrived;

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

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

Inhuman and degrading treatment[16]

The *Zayev v. Russia*[17] judgment concerned the importance of having in place safeguards against ill-treatment from the moment a person is taken into police custody.

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

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

14. *Vladimir Romanov v. Russia* no. 41461/02, 24 July 2008.
15. *Dedovskiy and Others v. Russia*, no. 7178/03, ECHR 2008 (extracts).
16. *Identoba and Others v. Georgia*, no. 73235/12, 12 May 2015.
17. *Zayev v. Russia*, no. 36552/05, 16 April 2015.

applicant had been subjected to inhuman and degrading treatment, the Court considered it important to note that the impugned ill-treatment had been made possible by the vulnerability of the applicant who, while in police custody, was deprived over a period of several hours of the procedural safeguards to which a person in that situation was normally entitled. The Court also reaffirmed the need to record without delay all information relating to a person's arrest in the relevant custody record (see *Timurtaş v. Turkey*[18]).

Emotional suffering of close relatives

The *Elberte v. Latvia*[19] judgment concerned the removal of tissue from the body of the applicant's deceased husband without her knowledge or consent and consequential emotional suffering.

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

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

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

The judgment is of particular note as regards the Court's finding of a breach of Article 3 of the Convention with respect to the applicant. The Court has not hesitated in finding a breach of Article 3 in cases brought by family members of the victims of "disappearances" or in cases of extrajudicial killings where the corpse of the victim had been mutilated (see *Khadzhialiyev and Others v. Russia*[20]). The circumstances of the applicant's case were of a different nature. The Court nevertheless found a breach of Article 3 with respect to the applicant. It observed among other things that:

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

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

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

18. *Timurtaş v. Turkey*, no. 23531/94, § 105, ECHR 2000-VI.
19. *Elberte v. Latvia*, no. 61243/08, ECHR 2015.
20. *Khadzhialiyev and Others v. Russia*, no. 3013/04, §§ 120-22, 6 November 2008.

(iv) in the event, no prosecutions were ever brought as a result both of the time-bar and uncertainty over whether or not the acts of the authorities could be considered illegal in terms of the domestic-law requirements at the time, thus denying the applicant redress for a breach of her personal rights relating to a very sensitive aspect of her private life, namely consenting or objecting to the removal of tissue from her dead husband's body.

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

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

Armed forces

The *Lyalyakin v. Russia* judgment[21] concerned treatment inflicted by the army on a 19-year-old soldier who, after being caught trying to escape, was given a reprimand on a parade ground dressed only in his military briefs.

For the first time, the Court considered whether the fact that an applicant had been forced to undress and to line up in front of his unit wearing only his military briefs had reached the threshold of severity to bring the case within Article 3. It reiterated that the State has a duty to ensure that soldiers perform their military service in conditions which are compatible with respect for their human dignity (*Chember v. Russia*[22]). While accepting the need to maintain discipline in a military setting, the Court noted that the respondent State had not explained why the undressing and exposure of the applicant during the lining up of the battalion had been necessary to prevent his or other soldiers' escape.

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

Prohibition of slavery and forced labour (Article 4)

Forced or compulsory labour

The *Chitos v. Greece*[23] judgment concerned the obligation imposed on an army officer to pay the State a substantial sum of money to allow him to leave the military before the end of his contracted service period.

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

The applicant was 37 years of age when he decided to resign. He was informed that he had to serve another nine years or pay the sum of 106,960 euros (EUR) to the State in compensation. He challenged the payment order before the Court of Auditors, which suspended the execution of the payment order pending its decision. Nevertheless, the tax authority requested immediate payment of the sum, which had been increased to EUR 112,115 given the accrued interest. The Court of Auditors subsequently found

21. *Lyalyakin v. Russia*, no. 31305/09, 12 March 2015.
22. *Chember v. Russia*, no. 7188/03, ECHR 2008, see Annual Report 2008.
23. *Chitos v. Greece*, no. 51637/12, ECHR 2015.

that the period of required service of seventeen years was lawful, but reduced the sum to be paid to EUR 49,978. The difference between the latter sum and the sum already paid was then reimbursed to the applicant.

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

The Court first examined the limitation under Article 4 § 3 which excluded from the scope of the term "forced labour" any service of a military character. It found that that limitation was aimed at military service by conscription only and did not apply to career servicemen: in so finding, the Court departed from the broad interpretation of the Commission in 1968 in the case of *W., X., Y. and Z. v. the United Kingdom*[24]. The Court found support for this interpretation in International Labour Organization Convention No. 29 as well as in the view taken both by the European Committee of Social Rights in the context of the European Social Charter and by the Committee of Ministers (see Recommendation CM/Rec(2010)4 to member States on human rights of members of the armed forces). This is the first case in which the Court has ruled on this issue.

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

Right to liberty and security (Article 5)

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

The judgment in *M.S. v. Croatia (no. 2)*[25] concerned the lack of effective legal representation in proceedings concerning the applicant's involuntary confinement in a psychiatric hospital.

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

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

The Court found a breach of Article 5 § 1 of the Convention. Its reasoning on the applicant's complaint is noteworthy as regards the quality of the legal representation of a person who risks involuntary confinement for reasons of mental health. The Court stressed that the mere appointment of a lawyer, without that lawyer actually providing legal assistance in the proceedings, could not satisfy the requirements of necessary "legal assistance" under Article 5 § 1 (e) for persons confined as being of "unsound mind". It held that "an effective legal representation of persons with disabilities requires an enhanced duty of supervision of their legal representatives by the competent domestic courts".

24. *W., X., Y. and Z. v. the United Kingdom*, nos. 3435/67, 3436/67, 3437/67 and 3438/67, Commission decision of 19 July 1968, Collection of Decisions 28.
25. *M.S. v. Croatia (no. 2)*, no. 75450/12, 19 February 2015.

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

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In the case of *Constancia v. the Netherlands*[26], the applicant was detained as a person of "unsound mind" in the absence of a precise diagnosis of his mental state. He was convicted of a violent homicide. In the ensuing criminal proceedings he refused to cooperate in any examination of his mental state, so that no diagnosis was possible. The trial court nonetheless found him to be severely disturbed and imposed a prison sentence followed by detention as a person of "unsound mind".

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

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It was suggested in *Varbanov v. Bulgaria*[27] that "[w]here no other possibility exists, for instance because of a refusal of the person concerned to appear for an examination, at least an assessment by a medical expert on the basis of the file must be sought, failing which it cannot be maintained that the person has reliably been shown to be of unsound mind".

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

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

In its judgment in *Gallardo Sanchez v. Italy*[28], the Court indicated that increased diligence is required when an extradition request concerns a person facing criminal charges in the requesting State. The applicant complained that he had been kept in detention for a period of approximately one year and six months pending his extradition to Greece where he was wanted on a charge of arson. The Court found a breach of Article 5 § 1. Its reasons for doing so are noteworthy as they represent a development in the case-law under sub-paragraph (f) of that provision.

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

In assessing the reasonableness of the time spent in detention awaiting extradition, the Court made a distinction between these two situations from the standpoint of the degree of diligence to be shown by the extraditing State when processing a request for extradition. For the Court, the extraditing State was

26. *Constancia v. the Netherlands* (dec.), no. 73560/12, 3 March 2015.
27. *Varbanov v. Bulgaria*, no. 31365/96, ECHR 2000-X.
28. *Gallardo Sanchez v. Italy*, no. 11620/07, ECHR 2015.

required to act with greater diligence in order to secure the defence rights of a person against whom criminal proceedings were pending in the requesting State.

