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Table of contents

ARTICLE 2

Positive obligations (substantive and procedural aspects)

Inefficiency of regulatory framework to protect patients' lives and absence of statutory remedy for non-pecuniary damage resulting from death caused by medical negligence: *violations*

Sarishvili-Bolkvadze v. Georgia, 58240/08, judgment 19.7.2018 [Section V] 6

Effective investigation

Inadequate and protracted investigation into contract killing of investigative journalist: *violation*

Mazepa and Others v. Russia, 15086/07, judgment 17.7.2018 [Section III] 7

ARTICLE 3

Effective investigation

Failure to hold effective investigation into allegations of degrading treatment in the workplace: *violation*

Hovhannisyan v. Armenia, 18419/13, judgment 19.7.2018 [Section I] 8

ARTICLE 4

Trafficking in human beings, positive obligations, effective investigation

Failure to hold effective investigation into allegation of human trafficking and exploitation of prostitution: *violation*

S.M. v. Croatia, 60561/14, judgment 19.7.2018 [Section I] 9

ARTICLE 5

ARTICLE 5 § 5

Compensation

Failure to adequately compensate persons subjected to wrongful domestic imprisonment: *violation*

Vasilevskiy and Bogdanov v. Russia, 52241/14 and 74222/14, judgment 10.7.2018 [Section III] 10

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Civil rights and obligations, access to court

Appeal against a dismissal decision not examined by a court with full jurisdiction: *violation*

Aleksandar Sabev v. Bulgaria, 43503/08, judgment 19.7.2018 [Section V] 11

Access to court

Inadmissibility of applicant's civil claim for failure to respect statutory limitation period: *no violation*

Kamenova v. Bulgaria, 62784/09, judgment 12.7.2018 [Section V] 12

ARTICLE 6 § 3 (d)

Examination of witnesses

Domestic violence conviction based on strongly corroborated untested evidence by victim refusing to testify, which had been reported by investigating judge: *no violation*

N.K. v. Germany, 59549/12, judgment 26.7.2018 [Section V] 13

ARTICLE 8

Respect for private life, positive obligations

Courts' refusal to award legal costs and compensation for defamatory statements declared null and void: *no violation*

Egill Einarsson v. Iceland (no. 2), 31221/15, judgment 17.7.2018 [Section II] . . . 14

Respect for private life

Courts' refusal to grant contact rights or order legal parents to provide information about child's personal circumstances to potential biological father: *no violation*

Fröhlich v. Germany, 16112/15, judgment 26.7.2018 [Section V] . . . 15

ARTICLE 10

Freedom of expression

Conviction and prison term for performing political song in cathedral and ban on performance video-recordings online: *violations*

Mariya Alekhina and Others v. Russia, 38004/12, judgment 17.7.2018 [Section III] . . . 17

ARTICLE 11

Freedom of association

Seven-year interruption in the activities of a foundation striving to establish a State based on Sharia, and failure to return certain properties: *no violation*

Zehra Foundation and Others v. Turkey, 51595/07, judgment 10.7.2018 [Section II] . . . 19

ARTICLE 14

Discrimination (Article 3 of Protocol No. 1)

National minority voters entitled to vote for one-choice minority list and excluded from the national proportional list parliamentary elections: *communicated*

E.C. v. Hungary, 65678/14 [Section IV],
Bakirdzi v. Hungary, 49636/14 [Section IV] . . . 20

ARTICLE 35

ARTICLE 35 § 1

Effective domestic remedy – Hungary

Effectiveness of constitutional complaint to challenge legislation directly affecting individual: *inadmissible*

Mendrei v. Hungary, 54927/15, decision 19.6.2018 [Section IV] . . . 20

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Authorities' failure to implement effective procedure to enable redemption of State issued bonds: *violation*

Volokitin and Others v. Russia, 74087/10 et al., judgment 3.7.2018 [Section III] . . . 21

Reduction in inflation-linked uprating of old-age pensions: *inadmissible*

Aielli and Others v. Italy, 27166/18 and 27167/18, decision 10.7.2018 [Section I] . . . 22

ARTICLE 3 OF PROTOCOL No. 1

Free expression of the opinion of the people

National minority voters entitled to vote for one-choice minority list and excluded from the national proportional list parliamentary elections: *communicated*

E.C. v. Hungary, 65678/14 [Section IV],
Bakirdzi v. Hungary, 49636/14 [Section IV] . . . 23

OTHER JURISDICTIONS

European Union – Court of Justice (CJEU) and General Court

Obligation for a religious community to comply with EU law when processing personal data collected in the course of door-to-door preaching

Tietosuojavaltuutettu/Jehovan todistajat – uskonnollinen yhdyskunta, C-25/17, judgment 10.7.2018 (CJEU, Grand Chamber) 24

Obligation to confer a residence advantage on a third-country national, in an unregistered durable relationship with an EU citizen returning to his State of origin after exercising his right of freedom of movement

Secretary of State for the Home Department v. Rozanne Banger, C-89/17, judgment 12.7.2018 (CJEU) 26

Framework agreement on fixed-term work does not preclude national legislation providing for the compulsory reinstatement of permanent public servants in the event of wrongful dismissal but a choice between reinstatement or mere compensation in the case of temporary workers employed by public authorities

Gardenia Vernaza Ayovi v. Consorci Sanitari de Terrassa, C-96/17, judgment 25.7.2018 (CJEU) 27

Assessment, by the executing judicial authority, of a real risk of inhuman or degrading treatment in the member State issuing a European arrest warrant, even where there is a remedy by which to challenge detention conditions

Assessment, by the executing judicial authority, of the actual and precise conditions of detention only in the prisons in which it was likely that the person concerned would be detained, including on a temporary or transitional basis, in the member State issuing a European arrest warrant

Generalstaatsanwaltschaft (Conditions of detention in Hungary), C-220/18 PPU, judgment 25.7.2018 (CJEU) 28

Exceptional refusal of executing judicial authority to give effect to European arrest warrant where there are deficiencies in terms of the independence of the issuing member State's judiciary

Minister for Justice and Equality v. LM (Deficiencies in the system of justice), C-216/18 PPU, judgment 25.7.2018 (CJEU, Grand Chamber) 30

Inter-American Court of Human Rights (IACtHR)

Political rights, freedom of expression and labour rights

San Miguel Sosa et al. v. Venezuela, Series C No. 348, judgment 8.2.2018 31

COURT NEWS

Case-law translations available in HUDOC 33

RECENT PUBLICATIONS

Overview of the Court's case-law 33

New Case-Law Guide 33

ARTICLE 2

Positive obligations (substantive and procedural aspects)

Inefficiency of regulatory framework to protect patients' lives and absence of statutory remedy for non-pecuniary damage resulting from death caused by medical negligence: *violations*

Sarishvili-Bolkvadze v. Georgia, 58240/08, judgment 19.7.2018 [Section V]

Facts – In 2004 the applicant's son, admitted to intensive care with traumatic injury, died in a hospital a month later. A panel of experts found that a medical error had been committed during his treatment. The applicant refusing to allow an autopsy and, later, an exhumation resulted in the criminal investigation being terminated in 2008, as the prosecuting authority was unable to establish a causal link between the alleged medical negligence and the death of her son. In the meantime, the civil courts concluded that his death had been caused by medical negligence, that the hospital had been carrying out unlicensed activities in a number of fields and that some of the medical staff did not have authorisation to practice medicine independently. The applicant was awarded about EUR 2,700 in respect of pecuniary damage. Her claim in respect of non-pecuniary damage was dismissed as domestic law did not provide for compensation of non-pecuniary damage resulting from the infringement of the right to life of a relative.

Law – Article 2

(a) *Substantive limb* – In the context of alleged medical negligence, States' substantive positive obligations were limited to a duty to put in place an effective regulatory framework compelling hospitals to adopt appropriate measures for the protection of patients' lives. Only in two categories of very exceptional circumstances the responsibility of the State could be engaged in respect of the acts and omissions of health-care providers (see *Lopes de Sousa Fernandes v. Portugal* [GC], 56080/13, 19 December 2017, Information Note 213).

As in the instant case no question arose of knowingly putting an individual patient's life in danger by denying access to life-saving emergency treatment, it did not fall within the first exceptional category. The Court thus had to examine, in accordance with the four cumulative criteria set out in *Lopes de Sousa Fernandes*, whether the case fell within the second exceptional category, that is, whether a systemic or structural dysfunction in hospital services had resulted in the applicant's son being deprived of access to life-saving emergency treatment and the authorities had known or ought to have known about that risk and failed to undertake the necessary measures to prevent that risk from materialising.

Regarding the first of the four criteria, it had not been established that the actions of the health-care providers had gone beyond a mere error or medical negligence in that they, in breach of their professional obligations, had denied the patient emergency medical treatment despite being fully aware that the person's life had been at risk if that treatment had not been given. The expert opinions as well as the court findings on the matter spoke of medical negligence and errors rather than the deprivation of emergency care as such. While some of the 29 doctors that had participated in the treatment of the applicant's son lacked adequate qualifications, the case files demonstrated that the emergency surgery had been performed by a surgeon whose qualifications had never been questioned. According to the majority of experts, the possible delay in performing the surgery had been a result of a mere medical error. Therefore, the first criterion was not met and the case did not fall within the second exceptional category.

With respect to whether the responding State had complied with its regulatory duties, the hospital had been carrying out unlicensed medical activities in several fields – cardiology and clinical transfusion in relation to the applicant's son, and several doctors involved in his treatment had lacked either the necessary licences or qualifications, in violation of domestic law. While there was a legal framework for supervising compliance with the relevant licensing requirements, the respondent Government had not clarified how its implementation had been ensured in practice, if at all. There had therefore been a violation of the State's substantive positive obligation to provide an effectively functioning regulatory framework that would ensure compliance with the applicable regulations geared to the protection of the patients' lives.

Conclusion: violation (unanimously).

(b) *Procedural limb*

(i) *Criminal-law remedy* – The decision to close the criminal investigation into the death of the appli-

cant's son had not been taken hastily or arbitrarily. It was duly reasoned and based, among others, on the findings of the relevant forensic experts that it had been impossible to establish a causal link between the medical negligence and the death without carrying out an autopsy or an exhumation, which the applicant had repeatedly refused to allow. Moreover, the prosecutor had demonstrated special diligence and had written to the competent ministry, stating that a medical error committed in the instant case called for "the implementation of adequate measures to prevent similar violations". Accordingly, the termination of the criminal proceedings in respect of medical negligence did not fall foul of the procedural requirements of Article 2 of the Convention.

Conclusion: no violation (unanimously).

(ii) *Civil law remedy* – The civil proceedings against the hospital had been successful in establishing the relevant facts related to the applicant's complaints. However, the domestic legal system did not afford a deceased victim's surviving next-of-kin the ability to claim and receive non-pecuniary damages in cases of death resulting from medical negligence. In the face of the applicant's psychological distress related to the death of her young son, the total and unconditional legislative restriction had unjustifiably deprived the applicant of the opportunity to claim an enforceable award of compensation for non-pecuniary damage.

Conclusion: violation (unanimously).

Article 41: no claim made in respect of damage.

(See also the Factsheet on Health)

Effective investigation

Inadequate and protracted investigation into contract killing of investigative journalist: *violation*

Mazepa and Others v. Russia, 15086/07, judgment 17.7.2018 [Section III]

Facts – The applicants are relatives of Ms Anna Politkovskaya, a renowned investigative journalist covering, *inter alia*, alleged violations of human rights in the Chechen Republic and an adamant critic of President Putin's politics. She was fatally shot in her block of flats in Moscow in 2006. The prosecutor's office opened a criminal investigation the same day. In 2014 five persons were convicted of the murder, which the Moscow City Court characterised as one committed by an organised group for a fee in connection with the victim's performance of her professional and civic duties. They were sentenced to prison terms ranging between twelve years and life imprisonment. The investigation was, at the time of the Court's consideration of the case, still pending.

Law – Article 2 (*procedural limb*): The pivotal question was the respondent State's compliance with its obligation to carry out an effective investigation into the contract killing of an investigative journalist. In such cases, it was of the utmost importance to check a possible connection between the crime and the journalist's professional activity.

(a) *Adequacy of the investigation* – The investigation had brought tangible results as it had led to the conviction of five persons directly responsible for the killing. However, when investigating a contract killing, genuine and serious investigative efforts had to be taken with a view to identifying the intellectual author of the crime, that is, the person or people who had commissioned the assassination. Given the respondent State's failure to provide copies of the investigation file, the Court's capacity to assess the nature and degree of the investigation's scrutiny in the present case was thus greatly diminished and restricted to the analysis of the parties' written submissions before it.

