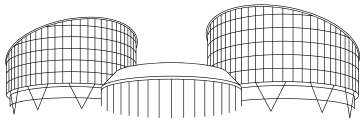

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Overview of the Court's case-law 2017

Overview of the Court's case-law

This Overview contains a selection by the Jurisconsult of the most interesting cases from 2017.

There were developments in the case-law in a wide range of areas in 2017, the Court's approach being to read the Convention as a whole so as to ensure the coherent and harmonious interpretation of its provisions.

The case-law on Articles 18, 19, 37, 41 and 46 was either clarified or extended. The Court explained its role in cases involving supervision by the Committee of Ministers or where the Court's judgment was the subject of interpretation by a domestic superior court. It also explained its approach regarding evidential matters and awards of just satisfaction to applicants.

The Grand Chamber delivered nineteen judgments and one decision in 2017. The *Lopes de Sousa Fernandes* judgment elucidated the case-law concerning allegations of medical negligence (Article 2). In its judgments in *Hutchinson* and *Khamtokhu and Aksenchik,* the Grand Chamber reaffirmed the relevant case-law principles both on the Article 3 requirement for whole life sentences to be reducible and on penal policy regarding the execution of life sentences (Articles 5 and 14).

The Grand Chamber also explained the distinction between "deprivation of liberty" within the meaning of Article 5 § 1 and restrictions on "freedom of movement" within the meaning of Article 2 of Protocol No. 4 (*De Tommaso*), ruled on complaints under Article 5 §§ 1 and 3 (*Merabishvili*) and clarified the criteria for deciding when Article 6 § 1 was applicable under its civil limb (*De Tommaso*, *Károly Nagy* and *Regner*).

It considered the right to a fair hearing in judgments concerning the lack of a public hearing (*De Tommaso*), the issue of arbitrariness and "denial of justice" (*Moreira Ferreira (no. 2)*), the refusal of access to

confidential information held by the intelligence services (*Regner*) and the right to legal assistance within the meaning of Article 6 § 3 (c) (*Simeonovi*).

The *Paradiso and Campanelli* judgment concerned the scope of the right to "private life" of a couple who were refused permission to adopt a child conceived abroad through surrogacy whom they had brought to their home country in violation of its adoption laws.

The *Bărbulescu* judgment established the jurisprudential principles governing the respective rights and obligations of employees and employers regarding personal electronic communications – such as electronic messaging – in the workplace.

The Grand Chamber developed its case-law on the balance to be struck between the right to respect for private life (Article 8) and the right to freedom of expression (Article 10) in its judgments in *Medžlis Islamske Zajednice Brčko and Others* and *Satakunnan Markkinapörssi Oy and Satamedia Oy*.

It also examined a difference in treatment based on "sex" and "age" (Articles 5 and 14) as regards the sentencing of adult men compared to female, juvenile and senior offenders (*Khamtokhu and Aksenchik*).

In the *Fábián* judgment it examined whether public and private-sector employees were, for the purposes of Article 14 of the Convention, in a "relevantly similar situation" and whether suspension of the disbursement of a State pension was compatible with Article 1 of Protocol No. 1.

In *De Tommaso* the Grand Chamber examined under Article 2 of Protocol No. 4 the foreseeability of measures restricting the freedom of movement and liberty to communicate of an individual considered to be a danger to society. The *Garib* judgment was the first case in which the Court had to scrutinise State choices regarding socio-economic measures that were liable to restrict freedom to choose one's residence.

The Grand Chamber analysed for the first time the construction of Article 18 of the Convention (*Merabishvili*) and the notion of an application "substantially the same as a matter that has already been examined" by the Court, within the meaning of Article 35 § 2 (b) of the Convention (*Harkins*).

Also for the first time it conducted a comprehensive review of the relevant principles governing requests for the striking out of all or part of an application (Article 37) on the basis of a unilateral declaration by the respondent Government (*De Tommaso*). In the *Burmych and Others* judgment the Grand Chamber expounded on the respective roles of the Court and of the Committee of Ministers regarding follow-up applications

arising out of a failure to execute a pilot judgment (Articles 19 and 46). In adopting its striking-out judgment (Article 37), the Grand Chamber stressed the public interest in the proper and effective functioning of the Convention system. In *Nagmetov* it set out the circumstances in which the Court would award just satisfaction under Article 41 in the absence of a properly submitted claim, and in the cases of *Chiragov and Others* and *Sargsyan* it examined the question of financial compensation for violations of the rights of persons displaced by conflict.

Other important judgments concerned State obligations to protect life during a hostage-taking by terrorists (*Tagayeva and Others*); the giving of reasons in court decisions (*Cerovšek and Božičnik*), including in cases concerning the fight against terrorism (*Ramda*); the right to self-determination of vulnerable people and the limits thereto (*A.-M.V. v. Finland*); and, for the first time, deprivation of citizenship in a terrorism and national-security context (*K2 v. the United Kingdom*).

The Court emphasised the vulnerability and special needs of minor migrants in detention (*S.F. and Others v. Bulgaria*). It stressed the importance of being able to communicate freely with one's lawyer (*M v. the Netherlands*), of protection against homophobia (*Bayev and Others*), of striking a balance between freedom of expression and the prevention of terrorism (*Döner and Others*) and of the protection of journalistic sources for freedom of the press (*Becker*). The Court also reaffirmed its case-law concerning budgetary austerity measures in the context of economic and financial crisis (*P. Plaisier B.V. and Others*).

Other cases of legal interest concerned human-trafficking (*Chowdury and Others* and *J. and Others v. Austria*); undercover police operations (*Grba*); the criminal liability of members of the government for acts or omissions in the exercise of their official functions (*Haarde*); the rights of transgender persons (*A.P., Garçon and Nicot*); the right to manifest one's religion at school (*Osmanoğlu and Kocabaş*), with respect to military service (*Adyan and Others*) or in a court (*Hamidović*); the right of the press to inform the public about the conduct of members of parliament (*Selmani and Others*); and the rights of victims of racially motivated violence (*Škorjanec*).

Other developments in the case-law concerned the applicability of Article 5 § 4 (*Oravec* and *Stollenwerk*), Article 7 (*Koprivnikar*), Article 13 (*Tagayeva and Others*), Article 35 § 1 (*Kósa*), Article 3 of Protocol No. 1 (*Davydov and Others* and *Moohan and Gillon*) and Article 4 of Protocol No. 7 in the context of terrorist offences (*Ramda*).

With regard to the prohibition of discrimination the Court, for the first time, found fault with the language used by a domestic court when

dealing with the age and gender of a litigant (*Carvalho Pinto de Sousa Morais*). It also examined a case concerning a difference in the penal policy applied to male or female detainees with a child of less than a year old (*Alexandru Enache*) and a case concerning the recognition of same-sex couples (*Ratzenböck and Seydl*).

The Court had regard to the interaction between the Convention and European Union law. It referred to the Charter of Fundamental Rights (in *Bărbulescu*), the case-law of the Court of Justice of the European Union (in *Merabishvili*) and to budgetary rules imposed by EU law (in *P. Plaisier B.V. and Others*).

It likewise took into account the interaction between the Convention and international law. Thus, as an aid to applying and interpreting the Convention, it referred to both international-law norms (for example, on the elimination of discrimination against women in *Khamtokhu and Aksenchik* and *Alexandru Enache*, and on the protection of personal data in *Bărbulescu*) and Council of Europe norms (including the European Prison Rules in *Khamtokhu and Aksenchik*; data-protection texts in *Satakunnan Markkinapörssi Oy and Satamedia Oy* and *Bărbulescu*; and the Convention on Action against Trafficking in Human Beings in *Chowdury and Others*).

In a number of cases the Court considered the States' positive obligations under the Convention (*Bărbulescu*; *Chiragov and Others*; *Sargsyan*; *Lopes de Sousa Fernandes*; *J. and Others v. Austria*; *Chowdury and Others*; *A.P., Garçon and Nicot*; *Škorjanec*; and *Davydov and Others*). It also highlighted the importance of the principle of subsidiarity (in *Moreira Ferreira (no. 2)*; *Burmych and Others*; *Chiragov and Others*; and *Sargsyan*) and delivered important judgments on the extent of the States' margin of appreciation (see, for example, *Paradiso and Campanelli*; *Khamtokhu and Aksenchik*; *Satakunnan Markkinapörssi Oy and Satamedia Oy*; *Moreira Ferreira (no. 2)*; *Fábián*; *Garib*; and *P. Plaisier B.V. and Others*).

JURISDICTION AND ADMISSIBILITY

Admissibility (Articles 34 and 35)

Exhaustion of domestic remedies (Article 35 § 1)

The decision in *Kósa v. Hungary*[1] raised the issue whether public-interest litigation can exonerate an applicant from bringing his or her own domestic court proceedings.

The applicant was of Roma origin. In the Convention proceedings she claimed that the discontinuance of a free bus service between

1. *Kósa v. Hungary* (dec.), no. 53461/15, 14 December 2017.

her home and her integrated primary school meant that, for over two years, her only option had been to attend a local Greek Catholic school which essentially catered for Roma children and provided substandard education. The applicant relied on Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1.

The applicant did not bring domestic proceedings to contest the lawfulness of the authorities' action from the standpoint of her own personal circumstances. The Government argued that the applicant had not exhausted domestic remedies and her case should therefore be declared inadmissible. The applicant stressed in reply that a non-governmental organisation had brought legal proceedings in the public interest challenging the policy of, among others, the local authority on the ground that it resulted in unlawful segregation of Roma children. The Supreme Court ultimately dismissed the public-interest action on the basis of a domestic legal provision according to which the equal-treatment requirement was not violated where the school (which otherwise had the characteristics of a segregated school in so far as the overwhelming majority of students were of Roma origin) was a faith school chosen voluntarily and in an informed manner by the parents, and the students were not provided with substandard education.

The case is interesting in that the Court had to address the sufficiency of public-interest litigation in terms of the requirements of Article 35 § 1 of the Convention and in particular whether such litigation could exonerate an individual from taking his or her own court proceedings.

It observed that in the instant case the domestic legislation explicitly allowed certain civil-society organisations to bring legal proceedings in defence of a larger group of people affected by a violation, or risk of a violation, of the requirements of equal treatment. Accordingly, it considered that, in principle, it would be conceivable to accept public-interest litigation as a form of exhaustion of domestic remedies for the purposes of Article 35 § 1. Interestingly, it noted that

> "[s]uch a proposition would be especially justified in relation to alleged discrimination against a vulnerable group requiring special protection, such as Roma children ... Access to justice for members of such groups should be facilitated so as to provide effective protection of rights: the Convention is intended to guarantee rights which are 'practical and effective' rather than theoretical and illusory ... For the Court, the Hungarian legislation, notably section 20 of the Equal Treatment Act ... is a laudable example of that facilitative and protective approach" (paragraph 57).

However, on the facts of the applicant's case the Court noted that although the Supreme Court's judgment in the public-interest case

concerned a matter which was closely related to the complaints set out in the applicant's application form, it did not correspond exactly to her individual situation. It observed that an essential element of the Supreme Court's finding – that segregation could not be established on account of the operation of the local faith school – was that Roma parents freely chose to send their children there and pupils attending the school had not been prejudiced as regards the quality of the education provided. The applicant for her part firmly disputed these conclusions with reference to her own particular circumstances.

Since the public-interest litigation did not provide the national courts with the opportunity to address and thereby prevent or put right the Convention violations alleged by the applicant against the local authority, nor provide the Court with the views of the national courts on the applicant's specific complaints, the applicant had failed to exhaust domestic remedies.

Matter already examined by the Court (Article 35 § 2 (b))

The issue before the Court in *Harkins v. the United Kingdom*[2] was whether a development in the Court's case-law subsequent to a judgment in an applicant's case could amount to "relevant new information" for the purposes of Article 35 § 2 (b) of the Convention.

The applicant's extradition was being sought by the government of the United States of America. He was facing charges in Florida of first-degree murder and attempted armed robbery. In his first application lodged with the Court, the applicant claimed among other things that, if convicted, he would receive a mandatory life sentence without the benefit of parole. The decision to extradite him would therefore be in breach of Article 3 of the Convention. In a judgment delivered on 17 January 2012 (*Harkins and Edwards v. the United Kingdom*[3]), a Chamber of the Fourth Section of the Court found that a mandatory life sentence without the possibility of parole would not be "grossly disproportionate", and the applicant had not demonstrated that there was a real risk of treatment reaching the Article 3 threshold as a result of his sentence were he to be extradited. In particular, the applicant had not shown that, if convicted, his incarceration would serve no penological purpose, so no Article 3 issue could arise at that time. If there came a time when his incarceration could be shown not to serve any legitimate penological purpose, it was "still less certain" that the Governor of Florida and Board of Executive Clemency would refuse to use their powers to commute

2. *Harkins v. the United Kingdom* (dec.) [GC], no. 71537/14, ECHR 2017.
3. *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, 17 January 2012.

his sentence. That judgment became final on 9 July 2012 following the rejection of the applicant's referral request by a panel of the Grand Chamber. The applicant then brought proceedings before the domestic courts in which he sought to have the final domestic decision rejecting his challenge to the extradition request reopened. He relied on two judgments adopted by the Court following the delivery of the judgment in his case: *Vinter and Others v. the United Kingdom*[4] and *Trabelsi v. Belgium*[5]. In *Vinter and Others* the Grand Chamber ruled among other things that a whole life prisoner was entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Where domestic law did not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground would therefore already arise at the moment of the imposition of the whole life sentence and not at a later stage of incarceration. In *Trabelsi* a Chamber of the Court held, with reference to the principles laid down in the *Vinter and Others* judgment, that the applicant's extradition to the United States of America had been in breach of Article 3 of the Convention as it had exposed him to a risk of a life sentence without the possibility of parole. The domestic court rejected Mr Harkin's request to reopen the proceedings. He subsequently lodged a fresh application with the Court. He complained that following the Court's judgment in *Trabelsi*, his extradition would breach Article 3 of the Convention since the sentencing and clemency regime in Florida did not satisfy the mandatory procedural requirements identified by the Grand Chamber in *Vinter and Others*. He further submitted that the imposition of a mandatory sentence of life imprisonment without parole would be "grossly disproportionate".

The judgment is of note in that this is the first occasion on which the Grand Chamber has elaborated on the rationale behind and the principles governing the admissibility requirement contained in the first limb of Article 35 § 2 (b) (which concerns applications that are "substantially the same as a matter that has already been examined by the Court"), in particular the scope of the notion of "relevant new information". It reiterated that the principal purpose of this admissibility criterion was to serve the interests of finality and legal certainty by preventing applicants from seeking, through the lodging of a fresh application, to appeal against previous judgments or decisions (see

4. *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and 2 others, ECHR 2013 (extracts).

5. *Trabelsi v. Belgium*, no. 140/10, ECHR 2014 (extracts).

paragraphs 41 and 51 of the judgment, referring to the decision in *Kafkaris v. Cyprus*[6]). Developing this point in its reasoning and with reference to the restrictions applied to requests for revision of its own judgments contained in Rule 80 of the Rules of Court (paragraph 54), it noted that

> "while legal certainty constitutes one of the fundamental elements of the rule of law which requires, *inter alia*, that, where a court has finally determined an issue, its ruling should not be called into question (*Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII). If this were not the case, the parties would not enjoy the certainty or stability of knowing that a matter had been subject to a final disposal by the Court."

Interestingly, it further observed that under the second limb of Article 35 § 2 (b) as interpreted in the case-law (see, for example, *OAO Neftyanaya Kompaniya Yukos v. Russia*[7]) the Court lacked jurisdiction to deal with any application that has already been submitted to another procedure of international investigation or settlement and contained no relevant new information. For the Court, if its jurisdiction is excluded in relation to an application that falls within the second limb of Article 35 § 2 (b), it must similarly be excluded in relation to an application that falls within the first limb of that Article. This restrictive approach was justified by the need to provide legal stability by indicating to individuals and the State authorities when its supervision is or is not possible.

The Court's approach to the interpretation of Article 35 § 2 (b) must in view of these considerations necessarily be a rigorous one. It stressed that in order for the Court to consider an application that relates to the same facts as a previous application, the applicant must genuinely advance a new complaint or submit new information – and this it qualified as factual information – that has not previously been considered by the Court (see paragraph 42 and the decision in *Kafkaris*, cited above, § 68). The core issue to be decided in the instant case was whether the above-mentioned development of the Court's case-law following its judgment in *Harkins and Edwards* by itself constituted "relevant new information" for the purposes of the first limb of Article 35 § 2 (b) of the Convention. It concluded that the applicant's Article 3 complaints (see above) were substantially the same as the complaints already examined by the Court in *Harkins and Edwards*. The Court's subsequent case-law did not constitute "relevant new information" for the purposes of Article 35 § 2 (b) of the Convention. Importantly, it noted (paragraph 56):

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6. *Kafkaris v. Cyprus* (dec.), no. 9644/09, 21 June 2011.
7. *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, § 520, 20 September 2011.

> "The Court's case-law is constantly evolving and if these jurisprudential developments were to permit unsuccessful applicants to reintroduce their complaints, final judgments would continually be called into question by the lodging of fresh applications. This would have the consequence of undermining the strict grounds set out in Rule 80 for permitting revision of the Court's judgments ... as well as the credibility and authority of those judgments. Moreover, the principle of legal certainty would not apply equally to both parties, as only an applicant, on the basis of subsequent jurisprudential developments, would effectively be permitted to 'reopen' previously examined cases, provided that he or she were in a position to lodge a fresh application within the six-month time-limit."

"CORE" RIGHTS

Right to life (Article 2)

Obligation to protect life

The *Lopes de Sousa Fernandes v. Portugal*[8] judgment concerned the responsibility of the State in the context of death following medical treatment.

The applicant's husband died following a series of medical problems that occurred in the months following surgery for the removal of nasal polyps. The applicant considered that her husband had died as a result of a hospital-acquired infection and carelessness and medical negligence during that post-surgery period. No negligence was established in the various domestic proceedings (disciplinary, civil and criminal).

She complained, mainly under Article 2, of the death of her husband and the failure by the authorities to elucidate the cause of the deterioration in his condition. The Grand Chamber found no violation of the substantive aspect of Article 2 and a violation of its procedural limb.

(i) The judgment is important because it reviews and clarifies the Court's case-law on the scope of the substantive positive obligation of the State as regards deaths resulting from alleged medical negligence. The judgment confirms that the obligation is an essentially regulatory one and that it is only exceptionally that the responsibility of the State to protect life will be engaged in respect of acts or omissions of health-care providers.

In particular, the Grand Chamber confirmed that, where a State has put the regulatory framework in place (by making adequate provision for securing high professional standards among health professionals and

8. *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, 19 December 2017.

the protection of the lives of patients, whether in the public or private sector), matters such as an error of judgment on the part of a health professional or negligent coordination among health professionals during treatment is not sufficient to call a State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life (*Powell v. the United Kingdom*[9] and *Sevim Güngör v. Turkey*[10]). This regulatory obligation has been found lacking rarely (see, for example, *Arskaya v. Ukraine*[11]).

Since this obligation must be understood in its broader sense, it includes the duty to ensure the effective functioning of that regulatory framework and encompasses measures necessary to ensure its implementation, including supervision and enforcement. Accordingly, the Court has accepted, in two very exceptional circumstances, that the responsibility of the State under the substantive limb of Article 2 was engaged as regards the acts and omissions of health-care providers: in the first instance, where an individual patient's life was knowingly put in danger by a denial of access to life-saving emergency treatment (for example, *Mehmet Şentürk and Bekir Şentürk v. Turkey*[12]) and, in the second, where a systemic or structural dysfunction in hospital services resulted in a patient being deprived of access to life-saving emergency treatment where the authorities knew or ought to have known about that risk and failed to take the necessary measures to prevent that risk from materialising, thus putting patients' lives, including the life of the particular patient concerned, in danger (for example, *Asiye Genç v. Turkey*[13] and *Aydoğdu v. Turkey*[14]).

In addition, the Grand Chamber went on to establish a test to determine whether a case fell within one of those exceptions. It is a strict test requiring the presence of a number of cumulative factors: the acts and omissions of the health-care providers had to go beyond a mere error or medical negligence, in that those health-care providers, in breach of their professional obligations, denied a patient emergency medical treatment despite being fully aware that the person's life was at risk if that treatment was not given; the impugned dysfunction had to be objectively and genuinely identifiable as systemic or structural in order to be attributable to the State authorities; there had to be a link between the impugned dysfunction and the harm sustained; and the dysfunction must have resulted from the failure of the State to meet its obligation to provide a regulatory framework in the broader sense indicated above.

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9. *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V.
10. *Sevim Güngör v. Turkey* (dec.), no. 75173/01, 14 April 2009.
11. *Arskaya v. Ukraine*, no. 45076/05, 5 December 2013.
12. *Mehmet Şentürk and Bekir Şentürk v. Turkey*, no. 13423/09, ECHR 2013.
13. *Asiye Genç v. Turkey*, no. 24109/07, 27 January 2015.
14. *Aydoğdu v. Turkey*, no. 40448/06, 30 August 2016.

Applying that test to the present case and finding no violation of Article 2, the Grand Chamber found that these factors were absent and that the regulatory framework did not disclose any shortcomings.

(ii) The Grand Chamber also confirmed its case-law as regards the procedural obligations of the State in a medical-negligence context and, notably, confirmed that the civil remedy is the "most appropriate".

The Grand Chamber reiterated that the State is required to set up an effective and independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable. While, in some exceptional situations where the fault attributable to the health-care providers went beyond a mere error or medical negligence, the Court has considered that compliance with the procedural obligation must include recourse to criminal law, in all other cases where the infringement of the right to life or to personal integrity is not caused intentionally, the procedural obligation imposed by Article 2 to set up an effective and independent judicial system does not necessarily require a criminal-law remedy. In this latter respect, it is worth noting that, when the Grand Chamber reviewed compliance with the six-month time-limit, it accepted that none of the proceedings (disciplinary, criminal or civil) were inappropriate or misconceived but it affirmed that the civil remedy was the most appropriate and the most apt to satisfy the procedural requirements of Article 2 in a medical-negligence context.

On the merits of the procedural complaint under Article 2, it was considered that the applicant had "arguable grounds" to suspect that her husband had died as a result of medical negligence, so that the State's duty to ensure compliance with the procedural obligation was engaged. Since domestic law provided for disciplinary, civil and criminal proceedings, the system satisfied in theory the procedural requirements of Article 2. The Grand Chamber found that neither the disciplinary nor criminal proceedings were effective. Nor was the civil action adequate: it was lengthy and, limited as it was to the time and direct cause of death, did not provide a thorough and overall assessment with a view to establishing fault.

In the *Tagayeva and Others v. Russia*[15] judgment the Court considered the obligations of the State, as regards a large-scale hostage-taking by terrorists, before, during and after the event.

15. *Tagayeva and Others v. Russia*, nos. 26562/07 and 6 others, 13 April 2017. See also under Article 13 (Right to an effective remedy) below.

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

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

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

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

Firstly, this is the first time the Court has found that, given the intelligence information available to it, the State had failed to take adequate measures to protect against a terrorist attack (see, applying the *Osman v. the United Kingdom*[16] test to situations concerning the obligation to afford general protection to society, *Mastromatteo v. Italy*[17]). However, the pre-attack intelligence available to the authorities in the present case was very specific and relevant: a hostage-taking by terrorists in an educational establishment on the day of the opening of the academic year (1 September 2004) near the North Ossetian border near to Beslan. Similar attacks had already been carried out on several occasions by Chechen separatists. The threat was therefore considered by the Court to amount to an immediate risk to the lives of an identified target population, including vulnerable children, and measures should have been taken that, when judged reasonably, could have prevented or minimised the known risk. While some had been taken, the Court considered those steps to have been inadequate: in the end, a sizeable illegal armed group was able to gather, prepare, travel to and seize the

16. *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports of Judgments and Decisions* 1998-VIII.