On the facts of the case, and having in mind the reasons for Greece's extradition request and the periods of delay in complying with that request – which were attributable to the Italian authorities – the Court concluded that there had been a breach of Article 5 § 1.

Conditional release on bail (Article 5 § 3)

The case of *Magee and Others v. the United Kingdom*[29] raised the question whether the judge referred to in Article 5 § 3 is required to address the issue of conditional release in the early stages of detention.

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

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

Moreover, as regards the first limb, the Court reiterated that Article 5 § 3 requires that a detainee be brought promptly and automatically before a judge or other officer able to review the lawfulness of the arrest and detention, to review whether there was a reasonable suspicion that the accused had committed a criminal office, and to order release if the detention fell foul of either requirement. The Court found that the County Court judge had those powers. However, and more interestingly, the Court clarified that nothing in its previous case-law (including in the oft-cited extract from the judgment of *Schiesser v. Switzerland*[30]) suggested that this initial review (first limb) should *also* include an examination of any release on bail. While the lawfulness of the applicants' detention and the existence of a reasonable suspicion against them had been reviewed twice by a County Court judge during the twelve days of initial detention, the applicants were never brought before a judge who had the power to examine or order release on bail pending trial. However, the Court found that the accused were still in the "early stages" of their deprivation of liberty during those twelve days (first limb) so that an examination of release on bail was not required by Article 5 § 3.

Procedural rights in civil proceedings

Right to a fair hearing (Article 6 § 1)

Applicability

The judgment in *Bochan v. Ukraine (no. 2)*[31] concerned the reopening of terminated civil proceedings following a finding of a violation by the Court in a judgment of 3 May 2007[32] that the domestic courts' decisions had been reached in proceedings which failed to respect the fair-trial guarantees existing under Article 6 § 1. Relying principally on the Court's judgment, the applicant lodged an exceptional appeal

29. *Magee and Others v. the United Kingdom*, nos. 26289/12, 29062/12 and 29891/12, ECHR 2015.
30. *Schiesser v. Switzerland*, 4 December 1979, § 31, Series A no. 34.
31. *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, ECHR 2015.
32. *Bochan v. Ukraine*, no. 7577/02, 3 May 2007.

with the Ukrainian Supreme Court challenging those decisions. However, the Supreme Court rejected her appeal, holding that the domestic decisions were correct and well-founded.

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

The Grand Chamber reaffirmed and clarified its case-law to the effect that while Article 6 § 1 does not normally apply to extraordinary appeals, the nature, scope and specific features of the procedure in question could bring it within the ambit of that provision, which was the case for the exceptional appeal proceedings in Ukraine. The Court reiterated that it was for the member States to decide how best to implement its judgments and that there was no uniform approach among them as to the possibility of seeking the reopening of terminated civil proceedings following a finding of a violation by the Court, or as to the modalities of implementation of existing reopening mechanisms. The decision is noteworthy in that the Court emphasised that the best way to achieve restoration of the applicant's original situation was through the availability of procedures allowing a case to be revisited when a violation of Article 6 had been found.

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

Access to a court

In the case of *Momčilović v. Croatia*[33], access to the civil courts was made dependent on a prior attempt to settle the claim. The applicants complained that the domestic courts had refused to examine the merits of their compensation claim against the State for the death of their daughter because they had not attempted to settle the claim with the relevant authorities before introducing the contentious proceedings. According to the terms of the Civil Procedure Act, a claimant intending to bring a civil claim against the Republic of Croatia must first submit a request for settlement to the competent State Attorney's Office.

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

The case is interesting in that the Court accepts that a domestic-law requirement to attempt to settle a civil claim as a necessary prelude to contentious proceedings is not of itself incompatible with the Article 6 guarantee of access to a court or tribunal. It is interesting to observe that the judgment refers to Council

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

of Europe statements on the desirability of encouraging alternative dispute-resolution procedures. The Court's judgment can be said to be in line with these statements.

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The *Zavodnik v. Slovenia*[34] judgment concerned the lack of proper notification of insolvency proceedings. The applicant mainly complained of an impairment of his right of access to court in respect of the insolvency proceedings involving his former employer, a company, in which he was a creditor. A hearing took place in the applicant's absence, confirming the receiver's distribution proposal. The applicant had not seen the notification of the hearing posted on the court's notice board beforehand, nor had he read the notification in the Official Gazette. He was also unable to appeal the decision as he had missed the relevant deadline.

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

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

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

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In *Klausecker v. Germany*[35] the applicant complained of his inability to obtain an examination on the merits of a complaint he had lodged against an international organisation. Although successful in examinations for a position in the European Patent Office (EPO), the applicant was ultimately refused employment on account of his physical disability. His appeals within the EPO system and his complaint to the Administrative Tribunal of the International Labour Organization (ILO) were unsuccessful given that candidates for employment lacked standing to complain. The applicant's appeal to the Federal Constitutional Court was rejected on the ground that it lacked jurisdiction since the EPO, which had taken the impugned decision, enjoyed immunity from the jurisdiction of the German courts.

In the Convention proceedings, the applicant complained, firstly, that the Federal Constitutional Court's decision had denied him access to the national courts and thereby prevented him from asserting his civil right not to be discriminated against on the ground of his disability. Secondly, he argued that in view of the deficiencies in the internal system of the EPO and the ILO, which had resulted in a failure to

34. *Zavodnik v. Slovenia*, no. 53723/13, 21 May 2015.
35. *Klausecker v. Germany* (dec.), no. 415/07, 6 January 2015.

consider his grievance, the respondent State should also be held accountable under the Convention for the lack of redress. As regards both complaints, the applicant relied on Article 6.

The Court dismissed the complaints in so far as they concerned his unsuccessful action before the domestic courts in the respondent State. It accepted that the applicant fell within the jurisdiction of the respondent State, given that the Federal Constitutional Court had ruled against him by declining to examine the decision given by the EPO. On that account, the respondent State had to justify the refusal to entertain the applicant's action based on an alleged civil right not to be discriminated against on the ground of physical disability when applying for employment. In addressing this complaint, the Court observed that it did not have to determine whether Article 6 was applicable and that it was prepared to assume that the applicant had a civil right since this part of the application was in any event manifestly ill-founded. The Court's reasoning on inadmissibility is essentially based on the approach taken in the earlier cases of *Waite and Kennedy v. Germany*[36] and *Beer and Regan v. Germany*[37]. On the question of proportionality, the Court gave weight to the fact that the EPO had offered the applicant the possibility of submitting his case to an arbitration procedure, an offer which he had declined.

The Court next considered the applicant's contention that the respondent State was responsible for his inability to have a ruling on the merits of his complaint by the EPO and the Administrative Tribunal of the ILO. Its treatment of this issue is interesting in that it took as its point of departure the "equivalent protection" doctrine first developed in the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*[38] and later applied in the context of its examination of complaints relating to acts of international organisations and tribunals in labour disputes, most notably *Gasparini v. Italy and Belgium*[39]. The *Gasparini* case concerned the compliance with the Convention of internal procedures on labour disputes within NATO without the respondent State having intervened in that procedure as such. On the facts of the applicant's case, the Court saw no reason to consider that since the transfer by Germany of its sovereign powers to the EPO, the rights guaranteed by the Convention would generally not receive within the EPO an "equivalent protection" to that secured by the Convention system. Consequently, Germany's responsibility under the Convention could only be engaged if the protection of fundamental rights offered by the EPO in the present case was "manifestly deficient".

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

Fairness of the proceedings[40]

The *Adorisio and Others v. the Netherlands*[41] decision related to restrictions on the applicants' Article 6 rights in the context of their legal challenge to emergency economic measures adopted in the banking sector.