The domestic investigations had focused on one hypothesis regarding the identity of the person who had commissioned the killing, namely "a well-known Russian former politician in London" who had died in 2013. However, the respondent State had not explained why the investigation had chosen to focus for a considerable number of years on that single line of inquiry, which had remained unsupported by tangible evidence. Furthermore, given Anna Politkovskaya's work covering the conflict in Chechnya, the investigative authorities should have explored the alleged implication of the officials from the Federal Security Service or from the administration of the Chechen Republic, even if such allegations were eventually proved unfounded. In sum, the investigation into Anna Politkovskaya's killing had not met the adequacy requirement.

(b) *Promptness and reasonable expedition of the investigation* – The criminal investigation had started on 7 October 2006 and was not yet terminated. The respondent State had not provided highly plausible and convincing reasons to justify

the length of the proceedings. In particular, its reference to the number of volumes of the investigative file and that of witnesses questioned appeared irrelevant in the absence of tangible results in the investigation in respect of those who had commissioned the killing. The investigation had thus been in breach of the promptness and reasonable expedition requirement.

(c) *The involvement of the relatives in the investigation* – Although several of the family's requests for investigative measures had been refused, considering the proceedings as a whole, they had not been excluded from the investigation to the extent that they had been deprived of the opportunity to participate effectively in the proceedings.

The aforementioned findings sufficed to conclude that the investigation into Anna Politkovskaya's killing had not been effective. The Court did not find it necessary to examine the issue of the independence of the investigation.

Conclusion: violation (five votes to two).

Article 41: EUR 20,000 jointly in respect of non-pecuniary damage.

(See also *Huseynova v. Azerbaijan*, 10653/10, 13 April 2017, Information Note 206; *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], 24014/05, 14 April 2015, Information Note 184; and *Gongadze v. Ukraine*, 34056/02, 8 November 2005)

ARTICLE 3

Effective investigation

Failure to hold effective investigation into allegations of degrading treatment in the workplace: *violation*

Hovhannisyan v. Armenia, 18419/13, judgment 19.7.2018 [Section I]

Facts – The applicant is a civil servant working for the Ministry of Environmental Protection. According to the applicant, she had an argument with her superior over her appraisal report in his office. The latter and his deputy assaulted her, grabbed her hands, insulted her and forcibly took the report away from her. As a result of the violence, she fainted, sustained bodily injuries, received numerous bruises on her hands and was seriously humiliated.

The applicant reported the incident to the head of staff of the Ministry and the police. The police investigator ordered a forensic medical examination of the applicant, questioned her and took statements from her superiors and colleagues. The forensic medical examination confirmed that the applicant had sustained bruises on different parts of her arm. However, all her colleagues who gave statements and who were subordinates of the alleged perpetrators denied the account of events given by the applicant. On the basis of these statements and on the prosecutor's instructions, the investigator refused to institute criminal proceedings. The applicant unsuccessfully complained against the decision.

Law – Article 3 (*procedural aspect*): The applicant had made an arguable claim of degrading treatment which attained the minimum level of severity under Article 3 of the Convention. However, no investigation had ever been launched, nor had any internal investigation been conducted within the Ministry. During the inquiry, the domestic authorities had not made any serious attempts to find out what had happened. No steps had been taken, for example, to take evidence from the applicant's colleagues under oath in order to avoid any possible problems created by the fact that they were subordinates of the alleged perpetrators. It had not been established how the applicant's injuries had been inflicted, in what circumstances and whether they were related to the impugned incident. Furthermore, no efforts had been made to clarify certain contradictions in her superior's statements or to investigate whether his statements were accurate. Nor had any steps been taken by the head of staff of the Ministry or other administrative authorities before the applicant had reported the matter to the police. Having regard to the above-mentioned deficiencies, the State authorities had failed to conduct a proper investigation into the applicant's allegations of ill-treatment.

Conclusion: violation (unanimously).

Article 41: EUR 3,000 in respect of non-pecuniary damage.

ARTICLE 4

Trafficking in human beings, positive obligations, effective investigation

Failure to hold effective investigation into allegation of human trafficking and exploitation of prostitution: *violation*

S.M. v. Croatia, 60561/14, judgment 19.7.2018 [Section I]

Facts – The applicant lodged a criminal complaint against a certain T.M., a former policeman, alleging that in the period between the summer of 2011 and September of the same year he had physically and psychologically forced her into prostitution. T.M. was subsequently indicted on charges of forcing another to prostitution, as an aggravated offence of organising prostitution. In 2013 the criminal court acquitted T.M. on the grounds that, although it had been established that he had organised a prostitution ring in which he had recruited the applicant, it had not been established that he had forced her into prostitution. He had only been indicted for the aggravated form of the offence at issue and thus he could not be convicted for the basic form of organising prostitution. The State Attorney's Office appeal against the decision was dismissed and the applicant's constitutional complaint was declared inadmissible.

Law – Article 4: The trafficking and exploitation of prostitution threatened the human dignity and fundamental freedoms of its victims and could not be considered compatible with a democratic society and the values expounded in the Convention. It was considered unnecessary to identify whether the treatment of which the applicant complained constituted "slavery", "servitude" or "forced and compulsory labour". Instead, it was concluded that trafficking itself as well as exploitation of prostitution – within the meaning of Article 3(a) of the Palermo Protocol, Article 4 (a) of the Council of Europe Convention on Action against Trafficking in Human Beings (Anti-Trafficking Convention), Article 1 of the UN Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) – fell within the scope of Article 4. In this connection it was irrelevant that the applicant was actually a national of the respondent State and that there was no international element since Article 2 of the Anti-Trafficking Convention encompassed "all forms of trafficking in human beings, whether national or transnational" and the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others referred to exploitation of prostitution in general.

The Court noted that the applicant's complaints had three aspects and assessed them separately:

(i) *Whether there was an appropriate legal and regulatory framework* – Prostitution in Croatia was illegal. Both exploitation of prostitution including forced prostitution, as the aggravated form of the former, and personal offering of sexual services were criminalised. The criminal offences of trafficking in human beings, slavery, forced labour and the criminal offence of pandering were prohibited. The consent of a victim was irrelevant for the existence of the criminal offence of trafficking in human beings and since 2013 the same was expressly stated in Criminal Code for pandering. Furthermore, since 2013 purchase of sexual services constituted a criminal act. Prosecution in respect of all of the above offences was undertaken by the State Attorney's Office. The Croatian Code of Criminal Procedure also contained provisions on the rights of victims of criminal offences and in particular the victims of offences against sexual freedom. Further to this, the Croatian Government had adopted various strategic documents aimed at preventing and combating trafficking in human beings and had established specialised teams designated with providing assistance to the victims of trafficking in human beings. The Court was therefore satisfied that at the time the alleged offence had been committed and prosecuted there was an adequate legal framework in Croatia for its examination within the context of trafficking in human beings, forced prostitution and exploitation of prostitution.

(ii) *Support given to the applicant* – The applicant had never objected to or brought any complaint as to the conduct of the national authorities, including the court conducting the criminal proceedings against T.M., or any other authority, or any complaint whatsoever concerning her rights as a victim of human trafficking, or concerning the assistance, support and any form of counselling provided to her or the lack of it. During the trial the applicant had been informed of the possibility to contact the Department for Organising and Providing Support for Witnesses and Victims within the criminal court. There was no evidence that the applicant had contacted the said Department. In those circumstances the Court accepted that the applicant had indeed been provided with the support and assistance as submitted by the Government. That included in the first place recognition of her status as a victim of human trafficking. As such she had been provided counselling by the Croatian Red Cross and free legal assistance through the State-funded programme carried out by a non-governmental organisation.

Furthermore, immediately upon the applicant's request the accused had been removed from the courtroom and the applicant had given evidence in his absence.

(iii) *Whether the State authorities complied with their procedural obligations* – The police and the prosecuting authorities had acted promptly, in particular in carrying out searches of T.M.'s premises, interviewing the applicant and indicting T.M. On the other hand the only witnesses interviewed during the investigation and heard at the trial were the applicant herself and her friend. Whereas it was true that her friend had not entirely corroborated the applicant's statement, there was indication that it was her friend's mother and not her friend to whom the applicant had turned for help and with whom she had spoken on the telephone on the day she had fled. Immediately after having run from T.M., the applicant had spent several months with her friend and the latter's mother. However, the investigating authorities had not obtained a statement from the mother. Likewise, they had not interviewed her friend's boyfriend, who had driven her to her friend's flat. Those elements demonstrated that the national authorities had not made a serious attempt to investigate in depth all relevant circumstances and gather all the available evidence. They had not made further attempts to identify the applicant's clients and interview them. They also had not heard evidence from the applicant's mother, the landlord and neighbours of the applicant and T.M., all of whom could have had some relevant knowledge of the true relationship between the applicant and T.M., alleged beatings and locking her up in the apartment.

There was no indication that the national authorities had made a serious attempt to investigate in depth the following circumstances, which all had been relevant for assessing whether T.M. had forced the applicant into prostitution: the applicant's allegations of being economically dependent on T.M. and of various forms of coercion he had allegedly used against her, such as stressing being a former policeman who had "an arsenal of weapons", making threats of hurting her family and manipulating her with false promises that he would find her a "proper job", as well as her friend's statement that the applicant had been very distressed and scared of T.M. who had continued to threaten her through social media network after she had fled. It appeared that no consideration had been given to the fact that during the search of T.M.'s premises the police had found several pieces of automatic rifles. The national courts had not given adequate attention to those elements and concluded that the applicant had given sexual services voluntarily. Furthermore, according to Croatian law, the United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others and the Council of Europe Anti-trafficking Convention, the consent of the victim was irrelevant. In addition, the national courts had dismissed the applicant's testimony as unreliable and incoherent, given that she had been unsure, paused and hesitated when speaking. The national authorities had not made any assessment of the possible impact of psychological trauma on the applicant's ability to consistently and clearly relate the circumstances of her exploitation. Given the vulnerability of the victims of sexually-related offences, the encounter with T.M. in the courtroom could have had an adverse effect on the applicant, regardless of T.M being subsequently removed from the courtroom.

In sum, the relevant State authorities had not fulfilled their procedural obligations under Article 4 of the Convention.

Conclusion: violation (six votes to one).

Article 41: EUR 5,000 in respect of non-pecuniary damage.

ARTICLE 5

ARTICLE 5 § 5

Compensation

Failure to adequately compensate persons subjected to wrongful domestic imprisonment: *violation*

Vasilevskiy and Bogdanov v. Russia, 52241/14 and 74222/14, judgment 10.7.2018 [Section III]

Facts – The applicants complained that the quantum of damages awarded by the domestic courts for their wrongful imprisonment was so small as to impair the very essence of their right under Article 5 § 5 of the Convention.

Law – Article 5 § 5: The domestic courts had established in substance that Mr Vasilevskiy had been deprived of his liberty for one and a half years as a result of a gross and obvious irregularity and that

Mr Bogdanov's unlawful conviction had been the consequence of a flagrant denial of justice undermining the lawfulness of his ensuing detention. Article 5 § 5 was therefore applicable.

The domestic courts had attempted, in good faith and to the best of their ability, to assess the level of suffering, distress, anxiety or other harmful effects sustained by the applicants by reason of their unlawful imprisonment. Such an assessment should be carried out in a manner consistent with the domestic legal requirements and take into account the standard of living in the country concerned, even if that resulted in awards of amounts that were lower than those fixed by the Court in similar cases. Mr Vasilevskiy had been awarded EUR 3,320 for the 472 days during which he had been unlawfully detained and Mr Bogdanov EUR 324 for the 119 days during which he had been unlawfully detained which amounted to the respective rates of EUR 7 and EUR 2.70 per day of wrongful deprivation of liberty. That level of compensation was not merely substantially lower than the Court's awards in similar cases but also disproportionate to the duration of their detention and negligible in absolute terms. The sums awarded were so low as to undermine the essence of the applicants' enforceable right to compensation.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 each in respect of non-pecuniary damage. In addition, the most appropriate form of redress would, in principle, be the reopening of compensation proceedings, if requested, and a new assessment of the applicants' claim, in compliance with the requirements of that provision and the Court's case-law. This was a legal possibility domestically.

ARTICLE 6

ARTICLE 6 § 1 (CIVIL)

Civil rights and obligations, access to court

Appeal against a dismissal decision not examined by a court with full jurisdiction: *violation*

Aleksandar Sabev v. Bulgaria, 43503/08, judgment 19.7.2018 [Section V]

Facts – Following the withdrawal of his clearance to access classified information, the applicant, who was an officer in the Bulgarian Military Intelligence Service, was dismissed. His appeal against that decision was unsuccessful.