17. *Mastromatteo v. Italy* [GC], no. 37703/97, § 69, ECHR 2002-VIII.

school without encountering any preventative security arrangements. The Court also specifically criticised the lack of any "single sufficiently high-level structure" responsible for evaluating and managing the threat with field teams.

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

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

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

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

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

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

Inhuman or degrading punishment

The *Hutchinson v. the United Kingdom*[18] judgment sets out the current case-law on the *de facto* and *de jure* reducibility of whole life sentences.

In 1984 the applicant was given a mandatory life sentence for murder. The Secretary of State later imposed a whole life order, which was later confirmed by the High Court. Further to the Court's judgment in *Kafkaris v. Cyprus*[19] (a whole life order had to be *de facto* and *de jure* reducible), the Court clarified in *Vinter and Others v. the United Kingdom*[20] that this meant that there had to be a prospect of release and a possibility of review, which review should extend to assessing whether there were legitimate penological grounds (including rehabilitation) for continued incarceration. While the Grand Chamber in *Vinter and Others* indicated that domestic law could, by virtue of section 6 of the Human Rights Act[21], be read as imposing a duty on the Secretary of State to release a life prisoner where detention was no longer compatible with Article 3 on legitimate penological grounds, it also found that the life policy set out in the Lifer Manual was too restrictive to comply with the *Kafkaris* principles and gave prisoners only a partial picture of the conditions in which the power of release might be exercised. The discrepancy between domestic case-law and the Lifer Manual gave rise to such a lack of clarity in domestic law that a whole life sentence could not be regarded as reducible and as such there had been a violation of Article 3 of the Convention. In its later *McLoughlin* judgment of 2014, the Court of Appeal addressed the Court's findings in *Vinter and Others*, indicating that the restrictive Lifer Manual, as a matter of domestic law, did not fetter the exercise by the Secretary of State of his discretion to review which, it considered, resolved the issue identified in *Vinter and Others*.

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

(i) One aspect of the judgment is rather State specific. The Grand Chamber found that the *McLoughlin* judgment of the Court of Appeal

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18. *Hutchinson v. the United Kingdom* [GC], no. 57592/08, ECHR 2017.

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

20. *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and 2 others, ECHR 2013 (extracts).

21. "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

had brought clarity to the content of domestic law and resolved the discrepancy that had provided the basis for a finding of a violation of Article 3 in the *Vinter and Others* judgment. It then went on to determine whether the Article 3 review requirements were now met in the applicant's case.

(ii) Of more general relevance and interest is the summary provided, in the course of this determination by the Grand Chamber, of the *Kafkaris* principles as clarified in *Vinter and Others* and *Murray v. the Netherlands*[22], and as illustrated by the Court's post *Vinter and Others* Chamber judgments on the subject[23]. These principles were summarised as follows.

> "42. The relevant principles, and the conclusions to be drawn from them, are set out at length in *Vinter and Others* (cited above, §§ 103-22; recently summarised in *Murray v. the Netherlands* [GC], no. 10511/10, §§ 99-100, ECHR 2016). The Convention does not prohibit the imposition of a life sentence on those convicted of especially serious crimes, such as murder. Yet to be compatible with Article 3 such a sentence must be reducible *de jure* and *de facto*, meaning that there must be both a prospect of release for the prisoner and a possibility of review. The basis of such review must extend to assessing whether there are legitimate penological grounds for the continuing incarceration of the prisoner. These grounds include punishment, deterrence, public protection and rehabilitation. The balance between them is not necessarily static and may shift in the course of a sentence, so that the primary justification for detention at the outset may not be so after a lengthy period of service of sentence. The importance of the ground of rehabilitation is emphasised, since it is here that the emphasis of European penal policy now lies, as reflected in the practice of the Contracting States, in the relevant standards adopted by the Council of Europe, and in the relevant international materials (see *Vinter and Others*, cited above, §§ 59-81).
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> 43. As recently stated by the Court, in the context of Article 8 of the Convention, 'emphasis on rehabilitation and reintegration has become a mandatory factor that the member States need to take into account in designing their penal policies' (see *Khoroshenko*

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

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

> *v. Russia* [GC], no. 41418/04, § 121, ECHR 2015; see also the cases referred to in *Murray*, cited above, § 102). Similar considerations apply under Article 3, given that respect for human dignity requires prison authorities to strive towards a life sentenced prisoner's rehabilitation (see *Murray*, cited above, §§ 103-04). It follows that the requisite review must take account of the progress that the prisoner has made towards rehabilitation, assessing whether such progress has been so significant that continued detention can no longer be justified on legitimate penological grounds (see *Vinter and Others*, cited above, §§ 113-16). A review limited to compassionate grounds is therefore insufficient (ibid., § 127).
>
> 44. The criteria and conditions laid down in domestic law that pertain to the review must have a sufficient degree of clarity and certainty, and also reflect the relevant case-law of the Court. Certainty in this area is not only a general requirement of the rule of law but also underpins the process of rehabilitation which risks being impeded if the procedure of sentence review and the prospects of release are unclear or uncertain. Therefore prisoners who receive a whole life sentence are entitled to know from the outset what they must do in order to be considered for release and under what conditions. This includes when a review of sentence will take place or may be sought (see *Vinter and Others*, cited above, § 122). In this respect the Court has noted clear support in the relevant comparative and international materials for a review taking place no later than twenty-five years after the imposition of sentence, with periodic reviews thereafter (ibid., §§ 68, 118-20). It has however also indicated that this is an issue coming within the margin of appreciation that must be accorded to Contracting States in the matters of criminal justice and sentencing (ibid., §§ 104-05 and 120).
>
> 45. As for the nature of the review, the Court has emphasised that it is not its task to prescribe whether it should be judicial or executive, having regard to the margin of appreciation that must be accorded to Contracting States (see *Vinter and Others*, cited above, § 120). It is therefore for each State to determine whether the review of sentence is conducted by the executive or the judiciary."

In applying those principles and finding no violation in the applicant's case, the Grand Chamber examined: the nature of the review (confirming that a review by the executive was not of itself contrary to Article 3); the scope of the review (confirming that the review must consider whether in light of significant change in a whole life prisoner and progress towards rehabilitation, continued detention could still be

justified on legitimate penological grounds); the criteria and conditions for the review (confirming that the relevant question was whether whole lifers could know what they must do to be considered for release and under what conditions the review would take place); and the time frame for review (reiterating the reference in *Vinter and Others* and *Murray* to the clear support in the comparative material for a review no later than twenty-five years after the imposition of the sentence).

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

Conditions of detention[24]

The *S.F. and Others v. Bulgaria*[25] judgment concerned the conditions of immigration detention imposed on accompanied minor migrants.

The applicants, Iraqi nationals, entered the respondent State illegally together with their parents. They were arrested and held together with their parents in immigration detention on the Bulgarian-Serbian border for a period of either thirty-two or forty-one hours (the exact length of time was disputed by the parties). They were aged 16, 11 and one and a half at the relevant time. They alleged that the conditions of their immigration detention had subjected them to inhuman and degrading treatment. The Court agreed and found a breach of Article 3 of the Convention.

The judgment is noteworthy for its comprehensive review of the Court's case-law on the treatment of accompanied minors held in immigration detention. The Court summarised the relevant case-law as follows.

> "78. The general principles applicable to the treatment of people held in immigration detention were recently set out in detail in *Khlaifia and Others v. Italy* ([GC], no. 16483/12, §§ 158-67, ECHR 2016), and there is no need to repeat them here.
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> 79. It should, however, be noted that the immigration detention of minors, whether accompanied or not, raises particular issues in that regard, since, as recognised by the Court, children, whether accompanied or not, are extremely vulnerable and have specific needs (see, as a recent authority, *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13, § 103, 22 November 2016). Indeed, the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal

24. See also *Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017.
25. *S.F. and Others v. Bulgaria*, no. 8138/16, 7 December 2017.

immigrant. Article 22 § 1 of the Convention on the Rights of the Child (adopted on 20 November 1989, 1577 UNTS 3) encourages States to take appropriate measures to ensure that children seeking refugee status, whether or not accompanied by their parents or others, receive appropriate protection and humanitarian assistance (see *Popov v. France*, nos. 39472/07 and 39474/07, § 91, 19 January 2012). In recent years, the Court has in several cases examined the conditions in which accompanied minors had been kept in immigration detention.

80. The applicants in *Muskhadzhiyeva and Others v. Belgium* (no. 41442/07, 19 January 2010) had been respectively seven months, three and a half years and five years and seven months old, and had been detained for one month. Noting their age, the length of their detention, the fact that the detention facility had not been adapted for minors, and the medical evidence that they had undergone serious psychological problems while in custody, the Court found a breach of Article 3 (ibid., §§ 57-63).

81. The applicants in *Kanagaratnam v. Belgium* (no. 15297/09, 13 December 2011) had been respectively 13, 11 and eight years old, and had been detained for about four months. The Court noted that they had been older than those in the above-mentioned case and that there was no medical evidence of mental distress having been experienced by them in custody. Even so, noting that (a) the detention facility had not been adapted to minors, (b) the applicants had been particularly vulnerable owing to the fact that, before arriving in Belgium, they had been separated from their father on account of his arrest in Sri Lanka and had fled the civil war there, (c) their mother, although with them in the facility, had been unable to take proper care of them, and (d) their detention had lasted a much longer period of time than that in the case of *Muskhadzhiyeva and Others* (cited above), the Court found a breach of Article 3 (ibid., §§ 64-69).

82. The applicants in *Popov* (cited above) had been respectively five months and three years old, and had been detained for fifteen days. Although designated for receiving families, the detention facility had been, according to several reports and domestic judicial decisions, not properly suited for that purpose, both in terms of material conditions and in terms of the lack of privacy and the hostile psychological environment prevailing there. That led the Court to find that (a) despite the lack of medical evidence to that effect, the applicants, who had been very young, had suffered stress

and anxiety, and that (b) in spite of the relatively short period of detention, there had been a breach of Article 3 (ibid., §§ 92-103).

83. The applicants in five recent cases against France – *R.M. and Others v. France* (no. 33201/11, 12 July 2016), *A.B. and Others v. France* (no. 11593/12, 12 July 2016), *A.M. and Others v. France* (no. 24587/12, 12 July 2016), *R.K. and Others v. France* (no. 68264/14, 12 July 2016) and *R.C. and V.C. v. France* (no. 76491/14, 12 July 2016) – had been between four months and four years old, and had been detained for periods ranging between seven and eighteen days. The Court noted that, unlike the detention facility in issue in *Popov* (cited above), the material conditions in the two detention facilities concerned in those five cases had not been problematic. They had been adapted for families, who had been kept apart from other detainees and provided with specially fitted rooms and childcare materials. However, one of the facilities had been situated right next to the runways of an airport, and so had exposed the applicants to particularly high noise levels. In the other facility, the internal yard had been separated from the zone for male detainees by only a net, and the noise levels had also been significant. That had affected the children considerably. Another source of anxiety had been the constraints inherent in a place of detention and the conditions in which the facilities had been organised. Although over a short period of time those factors had not been sufficient to attain the threshold of severity engaging Article 3 of the Convention, over a longer period their effects would necessarily have affected a young child to the point of exceeding that threshold. Since the periods of detention had been, in the Court's view, long enough in all five cases, it found breaches of Article 3 in each of them (see *R.M. and Others v. France*, §§ 72-76; *A.B. and Others v. France*, §§ 111-15; *A.M. and Others v. France*, §§ 48-53; *R.K. and Others v. France*, §§ 68-72; and *R.C. and V.C. v. France*, §§ 36-40, all cited above)."

The amount of time spent by the applicants in detention – regardless of which version was the correct one (see above) – was shorter than the periods referred to in the cases mentioned above. However, the conditions were considerably worse than those in all those cases (including limited access to toilet facilities, failure to provide food and drink and delayed access to the toddler's baby bottle and milk). For the Court, by keeping the three applicants in such conditions, even for a brief period of time, the Bulgarian authorities had subjected them to inhuman and degrading treatment.

The Court acknowledged that in recent years the High Contracting States that sit on the European Union's external borders have had

difficulties in coping with the massive influx of migrants (see *M.S.S. v. Belgium and Greece*[26]) and reiterated in this connection (paragraph 92) the conclusion reached in *Khlaifia and Others v. Italy*[27], namely:

> "In any event, in view of the absolute character of Article 3 of the Convention, an increasing influx of migrants cannot absolve a High Contracting State of its obligations under that provision, which requires that people deprived of their liberty be guaranteed conditions compatible with respect for their human dignity. A situation of extreme difficulty confronting the authorities is, however, one of the factors in the assessment whether or not there has been a breach of that Article in relation to the conditions in which such people are kept in custody."

However, it could not be said that at the relevant time Bulgaria was facing an emergency of such proportions that it was practically impossible for its authorities to ensure minimally decent conditions in the short-term holding facilities in which they decided to place minor migrants immediately after their interception and arrest.

Prohibition of slavery and forced labour (Article 4)

Positive obligations

In the *J. and Others v. Austria*[28] judgment, the Court examined the scope of the procedural obligation (if any) to investigate alleged human-trafficking offences committed outside the territory of a Contracting Party.

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

26. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 223, ECHR 2011.
27. *Khlaifia and Others v. Italy* [GC], no. 16483/12, §§ 184-85, ECHR 2016 (extracts).
28. *J. and Others v. Austria*, no. 58216/12, ECHR 2017 (extracts).

that during the applicants' stay in Austria a criminal offence had been committed on the territory of Austria by their employers, as alleged.

In the Convention proceedings the applicants contended, among other things, that the investigation conducted by the Austrian authorities should have been extended so as to cover the circumstances at the origin of their trafficking and forced labour, even though those events had occurred outside Austria. They relied essentially on Article 4 of the Convention as interpreted by the Court in its judgment in *Rantsev v. Cyprus and Russia*[29].

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

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

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

29. *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010 (extracts).

Emirates. Moreover, past experience had shown that simple requests sent to the United Arab Emirates had not produced any response.

The *Chowdury and Others v. Greece*[30] judgment concerned the State's positive and procedural obligations in respect of human trafficking, exploitation and forced labour.

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

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

Firstly, the Court situated its examination of the applicants' complaints within the framework of the principles described in paragraphs 283 to 289 of the *Rantsev v. Cyprus and Russia* judgment[31], which concerned trafficking for the purposes of sexual exploitation. The Court considered that those principles were of equal relevance when it came to human trafficking and the exploitation of individuals through

30. *Chowdury and Others v. Greece*, no. 21884/15, ECHR 2017.

31. *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010 (extracts).

work. Interestingly the Court had regard to Article 4 (a) of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) to reinforce its view that trafficking in human beings covers the recruitment of persons for the purposes of exploitation and that exploitation includes forced labour. Article 4 § 2 of the Convention implied a positive obligation on States to address this category of trafficking in the form of a legal and regulatory framework enabling the prevention of trafficking in human beings and their exploitation through work, the protection of victims, the investigation of arguable instances of trafficking of this nature, and the criminalisation and effective prosecution of any act aimed at maintaining a person in such a situation.

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

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

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

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

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

Right to liberty and security (Article 5)[32]

Deprivation of liberty (Article 5 § 1)

The *De Tommaso v. Italy*[33] judgment concerned the imposition of preventive measures on an individual considered to be a danger to society.

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

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

One of the aspects of the judgment that is worth noting concerns the nature and control of the preventive measures in question imposed under Act no. 1423/1956, as interpreted in the light of the judgments of the Italian Constitutional Court. The Grand Chamber found that the measures imposed did not amount to a deprivation of liberty within the meaning of Article 5, thereby confirming the principles set out in *Guzzardi v. Italy*[34] (and applied in several later cases, such as *Raimondo v. Italy*[35], *Labita v. Italy*[36], *Vito Sante Santoro v. Italy*[37] and, *mutatis mutandis*, *Villa v. Italy*[38] and *Monno v. Italy*[39]), and distinguishing the *Guzzardi* and later cases on the facts.

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32. See also, under Article 14 taken in conjunction with Article 5 below, *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, ECHR 2017, and, under Article 18 (Restrictions not prescribed by the Convention) below, *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017.

33. *De Tommaso v. Italy* [GC], no. 43395/09, ECHR 2017. See also under Article 6 § 1 (Right to a fair hearing in civil proceedings – Applicability) below, Article 2 of Protocol No. 4 (Freedom of movement) below, and Article 37 (Striking out) below.

34. *Guzzardi v. Italy*, 6 November 1980, Series A no. 39.

35. *Raimondo v. Italy*, 22 February 1994, § 39, Series A no. 281-A.

36. *Labita v. Italy* [GC], no. 26772/95, § 193, ECHR 2000-IV.

37. *Vito Sante Santoro v. Italy*, no. 36681/97, § 37, ECHR 2004-VI.

38. *Villa v. Italy*, no. 19675/06, §§ 43-44, 20 April 2010.

39. *Monno v. Italy* (dec.), no. 18675/09, §§ 22-23, 8 October 2013.

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

Review of lawfulness of detention (Article 5 § 4)

The issue in the *Oravec v. Croatia*[40] judgment was whether Article 5 § 4 of the Convention is applicable to an individual who is not deprived of his liberty.

This case raises the interesting issue as to whether an applicant, who was not in detention at the material time, can complain under Article 5 § 4 of the fact that, in his absence and without informing him of the proceedings, a domestic court ordered that he be detained. Article 5 § 4 normally contemplates situations in which an individual is deprived of his liberty and takes proceedings, while in detention, to contest the lawfulness of his deprivation of liberty.

In the instant case, the applicant had been detained on the order of an investigating judge on suspicion of involvement in drug trafficking. He was later released in view of developments in the case. The decision to release him, which was not final, was subsequently quashed by the competent court following an appeal by the prosecution, and the investigating judge was ordered to re-examine the case. The investigating judge confirmed his original decision to release the applicant. That decision was subject to appeal. The prosecutor in fact successfully lodged an appeal against the decision to the competent court and the applicant was ordered to be placed in pre-trial detention. Neither the applicant nor his representative was present at the appeal hearing in camera, nor had they been notified of the prosecutor's appeal or given the opportunity to comment on the prosecutor's submissions. The applicant was not in custody at that stage, having been released pursuant to the original decision of the investigating judge.

In the Convention proceedings, the applicant argued, among other things, that the conduct of the appeal proceedings which led to his being remanded in custody had violated the principle of equality of arms guaranteed by Article 5 § 4 of the Convention.

The Court found that Article 5 § 4 had been breached. It held that the appeal brought by the prosecutor against the investigating judge's decision ordering the applicant's release breached the principle of "equality of arms" since the applicant could not effectively exercise his

40. *Oravec v. Croatia*, no. 51249/11, 11 July 2017.

defence rights in the appeal proceedings. It noted that the court that ordered the applicant's detention did so in a closed session without informing, let alone inviting, the applicant or his representative, who were thus not given an opportunity to put forward any arguments concerning the applicant's detention.

As noted above, the judgment is of interest given that the applicant was not deprived of his liberty at the time of the proceedings leading to his detention the second time around. For that reason, the Government disputed the applicability of Article 5 § 4. On that point the Court, referring to *Fodale v. Italy*[41], found as follows (paragraph 65).

> "In calling for [the investigating judge's] decision to be quashed, the prosecutor's office sought, through the appeal proceedings, to have the initial detention order upheld. If the prosecution's appeal was dismissed the decision to release the applicant would become final; since it was accepted, the applicant was again placed in custody. The appeal thus represented a continuation of the proceedings relating to the lawfulness of the applicant's detention. In those circumstances, the Court considers that the outcome of the appeal proceedings was a crucial factor in the decision as to the lawfulness of the applicant's detention, irrespective of whether at that precise time the applicant was or was not held in custody. It cannot therefore subscribe to the Government's argument that Article 5 § 4 was not applicable to the appeal proceedings before the [competent court] when it ruled on the appeal by the public prosecutor's office."

The *Stollenwerk v. Germany*[42] judgment concerned the applicability of Article 5 § 4 in the period following conviction.

The applicant was arrested and remanded in custody in connection with drugs offences. The decision to detain him was reviewed on eight occasions. The applicant was eventually convicted. He appealed and, pending the outcome of his appeal, applied to be released from detention. His application was rejected, as was his appeal against that decision and his subsequent request for a hearing.

In the Convention proceedings the applicant complained that these proceedings had been unfair since the relevant domestic court, in breach of the principle of equality of arms, had examined his appeal and hearing request without affording him an opportunity to reply to the

41. *Fodale v. Italy*, no. 70148/01, § 40, ECHR 2006-VII.

42. *Stollenwerk v. Germany*, no. 8844/12, 7 September 2017.

prosecutor's written submissions. The Court agreed with the applicant that there had been a breach of Article 5 § 4 of the Convention.

Article 5 § 4 entitles an arrested or detained person to bring proceedings for review by a court of the procedural and substantive conditions that are essential for the "lawfulness", in the sense of Article 5 § 1, of his or her deprivation of liberty (see *Idalov v. Russia*[43]). Since judicial control of the deprivation of liberty has already been incorporated into the original conviction and sentence, Article 5 § 4 does not normally come into play as regards detention governed by Article 5 § 1 (a) (which was the case of the applicant) (see *De Wilde, Ooms and Versyp v. Belgium*[44], and *Wynne v. the United Kingdom*[45]), save where the grounds justifying the person's deprivation of liberty are susceptible to change with the passage of time (see the decision in *Kafkaris v. Cyprus*[46]) or where fresh issues affecting the lawfulness of such detention arise (see *Gavril Yosifov v. Bulgaria*[47]). It is for that reason that it was not open to the applicant to rely on Article 5 §§ 1 (c) and 3 of the Convention, the standard basis for contesting the length or lawfulness of detention during the pre-conviction phase.

The instant judgment is of interest in that the Court found Article 5 § 4 to be applicable in the post-conviction period because domestic law provided that a person is detained on remand until his or her conviction becomes final, including during appeal proceedings, and accorded the same procedural rights to all remand prisoners. It noted in this connection (paragraph 36):

> "Where the Contracting States provide for procedures which go beyond the requirements of Article 5 § 4 of the Convention, the provision's guarantees, nevertheless, have to be respected in these procedures."

As to the substance of the applicant's complaint, and notwithstanding the fact that the lawfulness of the applicant's detention had been reviewed on many occasions over a relatively short duration, the Court found that the failure to inform the applicant of the prosecutor's observations and to afford him an opportunity to comment on them had breached his right to an adversarial procedure. The conclusion is of interest. The Court has already stressed that proceedings conducted

43. *Idalov v. Russia* [GC], no. 5826/03, § 161, 22 May 2012.
44. *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 76, Series A no. 12.
45. *Wynne v. the United Kingdom*, 18 July 1994, § 36, Series A no. 294-A.
46. *Kafkaris v. Cyprus* (dec.), no. 9644/09, § 58, 21 June 2011.
47. *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 57, 6 November 2008.

under Article 5 § 4 of the Convention before the court examining an appeal against detention must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person (see, for example, *Mooren v. Germany*[48]). Its judgment in the instant case indicates that it is prepared to apply the same principle just as rigorously to procedures which Contracting States, as a matter of choice, make available to post-conviction detainees.