36. *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I.
37. *Beer and Regan v. Germany* [GC], no. 28934/95, 18 February 1999.
38. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.
39. *Gasparini v. Italy and Belgium* (dec.), no. 10750/03, 12 May 2009.
40. See also *Bochan (no. 2)*, *supra* note 31.
41. *Adorisio and Others v. the Netherlands* (dec.), nos. 47315/13, 48490/13 and 49016/13, 17 March 2015.

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

The applicants – all of whom were foreign nationals or entities – complained under Article 6 § 1 of the Convention that the time-limit for lodging an appeal (only ten days) was too short; that there was insufficient time to study the Minister of Finance's statement of defence (they received the statement late in the afternoon on the day before the hearing); and that they were given access to incomplete versions of financial reports drawn up by a firm of accountants and a firm of real-estate valuers.

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

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

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

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

Execution of a final judgment

Tchokontio Happi v. France[42] is the first case against France concerning a continuing failure to execute a final judgment requiring the authorities to rehouse an individual. The applicant had obtained such a judgment under a law of 2007 (known as the "DALO Law"). The DALO Law recognised the right to decent and independent housing and provided that failure by the authorities to comply with an order to rehouse would lead to the payment of a penalty charge into a special State fund. The Court found a violation under Article 6 § 1 given that the applicant had still not been rehoused, observing, *inter alia*, that it was not open to a State authority to cite lack of funds or other resources as an excuse for not honouring a judgment debt.

42. *Tchokontio Happi v. France*, no. 65829/12, 9 April 2015.

Right to an effective remedy (Article 13)

The judgment in *Kuppinger v. Germany*[43] concerns the notion of an effective remedy for delay in parent-child contact proceedings. In normal circumstances an Article 13 compliant remedy for length of proceedings may take two forms: a remedy allowing the victim to claim damages or a remedy enabling the victim to request the acceleration of the proceedings. Ideally, according to the Court's case-law, both remedies should be available in the domestic legal system.

This case is significant in that it highlights that in litigation concerning the enforcement of a parent's contact rights to his or her child, domestic law must provide a remedy which enables the requesting party to speed up the implementation of the decision awarding contact rights. In the case in issue, the applicant complained, among other things, that the domestic proceedings which he had taken to enforce a court decision awarding him contact rights to his child had lasted an unreasonable length of time and that he had no effective remedy to expedite the implementation of that decision. He alleged a breach of Article 13 of the Convention taken in conjunction with Article 8.

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

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

In reaching its conclusion, the Court had regard to two earlier judgments in which it had made similar findings, namely *Macready v. the Czech Republic*[44] and *Bergmann v. the Czech Republic*[45]. In the circumstances, the Court found that there had been a breach of Article 13 taken in conjunction with Article 8.

Procedural rights in criminal proceedings

Right to a fair hearing (Article 6)

Impartial tribunal (Article 6 § 1)

The judgment in *Morice v. France*[46] raises the question of the objective impartiality of a higher court in a case involving, on the one hand, members of the judiciary and, on the other, a lawyer (the applicant in the instant case). The applicant had complained about the judges' conduct in a letter which was printed in the French press. The judges lodged a complaint for public defamation of a civil servant. The applicant was convicted by the trial court of complicity in defamation. His appeal on points of law was dismissed by the Criminal Division of the Court of Cassation, which therefore upheld the conviction.

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

43. *Kuppinger v. Germany*, no. 62198/11, 15 January 2015.
44. *Macready v. the Czech Republic*, nos. 4824/06 and 15512/08, 22 April 2010.
45. *Bergmann v. the Czech Republic*, no. 8857/08, 27 October 2011.
46. *Morice v. France* [GC], no. 29369/10, 23 April 2015.

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

The Court found a violation of Article 6 § 1. Its judgment, which reiterates the case-law on the judicial-impartiality requirement (see, for example, *Kyprianou v. Cyprus*[47], and *Micallef v. Malta*[48]), is noteworthy for a number of reasons.

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

More generally, two aspects of the case were highlighted by the Grand Chamber: (i) the crucial role of cassation proceedings, which form a special stage of the criminal proceedings with, as in the instant case, potentially decisive consequences for the accused because if the case had been quashed it could have been remitted to a different court of appeal for a fresh examination of both the facts and the law; and (ii) the fact that the judge whose impartiality was questioned was sitting on a bench comprising ten judges was not decisive for the objective impartiality issue as, in view of the secrecy of the deliberations, it was impossible to ascertain his actual influence on the deliberations.

Presumption of innocence (Article 6 § 2)

The *Dicle and Sadak v. Turkey*[49] judgment concerned the consequences of the reopening of domestic criminal proceedings following a finding of a violation of Article 6 by the Court.

The applicants, who were former members of the Turkish National Assembly and of a political party that had been dissolved by the Constitutional Court, were sentenced in a final judgment in 1995 to fifteen years' imprisonment for belonging to an illegal organisation. Subsequently, in the *Sadak and Others v. Turkey*[50] judgment, the Court found violations of Article 6 of the Convention (right to a fair trial) in connection with those proceedings. Following that judgment the domestic proceedings were reopened by virtue of Article 327 of the Turkish Code of Criminal Procedure through a fresh set of criminal proceedings, independent from the original proceedings. In March 2007 the Assize Court confirmed the initial conviction, but reduced the prison sentence from fifteen to seven and a half years. In its judgment it referred to the applicants as "the accused/convicted persons".

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

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

The case raises some interesting questions. Firstly, the Court had to determine whether, by using the term "accused/convicted persons" rather than simply "accused" when referring to the applicants in the

47. *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII.
48. *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009.
49. *Dicle and Sadak v. Turkey*, no. 48621/07, 16 June 2015.
50. *Sadak and Others v. Turkey (no. 1)*, nos. 29900/96 et al., ECHR 2001-VIII.

retrial, the Assize Court could be regarded as having branded them as guilty before their guilt was legally established. Secondly, the Court had to decide whether the fact that the original conviction appeared on their criminal records even after the proceedings had been reopened had violated the applicants' right to be presumed innocent. The Court answered both these questions in the affirmative.

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

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

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

Defence rights (Article 6 § 3)

The judgment in *Vamvakas v. Greece (no. 2)*[51] concerned the failure of an appellate court to inquire into the absence of a legal-aid lawyer at a cassation hearing.

A legal-aid lawyer was appointed for the applicant for the purposes of his appeal to the Court of Cassation against his conviction. The lawyer did not appear at the appeal hearing. No advance warning or explanation was given for the non-appearance, and no request for an adjournment was ever made to the court, at least in the manner prescribed in domestic law. The applicant's appeal was dismissed on the ground that he had failed to pursue it.

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

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

The guiding considerations for complaints such as the applicant's were articulated in *Daud v. Portugal*[52]. In that case, the Court stated:

> "'... It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately

51. *Vamvakas v. Greece (no. 2)*, no. 2870/11, 9 April 2015.
52. *Daud v. Portugal*, 21 April 1998, § 38, *Reports of Judgments and Decisions* 1998-II.

financed ... [T]he competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way' (*Kamasinski v. Austria*, 19 December 1989, § 65, Series A no. 168)."

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

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The *A.T. v. Luxembourg*[53] judgment concerned the questioning of the applicant in custody in the absence of a lawyer and the refusal to grant the lawyer access to the case file in advance of the first hearing before an investigating judge.