Law – Article 6 § 1: The applicant's right to hold a civil service post, which had been affected by the withdrawal of his clearance to access classified information, was at stake. He was entitled to challenge his dismissal in accordance with domestic law. Thus the dispute in question concerned a "civil right"within the meaning of Article 6 § 1, and the civil limb of that Article was thus applicable to the judicial proceedings in which the applicant appealed against his dismissal.

The Defence Minister had been obliged to dismiss the applicant because he no longer had clearance to access classified information, which was a prerequisite for serving in units under the army's general staff.

The lawfulness of the dismissal thus depended entirely on whether or not it had been justified to revoke his security clearance. The State Commission for information security had rejected the applicant's appeal. However, that procedure had not been accompanied by the Article 6 § 1 safeguards: the State Commission was not independent of the executive, given that its members were elected by the Cabinet on a proposal from the Prime Minister; it had never disclosed to the applicant the reasons why his clearance had been revoked and the decision had been taken without his knowledge.

The applicant had challenged his dismissal before the Supreme Administrative Court, alleging in particular that the withdrawal of his clearance was not compliant with domestic law, that he had not committed any offence justifying that measure and that he had never been informed of the reasons. At no stage in the proceedings had the Supreme Administrative Court addressed the question whether the withdrawal of his clearance had been justified by any misconduct on his part. It had simply referred to the decision of the State Commission, pointing out that it could not be appealed against and that a decision to revoke clearance did not have to contain reasons. The applicant's situation was thus similar to that in the cases of *Myriana Petrova v. Bulgaria* and *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, where the Court had found a violation of Article 6 § 1 on account of a refusal by the domestic courts to examine questions that were essential for the outcome of disputes between the applicants and the authorities, that refusal being explained by the fact that the

questions had been dealt with beforehand by the authorities in such a way as to bind the courts by their findings of fact.

It was necessary, however, to distinguish the present case from that of *Regner v. the Czech Republic* [GC], where the Court had found the Article 6 safeguards to be applicable to judicial proceedings concerning the withdrawal of a security certificate, which had been crucial for the applicant's possibility of fully exercising his duties and for his capacity to find a new post in the civil service, and where the proceedings had been accompanied by sufficient safeguards under Article 6 § 1. In particular, unlike the Bulgarian Supreme Administrative Court in the present case, the Czech Supreme Administrative Court had had full jurisdiction to rule on the dispute between Mr Regner and the authorities: it had access to all the classified documents in the file which were used to support the authorities' decision; it could assess the reasons given for not disclosing classified documents and, if necessary, order their disclosure; its jurisdiction was not limited to examination of the grounds relied on by Mr Regner; and it was able to examine whether there was any justification for the decision to revoke his security clearance.

In the present case, the dispute concerning the applicant's dismissal had not been examined by a court with "full jurisdiction" to examine all the factual and legal circumstances, of a civil nature, that were relevant to the present case.

Conclusion: violation (unanimously).

Article 41: EUR 2,400 in respect of non-pecuniary damage.

(See *Myriana Petrova v. Bulgaria*, 57148/08, 21 July 2016; *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, 20390/92, 10 July 1998; and *Regner v. the Czech Republic* [GC], 35289/11, 19 September 2017, Information Note 210; see also *Ternovskis v. Latvia*, 33637/02, 29 April 2014)

Access to court

Inadmissibility of applicant's civil claim for failure to respect statutory limitation period: *no violation*

Kamenova v. Bulgaria, 62784/09, judgment 12.7.2018 [Section V]

Facts – In 1997 the applicant's daughter was killed in a traffic accident which had several victims. In 1999 the lorry driver responsible for the accident was convicted. In 2001, after his conviction had been quashed and the case remitted for a fresh examination, the applicant filed her compensation claim. In 2006 she was awarded damages, however, in 2007 the award was quashed and her claim was declared inadmissible on the grounds that it had been submitted out of time, that is, after the remittal of the case and not before its initial examination by a court of first instance, as required by the Code of Criminal Procedure. Later that year, the applicant brought a tort action against the driver before the civil courts. It was dismissed as time-barred, given that the statutory five-year limitation period had expired in 2002 and the applicant's belated claim brought in the context of the criminal proceedings in 2001 could not have interrupted its running.

Law – Article 6 § 1: Although the existence of a limitation period was not *per se* incompatible with the Convention, the application of such statutory limitation periods had to be foreseeable for the claimants, having regard to the relevant legislation, case-law and the particular circumstances.

The Code of Criminal Procedure stated expressly that any civil claim had to be brought before the commencement of the examination of the case by the court of first instance, and case-law accepting exceptions to that rule was scarce. The applicant should thus have been aware in 2001, when she had brought her civil action in the criminal proceedings, only after a remittal of the case, that she ran a risk to have that action declared inadmissible. Moreover, the civil courts, seized by the applicant in 2007, had held, pursuant to the relevant domestic law provisions, that the bringing of such an inadmissible claim could not have interrupted the running of the limitation period, which had already expired in 2002. Accordingly, the application of the rules on limitation periods had been sufficiently foreseeable.

The applicant had not presented any explanation as for why she had failed to put forward her claim in the initial set of the criminal proceedings nor referred to any obstruction on her right of access to a court at that time. Furthermore, the possibility of bringing a separate claim before the civil court had remained open to her until the expiration of the limitation period in 2002. Even though the examination of such a claim would have been stayed to

await the conclusion of the criminal proceedings as to the driver's guilt, it had not been argued that the delay thus incurred would, in itself, impermissibly restrict the applicant's right to access to a court, nor that the civil courts would in any way be prevented from examining the merits of the applicant's claim. Despite the existence of two clearly available avenues to seek the examination of her claim, she had taken the risk to bring a potentially inadmissible action in the criminal proceedings after the remittal of the case.

It was true that the national courts could be criticised for the manner in which they had treated the case. In particular, in 2001, once the regional court had erroneously accepted to examine the applicant's claim in the criminal proceedings, the applicant had been prevented, under domestic law, from bringing the same claim before the civil courts. That claim had remained pending before the criminal courts until 2007, long after the expiry of the limitation period. It was only after it had been found inadmissible that the applicant had been able to initiate separate civil proceedings. If the regional court had refused to accept the claim for examination, or had it been declared inadmissible on an earlier date, or had the criminal courts transferred it to the civil courts following the available procedure, the applicant could have been able to bring her claim before the civil courts in due time and have it examined on the merits.

However, the mistakes on the part of the national courts could not alter the fact that the applicant had failed, without any justification, to make use of the clear and indisputable possibilities to have her claimed duly examined. By failing to bring her claim for damage before the criminal courts at the start of the procedure, as the other victims of the traffic accident had done, and by not filing her claim later directly with the civil courts, the applicant had placed herself in a position where she had risked having it declared time-barred. It could therefore not be said that the statutory limitation period or the manner in which it had been interpreted or applied by the national courts had impaired the very essence of the applicant's right of access to a court.

Conclusion: no violation (four votes to three).

(See also *Baničević v. Croatia* (dec.), 44252/10, 2 October 2012)

ARTICLE 6 § 3 (d)

Examination of witnesses

Domestic violence conviction based on strongly corroborated untested evidence by victim refusing to testify, which had been reported by investigating judge: *no violation*

N.K. v. Germany, 59549/12, judgment 26.7.2018 [Section V]

Facts – Proceedings were initiated against the applicant based on the suspicion that he had committed violent acts against his spouse, R.K. She was examined at the request of the public prosecutor's office by the investigating judge, after the latter had decided to exclude the applicant from the hearing under the Code of Criminal Procedure, since there was a risk, given the nature of the reported offences, that R.K. would not testify or would not tell the truth in the applicant's presence. The applicant was not appointed defence counsel to cross-examine R.K at this hearing as procedure required.

The main proceedings were opened against the applicant with R.K. informing the domestic court that she did not wish to give evidence. The right of a – current or former – spouse of the accused not to give evidence was enshrined in the Code of Criminal Procedure but case-law provided an exception for a "spontaneous utterance" made by the witness before or outside his or her formal testimony. The investigating judge was examined on the evidence he had obtained from his examination of R.K. as were the police officers present at the scene with statements made by R.K being qualified as "spontaneous utterance" and used by the domestic court. Subsequently, R.K. stated that she did not consent to the use of the evidence which she had provided to the investigating judge, to the police officers and to the court-appointed medical expert; nor did she consent to the use of the results of the medical examination.

The domestic court convicted the applicant of dangerous assault, coercion and maliciously inflicting bodily injury. He was sentenced to six years and six months' imprisonment. All appeals were dismissed.

Law – Article 6 § 3 (d): The principles as set out in *Al-Khawaja and Tahery* and in *Schatschaschwili* concerning absent witnesses applied, *mutatis mutandis*, to the present scenario. R.K. had been entitled under the Code of Criminal Procedure to refuse to give evidence against the applicant because she

was married to him. Thus, there had been a good reason for her not appearing for cross-examination at the trial and for admitting the evidence of R.K., as reported by the investigating judge and, in part, by two police officers, at the trial. In this regard, the Court could not discern any arbitrariness in the domestic court's qualification of R.K.'s statement to the police officers as a "spontaneous utterance" and considered that there was no appearance that the applicant's rights under the Convention had been disrespected by admitting that statement, as reported by the police officers, as evidence.

Regarding the significance of the untested evidence, R.K.'s pre-trial statements had not been the only evidence relied upon by the domestic court. That court had also relied on the statements of the counsellor of the women's shelter to whom R.K. had provided a detailed account of the incidents and shown her injuries; R.K.'s son, who had heard screams and the applicant and R.K. having an argument; the statements of several neighbours who had seen R.K. immediately after her escape from the marital home with a bleeding head wound in a terrified state, and had seen the applicant leave that home and drive off following that; the letter by R.K. in which she had given examples of the acts committed by the applicant in the period in question; a draft letter her husband had forced her to write to the wife of a former lover of hers; and R.K.'s statement to the police officers, which the court had qualified as "spontaneous utterance". The domestic court had concluded that the applicant's conviction could be based on R.K.'s statements, as reported by the investigating judge, for they were corroborated by other significant factors independent of them. This evaluation of the weight of the evidence had been neither unacceptable nor arbitrary. At the same time, R.K.'s statement made at the pre-trial stage had carried at least significant weight for the applicant's conviction and its admission might have handicapped the defence.

Regarding counterbalancing measures to compensate the handicaps for the defence as a result of the admission of the untested witness evidence at trial, the Government – and the domestic court itself – had agreed that counsel for the applicant should have been appointed who could have examined R.K. during the hearing before the investigating judge. By not doing so, the authorities had taken a foreseeable risk, given that R.K. had been married to the applicant and thus had a right to refuse to testify under domestic law – an eventuality which had subsequently materialised – that neither the applicant nor his counsel would be able to question R.K. at any stage of the proceedings. However, the domestic court had thoroughly and cautiously assessed the credibility of R.K. and the reliability of her statements as reported by the investigating judge and there had been ample and strong corroborating evidence. The applicant had been provided with the opportunity to present his own version of the events, which he had chosen not to do, and to cross-examine the investigating judge when he had given evidence as a witness.

In making an assessment of the overall fairness of the trial, the Court, having regard to the foregoing considerations – notably the weight of R.K.'s statement for the applicant's conviction, the domestic court's approach to assessing that statement, the availability and strength of further incriminating evidence and the compensatory procedural measures taken by the domestic court –, found that the counterbalancing factors had been capable of compensating for the handicaps under which the defence had laboured. The criminal proceedings against the applicant, viewed in their entirety, had not been rendered unfair by the admission as evidence of the statement by the untested witness R.K., as reported by the investigating judge.

Conclusion: no violation (unanimously).

(See *Al-Khawaja and Tahery v. the United Kingdom* [GC], 26766/05 and 22228/06, 15 December 2011, Information Note 147; and *Schatschaschwili v. Germany* [GC], 9154/10, 15 December 2015, Information Note 191)

ARTICLE 8

Respect for private life, positive obligations

Courts' refusal to award legal costs and compensation for defamatory statements declared null and void: *no violation*

Egill Einarsson v. Iceland (no. 2), 31221/15, judgment 17.7.2018 [Section II]

Facts – The applicant, a well-known person in Iceland, was accused by two women of rape and sexual assault. Shortly after the dismissal of the cases, he gave an interview (see *Egill Einarsson v. Iceland*, 24703/15, 7 November 2017, Information

Note 212). Following its publication, a Facebook page was created to protest about it and a third party (X) made the following statements on the page: "This is also not an attack on a man for saying something wrong, but for raping a teenage girl ... It is permissible to criticise the fact that rapists appear on the cover of publications which are distributed all over town ..." The statements were removed seven days later, at the request of the applicant's lawyer.