PROCEDURAL RIGHTS

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

Applicability

The *De Tommaso*[49] judgment, as noted above, concerned the imposition of preventive measures on an individual considered to be a danger to society.

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

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

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

(i) This was the first time that the Court found the civil limb of Article 6 applicable to proceedings imposing such preventive measures. Relying on prior cases where the Court had found that restrictions on detainees' rights, and the possible repercussions of such restrictions, fell within the sphere of "civil rights" (*Gülmez v. Turkey*[50], *Ganci v. Italy*[51], *Musumeci v. Italy*[52], *Enea v. Italy*[53] and *Stegarescu and Bahrin v. Portugal*[54]), the Grand Chamber found that there had been "a shift in its

48. *Mooren v. Germany* [GC], no. 11364/03, § 124, 9 July 2009.

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

50. *Gülmez v. Turkey*, no. 16330/02, 20 May 2008.

51. *Ganci v. Italy*, no. 41576/98, ECHR 2003-XI.

52. *Musumeci v. Italy*, no. 33695/96, 11 January 2005.

53. *Enea v. Italy* [GC], no. 74912/01, ECHR 2009.

54. *Stegarescu and Bahrin v. Portugal*, no. 46194/06, 6 April 2010.

... case-law towards applying the civil limb of Article 6 to cases which might not initially appear to concern a civil right but which may have direct and significant repercussions on a private right belonging to an individual". Finding that the restrictions examined in those detainee cases resembled the preventive measures in issue in the present case, the Grand Chamber concluded that such measures fell within the sphere of personal rights and were civil in nature so that Article 6 applied to the proceedings imposing those restrictions.

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

The *Károly Nagy v. Hungary*[55] judgment concerned access to the civil courts with a pecuniary claim concerning the applicant's ecclesiastical service.

The applicant served as a pastor with the Reformed Church of Hungary ("the Church") until he was suspended in the course of disciplinary proceedings and ultimately dismissed. He then instituted civil proceedings against the Church seeking payment of unpaid salaries stemming from his religious service arguing that his ecclesiastical service was analogous to employment. His claim was discontinued by the domestic courts on the ground that his service was not regulated by civil law but by ecclesiastical law.

The applicant complained that he had been deprived of access to a court in breach of Article 6 § 1 of the Convention. The Chamber found that Article 6 applied. However, the Grand Chamber found that Article 6 did not apply and concluded that the application was incompatible *ratione materiae*.

The different findings of the Chamber and Grand Chamber can be explained by their divergent views on domestic law. The Grand Chamber, unlike the Chamber, considered the position in domestic law to be sufficiently clear to allow it to conclude that the applicant had no "right" which could be said, even on arguable grounds, to be recognised under domestic law. Article 6 was not therefore applicable so that the application was incompatible *ratione materiae* with the provisions of the Convention.

55. *Károly Nagy v. Hungary* [GC], no. 56665/09, ECHR 2017.

In particular, domestic law provided that claims involving internal laws and regulations of a church could not be enforced by State organs and that, if a domestic court established that a dispute concerned an ecclesiastical claim unenforceable by domestic organs, they were required to terminate the proceedings. In addition, a decision of the Hungarian Constitutional Court of 2003 (prior to the applicant's disciplinary proceedings) had clarified that claims based on ecclesiastical law could not be enforced by domestic courts. The applicant's appointment letter made it clear that his service was based on ecclesiastical law. Moreover, statutes of the Church provided that ecclesiastical law was to be applicable to the service relationships of pastors and that legal disputes in the sphere of, *inter alia*, the appointment, remuneration and retirement of pastors fell within the jurisdiction of the ecclesiastical courts. However, the present applicant had brought his claim to the labour and civil courts and each court had discontinued the action on the ground that his claim was governed by ecclesiastical law. This interpretation of the domestic courts not being "arbitrary or manifestly unreasonable", the Grand Chamber found that the applicant had no "right" which could be said, even on arguable grounds, to be recognised under domestic law.

The Grand Chamber judgment can be read therefore as confirmation of its existing case-law to the effect that Article 6 has no application to substantive limitations on a right existing under domestic law (see *Roche v. the United Kingdom*[56]; *Boulois v. Luxembourg*[57]; and, more recently, *Lupeni Greek Catholic Parish and Others v. Romania*[58]).

In the *Regner v. the Czech Republic*[59] judgment, Article 6 was applied to civil proceedings challenging the revocation of a security clearance that had prevented the applicant from continuing in a particular role in the Ministry of Defence.

Having rehearsed in some detail the applicable case-law and principles concerning the application of Article 6 to civil servant employment disputes, the Court identified the "right" in issue as being the right of the applicant to challenge the revocation of his security clearance, which

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

57. *Boulois v. Luxembourg* [GC], no. 37575/04, § 91, ECHR 2012.

58. *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 100, ECHR 2016 (extracts).

59. *Regner v. the Czech Republic* [GC], no. 35289/11, ECHR 2017. See also under Article 6 § 1 (Fairness of the proceedings) below.

revocation prevented him from continuing in his function of Deputy to the First Vice-Minister. The novel point and one which distinguishes this case from, in particular, *Myriana Petrova v. Bulgaria*[60], is that the revocation of the security clearance did not lead directly to his dismissal. Rather, the security clearance being a prerequisite for carrying out his functions, its revocation was considered to have had a decisive effect on his personal and professional situation preventing him from carrying out certain duties at the Ministry and adversely affecting his ability to obtain a new post within the State administration. That was considered sufficient for the applicant to claim the existence of a right within the meaning of Article 6 of the Convention.

Thereafter, the Grand Chamber had no difficulty in finding that that right was "civil" in nature. At the time, employment within the State administration was based on the Labour Code which did not contain specific provisions governing the status and functions of State employees: there was no "civil service" as such. Since private-employment disputes are considered to concern "civil" rights, the proceedings challenging the revocation of the security clearance were considered to affect the applicant's "civil" rights. In any event, the Grand Chamber applied the *Vilho Eskelinen* criteria (*Vilho Eskelinen and Others v. Finland*[61]) to find that his status in the State administration would not exclude the application of Article 6 of the Convention.

The judgment in *Selmani and Others v. the former Yugoslav Republic of Macedonia*[62] concerned the forcible removal of the applicant journalists from the press gallery of Parliament and the absence of an oral hearing in their legal challenge to the removal.

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

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60. *Myriana Petrova v. Bulgaria*, no. 57148/08, 21 July 2016.

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

62. *Selmani and Others v. the former Yugoslav Republic of Macedonia*, no. 67259/14, 9 February 2017. See also under Article 10 (Freedom of the press) below.

In the Convention proceedings the applicants complained under Article 6 of the Convention that the proceedings before the Constitutional Court had been unfair on account of the rejection of their request for an oral hearing. This part of the judgment is of interest in that the Court raised as a preliminary matter – and of its own motion – the issue of the applicability of Article 6. The issue was: did the domestic court determine the applicants' "civil rights"? The Court found that the domestic law recognised the right of accredited journalists to report from Parliament in the exercise of their right to freedom of expression. That right was of a civil-law nature, since reporting from the press gallery was necessary for the applicants as accredited journalists to exercise their profession and to inform the public about events in Parliament. Article 6 was therefore applicable (see, similarly, *Shapovalov v. Ukraine*[63]; *RTBF v. Belgium*[64]; and *Kenedi v. Hungary*[65]).

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

Fairness of the proceedings[66]

In the *Regner*[67] judgment, cited above, Article 6 was applied to civil proceedings challenging the revocation of a security clearance that had prevented the applicant from continuing in a particular role in the Ministry of Defence.

The applicant was employed in the Ministry of Defence and appointed as a Deputy to the First Vice-Minister when his security clearance, a *sine qua non* for the exercise of his duties, was revoked by the National Security Authority on the basis of information from the intelligence service casting doubt on his suitability for such clearance. Soon thereafter his employment contract was terminated by mutual consent. His proceedings for judicial review of the decision to revoke

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63. *Shapovalov v. Ukraine*, no. 45835/05, § 49, 31 July 2012.

64. *RTBF v. Belgium*, no. 50084/06, § 65, ECHR 2011 (extracts).

65. *Kenedi v. Hungary*, no. 31475/05, § 33, 26 May 2009.

66. See, as regards the lack of a public hearing, *De Tommaso v. Italy* [GC], no. 43395/09, ECHR 2017, and *Selmani and Others v. the former Yugoslav Republic of Macedonia*, no. 67259/14, 9 February 2017, both under Article 6 § 1 (Right to a fair hearing in civil proceedings – Applicability) above.

67. *Regner v. the Czech Republic* [GC], no. 35289/11, ECHR 2017. See also under Article 6 § 1 (Right to a fair hearing in civil proceedings – Applicability) above.

his security clearance were unsuccessful. During those proceedings the applicant was refused access to the intelligence information on which the revocation decision was based. He was later convicted and sentenced for, *inter alia*, participation in organised crime as well as for aiding and abetting an abuse of power and influencing public procurement. He complained under Article 6 of his lack of access to the intelligence information during the civil proceedings challenging the revocation of his security clearance.

The Grand Chamber found no violation of Article 6.

The Grand Chamber accepted that the national courts' access to and review of classified intelligence material could constitute the principal safeguard of the rights of a party to civil proceedings who had had no access to that material.

It noted, in particular, that neither the applicant nor his lawyer had had access to the classified security-service information on which the revocation decision had been based; the defendant Ministry had had access to that information; and, in so far as the revocation decision was based on those documents, the grounds for that decision had not been disclosed to him. Drawing on cases where evidence had been withheld from an applicant on public-interest grounds both in civil (*Myriana Petrova*[68], cited above, and *Ternovskis v. Latvia*[69]) and criminal proceedings (notably, *Fitt v. the United Kingdom*[70]), the Grand Chamber had regard to the proceedings as a whole (*Schatschaschwili v. Germany*[71]) to determine whether the restrictions on the adversarial and equality-of-arms principles, as applicable to civil proceedings, were sufficiently counterbalanced by other procedural safeguards.

In finding that there were sufficient safeguards and no violation of Article 6, the Grand Chamber, as noted above, was persuaded by the protection afforded by the national courts' access to and review of the classified material as well as their review of the decision-making based on that material. Certain aspects were of particular importance: the domestic courts had unlimited access to all the classified documents on which the revocation decision had been based and could have ordered disclosure if they felt classification was not warranted; the domestic courts' jurisdiction was broader than the items pleaded by the applicant and extended to all the facts of the case so that they could, for example, compensate for any gaps in the defence due to the lack of disclosure;

68. *Myriana Petrova v. Bulgaria*, no. 57148/08, 21 July 2016.
69. *Ternovskis v. Latvia*, no. 33637/02, 29 April 2014.
70. *Fitt v. the United Kingdom* [GC], no. 29777/96, ECHR 2000-II.
71. *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015.

and those courts had the power to review the merits of and quash the revocation decision as arbitrary.

The Grand Chamber's reasoning does, nevertheless, suggest that the revocation proceedings could have been improved, while respecting the necessary confidentiality: it would have been desirable for the authorities, or at least the Supreme Administrative Court, to have explained to the applicant, even summarily, the substance of the accusations that led to the revocation and the extent of the review carried out by them.

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

Applicability

The *Simeonovi v. Bulgaria*[72] judgment concerned the right to a lawyer from the moment of arrest and the right to be informed of that defence right.

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

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

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

It was necessary to clarify whether the right to a lawyer was triggered from the moment of arrest or from the moment of interrogation. The Grand Chamber reiterated its established case-law (see *Ibrahim and Others v. the United Kingdom*[73]) that a "criminal charge" existed from the moment an individual was officially notified by the competent authority of an allegation that he had committed a criminal offence, or from the point at which his situation had been substantially affected by actions

72. *Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017. See also under Article 6 § 3 (c) (Defence through legal assistance) below.

73. *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 249, ECHR 2016.

taken by the authorities as a result of a suspicion against him. It followed that the right to legal assistance became applicable from the moment of the applicant's arrest and, thus, it applied whether or not the applicant had been interrogated or subjected to any investigative act during the relevant period.

One of the issues in *Moreira Ferreira v. Portugal (no. 2)*[74] was whether the Court was competent to examine a complaint regarding the refusal by a Supreme Court to reopen criminal proceedings following an earlier finding by the Court of a violation of Article 6. The Court found that it was (see below under Fairness of the proceedings).

Fairness of the proceedings[75]

The *Moreira Ferreira (no. 2)* judgment, cited above, concerned the competence of the Court to examine a complaint regarding the refusal by a domestic court to reopen criminal proceedings following an earlier finding by the Court of a violation of Article 6.

The applicant's previous application before the Court (no. 19808/08) had ended with a finding of a violation of Article 6 as she had not been heard in person by the domestic court that had convicted her. Under Article 41 the Court noted that reopening the proceedings represented, in principle, an appropriate means of addressing the violation of Article 6 and, further, that Article 449 of the Code of Criminal Procedure allowed such reopening. When the applicant then applied to reopen those proceedings under Article 449 citing the violation found by the Court, the Supreme Court refused on the basis that the Court's finding was not incompatible with, and did not give rise to serious doubts about, that conviction. The applicant then complained to the Court under Articles 6 and 46 of the Convention (the present application) of the refusal of the Supreme Court to reopen the proceedings.

The Grand Chamber considered that Article 46 did not preclude it from examining the applicant's complaint under Article 6 of the Convention. It concluded that, while Article 6 applied to the reopening proceedings before the Supreme Court, there had been no violation of that provision.

In the present case, the Grand Chamber extended the principles adopted in a civil context in *Bochan v. Ukraine (no. 2)*[76] to the criminal

74. *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, ECHR 2017.
75. See also *Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017.
76. *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, ECHR 2015.

context, emphasising that the rights of persons charged with a criminal offence require greater protection than those of parties to civil proceedings and noting that the Explanatory Memorandum of Recommendation No. R (2000) 2 of the Committee of Ministers states that reopening proceedings would be of particular importance in the field of criminal law.

Three issues had to be examined by the Court.

The first was whether Article 46 of the Convention precluded the Court's examination under Article 6 and, notably, to what extent the Court's assessment of the Supreme Court's refusal to reopen the criminal trial amounted to assessing the adequacy of execution. Relying on the cases of *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*[77], *Egmez v. Cyprus*[78] and, notably, *Bochan (no. 2)*, cited above, the Court observed that measures taken by a State following a finding of a violation of the Convention (including a domestic rehearing) could give rise to a "new issue" falling to be examined by the Court. In the present case, the Grand Chamber considered that the Supreme Court had dealt with a new issue, namely the compatibility of the applicant's conviction in the light of the finding of a violation of the right to a fair trial by the Court. It concluded that Article 46 did not preclude the Court from examining a new complaint (regarding the fairness of the proceedings before the Supreme Court) under Article 6 of the Convention.

The next question was whether Article 6 applied to the proceedings to reopen before the Supreme Court. Reiterating again the principles set out in *Bochan (no. 2)*, the Grand Chamber drew on the Court's case-law on the applicability of Article 6 to review proceedings in a criminal context – notably, to reopening on the grounds of a miscarriage of justice (for example, *Lenskaya v. Russia*[79]), to review proceedings (*Yaremenko v. Ukraine (no. 2)*[80]) and to an extraordinary remedy (*Meftah and Others v. France*[81]) – to find that Article 6 applies in its criminal aspect to remedies classified as extraordinary in domestic law where the domestic court is called upon to "determine the charge".

Having regard to the nature of the task of the Supreme Court under Article 449 (to compare the conviction with the grounds on which the Court found a violation of Article 6) and having regard to the Supreme Court's review in the present case (in addition to its role

77. *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, ECHR 2009.
78. *Egmez v. Cyprus*, no. 30873/96, ECHR 2000-XII.
79. *Lenskaya v. Russia*, no. 28730/03, §§ 39-40, 29 January 2009.
80. *Yaremenko v. Ukraine (no. 2)*, no. 66338/09, 30 April 2015.
81. *Meftah and Others v. France* [GC], nos. 32911/96 and 2 others, ECHR 2002-VII.

under Article 449, it had also re-examined the merits of the applicant's complaint concerning her absence from the relevant hearing and the consequences for the validity of her conviction), the Grand Chamber found that the Supreme Court's scrutiny was such as to amount to "an extension" of the original criminal proceedings and, thus, to the determination of a criminal charge so that Article 6 of the Convention was found to apply to the reopening proceedings before the Supreme Court.

Thirdly, the Grand Chamber went on to examine the merits of the Article 6 § 1 complaint regarding the reasons provided by the Supreme Court for its decision. According to the Court's established case-law (outlined in *Bochan (no. 2)*), a judicial decision could not be qualified as arbitrary to the point of undermining the fairness of the proceedings unless no reasons were given or unless the reasons given were based on a manifest factual or legal error of the domestic court resulting in a denial of justice. The Grand Chamber found that neither the Supreme Court's review of the relevant domestic judgment nor its interpretation of the Court's 2011 judgment were arbitrary. Interestingly, the Grand Chamber accorded to the Supreme Court a margin of appreciation as regards its interpretation of the Court's 2011 judgment. While the Supreme Court had inferred from its reading of the 2011 judgment that the Court had "precluded from the outset any possibility that its decision might raise serious doubts about the conviction", the margin of appreciation meant that the Grand Chamber did not consider it necessary to express a position on the validity of that interpretation.

The *Cerovšek and Božičnik v. Slovenia*[82] judgment concerned a case in which the reasons for finding the applicants guilty were given by judges who had not participated in their trial.

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

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

82. *Cerovšek and Božičnik v. Slovenia*, nos. 68939/12 and 68949/12, 7 March 2017.

The judgment is noteworthy for the Court's reiteration in the above context of the importance of a reasoned judgment at the close of a trial and of the principle of immediacy. It stressed that the duty to give reasons, among other things, ensured the proper administration of justice, prevented arbitrariness, contributed to the confidence of the public and the accused in the decision reached, and allowed for possible bias on the part of a judge to be discerned and redressed. These objectives could not be satisfied in the circumstances of the applicants' case, since the judge who had conducted the trial did not explain her verdict in terms of her assessment of the evidence adduced before her, including the credibility of the oral testimony given by the applicants and witnesses. In answer to the Government's argument that there were exceptional circumstances that warranted a departure from the standard domestic procedure, namely the trial judge's retirement, the Court observed (paragraph 44):

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

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

The *Grba v. Croatia*[83] judgment concerned the applicant's participation in multiple illicit transactions with undercover agents.

The applicant was involved in four encounters with undercover police agents during which he sold them a significant quantity of counterfeit euros. In the criminal proceedings the applicant claimed that those transactions were the result of the influence of the undercover agents in inciting him to commit the offences. The domestic court rejected that defence, finding that the undercover agents' actions had been covered by an investigating judge's order and that it could not be said that they had allowed the applicant to develop his criminal activity or in any manner incited him to commit an offence.

In the Convention proceedings the applicant maintained that he had been the victim of police entrapment and for that reason his trial had not complied with Article 6 fairness guarantees.

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83. *Grba v. Croatia*, no. 47074/12, 23 November 2017.

The Court has addressed on several occasions the use of evidence obtained by means of entrapment by an *agent provocateur*. The relevant principles are well-established (see, most recently, the comprehensive review of the case-law in *Matanović v. Croatia*[84]). However, this is the first case in which the Court has expressly addressed the question of whether and in what circumstances recourse to a strategy involving the arrangement of multiple illicit transactions with a suspect by the State authorities may run counter to the Article 6 requirements of protection from entrapment and the abuse of powers by the State in the investigation of crime. The Court distilled the following guiding principles from the existing case-law, observing at the outset that recourse to such strategy is a recognised and permissible means of investigating a crime when the criminal activity is not a one-off, isolated criminal incident but a continuing illegal enterprise.

In the first place, in keeping with the general prohibition of entrapment, the actions of undercover agents must seek to investigate ongoing criminal activity in an essentially passive manner and not exert an influence such as to incite the commission of a greater offence than the one the individual was already planning to commit without such incitement.

Secondly, any extension of the investigation must be based on valid reasons, such as the need to ensure sufficient evidence to obtain a conviction, to obtain a greater understanding of the nature and scope of the suspect's criminal activity, or to uncover a larger criminal circle. In the absence of such reasons, the State authorities may be found to be engaging in activities which improperly enlarge the scope or scale of the crime.

Thirdly, in either of the above situations (improper conduct of undercover agents in one or more multiple illicit transactions or involvement in activities enlarging the scope or scale of the crime) the State authorities might unfairly subject the defendant to increased penalties either within the prescribed range of penalties or for an aggravated offence. Should it be established that this was the case, the relevant inferences in accordance with the Convention must be drawn either with regard to the particular illicit transaction effected by the improper conduct of State authorities or with regard to the arrangement of multiple illicit transactions as a whole.

Fourthly, as a matter of fairness, the sentence imposed should reflect the offence which the defendant was actually planning to commit.

84. *Matanović v. Croatia*, no. 2742/12, §§ 123-24 and 132, 4 April 2017.

Although it would not be unfair to convict the person, it would be unfair for him or her to be punished for that part of the criminal activity that was the result of improper conduct on the part of the State authorities.

On the facts of the applicant's case, the Court was satisfied that the first illicit transaction between the applicant and the undercover agent was the result of the applicant's own deliberate conduct and he had not been induced to produce counterfeit money. Furthermore, and again with reference to the facts and the materials available to it, the Court found it impossible to establish with a sufficient degree of certainty whether or not the applicant was the victim of entrapment contrary to Article 6 with regard to his participation in the later transactions (the substantive test of incitement). On that account, it was essential to examine the procedure whereby the applicant's plea of entrapment, which was arguable, was assessed so as to ensure that the rights of the defence were adequately protected (the procedural test of incitement). The Court's inquiry into this matter led it to conclude that the domestic courts had failed in their task of verifying that the manner in which the multiple test purchases had been ordered and conducted excluded the possibility of abuse of power, in particular of entrapment in any of the subsequent illegal purchases, or whether the police agents engaged in the activities which might have improperly enlarged the scope of the applicant's criminal activity. In addition, the Court noted that the domestic courts had based the applicant's sentence on the continuing criminal activity related to his multiple illicit transactions with the police agents.

The *Haarde v. Iceland*[85] judgment concerned the fairness of impeachment proceedings.

The applicant was Prime Minister of Iceland between 2006 and 2009. Following the adoption of a resolution by Parliament, the applicant was impeached before the Court of Impeachment on six charges relating to the collapse of the Icelandic banking system in October 2008. The resolution had been preceded by (i) the establishment of a Special Investigation Commission tasked among other things with analysing the causes of the collapse, (ii) the conduct of a fact-finding inquiry by an *ad hoc* parliamentary review committee ("PRC"), and (iii) the appointment by Parliament of a prosecutor to prepare the case for trial. The applicant was ultimately convicted of only one of the charges,

85. *Haarde v. Iceland*, no. 66847/12, 23 November 2017.

namely failure through gross negligence to hold ministerial meetings on important government matters, as prescribed by Article 17 of the Constitution and section 8c of the Ministerial Accountability Act.

In the Convention proceedings the applicant claimed that the process of deciding whether to bring charges against him, including the PRC's and Parliament's examination of and vote on the issue, had been arbitrary and political. He also complained among other things that the PRC and the prosecutor had failed to investigate the case properly to the detriment of the fairness of the proceedings before the Court of Impeachment and that that body had lacked impartiality.