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

The applicant made two complaints under Article 6 § 3 (c) in conjunction with Article 6 § 1. Firstly, he complained of the absence of a lawyer during his first questioning by the police. Having regard to the fact that domestic law made no provision at the time for the presence of a lawyer at that stage, which meant that the applicant was automatically deprived of the right to assistance by a lawyer, the Court found a violation. The Court's approach is entirely in line with the earlier cases of *Salduz v. Turkey*[54], *Dayanan v. Turkey*[55], *Panovits v. Cyprus*[56], and *Navone and Others v. Monaco*[57]. Even if the applicant did not make any incriminating statements when questioned by the police, the trial court nevertheless compared and contrasted his declarations at that stage with later versions.

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

– Concerning access to the case file, the case is noteworthy in that the Court found that, where the national authorities considered that the interests of justice were best served in a particular case by not allowing an accused access to the case file in advance of questioning before an investigating judge, Article 6 cannot be relied upon in order to require full access at that stage of the procedure. It observed that, according to the domestic law of the respondent State, it was open to an accused to remain silent before the investigating judge, to consult the case file if officially charged and then to offer a defence at subsequent hearings in light of the information obtained from the study of the case file. Hence, the Court found no violation under Article 6 § 3 (c) in conjunction with Article 6 § 1 in respect of this aspect of the applicant's complaint.

53. *A.T. v. Luxembourg*, no. 30460/13, 9 April 2015.
54. *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008.
55. *Dayanan v. Turkey*, no. 7377/03, 13 October 2009.
56. *Panovits v. Cyprus*, no. 4268/04, § 64, 11 December 2008.
57. *Navone and Others v. Monaco*, nos. 62880/11, 62892/11 and 62899/11, 24 October 2013.

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

No punishment without law (Article 7)

The judgment in *Rohlena v. the Czech Republic*[58] clarifies the Court's case-law under Article 7 of the Convention concerning application of the notion of a "continuous" criminal offence, which was examined by the Czech courts under the law in force at the time the last offence was committed. The applicant complained, in particular, that his conviction of a domestic-violence offence had encompassed his conduct even before the offence concerned was criminalised in 2004. The judgment of the Grand Chamber is of interest for the way in which it deals with the specific case of continuous criminal offences.

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

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

It is noteworthy that the Court also referred to the law of other member States and noted in that connection that the notion of a continuous criminal offence as interpreted by the Czech courts was, as shown by a comparative-law study, in line with the European tradition in this area. This type of criminal offence had been developed in the vast majority of the Contracting States, either in legislation, or in legal theory and case-law.

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

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

The *Ruslan Yakovenko v. Ukraine*[59] judgment concerned impediments to the exercise of the right of appeal in criminal matters. This case deals with a procedure under domestic law for appealing against a judgment in criminal proceedings, which has a direct impact on the right to liberty.

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

58. *Rohlena v. the Czech Republic* [GC], no. 59552/08, 27 January 2015.
59. *Ruslan Yakovenko v. Ukraine*, no. 5425/11, 4 June 2015.

applicant did appeal, he would have delayed the trial court's judgment becoming final for an unspecified period of time thereby prolonging this "preventative detention" indefinitely.

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

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

Civil and political rights

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

Private life[60]

The *Bohlen v. Germany* judgment[61] concerned the non-consensual use of the applicant's first name for the purposes of a cigarette advertising campaign (Article 8 of the Convention and Article 1 of Protocol No. 1).

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

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

The Court confirmed at the outset that an individual's first name is part of his or her private (and family) life. In the instant case, even if the applicant's first name was not uncommon, the fact that the advertising campaign had linked it to the controversy surrounding the publication of his book made it possible to identify him. On that account, Article 8 was engaged. The Court inquired into whether the applicant's unsuccessful civil action meant that the respondent State had failed to protect the applicant's right to respect for his private life. It did so with reference to the various criteria which it had established in its judgment in *Axel Springer AG v. Germany*[62], in order to gauge whether a fair balance had been struck between the competing interests of free speech and privacy in a particular set of circumstances. The Court reached the following conclusions:

(i) The background to the advertising campaign was the media interest generated by the publication of the applicant's book and the litigation which ensued. The advertising campaign alluded in a satirical and

60. See also *Elberte*, *supra* note 19.
61. *Bohlen v. Germany*, no. 53495/09, 19 February 2015. See also *Ernst August von Hannover v. Germany*, no. 53649/09, 19 February 2015.
62. *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 90-95, 7 February 2012, see Annual Report 2012.

humorous style to the discussion surrounding the appearance of the book at the time, satire and humour being forms of expression protected by Article 10 of the Convention. The advertising campaign could thus be considered to be a contribution to a debate on a matter of general interest.

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

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

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

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

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

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The applicant in *Y.Y. v. Turkey*[63] sought authorisation to undergo gender reassignment surgery, but this was refused on the ground that she was not definitively unable to procreate. The domestic courts relied on Article 40 of the Civil Code in this connection. It was not disputed that the applicant complied with the other conditions for undergoing surgery. The applicant was eventually allowed to have surgery in 2013, five years and seven months after the earlier refusal of her application. The domestic court decided the applicant's request without considering whether she was able to procreate. The applicant maintained in the Convention proceedings that there had been a breach of her right under Article 8 to respect for her private life.

The case raises a new issue in that, unlike earlier transsexual cases, the Court was called upon to address the compatibility with Article 8 of conditions imposed on an applicant seeking to change sex. In previous cases, the Court's concern had been to assess the justification for restrictions imposed on a post-operative transsexual's enjoyment of their Article 8 rights (see, for example, *Christine Goodwin v. the United Kingdom*[64], *Van Kück v. Germany*[65], and *Hämäläinen v. Finland*[66]).

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

63. *Y.Y. v. Turkey*, no. 14793/08, 10 March 2015.
64. *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI.
65. *Van Kück v. Germany*, no. 35968/97, § 69, ECHR 2003-VII.
66. *Hämäläinen v. Finland* [GC], no. 37359/09, § 67, ECHR 2014, see Annual Report 2014.

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

The Court's focus was on the necessity of the interference, having regard in particular to the margin of appreciation afforded to the authorities when legislating for the conditions governing access to gender reassignment surgery and the legal recognition of a new gender, the scope of the margin being defined by the nature of the right in issue as well as by emerging national and European trends in this area. The Court observed, among other things, that in many member States of the Council of Europe gender reassignment surgery was available to transsexuals, and the new post-operative gender was recognised in law. Some States made legal recognition of a new gender conditional on the person undergoing surgery and/or on his or her inability to procreate. Certain States had recently abolished the inability-to-procreate requirement as a precondition of legal recognition of a new gender. Moreover, in those countries where the requirement existed, fertility only became an issue after surgery. In the instant case, and having regard to the initial decision of the domestic court, it would appear that this requirement had to be fulfilled before gender reassignment surgery could be authorised. For the Court, even assuming that relevant arguments had been advanced for the refusal of the applicant's request, they could not be considered sufficient. For that reason there had been a breach of Article 8.

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The *Y. v. Slovenia*[67] judgment concerned the cross-examination at trial of a rape victim by the accused and the question of the protection of her personal integrity at the trial.

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

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

In assessing whether the trial court had struck a proper balance between the applicant's Article 8 interests and the exercise by the accused of his defence rights guaranteed by Article 6, the Court took as its point of departure the distress which a direct confrontation between the victim of a sexual offence and the accused person may entail for the victim. For the Court such confrontation involves a risk of further traumatisation for the victim, which requires the domestic court to subject the accused's personal cross-examination of the victim to a close assessment, the more so when the questions put to the victim are of an intimate nature.