The applicant subsequently instituted defamation proceedings against X. The domestic courts, finding the statements defamatory, declared them null and void. However, it was held that the applicant had received "full judicial satisfaction" and he was thus not awarded non-pecuniary damage. The courts furthermore rejected the claim to have X bear the cost of publishing the findings of the judgment in a newspaper and concluded that each party should bear its own legal costs.

Law – Article 8: The issue to be determined in the present case was whether declaring the impugned statements null and void was sufficient, or whether only an award of non-pecuniary damage and legal costs could afford the necessary protection of the applicant's right to respect for his private life under Article 8 of the Convention.

The decision not to grant compensation did not in itself amount to a violation of Article 8. However, it was necessary to examine whether the national courts had analysed the specific circumstances of the case, including the nature and gravity of the violation as well as the conduct of the applicant.

In reaching their conclusion, the domestic courts had taken into account the applicant's previous behaviour, the public reputation he had made for himself, the substance of the material that had stemmed from him, which was often ambiguous and provocative and could be interpreted as an incitement to sexual violence, the distribution of the comment on a Facebook page amongst hundreds or thousands of other comments, and the fact that the statements had been removed by X as soon as the applicant had so requested.

On that basis, it could not be held that the protection afforded to the applicant by the Icelandic courts, finding that he had been defamed and declaring the statements null and void, had not been effective or sufficient with regard to the State's positive obligations or that the decision not to grant him compensation had deprived the applicant of his right to reputation and had, thereby, voided his right under Article 8 of its effective content.

As regards the legal costs, the domestic courts had not accepted all of the applicant's claims and concluded that each party should bear its own legal costs in the light of the outcome of the case and the facts as a whole. Hence the issue of legal costs had not been handled in a manner that appeared unreasonable or disproportionate.

The national authorities had therefore not failed in their positive obligations towards the applicant and he had been afforded sufficient protection under Article 8 of the Convention.

Conclusion: no violation (unanimously).

Respect for private life

Courts' refusal to grant contact rights or order legal parents to provide information about child's personal circumstances to potential biological father: *no violation*

Fröhlich v. Germany, 16112/15, judgment 26.7.2018 [Section V]

Facts – The applicant began a relationship with X, a married woman who continued to live with her husband, with whom she had six children. In early 2006, X became pregnant and disclosed this to the applicant. In October 2006 she gave birth to a girl. Shortly after, the relationship with the applicant ended. X and her husband, the girl's legal father, refused the applicant's subsequent initiatives to have contact with the child. They disputed that the applicant was the biological father but refused to consent to paternity testing. The applicant initiated various proceedings to establish his legal paternity, to have biological paternity testing conducted and to obtain joint custody. The domestic courts rejected all his requests.

Law – Article 8

(a) *Complaint about the refusal of contact rights* – The Court of Appeal's refusal to grant the applicant contact rights amounted to an interference with the applicant's right to private life. Its decision had a legal basis in domestic law and aimed to protect the rights and freedoms of the child. In determining whether the interference was "necessary in a democratic society", the applicant could not claim contact rights under German civil law in force

at that time because he was neither the child's legal father nor had he borne actual responsibility for the child. Regarding the possibility to base contact rights on the applicant's alleged biological paternity, bearing in mind the Court's judgments in *Anayo* and *Schneider*, the Court of Appeal had held that determining the applicant's biological paternity against the legal parents' will would be contrary to the child's well-being. However, it had left open that question because contact with the applicant would, in any event, have jeopardised the child's well-being due to the deep conflict between the legal parents and the applicant and the risk entailed by the fact that the applicant had not ruled out telling the child that he was her biological father. The Court of Appeal had, thus, adduced relevant reasons to justify its decision.

Regarding the decision-making process, firstly, the applicant had been directly involved in the proceedings in person and advised by counsel. Secondly, the Court of Appeal had heard not only the applicant, but also the child and the child's legal parents. Furthermore, in taking its decision to refuse contact, the Court of Appeal had had regard to the entire family situation and relied on an extensive written statement by the child's guardian *ad litem*, an experienced psychologist. Therefore, there was no indication that the judges of the Court of Appeal had based their findings on standardised arguments in favour of social families. Moreover, while it was true that the Court of Appeal had refused the applicant's request to establish his paternity, it was also true that a court could refrain from ordering a paternity test in cases where the further conditions for contact were not met. Therefore, the Court of Appeal's procedural approach was reasonable and it had adduced sufficient reasons for its decision to refuse the applicant contact rights and provided the applicant with the requisite protection of his interests.

Conclusion: inadmissible (manifestly ill-founded).

(b) *Complaint concerning the refusal to provide information about the child* – The Court of Appeal's decision to refuse the applicant information about the child, taking into account the specific circumstances of the case, had interfered with his right to respect for his private life. The decision was based on the relevant provision of the Civil Code and aimed at pursuing the best interest of the child and the rights of the legal parents. Regarding whether the interference had been "necessary in a democratic society", at the time of the Court of Appeal's decision, German family law did not provide for the possibility for a judicial examination of the question of whether any relationship, either by way of contact between an – assumed – biological father and his child or by way of providing information about the child, would be in the child's best interests if another man was the child's legal father and if the biological father had not yet borne any responsibility for the child. However, the Court of Appeal had not based its refusal of information rights on the absence of a legal basis in domestic law but because it had found that clarifying the paternity issue as a preliminary question would in itself be contrary to the well-being of the child, who did not know about the applicant's claims. If the applicant's biological paternity had been established, it could not be ruled out that that might destroy the child's present family as the mother's husband might lose trust in his wife.

The Court of Appeal had held it more likely that the applicant was the child's biological father than the mother's husband and although the latter might have had doubts about his biological paternity he could live with this uncertainty and his attitude had had no negative consequences for the child. The Court of Appeal had been convinced that if the applicant's biological paternity was established against the spouses' will, there was a risk that their marriage would break up, thereby endangering the well-being of the child who would lose her family unit and her relationships. That conclusion had been reached after a thorough analysis of the child's integration in the family where she felt protected and secure, the role of the mother's husband as father and by taking into account the spouses' difficulties and crisis in the past, which were related to the applicant. While aware of the importance the question of paternity might have for the child in the future, the Court of Appeal had held that for the time being, it had not been in the best interest of the six-year-old child to be confronted with the paternity issue.

Regarding the decision-making process, the Court of Appeal had specifically decided to orally hear the child against the opinion of the child's guardian *ad litem*. Furthermore, even if the latter in her written statement had only addressed the question of compatibility of contact rights with the child's well-being, the Court of Appeal could extract relevant general information regarding the family in which

the child grew up. Its decision had therefore been made in the child's best interest. It was true that the Court of Appeal had not specifically addressed the right to information. In particular, it had not given any weight to the question whether the obligation to provide the applicant with information about the child would have any significant impact on the spouses' right to respect for their family life. However, in the specific circumstances of the case, the Court accepted the Court of Appeal's argumentation based on the negative consequences for the child of the determination of paternity which was a necessary preliminary condition for granting information rights.

In sum, the Court of Appeal had adduced sufficient reasons for its refusal to order the child's legal parents to provide the applicant with information about the child and provided the applicant with the requisite protection of his interests.

Conclusion: no violation (unanimously).

(See *Anayo v. Germany*, 20578/07, 21 December 2010; and *Schneider v. Germany*, 17080/07, 15 September 2011, Information Note 144)

ARTICLE 10

Freedom of expression

Conviction and prison term for performing political song in cathedral and ban on performance video-recordings online: *violations*

Mariya Alekhina and Others v. Russia, 38004/12, judgment 17.7.2018 [Section III]

Facts – The three applicants are members of a Russian feminist punk band, Pussy Riot. The group carried out impromptu performances of their songs which contained lyrics criticising the political process in Russia. The group performed in disguise, with its members wearing brightly coloured balaclavas and dresses, in various public places selected to enhance their message.

On 21 February 2012 five members of the band, including the three applicants, attempted to perform *Punk Prayer – Virgin Mary, Drive Putin Away* from the altar of Moscow's Christ the Saviour Cathedral. No service was taking place, although a number of persons were inside the Cathedral. The band had invited journalists and media to the performance to gain publicity. The attempt was unsuccessful as cathedral guards quickly forced the band out, with the performance lasting slightly over a minute. A video of the performance was uploaded to YouTube.

Subsequently, the applicants were remanded in custody, convicted of hooliganism motivated by religious hatred and sentenced to two years imprisonment. In addition, a court ruled that videos of the band performances on http://pussy-riot.livejournal.com were extremist within the meaning of the Suppression of Extremism Act and ordered that access to that material be limited by a filter on the website's IP address.

Law – Article 10

(a) *Criminal prosecution for the performance of 21 February 2012* – The applicants' "performance" constituted a mix of conduct and verbal expression and amounted to a form of artistic and political expression covered by Article 10 of the Convention. The subsequent criminal proceedings, which resulted in a prison sentence, amounted to an interference with their right to freedom of expression. The interference pursued the legitimate aim of protecting the rights of others. The question as to whether it was "prescribed by law" was left open. Regarding the necessity of the interference, the applicants had wished to draw the attention of their fellow citizens and the Russian Orthodox Church to their disapproval of the political situation in Russia and the stance of Patriarch Kirill and some other clerics towards street protests in a number of Russian cities, which had been caused by recent parliamentary elections and the approaching presidential election. The applicants' actions addressed those topics of public interest and contributed to the debate about the political situation in Russia and the exercise of parliamentary and presidential powers.

The applicants' performance could be considered as having violated the accepted rules of conduct in a place of religious worship. Therefore, the imposition of certain sanctions might in principle be justified by the demands of protecting the rights of others. However, the applicants had been charged with a criminal offence and sentenced to one year and eleven months in prison. The first and second applicants had served approximately one year and nine months of that term before being amnestied while the third applicant had served approximately seven months before her sentence had been suspended. The applicants' actions had not disrupted any religious services, nor had they

caused any injuries to people inside the cathedral or any damage to church property. In those circumstances the punishment imposed on the applicants had been very severe in relation to the actions in question.

It was significant that the courts had not examined the lyrics of the song *Punk Prayer – Virgin Mary, Drive Putin Away* performed by the applicants, but based the conviction primarily on the applicants' particular conduct. The applicants had been convicted of hooliganism motivated by religious hatred on account of the clothes and balaclavas they had worn, their bodily movements and strong language. As the conduct in question had taken place in a cathedral it could have been found offensive by a number of people, which might include churchgoers. However, the Court was unable to discern any element in the domestic courts' analysis which would allow a description of the applicants' conduct as incitement to religious hatred. In particular, the domestic courts had stated that the applicants' manner of dress and behaviour had not respected the canons of the Orthodox Church, which might have appeared unacceptable to certain people, but no analysis had been made of the context of their performance. The domestic courts had not examined whether the applicants' actions could be interpreted as a call for violence or as a justification of violence, hatred or intolerance. Nor had they examined whether the actions in question could have led to harmful consequences.

The applicants' actions neither contained elements of violence, nor stirred up or justified violence, hatred or intolerance of believers. Although certain reactions to the applicants' actions might have been warranted by the demands of protecting the rights of others on account of the breach of the rules of conduct in a religious institution, the domestic courts had failed to adduce "relevant and sufficient" reasons to justify the criminal conviction and prison sentence imposed on the applicants and the sanctions had not been proportionate to the legitimate aim pursued. In view of the above, and bearing in mind the exceptional seriousness of the sanctions involved, the interference in question had not been necessary in a democratic society.

Conclusion: violation (six votes to one).

(b) *Ban on access to video-recordings of the applicants' performances online* – Declaring the video-recordings of the applicants' performances available on the Internet as "extremist" and banning them amounted to "interference" with the applicants' right to freedom of expression, with the Suppression of Extremism Act constituting the statutory basis for the interference at issue. The interference pursued the legitimate aim of protecting the morals and rights of others. The Court decided to leave open the question as to whether the interference was "prescribed by law". Assessing whether the interference was necessary in a democratic society, firstly, it was evident from the court's decision that the crucial legal findings as to the extremist nature of the video material had been made by linguistic experts, and not by that court. The expert report had not been assessed and the linguistic experts' conclusions had merely been endorsed. The Court found that situation unacceptable and stressed that all legal matters had to be resolved exclusively by the courts. Secondly, the court had made no attempt to conduct its own analysis of the video materials in question. It had not specified which particular elements of the videos were problematic or quoted the relevant parts of the expert report, referring only briefly to its overall findings. The virtual absence of reasoning made it impossible for the Court to grasp the rationale behind the interference. The Court was not satisfied that the court had applied standards which were in conformity with the principles embodied in Article 10 or based itself on an acceptable assessment of the relevant facts. They had thus failed to provide "relevant and sufficient" reasons for the interference in question.