The Court ruled against the applicant. The judgment is of note on account of the context and the manner in which the Court addressed the applicant's complaint from the standpoint of Article 6. Interestingly, the Court examined the applicant's complaints without dwelling on the question whether the impeachment proceedings involved the determination of a criminal charge or charges against him (see, for example, *Ninn-Hansen v. Denmark*[86]). This was not disputed by the Government.

It is also of interest that the Court assessed whether any measures taken by the PRC and the prosecutor during the pre-trial stage of the proceedings "could have weakened his position to such an extent that all subsequent stages of the proceedings were unfair". It found on the facts and with reference to the conclusions of the Court of Impeachment on the applicant's allegations of pre-trial unfairness that the pre-trial collection of evidence had not been conducted in a manner prejudicial to the interests of the defence. The Court's approach to the applicant's complaints suggests that there may be occasions on which it would be prepared to find that Article 6 had been breached precisely because of a failure on the part of the authorities to comply with the safeguards contained in that Article before a case reaches trial, and irrespective of the overall fairness of the proceedings. As the case-law stands, an exception to the overall-fairness approach has only been applied in the case of confessions obtained as a result of torture or of other ill-treatment in breach of Article 3 (see, for example, *Gäfgen v. Germany*[87]).

Responding to the applicant's allegations that the bringing of the impeachment proceedings was political and arbitrary, the Court noted in the light of the comparative information available to it that the Contracting States have adopted different approaches to dealing with the criminal liability of members of the government for acts or omissions

86. *Ninn-Hansen v. Denmark* (dec.), no. 28972/95, ECHR 1999-V.

87. *Gäfgen v. Germany* [GC], no. 22978/05, § 166, ECHR 2010.

that have taken place in the exercise of their official functions. It stressed that its task was confined, whatever the approach chosen at the national level, to reviewing the complaints submitted to it. Significantly, the Court observed as follows (paragraph 85):

> "The Court is mindful of the fact that while the purpose of the relevant constitutional, legislative and procedural frameworks on this subject should be to seek a balance between political accountability and criminal liability, and to avoid both the risk of impunity and the risk of ill-founded recourse to criminal proceedings, there may be risks of abuse or dysfunctionalities involved, which must be avoided. The Court is aware of the importance of ensuring that criminal proceedings are not misused for the purpose of harming political opponents or as instruments in political conflict. The Court must therefore bear in mind, when reviewing and assessing the circumstances of each case and the conduct of the proceedings complained of under Article 6, the need to ensure that the necessary standards of fairness are upheld regardless of the special features of those proceedings."

The Court noted that the fact that the decision to prosecute a member of the government was entrusted to Parliament – and may to some extent involve political or party-political considerations – was not of itself sufficient to raise an issue under Article 6. What was important was the fact that the applicant's guilt or innocence was determined by a court of law in accordance with the evidence presented and that the process leading to the applicant's indictment was neither arbitrary nor political to such an extent that the fairness of his trial was prejudiced.

Finally the Court had to address the applicant's allegation that the eight lay judges of the fifteen-member Court of Impeachment had been appointed by Parliament, effectively the prosecutor in his case, thus undermining its independence and impartiality. It is noteworthy that in rejecting the applicant's contention the Court had regard to the "special character" of the Court of Impeachment, observing that "[a]lthough political sympathies may still play a part in the process of appointment of lay judges to the Court of Impeachment, [it] does not consider that this alone raises legitimate doubts as to their independence and impartiality". It was crucial for the Court that the relevant legislation provided guarantees for securing their independence and impartiality and that there was no evidence that the lay judges had by their conduct shown bias or cast doubt on their or the tribunal's independence.

The *Ramda v. France*[88] judgment concerned the lack of reasons given for the verdict of a jury formed of professional judges.

The applicant, an Algerian national, was extradited from the United Kingdom to France on charges related to a series of terrorist attacks in 1995 in France. He was first tried and convicted by a criminal court (*tribunal correctionnel*) on charges concerning his participation in a group aimed at preparing terrorist attacks. He was subsequently tried and convicted by an assize court (*cour d'assises*) on charges of complicity to commit a series of particular crimes, such as murder and attempted murder. The assize court was specially constituted in that the lay jurors were replaced with professional judges, it being considered that lay persons would be fearful of reprisals if sitting in a terrorism case.

The Chamber found that there had been no violation of Article 6 as regards the lack of reasons given by the jury of professional judges of the assize court.

The judgment is of contemporary relevance concerning as it does the prosecution of terrorist offences.

The judgment applies for the first time the *Taxquet v. Belgium*[89] principles (see, most recently, *Lhermitte v. Belgium*[90]) to professional judges. The general principle is that reasons should be given by judges for their decisions so the accused and the public can understand the verdict, this being a vital safeguard against arbitrariness which, in turn, fosters public confidence in an objective and transparent justice system. Reasoned decisions are also considered to demonstrate to the defence that it has been heard, contributing thereby to the acceptance of the decision, and the requirement to give reasons obliges judges to base their reasoning on objective arguments (*Hadjianastassiou v. Greece*[91], and *Taxquet*). The *Taxquet* judgment developed an exception to this general principle in order to accommodate legal systems where the criminal courts sit with lay jurors who did not therefore give reasons. Although the present case concerned a jury of *professional* judges, the Chamber still applied the *Taxquet* exception.

Although it is an interesting case-law point, it is of historical interest only for France since Law no. 2011/939 of August 2011 now requires a "statement of reasons" for all decisions of the assize court including an

88. *Ramda v. France*, no. 78477/11, 19 December 2017. See also under Article 4 of Protocol No. 7 (Right not to be tried or punished twice: *ne bis in idem*) below.

89. *Taxquet v. Belgium* [GC], no. 926/05, § 90, ECHR 2010.

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

91. *Hadjianastassiou v. Greece*, 16 December 1992, § 33, Series A no. 252.

assize court specially composed as in the present case. The present case should also be distinguished from those where the jury (lay) was entirely replaced (also to avoid intimidation of lay persons in terrorism cases) by judges sitting on the bench and who therefore give reasons for their judgments (see the "Diplock courts" in *McKeown v. the United Kingdom*[92], as well as the Special Criminal Court in *Donohoe v. Ireland*[93] and *Heaney and McGuinness v. Ireland*[94]).

Defence rights (Article 6 § 3)

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

The *Simeonovi*[95] judgment, cited above, concerned the right to a lawyer from the moment of arrest and the right to be informed of that defence right.

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

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

(i) The particular factual context of the present case allowed the Grand Chamber to confirm the scope and application of its judgments in *Salduz v. Turkey*[96] and *Ibrahim and Others v. the United Kingdom*[97]. On the one hand, the applicant had been detained in police custody for three days after his arrest ("the relevant period") during which time he was neither informed of his right to be represented by a lawyer of his own choosing nor provided with a lawyer. On the other, during that period no statement was taken from him, no evidence capable of being used

92. *McKeown v. the United Kingdom*, no. 6684/05, 11 January 2011.
93. *Donohoe v. Ireland*, no. 19165/08, 12 December 2013.
94. *Heaney and McGuinness v. Ireland*, no. 34720/97, ECHR 2000-XII.
95. *Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017. See also under Article 6 § 1 (Right to a fair hearing in criminal proceedings – Applicability) above.
96. *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008.
97. *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, ECHR 2016.

against him was obtained or included in the case file, and there was no evidence that he had been involved in any investigative measures.

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

(iii) The Grand Chamber confirmed the link between the requirement to notify an accused of his rights and the establishment of any "voluntary, knowing and intelligent" waiver of those rights (*Dvorski v. Croatia*[98], and *Ibrahim and Others*[99]). In the present case, the Grand Chamber found that, even supposing that the applicant did not expressly request the assistance of a lawyer during the relevant period (there was a factual dispute), he could not be deemed to have implicitly waived his right to legal assistance, since he had not received, promptly after his arrest, information regarding his right to be represented by a lawyer of his own choosing. The Court could therefore conclude that the applicant's right to legal assistance had been restricted during the relevant period.

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

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

In that connection, the Grand Chamber attached decisive importance to the fact that, during the relevant period, no evidence capable of being used against the applicant had been obtained and included in the case file. No statement was taken from him. No evidence indicated that he was involved in any other investigative measures during that period (such as an identification parade) and he did not personally allege before the Court that the domestic courts had possessed evidence obtained during the relevant period and used it against him at the trial. Domestic law excluded evidence obtained in a manner incompatible with the Code of Criminal Procedure and the lack of legal assistance

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

99. *Ibrahim and Others*, cited above, §§ 272-73.

during questioning would have rendered any resulting statement inadmissible. No adverse inferences would have been drawn from the applicant's silence and there was no causal link even posited between his later confession and the prior absence of a lawyer. He had actively participated in all stages of the criminal proceedings. His conviction was not based exclusively on his later confession but also on a "whole body of consistent evidence". The case was examined at three instances, all courts giving due consideration to the evidence available.

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

The judgment in *M v. the Netherlands*[100] concerned a complaint under Article 6 §§ 1 and 3 (c) of the Convention regarding restrictions on communications between the applicant and his defence team.

The applicant, a former member of the Netherlands secret service, the AIVD (*Algemene Inlichtingen – en Veiligheidsdienst*, General Intelligence and Security Service), was charged with having supplied information covered by State secrecy to unauthorised third parties. He was ultimately convicted.

In the Convention proceedings the applicant made a number of complaints concerning the fairness of the domestic proceedings. Of particular interest is his submission that the fairness of the proceedings was compromised on account of the restrictions placed by the prosecution on the scope of his communication with his lawyers during the trial proceedings. The applicant was given to understand by the AIVD that he would not be allowed to disclose information defined by the AIVD itself as secret (such as the names of AIVD members to be called as witnesses) even to his defence lawyers. He was threatened with further prosecution if he did. The applicant contended that there had been a breach of Article 6 §§ 1 and 3 (c), and this notwithstanding an undertaking given by the Advocate-General not to prosecute him for breach of his duty of secrecy if such breach was justified by the rights of the defence.

The Court has already had occasion to underscore in a variety of contexts that the lawyer-client relationship is in principle privileged and

100. *M v. the Netherlands*, no. 2156/10, ECHR 2017.

that the fundamental rule of respect for lawyer-client confidentiality may only be derogated from in exceptional cases and on condition that adequate and sufficient safeguards against abuse are in place (see, for example, *Erdem v. Germany*[101]). It is of interest that in the applicant's case there was no direct or indirect interference with the communication between the applicant and his defence team, for example in the form of surveillance of their discussions or monitoring of their correspondence (compare and contrast *S. v. Switzerland*[102]; *Castravet v. Moldova*[103]; and *Khodorkovskiy and Lebedev v. Russia*[104]). However what was important for the Court was the fact that communication between the applicant and his counsel was not free and unrestricted as to its content, as the requirements of a fair trial normally require. The applicant was at all times exposed to the risk of prosecution were he to divulge State secret information to his lawyers. The Court dismissed the Government's argument that the Advocate-General's undertaking referred to above acted as a counterbalancing factor. It observed (paragraph 95):

> "This laid upon the applicant the burden to decide, without the benefit of counsel's advice, whether to disclose facts not already recorded in the case file and in so doing risk further prosecution, the Advocate-General retaining full discretion in the matter."

It further considered

> "that it cannot be expected of a defendant to serious criminal charges to be able, without professional advice, to weigh up the benefits of full disclosure of his case to his lawyer against the risk of prosecution for so doing" (paragraph 96).

In conclusion, the Court found that the fairness of the proceedings was thus irretrievably compromised and for that reason there had been a violation of Article 6 §§ 1 and 3 (c) in this respect.

Other rights in criminal proceedings

No punishment without law (Article 7)

In *Koprivnikar v. Slovenia*[105] the Court examined whether the domestic courts had complied with the principle of legality when fixing a combined sentence for multiple offences.

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101. *Erdem v. Germany*, no. 38321/97, §§ 65 et seq., ECHR 2001-VII (extracts).
102. *S. v. Switzerland*, 28 November 1991, § 48, Series A no. 220.
103. *Castravet v. Moldova*, no. 23393/05, § 51, 13 March 2007.
104. *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 627, 25 July 2013.
105. *Koprivnikar v. Slovenia*, no. 67503/13, 24 January 2017.

The applicant was convicted (in three separate judgments) of three separate offences including murder, the latter offence attracting at the time a maximum sentence of thirty years' imprisonment. On the basis of its interpretation of the provisions of the 2008 Criminal Code, a sentencing court subsequently imposed an overall or combined sentence of thirty years' imprisonment on the applicant in respect of all three offences.

In the Convention proceedings, the applicant maintained that the overall sentence imposed breached Article 7 of the Convention given that the 2008 Criminal Code provided for the imposition of a maximum overall penalty of twenty years in a situation such as the applicant's, and not thirty years as found by the sentencing court.

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

Firstly, the Court observed that the legal provision relied on by the sentencing court provided a deficient legal basis for the determination of the combined sentence in the applicant's case and allowed for contradictory conclusions to be drawn. This situation contravened the principle of legality and in particular the requirement that a penalty be clearly defined in domestic law. It noted (paragraph 55):

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

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

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

Right not to be tried or punished twice: *ne bis in idem* (Article 4 of Protocol No. 7)

The *Ramda*[106] judgment, cited above, concerned the compatibility of successive trials with Article 4 of Protocol No. 7.

The applicant, an Algerian national, was extradited from the United Kingdom to France on charges related to a series of terrorist attacks in 1995 in France. He was first tried and convicted by a criminal court (*tribunal correctionnel*) on charges concerning his participation in a group aimed at preparing terrorist attacks. He was subsequently tried and convicted by an assize court (*cour d'assises*) on charges of complicity to commit a series of particular crimes, such as murder and attempted murder.

The Chamber found that there had been no violation of Article 4 of Protocol No. 7 (the *ne bis in idem* principle) as regards the successive trials of the applicant.

As regards Article 4 of Protocol No. 7 and the determination of whether the offences in question were the same, the judgment applies the factual approach of *Sergey Zolotukhin v. Russia*[107], an approach explicitly approved in the later case of *A and B v. Norway*[108]. That approach provides, in particular, that the question of whether the relevant offences were the same (*idem*) depends on a facts-based assessment rather than, for example, on a formal assessment comparing the "essential elements" of the offences.

It is further interesting to note that the Court drew on the obligation on the State to prosecute grave (war) crimes developed in *Marguš v. Croatia*[109], and applied it to the present terrorism context.

Right to an effective remedy (Article 13)

In the *Tagayeva and Others*[110] judgment, cited above, the Court considered the obligations of the State, as regards a large-scale hostage-taking by terrorists, before, during and after the event.

The case concerned the hostage-taking in a school in Beslan, North Ossetia, from 1 to 3 September 2004, the organisation of the rescue operation, the storming of the school by State forces and the

106. *Ramda v. France*, no. 78477/11, 19 December 2017. See also under Article 6 § 1 (Right to a fair hearing in criminal proceedings – Fairness of the proceedings above.

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

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

109. *Marguš v. Croatia* [GC], no. 4455/10, §§ 127-28, ECHR 2014 (extracts).

110. *Tagayeva and Others v. Russia*, nos. 26562/07 and 6 others, 13 April 2017. See also under Article 2 (Obligation to protect life) above.

subsequent proceedings. There were hundreds of dead and injured and the applicants (over 400) are next of kin and survivors. They complained under Article 2 alone and in conjunction with Article 13 of the Convention.

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

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

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

Firstly, Article 13 required a compensation mechanism. In the present case, all of the applicants had obtained State and local compensation based on damage suffered regardless of the outcome of the criminal proceedings: this being a "victim based" solution, it was considered justified by the Court. The Court also noted with approval in this context additional commemorative actions benefitting all affected by the events at Beslan (see, in a comparable context, *Zuban and Hamidović v. Bosnia and Herzegovina*[111]). The awards later made by the Court under Article 41 took into account the compensation awarded at the national level. Secondly, while the facts underlying the violations of Article 2 by the State had not been elucidated in the main and ongoing criminal investigation, the criminal prosecutions of individuals (the surviving terrorist and two police officers) as well as the detailed investigative work of parliamentary commissions, ensured access by the victims and the public to detailed knowledge concerning aspects of the serious human rights violations that would otherwise have remained inaccessible. In that sense, these could be considered relevant aspects of effective remedies to which Article 13 referred, which were aimed at establishing the knowledge necessary to elucidate the facts and which were distinct from the State's obligations under Article 2 of the Convention.

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111. *Zuban and Hamidović v. Bosnia and Herzegovina* (dec.), nos. 7175/06 and 8710/06, 2 September 2014.

OTHERS RIGHTS AND FREEDOMS

Right to respect for one's private and family life, home and correspondence (Article 8)[112]

Private life[113]

The *A.-M.V. v. Finland*[114] judgment concerned restrictions on the right to self-determination of an intellectually disabled person.

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

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

The Court did not find fault with the legislative framework governing the appointment of a mentor in respect of a person such as the

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112. See also under Article 8 (Private and family life), *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, ECHR 2017, and *K2 v. the United Kingdom* (dec.), no. 42387/13, 7 February 2017; under Article 8 (Private life), *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, 6 April 2017; under Article 8 (Private life and correspondence) *Bărbulescu v. Romania* [GC], no. 61496/08, ECHR 2017; and under Article 2 of Protocol No. 4 (Freedom to choose residence), *Garib v. the Netherlands* [GC], no. 43494/09, 6 November 2017.

113. See also, under Article 10 below, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, ECHR 2017, and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, ECHR 2017 (extracts).

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

applicant, nor with the manner of its application in his case (see above). It was important for the Court

> "that the impugned decision was taken in the context of a mentor arrangement that had been based on, and tailored to, the specific individual circumstances of the applicant, and that the impugned decision was reached on the basis of a concrete and careful consideration of all the relevant aspects of the particular situation. In essence, the decision was not based on a qualification of the applicant as a person with a disability. Instead, the decision was based on the finding that, in this particular case, the disability was of a kind that, in terms of its effects on the applicant's cognitive skills, rendered the applicant unable to adequately understand the significance and the implications of the specific decision he wished to take, and that therefore the applicant's well-being and interests required that the mentor arrangement be maintained" (paragraph 89).

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

The judgment is an important contribution to the Court's case-law on disability. It is also of interest to note that according to the Committee established under the United Nations Convention on the Rights of Persons with Disabilities, which has been ratified by forty-four of the forty-seven Council of Europe member States, including Finland, States Parties must "review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences"[115].

The *A.P., Garçon and Nicot v. France*[116] judgment concerned the making of a change of gender in civil-status documents conditional on completion of sterilisation surgery or treatment entailing a very high probability of sterility.

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115. General Comment No. 1 concerning Article 12, which proclaims the principle of equal recognition before the law.

116. *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, 6 April 2017.

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

The Court had previously found Article 8 to apply to legal recognition of the gender identity of transgender persons having undergone reassignment surgery (*Hämäläinen v. Finland*[117]), and to the conditions of eligibility for such surgery (*Schlumpf v. Switzerland*[118], and *Y.Y. v. Turkey*[119]). In the present case it found, with regard to legal recognition of the gender identity of transgender persons who had not undergone gender reassignment surgery or did not wish to do so, that gender identity, as a component of personal identity, came within the scope of the right to respect for private life. The "private life" aspect of Article 8 was therefore applicable.

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

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

Referring to the comparative law materials provided by the third-party interveners, the Court noted that the Contracting States held differing views on the sterilisation requirement and that no consensus

117. *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014.

118. *Schlumpf v. Switzerland*, no. 29002/06, 8 January 2009.

119. *Y.Y. v. Turkey*, no. 14793/08, ECHR 2015 (extracts).

had emerged on the subject. In principle, this finding thus entailed a wider margin of appreciation, especially since a public interest (civil status) was involved. Nevertheless, in view of the particularly fundamental nature of an individual's identity, which was of necessity affected by possible sterilisation, the State's margin of appreciation was narrow. The Court also highlighted the trend in the Contracting States' legal systems towards abolishing the sterilisation requirement, with eleven States having abolished it between 2009 and 2016.

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

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

The second condition, which made legal recognition of the gender identity of transgender individuals subject to proof that they "actually

suffered from the gender-identity disorder [in question]", was also contested by the second applicant.

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

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

While this judgment will not have a direct impact on the applicable legislation in France, which since 12 October 2016 has done away with the requirement concerning the irreversible change in appearance, it is of major significance for those Contracting Parties which continue to make sterilisation a prerequisite for recording a change of gender in civil-status documents. In that regard, the judgment is in line with the cases of *Y.Y. v. Turkey*, cited above, and *Soares de Melo v. Portugal*[120]. In these two judgments, the Court criticised sterilisation, whether as a prerequisite for authorisation to undergo gender reassignment surgery or in order to continue to exercise parental rights.

Private and family life

The *Paradiso and Campanelli v. Italy*[121] judgment concerned the separation and placement for adoption of a child conceived abroad through surrogacy and brought back to Italy in violation of Italian adoption laws.

The applicants, Italian nationals and a married couple, entered into a surrogacy arrangement in Russia, following which a child was born in Moscow. A birth certificate was issued in Moscow recording the applicants as the parents, without mention of the surrogacy. The first applicant brought the child back to Italy. The applicants requested the municipality to register the birth certificate. Criminal proceedings, which appeared still to be pending, were opened against the applicants.

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120. *Soares de Melo v. Portugal*, no. 72850/14, 16 February 2016.

121. *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, ECHR 2017.

The Italian courts ordered the child's removal from the applicants (the order was implemented when the child was about eight months old) and placement for adoption. The authorities also refused to accept the birth certificate and to register the applicants as the parents of the child. DNA tests established that there was no biological link between the child and the husband. In ordering the removal of the child, the courts gave weight to the illegality of the applicants' conduct under Italian law (concluding a surrogacy agreement contrary to assisted-reproduction laws and bringing the child to Italy in breach of adoption laws) and to the urgency of the situation (the child was considered to have been "abandoned").

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

(i) It is worth noting that the scope of the case before the Grand Chamber was quite circumscribed. It did not concern the registration of a foreign birth certificate or the recognition of a legal parent-child relationship in respect of a child born from a gestational surrogacy arrangement, the Chamber having dismissed this complaint on grounds of non-exhaustion. It did not concern separate complaints of an applicant child, the Chamber having dismissed the complaints raised on his behalf by the applicants (contrast *Mennesson v. France*[122], and *Labassee v. France*[123]).

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

(ii) The Grand Chamber concluded that the applicants' relationship with the child did not come within the sphere of family life because their "genuine personal ties" did not amount to *de facto* "family life". In particular, drawing on the Court's approach in earlier cases (*Wagner and J.M.W.L. v. Luxembourg*[124]; *Moretti and Benedetti v. Italy*[125]; and *Kopf and Liberda v. Austria*[126]), the Grand Chamber assessed the quality of the ties, the role played by the applicants and the duration of cohabitation, the

122. *Mennesson v. France*, no. 65192/11, §§ 96-102, ECHR 2014 (extracts).
123. *Labassee v. France*, no. 65941/11, §§ 75-81, 26 June 2014.
124. *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, 28 June 2007.
125. *Moretti and Benedetti v. Italy*, no. 16318/07, 27 April 2010.
126. *Kopf and Liberda v. Austria*, no. 1598/06, 17 January 2012.

latter criteria being a key factor. However, while it was accepted that the applicants had developed "a parental project" and close emotional bonds with the child, there was no biological tie with the child, the relationship was of short duration and the ties with the child had always been uncertain from a legal perspective (the birth certificate's compatibility with Russian law was uncertain and the applicants had acted contrary to Italian reproductive and adoption laws).