The Court found in the circumstances of the applicant's case that the trial court had failed to strike a proper balance between the rights at stake. It observed among other things that the accused was permitted to put extremely personal questions to the applicant, some of which had been calculated not to attack her credibility but to disparage her character, and at times his questions amounted to offensive insinuations. While accepting that the defence had to be allowed some latitude to challenge the reliability and

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

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

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In *Y v. Turkey*[68] the applicant complained that information that he was HIV-positive had been disclosed to staff at a hospital to which he had been admitted after collapsing. He was unconscious on arrival and so had been unable to reveal that he was HIV-positive himself. His relatives had given the information to the ambulance crew they had called. The applicant complained that the ambulance crew had passed the information on to both medical and administrative staff at the hospital, in breach of his right to respect for his private life under Article 8.

The main legal interest in this decision concerns the protection of medical data on the admission of an HIV-positive patient to hospital. The protection of the confidentiality of data relating to persons with HIV was examined by the Court in the context of unauthorised access to a medical file (*I. v. Finland*[69]) and in relation to court proceedings (*Z v. Finland*[70], and *C.C. v. Spain*[71]). The Court reiterated that people living with HIV were a vulnerable group (see *Kiyutin v. Russia*[72]) and stressed the importance of keeping medical information relating to them confidential (*Z v. Finland*, cited above). Interestingly, the Court observed that the passing on to hospital staff of information relating to the conditions of an HIV-positive patient may, in certain circumstances, be relevant and necessary, in the interests both of the patient and of the medical staff and other patients at the hospital. In such cases it was important to ensure that the recipient of the information was bound by the rules of confidentiality applicable to members of the medical profession or by comparable rules of confidentiality.

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

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

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

(iii) the need to ensure the safety of hospital staff and to protect public health. The Court stressed that as a matter of principle any passing on of information as sensitive as that concerned in the applicant's case had to avoid any form of stigmatisation of the patient and afford sufficient guarantees in that respect.

68. *Y v. Turkey* (dec.), no. 648/10, 17 February 2015.
69. *I. v. Finland*, no. 20511/03, 17 July 2008.
70. *Z v. Finland*, 25 February 1997, *Reports of Judgments and Decisions* 1997-I.
71. *C.C. v. Spain*, no. 1425/06, 6 October 2009.
72. *Kiyutin v. Russia*, no. 2700/10, ECHR 2011, see Annual Report 2011.

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

It also reached the same conclusion with regard to the inclusion of the applicant's name and the fact that he was HIV-positive in a judicial decision that was neither published nor accessible to the public and was adopted in a written administrative procedure without a hearing that had been brought by the applicant against hospital staff (compare with the position in *C.C. v. Spain*, cited above[73]).

Private and family life

The case of *Khoroshenko v. Russia*[74] concerned long-term imprisonment and the right to family visits. The applicant was a Russian national. He was convicted of murder and sentenced to death in 1995. In 1999 his sentence was commuted to life imprisonment and he was transferred to a special-regime correctional colony. For the first ten years of his life sentence (1999-2009), the applicant was subjected to the "strict regime". He was therefore entitled to two family visits per year: each lasted four hours and involved no more than two family members, the prisoner and his family were separated by a glass partition, and the visit was supervised by a prison guard within hearing distance. A prisoner could write letters but could not telephone (unless in an emergency).

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

As regards rights to visits from family members, the judgment provides an interesting recapitulation of the Convention case-law on prison visits, a useful review of the relevant standards of the Council of Europe (including the CPT), of the United Nations (including the International Covenant on Civil and Political Rights) and of the Inter-American Commission on Human Rights, as well as a summary of the Court's comparative research findings as regards prison visits for life sentenced prisoners.

The judgment also provides a useful summary of the Court's position on the importance to be accorded by States in its penal policy to the rehabilitative and reintegration aim of imprisonment. The Court relied on certain prior cases (notably *Dickson v. the United Kingdom*[75]; *Vinter and Others v. the United Kingdom*[76]; and *Harakchiev and Tolumov v. Bulgaria*[77]) and on relevant international instruments. Interestingly, while the *Dickson* case underlined the particular importance of rehabilitation at the end of a long sentence and while the *Vinter* case underlined its particular importance for release, in the present case the Court imposed a clear obligation on States to be proactive in that regard independently of such end-of-sentence or release contexts and with specific reference to prison visits. In particular, the Court attached "considerable importance" to the recommendations of the CPT to the effect that long-term prison regimes should seek to compensate for the desocialising effects of imprisonment in a positive and proactive way.

Family life[78]

The *Penchevi v. Bulgaria* judgment[79] concerned a refusal to allow a child to travel abroad to join his mother. The cassation court, contrary to the approach that had been taken by the courts below, refused the applicant permission to allow her child to leave Bulgaria and to stay with her in Germany while she

73. *C.C. v. Spain*, *supra* note 71.
74. *Khoroshenko v. Russia* [GC], no. 41418/04, ECHR 2015.
75. *Dickson v. the United Kingdom* [GC], no. 44362/04, § 75, ECHR 2007-V.
76. *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, §§ 111-16, ECHR 2013 (extracts).
77. *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, §§ 243-46 and 265, ECHR 2014 (extracts).
78. See also *Kuppinger*, *supra* note 43.
79. *Penchevi v. Bulgaria*, no. 77818/12, 10 February 2015.

was completing a postgraduate course of studies there. It relied on the provisions of the domestic legislation which required the consent of both parents before their child could leave the jurisdiction. The father had withheld his consent. The domestic proceedings lasted almost two years and three months. The domestic courts eventually authorised the child to join his mother in Germany. The applicants (mother and child) complained that the refusal to allow the child to leave Bulgaria amounted to an interference with their right to respect for their family life.

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

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

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

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

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

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

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The judgment in *Zaieț v. Romania*[80] concerned the annulment of an adoption order several decades after it was issued. The applicant was adopted at the age of seventeen. She also had a sister who had been adopted by the same adoptive mother. After the death of their adoptive mother, it transpired that the latter was entitled to a parcel of forest land which had been unlawfully expropriated from her family. The applicant was in principle entitled to inherit a half share. However, the applicant's sister successfully sought the annulment of the applicant's adoption. The domestic court which heard the action found that the adoption had only been intended to serve the economic interests of the adoptive mother and the applicant, and not to provide a better life for the applicant. This decision annulling the applicant's adoption was taken thirty-one years after the act of adoption and eighteen years after the death of the applicant's adoptive mother. The applicant's complaints in the Convention proceedings were examined under Article 8 of the Convention and Article 1 of Protocol No. 1.

80. *Zaieț v. Romania*, no. 44958/05, 24 March 2015.

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

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

This is the first occasion on which the Court had to consider the annulment of an adoption order in a context where the adoptive parent was dead and the adoptee had long reached adulthood. The judgment is interesting in that the Court stressed in its reasoning that:

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

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

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

Freedom of thought, conscience and religion (Article 9)

The judgment in *Karaahmed v. Bulgaria*[81] concerned a demonstration outside a mosque during regular Friday prayers and an official investigation into clashes that erupted in the grounds of the mosque. There were some 100 to 150 demonstrators, all members and supporters of a political party who were protesting against what they referred to as "howling" emanating during the calls to prayer from the loudspeakers installed on the capital's only mosque. The demonstration got out of hand. Muslim worshippers, including the applicant, were insulted and this was followed by acts of violence and the throwing of objects. The police intervened to stop the violence.