Furthermore, the applicants had been unable to participate in the proceedings, as the domestic law did not provide for concerned parties to participate in proceedings under the Suppression of Extremism Act. In the Court's view, in such proceedings a domestic court could never be in a position to provide "relevant and sufficient" reasons for an interference with the rights guaranteed by Article 10 without some form of judicial review based on a weighing up of the arguments put forward by the public authority against those of the interested party. Therefore, the impugned proceedings could not be found compatible with Article 10. Declaring that the applicants' video materials available on the Internet were extremist and placing a ban on access to them had not met a "pressing social need" and had been disproportionate to the legitimate aim invoked.

Conclusion: violation (unanimously).

The Court also found a violation of Article 3 in respect of the conditions of the applicants' transport to and from the trial hearings and the conditions in the courtroom (the applicants' confinement in a glass dock); a violation of Article 5 § 3 concerning the extension of the applicants' detention; and a violation Article 6 §§ 1 and 3 (c) in relation to the courtroom arrangements that had restricted the applicants' rights to participate effectively in the trial court proceedings and to receive practical and effective legal assistance.

Article 41: EUR 16,000 to the first and second applicant each in respect of non-pecuniary damage and EUR 5,000 to the third applicant in respect of non-pecuniary damage.

ARTICLE 11

Freedom of association

Seven-year interruption in the activities of a foundation striving to establish a State based on Sharia, and failure to return certain properties: *no violation*

Zehra Foundation and Others v. Turkey, 51595/07, judgment 10.7.2018 [Section II]

Facts – The operation of the applicant foundation (hereafter "the foundation") was interrupted from the time of its dissolution by the courts in 2006 until its re-registration in 2013 under new legislation. The foundation was thus unable to make use of its assets in order to fund its activities. Furthermore, when it was re-registered some of its properties were not returned to it. It was clear from the foundation's publications that its ultimate objectives were the creation of a State system based on Sharia and the setting-up of secondary and tertiary education establishments furthering that aim. Those objectives went beyond its social purpose and the aims laid down in its statute.

Law – Article 11: The dissolution of the foundation, which had resulted in the cessation of its activities for over seven years, and the failure to return some of its properties, amounted to interference with the exercise by the foundation and the other applicants, who were founding members, of their right to freedom of association. The measures complained of were prescribed by law and pursued the legitimate aims of protecting the rights and freedoms of others, preventing disorder and ensuring public safety.

The foundation had been dissolved on the basis of articles published in its official newsletter. The articles selected had emphasised the foundation's vision and goals comprising its view of its future activities, rather than the personal views of the authors. The ultimate goals were the establishment of a State system based on Sharia and the setting-up of educational establishments serving that cause, and demonstrated clear opposition to the principles of secularism and pluralist democracy.

Such a foundation in a State Party to the Convention could hardly be regarded as an association complying with the democratic ideal underlying the whole of the Convention.

The judicial authorities had fulfilled their obligation to ensure that the national curriculum was organised "in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism."

The dissolution of the foundation had been justified despite the fact that none of its founding members were convicted by the criminal courts of illegal acts; since 1991, the expression of ideas and opinions contrary to the principle of secularism was no longer punishable as a criminal offence in Turkey. This was in line with the Court's case-law according to which, in pluralist democracies, even ideas diverging from those of a democratic system could be expressed in public debate provided that they did not give rise to hate speech or incite others to violence. However, the Contracting States were not prevented from taking measures to ensure that a foundation did not deploy its assets to serve educational policy goals that were contrary to the values of pluralist democracy and in breach of the rights and freedoms guaranteed by the Convention.

Once it became clear from the foundation's activities, including the articles it had published and disseminated in its name, that it was pursuing an aim other than those set forth in its statute, the authorities had been entitled to intervene in order to put an end to that divergence.

Accordingly, the national courts, which had examined the case in depth, had not overstepped their margin of appreciation in finding that there had been a pressing social need – in order to safeguard the specific nature of education in a pluralist

democratic society and thus preserve public order and protect the rights of others – to prevent the foundation from achieving its covert aims.

Likewise, the measure complained of had not been disproportionate to the aims pursued given that the foundation's activities had ceased for a limited period only, that most of its properties had been returned to it and that the few properties that remained at the disposal of the public services had been selected on the basis of an objective criterion prescribed by law.

Hence, the interference had corresponded to a pressing social need, had been proportionate to the aims pursued and could be regarded as necessary in a democratic society.

Conclusion: no violation (unanimously).

(See also *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], 41340/98 et al., 13 February 2003, Information Note 50 ; *Kalifatstaat v. Germany* (dec.), 13828/04, 11 December 2006, Information Note 92; and the Factsheet on Hate speech)

ARTICLE 14

Discrimination (Article 3 of Protocol No. 1)

National minority voters entitled to vote for one-choice minority list and excluded from the national proportional list parliamentary elections: *communicated*

E.C. v. Hungary, 65678/14 [Section IV],
Bakirdzi v. Hungary, 49636/14 [Section IV]

(See Article 3 of Protocol No. 1 below, page 23)

ARTICLE 35

ARTICLE 35 § 1

Effective domestic remedy – Hungary

Effectiveness of constitutional complaint to challenge legislation directly affecting individual: *inadmissible*

Mendrei v. Hungary, 54927/15,
decision 19.6.2018 [Section IV]

Facts – The applicant, a teacher at a public educational institution, complained, under Articles 10 and 14 of the Convention, that he became *ipso iure* a member of the National Teachers' Chamber ("the Chamber"), which was introduced by the National Public Education Act in 2013.

Law – Article 35 § 1 (*exhaustion of domestic remedies*): The Court was called on to examine whether a constitutional complaint under section 26(2) of the Constitutional Court Act 2012 was accessible, effective and capable of offering sufficient redress.

The Constitutional Court could examine constitutional complaints if the grievance had occurred directly as a result of the taking effect of a legal provision, provided the absence of any other remedies. The applicant's case fell into that category.

Section 41 of the Constitutional Court Act contemplated the quashing of a legal provision in breach of the Fundamental Law, but provided no possibility of compensation or other measures of redress. However, this fact did not exclude the remedy's efficiency in the instant case, since the removal of the impugned provisions would have, in all likelihood, terminated the membership complained of – itself an *ipso iure* consequence of the law. Therefore, the Court was satisfied that a successful constitutional complaint would have been capable of putting an end to the grievance, restoring the *status quo ante* the adoption of the National Public Education Act. Indeed, had the applicant availed himself of a constitutional complaint shortly after the enactment of the law, a positive outcome might have secured him redress of an essentially preventive nature, rendering a compensatory remedy unwarranted. Moreover, since the occurrence of the alleged grievance was an immediate, rather than postponed, consequence of the enactment of the impugned law, the statutory 180-day time-limit provided ample opportunity for the applicant to lodge a constitutional complaint.

Regarding the question whether a constitutional complaint would have provided, in practice, a reasonable prospect of success, the Government had not provided any examples of cases where the Constitutional Court had dealt with issues similar to the ones arising in the present application. However, aware of its supervisory role subject to the principle of subsidiarity, the Court considered that it could not substitute its own view of the issues at hand for that of the Constitutional Court, which, for its part, had not been afforded the possibility to examine the novel issues arising in the applicant's case.

The applicant's arguments on the length of the Constitutional Court's procedure and the success rate

of complainants were largely of speculative and empirical nature and not capable as such of proving that the remedy in question would not be effective in practice in the circumstances of the applicant's case. As to the allegedly discretionary features of the remedy suggested, the wording of section 26(2) of the Constitutional Court Act contemplated that the procedure described could be initiated "exceptionally", however, the Court was not convinced that that term restricted in any manner a complainant's right to approach the Constitutional Court. It was moreover true that a threshold requirement for the admissibility of a constitutional complaint was the presence of a question of fundamental constitutional importance, an element verified by the Constitutional Court within its competence. The issue at stake in the present case did not appear to be devoid of aspects of fundamental importance. In any event, the Constitutional Court's verification bore similarity to the procedure of many national courts of the highest level, aimed at rationalising their workload and ensuring that non-meritorious applications did not congest those legal avenues. The existence of such a filtering system could not be taken as being akin to a purely discretionary system that would remove the efficiency of the remedy offered by the highest national jurisdiction.

In sum, in the particular circumstances of the applicant's case a constitutional complaint against the impugned legislation, that is to say the National Public Education Act, was an accessible remedy offering reasonable prospects of success. Furthermore, the Court saw no circumstances exempting the applicant from having lodged such a complaint in the present case.

Conclusion: inadmissible (failure to exhaust domestic remedies).

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Authorities' failure to implement effective procedure to enable redemption of State issued bonds: *violation*

Volokitin and Others v. Russia, 74087/10 et al., judgment 3.7.2018 [Section III]

Facts – On 30 December 1980 the USSR Cabinet of Ministers decided to issue bonds of an internal premium loan to finance certain State programmes ("the 1982 premium bonds"). Soviet citizens could either buy the premium bonds with their own money or obtain them in exchange for bonds from an earlier 1966 State internal premium loan. Upon the dissolution of the USSR the Russian Government recognised its succession in respect of the obligations of the former USSR under the 1982 loan.

Between 1995 and 2000 a series of Russian laws and regulations were passed which provided for the conversion of Soviet securities, including the 1982 premium bonds, into special Russian promissory notes nominated in "promissory roubles". From 2003 to the present day, the application and implementation of those laws and regulations have been continuously suspended, most recently for the period 1 January 2017 to 1 January 2020. The fifteen applicants as owners of the bonds applied to the Russian financial authorities and the courts, seeking their redemption. Their claims were rejected on procedural and substantive grounds.

Law

Article 1 of Protocol No. 1: The applicants' "possessions" consisted of their entitlement to obtain some form of compensation for, or redemption of, the 1982 premium bonds which were currently in their possession. By enacting the Savings Protection Act in 1995, the Russian State had taken upon itself an obligation to settle the debt arising out of the 1982 premium bonds. The repeated suspensions of the implementing regulations had been decided through the legislative process, accordingly, a restriction on the exercise of applicants' right to the peaceful enjoyment of their possessions was "provided for by law". Given Russia's tumultuous transition from a State-controlled to a market economy and the impact of the 1998 financial crisis on its economic well-being, defining budgetary priorities in terms of favouring expenditure on pressing social issues to the detriment of claims of a purely pecuniary nature was a legitimate aim in the public interest.

On the question of the striking of a fair balance between the general interest and the applicants' rights, the Russian Parliament had promptly enacted the legislative acts required for the successful implementation of the 1995 Savings Protection Act. However, from 2003 the implementation of the existing legal framework had remained continuously suspended. As an inventory of the outstanding bonds and their total valuation had never been completed, there had been no assessment of

the amount of budget appropriations necessary to settle the debt in view of other priority social expenses. The Russian Government had been unable to put forward a satisfactory justification for their continuous failure, over a period of more than fifteen years, to implement an entitlement conferred on the applicants by Russian legislation.

In addition, the applicants had not remained passive, but rather displayed an active attitude by making requests to the competent authorities and lodging claims with the domestic courts. There was no indication that the applicants were responsible for, or culpably contributed to, the state of affairs which they complained about. The Russian authorities had kept them in a state of uncertainty, which was incompatible in itself with the obligation to secure the peaceful enjoyment of possessions, notably with the duty to act in good time and in an appropriate and consistent manner where an issue of general interest is at stake.

Conclusion: violation (unanimously).

Article 41

(a) *Pecuniary damage* – The tumultuous development of the Russian economy and continuous suspension of the applicable legal framework must have affected the value of the bonds and the amount to be awarded to the applicants for the loss actually sustained (*damnum emergens*). The State's failure to implement a redemption scheme could not be interpreted as calling for any particular method of calculation or a determination *in abstracto* of the current value of the bonds.

The situation of applicants who had acquired bonds in the Soviet times at full value accordingly had to be distinguished from those who had bought them in the later period on account of differences in their respective financial exposure. The Court had therefore asked the applicants to specify the time and manner of acquisition of the 1982 premium bonds in their possession, and the purchase price, if any, they had paid.

The amount of bonds held by three applicants was consistent with the explanation of their origin they provided. The Court awarded them the sums ranging from EUR 2,000 to 6,000. Claims of the remaining applicants were dismissed.

(b) *Non-pecuniary damage* – The Court awarded EUR 1,800 to each of the three aforementioned applicants under this head.

As regards the other applicants in respect of whom the time of acquisition of bonds and the length of period of their possession could not be ascertained, the finding of a violation constituted sufficient just satisfaction.

Article 46: There existed a structural problem stemming from the authorities' continued failure to implement the entitlement of the bondholders to some form of compensation and to execute its earlier judgments concerning the same issue, which amounted to a practice incompatible with the Convention. Accordingly, the respondent State should, without further delay, initiate a genuine discussion with the Committee of Ministers of the Council of Europe on the issue of what may be required by way of compliance with the present and earlier judgments concerning the 1982 premium bonds.