(iii) However, concerning as it did the applicants' decision to become parents (*S.H. and Others v. Austria*[127]), the case fell within the scope of their right to respect for their "private life". Since certain domestic proceedings concerned the second applicant's biological link to the child, "the establishment of the genetic facts" also had an impact on his identity and the applicants' relationship.

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

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

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127. *S.H. and Others v. Austria* [GC], no. 57813/00, § 82, ECHR 2011.

In the *K2 v. the United Kingdom*[128] decision the Court considered the test for assessing arbitrariness in the context of deprivation of citizenship.

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

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

Firstly, the Court confirmed that an arbitrary denial (*Genovese v. Malta*[129]) or revocation (*Ramadan v. Malta*[130]) of citizenship might, in certain circumstances, raise an issue under Article 8 of the Convention because of its impact on the private life of the individual. In determining whether a revocation of citizenship was in breach of Article 8, two separate issues had to be addressed: whether the revocation was arbitrary; and what the consequences of revocation were for the applicant.

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

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

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128. *K2 v. the United Kingdom* (dec.), no. 42387/13, 7 February 2017.

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

130. *Ramadan v. Malta*, no. 76136/12, § 85, ECHR 2016 (extracts).

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

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

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

Private life and correspondence

The *Bărbulescu v. Romania*[131] judgment concerned an employee's right to respect for private life and correspondence in the workplace and the limits of the employer's right to monitor.

The applicant's employer prohibited personal activities in the workplace including the use by employees of company resources for personal reasons. The employer monitored the applicant's electronic messaging, accessing mainly a Yahoo messenger account which the applicant had been instructed to create to communicate with customers but also his personal Yahoo messenger account. The volume and content of his messages were recorded and stored: certain messages were personal (some intimate). He was dismissed for using company resources for personal reasons. The transcript of his communications was used in evidence before the domestic courts.

The applicant complained under Article 8 of a breach of his right to respect for his private life and correspondence. Both the French Government and the European Trade Union Confederation were given

131. *Bărbulescu v. Romania* [GC], no. 61496/08, ECHR 2017.

leave to intervene as third parties. The Grand Chamber found a violation of the applicant's right to respect for his private life and correspondence.

The case gives rise to a number of interesting issues concerning the respective rights and obligations of employees and employers as regards personal electronic communications in the workplace.

(i) The question whether Article 8 applied – essentially whether the applicant could be said to have had a reasonable expectation of privacy – was not a straightforward one. While a messaging service is a form of communication in principle covered by the notions of private (social) life and correspondence, the applicant had been instructed by his employer to refrain from personal activities in the workplace including using company resources for personal reasons. Other factors were also considered to be relevant: the applicant had not been informed in advance of the nature and extent of his employer's monitoring activities; and while the applicant created the customer messenger account himself and had put a password on it, it was done on the employer's instructions and for professional activities. Interestingly, the Grand Chamber decided to leave open the question whether the applicant had a reasonable expectation of privacy because, in any event, "an employer's instructions cannot reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary". Article 8 therefore applied. In sum, whether or not an individual had a reasonable expectation of privacy, communications in the workplace are covered by the concepts of private life and correspondence.

(ii) The core question being whether the State had fulfilled its positive obligation to ensure respect for the applicant's Article 8 rights in the workplace, the Grand Chamber set down in some detail the principles by which the nature and scope of that obligation could be determined. Three aspects are worth noting.

– While in certain contexts that positive obligation translated into a requirement to establish a protective legislative framework, the Grand Chamber did not require this in the present context. It considered that the Contracting States had to be granted "a wide margin of appreciation" as regards the legal framework to regulate the conditions in which an employer might regulate electronic or other communications of a non-professional nature by its employees in the workplace. In this respect, the Grand Chamber was guided by the specific features of the labour context (contractual, partly self-regulatory, etc.) and the lack of any European consensus on the regulatory issue (few States having legislated on the exercise of employees' right to respect for their private life and correspondence in the workplace). That said, the States' discretion was not unlimited so that the positive obligation on the authorities was to

ensure that the introduction by an employer of measures to monitor correspondence and other communications, irrespective of the extent and duration of such measures, was to be "accompanied by adequate and sufficient safeguards against abuse", proportionality and procedural guarantees against arbitrariness being considered essential.

– The Grand Chamber then set down a detailed list of factors by which compliance with this positive obligation should be assessed, drawing on various international and European standards[132] and on the Court's comparative analysis: (i) whether the employee has been notified clearly and in advance of the possibility that the employer might monitor correspondence and other communications, and of the implementation of such measures; (ii) the extent of the monitoring by the employer and the degree of intrusion into the employee's privacy (traffic and content); (iii) whether the employer has provided legitimate reasons to justify monitoring the communications and accessing their actual content; (iv) whether there is a possibility of establishing a monitoring system based on less intrusive methods and measures; (v) the seriousness of the consequences of the monitoring for the employee subjected to it, as well as the use made of the results of monitoring; and (vi) whether the employee has been provided with adequate safeguards including, in particular, prior notification of the possibility of accessing the content of communications.

On the facts of the case, the Grand Chamber found that, while the domestic courts had "correctly" identified and applied the legal principles on monitoring of Internet use and electronic communications in the workplace set out in Directive 95/46/EC, there had been a violation of Article 8 because those courts had not also applied most of the above-listed criteria. Notwithstanding therefore the State's margin of appreciation, the domestic authorities had failed to strike a fair balance between the interests at stake, so that there had therefore been a violation of Article 8 of the Convention.

– The Grand Chamber also observed that an employee whose communications had been monitored should have access to a "remedy before a judicial body with jurisdiction to determine, at least in substance, how the criteria outlined above were observed and whether the impugned measures were lawful".

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132. International Labour Organization Code of Practice on the Protection of workers' personal data, 1997; Directive 95/46/EC of the European Parliament and of the Council 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; and Recommendation CM/Rec(2015)5 of the Committee of Ministers of the Council of Europe on the processing of personal data in the context of employment.

Freedom of thought, conscience and religion (Article 9)

Manifest one's religion or belief

The judgment in *Osmanoğlu and Kocabaş v. Switzerland*[133] concerned a refusal by the applicant parents on religious grounds to allow their daughters to attend compulsory mixed swimming lessons organised by the school.

The applicants were devout Muslims. They were fined on account of their refusal to comply with a requirement that their children take part in swimming classes organised by the primary school. The applicants' opposition was based on the fact that their children were girls and would have to share the swimming pool with boys, which was not in accordance with their religious beliefs. Pursuant to local-education regulations, attendance at swimming classes was a compulsory part of the physical-education component of the primary-school curriculum, which obligation applied until children reached the age of puberty. The applicants contested the refusal of the local authority to grant their children a dispensation from the obligation as well as the decision to fine them for their failure to ensure their children's presence at the classes. Their case was ultimately rejected by the Federal Tribunal, which reasoned that the local-education policy, as reflected in the impugned regulations, was designed to secure the integration of children, regardless of their or their parents' religious or cultural background, and that the authorities had made provision for particular religious or cultural sensitivities by installing separate changing and showering rooms for boys and girls and by allowing girls to wear burkinis in the swimming pool. It also observed that the mixed-swimming requirement only applied to children who had not reached the age of puberty.

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

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

As to the question of interference, the Court reiterated its previous case-law in concluding that, even if the Koran prescribed that the bodies

133. *Osmanoğlu and Kocabaş v. Switzerland*, no. 29086/12, ECHR 2017.

of female children should only be covered as from the age of puberty, the applicants' belief that their children should be prepared in advance to adhere to this tenet of the applicants' faith was an expression of their religious belief (see, in this connection, *Eweida and Others v. the United Kingdom*[134]). Article 9 was applicable and the refusal to dispense the applicants from the requirement to ensure their children's attendance at the school's swimming lessons amounted to an interference with the applicants' right to manifest their religion. It is important to note that Switzerland has not ratified Protocol No. 1 to the Convention, which in its Article 2 guarantees the right to education. That Article is usually regarded as *lex specialis* when it comes to disputes in the education sector involving the religious beliefs of parents.

In the instant case, the Court drew on the case-law principles which have informed its approach under Article 2 of Protocol No. 1 (see in particular, *Folgerø and Others v. Norway*[135], and *Lautsi and Others v. Italy*[136]) in order to determine, among other things, the scope of the authorities' margin of appreciation – wide in the Court's view – and whether a fair balance had been struck between the applicants' Article 9 rights and the aims which the impugned restriction sought to achieve (for which see the view of the Federal Tribunal, set out above).

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

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134. *Eweida and Others v. the United Kingdom*, nos. 48420/10 and 3 others, § 82, ECHR 2013 (extracts).

135. *Folgerø and Others v. Norway* [GC], no. 15472/02, § 84, ECHR 2007-III.

136. *Lautsi and Others v. Italy* [GC], no. 30814/06, §§ 59-62, ECHR 2011 (extracts).

beliefs (see above), the proportionate nature of the fine imposed on them following a series of warnings and the availability of an effective procedure to allow the applicants to assert their right to freedom of religion.

The *Adyan and Others v. Armenia*[137] judgment concerned the applicants' objection on grounds of conscience and religion to performing a service offered as an alternative to military service.

The applicants, who were Jehovah's Witnesses, objected to performing military service as well as the alternative to military service which had been introduced in Armenia in 2004. They were charged and later convicted under the Criminal Code of "evasion of fixed-term regular conscription to military or alternative service". In the domestic proceedings, they argued unsuccessfully that the alternative service was not of a genuinely civilian nature since it was supervised by the military authorities, was punitive in nature and that their conscience did not allow them to work directly or indirectly for the military.

In the Convention proceedings, the applicants pleaded that their conviction had violated their right to conscientious objection guaranteed by Article 9 of the Convention. The Court agreed with that submission.

In its landmark judgment in *Bayatyan v. Armenia*[138], the Grand Chamber addressed the scope of the protection afforded by Article 9 to conscientious objectors. It ruled that

> "opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9".

The applicant in the *Bayatyan* case, also a Jehovah's Witness, did not raise any objection to performing an alternative civilian service given that there was no such alternative in Armenia at the material time. His only complaint related to his conviction for refusing to serve in the army. In the instant case, the applicants did object to performing the alternative service and the Court had to address for the first time the applicability of Article 9 to such objection. In view of the principles set

137. *Adyan and Others v. Armenia*, nos. 75604/11 and 21759/15, 12 October 2017 (not final).
138. *Bayatyan v. Armenia* [GC], no. 23459/03, § 110, ECHR 2011.

out in *Bayatyan* and the reasons underpinning the objection, the Court had no difficulty in finding that Article 9 was applicable. The applicants' refusal to perform the alternative service was a manifestation of their religious beliefs and their conviction for evasion of the draft amounted to an interference with their freedom to manifest their religion.

As to the necessity of the interference, the Court observed that the fact that Armenia had introduced an alternative to military service in 2004 was not of itself sufficient to conclude that the authorities had discharged their obligation under Article 9 to make allowances for the exigencies of an individual's conscience and beliefs when implementing a system of compulsory military service (see, in this connection, *Bayatyan*, §§ 124-25). Importantly, it noted that

> "the right to conscientious objection guaranteed by Article 9 of the Convention would be illusory if a State were allowed to organise and implement its system of alternative service in a way that would fail to offer – whether in law or in practice – an alternative to military service of a genuinely civilian nature and one which was not deterrent or punitive in character" (paragraph 67).

The question for the Court to determine was whether the alternative labour service available to the applicants at the material time complied with those requirements.

The Court observed that, although the work was carried out in civilian institutions (for example, orphanages and hospitals) and was of a civilian nature, the military authorities were actively involved in the supervision of the work and of those performing it. It concluded that the alternative service was not hierarchically and institutionally sufficiently separated from the military system at the material time. It was significant for the Court, among other things, that the alternative-labour servicemen were required to wear a uniform and to stay at their place of service. Turning to the alleged deterrent or punitive nature of the work, it noted that the duration of the alternative labour service was much longer than the length of military service (forty-two months instead of twenty-four). In the Court's opinion, such a significant difference in the duration of service must have had a deterrent effect and can be said to have contained a punitive element.

The Court concluded that the authorities had failed to make appropriate allowances for the exigencies of the applicants' conscience and beliefs and to guarantee a system of alternative service that struck a fair balance between the interests of society as a whole and those of the applicants, as required by Article 9. It is noteworthy that the law

on alternative service was amended in 2013 in order to place it under purely civilian administration.

The judgment in *Hamidović v. Bosnia and Herzogovina*[139] concerned the punishment of a witness (the applicant) on account of his refusal to comply with a court order to remove a religious symbol when giving evidence.

The applicant was a member of a local group advocating the Wahhabi/Salafi version of Islam which opposed the concept of a secular State and recognised only God's law and court. The applicant was called to give evidence in a criminal trial involving members of the same group charged with offences of terrorism. He was fined for contempt of court for having refused to remove his skullcap when asked to testify. He had been warned of the consequences, but nevertheless insisted that the wearing of the skullcap was an integral part of his faith, in fact a duty. The trial court acted on the basis of an inherent power to regulate the conduct of proceedings in the interests of fairness for all parties. His appeal against the fine was based on his right to manifest his religion, as guaranteed by Article 9. The appeal was rejected, ultimately by the Constitutional Court, on the ground that the principle of secularism as enshrined in the Constitution of the respondent State took precedence over the right (which it acknowledged to be a duty) asserted by the applicant.

In the Convention proceedings, the applicant asked the Court to find that the sanction imposed on him had breached his rights under Article 9 of the Convention. The Court found for the applicant. The judgment is noteworthy for the following reasons.

In the first place, this was the first occasion on which the Court had to address the wearing of a religious symbol by a witness, a private individual, in a court setting and not at the place of work – a completely different context.

Secondly, and accepting that the sanction imposed on the applicant was "prescribed by law", having regard to the fact that the applicant had been warned of the consequences of his action, the Court reaffirmed that secularism is a belief protected by Article 9 of the Convention (see *Lautsi and Others v. Italy*[140]) and the upholding of secular and democratic values can be linked to the legitimate aim of the "protection of the rights

139. *Hamidović v. Bosnia and Herzegovina*, no. 57792/15, 5 December 2017.
140. *Lautsi and Others v. Italy* [GC], no. 30814/06, § 58, ECHR 2011 (extracts).

and freedoms of others" within the meaning of Article 9 § 2 (see *Leyla Şahin v. Turkey*[141], and *Ahmet Arslan and Others v. Turkey*[142]).

Thirdly, the Court reiterated that States should, in principle, be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one's religion or beliefs is "necessary". Its task was to determine whether the measures taken at national level were justified in principle and proportionate. On the facts of the applicant's case, the Court found that the respondent State had exceeded the wide margin afforded to it. It placed emphasis on the following main considerations: unlike a public official whose duty of discretion, neutrality and impartiality may entail a duty not to wear religious symbols and clothing when exercising his or her authority, the applicant was a private individual (see, for example, *Dahlab v. Switzerland*[143]; *Kurtulmuş v. Turkey*[144]; and *Ebrahimian v. France*[145]); the applicant was required to testify on pain of sanction and there was no indication that he was unwilling to give evidence; there was no reason to doubt that the applicant's act was inspired by his sincere religious belief that he must wear a skullcap at all times, "without any hidden agenda to make a mockery of the trial, incite others to reject secular and democratic values or cause a disturbance"; unlike the members of his religious group on trial, the applicant appeared before the court as summoned and stood up when requested, thereby clearly submitting to the laws and courts of the country.

Interestingly, the Court observed that there may be cases in which it would be justified to order a witness to remove a religious symbol. However, no such justification could be found in the applicant's case.

Freedom of expression (Article 10)[146]

Freedom of expression

The judgment in *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*[147] concerned the protection and responsibilities of non-governmental organisations (NGOs) when assuming a social-

141. *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 99, ECHR 2005-XI.

142. *Ahmet Arslan and Others v. Turkey*, no. 41135/98, § 43, 23 February 2010.

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

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

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

146. See also under Article 3 of Protocol No. 1 (Right to free elections) below, *Moohan and Gillon v. the United Kingdom* (dec.), nos. 22962/15 and 23345/15, ECHR 2017.

147. *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, ECHR 2017.

watchdog function (in this case, making allegations of misconduct by civil servants).

The applicant NGOs wrote a letter to three persons in authority in the District of Brčko voicing concerns about M.S., at the time a public servant at the district's multi-ethnic public radio station and a candidate for the post of director of the radio station. The letter criticised the district authorities for failing to apply the principle of proportionate representation of ethnic communities in the public service of the district and challenged the alleged proposed appointment of M.S. on the basis of alleged actions by M.S. that were disrespectful of Muslims and ethnic Bosniacs. The letter was later published: it was not established by whom. M.S. successfully brought defamation proceedings. The domestic courts' finding concerned only the applicant NGOs' private correspondence with the district authorities, not the later publication of the letter. Having failed to retract the contents of the letter, the applicant NGOs paid a fine of approximately 1,500 euros.

The applicant NGOs complained to the Court mainly under Article 10 of the Convention. The Grand Chamber found that there had been no violation of that provision, as the disputed interference was supported by relevant and sufficient reasons.

There are a number of noteworthy aspects to this judgment

Firstly, the Court balanced the expression rights of the applicant NGOs against M.S.'s right to private life guaranteed by Article 8, as opposed to the protection of the "reputation and rights of others" in Article 10 § 2 of the Convention. In so doing the Grand Chamber reiterated that, for Article 8 to apply, the attack had to be sufficiently serious and done in a manner causing prejudice to the personal enjoyment of the right to respect for private life (*Axel Springer AG v. Germany*[148]). Finding that the accusations against M.S. were not only capable of tarnishing her reputation but also of causing prejudice both to her professional and social environment, the accusations attained the required level of severity considered to harm M.S.'s rights under Article 8. It is interesting as M.S. was a civil servant, the context was her candidature for another civil-service post and, there being no evidence that the applicant NGOs had published the letter, their liability was assessed only in relation to their private correspondence with the three authorities.

Secondly, it is worth noting how the Grand Chamber characterised the applicant NGOs' actions. It found that they were not whistle-blowers within the meaning of that concept in this Court's case-law (*Guja v.*

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

Moldova[149]; *Heinisch v. Germany*[150]; and *Aurelian Oprea v. Romania*[151]). This was because they were not in an employment relationship with the radio station and did not therefore owe a duty of "loyalty, reserve and discretion" towards the radio station.

Rather, the situation was similar to cases concerning the right to report alleged irregularities in the conduct of State officials (*Zakharov v. Russia*[152]). However, the *Zakharov* case-law – which saw the Court "prepared to assess an applicant's good faith and efforts to ascertain the truth according to a more subjective and lenient approach than in other types of case" – had to be adapted to the distinctive features of the present case.

The main distinguishing feature was that the present applicants were NGOs playing a watchdog role "of similar importance to that of the press" (*Animal Defenders International v. the United Kingdom*[153]; the Grand Chamber also referred to the Fundamental Principles on the Status of Non-governmental Organisations in Europe, Council of Europe, 2002). According to the Court's constant case-law, by reason of the "duties and responsibilities" inherent in the exercise of freedom of expression, the safeguard afforded to journalists reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. The Grand Chamber had recently found (*Magyar Helsinki Bizottság v. Hungary*[154]) that the same obligations apply to an NGO assuming a social-watchdog function. The obligations in the present case were therefore stricter than in *Zakharov* given the identity (NGOs) and role (social watchdog) of the applicants. The Court concluded its review of the applicable principles by confirming that it would also take into account the criteria that apply to the dissemination of defamatory statements by the media in the exercise of their public-watchdog role (*Von Hannover v. Germany (no. 2)*[155]; *Axel Springer AG*, cited above, §§ 89-95; and *Couderc and Hachette Filipacchi Associés v. France*[156]).

Thirdly, applying these principles and finding no violation of Article 10, the Grand Chamber demonstrated how the requirement to act in "good

149. *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008.

150. *Heinisch v. Germany*, no. 28274/08, ECHR 2011 (extracts).

151. *Aurelian Oprea v. Romania*, no. 12138/08, 19 January 2016.

152. *Zakharov v. Russia*, no. 14881/03, 5 October 2006.

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

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

155. *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 108-13, ECHR 2012.

156. *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 93, ECHR 2015 (extracts).

faith ... to provide accurate and reliable information" translated into obligations on the applicant NGOs reporting on matters of public interest. A number of factors were of particular importance in that regard.

– The manner in which the applicant NGOs drafted the letter was reviewed in some detail and criticised by the Grand Chamber. For example, the term "[a]ccording to our information" failed to clearly indicate that part of the information came from sources other than the applicant NGOs and, since they had implied that they had direct access to that information, they had to take responsibility for it; and, while the letter requested the authorities to "react appropriately", the Court considered that insufficient to conclude that the applicant NGOs had requested the authorities to investigate or verify their allegations.

– The most important factor for the Court was the authenticity of the information disclosed. As noted above, the applicant NGOs were required, as the press would be, to verify the veracity of the allegations they had made against M.S. On the one hand, the Court added that this duty was greater since the applicant NGOs acted as representatives of particular segments of society and, further, that rendering an accurate account was important for the development and maintenance of mutual trust and of the NGOs' image as competent and responsible participants in public life. On the other, the Court accepted that a certain degree of hyperbole and exaggeration was to be tolerated and even expected from NGOs. However, the Grand Chamber found that the applicant NGOs' allegations were clearly inaccurate and unverified so that the extent of the obligation on NGOs to provide accurate and reliable information was not tested by the facts of the present case. For example, they had inaccurately reported one account by radio-station employees, and thus "loaded" that account against M.S.; another allegation amounted to an unverified rumour; and an additional and serious accusation (that M.S. had made an anti-Muslim statement in a newspaper) had been made frivolously without checking if M.S. was indeed the author of that statement and, when they later discovered that M.S. was not the author, they had failed to inform the recipients of the letter of this.

The *Bayev and Others v. Russia*[157] judgment concerned a legislative prohibition on the promotion of homosexuality among minors.

Each of the applicants was fined in administrative proceedings for having staged a protest against laws banning the promotion of homosexuality among minors. Such laws were enacted first at the

157. *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, ECHR 2017.

regional level and subsequently at the federal level. In the Convention proceedings the applicants relied on Articles 10 and 14 of the Convention. They maintained that the legislation in issue prevented them from campaigning in favour of the rights of sexual minorities and that the vagueness of the legislation made its application unforeseeable since it required them to be aware of the presence of minors in their daily activities in order to conceal their sexual orientation. The Court found a breach of both provisions of the Convention.

As to Article 10 of the Convention, the Court readily accepted that there had been an interference with the applicants' right to freedom of expression – they had been fined on account of their protest actions. It is noteworthy that the Court intimated that, irrespective of the fact that the applicants had been sanctioned for their individual acts of defiance, the very existence of the ban might of itself have constituted an interference with their Article 10 rights, having regard to its possible "chilling effect" on the applicants' situation as LGBT activists (see, in this connection, *Smith and Grady v. the United Kingdom*[158]). It is also of note that the Court decided to assess the justification relied on by the Government for the impugned legislation as general measures. It noted in line with precedent that the more convincing the general justifications for the general measures are, the less importance the Court will attach to its impact in the particular case (see *Animal Defenders International v. the United Kingdom*[159]).