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

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

The interesting feature of this judgment is the importance it attaches to reconciling the various rights and liberties at stake, which were guaranteed by Articles 9, 10 and 11 of the Convention. The Court

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

observed that, in principle, these fundamental rights and freedoms merit equal respect. Their importance in a society based on pluralism, tolerance and broad-mindedness must be recognised when they are weighed against each other. The police had therefore been under a positive obligation to guarantee both the right of citizens to demonstrate and the right of worshippers to practise their religion, although that obligation should not create an excessive burden.

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

Freedom of expression (Article 10)[82]

Applicability

The *Petropavlovskis v. Latvia* judgment[83] concerned a refusal, on account of criticism by the applicant of the government's language policy in the education sector, to grant an application for citizenship. The applicant alleged violations of Articles 10, 11 and 13 of the Convention.

The applicant was a "permanently resident non-citizen" of the Republic of Latvia. He had been active in protests against the respondent State's policies with regard to the use of Russian as the language of instruction in primary and State schools. His request to become a naturalised citizen of Latvia was rejected by the Cabinet of Ministers on the ground that his actions had not demonstrated allegiance to the Republic of Latvia, as required under the Citizenship Law. His challenge before the domestic courts as to the rejection of his application was unsuccessful. In the view of the domestic courts, the contested decision was "a political decision" and thus not amenable to judicial review. In the Convention proceedings the applicant argued that he had been arbitrarily denied citizenship of the respondent State because he had exercised his rights under Articles 10 and 11 of the Convention. In sum, he had been the victim of a punitive measure because of his criticism of the respondent State's reform of the education sector and, in particular, of its language policy. The judgment is of note in two respects, which are interrelated.

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

Secondly, and related to the previous finding, the Court found that the authorities' decision to refuse the applicant's application for citizenship could not be considered to have been a punitive measure. It had regard to the position under international law regarding the existence, or not, of a duty to grant citizenship. While observing that both the Universal Declaration of Human Rights and the American Convention on Human Rights both explicitly provided for a right to nationality, the Court stressed that such obligation was absent in the Convention system. It accepted that arbitrary or discriminatory decisions in the field of nationality may raise an issue under the Convention (see, for example, *Genovese v.*

82. See also *Bohlen*, *supra* note 61.
83. *Petropavlovskis v. Latvia*, no. 44230/06, 13 January 2015.

Malta[84]). However, that did not mean that the Convention provided for a right to acquire a specific nationality. In the view of the Court, the issue was to be determined at the domestic level, having regard to the citizenship rules in the Contracting State in question and the criteria used for granting citizenship. The Court noted that the choice of criteria for the purposes of granting citizenship through naturalisation in accordance with domestic law was linked to the nature of the bond between the State and the individual concerned, a bond that each society deemed necessary to ensure. With reference to the facts of the applicant's case, the Court observed that a democratic State was entitled to require persons who wished to acquire its citizenship to be loyal to the State and, in particular, to the constitutional principles on which it was founded. It noted that the requirement of loyalty to the State and its Constitution could not be considered a punitive measure capable of interfering with the freedom of expression and assembly. Rather, it was a criterion which had to be fulfilled by any person seeking to obtain Latvian citizenship through naturalisation.

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

Freedom of expression

The *Morice*[85] judgment, cited above, concerned a lawyer's conviction for defamation in respect of remarks he had made about members of the judiciary. The impugned remarks were published in an article in a national newspaper which quoted the terms of a letter the applicant and one of his colleagues had written to the Minister of Justice requesting an administrative investigation into the conduct of two judges and comments that had been made to the journalist who had written the article.

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

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

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

The Court's judgment, which contains an exhaustive recapitulation of the case-law on lawyers' freedom of expression, emphasises the need to distinguish between two situations: cases in which the lawyer makes remarks inside the courtroom; and cases in which he makes them outside the courtroom. The Court observed that lawyers have a special role as independent professionals in the administration of justice, and cannot be equated with journalists. It also underscored the importance of examining the nature of the impugned remarks – including the tone used – in the general context in which they were made. This the domestic courts had not done.

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

84. *Genovese v. Malta*, no. 53124/09, 11 October 2011.
85. *Morice*, *supra* note 46.

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

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

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

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

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The decision in *Fuchs v. Germany*[86] concerned criminal and disciplinary sanctions imposed on the applicant lawyer for having made defamatory statements against an expert for the prosecution. While representing a client accused of downloading child pornography on his computer, the applicant alleged in writing before a domestic court that the private expert engaged by the prosecution to decrypt the data files had manipulated them in order to obtain the result sought by the prosecution and had a personal interest in falsifying evidence. The expert had been sworn in before presenting his results to the court. The expert lodged a criminal complaint against the applicant. The applicant was ultimately convicted of, among other offences, defamation and was fined. In subsequent disciplinary proceedings he received a reprimand and a fine for having breached his duty to exercise his professional duties in a conscientious manner and to be worthy of the trust owed to his profession.

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

The Court declared the complaint inadmissible, being persuaded that the measures had been necessary in a democratic society. It had regard to the relevance and sufficiency of the reasons given by the domestic courts. In the first place, it agreed with the domestic criminal court that the defence of his client's interests did not allow the applicant to imply, generally, that the expert would falsify evidence. Secondly, agreeing with the court in the disciplinary proceedings, the Court considered that the offensive statements did not contain any objective criticism of the expert's work in his client's case, but were aimed at deprecating his work generally and declaring his findings to be unusable. It accepted the domestic courts' conclusions that the statements which formed the subject matter of the criminal and disciplinary proceedings were not justified by the legitimate pursuit of the client's interests. As to the question of proportionality, the Court noted that the criminal court, in determining the sanction to be imposed on the applicant, had taken into account the fact that his statements had not been made publicly and that the fines imposed in the criminal and disciplinary proceedings did not appear to be disproportionate.

The case is noteworthy in that this would appear to be the first occasion on which the Court has addressed the extent to which lawyers may impugn the integrity of sworn-in experts. It observed that

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

sworn-in experts must be able to perform their duties in conditions "free of undue perturbation if they are to be successful in performing their tasks. It may therefore be necessary to protect them from offensive and abusive verbal attacks on duty." The Court's decision may be seen as a development of the principles set out in its earlier judgments regarding the central role played by lawyers in ensuring public confidence in the administration of justice (see *Nikula v. Finland*[87], and *Steur v. the Netherlands*[88]).

Freedom to impart information

The case of *Delfi AS v. Estonia*[89] concerned the duties and responsibilities of an Internet news portal as regards comments made by users on material published on the portal.

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

In 2006 the applicant company published an article indicating that a ferry company, by changing its routes, had postponed the opening of the ice roads (a cheaper and faster connection). The article attracted a relatively high number of comments, many of which the Grand Chamber later found to incite hatred of, or violence against, the majority shareholder in the ferry company. Once notified by the victim some weeks later, the applicant company immediately removed the comments. The victim's civil action against the applicant company was successful. The damages awarded were low (EUR 320).

The Chamber found no violation of Article 10 of the Convention and, further to the applicant company's request, the case was referred to the Grand Chamber, which arrived at the same conclusion.

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

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

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

87. *Nikula v. Finland*, no. 31611/96, §§ 45-50, ECHR 2002-II.
88. *Steur v. the Netherlands*, no. 39657/98, § 36, ECHR 2003-XI.
89. *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 2015.

found to have been insufficient. The Court noted in this connection that a large commercial news portal had a monitoring capacity that a victim of user comments would not have. Fourthly, the impact on the applicant news portal of the interference was found not to have been significant: the sanction was small and the news portal had continued to operate successfully thereafter without fundamental changes to its business model.