(See also *Yuriy Lobanov v. Russia*, 15578/03, 2 December 2010; *Malysh and Others v. Russia*, 30280/03, 11 February 2010; *Tronin v. Russia*, 24461/02, 18 March 2010; *SPK Dimskiy v. Russia*, 27191/02, 18 March 2010; *Andreyeva v. Russia*, 73659/10, 10 April 2012; *Fomin and Others v. Russia*, 34703/04, 26 February 2013; *Alekseyeva v. Russia*, 36153/03, 11 December 2008; *Milosavljev v. Serbia*, 15112/07, 12 June 2012; and *Vasilevski v. the former Yugoslav Republic of Macedonia*, 22653/08, 28 April 2016)

Peaceful enjoyment of possessions

Reduction in inflation-linked uprating of old-age pensions: *inadmissible*

Aielli and Others v. Italy, 27166/18 and 27167/18, decision 10.7.2018 [Section I]

Facts – In 2011 Legislative Decree no. 201 provided for the freezing, in 2012 and 2013, of the inflation-linked uprating of old-age pensions which were more than three times the guaranteed minimum amount. In 2015 the Constitutional Court found that the provision was disproportionate and insufficiently reasoned. A new Legislative Decree no. 65 retroactively amended the provisions that had been declared unconstitutional, introducing five different levels of uprating ranging between 0 and 100% of inflation depending on the amount of the pension.

The applicants are pensioners whose pensions were reduced by the freezing or limiting of the uprating pursuant to the legislation of 2015 (by

way of comparison, the mechanism provided for by the previous legislation had been much closer to the rate of inflation, especially for the highest pensions). In 2017 the Constitutional Court took the view, however, that the legislature had complied with its previous ruling of 2015.

Law – Article 1 of Protocol No. 1: The aims pursued by the Italian legislature had been clearly identified in Legislative Decree no. 65/2015, in the reports accompanying the ratification law, and in the Constitutional Court's analysis. It was a question of, on the one hand, bringing the legislation into conformity with the Constitutional Court's judgment of 2015, while ensuring budgetary stability and control over public expenditure, and on the other, of protecting a minimum level of welfare benefits and ensuring the sustainability of the social security system for future generations. However, in the context of implementing social and economic policies, the legislature had significant latitude. The Court did not see any reason in the present case to dismiss the considerations of the Constitutional Court or question the fact that the Italian legislature was pursuing a public-interest aim, which was necessarily a broad concept.

The proportionality of the interference could not be assessed in the abstract, having regard purely to the amount or percentage of the reduction sustained: all relevant factors had to be taken into account and placed in context.

Legislative Decree no. 65/2015 had not affected the nominal amount of the pension, but had reduced, with *erga omnes* effect, the mechanism for the uprating of the pension in line with the cost of living. For the years in question (2012 and 2013), that index has only risen by 2.7% and 3% respectively.

The impugned measure did not appear to have had a significant impact in respect of the years in question: for 2012 the legislation had no impact on pensions of less than about EUR 1,500 and the reduction rose to 2.7% for pensions higher than about EUR 3,000. The result was similar for 2013.

As regards the alleged impact of this measure from 2014 onwards, by way of cumulative repercussion (*trascinamento*), the Court did not share the applicants' opinion that their pension rights, once acquired, could never be amended for subsequent years. To reduce or amend the amount of social security benefit fell within the legislative authority of the State.

In addition, the legislature had been obliged to intervene in a difficult economic context. The Legislative Decree in question had sought to provide for redistribution in favour of lower pensions, while preserving the sustainability of the social security system for future generations. The Italian government's room for manoeuvre had been restricted on account of the limited resources and the risk that the European Commission might take action for an excessive budget deficit (the effects of the Constitutional Court's 2015 judgment risked pushing the deficit above 3% of GDP).

In its 2017 judgment, in order to find the impugned system to be fair and proportionate, the Constitutional Court noted first that the curbing of pension uprating would be applied gradually, depending on the amount of the pension (based on five categories), and secondly that the adjustment lost in 2012 and 2013 on account of the limitation in uprating would be fully recovered from 2014 onwards.

Thus, the effects of the reform of the uprating mechanism on the applicants' pensions had not been of such a level that they had encountered hardship incompatible with Article 1 of Protocol No. 1. The impugned interference had not placed an excessive burden on the applicants.

Conclusion: inadmissible (manifestly ill-founded).

(See also the Factsheets on Austerity measures and Elderly people)

ARTICLE 3 OF PROTOCOL No. 1

Free expression of the opinion of the people

National minority voters entitled to vote for one-choice minority list and excluded from the national proportional list parliamentary elections: *communicated*

E.C. v. Hungary, 65678/14 [Section IV], Bakirdzi v. Hungary, 49636/14 [Section IV]

There are thirteen recognised national minorities in Hungary. The first applicant (E.C.) belongs to the Armenian minority and the second applicant (Ms Bakirdzi) to the Greek minority. As members of recognised national minorities, they both requested registration as national minority voters

in the electoral roll before the 2014 parliamentary elections. Members of national minorities who registered for "minority elections" could only vote for a candidate on the national minority list in a single-mandate constituency. For the national minority lists only one choice was available on the ballot paper. Minority voters were excluded from voting in the national, proportional list elections. Pursuant to the Election Act, the national minority lists enjoyed a preferential threshold. The threshold was obtained by dividing the total number of national votes cast by 93, then dividing by 4 (22,022 votes in the 2014 elections).

All thirteen recognised national minorities registered lists for the elections, with a total of ninety-nine candidates. However, none of the minorities obtained enough votes to win a minority seat. As a result, they were each to be represented by a spokesperson in parliament, with no right to vote and their competence limited to discussing minority issues.

The applicants allege that their exclusion from participating in the national, proportional list parliamentary elections and the practice of a minority list with a single choice interfered with the free expression of the opinion of the people in the choice of the legislature. They further complain that, since the ballot papers for the minority elections contained only one choice, the secrecy of the vote was violated.

Cases communicated under Article 3 of Protocol No. 1, taken separately and in conjunction with Article 14 of the Convention.

OTHER JURISDICTIONS

European Union – Court of Justice (CJEU) and General Court

Obligation for a religious community to comply with EU law when processing personal data collected in the course of door-to-door preaching

Tietosuojavaltuutettu/Jehovan todistajat – uskonnollinen yhdyskunta, C-25/17, judgment 10.7.2018 (CJEU, Grand Chamber)

The Finnish Supreme Administrative Court referred to the CJEU a number of questions for a preliminary ruling concerning the interpretation of Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("the Directive"), in the light of the freedom of religion and freedom of association guaranteed in the EU Charter of Fundamental Rights.

The dispute was between the Jehovah's Witnesses Community ("the Community") and the Finnish authorities concerning a decision prohibiting them from collecting or processing personal data in the context of their door-to-door evangelism unless they complied with the data processing legislation.

The questions referred may be summed up as follows:

(1) Does the religious context of the data processing in question mean that it falls outside the scope of the Directive?

(2) Does such processing entail the creation of a "filing system" within the meaning of the Directive?

(3) Should the Community be regarded as the "data controller" jointly with the members collecting that data?

The CJEU gave the following answers in substance.

(1) *Does the collection and other processing of personal data carried out by the members of a religious community in connection with door-to-door preaching fall outside the scope of the Directive?* – The Directive sought to ensure a high level of protection of the right to privacy of natural persons. Its provisions applied to the processing of personal data wholly or partly by "automatic means", and to the processing otherwise than by automatic means of personal data which formed, or were intended to form, part of a "filing system" (as relevant in the present case according to the answer to the second question).

There were two exceptions to the scope of application of the Directive and they had to be strictly interpreted.

The first exception related to activities of the State authorities; the collection of personal data in question was, by contrast, a religious procedure carried out by individuals.

The second concerned data processing carried out in relation to an activity that was "purely personal or household in nature". Door-to-door preaching was, by its very nature, intended to spread the faith of the Community among people who did not belong to the "household setting" of the members who engaged in preaching. Therefore, that activity was directed outwards from the private setting of those

members. Furthermore, some of the data collected by the members who engaged in preaching were sent by them to the congregations of the Community, which compiled lists from that data of persons who no longer wished to receive visits from those members. At least some of the data collected were thus made accessible to a potentially unlimited number of persons.

To be sure, the EU Charter of Fundamental Rights adopted a broad understanding of the concept of "religion", covering both the *forum internum* (the fact of having a belief), and the *forum externum*, the freedom to manifest one's religion individually or collectively in public or in private, including the right to preach to other persons (see the ECHR judgments in *Kokkinakis v. Greece*, 14307/88, 25 May 1993, and *Perry v. Latvia*, 63737/00, 8 November 2007, Information Note 55). In the present case, however, the preaching extended beyond the private sphere of a member of a religious community who engaged in preaching.

Therefore, the fact that the door-to-door preaching activity was protected by the fundamental right to freedom of conscience and religion did not mean that it was a purely personal or household activity.

(2) *Does the impugned data collection entail the creation of a "filing system"?* – Since the processing of the personal data at issue was carried out otherwise than by automatic means, the question arose as to whether it could be characterised as a "filing system" (which governed the Directive's applicability to manual processing).

The Directive broadly defined the concept of "filing system", in particular by referring to any structured set of personal data. The specific criterion and the specific form in which the set of personal data collected was actually structured was irrelevant, so long as that set of data made it possible for the data relating to a specific person who had been contacted to be easily retrieved.

The concept of "filing system" covered all the personal data collected in the course of the door-to-door preaching, including the name and address of persons contacted and other information concerning their family situation, their beliefs or their wish not to receive further visits, in so far as the data were structured according to predetermined criteria to enable data relating to specific persons to be easily retrieved for future use. It was not necessary for the "filing system" to include data sheets, specific lists or other search methods.

(3) *Does the Community share joint responsibility with its members?* – The Directive provided that the "data controller" was the natural or legal person who "alone or jointly with others determine[d] the purposes and means of the processing of personal data". Therefore, that concept did not necessarily refer to a single natural or legal person and might concern several actors taking part in that processing, who could be involved at different stages and to different degrees. The level of responsibility of each of them had to be assessed with regard to all the relevant circumstances of the particular case.

The "determination of the purpose and means of processing" did not have to be carried out by the use of written guidelines or instructions from the controller: it sufficed for a natural or legal person to exert influence over the processing of the personal data, for his or her own purposes. The joint responsibility of several actors for the same processing, under that provision, did not require each of them to have access to the personal data.

In the present case, it appeared that the Community, by organising, coordinating and encouraging the preaching activities of its members, participated, jointly with its members who engaged in preaching, in determining the purposes and means of processing of personal data of the persons contacted; this was, however, for the Finnish court to verify with regard to all of the circumstances of the case.

The principle of organisational autonomy of religious communities which derived from Article 17 of the Treaty on the Functioning of the European Union was not pertinent here; the obligation for every person to comply with the rules of EU law on the protection of personal data could not be regarded as an interference in the organisational autonomy of those communities (see, to that effect, the CJEU judgment in *Egenberger*, C-414/16, 17 April 2018, Information Note 217).

A religious community was therefore to be regarded as controller, jointly with the members concerned, in respect of personal data collected and processed by those members in the context of their door-to-door preaching, an activity which was organised, coordinated and encouraged by that community, without it being necessary for the community to have access to those data or to have given its

members written guidelines or instructions about the processing thereof.

Conclusion: The collection of personal data by members of a religious community in the context of door-to-door evangelism and the subsequent processing of that data fell within the scope of the Directive and accordingly had to comply with EU law.

European Union – Court of Justice (CJEU) and General Court

Obligation to confer a residence advantage on a third-country national, in an unregistered durable relationship with an EU citizen returning to his State of origin after exercising his right of freedom of movement

Secretary of State for the Home Department v. Rozanne Banger, C-89/17, judgment 12.7.2018 (CJEU)

In the context of a dispute before the domestic courts between the Home Secretary and a third-country national concerning a refusal to issue the latter with residence authorisation, the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom) referred a number of questions to the CJEU for a preliminary ruling concerning the interpretation of Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States ("the Directive").

The applicant in the main proceedings ("the applicant") is a national of South Africa and the partner of a United Kingdom national. After residing together for two years in South Africa, in 2010 the couple went to live in the Netherlands, where her partner had found employment. The Netherlands issued the applicant with a residence card in her capacity as an "extended family member" of an EU citizen, in accordance with the Directive. In 2013 the couple decided to settle in the United Kingdom. But the UK authorities refused to issue the applicant with residence authorisation on the ground that their partnership was not "registered" and she could not therefore be regarded as her partner's "family member". Her appeal and the appeal by the Home Office led to the proceedings before the referring court.