As regards the applicants' criticism of the quality of the laws under consideration, the Court acknowledged that the impugned legislation was vague and unforeseeable in its application. Interestingly, it did not consider it appropriate to limit its analysis under Article 10 to the quality of the law requirement. It observed that this matter was secondary to the question of the necessity of such laws as general measures. For that reason, it took the broad scope of the laws into account in its assessment of the justifications put forward by the Government.

The Government defended the need for the legislative ban with reference to three imperatives drawn from the second paragraph of Article 10: (i) the protection of morals and family values and the fact that the majority of the Russian population disapproved of homosexuality and resented any display of same-sex relations; (ii) the protection of health on the ground that same-sex relationships posed a risk to public health and the attainment of demographic targets; (iii) the protection of

158. *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 127, ECHR 1999-VI.
159. *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 109, ECHR 2013 (extracts).

the rights of others, critically minors, and the need to shield them from information which could convey a positive image of homosexuality with the risk of inducing or forcing them into adopting a different sexual orientation.

(i) The Court's reasoning in response to the Government's first argument is of particular significance, based as it is on a clear line of case-law confirming the following principles: there is a clear European consensus on the recognition of individuals' rights to openly identify themselves as belonging to a sexual minority and to promote their own rights and freedoms (see, in this connection, *Alekseyev v. Russia*[160]); there is a growing tendency to include relationships between same-sex couples within the concept of "family life" (see *Schalk and Kopf v. Austria*[161]) and an acknowledgement of the need for their legal recognition and protection (see *Oliari and Others v. Italy*[162]); policies and decisions which embody a predisposed bias on the part of a heterosexual majority against a homosexual minority, even if they reflect traditions or general assumptions in a particular country, cannot be justified in Convention terms (see, for example, *Smith and Grady*, cited above, § 97).

With these considerations in mind, the Court rejected the Government's claim that regulating public debate on LGBT issues could be justified in order to protect public morality. It is noteworthy that the Court found that the legislation in question represented a pre-disposed bias against a homosexual minority, which could not be justified with reference to the popular support which the ban commanded (this conclusion also underpinned its finding of a breach of Article 14 of the Convention). It reiterated in this connection that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority.

(ii) As to the justification advanced on health grounds and demographic growth, the Court observed among other things that the Government had not demonstrated that the messages conveyed by the applicants at the time of their protests advocated reckless behaviour or any other unhealthy personal choices, and that suppression of information about same-sex relationships was not a method by which a negative demographic trend might be reversed.

(iii) Turning to the argument based on the need to protect minors, the main reason for the adoption of the laws in issue, the Court observed

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160. *Alekseyev v. Russia*, nos. 4916/07 and 2 others, § 84, 21 October 2010.

161. *Schalk and Kopf v. Austria*, no. 30141/04, §§ 91-94, ECHR 2010.

162. *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, § 165, 21 July 2015.

with reference to its conclusions in the earlier case of *Alekseyev* (cited above, § 86) that the Government had not provided any evidentiary basis for the belief that minors were at risk of being enticed into changing their sexual orientation by being exposed to discussion on matters relating to the status of sexual minorities; nor was it possible to defend the ban with reference to the need to guard against the risk of exploitation and corruption of minors. For the Court, protection against such risks should not be limited to same-sex relationships. Interestingly, in replying to the Government's argument that the applicants' actions had intruded in the field of educational policies and parental choices on matters of sex education, the Court noted that the applicants' messages were not inaccurate, sexually explicit or aggressive, nor had the applicants made any attempt to advocate any sexual behaviour and

> "[t]o the extent that the minors who witnessed the applicants' campaign were exposed to the ideas of diversity, equality and tolerance, the adoption of these views could only be conducive to social cohesion" (paragraph 82).

The Court's overall conclusion (paragraph 83) is particularly striking:

> "Given the vagueness of the terminology used and the potentially unlimited scope of their application, these provisions are open to abuse in individual cases, as evidenced in the three applications at hand. Above all, by adopting such laws the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society."

In *Döner and Others v. Turkey*[163] the Court considered the balance to be struck between freedom of expression and the fight against terrorism.

In the exercise of their constitutional rights, and at a time when this issue was a matter of public discussion, the applicants filed petitions with the competent national authorities requesting that provision be made for their children to be educated in the Kurdish language in the public elementary schools they attended. The applicants' houses were subsequently searched on suspicion that their action had been instigated by an illegal armed organisation. Although no incriminating materials were found, the applicants were arrested and detained – all of

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

them for four days and some were remanded in custody for almost one month. All the applicants were charged and tried before a State Security Court with aiding and abetting an illegal armed organisation. They were eventually acquitted.

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

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

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

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

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

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

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

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

(iii) The applicants had used their constitutional right to file a petition regarding the education of their children in Kurdish and, significantly, after the applicants' arrest and while they were still on trial the relevant

law had been amended to provide for such, at least initially on a private basis.

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

Freedom of the press

The judgment in *Selmani and Others v. the former Yugoslav Republic of Macedonia*[164] concerned the forcible removal of the applicant journalists from the press gallery of Parliament and the absence of an oral hearing in their legal challenge to the removal.

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

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

Firstly, the Court reiterated that any attempt to remove journalists from the scene of demonstrations must be subject to strict scrutiny (see *Pentikäinen v. Finland*[165]), and stressed that this principle applies even more so when journalists exercise their right to impart information to the public concerning the behaviour of elected representatives in Parliament and the manner in which the authorities handle disorder that occurs during parliamentary sessions, these being matters of

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164. *Selmani and Others v. the former Yugoslav Republic of Macedonia*, no. 67259/14, 9 February 2017. See also under Article 6 § 1 (Right to a fair hearing in civil proceedings – Applicability) above.

165. *Pentikäinen v. Finland* [GC], no. 11882/10, §§ 89 and 107, ECHR 2015.

public interest. At the same time, the Court had recently stressed in its *Karácsony and Others v. Hungary* judgment[166] that Parliaments are entitled to react when their members engage in disorderly conduct disrupting the normal functioning of the legislature. Secondly, on the basis of its analysis of all the relevant facts, the Court found that the applicants had not posed any threat to order in Parliament and, contrary to the risk assessment made by the security staff, there was no indication that the disturbances created by members of parliament had endangered the applicants' own personal safety in the gallery. Thirdly, as to the argument that the applicants could have followed the live broadcast of the debate, for example in premises adjacent to the press gallery, the Court observed in paragraph 84 of the judgment that "the applicants' removal entailed immediate adverse effects that instantaneously prevented them from obtaining first-hand and direct knowledge based on their personal experience of the events unfolding in the chamber ... Those were important elements in the exercise of the applicants' journalistic functions, which the public should not have been deprived of in the circumstances of the present case."

The *Becker v. Norway*[167] judgment concerned the scope of a journalist's right not to testify about his or her contact with a source where the source has come forward.

The applicant, a journalist, published an article based on (incorrect) information supplied to her by a third party in which she drew attention to the gloomy financial prospects of the Norwegian Oil Company. The share price of the company fell following publication. The third party was arrested and charged with various economic crimes including market manipulation. The third party admitted that he was the source of the applicant's article, having sent the applicant a letter misrepresenting the financial health of the company. The applicant was ordered to testify as a prosecution witness about her contact with the third party. She refused relying on her right to protect the confidentiality of her sources. The applicant was fined. She unsuccessfully challenged the order, including before the Norwegian Supreme Court (which was divided on the matter, having considered the relevant case-law of this Court).

In the Convention proceedings the applicant complained that there had been an unjustified interference with her right under Article 10 of the Convention not to be compelled to disclose her sources.

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166. *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, §§ 139 and 141, ECHR 2016 (extracts).

167. *Becker v. Norway*, no. 21272/12, 5 October 2017.

The Court found for the applicant. The judgment is noteworthy since it marks a development in the Court's case-law on the protection of journalistic sources. The Court has consistently emphasised that such protection is a fundamental aspect of press freedom and an order requiring a journalist to reveal his or her sources of information demands "the most careful scrutiny" and can only be justified by "an overriding requirement in the public interest" (see, for example, *Goodwin v. the United Kingdom*[168]). It is important to reiterate that the Court has already held that the conduct of the source, for example the fact that the source acted in bad faith for a harmful purpose when supplying the information to a journalist, does not automatically deprive the journalist of the protection afforded by Article 10. The source's conduct is a matter to be weighed in the balance when assessing the proportionality of the disclosure order (see, for example, *Financial Times Ltd and Others v. the United Kingdom*[169]). Of equal relevance is the fact that the Court has previously declared in the context of a search conducted by the authorities that the fact that the source's identity had been known to them did not remove a journalist's protection under Article 10 (see, in this connection, *Nagla v. Latvia*[170]).

What is interesting in the applicant's case is that the source had "come forward" and freely volunteered that he was the applicant's source for the article that she had published. In other words, there was no source to protect. Does this development remove the journalist from the protection of Article 10, or is it one consideration, among others, to be examined as part of the proportionality test?

Significantly, and with reference to the case-law cited above, the Court found that the source's decision to "come forward" had to be examined as an aspect of the proportionality of the interference alleged by the applicant, and in particular whether the domestic courts had given relevant and sufficient reasons capable of satisfying the "necessity" test or, in case-law terms, the existence of a "pressing social need" for the interference with the applicant journalist's Article 10 right. Importantly, the Court also observed (paragraph 76, with reference to *Nordisk Film & TV A/S v. Denmark*[171], and *Stichting Ostade Blade v. the Netherlands*[172]):

> "... the circumstances with respect to both [the third party's] motivation for presenting himself as a 'source' to the applicant

168. *Goodwin v. the United Kingdom*, 27 March 1996, *Reports of Judgments and Decisions* 1996-II.
169. *Financial Times Ltd and Others v. the United Kingdom*, no. 821/03, § 63, 15 December 2009.
170. *Nagla v. Latvia*, no. 73469/10, 16 July 2013.
171. *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02, ECHR 2005-XIII.
172. *Stichting Ostade Blade v. the Netherlands* (dec.), no. 8406/06, § 64, 27 May 2014.

> and his coming forward during the investigation suggest that the degree of protection under Article 10 of the Convention to be applied in the present case cannot reach the same level as that afforded to journalists who have been assisted by persons of unknown identity to inform the public about matters of public interest or matters concerning others."

Against that background, the Court found on the facts that the "necessity" test had not been satisfied. It gave prominence to the fact that the applicant's refusal to comply with the order did not at any point in time hinder either the criminal investigation or the proceedings against the third party (see, in this connection, *Voskuil v. the Netherlands*[173]) and at no stage did the third party argue that the order should be imposed on the applicant in order to safeguard his rights.

Having regard to the importance of the protection of journalistic sources for press freedom, the Court found the reasons adduced in favour of compelling the applicant to testify about her contact with the third party, although relevant, were insufficient. Even bearing in mind the appropriate level of protection applicable to the particular circumstances of the case, the Court was not convinced that the impugned order was justified by an "overriding requirement in the public interest" and, hence, necessary in a democratic society.

Freedom to receive and impart information

The judgment in *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*[174] concerned restrictions on the dissemination on a massive scale of personal taxation data that under domestic law were accessible to the public.

The applicants, media organisations, were involved at the material time in the collection, processing and dissemination of personal taxation data (details of named individual's taxable earned and unearned income as well as their taxable net assets) on a massive scale both in print form and via an SMS service. Data relating to about one-third of Finnish taxpayers were so published. Such information is accessible to the public in the respondent State subject to compliance with certain conditions. The Data Protection Ombudsman brought proceedings to limit the scope of the applicants' activities. Ultimately, the Supreme Administrative Court, having requested a preliminary ruling from the Court of Justice of the European Union on whether the

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173. *Voskuil v. the Netherlands*, no. 64752/01, § 67, 22 November 2007.

174. *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, ECHR 2017 (extracts).

applicants' activities were carried out for journalistic purposes thereby enabling them to benefit from the derogation contained in Article 9 of the Data Protection Directive[175] (which Directive had been transposed into domestic law through the enactment of the Personal Data Act), ordered the applicants to scale back considerably their operations in view of data-protection considerations and to refrain from use of the SMS service.

In the Convention proceedings, the applicants argued that these prohibitions on their activities amounted to an unlawful restriction on their right to impart information, having regard among other things to the fact that the collection of personal taxation data was not illegal as such and that the information collected and published was in the public domain.

The Grand Chamber found in the circumstances that there had been an interference with the applicants' Article 10 right, but there had been no breach of that provision given that the domestic courts had struck a fair balance between the competing rights in issue, namely press freedom and privacy, rights which, it noted, are deserving of equal respect, the margin of appreciation being the same regardless of the right invoked in a particular situation. In balancing these rights, it had regard, as appropriate, to the criteria established in its previous judgments, including *Von Hannover v. Germany (no. 2)*[176] and *Couderc and Hachette Filipacchi Associés v. France*[177].

However, to get to the balancing stage the Grand Chamber had to address the applicants' assertion that their activities did not impact on individual privacy rights since the taxation data were already in the public domain. On this point it is noteworthy that the Grand Chamber, on the basis of a careful review of its Article 8 case-law on privacy and data protection as well as the relevance of the public sphere in which personal information may be obtained, concluded that the private life of the taxpayers concerned was engaged. It noted in this connection that, notwithstanding the fact that their data could be accessed by the public pursuant to Finnish law under certain conditions, such data clearly concerned their private life. Significantly, it noted in this connection that Article 8 provides for the right to a form of informational self-determination, allowing individuals to rely on

175. Directive 95/46/EC of the European Parliament and of the Council 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.

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

177. *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, ECHR 2015 (extracts).

their right to privacy as regards data that, albeit neutral, are collected, processed and disseminated collectively and in such a form or manner that their Article 8 rights are engaged. This would appear to be the first occasion on which the Court has linked the Article 8 privacy right to the right of the data-subject to have a say in the use made of the personal information that he or she is obliged to provide to the authorities and that, pursuant to openness legislation, can be accessed by the public albeit subject to certain conditions (as in Finland and a limited number of other Contracting States). It is of relevance in this connection that the Grand Chamber, when discussing the legitimacy of the aim pursued by the limits placed on the applicants' activities, stressed that the impugned interference with the applicants' Article 10 right pursued the legitimate aim of protecting "the reputation or rights of others" within the meaning of paragraph 2 of that provision and that the protection of privacy was at the heart of the data-protection legislation that was applied in their case to their detriment. It is of interest that it had regard in this connection to the aims of the Council of Europe's Data Protection Convention[178], noting that its principles are reflected in the corresponding EU instruments on data protection. It is of further interest that, when it comes to the protection of personal data that are in the public domain, the Court is able to adjudicate effectively on the scope of protection within the ambit of Article 8 of the Convention, even if the right to data protection, unlike in Article 8 of the Charter of Fundamental Rights of the European Union, is not as such explicitly articulated as a fundamental aspect of private life. The instant case confirms that it does.

The applicants argued that the interference was not prescribed by law since they could not have foreseen that their specific publishing activities would be caught by the data-protection law, having regard in this connection to the journalistic-purposes derogation (see above). The Grand Chamber noted among other things that

> "the applicant companies were media professionals and, as such, they should have been aware of the possibility that the mass collection of data and its wholesale dissemination – pertaining to about one-third of Finnish taxpayers or 1.2 million people, a number ten to twenty times greater than that covered by any other media organisation at the time – might not be considered as processing 'solely' for journalistic purposes under the relevant provisions of Finnish and EU law" (paragraph 151).

Turning to the Article 10/Article 8 balancing exercise (see above), two issues may be highlighted.

178. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108.

Firstly, the Grand Chamber readily accepted that permitting public access to official documents, including taxation data, is designed to secure the availability of information for the purpose of enabling a debate on matters of public interest. Such access, albeit subject to clear statutory rules and restrictions, has a constitutional basis in Finnish law and has been widely guaranteed for many decades. However, like the Supreme Administrative Court, the Grand Chamber was not persuaded that publication of taxation data in the manner and to the extent done by the applicant companies contributed to such a debate, or indeed that its principal purpose was to do so. In the Grand Chamber's view

> "the existence of a public interest in providing access to, and allowing the collection of, large amounts of taxation data did not necessarily or automatically mean that there was also a public interest in disseminating en masse such raw data in unaltered form without any analytical input" (paragraph 175).

Secondly, the Grand Chamber observed that Finland is one of the very few Council of Europe member States with such a high level of public access to personal taxation data. Finland had sought in the relevant national legislation to reconcile access, data-protection and press-freedom considerations, including by making access subject to compliance with certain conditions and by allowing journalists to benefit from a derogation from data-protection rules when processing personal data for journalistic purposes. Interestingly, it observed that it

> "may also take into consideration, when assessing the overall balance struck, the fact that that State, somewhat exceptionally, as a matter of constitutional choice and, in the interests of transparency, has chosen to make taxation data accessible to the public" (paragraph 195).

Prohibition of discrimination (Article 14)

Article 14 taken in conjunction with Article 3

The question examined in *Škorjanec v. Croatia*[179] was the scope of the duty to investigate a racially motivated act of violence.

The applicant's partner was of Roma origin. In 2013 the couple were assaulted by two individuals who were later convicted of the attack on the applicant's partner. It was established that there was also proof of an element of a hate-related crime in view of the anti-Roma insults uttered by the two individuals immediately preceding and during the attack.

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

The applicant was treated as a witness in the criminal case and not as a victim alongside her partner. In the meantime, the applicant herself tried to bring criminal proceedings against her attackers. The competent State Attorney's Office, while not disputing that the applicant had been injured in the attack, concluded that there was no proof that she had been the victim of a racially motivated assault as she was not of Roma origin. The applicant's partner, and not the applicant, had been singled out on account of his Roma origin and for that reason her criminal complaint was dismissed. In the Convention proceedings the Court decided to examine the applicant's complaint regarding the authorities' failure to discharge their positive obligations in relation to a racially motivated act of violence against her under Article 14 of the Convention read in conjunction with Article 3. The Court found a breach of these provisions.

The following points are worthy of attention.

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

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

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

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

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

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

Article 14 taken in conjunction with Article 5

The *Khamtokhu and Aksenchik v. Russia*[180] judgment concerned a difference in treatment in sentencing of, on the one hand, adult men and, on the other, female, juvenile and senior offenders.

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

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

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

In particular, matters of appropriate sentencing fall, in principle, outside the scope of the Convention. However, a sentencing measure differentiating between offenders by age and gender had already been found by the former Commission to give rise to an issue under Article 14 in conjunction with Article 5 (*Nelson v. the United Kingdom*[181], and *A.P. v. the United Kingdom*[182]). The Court had also viewed measures relating to execution of a sentence and impacting on the length of a sentence as falling within the scope of Article 5, and matters concerning eligibility

180. *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, ECHR 2017.

181. *Nelson v. the United Kingdom*, no. 11077/84, Commission decision of 13 October 1986, Decisions and Reports 49.

182. *A.P. v. the United Kingdom*, no. 15397/89, Commission decision of 8 January 1992, unreported.

for parole as giving rise to an issue under Article 14 in conjunction with Article 5 (*Gerger v. Turkey*[183], and *Clift v. the United Kingdom*[184]). Moreover, Article 14 extends to additional rights, falling within the scope of the Convention, that a State volunteers to provide (*Stec and Others v. the United Kingdom*[185]). Accordingly, national legislation exempting certain categories of offender from life imprisonment fell within the scope of Article 5 for the purposes of the applicability of Article 14. The applicants having been treated differently on the basis of "sex" and "age", Article 14 in conjunction with Article 5 was applicable.

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

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

As to whether this difference in treatment was justifiable, the Grand Chamber's analysis drew on the Court's case-law regarding the compatibility of life sentences with Article 3 of the Convention. While life sentences were not, as such, incompatible with Article 3, the case-law had established certain minimum requirements in that regard: a life sentence had to be reducible, so there had to be a prospect of release and a possibility of review, both of which had to exist at the time of the imposition of the sentence (*Vinter and Others v. the United Kingdom*[186], and *Murray v. the Netherlands*[187]). Accordingly the fact that a State took measures aimed at complying with such minimum requirements would weigh heavily in favour of the State in the Article 14 assessment.

Turning then to the respective differences in treatment, the Grand Chamber considered the exception in favour of juvenile offenders to be justified given that it was in line with the clear European consensus and with other international standards. Nor did the Grand Chamber have much difficulty with the exclusion of senior offenders, as this was in line with the Court's case-law, since reducibility clearly carried even greater

183. *Gerger v. Turkey* [GC], no. 24919/94, 8 July 1999.

184. *Clift v. the United Kingdom*, no. 7205/07, 13 July 2010.

185. *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, ECHR 2006-VI.

186. *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and 2 others, ECHR 2013 (extracts).

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

weight for elderly offenders: setting the age after which a life sentence could not be imposed was consistent with this. The justification for the exclusion of adult female offenders appeared to be more complex for the Grand Chamber. While it would not assess the various instruments and data submitted by the parties regarding the needs of women in prisons, it accepted that there was a "sufficient basis for the Court to conclude that there was a public interest" underlying the exemption of female offenders from life imprisonment.

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

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

Article 14 taken in conjunction with Article 8

The judgment in *Carvalho Pinto de Sousa Morais v. Portugal*[188] concerned a domestic court's decision based on gender and age-based stereotypes.

The applicant underwent surgery which resulted in, among other things, mobility problems and difficulties in having sexual relations. She was 50 years old at the time. She brought civil proceedings against the

188. *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, ECHR 2017.

hospital, and was awarded compensation in respect of pecuniary and non-pecuniary damage. On appeal, the Supreme Administrative Court reduced the amount awarded on the following grounds.

> "(1) [I]t has not been established that the plaintiff had lost her capacity to take care of domestic tasks, (2) professional activity outside the home is one thing while domestic work is another, and (3) considering the age of her children, she [the plaintiff] probably only needed to take care of her husband, which leads us to the conclusion that she did not need to hire a full-time maid.
>
> ... it should not be forgotten that at the time of the operation the plaintiff was already 50 years old and had two children, that is, an age when sex is not as important as in younger years, its significance diminishing with age."

In reducing the award the Supreme Administrative Court also had regard to the fact that the surgical procedure had only aggravated the applicant's already difficult medical situation.

In the Convention proceedings, the applicant complained that the decision of the Supreme Administrative Court was discriminatory – on grounds of her gender and age – and breached Article 14 of the Convention read in conjunction with Article 8.

The Court found for the applicant. The judgment is noteworthy in that this is the first occasion on which the Court has found fault with the language used by a domestic court – in the instant case a superior court – when dealing with the age and gender of a litigant.

In accordance with its established case-law, the Court had to establish as a preliminary issue that Article 14 was engaged on the facts. It found that that Article could be relied on by the applicant given that the facts in issue fell within the scope of the applicant's Article 8 right to respect for her private life, a broad concept which does not lend itself to exhaustive definition. The applicant had brought civil proceedings to be compensated for the damage caused to her physical and psychological integrity as a result of medical malpractice. This was sufficient to allow the Court to assess whether the language used by the Supreme Administrative Court meant that the applicant had been treated differently from persons in an analogous or relevantly similar situation and whether the Government had shown the existence of reasonable and objective justification for such difference.

In order to determine whether the applicant had been the victim of discrimination the Court had careful regard to the reasoning of the Supreme Administrative Court when reducing the award. It placed

emphasis on the following considerations: firstly, very weighty reasons had to be advanced in order to justify a difference of treatment based on gender (see, for example, *Konstantin Markin v. Russia*[189]); secondly, a difference of treatment based on age also required to be justified, the Court adding that "it has not, to date, suggested that discrimination on grounds of age should be equated with other 'suspect' grounds of discrimination" (*British Gurkha Welfare Society and Others v. the United Kingdom*[190]).