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

Freedom of the press

The judgment in the case of *Haldimann and Others v. Switzerland*[90] concerned an audio-visual recording of a private individual's professional conduct without his knowledge and consent, and the subsequent broadcasting of part of that interview for public-interest purposes. The applicant journalists wished to expose malpractice in the insurance sector, in particular the giving of wrong advice to potential clients so as to encourage them to take out life assurance policies. They arranged for an insurance agent working for an insurance company to interview a potential client in a private apartment and secretly filmed the interview. The agent was unaware of the situation and the potential client was in fact one of the journalists. Part of the recorded interview was subsequently broadcast on television. Steps were taken to ensure that the insurance agent's face and voice could not be recognised by viewers. Only the colour of his hair and skin was visible. The journalists were subsequently convicted and fined under the Penal Code for having recorded and broadcast the insurance agent's conversation without having obtained his prior consent.

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

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

In the first place, the Court accepted that there was a basis in domestic law for the applicants' conviction and fine and that the measures taken against them were aimed at protecting the insurance agent's right to protection of, among other things, his reputation. It further accepted that Article 8 was engaged on the facts given that the infringement of the insurance agent's right to protection of his reputation had been such as to cause prejudice to his private life (see *A. v. Norway*[91]).The key issue was whether the interference was necessary in a democratic society.

It is interesting to observe that the Court drew on the criteria which it had established in the case of *Axel Springer AG v. Germany*[92] in its assessment of whether a fair balance had been struck at the domestic level between media freedom and private life. Unlike the position in that case, the injured party in the instant case was not a person in the public eye but a private individual. The aim of the journalists was not to expose details of the insurance agent's own private life but to criticise and draw attention to the practices of the industry which employed him.

The Court gave prominence to the following factors. Firstly, the journalists' actions had been guided by public-interest considerations, namely the protection of consumers. Secondly, the insurance agent was not

90. *Haldimann and Others v. Switzerland*, no. 21830/09, 24 February 2015.
91. *A. v. Norway*, no. 28070/06, § 64, 9 April 2009.
92. *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 90-95, 7 February 2012.

the direct target of the journalists' actions, notwithstanding the fact that he could reasonably have expected that his interview would not have been secretly filmed. Thirdly, the use of a hidden camera was not the subject of an absolute prohibition in domestic law. Recourse to such devices could be permitted under strict conditions. Moreover, the journalists had believed that they were acting within the framework of their own professional rules of conduct. For these reasons, the Court was prepared to find that the applicants had acted in good faith in order to protect consumers from the misinformation being supplied by insurance companies. Fourthly, it was never disputed that the facts revealed by the journalists reflected the reality of the practices engaged in the insurance industry. Fifthly, measures had been taken to prevent the identification of the insurance agent when the interview was broadcast. Lastly, although the fines imposed on the journalists were modest, the sanction was nevertheless capable of dissuading media professionals from drawing attention to matters of public concern.

Right to receive and impart information

The *Guseva v. Bulgaria* judgment[93] concerned the refusal by a municipal authority to give the applicant access to official information in accordance with final court judgments in the applicant's favour. The applicant, a member of an association active in the area of animal rights protection, had obtained three separate and final court rulings requiring the mayor of a town to provide her with information relating to the treatment of stray animals found on the streets of the town. The mayor did not comply with the requests. The applicant complained under Article 10 of the Convention that the mayor's conduct was in breach of her right to receive and impart information.

The Court found that there had been a breach of the Convention. It confirmed its growing line of authority to the effect that Article 10 can be relied on to contest a refusal to grant a journalist or a non-governmental organisation official information on a matter of public interest (see, for example, *Kenedi v. Hungary*[94], *Youth Initiative for Human Rights v. Serbia*[95], and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*[96]). The Court had given prominence in the relevant judgments to the public-watchdog role performed by the media and non-governmental organisations.

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

Freedom of assembly and association (Article 11)[97]

Right to strike

The judgment in *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain*[98] concerned the lack of a right to strike for members of the State security forces. Relying in particular on Article 11 of the

93. *Guseva v. Bulgaria*, no. 6987/07, 17 February 2015.
94. *Kenedi v. Hungary*, no. 31475/05, 26 May 2009, see Annual Report 2009.
95. *Youth Initiative for Human Rights v. Serbia*, no. 48135/06, § 20, 25 June 2013, see Annual Report 2013.
96. *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, no. 39534/07, § 34, 28 November 2013, see Annual Report 2013.
97. See also *Petropavlovskis*, *supra* note 83.
98. *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain*, no. 45892/09, 21 April 2015.

Convention, the applicant trade union complained of a statutory ban on the exercise of the right to strike by public servants in this category.

It will be recalled that Article 11 expressly includes the armed forces and the police among those on whom, at most, "lawful restrictions" may be imposed without their members' trade-union freedom being called into question. Such restrictions must not impair the very essence of the right to organise (see *Matelly v. France*[99]).

The judgment is interesting for the way in which it takes into account in the assessment of compliance with Article 11 the specific responsibilities borne by public law-enforcement officers. The Court held that there had been no violation of Article 11. Although the facts complained of in the applicant trade union's specific circumstances amounted to an interference with its right to freedom of association, that interference was not unjustified as the union had been able to exercise the essential content of that right. Unlike the position in the case of *Enerji Yapı-Yol Sen v. Turkey*[100], the restriction laid down by the legislation did not apply to all public servants but was imposed exclusively on members of the State security forces, as guarantors of public safety. That legislation gave those forces greater responsibility, requiring them to act at any time and in any place to uphold the law, both during and outside working hours. The Court noted in particular:

> "38. … [T]his need to provide a continuous service and the fact that these 'law-enforcement agents' were armed distinguished this group from other civil servants such as members of the national legal service and doctors and justified the restriction of their right to organise. The more stringent requirements imposed on them did not exceed what was necessary in a democratic society, in so far as those requirements served to protect the State's general interests and in particular to ensure national security, public safety and the prevention of disorder, principles set forth in Article 11 § 2 of the Convention.
>
> 39. The specific nature of those agents' activities warranted granting the State a sufficiently wide margin of appreciation to develop its legislative policy and to thus enable it to regulate, in the public interest, certain aspects of a trade union's activities, without depriving it of the essential content of its rights under Article 11 …"

Prohibition of discrimination (Article 14)

Article 14 in conjunction with Article 3

The case of *Identoba and Others*[101], cited above, concerned an incident in Georgia that occurred during a peaceful demonstration organised by a non-governmental organisation for the protection of the rights of lesbian, gay, bisexual and transgender (LGBT) people. In order to mark International Day against Homophobia, thirty people took part in a march in the capital, having notified the authorities beforehand. They were encircled by a larger group of counter-demonstrators from religious groups who insulted, threatened and physically assaulted them. All thirteen applicants were subjected to hate speech and aggressive behaviour. Two of the counter-demonstrators were subsequently ordered to pay an administrative fine. Investigations into the injuries sustained by two of the applicants were still pending when the Court delivered its judgment.

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

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

Firstly, in reaching its conclusion that there was a discriminatory motive to the attacks, the Court referred to reports by the Council of Europe Commissioner for Human Rights and also by the

99. *Matelly v. France*, no. 10609/10, § 75, 2 October 2014.
100. *Enerji Yapı-Yol Sen v. Turkey*, no. 68959/01, § 32, 21 April 2009.
101. *Identoba and Others*, *supra* note 16.

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

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

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

Applicability

The *Tchokontio Happi*[102] judgment, cited above, concerned the continuing failure to execute a final judgment requiring the authorities to rehouse an individual. The applicant had obtained such a judgment under a law which recognised the right to decent and independent housing and provided that failure by the authorities to comply with an order to rehouse would lead to the payment of a penalty charge into a special State fund.