The questions can be summarised as follows:

(1) In such a context ((i) UK national returning to his country of origin after exercising his freedom of movement rights to work in another EU State, (ii) partner being a third-country national, (iii) duly-attested durable relationship, but no marriage or registered partnership), is a member State required to issue or facilitate the provision of residence authorisation to its national's partner?

(2) In the same context, must a decision to refuse residence authorisation be founded on an extensive examination of the personal circumstances of the applicant and be justified by adequate or sufficient reasons?

(3) Still in that context, must the person concerned, in the event of a refusal to grant a residence authorisation, have a remedy enabling scrutiny by a court both in law and in fact?

The CJEU provided the following answers, in substance:

(1) Even though the Directive governed only the conditions determining whether a Union citizen could enter and reside in member States *other* than that of which he was a national and did not confer a derived right of residence on third-country nationals, who were family members of a Union citizen, *in the member State of which that citizen was a national*, the CJEU had acknowledged, in certain cases, that such third-country nationals could, nevertheless, be accorded such a right on the basis of Article 21 of the Treaty on the Functioning of the European Union (right to freedom of movement) and the Directive then had to be applied by analogy (see the CJEU judgment in *Relu Adrian Coman and Others*, C-673/16, 5 June 2018, Information Note 219).

In the view of the CJEU, that case-law remained valid in the present case, even though the couple did not have a "registered" partnership, provided that there was a duly-attested durable relationship.

Under the Directive there was admittedly no obligation for a member State to grant a right of residence to a third-country national partner with whom the Union citizen was in a duly-attested durable relationship, but nevertheless the State had to facilitate entry and residence for that partner. In its case-law the CJEU had concluded that member States had an obligation to confer a certain advantage on such a partner compared with residence applications from other third-country nationals.

Conclusion: Where the Union citizen, having exercised his right of freedom of movement to work in a second member State, returned with his partner to the member State of which he was a national in order to reside there, the latter State was required to facilitate the provision of residence authorisation to an unregistered partner, a third-country national with whom that Union citizen had a durable relationship that was duly attested.

(2) In the same context, any refusal to issue the partners with residence authorisation had to be founded on an extensive examination of the applicant's personal circumstances and be justified by reasons.

The CJEU noted here that the authority had to take account of the various factors that might be relevant in the particular case and that the Directive afforded wide discretion as regards the selection of those factors, but domestic legislation had to contain criteria which were consistent with the normal meaning of the term "facilitate" and which did not deprive that provision of its effectiveness.

(3) The Directive had to be interpreted in conformity with the requirements of Article 47 of the EU Charter of Fundamental Rights: the third-country nationals concerned had to have available to them an effective judicial remedy against a decision, permitting a review of the legality of that decision as regards matters of both fact and law.

In the present context, it was necessary for the partner to have available to him or her a redress procedure in order to challenge a decision to refuse residence authorisation, following which the national court had to be able to ascertain: whether the refusal decision was based on a sufficiently solid factual basis; whether the authority had remained within the limits of its discretion; and whether the procedural safeguards were complied with (including the obligation to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence).

European Union – Court of Justice (CJEU) and General Court

Framework agreement on fixed-term work does not preclude national legislation providing for the compulsory reinstatement of permanent public servants in the event of wrongful dismissal but a choice between reinstatement or mere compensation in the case of temporary workers employed by public authorities

Gardenia Vernaza Ayovi v. Consorci Sanitari de Terrassa, C-96/17, judgment 25.7.2018 (CJEU)

Ms Vernaza Ayovi worked as a nurse for the Health Consortium, Terrassa (Spain), under a non-permanent employment contract of indefinite duration. She was granted leave on personal grounds in July 2011. When she asked to be reinstated the employer offered her a part-time position. Refusing to accept any job that was not a full-time position, she did not turn up for work and was dismissed on that ground in July 2016.

She then brought a case in a Spanish employment tribunal seeking a declaration that her dismissal was wrongful and an order requiring her employer either to reinstate her under employment conditions identical to those that were applicable prior to her dismissal and pay in full the arrears of salary owed to her from the time of her dismissal, or to pay her the maximum amount of compensation available in law for wrongful dismissal.

Under the domestic law, where the disciplinary dismissal of a *permanent* worker in the service of a public authority was declared wrongful (unlawful), the worker in question had to be reinstated, whereas, in the same situation, if the worker was employed under a *temporary* contract or a temporary contract of indefinite duration, while performing the same duties as a permanent worker, the employer could choose either to reinstate the worker or to pay compensation.

The employment tribunal asked the CJEU if, pursuant to Clause 4(1) of the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP on 18 March 1999, a situation such as that provided for in the national legislation at issue in the main proceedings was discriminatory.

Clause 4(1) of the Framework Agreement prohibited, with regard to employment conditions, less favourable treatment of fixed-term workers than that of comparable permanent workers on the sole ground that they worked on a fixed-term basis, unless different treatment was justified on objective grounds.

The CJEU found that the general rule applicable in the event of wrongful or unlawful dismissal provided that the employer might choose between reinstatement of the worker in question and

granting that worker compensation. It was only by way of exception to that general rule that permanent workers in the service of the public authorities whose disciplinary dismissal was declared wrongful had to be reinstated.

While the difference in treatment at issue could not be justified by the public interest which attached, in itself, to the methods of recruitment of permanent workers, the fact remained that considerations based on the characteristics of the law governing the national civil service, such as impartiality, efficiency and independence of the administration, implying a certain permanence and stability of employment, were capable of justifying such a difference in treatment. Those considerations, which had no counterpart in standard employment law, explained and justified the limitations on the power of public employers unilaterally to terminate employment contracts and, as a consequence, the national legislature's decision not to grant them the right to choose between reinstatement and compensation for harm suffered owing to wrongful dismissal.

Consequently, the automatic reinstatement of permanent workers took place in a significantly different context, factually and legally, from that in which non-permanent workers found themselves.

In those circumstances, the unequal treatment found to exist was justified by the existence of precise and specific factors, characterising the employment condition to which it related, in the particular context in which it occurred, and on the basis of objective and transparent criteria.

The CJEU thus concluded that Clause 4(1) of the Framework Agreement had to be interpreted as not precluding the national legislation at issue in the main proceedings.

European Union – Court of Justice (CJEU) and General Court

Assessment, by the executing judicial authority, of a real risk of inhuman or degrading treatment in the member State issuing a European arrest warrant, even where there is a remedy by which to challenge detention conditions

Assessment, by the executing judicial authority, of the actual and precise conditions of detention only in the prisons in which it was likely that the person concerned would be detained, including on a temporary or transitional basis, in the member State issuing a European arrest warrant

Generalstaatsanwaltschaft (Conditions of detention in Hungary), C-220/18 PPU, judgment 25.7.2018 (CJEU)

In August 2017 a district court in Hungary issued a European arrest warrant against ML, a Hungarian national, so that he could be prosecuted and tried for offences of bodily harm, criminal damage, minor fraud and burglary. The Hungarian Minister of Justice forwarded the European arrest warrant to the Public Prosecutor's Office in Bremen, Germany. In September 2017 the Hungarian court sentenced ML *in absentia* to a custodial sentence of one year and eight months. Since November 2017 ML has been in custody, in Germany, pending extradition.

In order to assess the lawfulness of the surrender in the light of the conditions of detention in Hungarian prisons, the Bremen Higher Regional Court (*Oberlandesgericht*) took the view that it needed to request additional information. The court considered that there was evidence of systemic or generalised deficiencies as regards detention conditions in Hungary. Relying on the judgment of the European Court of Human Rights (ECHR) in *Varga and Others v. Hungary*, it noted that, in view of the prison overcrowding in that country, there was a risk that the person might be subjected to inhuman or degrading treatment. The domestic court thus first looked at the remedy introduced in Hungary in 2017 by which prisoners could complain about their conditions of detention in the light of their fundamental rights. The ECHR had recently held, in *Domján v. Hungary* (dec.), that nothing proved that the remedy concerned was not going to offer realistic prospects of improving unsuitable conditions of detention in order to ensure compliance with the requirements arising under Article 3 of the European Convention on Human Rights. Should the legal remedy in question not avert the risk of a prisoner being subjected to inhuman or degrading treatment as a result of the conditions of his detention, the referring court enquired, in the second place, about the extent, in view of the information and assurances obtained from the Hungarian authorities, of any obligation it would have to review the arrangements for and conditions of detention in all the prisons in which ML might be held.

The CJEU pointed out that it was not being asked about the existence of systemic or generalised defi-

ciencies as regards detention conditions in Hungary. By its questions the Bremen Higher Regional Court, based on the premise that such deficiencies existed, was seeking to determine, in the light of the *Aranyosi and Căldăraru* case-law (C-404/15 PPU and C-659/15 PPU, 5 April 2016), whether the various information received from the issuing member State would enable it to rule out the existence of a real risk that the person concerned might be subjected, in that State, to inhuman or degrading treatment within the meaning of Article 4 of the EU Charter of Fundamental Rights. The CJEU would thus answer the questions based on the premise asserted by the domestic court, under its sole responsibility and provided it verified the accuracy of the information taking account of duly updated data.

First the CJEU found that, even if the issuing member State provided for legal remedies that made it possible to review the legality of detention conditions from the perspective of fundamental rights, the executing judicial authorities were still bound to undertake an individual assessment of the situation of each person concerned, in order to satisfy themselves that their decision on the surrender of that person would not expose him, on account of those conditions, to a real risk of inhuman or degrading treatment.

Secondly, the CJEU observed that the executing judicial authorities responsible for deciding on the surrender of a person who was the subject of a European arrest warrant must determine, specifically and precisely, whether, in the circumstances of a particular case, there was a real risk that that person would be subjected in the issuing member State to inhuman or degrading treatment.

That assessment would not have to cover the general conditions of detention in all the prisons of the member States in which the person concerned could be held. The authorities were solely required to assess the conditions of detention in the prisons in which, according to the information available to them, it was actually intended that the person concerned would be detained, including on a temporary or transitional basis. The compatibility with fundamental rights of the conditions of detention in the other prisons in which that person might possibly be held at a later stage was a matter that fell exclusively within the jurisdiction of the courts of the issuing member State.

Thirdly, the CJEU held that, if the executing judicial authority found the information communicated by the issuing member State to be insufficient to allow it to decide on surrender, it could request that the issuing judicial authority provide it as a matter of urgency with the supplementary information it deemed necessary in order to obtain further details on the actual and precise conditions of detention of the person concerned in the prison in question. The questions, by their number and scope, should not paralyse the functioning of the European arrest warrant system. Thus they would not concern aspects of detention that were of no obvious relevance for the purposes of that assessment, such as, for example, opportunities for religious worship, whether it was possible to smoke, the arrangements for the washing of clothing and whether there were bars or slatted shutters on cell windows.

Fourthly, when assurance was given, or at least endorsed, by the issuing judicial authority, if need be after requesting the assistance of the central authority, or one of the central authorities, of the issuing member State, that the person concerned would not be subjected to inhuman or degrading treatment as a result of his precise detention conditions in any of the prisons where he would be held, the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the member States and on which the European arrest warrant system was based, would be required to rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre were in breach of the prohibition of inhuman or degrading treatment.

Where the assurance was not given by a judicial authority, as in the present case, it would have to be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority.

In the present case, it thus appeared that ML could be surrendered to the Hungarian authorities without any breach of his fundamental right not to be subjected to inhuman or degrading treatment, a matter which nevertheless still had to be verified by the Bremen Higher Regional Court.

(As regards the ECHR case-law, see *Varga and Others v. Hungary*, 14097/12 et al., 10 March 2015, Information Note 183; and *Domján v. Hungary* (dec.), 5433/17, 14 November 2017, Information Note 212)

European Union – Court of Justice (CJEU) and General Court

Exceptional refusal of executing judicial authority to give effect to European arrest warrant where there are deficiencies in terms of the independence of the issuing member State's judiciary

Minister for Justice and Equality v. LM (Deficiencies in the system of justice), C-216/18 PPU, judgment 25.7.2018 (CJEU, Grand Chamber)

LM, a Polish national, was wanted under three European arrest warrants issued by Polish courts for the purpose of conducting criminal prosecutions, *inter alia* for trafficking in narcotic drugs. After being arrested in Ireland in 2017, he did not consent to his surrender to the Polish judicial authorities on the ground that it would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 of the European Convention on Human Rights, as the recent legislative reforms of the Polish justice system would deny him his right to a fair trial.

LM relied in particular on the Commission's reasoned proposal of 20 December 2017 submitted in accordance with Article 7(1) of the Treaty on European Union (TEU)[1] regarding the rule of law in Poland (document COM(2017) 835 final), identifying a clear risk of a serious breach of the rule of law by Poland.