It found on the facts that the wording used by the domestic court could not be regarded as "an unfortunate turn of phrase" and that the applicant's age and sex "appear to have been decisive factors in the final decision". It is noteworthy that the Court found support for its view that the applicant had been treated differently on account of her age and sex in a number of reports that drew attention to the existence of a problem of gender-based stereotyping in the respondent State including in its judicial institutions. In addition, it had regard to the manner in which the Supreme Court of Justice had dealt with two previous sets of medical malpractice proceedings brought by two male patients, respectively 55 and 59 years old. The Court found it significant that the domestic court considered that the fact that the men could no longer have normal sexual relations had affected their self-esteem and resulted in a "tremendous shock" and "strong mental shock". Their age was not considered to be relevant. Contrasting the applicant's case, the Court observed (paragraph 52) that the domestic court worked on the

> "assumption that sexuality is not as important for a 50-year-old woman and mother of two children as for someone of a younger age. That assumption reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people."

The *Alexandru Enache v. Romania*[191] judgment concerned a difference in treatment between female and male offenders who have a child less than a year old.

The applicant was sentenced to a seven-year term of imprisonment. He had a child who was less than a year old at the time. A female offender

189. *Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012 (extracts).

190. *British Gurkha Welfare Society and Others v. the United Kingdom*, no. 44818/11, § 88, 15 September 2016.

191. *Alexandru Enache v. Romania*, no. 16986/12, 3 October 2017.

in his situation would have been allowed to request that the starting date for serving the sentence be deferred until the child had reached its first birthday.

The applicant complained in the Convention proceedings that this difference in treatment amounted to unlawful discrimination on grounds of sex in the enjoyment of his right to family life.

The Court found that the refusal to allow the applicant to defer the starting date had had a direct impact on the manner in which he organised his family life. Reiterating that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention, the applicant in the instant case continued to enjoy the right to respect for family life, guaranteed by Article 8 (*Dickson v. the United Kingdom*[192], and *Khoroshenko v. Russia*[193]). The facts of the case fell within the scope of Article 8, with the result that the applicant could rely on Article 14.

The Court then inquired as to whether the applicant was in an analogous situation to that of a female and, in the affirmative, whether he had been treated differently because of his sex and without any reasonable and objective justification linked to the pursuit of a legitimate aim. In previous cases having their background in the context of employment the Court has found male applicants to be in an analogous situation to that of women when it comes to matters such as entitlement to parental leave and related allowances. In *Konstantin Markin v. Russia*[194] the Grand Chamber concluded:

> "Whilst being aware of the differences which may exist between mother and father in their relationship with the child, ..., as far as the role of taking care of the child during the period corresponding to parental leave is concerned, men and women are 'similarly placed'."

The instant case concerned the entirely different context of the respondent State's penal policy. However, the Court found that the same considerations applied. In response to the Government's argument that the deferral of the start of a female offender's sentence was intended to promote the best interests of the child by enabling it to receive the necessary care and attention during the first year of its life, the Court observed that the child's father was equally capable of assuming that responsibility.

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192. *Dickson v. the United Kingdom* [GC], no. 44362/04, § 67, ECHR 2007-V.
193. *Khoroshenko v. Russia* [GC], no. 41418/04, § 117, ECHR 2015.
194. *Konstantin Markin v. Russia* [GC], no. 30078/06, § 132, ECHR 2012 (extracts).

Turning to the justification for the difference in treatment and the question of proportionality, the Court had regard to two considerations: a female offender had no automatic entitlement to a deferral of sentence; and both male and female offenders had the possibility to request a deferral of their sentence on proof of special hardship that imprisonment would entail, including for their families.

More importantly, weight had to be given to the fact that the penal provisions contested as discriminatory by the applicant were intended to take account of the particular bond between a mother and her child during the first year of its life, a period that, according to the Government, was a natural progression from pregnancy and childbirth. The Court agreed that this consideration, based as it was on the special nature of maternity, was sufficient to justify the difference in treatment. It found support for this conclusion in Article 4 § 2 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, which reads:

> "Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."

In the Court's view, the difference in treatment criticised in the instant case involving a mother subject to deprivation of liberty should also be viewed against this background (see the use made by the Court of the UN Convention in *Khamtokhu and Aksenchik v. Russia*[195]). Having regard to the wide margin of appreciation that the respondent State enjoys in this context, the Court was satisfied that there was a reasonable relationship of proportionality between the means employed and the legitimate aim pursued, and that there had been no breach of Article 14 taken in conjunction with Article 8.

The judgment in *Ratzenböck and Seydl v. Austria*[196] concerned the inability of different-sex couples to enter into a registered partnership, such partnerships being reserved for same-sex couples.

The applicants, a different-sex couple in a stable, long-term relationship, complained under Article 14 read in conjunction with Article 8 that they were prevented from having access to domestic-law arrangements whereby persons of the same sex could have their relationship recognised and given legal effect in the form of a registered

195. *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 82, ECHR 2017.
196. *Ratzenböck and Seydl v. Austria*, no. 28475/12, 26 October 2017 (not final).

partnership. The applicants unsuccessfully argued before the domestic courts that, although the possibility was available to them, marriage was not their preferred option. In their view, a registered partnership was in many respects a more advantageous alternative. According to the applicants, the fact that domestic law (the Registered Partnership Act) reserved the registered-partnership institution exclusively to same-sex couples meant that they were discriminated against on grounds of their sex and sexual orientation. The applicants renewed their arguments in the Convention proceedings. The Court found that there had been no breach of the provisions relied on.

This was the first occasion on which the Court had had to examine the question of differences in treatment based on sex and sexual orientation relating to the exclusion of a different-sex couple from a legal institution for recognition of a relationship reserved to same-sex couples. Prior to this judgment, the Court's relevant case-law in such matters had originated in applications lodged by same-sex couples whose complaints concerned the lack of access to marriage and lack of alternative means of legal recognition (see *Schalk and Kopf v. Austria*[197]; *Vallianatos and Others v. Greece*[198]; and *Oliari and Others v. Italy*[199]).

In the first place, the Court had no difficulty in confirming that the applicants, although not married, could rely on the "family life" limb of Article 8, since they had, through their relationship, created *de facto* family ties (see *Elsholz v. Germany*[200]). Article 14 therefore applied.

In accordance with its usual practice the Court examined whether, for the purpose of Article 14, the applicants were in a comparable situation to same-sex couples who have access to registered partnerships. It observed in that connection that it had already found that different-sex couples are in principle in a relevantly similar or comparable position to same-sex couples as regards their general need for legal recognition and protection of their relationship (see, for example, *Vallianatos and Others*, cited above, § 78, and the other judgments cited above). However, on closer analysis of the background to the adoption of the Registered Partnership Act and its relationship to the institution of marriage, it concluded that the applicants were not in a relevantly similar or comparable position to same-sex couples. Its analysis reflects the approach to the comparator issue most recently set out in *Fábián v. Hungary*[201], namely:

197. *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010.
198. *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, ECHR 2013 (extracts).
199. *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, 21 July 2015.
200. *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII.
201. *Fábián v. Hungary* [GC], no. 78117/13, ECHR 2017 (extracts).

> "In examining whether persons subject to different treatment are in a relevantly similar situation, the Court takes into account the elements that characterise their circumstances in the particular context. The elements which characterise different situations, and determine their comparability, must be assessed in the light of the subject matter and purpose of the measure which makes the distinction in question."

The Court noted among other things:

(i) The registered partnership was introduced as an alternative to marriage in order to make available to same-sex couples an arrangement which was substantially similar to marriage in terms of the legal recognition of their relationship.

(ii) The institutions of marriage and the registered partnership were essentially complementary in Austrian law and there were no substantial differences between them. Although the applicants maintained that a registered partnership is a "more modern and lighter institution" than marriage, they did not claim to have been specifically affected by any difference in law between those institutions.

(iii) The applicants, as a different-sex couple, had access to the institution of marriage. This satisfied – contrary to same-sex couples before the enactment of the Registered Partnership Act – their principal need for legal recognition.

Having regard to that conclusion, the Court did not need to inquire into the justification for the difference in treatment.

Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1

One of the issues in the *Fábián v. Hungary*[202] judgment was whether public and private-sector employees were, for the purposes of Article 14 of the Convention, in a "relevantly similar situation".

The case concerned the suspension, following the introduction of legislative changes, of the disbursement of the applicant's State pension during the period he was also employed in the public sector. The legislative prohibition on accumulating a pension and salary did not apply to those employed in the private sector or to certain groups of public-sector employees.

The Grand Chamber found that there had been no violation as regards the complaint of discrimination between pensioners employed in the public sector and the private sector, as the applicant had not

202. *Fábián v. Hungary* [GC], no. 78117/13, ECHR 2017. See also under Article 1 of Protocol No. 1 (Enjoyment of possessions) below.

discharged the burden on him to demonstrate that those two groups were in an analogous or relevantly similar situation. In so finding, this judgment can be seen to confirm and supplement the decision in *Panfile v. Romania*[203], the Grand Chamber explaining why and how the Court distinguished between public and private-sector employees.

The elements that characterised the circumstances of the groups in the particular context were to be taken into account and, further, were to be examined in the light of the subject matter and purpose of the impugned measure. Three preliminary factors were to be retained in that regard. The State enjoys "wide latitude in organising State functions and public services". In addition, there were substantial legal and factual differences between public and private-sector employment for institutional and functional reasons, not least in fields involving the exercise of sovereign State power and the provision of essential public services. Moreover, it could not therefore be presumed that the terms and conditions of employment (including financial), or the eligibility for social benefits linked to employment, would be similar in the public and private sectors, nor could it be presumed that these categories of employee would be in relevantly similar situations in those respects. In this latter respect, it was noted that the salaries and employment-linked social benefits of State employees were, unlike those of private-sector employees, paid by the State.

These factors were reflected in the Court's case-law distinguishing between public and private-sector employees. In *Valkov and Others v. Bulgaria*[204] the Court observed that it was not for an international court to rule on the question of whether the authorities had made a valid distinction between employment in these two groups, such decisions being policy judgments in principle for the national authorities. In various cases the Court had also recognised the particular status of civil servants given the special features of their role in the exercise of public powers and functions including, for example, their duty of loyalty in an Article 10 context (*Heinisch v. Germany*[205]) or their exercise of the discretionary powers intrinsic to State sovereignty in the context of their right of access to a court (*Pellegrin v. France*[206], and *Vilho Eskelinen and Others v. Finland*[207]). Finally, in *Panfile*, cited above, the Court had emphasised the different sources of the salaries of public and private employees. The present case required a fourth factor to be taken into

203. *Panfile v. Roumania* (dec.), no. 13902/11, 20 March 2012.
204. *Valkov and Others v. Bulgaria*, nos. 2033/04 and 8 others, 25 October 2011.
205. *Heinisch v. Germany*, no. 28274/08, ECHR 2011 (extracts).
206. *Pellegrin v. France* [GC], no. 28541/95, ECHR 1999-VIII.
207. *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-II.

account: the role of the State when acting in its capacity as employer, which was not comparable to private-sector employers either from the perspective of the instructional framework or in terms of the financial and economic fundamentals of their activities.

These principles were applied to the present case. It was true that the old-age pension for private and public-sector employees came from the same public source to which each group contributed equally. However, a key point of distinction was that the applicant's salary and old-age pension came from the same State source and the ban on accumulating both was a measure aimed at reducing public expenditure, the Grand Chamber remarking that in *Panfile* it was the distinction between the source of their salaries that led to the finding that the relevant groups were not in an analogous situation. Noting certain additional points of distinction (under domestic law, employment in the civil service and employment in the private sector were treated as distinct categories; the applicant's public-sector profession was difficult to compare with any private-sector profession; and it was for the State as his employer to set down the terms of his employment and, as the manager of the pension fund, the conditions for disbursement of pensions), the Grand Chamber concluded that the applicant had not demonstrated that he was in a relevantly similar situation to pensioners employed in the private sector.

The decision in *P. Plaisier B.V. and Others. v. the Netherlands*[208] concerned certain budgetary austerity measures and their compatibility with Article 1 of Protocol No. 1 and Article 14 of the Convention.

The applicant companies contested the compatibility with Article 1 of Protocol No. 1 and Article 14 of the Convention of a levy imposed on employers, like themselves, who had paid their employees salaries of more than 150,000 euros (EUR) pre-tax during the previous tax year (2012). This levy, or high-wages tax surcharge, was a feature of the Budget Agreement approved by Parliament against the background of the sovereign debt crisis in Europe at the relevant time, as well as the need to ensure compliance with the State's EU obligations on budget deficit. The levy was to apply only for 2013 (it was renewed once for 2014). The applicant companies contested what they saw as the discriminatory and disproportionate nature of the levy since it did not apply to employees who earned more than EUR 150,000 pre-tax, persons of individual wealth or the self-employed. They also took

208. *P. Plaisier B.V. and Others. v. the Netherlands* (dec.), nos. 46184/16 and 2 others, 14 November 2017.

issue with the absence of any individual assessment of means and the retroactive nature of the measure, which had made it impossible for them to plan for its application in practice. Finally, they argued that the actual contribution of the levy to tax revenue had been minimal.

The Court declared the applications inadmissible as a whole as being manifestly ill-founded (Article 35 §§ 3 (a) and 4 of the Convention). The decision is interesting for the following reasons.

In the first place, this is the latest in a series of cases in which the Court has been asked to address the proportionality of measures adopted by a number of Contracting States in response to the sovereign debt crisis which reached its peak in 2012.

Secondly, the decision in this case transcends mere national interests, given that the financial crisis has affected many EU member States.

Thirdly, the decision contains a comprehensive description of the cases which the Court has so far dealt with including the nature of the impugned measures.

Fourthly, the Court confirmed its starting-point for assessing whether a State has exceeded its margin of appreciation when implementing austerity measures, including by means of stringent taxation policies as in the instant case. It observed (paragraph 82):

> "There can be no doubt that the Netherlands was entitled in principle to take far-reaching measures to bring its economy back into line with its international obligations, as indeed were the other member States whose measures – some of which continue to affect the financial position of entire segments of their societies to the present day – have been the object of applications to the Court. This entitlement is however subject to the proviso that no 'individual and excessive burden' be imposed on any person."

On the facts, the Court found that the individual burden imposed on the applicant companies was not excessive. In particular, the Court had regard to austerity measures introduced elsewhere – such as the cutting of public-sector wages (*Koufaki and Adedy v. Greece*[209]) and the "haircut" imposed on holders of Greek government bonds (*Mamatas and Others v. Greece*[210]) – which were far more dramatic in their effects on individuals than the tax surcharge in issue in the present case. Acting within its wide margin of appreciation, the Netherlands had adopted a measure that did not upset the balance that must be struck between the demands of the public interest and the protection of the applicant companies' rights.

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209. *Koufaki and Adedy v. Greece* (dec.), nos. 57665/12 and 57657/12, 7 May 2013.
210. *Mamatas and Others v. Greece*, nos. 63066/14 and 2 others, 21 July 2016.

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

Enjoyment of possessions

A further issue arising in the *Fábián*[211] judgment, cited above, was the proportionality of the suspension of a State pension. The applicant, who was already in receipt of an old-age pension, took up employment as a civil servant. Following the introduction of new legislation prohibiting the accumulation of a pension and a salary, payment of the applicant's pension was suspended in respect of the period for which he had worked in the public sector.

The Grand Chamber found that there had been no violation of Article 1 of Protocol No. 1.

In examining whether the national authorities had acted within their margin of appreciation in the instant case, the Grand Chamber stated that it would have particular regard to certain factors that the case-law "relating to the reduction, suspension or discontinuance of social-security pensions" indicated were of relevance: the extent of the loss of benefits; whether there was an element of choice; and the extent of the loss of means of subsistence. Since the present applicant's pension was only suspended during the period he was re-employed in the public service, since he was able to choose between continuing State employment and receiving his pension and since he was by no means left devoid of subsistence, the Court concluded that a fair balance had been struck between the demands of the general interest and the applicant's rights.

It is useful to compare the above three criteria to those identified in *Béláné Nagy v. Hungary*[212], by which the Grand Chamber assessed, also in the context of Article 1 of Protocol No. 1, the proportionality of changes to the qualification criteria for a disability benefit which meant the withdrawal of that benefit even though the applicant's health had not changed. The *Béláné Nagy* assessment criteria included: the level of reduction in benefits; the discriminatory nature of any loss of entitlement; the use of transitional measures; any arbitrariness of the new condition; the applicant's good faith; and, importantly, any impairment of the essence of the pension rights. It would appear therefore that the criteria for assessing the proportionality of a change in social benefits will depend on the particular context of the case.

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211. *Fábián v. Hungary* [GC], no. 78117/13, ECHR 2017. See also under Article 14 taken in conjunction with Article 1 of Protocol No. 1 above.

212. *Béláné Nagy v. Hungary* [GC], no. 53080/13, § 117, ECHR 2016.

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

The *Davydov and Others v. Russia*[213] judgment concerned the extent of the Court's scrutiny in respect of alleged irregularities during the counting and tabulation of votes.

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

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

The judgment is noteworthy for the following reasons.

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

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213. *Davydov and Others v. Russia,* no. 75947/11, 30 May 2017.

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

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

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

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

In its decision in *Moohan and Gillon v. the United Kingdom*[214] the Court considered whether a secession referendum fell within the ambit of Article 3 of Protocol No. 1.

The applicants were serving prison sentences in Scotland. They were ineligible to vote in the independence referendum organised in Scotland on 18 September 2014 since the relevant domestic legislation stipulated that a convicted person was legally incapable of voting in the referendum if he was, on the date of the referendum, detained in a penal institution in pursuance of the sentence imposed on him. The applicants' challenge to the prohibition was ultimately dismissed by a majority of the Supreme Court of the United Kingdom after a detailed consideration of the Court's case-law on the applicability of Article 3 of Protocol No. 1 to the right to vote in a referendum. The majority carefully reasoned that the case-law and the plain language of Article 3 unequivocally excluded referenda from the purview of that provision, notwithstanding the fact that the independence referendum in issue was a secession referendum of considerable political importance. The minority expressed the view that the Court's case-law did in fact draw a distinction between referenda that merely had an effect on the powers and operation of a legislature and those that, like the independence referendum under consideration, necessarily determined the type of legislature that citizens of a country would have. The minority referred among other things to the need to interpret the Convention as a "living instrument" in light of its object and purpose including the guarantee of "an effective political democracy" as proclaimed in its Preamble.

In the Convention proceedings the applicants complained under Article 10 of the Convention and under Article 3 of Protocol No. 1 that they were subject to a "blanket ban" on voting in the independence referendum.

The Court ruled against the applicants, finding their complaint to be incompatible with the provisions of the Convention and its Protocols. It noted that the established case-law strongly indicated that both the Court and the former Commission considered that Article 3 of Protocol No. 1 (which is more narrowly drafted than Article 25 of the International Covenant on Civil and Political Rights) did not apply to referenda (see paragraph 40 of the judgment and the case-law referenced therein). It is noteworthy that the Court engaged with the view expressed by the minority of the Supreme Court. It accepted that at first glance it might appear anomalous that the Scottish independence referendum in which the people of Scotland were effectively voting to determine

214. *Moohan and Gillon v. the United Kingdom* (dec.), nos. 22962/15 and 23345/15, ECHR 2017.

the *type* of legislature that they would have fell outside the sphere of protection of Article 3 of Protocol No. 1, while elections concerning the *choice* of the legislature fell within it. For the Court, however, this distinction found support in its case-law on the meaning of Article 3, even if that case-law had not up to now addressed a referendum of the type organised in Scotland, namely a secession referendum. It observed in this connection that there had been a number of cases concerning referenda on Contracting States' accession to or continued membership of the European Union (see, for example, *Ž. v. Latvia*[215], and *Niedźwiedź v. Poland*[216]). It noted that in each of those cases the people were also voting to determine the type of legislature they would have, but that factor was not deemed sufficient to bring the referenda within the ambit of Article 3 of Protocol No. 1.

A further point is worthy of comment. The Court noted that it has not excluded the possibility that a democratic process described as a "referendum" by a Contracting State could potentially fall within the ambit of Article 3 of Protocol No. 1. However, in order to do so the process would need to take place "at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

The applicants also complained that the impugned prohibition also breached their rights under Article 10 of the Convention. The Court found this complaint to be outside the scope of the provisions of the Convention and its Protocols. The case-law on this point is clear: Article 10 does not protect the right to vote, either in an election or a referendum (see, for example, *Luksch v. Italy*[217], and *Baškauskaitė v. Lithuania*[218]).

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

Freedom of movement

The *De Tommaso*[219] judgment, cited above, concerned the imposition of preventive measures on an individual considered to be a danger to society.

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215. *Ž. v. Latvia* (dec.), no. 14755/03, 26 January 2006.

216. *Niedźwiedź v. Poland* (dec.), no. 1345/06, 11 March 2008.

217. *Luksch v. Italy*, no. 27614/95, Commission decision of 21 May 1997, Decisions and Reports 89-B.

218. *Baškauskaitė v. Lithuania*, no. 41090/98, Commission decision of 21 October 1998, unreported.

219. *De Tommaso v. Italy* [GC], no. 43395/09, ECHR 2017. See also under Article 5 (Right to liberty and security) above, Article 6 § 1 (Right to a fair hearing in civil proceedings

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

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

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

Freedom to choose residence

The *Garib v. the Netherlands*[220] judgment concerned the justification for a restriction on the freedom to choose one's residence under the fourth paragraph of Article 2 of Protocol No. 4.

With a view to stopping the decline of certain impoverished inner-city districts in Rotterdam, the State enacted legislation in 2006 permitting local authorities to require persons wishing to live in such districts to obtain a housing permit. The permit would be refused to new residents not already resident locally for the preceding six years unless they had an income from work, with a view to encouraging settlement by persons who were not dependent on social welfare and thereby stopping the trend towards "ghettoisation" in those districts. The applicant, a Dutch national and an unemployed single mother whose only income at

– Applicability) above and Article 37 (Striking out) below.

220. *Garib v. the Netherlands* [GC], no. 43494/09, 6 November 2017.

the time was from social welfare, settled in Rotterdam in 2005 in an impoverished district which later became a designated district covered by the 2006 legislation. In 2007 she unsuccessfully applied for a housing permit to move to a different apartment in the same district, the reason given being that she had not been a Rotterdam resident for six years and did not have an income from work.

She complained to the Court under Article 2 of Protocol No. 4. The Grand Chamber found that there had been no violation of the Convention.

The judgment is noteworthy as it is the first to address Article 2 of Protocol No. 4 in any depth. The Grand Chamber judgment therefore provides an authoritative interpretation of, in particular, the expression "freedom to choose [one's] residence" (the first paragraph of the Article) and of the conditions in which this freedom may be restricted (third and fourth paragraphs). The following elements are worth noting.

(i) There had undoubtedly been a "restriction" on her "freedom to choose [her] residence": the applicant had been prevented from taking up residence with her family in a property of her choice and it was implicit that this property was available to her on conditions she was willing and able to meet.

(ii) The impugned restriction was to be examined under the fourth paragraph of Article 2. The restrictions referred to in the third and fourth paragraphs are of equal rank but they are different in scope: paragraph 3 allows restrictions for specified purposes with no limit on their geographical scope and paragraph 4 allows for restrictions "justified by the public interest" but limited in their geographical scope.

(iii) As to whether the restriction was justified, certain points are worth noting.

– A wide margin of appreciation applied given the social and economic context, which included housing and town planning, the margin extending to both the decision to intervene and to the detailed rules adopted to balance the public and private interests concerned.

– The judgment distinguishes between the protections afforded by Article 8 and Article 2 of Protocol No. 4. It acknowledges the interplay between the freedom to choose one's residence and the right to respect for one's "home" and one's "private life" and, further, that the Court had previously applied Article 8 reasoning to a complaint under Article 2 of Protocol No. 4 (*Noack and Others v. Germany*[221]). However, the Grand Chamber considered that it was not possible to apply the same tests

221. *Noack and Others v. Germany* (dec.), no. 46346/99, ECHR 2000-VI.

under Article 2 § 4 of Protocol No. 4 and Article 8 § 2 of the Convention: while Article 8 could not be construed as conferring a right to live in a particular location (*Ward v. the United Kingdom*[222], and *Codona v. the United Kingdom*[223]), freedom to choose one's residence was at the very heart of Article 2 § 1 of Protocol No. 4, which provision would be voided of all significance if it did not in principle require Contracting States to accommodate individual preferences in the matter.

– In determining whether the interference was justified, the judgment assesses the legislative framework including the relevant parliamentary debates but also (and in detail) the applicant's individual circumstances, the Court considering that it was not its role to review domestic law *in abstracto*. Had the Court reviewed the residence restriction as a "general measure", the legislative framework and choices underlying it would have been of primary importance and, the more convincing the general justifications, the less importance the Court would have attached to the impact on the applicant of the measures (see, for example, *James and Others v. the United Kingdom*[224]; *Ždanoka v. Latvia*[225]; *Stec and Others v. the United Kingdom*[226]; and *Animal Defenders International v. the United Kingdom*[227]).

As to the legislative and policy framework, two aspects of the Grand Chamber's examination are worth highlighting. In the first place, the applicant maintained that the legislation did not have the desired effect (of stopping the trend toward "ghettoisation"). The Grand Chamber clarified that, to the extent it was called upon to assess socioeconomic policy choices, it would do so in light of the situation at the material time and not with the benefit of hindsight. There was no evidence that the authorities' decision was at the time "plainly wrong or produced disproportionate negative effects at the level of the individual affected". Indeed, the evidence was that the socioeconomic composition of the relevant districts had begun to change, the domestic authorities believed so and they had, for example, extended the measures linking them to a programme involving considerable public expenditure. In addition, the Grand Chamber reviewed the legislative history of the impugned law and, in so doing, accorded considerable importance to

222. *Ward v. the United Kingdom* (dec.), no. 31888/03, 9 November 2004.

223. *Codona v. the United Kingdom* (dec.), no. 485/05, 7 February 2006.

224. *James and Others v. the United Kingdom*, 21 February 1986, Series A no. 98.

225. *Ždanoka v. Latvia* [GC], no. 58278/00, ECHR 2006-IV.

226. *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, ECHR 2006-VI.

227. *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, §§ 106-12, ECHR 2013 (extracts).

the inclusion of safeguards which had been prompted by Parliament and which indicated that adequate provision had been made for the rights and interests of persons such as the applicant: sufficient alternative housing had to be available locally for those who did not qualify for a permit; the designation of districts had to be reviewed every four years and the relevant minister would report every five years to Parliament on the effectiveness of the legislation and its effects in practice; and an individual hardship clause was included. The availability of judicial review (at two levels of jurisdiction satisfying Article 6) provided additional protection.

The present applicant's personal situation was to be assessed and, in turn, weighed against the public interest. The Grand Chamber accorded the same meaning to "public interest" as it did in an environmental-protection context under Article 8: the evaluation of alternative accommodation would involve a consideration of the particular needs of the persons concerned (family requirements and financial resources), on the one hand, and, on the other, the interests of the local community. The present applicant's personal position was not particularly compelling, notably: she had not suggested particular hardship; she had refused to state why – personal preference apart – she wished to remain in the district; and it emerged that she had moved to government-subsidised housing in a different municipality just before her six-year waiting period ended. Were an unsupported personal preference to be accepted, the domestic authorities and the Court would be deprived of the possibility of weighing up the public and private interests involved and public decision-making would be overridden, in effect reducing the State's margin of appreciation to nought.

OTHER CONVENTION PROVISIONS

Restrictions not prescribed by the Convention (Article 18)

The *Merabishvili v. Georgia*[228] judgment concerned Article 18 read in conjunction with Article 5 of the Convention.

The applicant was a former Minister of Internal Affairs and former Prime Minister of Georgia. At the relevant time, he was the leader of the main opposition party. He was arrested and held in pre-trial detention on charges of, *inter alia*, abuse of power, election fraud and misappropriation of public funds. He disputed the necessity of his pre-trial detention, arguing that the real objectives were, in the first place, to

228. *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017.

remove him from the political scene and, secondly, to obtain information from him (regarding the death in 2005 of a former Prime Minister and the bank accounts of a former President). In this latter respect, the applicant alleged that he had been covertly taken out of his cell during the night and taken to the office of the head of the Prison Authority where the then Chief Prosecutor had questioned him on these two matters.

The applicant complained under Article 5 §§ 1, 3 and 4 and Article 18 of the Convention. The Chamber did not consider it established that the purpose of his arrest and detention was to remove him from the political scene but found that he had been detained for a legitimate law-enforcement purpose, as well as for the unlawful purpose of obtaining information from him. It found no violation of Article 5 § 1, a violation of Article 5 § 3, that it was not necessary to examine his complaint under Article 5 § 4 and that there had been a violation of Article 18 in conjunction with Article 5 § 1. The Grand Chamber arrived at the same conclusion.

This was the first occasion the Grand Chamber had analysed Article 18 of the Convention and it is the central focus of this judgment. Certain aspects are worth noting.

(i) The judgment provides a comprehensive review of Article 18 case-law to date: beginning with the case-law of the former Commission (the first detailed examination being in *Kamma v. the Netherlands*[229]); continuing with the case-law of this Court, before and after its first finding of a violation of Article 18 in *Gusinskiy v. Russia*[230]; and ending with the Court's recent findings in *Ilgar Mammadov v. Azerbaijan*[231] and *Rasul Jafarov v. Azerbaijan*[232]. This review indicated that three matters required clarification: whether Article 18 allowed for a more objective assessment of the presence of an ulterior motive than proof of "bad faith", namely, proof of a "misuse of power"; the requirement of "direct and incontrovertible proof" (sourced from *Khodorkovskiy v. Russia*)[233] which had not been consistently relied upon since then and was absent from recent Article 18 judgments; and how to analyse a case characterised by a plurality of purposes.

(ii) As a general interpretive point, the Grand Chamber pointed out the similarity between Articles 14 and 18. While Article 18 does not have an independent existence, complementing as it does other Articles of

229. *Kamma v. the Netherlands*, no. 4771/71, Commission's report of 14 July 1974, unreported.
230. *Gusinskiy v. Russia*, no. 70276/01, ECHR 2004-IV.
231. *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014.
232. *Rasul Jafarov v. Azerbaijan*, no. 69981/14, 17 March 2016.
233. *Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011.

the Convention, it is an "autonomous" requirement which means that Article 18 can be breached even if there has been no breach of the Article in conjunction with which it is relied on.

(iii) Since the Grand Chamber had found that the applicant's arrest and pre-trial detention had been carried out for a purpose prescribed by Article 5 § 1 (c), and given the applicant's allegations, it was necessary to determine the approach to be adopted in cases where it is alleged that a right was restricted for an ulterior purpose in addition to the one prescribed by the Convention (plurality of purposes).

In this respect, three options were open to the Grand Chamber: the legitimate purpose expunged the ulterior purpose; the mere presence of the ulterior motive contravened Article 18; or a form of intermediary solution, which was the option adopted by the Grand Chamber. Relying on similarities between Article 18 and the second paragraph of other Articles such as Articles 8 to 11, as well as Article 5 § 1, and thus inspired by the Court's approach in those contexts, the Grand Chamber found that a restriction can be compatible with the substantive Convention provision which authorises it because it pursues an aim permissible under that provision, but can still infringe Article 18 because another purpose not prescribed by the Convention was "predominant". This interpretation was consistent with the case-law of national courts and of the Court of Justice of the European Union, especially appropriate in this case since the *travaux préparatoires* clearly indicate that Article 18 was meant to be the Convention version of the administrative-law notion of "misuse of power". Which purpose was predominant would depend on all the circumstances and the Court would have regard, notably, to the "nature and degree of reprehensibility of the alleged ulterior purpose" and to the fact that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law.

(iv) As to how it could be established that there was an ulterior purpose and that it was predominant (question of proof), the Grand Chamber confirmed that it would adhere to its usual approach, there being no reason to restrict itself to any special standard of proof. The judgment goes on to outline comprehensively the three aspects of that usual approach: in the first place, the burden of proof is not borne by one or other party because the Court examines all material before it irrespective of its origin; secondly, the standard of proof is "beyond reasonable doubt" (not coextensive with the domestic-law standard in criminal cases); and, thirdly, the Court is free to assess not only the admissibility and relevance but also the probative value of each item of evidence before it.

Importantly in the context of Article 18, the Grand Chamber clarified that circumstantial evidence means information, about the primary facts, or contextual facts or sequences of events, which can form the basis for inferences about them (the Grand Chamber referred to *Ilgar Mammadov*, cited above, § 142, and *Rasul Jafarov*, cited above, § 158). Accordingly, reports/statements by international observers, NGOs or the media as well as decisions of other national/international courts are often taken into account, in particular to shed light on the facts or to corroborate findings made by the Court.

(v) Finally, the Court applied those principles to the two allegations of the present applicant. As to the first, and despite the fraught political backdrop, it had not been shown that the predominant purpose of his pre-trial detention was to hinder his participation in Georgian politics rather than to ensure the proper conduct of the criminal proceedings against him. As to the second, the Grand Chamber considered that it could draw inferences from the available material and the authorities' conduct to find the applicant's allegations, concerning his covert removal from his prison cell to obtain information from him, to be sufficiently convincing and therefore proven. As to whether this was the predominant purpose of his detention, the Grand Chamber clarified that, where the restriction of a Convention right amounted to a continuous situation, its chief purpose had to remain the one prescribed by the Convention throughout its duration in order for it not to contravene Article 18 and it could not be excluded that the initial purpose would be supplanted by another one as time went by. The Court was satisfied that, during the continuing situation of the applicant's pre-trial detention, the predominant purpose of this restriction of his liberty had changed. While in the beginning it was the investigation of offences based on a reasonable suspicion, later on the predominant purpose had become the wish to obtain information from the applicant, as demonstrated by his covert removal from his cell. This was sufficient to find a violation of Article 18 of the Convention.

Striking out (Article 37)

The *De Tommaso*[234] judgment, cited above, concerned the imposition of preventive measures on an individual considered to be a danger to society.

In 2008 the District Court, considering that the applicant represented a danger to society, imposed special police supervision orders for two

234. *De Tommaso v. Italy* [GC], no. 43395/09, ECHR 2017. See also under Article 5 (Right to liberty and security) above, Article 6 § 1 (Right to a fair hearing in civil proceedings – Applicability) above and Article 2 of Protocol No. 4 (Freedom of movement) above.

years. The decision was overturned on appeal seven months later, the appeal court having found that the applicant had not been a danger to society when the measures were imposed. The applicant did not have a public hearing at which to contest the measure.

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

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

The Court delivered a striking-out judgment in the case of *Burmych and Others v. Ukraine*[235]. Faced with the ineffective execution of a pilot judgment that had identified a structural problem resulting in violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, the Grand Chamber was required to decide whether the Court had to continue to examine the resulting follow-up individual applications. It concluded that no useful purpose was served in terms of the Convention's aims in its continuing to deal with those applications and decided to strike them out pursuant to Article 37 § 1 (c) of the Convention and to transmit them to the Committee of Ministers of the Council of Europe in order for them to be dealt with in the framework of the general measures of execution of the pilot judgment.

Just satisfaction (Article 41)

The issue in *Nagmetov v. Russia*[236] was whether the Court was competent to make an award for non-pecuniary damage in the absence of a properly submitted claim.

The applicant's complaint concerned his son's death, caused by a tear-gas grenade fired during a demonstration against corruption of

235. *Burmych and Others v. Ukraine* (striking out) [GC], nos. 46852/13 et al., 12 October 2017. See also under Article 46 (Execution of pilot judgments) below.

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

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

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

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

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

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

> "remains empowered to afford, in a reasonable and restrained manner, just satisfaction on account of non-pecuniary damage arising in the exceptional circumstances of a given case, where a

'claim' has not been properly made in compliance with the Rules of Court" (paragraph 76).

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

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

– there were "compelling considerations" in favour of making such an award: the particular gravity and impact of the violation and, if relevant, the overall context in which the breach occurred, as well as whether there were reasonable prospects of obtaining adequate "reparation" (within the meaning of Article 41) at the national level.

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

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

The *Chiragov and Others v. Armenia*[237] and *Sargsyan v. Azerbaijan*[238] judgments concerned the continuing loss of use of property of persons displaced by the Nagorno-Karabakh conflict in 1992.

A number of points are worth noting and of particular relevance for Article 41 assessments in cases arising from a conflict context.

The Grand Chamber premised its assessment by emphasising the "exceptional" nature of the cases.

In the first place, the Nagorno-Karabakh conflict took place ten years before Armenia and Azerbaijan ratified the Convention. The States'

237. *Chiragov and Others v. Armenia* (just satisfaction) [GC], no. 13216/05, 12 December 2017.
238. *Sargsyan v. Azerbaijan* (just satisfaction) [GC], no. 40167/06, 12 December 2017.

Convention responsibility arose, therefore, not out of damage from the conflict itself, but from the States' continuing failures since ratification in 2002 (compare *Cyprus v. Turkey*[239]). Accordingly, only pecuniary and non-pecuniary losses incurred since ratification were to be compensated under Article 41 of the Convention.

Secondly, the underlying conflict remained unresolved. The Grand Chamber therefore highlighted the number of applications pending before the Court by persons displaced because of the conflict (approximately a thousand) and the potential for further applications (over a million people were still so displaced). The Grand Chamber also emphasised in this regard, as it had in the principal judgments, the relevance of the principle of subsidiarity. That principle had a political dimension: the failure by Armenia and Azerbaijan to honour their Convention accession commitments to find a political solution to the conflict. It also had a legal dimension: the Court was not to be used as a court of first instance to resolve large numbers of cases arising out of an unresolved conflict. In that connection, the Court repeated the importance of the adoption by the States of general measures at national level such as the creation of a property-claims mechanism.

In *Chiragov and Others*, the six applicants were Azerbaijani Kurds who had been unable to return to their homes and property in the district of Lachin in Azerbaijan since they fled the Nagorno-Karabakh conflict in 1992. In *Sargsyan* the applicant, an ethnic Armenian, fled his village in 1992 during the Nagorno-Karabakh conflict. The village was on the north and Azerbaijani bank of a river which constituted the border with Nagorno-Karabakh, an area still inaccessible for security reasons. On 16 June 2015 the Grand Chamber found in two principal judgments[240], as regards the period falling within its temporal jurisdiction (Armenia ratified the Convention on 26 April 2002 and Azerbaijan on 15 April 2002), that there had been continuing violations as regard the applicants' lack of access to their properties and homes (Article 8 and Article 1 of Protocol No. 1) and as regards the lack of effective remedies (Article 13). In *Chiragov and Others*, it found, in particular, that no aim had been indicated that could justify the denial of access of the applicants to their property and homes and the lack of compensation, which constituted a continuing violation of Article 1 of Protocol No. 1. In *Sargsyan*, while the applicant's inability to access his property and home was explained by ongoing security considerations, the failure by the State to take

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

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

alternative measures to restore his property rights and to compensate him for the loss of enjoyment of the property placed a disproportionate burden on him and constituted a continuing violation of Article 1 of Protocol No. 1.

In both cases, the question of just satisfaction was reserved and is the subject of the present judgments.

Restitution not being realistically possible in the prevailing conditions, the Grand Chamber considered that compensation was appropriate just satisfaction. While some pecuniary loss had to be compensated (loss of income and increased rental and/or living expenses), the Court's assessment was burdened with many uncertainties and difficulties mainly linked to the unresolved conflict and the passage of time (approximately twenty-five years had passed since the applicants fled the conflict). Finding that each applicant was entitled to compensation for pecuniary and non-pecuniary damage and that these were closely connected, and given the difficulties in calculating such damage, the Grand Chamber awarded a global sum of EUR 5,000 to each of the applicants, as well as legal costs and expenses, emphasising that the award was made pending a political solution being found to the Nagorno-Karabakh conflict.

In both cases, interesting issues were raised by the deaths of two of the applicants (the sixth applicant in *Chiragov and Others* and the applicant in *Sargsyan*) after the introduction of their applications and the pursuit of the applications by their children. In the first place, the children's standing had already been addressed in the 2011 admissibility decision[241], so their entitlement to claim compensation was examined at the Article 41 stage (compare the examination of the admissibility of allegedly belated just-satisfaction submissions in *Cyprus v. Turkey*[242]). Secondly, the Government argued that, since the cases concerned a continuing violation, any claims in respect of non-pecuniary damage were extinguished with the applicants' deaths. The Grand Chamber rejected this argument finding that family members, who were entitled to pursue an application after an applicant's death, could also take an applicant's place as regards claims for compensation for non-pecuniary damage arising even after his death (relying on *Ernestina Zullo v. Italy*[243]). The Court did note that such an award might not be made when an application was pursued by the administrator of an applicant's

241. *Chiragov and Others v. Armenia* (dec.) [GC], no. 13216/05, 14 December 2011.

242. *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, §§ 13-29, ECHR 2014.

243. *Ernestina Zullo v. Italy* [GC], no. 64897/01, §§ 115-16 and 148-49, 29 March 2006.

estate (*Solomonides v. Turkey*[244]) or when the next of kin pursuing the application were not personally affected by it (*Malhous v. the Czech Republic*[245]). However, the children who had pursued the applications in the present cases were considered to have been personally affected by the relevant breaches: both as family members who fled and were affected by the loss of enjoyment of the property and as successors to the applicants' property rights (the right to use the land and ownership of the house).

Execution of pilot judgments (Article 46)

The *Burmych and Others v. Ukraine*[246] judgment examined the respective roles of the Court and the Committee of Ministers as regards individual cases arising out of a failure to execute a pilot judgment.

The five applications lodged in this case concerned prolonged non-enforcement of domestic final judicial decisions. They raised issues similar to those examined in the pilot judgment of *Yuriy Nikolayevich Ivanov v. Ukraine*[247] ("the *Ivanov* pilot judgment") and formed part of a larger group of pending follow-up cases. The *Ivanov* pilot judgment concluded as to a violation of Article 6 § 1 and Article 1 of Protocol No. 1 and, under Article 46, required that Ukraine set up, within one year, effective domestic remedies capable of securing redress for delayed enforcement. Pending the adoption of those measures, the Court adjourned pending and future similar cases reserving the right to resume examination if necessary to ensure the effective observance of the Convention. Thereafter, the influx of follow-up cases was such that the Court twice resumed its examination of such cases, before finally adjourning matters pending the outcome of the present cases, which were relinquished to the Grand Chamber in December 2015. By the date of the Grand Chamber's judgment, there were over 12,000 *Ivanov*-type cases pending before the Court, with approximately 200 introduced per month since the beginning of 2016.

The Committee of Ministers, in the context of its supervision of the execution of the *Ivanov* pilot judgment, adopted in June 2017 a further Interim Resolution calling upon the authorities to adopt as a matter of priority the general measures required to fully comply with the *Ivanov* pilot judgment.

This judgment is noteworthy because, faced with the ineffective execution of a pilot judgment, the Grand Chamber was required to

244. *Solomonides v. Turkey* (just satisfaction), no. 16161/90, 27 July 2010.

245. *Malhous v. the Czech Republic* [GC], no. 33071/96, 12 July 2001.

246. *Burmych and Others v. Ukraine* (striking out) [GC], nos. 46852/13 et al., 12 October 2017.

247. *Yuriy Nikolayevich Ivanov v. Ukraine*, no. 40450/04, 15 October 2009.

decide whether the Court had to continue to examine the resulting follow-up individual applications and thus was required to clarify the respective roles of the Court and of the Committee of Ministers in that context.

In particular, with the proliferation of structural and systemic issues and the phenomenon of repetitive follow-up cases, the pilot-judgment procedure was developed to reduce the threat to the effective functioning of the Convention system and to facilitate an effective resolution of the dysfunction in the national legal order. The central question was whether, when a pilot judgment is not executed and those objectives are not achieved, resulting in an abundance of follow-up individual applications, the Court should continue to examine the follow-up cases having regard to Articles 19 and 46 of the Convention and, if not, whether the Court had the power under Article 37 § 1 (c) to strike those applications from its list of cases.

(i) As regards Article 19 and the question of the requirement to deliver individual decisions in "cases where there was no longer any live issue", the Court, relying on the post pilot-judgment decision in *E.G. v. Poland and 175 other Bug River applications*[248], found that the Court's role under Article 19 could not be considered to require "individualised financial relief in each and every repetitive case arising from the same systemic situation". By adopting the pilot judgment, the Grand Chamber considered that the Court had discharged its functions under Article 19 of the Convention.

As to the conclusions to be drawn in light of Article 46 of the Convention, the Court considered that the division of roles between the Court and the Committee of Ministers was clear. While the Court might assist the State in fulfilling its obligations under Article 46 (by seeking to indicate in a pilot judgment the type of measure to be taken to put an end to a systemic problem identified), it was for the Committee of Ministers to supervise the execution of that judgment and to ensure that the State had discharged its legal obligation under Article 46, including the taking of such general remedial measures as may be required by the pilot judgment. Follow-up cases resulting from ineffective execution of the pilot judgment involved problems of a financial and political nature, the resolution of which lay outside the Court's competence. They could only be adequately addressed between the State and the Committee of Ministers, on whom it was incumbent to ensure the pilot judgment was fully implemented through general measures and appropriate relief to individual applicants.

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248. *E.G. v. Poland and 175 other Bug River applications* (dec.), no. 50425/99, ECHR 2008 (extracts).

Having regard therefore to the respective competences of the Court and the Committee of Ministers under Articles 19 and 46 of the Convention, the Grand Chamber concluded that no useful purpose was served in terms of the Convention's aims in its continuing to deal with the individual follow-up cases.

(ii) Moreover, the Grand Chamber went on to find that the Court could and should strike out those applications under Article 37 § 1 (c) of the Convention. For the reasons already evoked in the judgment, it was considered not "justified" to continue with the examination of those cases and that "respect for human rights" did not require such an examination by the Court. Indeed, it was considered that the interests of the individual applicants would be better served in the execution process.

(iii) Finally, and as in previous pilot judgments, the Grand Chamber determined the procedure to be adopted as regards other pending and future cases but, in this instance, it went one step further. The Grand Chamber found that it had the power to join to the present five cases (of which it had been seised under Article 30 of the Convention) all follow-up *Ivanov*-type applications pending before the Court (the Grand Chamber thereby considering itself seised of those cases also). It proceeded to strike out all those applications (namely, the initial five applications as well as over 12,000 pending applications). Future applications might also be struck out, unless otherwise inadmissible under Article 35 of the Convention. The Grand Chamber noted that the decision to strike out applications was without prejudice to the Court's power to restore applications to its list of cases and, in that respect, cautioned that it would reassess the situation within two years.