The judgment is noteworthy in that the Court distinguished the facts of the present case from the cases of *Teteriny v. Russia*[103] and *Olaru and Others v. Moldova*[104]. In the instant case the final judgment did not require the authorities to confer ownership of an apartment on the applicant, but rather to make one available to her. It was true that the applicant could acquire ownership of the apartment under certain conditions. However, there was no legal obligation on the authorities to sell it. Accordingly, she had no legitimate expectation to acquire a pecuniary asset and her complaint under this Article was for that reason dismissed as incompatible *ratione materiae*.

Enjoyment of possessions

Judgments in the cases of *Chiragov and Others* and *Sargsyan*[105], cited above, were both delivered on the same day and concerned those States' jurisdiction and Convention responsibilities as regards Nagorno-Karabakh and certain surrounding territories.

The case of *Chiragov and Others* concerned the jurisdiction of Armenia as regards Nagorno-Karabakh and the adjacent occupied territories, and the consequent Convention responsibility (notably under Article 1 of Protocol No. 1) for the violations alleged by Azerbaijani Kurds displaced therefrom. The six applicants were Azerbaijani Kurds who have been unable to return to their homes and property in the district of Lachin in Azerbaijan since they fled the Armenian-Azerbaijani conflict over Nagorno-Karabakh in 1992. The Court found that Armenia exercised effective control over Nagorno-Karabakh and the seven adjacent occupied territories and thus had jurisdiction over the district of Lachin[106].

102. *Tchokontio Happi*, *supra* note 42.
103. *Teteriny v. Russia*, no. 11931/03, 30 June 2005.
104. *Olaru and Others v. Moldova*, nos. 476/07 et al., 28 July 2009.
105. *Chiragov and Others* and *Sargsyan*, *supra* note 2.
106. See Article 1 above.

The case of *Sargsyan* concerned the jurisdiction of Azerbaijan as regards a village near Nagorno-Karabakh on the territory of Azerbaijan, and its consequent Convention responsibility (notably under Article 1 of Protocol No. 1) for the violations alleged by an Armenian displaced therefrom. The applicant is ethnic Armenian and has been unable to return to his property and home in the village of Gulistan since he fled the conflict in 1992. His village is not in Nagorno-Karabakh proper but is in a disputed area on the north and Azerbaijani bank of a river, which river constitutes the border with Nagorno-Karabakh. The Court found that the impugned facts fell within the jurisdiction of Azerbaijan[107].

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

In addition, the Grand Chamber adopted similar reasoning in both cases under Article 1 of Protocol No. 1 as regards the justification for the applicants' lack of access to their property. It underlined that the mere fact of participating in ongoing peace negotiations did not absolve the respondent State from taking other measures especially when negotiations had been pending for a long time (*Cyprus v. Turkey*[108]). Guidance as to the necessary measures could be found in the UN "Pinheiro Principles" ("Principles on Housing and Property Restitution for Refugees and Displaced Persons") and in the Parliamentary Assembly of the Council of Europe's Resolution 1708 (2010) on solving property issues of refugees and displaced persons. A particularly important step would have been the establishment of a property-claims mechanism, which would be easily accessible and allow the applicants and others in their situation to have property rights restored and to obtain compensation. That each respondent State had to deal with large influxes of refugees and/or internally displaced persons (who had fled the conflict in 1992) was an important factor to be weighed in the balance, but it did not exempt the respondent State entirely from its obligations to another group comprised of persons such as the applicants. The lack of access, combined with the lack of measures to restore the applicants' property rights or to compensate them, amounted to a violation of Article 1 of Protocol No. 1.

Certain other interesting issues arose in both cases in the context of Article 1 of Protocol No. 1:

– The judgment contains an analysis of the Court's case-law as to the evidence to be presented by applicants to prove identity, residence and ownership of property when they have been forcibly displaced and lost property as a result of an armed conflict. Reference was made to cases concerning Northern Cyprus, south-east Turkey and Chechnya, as well as to the above-cited UN "Pinheiro Principles". The Court summarised its approach as "flexible". Regard being had to the circumstances in which the applicants had had to leave (under military attack), their properties' "technical passport" as well as statements of the applicants backed up by others sufficed as proof that the applicants had houses and property when they fled the conflict in 1992.

– According to the domestic law applicable when the applicants fled, the applicants could only have had a *right to use* the land (as opposed to full ownership) from which they fled, which right the Court

107. See Article 1 above.
108. *Cyprus v. Turkey* [GC], no. 25781/94, § 188, ECHR 2001-IV.

considered to be a "strong and protected right which represented a substantive economic interest", whether the applicants right to use the land had been indefinite or temporary.

Positive obligations

The case of *S.L. and J.L. v. Croatia*[109] concerned the conditions in which a villa belonging to two minor children was transferred. The Court's judgment underlines the extent to which State authorities are required to protect children's proprietary interests.

The children's mother and her husband (who was the father of one of the two girls) decided to sell the villa. For this they required the permission of the Social Welfare Centre. In the meantime, the husband was prosecuted and detained. His lawyer took over the property transaction and opted to proceed by way of a swap agreement with his mother-in-law in exchange for a lower value property, rather than a sale. After interviewing the mother, the Social Welfare Centre authorised the swap. Subsequently, the husband, acting as the children's legal guardian, made an unsuccessful attempt to have the unfavourable swap agreement declared null and void. The domestic courts dismissed his action without having regard to the relevant issues, such as the fact that the owners were both minors whose guardian was in detention and whose mother was under severe financial and personal pressures and that a lawyer with a conflict of interest had interfered in the transfer process.

In the Convention proceedings the two sisters, complained that the national authorities had failed to protect them against the exchange of their villa for a flat of significantly less value.

The Court found a violation of Article 1 of Protocol No. 1. The legal interest in the case lies in the positive obligations it imposes on the State when the financial interests of children are at stake. The Court had previously stressed the overriding importance of protecting children's best interests in any decision affecting them (see, among other authorities, *X v. Latvia*[110], and *Jeunesse v. the Netherlands*[111]). The instant judgment applies this principle to Article 1 of Protocol No. 1. The Court considered that both the Social Welfare Office and the judicial authorities were under the obligation to afford concrete protection for the children's proprietary interests, including against dishonesty by third parties.

In the instant case, however, the decisions taken by the competent authorities involved in the transaction had revealed a number of shortcomings, in particular: (i) the Social Welfare Office had not exercised the necessary diligence in terms of assessing the possible adverse effects of the swap agreement on the interests of the children; and (ii) the civil courts failed to appreciate the particular circumstances in which those concerned by the property transfer found themselves.

Other Convention provisions

Binding force and execution of judgments (Article 46)

Execution of judgments [112]

In *Bochan (no. 2)*[113], cited above, the Court stressed the importance of ensuring that domestic procedures are in place which allow a case to be revisited following a finding that the fair-trial guarantees of Article 6 have been violated. As the Committee of Ministers of the Council of Europe had indicated, the existence of a procedure to allow the reopening of proceedings at domestic level following a finding of a violation of the Convention is an important aspect of the execution process for the Court's judgments.

109. *S.L. and J.L. v. Croatia*, no. 13712/11, 7 May 2015.
110. *X v. Latvia* [GC], no. 27853/09, ECHR 2013.
111. *Jeunesse v. the Netherlands* [GC], no. 12738/10, 3 October 2014.
112. See also *Cestaro*, *supra* note 13.
113. *Bochan (no. 2)*, *supra* note 31.