In its judgment in *Aranyosi and Căldăraru* (C-404/15 PPU and C-659/15 PPU, 5 April 2016), the CJEU had recognised the possibility for an executing judicial authority to discontinue a surrender where it might lead to inhuman or degrading treatment, within the meaning of Article 4 of the EU Charter of Fundamental Rights. That authority was required to apply a two-stage approach: first of all, to make a finding of systemic or generalised deficiencies in the protections provided in the issuing member State; then to seek all necessary supplementary information from the issuing member State's judicial authority as to the protections for the individual concerned.

In the present case, the Irish High Court asked the CJEU whether Article 1(3) of the Framework Decision 2002/584/JAI of 13 June 2002 must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant had been issued for the purposes of conducting a criminal prosecution was to be surrendered, had material, such as that set out in a reasoned proposal of the Commission, indicating that there was a real risk of breach of the fundamental right to a fair trial, on account of systemic or generalised deficiencies as regards the independence of the issuing member State's judiciary, that authority would have to determine, specifically and precisely, whether there were substantial grounds for believing that the individual concerned would run such a risk if surrendered to that State. If the answer was in the affirmative, the referring court asked the CJEU to specify the conditions which such a check would have to satisfy.

In its judgment the CJEU observed that, in accordance with Framework Decision 2002/584, member States were required to execute any European arrest warrant on the basis of the principle of mutual recognition. Refusal to execute was intended to be an exception which would have to be interpreted strictly. The independence of the domestic courts was thus paramount in the context of the European arrest warrant mechanism.

The existence of a real risk that the person in respect of whom a European arrest warrant had been issued would suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, was capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that warrant.

Thus, where the person in respect of whom a European arrest warrant had been issued, pleaded, in order to oppose his surrender to the issuing judicial authority, that there were systemic deficiencies, or, at all events, generalised deficiencies, which, according to him, were liable to affect the independence of the judiciary in the issuing member State and thus to compromise the essence of his fundamental right to a fair trial, the executing judicial authority was required, as a first step, to assess, on the basis of material that was objective, reliable, specific and properly updated, whether there was a

1. Article 7(1) of the TEU provides that, on a reasoned proposal by one third of the member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a member State of the values referred to in Article 2.

real risk, connected with a lack of independence of the courts of that member State on account of such deficiencies there, of the fundamental right to a fair trial being breached. Information in a reasoned proposal recently addressed by the Commission would be particularly relevant for the purposes of that assessment.

In addition, the requirement that courts be independent had two aspects. The first aspect presupposed that the court concerned exercised its functions wholly autonomously, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The second aspect was linked to impartiality and sought to ensure that an equal distance was maintained from the parties to the proceedings and their respective interests, with the strict application of the legal rule. Those guarantees of independence and impartiality required rules, particularly as regards the composition of the judicial body and the appointment, length of service and grounds for the abstention, withdrawal and dismissal of the members of the court in question. The disciplinary regime for judges had to display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions.

If the executing judicial authority, in the light of these independence and impartiality requirements, found that there was, in the issuing member State, a real risk of a breach of the essence of the fundamental right to a fair trial, that authority would be required, as a second step, to assess specifically and precisely whether, in the particular circumstances of the case, there were substantial grounds for believing that, following his surrender to the issuing member State, the requested person would run that risk. That specific assessment was also necessary where, as in the present instance, first the issuing member State had been the subject of a reasoned proposal of the Commission in order to determine whether there was a clear risk of a serious breach by that member State of the values referred to in Article 2 of the TEU[2]; and secondly the executing judicial authority considered that it possessed material showing that there were systemic deficiencies, in the light of those values.

In the course of such an assessment of the real risk incurred by the requested person, the executing judicial authority would be required, in particular, to examine to what extent the systemic or generalised deficiencies were liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person would be subject. If that examination showed that those deficiencies were liable to affect those courts, the executing judicial authority would also have to assess whether there were substantial grounds for believing that he would run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, as well as to the nature of the offence for which he was being prosecuted and the factual context that formed the basis of the European arrest warrant.

Furthermore, the executing judicial authority had to request from the issuing judicial authority any supplementary information that it considered necessary for assessing whether there was such a risk. In that context, the issuing judicial authority might, where appropriate, provide the executing judicial authority with any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence, material which might rule out the existence of that risk for the individual concerned.

If all the above-mentioned material did not lead it to discount the existence of a real risk that the individual concerned would suffer, in the issuing member State, a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, the executing judicial authority would have to refrain from giving effect to the European arrest warrant relating to him.

Inter-American Court of Human Rights (IACtHR)

Political rights, freedom of expression and labour rights

San Miguel Sosa et al. v. Venezuela, Series C No. 348, judgment 8.2.2018

2. Article 2 of the TEU provides: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. It relates only to the merits and reparations aspects of the judgment. A more detailed, official abstract (in Spanish only) is available on that Court's Internet site: www.corteidh.or.cr.]

The applicants, Ms San Miguel Sosa, Ms Chang Girón and Ms Coromoto Peña, signed a petition for a recall referendum of the President of Venezuela, which was presented before the National Electoral Council in December 2003. The President of Venezuela authorised a member of the National Assembly to obtain a copy of the list of signatories to the petition from that council. Later on, such member published the list of signatories on a web page (known as the "Tascón list") accusing them of taking part in a "mega fraud". After the list was made public, workers and public officials of several institutions denounced that they had been fired as retaliation for having signed the petition for a recall referendum. In March 2004 the applicants, who had worked for several years at the National Borders Council (organ of the Ministry of Foreign Affairs), received a letter from their superior communicating that their temporary labour contracts had been terminated. The decision was allegedly based on a discretional clause stipulated therein. All the subsequent remedies filed by the applicants before judicial authorities and the Ombudsperson were declared inadmissible or denied on the merits.

Merits

Article 23(1.a) and (1.b) (right to political participation), in conjunction with Article 1(1) (obligation to respect and guarantee rights without discrimination) of the American Convention on Human Rights (ACHR): The Inter-American Court of Human Rights (hereafter, "the Court") considered that the possibility to seek and participate in a recall referendum is a political right protected under Article 23(1.a) and (1.b) of the ACHR. Such right was also stipulated in the Venezuelan Constitution. Therefore, the applicants were entitled, as citizens, to request it individually or to participate in the collective gathering of signatures. The Court stressed that in a democratic society no one should be subjected to any form of discrimination based on their political opinion or due to the legitimate exercise of his or her political rights. The Court noted that the process of gathering signatures was conducted in a context of political instability and intolerance to dissidence.

The Court acknowledged that the motive or purpose of a certain official act can provide the basis to determine whether a State´s action can be considered arbitrary or an abuse of power. The Court, however, noted that the actions of State authorities are covered by a presumption of legality. Hence, in order to rebut this presumption of good faith, an irregular action on the part of the authorities must be established. For such purposes, the Court proceeded to recount and examine the evidence in the case file related to the alleged undeclared purpose, that is to say, that the motivation or real purpose of the termination of the applicants' contracts was to exercise some form of disguised retaliation, persecution or discrimination against them.

For the Court, the act of handing the list of signatories to a member of the National Assembly, authorised by the President, without due safeguards in that political context, revealed a lack of guarantees against possible actions or threats of retaliation. Given the size and scope of the "Tascón list" published on a web page under a "mega fraud" label, it was clear that, beyond the legitimate aim to guarantee the rights of the revocable official or of the applicants, the publication of the identity of the citizens who signed the petition for a recall referendum had ulterior motives aimed at intimidating and deterring political participation and dissidence. This, in turn, favoured retaliation, political persecution and discrimination of those who were perceived as political opponents.

The Court determined that the termination of the applicants' contracts constituted a form of abuse of power, which was carried out under the veil of legality of a contract clause to cover its real motivation, that is to say, retaliation for having legitimately exercised a political right. The Court based such conclusion on the fact that the applicants were dismissed one month after the "Tascón list", which included their names, was published and on the lack of explanation from the State regarding the motivation of such decision, among other elements of the relevant context. In other words, because the applicants supported the call for a referendum to recall the President's mandate, their signature was perceived by their superiors as an act of disloyalty and the expression of an intolerable dissident political opinion or orientation. Therefore, the Court found that the State had not complied with its obligation to guarantee, without discrimination, their right to political participation.

Conclusion: violation (unanimously).

Article 13(1) (freedom of thought and expression), in conjunction with Article 1(1) of the ACHR: The Court held that signing the petition for a recall referendum constituted in itself a form of political opinion. It considered it a manifestation of the need for a public consultation on a subject of public interest and on the possibility of revoking the President's mandate. For the Court, such manifestation was an exercise of freedom of expression.

The Court found that the applicants' dismissal had the veiled intention of deterring political dissidence, because it was used to provoke a chilling effect on political participation. Thus, the fact that they were subjected to political discrimination in retaliation for signing the petition for a recall referendum constituted a direct restriction on the exercise of their freedom of expression, which was not permissible under the ACHR.

Conclusion: violation (six votes to one).

Article 26 (right to work), in conjunction with Articles 1(1), 8(1), 13(1), 23(1) and 25(1) of the ACHR: The Court asserted its jurisdiction, according to the ACHR and the principle *jura novit curia*, to analyse the impact on the applicants' labour rights. In this regard, the Court reiterated its position held in the case of *Lagos del Campo v. Peru* (see the ECHR Information Note 213) on the justiciability of economic, social and cultural rights as protected under Article 26 of the ACHR. The Court found a specific violation of the right to work, as a consequence of the arbitrary decision to terminate the applicants' contracts, the abuse of power, political discrimination and lack of access to justice.

Conclusion: violation (five votes to two).

Reparations – The Court established that the judgment constituted *per se* a form of reparation and ordered that the State: (i) adopt the necessary measures to avoid the relevant facts of abuse of power remaining unpunished; (ii) publish the judgment and its official summary; and (iii) pay compensation in respect of pecuniary and non-pecuniary damage.

COURT NEWS

Case-law translations available in HUDOC

To make its case-law more accessible, the Court publishes translations of its judgments, decisions and summaries in the HUDOC database (https://hudoc.echr.coe.int). To date, 25,000 translations in more than 30 languages have been made available online. They emanate from governments, NGOs, associations, bar councils and academic institutions, as well as those obtained with the support of the Human Rights Trust Fund.

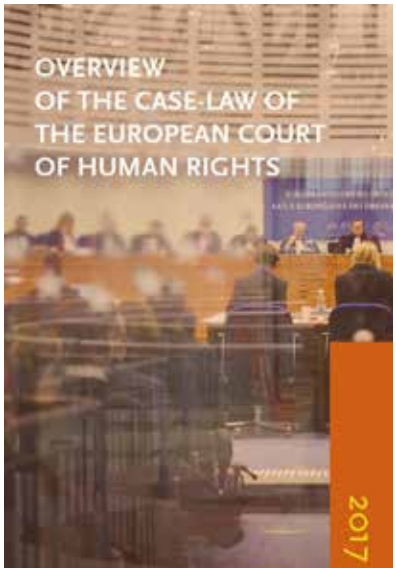
More information can be found on the Court's Internet site (www.echr.coe.int – Case-law – Judgments and decisions).

RECENT PUBLICATIONS

Overview of the Court's case-law

The Court has published an Overview of its case-law for the first 6 months of 2018 (precisely from 1 January to 15 June), which contains a selection of cases of interest from a legal perspective.

The Overviews can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law). Moreover, a print edition of the 2017 Overview is also available from Wolf Legal Publishers at sales@wolf-publishers.nl.



New Case-Law Guide

As part of its series on the case-law relating to particular Convention Articles the Court has recently published a Case-Law Guide on Article 2 of the Convention which relates to the right to life, one of the core rights protected by the Convention. Translation into French is pending.

All Case-Law Guides can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law).

The Information Note, compiled by the Court's Case-Law Information and Publications Division, contains summaries of cases examined during the month in question which the Registry considers as being of particular interest. The summaries are not binding on the Court.

In the provisional version the summaries are normally drafted in the language of the case concerned, whereas the final single-language version appears in English and French respectively. The Information Note may be downloaded at www.echr.coe.int/NoteInformation/en. For publication updates please follow the Court's Twitter account at twitter.com/echrpublication.

The HUDOC database is available free-of-charge through the Court's Internet site (http://hudoc.echr.coe.int/sites/eng). It provides access to the case-law of the European Court of Human Rights (Grand Chamber, Chamber and Committee judgments, decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions).

ENG

www.echr.coe.int

The European Court of Human Rights is an international court set up in 1959 by the member States of the Council of Europe. It rules on individual or State applications alleging violations of the rights set out in the European Convention on Human Rights of 1950.

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE