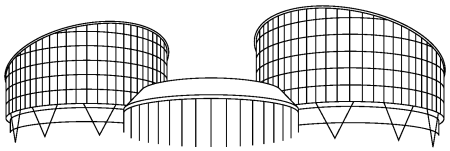

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Overview of the Court's case-law from 1 January to 15 June 2016

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Overview of the Court's case-law from 1 January to 15 June 2016[1]

1. This Overview contains a selection by the Jurisconsult of cases of interest from a legal perspective. It has been drafted by the Jurisconsult's Department and is not binding on the Court.
This provisional version will be superseded by the final version covering the whole of 2016.

Table of Contents

Jurisdiction and admissibility

Jurisdiction of States (Article 1)

The *Mozer v. the Republic of Moldova and Russia*[1] judgment concerned the lawfulness of detention ordered by courts of the "Moldavian Republic of Transdniestria" ("MRT"). The Grand Chamber examined the issue of "jurisdiction" within the meaning of Article 1 of the Convention with regard to the two respondent States.

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

The Grand Chamber found that Russia had violated Articles 3, 5, 8, 9 and 13 of the Convention and that there had been no violation of those Articles by the Republic of Moldova.[2]

In reaching that conclusion, it maintained its previous findings on the jurisdiction of both respondent States as regards the "MRT" (*Ilaşcu and Others v. Moldova and Russia*[3], *Ivanţoc and Others v. Moldova and Russia*[4] and *Catan and Others v. the Republic of Moldova and Russia*[5]).

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

As to the Republic of Moldova, the Court reiterated that, while it had no effective control over the acts of the "MRT", public international law recognised Transdniestria as part of the Republic of Moldova's territory. This gave rise to positive obligations on it, under Article 1 of the Convention, "to use all the legal and diplomatic means available to it to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention to those living there".[6]

"Core" rights

Right to life (Article 2)

Effective investigation

The *Armani Da Silva v. the United Kingdom*[7] judgment concerned the criminal conviction of the police force, but not the individual police officers, following a fatal shooting incident.

The applicant's cousin was shot dead, in error, by Special Firearms Officers while on the underground in London in the wake of a series of bombs on the city's transport network. An extensive investigation was conducted and detailed investigation reports were published. The decisions of the Crown Prosecution Service not to prosecute were detailed and the inquest was

1. *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, 23 February 2016.
2. See Articles 5 and 13 below.
3. *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII.
4. *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, 15 November 2011.
5. *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and others, ECHR 2012 (extracts).
6. See also Article 5 below.
7. *Armani Da Silva v. the United Kingdom*, no. 5878/08, ECHR 2016.

comprehensive: both were the subject of judicial review. While no individual officer was disciplined or prosecuted, the Office of the Commissioner of Police of the Metropolis ("the OCPM") was found guilty of criminal charges under health and safety legislation.

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

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

(ii) The judgment is interesting in that it clarifies precisely what the Court meant in *McCann and Others v. the United Kingdom*[8] by an "honest belief [that the use of force was justified] which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken".

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

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

In so finding, the Court clarified that an aspect of its case-law had evolved. While it had initially stated that an investigation should be capable of leading to the "identification and punishment of those responsible", the case-law now recognised that the obligation to punish would apply only "if appropriate" (see, for example, *Giuliani and Gaggio v. Italy*[9]). As to whether it was "appropriate" or not to punish the individual police officers, the Court noted that it had never found to be at fault a prosecutorial decision following an Article 2 compliant investigation (and the present one had so complied) but that "institutional deficiencies" in the systems of criminal justice and prosecution had led to such findings. The present applicant had alleged one such deficiency: the threshold evidential test (whether there was a "realistic prospect of conviction") applied when deciding whether or not to prosecute. The Court did not dispute the need for such a test and, further, considered that the State should be accorded a certain margin of appreciation in setting the threshold (it required balancing competing interests and there was no relevant European consensus). Having regard to other related domestic-law factors, it could not be said that the threshold evidential test for bringing a prosecution was so high as to fall outside the State's margin of appreciation. The authorities were entitled to take the view that public confidence in the prosecutorial system was best maintained by prosecuting where the evidence justified it and not prosecuting where it did not. The applicant had

8. *McCann and Others v. the United Kingdom* [GC], 27 September 1995, § 200, Series A no. 324.
9. *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, ECHR 2011 (extracts).

not therefore demonstrated any "institutional deficiencies" which gave rise – or were capable of giving rise – to a procedural breach of Article 2 concerning the decision not to prosecute the individual officers.

In concluding on this question of individual or institutional prosecutions, the Court reviewed the State's overall response to the shooting incident to find that it could not be said that any question of the authorities' responsibility was left in abeyance (unlike the position in *Öneryildiz v. Turkey*[10]). In particular, it noted that during the extensive investigations both individual and institutional responsibility had been considered, the prosecution deciding to prosecute the OCPM for the detailed reasons given (including the accepted threshold evidential test). The institutional changes recommended by the Independent Police Complaints Commission had been made and it could not be said that the fine imposed on the OCPM following its conviction was manifestly disproportionate (that is, it was not too low). The next of kin had been adequately involved and the Court noted the prompt *ex gratia* payments to them and the settlement of the civil proceedings.

Expulsion

The judgment in *F.G. v. Sweden*[11] concerned the duty of an expelling State to investigate an individual risk factor not relied upon by an applicant in his or her asylum application.

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

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

(i) The first issue worth noting concerned the fact that the deportation order expired after the Chamber judgment was delivered. The Government therefore argued before the Grand Chamber that the case should be struck out (Article 37 § 1 (c) of the Convention) or that the applicant could no longer claim to be a victim (Article 34). While the Grand Chamber was not convinced that the applicant had lost his victim status, it observed that, in principle, it might not be justified to continue its examination as it was clear the applicant could not be expelled for a considerable time to come (Article 37 § 1 (c)). However, "special circumstances concerning respect for human rights" required the continued examination of the application: the case had been referred to the Grand Chamber under Article 43 (a serious question of interpretation) and it concerned important issues regarding the duties of parties to asylum proceedings which would have an impact beyond the applicant's situation. The request to strike out the case was dismissed.

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

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

10. *Öneryildiz v. Turkey* [GC], no. 48939/99, ECHR 2004-XII.
11. *F.G. v. Sweden* [GC], no. 43611/11, ECHR 2016.

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

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

Prohibition of torture and inhuman or degrading treatment and punishment (Article 3)[12]

Degrading treatment

The *Cazan v. Romania*[13] judgment concerned ill-treatment inflicted on the applicant, a lawyer, when representing a client at police headquarters. He had gone to the police station of his own accord with a view to obtaining information about a criminal case against his client.

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

The judgment is of interest in that it applies to Article 3 of the Convention the general principles of case-law relating to the protection of a lawyer (see, as a recent example, *Morice v. France*[14]). The judgment refers, in particular, to Recommendation Rec(2001)10 of the Committee of Ministers of the Council of Europe on the European Code of Police Ethics, adopted on 19 September 2001. The Court emphasised the right of lawyers to exercise their professional duties without being subjected to ill-treatment. It was thus incumbent "on the police to respect [their] role, not to interfere unduly with their work, or to subject them to any form of intimidation or petty annoyance … or, therefore, to any ill-treatment".

Inhuman or degrading punishment

The judgment in *Murray v. the Netherlands*[15] concerned the *de facto* irreducibility of a life sentence. In 1980 the applicant was convicted of murder. Given the psychiatric evidence, the risk of reoffending and the absence of a more suitable confinement solution, he was sentenced to life imprisonment. His requests for a pardon were refused. A procedure to review life sentences was introduced in 2011: his first review in 2012 was unsuccessful (continued risk of reoffending). In March 2014 he was pardoned on the ground of ill-health and released. The applicant later passed away and the application was continued by his son and sister.

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

12. *R.B. v. Hungary*, no. 64602/12, 12 April 2016.
13. *Cazan v. Romania*, no. 30050/12, 5 April 2016.
14. *Morice v. France* [GC], no. 29369/10, 23 April 2015.
15. *Murray v. the Netherlands* [GC], no. 10511/10, ECHR 2016.

This Grand Chamber judgment develops the Court's case-law concerning the need for life sentences to be, notably, *de facto* reducible (*Kafkaris v. Cyprus*[16]; *Vinter and Others v. the United Kingdom*[17]; and, notably, *Harakchiev and Tolumov v. Bulgaria*[18]).

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

– The Grand Chamber's reasoning reflects the importance attached to the rehabilitation of prisoners. Having noted rehabilitation as a legitimate penological ground for imprisonment (*Vinter and Others*, cited above), the Grand Chamber highlighted the increasing importance of rehabilitation in the Court's case-law outside of the *Vinter and Others* context (for example, *Dickson v. the United Kingdom*[19]; *James, Wells and Lee v. the United Kingdom*[20]; and *Khoroshenko v. Russia*[21]). While there is no right to rehabilitation as such, prisoners should be allowed to rehabilitate themselves. A prisoner sentenced to life had to have, in particular, a real opportunity to make progress towards rehabilitation, such that he or she had hope of one day being eligible for release.

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

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

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

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

16. *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008.
17. *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and others (extracts).
18. *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, ECHR 2014 (extracts).
19. *Dickson v. the United Kingdom* [GC], no. 44362/04, ECHR 2007-V.
20. *James, Wells and Lee v. the United Kingdom*, nos. 25119/09 and others, 18 September 2012.
21. *Khoroshenko v. Russia* [GC], no. 41418/04, ECHR 2015.

Effective investigation

The judgment in *Sakir v. Greece*[22] concerned a physical assault on the applicant, an Afghan national, in the centre of Athens in 2009. The applicant had left his country of origin for fear of persecution on account of his political convictions and entered Greece without a residence permit. He was attacked by an armed gang in the centre of Athens and admitted to hospital with injuries inflicted by a sharp pointed object. After his discharge from hospital he was detained pending expulsion because he did not have a residence permit.

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

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

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

Detention

The case of *Blokhin v. Russia*[23] concerned the placement of the applicant, a minor, in a juvenile detention centre. He was suspected of having extorted money from another minor. As he was only 12 years of age at the material time, he was below the age of criminal responsibility and so was not prosecuted. He was brought before a court, which ordered his placement in a temporary detention centre for minor offenders for a period of thirty days in order to "correct his behaviour" and to prevent his committing any further acts of delinquency.

The Grand Chamber found, *inter alia*, a violation of Article 3 (on the ground of inadequate medical treatment).[24]

In so doing, it set down specific standards for the protection of the health of juvenile detainees, drawing inspiration from European and international standards[25] and providing, in particular, that a

22. *Sakir v. Greece*, no. 48475/09, 24 March 2016.
23. *Blokhin v. Russia* [GC], no. 47152/06, ECHR 2016.
24. See also Articles 5 and 6 below.
25. Including the United Nations Convention on the Rights of the Child, the UN Standard Minimum Rules for the Administration of Juvenile Justice of 1985 ("the Beijing Rules") and the UN Rules for the Protection of Juveniles Deprived of their Liberty ("the Havana Rules"), as well as the 2008 European Rules for juvenile offenders subject to sanctions or measures and the 2010 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

child should, it appears systematically, be medically assessed for suitability prior to placement in a juvenile detention centre.

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The judgment in *Korneykova and Korneykov v. Ukraine*[26] concerned the case of a pregnant mother who gave birth and breastfed her baby in prison. In addition to examining the mother's conditions of detention and the fairness of her trial, the Court also considered the adequacy of the medical care provided for her child, who spent nearly six months in prison with her from the age of four days.

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

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

The judgment thus concerned the situation of a newborn child forced, by his very young age, to accompany his mother in prison during her pre-trial detention. The Court referred to the relevant international standards. It noted that the child was particularly vulnerable and required close medical monitoring by a specialist. However, there were a number of inaccuracies and contradictions in his medical file, particularly regarding the dates of his medical examinations. The Court found it established that, as his mother had alleged, the child had gone without any monitoring by a paediatrician for almost three months. That in itself was sufficient to find a violation of Article 3 of the Convention.

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The judgment in *Cătălin Eugen Micu v. Romania*[27] concerned transmissible diseases contracted in prison.

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

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

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

26. *Korneykova and Korneykov v. Ukraine*, no. 56660/12, 24 March 2016.
27. *Cătălin Eugen Micu v. Romania*, no. 55104/13, 5 January 2016.

Prohibition of slavery and forced labour (Article 4)

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

The judgment in *Meier v. Switzerland*[28] concerned the obligation of prisoners to perform work in prison after they have reached retirement age.

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

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

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

The Court noted among other things that

(i) the aim of the obligation was to offset the harmful effects of long-term imprisonment by providing a structure to a prisoner's daily life;

(ii) the nature of the work to be performed was adapted to the age and health of the prisoner, and the work required of the applicant duly took account of his age and physical capacity to perform it;

(iii) the applicant was paid for the work;

(iv) a wide margin of appreciation should be accorded to the respondent State in this area, notwithstanding the fact that the European Prison Rules could be interpreted in the sense that prisoners of retirement age should be exempted from the obligation to work.

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

Lawful arrest or detention (Article 5 § 1)

The judgment in *Mozer*[30], cited above, concerned the lawfulness of detention ordered by courts of the "Moldavian Republic of Transdniestria" ("MRT").

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

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

28. *Meier v. Switzerland*, no. 10109/14, 9 February 2016.
29. *Stummer v. Austria* [GC], no. 37452/02, ECHR 2011.
30. *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, 23 February 2016.

The principal issue for the Grand Chamber was whether the applicant's detention ordered by the "MRT courts" could be considered "lawful" within the meaning of Article 5 § 1 (c). In particular, the Court was required to reconcile its recognition of the legal basis of the courts of the "Turkish Republic of Northern Cyprus"[31], on the one hand, with its finding that there was no legal basis for decisions of the "MRT courts", on the other (*Ilaşcu and Others*[32], cited above, and *Ivanţoc and Others*[33], cited above).

The Court applied the test as expressed in *Ilaşcu and Others (*§§ 436 and 460). It noted that it had already been found in that case that the relevant "MRT court" did not form part of a judicial system operating "on a constitutional and legal basis reflecting a judicial tradition compatible with the Convention". It remained to verify whether this continued to be valid in the present case. The Russian Government, which had effective control over the "MRT", had failed to submit information on the "MRT court" system. There was, moreover, no basis for assuming that that system reflected a judicial tradition compatible with the Convention and similar to the one in the remainder of the Republic of Moldova (the Court compared and contrasted the position in Northern Cyprus in that regard, see *Cyprus v. Turkey*[34]). The Grand Chamber concluded that its findings in *Ilaşcu and Others* were still valid so that the "MRT courts" could not have ordered the applicant's lawful arrest or detention. His detention was therefore "unlawful" within the meaning of Article 5 § 1 (c) of the Convention.

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

Minors (Article 5 § 1 (d))

The case of *Blokhin*[35], cited above, concerned the placement of the applicant, a minor who had not reached the age of criminal responsibility, in a juvenile detention centre.

The applicant, who was 12 years of age at the material time, was arrested and taken to a police station on suspicion of having extorted money from another minor. The authorities found that he had committed offences punishable under the Criminal Code. However, no criminal proceedings were initiated since he was below the statutory age of criminal responsibility. He was brought before a court, which ordered that he be placed in a temporary detention centre for minor offenders for a period of thirty days in order to "correct his behaviour" and to prevent his committing any further acts of delinquency.

The Grand Chamber found, *inter alia*, a violation of Article 5 § 1.[36]

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

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31. *Loizidou v. Turkey* (merits), 18 December 1996, *Reports of Judgments and Decisions* 1996-VI; *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and others, ECHR 2010; *Foka v. Turkey*, no. 28940/95, 24 June 2008; *Protopapa v. Turkey*, no. 16084/90, 24 February 2009; *Asproftas v. Turkey*, no. 16079/90, 27 May 2010; *Petrakidou v. Turkey*, no. 16081/90, 27 May 2010; and *Union Européenne Des Droits de L'Homme and Josephides v. Turkey* (dec.), no. 7116/10, 2 April 2013.
32. *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII.
33. *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, 15 November 2011.
34. *Cyprus v. Turkey* [GC], no. 25781/94, § 237, ECHR 2001-IV.
35. *Blokhin v. Russia* [GC], no. 47152/06, ECHR 2016.
36. See also Article 3 above and Article 6 below.

This finding is interesting in that the Court appears to have clarified the meaning of "educational supervision". Previous case-law indicated that the notion of "educational supervision" was not to be "equated rigidly with notions of classroom teaching" so that, in the context of a young person in local-authority care, educational supervision had to "embrace many aspects of the exercise … of parental rights for the benefit and protection of the person concerned" (*Koniarska v. the United Kingdom*[37]; *D.G. v. Ireland*[38]; and *P. and S. v. Poland*[39]). Relying on European and international standards in this field[40], the Grand Chamber clarified that "educational supervision" must nevertheless contain an important core schooling aspect so that "schooling in line with the normal school curriculum should be standard practice" for all detained minors "even when they are placed in a temporary detention centre for a limited period of time, in order to avoid gaps in their education".

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The judgment in *D.L. v. Bulgaria*[41] concerned safeguards governing detention for the purposes of educational supervision. The applicant, who was a minor, was placed in a closed educational institution on account of, among other things, her antisocial behaviour and the risk that she would become further involved in prostitution. The placement was ordered by a court following a hearing at which she was represented.

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

The judgment can be seen as an important contribution to the Court's case-law on juvenile justice (see also in this respect the recent Grand Chamber judgment in *Blokhin*[42], cited above) and on the rights of juveniles deprived of their liberty in circumstances foreseen by Article 5 § 1 (d) of the Convention. The following points are worthy of note.

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

37. *Koniarska v. the United Kingdom* (dec.), no. 33670/96, 12 October 2000.
38. *D.G. v. Ireland*, no. 39474/98, § 80, ECHR 2002-III.
39. *P. and S. v. Poland*, no. 57375/08, § 147, 30 October 2012.
40. Including the United Nations Convention on the Rights of the Child, the Beijing Rules and the Havana Rules, as well as the 2008 European Rules for juvenile offenders subject to sanctions or measures and the 2010 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.
41. *D.L. v. Bulgaria*, no. 7472/14, 19 May 2016.
42. *Blokhin v. Russia* [GC], no. 47152/06, ECHR 2016.

Procedural rights

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

Access to a court

The judgment in *Arlewin v. Sweden*[43] related to a decision of the national courts to decline jurisdiction in respect of the alleged defamatory content of a transfrontier programme service.

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

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

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

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

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

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The decision in *Tabbane v. Switzerland*[44] concerned the resolution of a dispute by an international arbitration tribunal in Geneva with no right of appeal to the courts.

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

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

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

Fairness of the proceedings

The judgment in *Avotiņš v. Latvia*[45] developed the case-law in two areas:

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

– with regard to EU law, the presumption of equivalent protection (see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*[46], and *Michaud v. France*[47]) and the principle of mutual recognition of judgments within the European Union.

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

The applicant alleged a violation of his right to a fair hearing guaranteed by Article 6 § 1 of the Convention. The Grand Chamber found no violation of Article 6 § 1. It considered that there had indeed been a regrettable shortcoming because of the way in which the Supreme Court had dealt

44. *Tabbane v. Switzerland* (dec.), no. 41069/12, 1 March 2016.
45. *Avotiņš v. Latvia* [GC], no. 17502/07, ECHR 2016.
46. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.
47. *Michaud v. France*, no. 12323/11, ECHR 2012.

with the prima facie serious issue raised by the applicant. However, this shortcoming did not entail a violation of Article 6 § 1 as the applicant had had a real opportunity to appeal against the impugned judgment in Cyprus.

(i) The Grand Chamber judgment develops the Court's case-law concerning the presumption of equivalent protection of fundamental rights by European Union law (known as "*Bosphorus* presumption", first defined by the Court in *Bosphorus* and then clarified in *Michaud*). It maintains the two conditions set forth in *Michaud*, that is, the "absence of any margin of manoeuvre" on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by EU law. With regard to the first condition, the judgment gives a valuable indication as to how to interpret the "absence of any margin of manoeuvre" in the case of an EU regulation which, unlike a directive, is directly applicable in the member States. In order to know whether the State authorities have a "margin of manoeuvre" in applying the specific provision at stake, regard must be had first and foremost to the interpretation of this provision given by the Court of Justice of the European Union (CJEU). As regards the second condition of the *Bosphorus* presumption, namely the deployment of the full potential of the supervisory mechanism provided for by EU law in the specific case, the judgment emphasises that this condition must be applied in a flexible way and without excessive formalism. More precisely, it cannot be understood as requiring the domestic court to request a preliminary ruling from the CJEU in all cases without exception, including those cases where no genuine and serious issue arises with regard to the protection of fundamental rights by EU law, or those in which the CJEU has already stated precisely how the applicable provisions of EU law should be interpreted in a manner compatible with fundamental rights.

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

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

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

Presumption of innocence (Article 6 § 2)

The judgment in *Rywin v. Poland*[48] concerned the impact of a parliamentary commission of inquiry on the conduct of parallel criminal proceedings relating to the same matters.

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

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

The judgment is noteworthy in that this was the first time the Court had had to address the implications for the presumption of innocence of the parallel conduct of an official inquiry and criminal proceedings dealing with the same background facts and circumstances. In previous judgments, the Court had laid down the relevant principles governing the making of statements by public officials which may be seen as a premature expression of a defendant's guilt (see, for example, *Daktaras v. Lithuania*[49]; *Butkevičius v. Lithuania*[50] and *Gutsanovi v. Bulgaria*[51]). In the applicant's case the Court found that parliamentary commissions of inquiry were also required to respect the guarantee contained in Article 6 § 2 as regards the wording of their terms of reference, the discharge of their mandate and their published conclusions. It is interesting to note that the Court did not at any stage take issue with the decision to allow a parliamentary investigation to run in parallel with a criminal trial dealing with a related matter.

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

Defence rights (Article 6 § 3)

The case of *Blokhin*[52], cited above, concerned the placement of the applicant, a minor who had not reached the age of criminal responsibility, in a juvenile detention centre.

48. *Rywin v. Poland*, nos. 6091/06 and others, 18 February 2016.
49. *Daktaras v. Lithuania*, no. 42095/98, § 41, ECHR 2000-X.
50. *Butkevičius v. Lithuania*, no. 48297/99, §§ 49, 50 and 53, ECHR 2002-II (extracts).
51. *Gutsanovi v. Bulgaria*, no. 34529/10, §§ 191 et seq., ECHR 2013 (extracts).
52. *Blokhin v. Russia* [GC], no. 47152/06, ECHR 2016.

The applicant, who was 12 years of age at the material time, was arrested and taken to a police station on suspicion of having extorted money from another minor. On the strength of the applicant's confession (which he later contested) and the statements of the alleged victim and the latter's mother, the authorities found that he had committed offences punishable under the Criminal Code. However, no criminal proceedings were initiated since he was below the statutory age of criminal responsibility. He was brought before a court, which ordered his placement in a temporary detention centre for minor offenders for a period of thirty days in order to "correct his behaviour" and to prevent his committing any further acts of delinquency.

The Grand Chamber found, *inter alia*, a violation of Articles 6 §§ 1 and 3 (on the ground that the applicant had been entitled to, but did not benefit from, the procedural guarantees of Article 6 of the Convention).[53]

The judgment is noteworthy because it comprehensively addresses, and in some respects develops, the procedural rights of detained juveniles (under the age of criminal responsibility). It also lists relevant international and regional juvenile justice standards on which, in certain respects, the judgment directly relied.[54]

It is interesting to note that the Grand Chamber, like the Chamber, applied the procedural guarantees of Article 6 to the proceedings which led to the applicant's detention. The Grand Chamber adopted the reasoning of the Chamber and, stressing the need to look beyond appearances and at the realities of the situation, found that the "more far-reaching procedural guarantees" of Article 6 should have applied to those proceedings: even though no criminal proceedings had been initiated against the applicant, the nature of the offence, together with the nature and severity of the penalty, were such as to engage the applicability of the criminal limb of that provision. The Court rejected the Government's contention that these procedural complaints should be examined under Article 5 § 4 (see, in this connection, *Bouamar v. Belgium*[55]).

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

Other rights in criminal proceedings

No punishment without law (Article 7)

The *Bergmann v. Germany*[56] judgment concerned the retrospective prolongation of preventive detention ordered by a criminal court and the notion of a "penalty".

The applicant was convicted in 1986 of serious violent sexual offences and sentenced to a term of imprisonment. The sentencing court also ordered that the applicant be placed in preventive

53. See also Articles 3 and 5 above.
54. These included the UN Convention on the Rights of the Child and the UN Standard Minimum Rules for the Administration of Juvenile Justice of 1985 ("the Beijing Rules"), as well as the 2008 European Rules for juvenile offenders subject to sanctions or measures and the 2010 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.
55. *Bouamar v. Belgium*, 29 February 1988, Series A no. 129.
56. *Bergmann v. Germany*, no. 23279/14, 7 January 2016.

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

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

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

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

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

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

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

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The judgment in *Dallas v. the United Kingdom*[57] concerned the allegedly unforeseeable application of the law on contempt for breach of a judge's direction to jurors prohibiting them from researching on the Internet the case being tried before them.

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

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

merely risked causing prejudice to the administration of justice through her Internet research but had caused such prejudice by disclosing her findings to her fellow jurors.

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

The Court disagreed with the applicant. In so doing, it referred to the accessibility and foreseeability requirements which the notion of "law" must satisfy and noted also that the process of judicial interpretation may lead to the gradual clarification of the rules of criminal liability on a case-by-case basis (*Del Río Prada v. Spain*[58]).

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

The judgment is of interest for several reasons.

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

Secondly, the case highlights the importance which the Court attaches to the nature of a judge's directions to a jury as a means of framing its decision-making and securing the fairness of proceedings; it complements previous case-law on this point (see, for example, *Beggs v. the United Kingdom*[59], and *Abdulla Ali v. the United Kingdom*[60], in the context of a common-law system, and, in the context of a civil-law system, *Taxquet v. Belgium*[61]).

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

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

58. *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 77-80 and 91-93, ECHR 2013.
59. *Beggs v. the United Kingdom* (dec.), no. 15499/10, §§ 128, 131 and 158, 16 October 2012.
60. *Abdulla Ali v. the United Kingdom*, no. 30971/12, § 96, 30 June 2015.
61. *Taxquet v. Belgium* [GC], no. 926/05, § 92, ECHR 2010.

Right to an effective remedy (Article 13)

In *Mozer*[62], cited above, the applicant, who had been detained since 2008, was convicted in 2010 of defrauding two companies and sentenced to seven years' imprisonment, five of which were suspended. He was released on the basis of an undertaking not to leave the city of Tiraspol. On an unspecified date after July 2010, he went to Chișinău for medical treatment and, in 2011, to Switzerland, where he applied for asylum. He complained under Article 5 that his detention by the "MRT courts" had been unlawful. He also complained of his treatment in detention under, *inter alia*, Articles 3, 8 and 9 of the Convention, read alone and in conjunction with Article 13.

The Grand Chamber found that Russia had violated Articles 3, 5, 8, 9 and 13[63] of the Convention and that there had been no violation of those Articles by the Republic of Moldova.

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

Others rights and freedoms

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

Private life[64]

The issue in *Kahn v. Germany*[65] was whether an award of damages was an inevitable consequence of an infringement of an applicant's personality rights

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

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

62. *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, 23 February 2016.
63. See also Articles 1 and 5 above.
64. *Di Trizio v. Switzerland*, no. 7186/09, 2 February 2016.
65. *Kahn v. Germany*, no. 16313/10, 17 March 2016.

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

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

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The *Vasileva v. Bulgaria*[66] judgment concerned a claim for damages by a patient against a surgeon and hospital following an operation. Various expert medical reports were produced in the proceedings. After examining the reports (with the exception of a report that had been prepared by a surgeon employed by the defendant hospital), the domestic courts found no evidence of negligence by the surgeon.

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

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

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

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

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

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

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The *Sousa Goucha v. Portugal*[67] judgment concerned a well-known celebrity who alleged that he had been defamed during a television comedy show shortly after making a public announcement concerning his sexual orientation.

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

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

The Court examined the application under Article 8 of the Convention, the main issue being whether, in the context of its positive obligations, the State had achieved a fair balance between the right to protection of reputation and the right to freedom of expression. Endorsing the approach adopted by the domestic authorities' in the instant case, the Court noted that in *Nikowitz and Verlagsgruppe News GmbH v. Austria*[68] it had introduced the criterion of the reasonable reader in cases involving satire.

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

Unlike the position in other cases concerning satirical forms of expression (see, for example, *Alves da Silva v. Portugal*[69], and *Welsh and Silva Canha v. Portugal*[70]), the joke in the applicant's case had not been made in the context of a debate of public interest. The Court stated that in such circumstances an obligation could arise under Article 8 for the State to protect a person's reputation where the statement went beyond the limits of what was considered acceptable under Article 10.

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The judgment in *R.B. v. Hungary*[71] concerned the procedural obligation to investigate racial abuse and threats directed at an individual of Roma origin.

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

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

67. *Sousa Goucha v. Portugal*, no. 70434/12, 22 March 2016.
68. *Nikowitz and Verlagsgruppe News GmbH v. Austria*, no. 5266/03, 22 February 2007.
69. *Alves da Silva v. Portugal*, no. 41665/07, 20 October 2009.
70. *Welsh and Silva Canha v. Portugal*, no. 16812/11, 17 September 2013.
71. *R.B. v. Hungary*, no. 64602/12, 12 April 2016.

In the first place, the Court found that the accused's utterances and acts, although overtly discriminatory and to be seen in the light of the anti-Roma rally in the applicant's locality, were not so severe as to cause the kind of fear, anguish or feelings of inferiority needed to engage Article 3 (compare and contrast cases in which sectarian and homophobic abuse were accompanied by physical violence: *P.F. and E.F. v. the United Kingdom* [72]; *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*[73]; and *Identoba and Others v. Georgia*[74]). The complaint under Article 3 was therefore manifestly ill-founded.

Secondly, the Court's finding of a procedural breach of Article 8 represents a new development in the case-law in this area. For the Court, the applicant was racially abused and threatened because she belonged to the Roma community. Her ethnic identity was an aspect of her private life and the abuse and threats to which she had been subjected, bearing in mind the overall anti-Roma hostility deliberately generated by the marchers in her neighbourhood, necessarily interfered with her right to respect for her private life. In the Court's view, the authorities were required to take all reasonable steps to unmask any racist motive in the incident complained of and to establish whether or not ethnic hatred or prejudice may have played a role in it. They had failed to do so in the applicant's case since the investigation carried out into alleged violence of a member of an ethnic group was too narrow in its scope (the police limited themselves to assessing whether the accused's threats had been directed against the applicant or uttered "in general") and was confined by the terms of the relevant criminal law (the provision of the Criminal Code on harassment did not contain any element alluding to racist motives).

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

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The judgment in *Biržietis v. Lithuania*[75] concerned the absolute prohibition on growing a beard in prison.

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

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

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

72. *P.F. and E.F. v. the United Kingdom* (dec.), no. 28326/09, 23 November 2010.
73. *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, 3 May 2007.
74. *Identoba and Others v. Georgia*, no. 73235/12, 12 May 2015.
75. *Biržietis v. Lithuania*, no. 49304/09, 14 June 2016.

expression of his personality and individual identity [which was] protected by Article 8 of the Convention".

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

The Court's judgment is a further illustration of the flexibility of the notion of "private life" and a confirmation of the established case-law that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention, save for the right to liberty. There is no question that a prisoner forfeits his or her Convention rights merely because of his or her status as a person detained following conviction. The circumstances of imprisonment, in particular considerations of security and the prevention of crime and disorder, may justify restrictions on those rights; nonetheless, any restriction must be justified in each individual case (see, for example, *Dickson v. the United Kingdom*[76]).

Family life[77]

The *Kocherov and Sergeyeva v. Russia*[78] judgment concerned the obligations of national courts when restricting the parental rights of parents with disabilities.

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

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

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

76. *Dickson v. the United Kingdom* [GC], no. 44362/04, ECHR 2007-V.
77. See also *Di Trizio v. Switzerland*, no. 7186/09, 2 February 2016, and *Pajić v. Croatia*, no. 68453/13, 23 February 2016.
78. *Kocherov and Sergeyeva v. Russia*, no. 16899/13, 29 March 2016.

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

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

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

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

Home

The *Ivanova and Cherkezov v. Bulgaria*[79] judgment concerned the imminent execution of a demolition order and the scope of the protection afforded to a home with no planning permission.

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

The Court found that the circumstances of the case gave rise to a breach of Article 8 of the Convention but no breach of Article 1 of Protocol No. 1[80]. Its reasoning for so doing is interesting in that it illustrates the difference in the interests protected by the respective provisions and hence the scope of protection afforded by them, especially when it comes to the application of the proportionality requirement to the facts of a particular case.

As to the Article 8 complaint, the Court essentially focused on whether the demolition would be "necessary in a democratic society." Its approach to that question was informed by its judgments in previous cases in which it had read into domestic procedures to evict tenants from public-sector housing (see, for example, *McCann v. the United Kingdom*[81]; *Paulić v. Croatia*[82]; and *Kay and Others v. the United Kingdom*[83]) or occupiers from publicly owned land (see, for example, *Chapman v. the*

79. *Ivanova and Cherkezov v. Bulgaria*, no. 46577/15, 21 April 2016.
80. See Article 1 of Protocol No. 1 below.
81. *McCann v. the United Kingdom*, no. 19009/04, § 46, ECHR 2008.
82. *Paulić v. Croatia*, no. 3572/06, 22 October 2009.
83. *Kay and Others v. the United Kingdom*, no. 37341/06, 21 September 2010.

United Kingdom[84]) a requirement to afford due respect to the interests protected by Article 8, given that the loss of one's home is an extreme form of interference with the right to respect for one's home (see, for example, *McCann*, § 49), regardless of whether the person concerned belongs to a vulnerable group.

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

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

Correspondence

The judgment in *D.L. v. Bulgaria*[85], cited above, concerned, *inter alia*, the right of minors detained in a closed educational institution to communicate with the outside world. The applicant, a minor, was placed in a closed educational institution on account of, among other things, her antisocial behaviour and the risk that she would become further involved in prostitution.

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

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

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

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

84. *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I.
85. *D.L. v. Bulgaria*, no. 7472/14, 19 May 2016. See also Article 5 § 1 (d) above.

Freedom of thought, conscience and religion (Article 9)

Freedom of religion

İzzettin Doğan and Others v. Turkey[86] concerned the State's obligation of impartiality and neutrality as regards religious beliefs.

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

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

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

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

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

(i) While the role of the State as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs might allow it to assess certain objective elements (such as the "level of cogency, seriousness, cohesion and importance" of a belief), that role excluded "any discretion on [the State's] part to determine whether religious beliefs or the means used to express such beliefs are legitimate" (citing *Manoussakis and Others v. Greece*[87]; *Hasan and Chaush v. Bulgaria*[88]; and *Fernández Martínez v. Spain*[89]). The right enshrined in Article 9 "would be highly theoretical and illusory if the degree of discretion granted to States allowed them to interpret the notion of religious denomination so restrictively as to deprive a non-traditional and minority form of religion, such as the Alevi faith, of legal protection (relying on, *inter alia*, *Kimlya and Others v. Russia*[90], and *Magyar Keresztény Mennonita Egyház and Others v. Hungary*[91]).

(ii) The corollary of that obligation of neutrality and impartiality was the principle of autonomy of religious communities, according to which it was the task of the highest spiritual authorities of a religious community to determine to which faith that community belonged. Only the most serious

86. *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, ECHR 2016.
87. *Manoussakis and Others v. Greece*, 26 September 1996, § 47, *Reports of Judgments and Decisions* 1996-IV.
88. *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000-XI.
89. *Fernández Martínez v. Spain* [GC], no. 56030/07, § 129, ECHR 2014 (extracts).
90. *Kimlya and Others v. Russia*, nos. 76836/01 and 32782/03, § 86, ECHR 2009.
91. *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, nos. 70945/11 and others, § 88, ECHR 2014 (extracts).

and compelling reasons could justify State intervention. The Court found that the respondent State's attitude towards the Alevi faith breached the right of the Alevi community to an autonomous existence, which was at the very heart of the guarantees in Article 9 (see, *mutatis mutandis*, *Miroļubovs and Others v. Latvia*[92], and *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*[93]).

Moreover, in describing the requirements and value of a pluralist society, the Court opined that "[r]espect for religious diversity undoubtedly represents one of the most important challenges to be faced today; for that reason, the authorities must perceive religious diversity not as a threat but as a source of enrichment" (citing, *mutatis mutandis*, *Nachova and Others v. Bulgaria*[94]).

Manifest one's religion or belief

The judgment in *Süveges v. Hungary*[95] concerned house arrest and its consequences for the applicant's right to manifest his religion in community with others.

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

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

The Court noted that had the applicant remained in pre-trial detention, rather than being placed under house arrest, he would in all likelihood have been able to take advantage of religious services at his place of detention. His inability to attend Mass, and thus the interference with his right to manifest his religion in community with others, had resulted from the decision to release him from custody and to impose a less coercive form of deprivation of liberty in order to secure his presence during the criminal proceedings. In the circumstances, the Court found that there had been no violation of Article 9. In examining the proportionality of the impugned restriction, it noted, firstly, and without further elaboration, that the very essence of the applicant's right to manifest his religion had not been impaired and, secondly, when requesting leave to attend Sunday Mass the applicant had failed to specify the time and place of worship. The latter consideration had weighed heavily in the domestic authorities' decision to refuse leave. Having regard to the margin of appreciation available to the authorities, the Court saw no reason to question that finding.

Freedom of expression (Article 10)

Freedom of expression

The *Karácsony and Others v. Hungary*[96] judgment related to procedural safeguards in disciplinary procedures against parliamentarians considered to have acted in a manner gravely offensive to parliamentary order.

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

92. *Miroļubovs and Others v. Latvia*, no. 798/05, §§ 86 (g) and 90, 15 September 2009.
93. *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, no. 40825/98, § 79, 31 July 2008.
94. *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII.
95. *Süveges v. Hungary*, no. 50255/12, 5 January 2016.
96. *Karácsony and Others v. Hungary* [GC], no. 42461/13, ECHR 2016.

It is, in the first place, worth nothing that this was the first case where the Court was required to examine the extent to which a Parliament is entitled to autonomously regulate its own internal affairs and, in particular, to restrict the expression rights of MPs in Parliament. The judgment begins by setting out comprehensively the Court's case-law concerning the various elements to be balanced in the Convention review of the interference with MPs' expression rights.

On the one hand, the procedural guarantees of Article 10 were to be taken into account when assessing the proportionality of such an interference (see, in particular, *Association Ekin v. France*[97]; *Lombardi Vallauri v. Italy*[98], and *Cumhuriyet Halk Partisi v. Turkey*[99]), as was the Court's case-law concerning the freedom of expression of MPs, especially in Parliament. In this latter respect, the Court made a novel distinction between restrictions on the substance of an MP's expression – in respect of which Parliaments had very limited latitude – and controlling the means ("time, place and manner") of such expression (which was in issue in the present case), which was to be independently regulated by Parliament and to which a broad margin of appreciation applied.

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

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

It is noteworthy that, despite the above-noted broad margin of appreciation given the principle of parliamentary autonomy, the Grand Chamber found that certain procedural safeguards should, as a minimum, be available during such a parliamentary disciplinary process. The first was the "right for [an] MP to be heard in a parliamentary procedure" before any sanction was imposed. The Court noted, as a source supplemental to its own case-law, that the right to be heard increasingly appeared as a basic procedural rule in democratic States, over and above judicial procedures, as demonstrated, *inter alia*, by Article 41 § 2 (a) of the Charter of Fundamental Rights of the European Union. The implementation of that right to be heard had to be adapted to the parliamentary context to ensure the fair and proper treatment of the parliamentary minority and to avoid abuse by the dominant party so that, *inter alia*, the Speaker of Parliament had to act "in a manner that is free of personal prejudice or political bias". The second procedural safeguard required was that the decision imposing a sanction on the MP should "state basic reasons" so the MP could understand the justification for the measure and so there could be public scrutiny of it.

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

97. *Association Ekin v. France*, no. 39288/98, § 61, ECHR 2001-VIII.
98. *Lombardi Vallauri v. Italy*, no. 39128/05, § 46, 20 October 2009.
99. *Cumhuriyet Halk Partisi v. Turkey*, no. 19920/13, § 59, ECHR 2016.

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The judgment in *Novikova and Others v. Russia*[100] concerned persons who staged solo demonstrations in the street on subjects of public interest, holding up placards. The actions of each applicant were peaceful and did not impede the movement of pedestrians or road traffic.

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

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

The Court viewed the applicants' actions as a form of political expression (compare with *Tatár and Fáber v. Hungary*[101]) and examined the case under Article 10 taking account of case-law principles related to Article 11.

Particular attention was given to the question of the "legitimate aim" pursued in the cases of the applicants who had not been charged after being taken to the police station, because no judicial decision had been taken as to whether an offence had been committed so the justification for the measure could not be assessed. The Court was not persuaded that the impugned measures pursued the aim of the "prevention of disorder", pointing out that the burden of proof was on the Government (*Perinçek v. Switzerland*[102]). It also had some doubt as to whether any legitimate aim, among those provided for by Article 10 § 2 permitting restrictions on freedom of expression, had been pursued by the measures in question and it was only with some reservation that it took into consideration the "prevention of crime".

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

Freedom of the press

In issue in the *Bédat v. Switzerland*[103] judgment was the balancing of a journalist's interest in publishing against the competing (private and public) interests protected by the secrecy of criminal investigations.

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

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

For the first time, the Court stated that the same approach is to be applied in cases, such as the present one, where the Article 10 rights of an applicant journalist are to be balanced against the

100. *Novikova and Others v. Russia*, nos. 25501/07 and others, 26 April 2016.
101. *Tatár and Fáber v. Hungary*, nos. 26005/08 and 26160/08, 12 June 2012.
102. *Perinçek v. Switzerland* [GC], no. 27510/08, ECHR 2015 (extracts).
103. *Bédat v. Switzerland* [GC], no. 56925/08, ECHR 2016.

competing Article 6 rights of the accused (including the right to an impartial tribunal and to be presumed innocent) in the pending criminal proceedings about which information, covered by the secrecy of criminal investigations, had been disclosed.

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

(iii) Just as it did in the cases of *Axel Springer AG v. Germany*[104] and *Stoll v. Switzerland*[105], the Court listed the criteria to be applied when carrying out this balancing exercise between Article 10, on the one hand, and the public and private interests protected by the principle of the secrecy of criminal investigations, on the other. Those criteria were drawn from the Court's jurisprudence and from the legislation of thirty Contracting States surveyed (for the purposes of the present case) and they were as follows: how the applicant journalist came into possession of the secret documents; the content of the impugned article; the contribution of the article to a public debate; the influence of the article on the criminal proceedings; any infringement of an accused's private life; and the proportionality of the penalty imposed.

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

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

Freedom to receive and impart information

The *Kalda v. Estonia*[106] judgment concerned restrictions placed on the applicant prisoner's access to certain Internet sites containing legal information.

The applicant, a prisoner, complained that he was refused access to several Internet sites and was thereby prevented from carrying out legal research. The sites included the website of the local information office of the Council of Europe and certain, but not all, State-run databases containing legislation and judicial decisions. In the appeal proceedings brought by the applicant, the Supreme Court concluded that granting access to Internet sites beyond those authorised by the prison authorities could increase the risk of prisoners engaging in prohibited communication, thus giving rise to a need for increased levels of monitoring of their use of computers.

The applicant relied on Article 10 of the Convention. The Court agreed with him that the prohibition on access to the sites in question interfered with his right to receive information which was freely available in the public domain. On that particular point, it is interesting to observe that the Court viewed the interference not in terms of the authorities' refusal to release the information requested by the applicant, but in terms of a prohibition on granting him access by means of the Internet to

104. *Axel Springer AG v. Germany* [GC], no. 39954/08, 7 February 2012.
105. *Stoll v. Switzerland* [GC], no. 69698/01, ECHR 2007-V.
106. *Kalda v. Estonia*, no. 17429/10, 19 January 2016.

information which others were willing to communicate, including the State via its official legal-information websites.

It reiterated in this connection that the Internet played an important role in enhancing the dissemination of information in general (see in this connection, *Delfi AS v. Estonia*[107], and *Ahmet Yıldırım v. Turkey*[108]) and, of relevance to prisoners, that an increasing amount of services and information is only available on the Internet. This included the Court's judgments and translations of them into the official languages of Contracting States including, as regards the applicant, in Estonian.

That said, it is noteworthy that the Court stressed that Article 10 cannot be interpreted as imposing a general obligation on States to provide access to the Internet, or to specific Internet sites, for prisoners. The facts of the particular case submitted to its examination would appear to be decisive in this connection.

In the instant case, in finding that the State had breached the applicant's right under Article 10 of the Convention, the Court laid emphasis on the fact that the law of the respondent State did not prevent prisoners from having access to all legal-information sites. As to the sites to which access was denied, it observed that they essentially stored information relating to fundamental rights, including the rights of prisoners. Such information was used by the courts of the respondent State and was of relevance to the applicant when it came to asserting and defending his rights before the domestic courts. It is of interest that the Court gave prominence to the fact that, when the applicant lodged his complaint with the domestic courts, translations of the Court's judgments against the respondent State into Estonian were only available on the website of the local Council of Europe Office, to which he was denied access.

The Court had to address the Government's argument that there were security and cost implications in allowing prisoners extended access to Internet sites of the type denied to the applicant. Its response was that their authorities had already made security arrangements for the use of the Internet by prisoners and had borne the related costs. In examining the applicant's case, it found that the domestic courts had not given due consideration to any possible security risks attendant on the applicant's use of the websites, bearing in mind that they were run by the Council of Europe and by the State itself. The reasons given by the domestic courts, albeit relevant, were not sufficient for the purposes of the second paragraph of Article 10.

The judgment is noteworthy in that the Court, while affirming that Contracting States are not obliged to grant prisoners access to the Internet, may be in breach of Article 10 of the Convention where they are willing to allow prisoners access to the Internet, but not to specific sites. It would appear from the judgment that it is for the domestic courts to provide relevant and sufficient reasons for any restrictions imposed on access to such sites, having regard to their nature and purpose.

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The judgment in *Pinto Coelho v. Portugal (no. 2)*[109] concerned the unauthorised broadcasting of a report containing audio extracts from a court recording of a hearing. In the retransmission, the voices of the three judges sitting on the bench and of the witnesses were digitally altered. These extracts were followed by comments by the applicant, a journalist specialising in court cases, referring to a miscarriage of justice. Following the broadcast, the president of the chamber which had tried the case submitted a complaint to the prosecutor's office. The persons whose voices had been broadcast did not, however, complain to the courts of an infringement of their right to be

107. *Delfi AS v. Estonia* [GC], no. 64569/09, § 133, ECHR 2015.
108. *Ahmet Yıldırım v. Turkey*, no. 3111/10, § 48, ECHR 2012.
109. *Pinto Coelho v. Portugal (no. 2)*, no. 48718/11, 22 March 2016.

heard. The applicant was convicted of breaching the statutory prohibition on broadcasting audio-recordings of a hearing without permission from the court and ordered to pay a fine.

The applicant complained of a breach of her right to freedom of expression.

The interest of the case lies in the fact that it pitches competing interests against each other: on the one hand, the rights of the press to inform the public and of the public to be informed and, on the other, the right of trial witnesses to be heard and the need to ensure the proper administration of justice.

The Court had regard to the determination of the superior courts of the member States of the Council of Europe to respond forcefully to the harmful pressure the media could put on civil parties and defendants and which was liable to undermine the presumption of innocence. Nevertheless, a number of factors swayed the balance in favour of finding a violation of Article 10 of the Convention.

(i) The trial was already over when the report was broadcast.

(ii) The hearing had been public and none of those concerned had used the remedy available to them for an infringement of their right to be heard. For the Court, the onus had primarily been on them to ensure respect for that right.

(iii) Additionally, the voices of those taking part in the hearing had been distorted to prevent them from being identified. In this connection, it is noteworthy that the Court found that Article 10 § 2 of the Convention did not provide for restrictions on freedom of expression based on the right to be heard, as that right was not afforded the same protection as the right to reputation. It was unclear why the right to be heard ought to prevent the broadcasting of sound clips from a hearing held in public. In sum, the Government had not given sufficient reasons to justify the fine imposed on the applicant.

Freedom of assembly and association (Article 11)

Freedom of peaceful assembly

The *Frumkin v. Russia*[110] judgment related to the State authorities' positive obligation to communicate with the leaders of a protest demonstration in order to ensure its peaceful conduct.

The applicant was arrested during the dispersal of a political rally in Moscow. He was detained for a period of thirty-six hours and eventually sentenced to fifteen days' administrative detention for obstructing traffic and disobeying police orders to refrain from doing so. In the Convention proceedings, he alleged among other things a breach of Article 11. The Court found for the applicant.

The judgment is noteworthy in that the Court had regard to the broader context in which the demonstration had been planned and in particular to the manner in which the police, during a stand-off with demonstrators which subsequently degenerated into violence, had responded to the wishes of the organisers to be authorised to hold the rally at what they believed to be a venue previously approved by the authorities. Using a cordon, the police sought to prevent the protestors from proceeding to the venue and tried to redirect them to an adjacent area. It was a matter of dispute between the parties as to whether approval had been given for the venue. The Court found on the facts that tacit, if not express, agreement had been given.

It is of interest that the Court examined the policing of the demonstration and the decision to disperse it from the standpoint of the authorities' duty to communicate with the leaders of the assembly, which it considered to be an essential aspect of their positive obligation under Article 11

110. *Frumkin v. Russia*, no. 74568/12, 5 January 2016.

of the Convention to ensure the peaceful conduct of the assembly, to prevent disorder and to secure the safety of all involved. A number of points may be highlighted in this connection.

(i) As to the authorities' fear that the protestors would set up a campsite on the venue, which justified the decision to deny them access to it, the Court observed that, although Article 11 did not guarantee a right to set up a campsite at a location of one's choice, such temporary installations may in certain circumstances constitute a form of political expression, restrictions on which must comply with the requirements of the second paragraph of Article 10.

(ii) Whatever course of action the police deemed correct, it was incumbent on them to engage with the leaders in order to communicate their position openly, clearly and promptly.

(iii) The police authorities had not provided for a reliable channel of communication with the organisers before the rally and had failed to respond to developments in a constructive manner and to resolve the tension caused by the confusion over the venue.

(iv) The failure to take simple and obvious steps at the first signs of conflict had allowed it to escalate, leading to the disruption of what had previously been a peaceful assembly and ultimately its dispersal.

The Court went on to find a further breach of Article 11 having regard to the absence of any pressing social need which would have justified the applicant's arrest and detention and certainly not his imprisonment.

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The *Gülcü v. Turkey*[111] judgment concerned the compatibility with Article 11 of the Convention of the sentence imposed on a minor for participating in an illegal demonstration and engaging in acts of violence against police officers.

The applicant, who was 15 at the time, was remanded in custody and subsequently convicted of membership of a proscribed organisation, promoting the aims of that organisation and resisting the police. The charges arose out of his participation in an illegal demonstration during which he had thrown stones at members of the security forces. The applicant, who had spent three months and twenty days in custody before being convicted, was given a prison sentence of seven years and five months in respect of all of the charges. He served part of that sentence before being released. In all, he was deprived of his liberty for a period of almost two years.

The Court examined the applicant's arguments from the standpoint of an alleged interference with his right to freedom of assembly, as guaranteed by Article 11 of the Convention. It found that the Convention had been breached. The judgment is of interest for the following reasons.

In the first place, the Court noted that, even if the applicant had been convicted of an act of violence against police officers, there was nothing to suggest that when joining the demonstration he had had any violent intentions; nor had the organisers of the demonstration intended anything other than a peaceful assembly. On that account, and notwithstanding his acts of violence directed at the police officers present at the demonstration, the applicant could rely on Article 11 of the Convention.

Secondly, the Court took issue with the domestic court's finding that the applicant's participation in the illegal demonstration was proof of his membership of the proscribed organisation and of his intention to disseminate propaganda in support of it. It observed that the domestic court had failed to provide relevant and sufficient reasons for these conclusions, in breach of the procedural safeguards inherent in Article 11.

111. *Gülcü v. Turkey*, no. 17526/10, 19 January 2016.

Thirdly, the Court noted the extreme severity of the penalty imposed. The applicant was 15 years old at the time of the incident. However, the domestic courts failed to have regard to his young age both when remanding him in custody and when passing sentence. It is interesting to observe that the Court had regard in this connection to Article 37 of the UN Convention on the Rights of the Child and General Comment No. 10 (2007), according to which the arrest, detention or imprisonment of a child can be used only as a measure of last resort and for the shortest appropriate period of time.

As to the part of the sentence imposed for the stone-throwing incident (two years, nine months and ten days), the Court could accept that the authorities enjoyed a wider margin of appreciation when examining the need for an interference with the Article 11 rights of those involved in such reprehensible acts. However, given the applicant's age the punishment could not be considered proportionate to the legitimate aims pursued.

Freedom of association

Cumhuriyet Halk Partisi[112], cited above, concerned the issue of the compatibility of the imposition of financial sanctions on a political party on account of irregularities in its expenditure discovered during inspection of its accounts.

The applicant, the main opposition party in Turkey, complained in the Convention proceedings that the Constitutional Court had ordered the confiscation of a substantial part of its assets following an inspection of its accounts which, according to the court's findings, revealed that over the course of a number of financial years the applicant party had incurred expenses which could not be considered lawful expenditure in terms of the "objectives of a political party". The amount covered by the confiscation orders represented the amount deemed to be unlawful expenditure. The applicant party's case was essentially based on the authorities' alleged failure to provide at the relevant time for a clear, foreseeable and predictable basis in law making it possible, firstly, to determine in advance the kinds of expenditure which fell within the scope of "unlawful expenditure" and, secondly, to anticipate the circumstances in which the Constitutional Court in response to an identified financial irregularity would have recourse to the making of a confiscation order rather than issuing a warning.

The Court agreed with the applicant party. The interference had not been "prescribed by law" and Article 11 of the Convention had thereby been breached. The judgment is noteworthy for a number of reasons.

In the first place, the Court observed that requiring political parties to subject their finances to official inspection does not of itself raise an issue under Article 11. Such requirement serves the goals of transparency and accountability, thus ensuring public confidence in the political process. Member States enjoy a relatively wide margin of appreciation when it comes to the supervision of the finances of political parties and the choice of sanctions to be imposed in the event of the discovery of irregular financial transactions.

Secondly, the Court noted that the confiscation orders obliged the applicant party to curtail a significant number of its political activities, including at local branch level. There had therefore been an interference with its right to freedom of association, political parties being a form of association essential to the proper functioning of democracy.

Thirdly, before examining compliance with the "prescribed by law" component of Article 11, the Court underscored that the financial inspection of political parties should never be used as a political tool to exercise political control over them, especially on the pretext that the political party (like the applicant party) is publicly financed. It continued (paragraph 88 of the judgment):

112. *Cumhuriyet Halk Partisi v. Turkey*, no. 19920/13, ECHR 2016.

> "In order to prevent the abuse of the financial-inspection mechanism for political purposes, a high standard of 'foreseeability' must be applied with regard to laws that govern the inspection of the finances of political parties, in terms of both the specific requirements imposed and the sanctions that the breach of those requirements entails."

Fourthly, the Court returned to this issue in its concluding remarks on the case. It accepted that the broad spectrum of activities undertaken by political parties in modern societies made it difficult to provide for comprehensive criteria to determine those activities which may be considered to be in line with the objectives of a political party and which relate genuinely to party work. However, in paragraph 106 of the judgment it stressed that, having regard to the important role played by political parties in democratic societies

> "any legal regulations which may have the effect of interfering with their freedom of association, such as the inspection of their expenditure, must be couched in terms that provide a reasonable indication as to how those provisions will be interpreted and applied".

On the facts of the applicant party's case, the Court found that the relevant legal provisions in force at the time lacked precision as regards the scope of the notion of unlawful expenditure. The decisions of the Constitutional Court had failed to bring clarity to the matter, resulting in an inconsistent and unpredictable interpretation and application of the applicable law to the detriment of the applicant party's need to be able to regulate its expenditure in order to avoid falling foul of the law. The lack of foreseeability was also compounded by the absence of guidance on whether and when an item of unlawful expenditure would be sanctioned by means of a warning or a confiscation order.

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Geotech Kancev Gmbh v. Germany[113] concerned the alleged breach of the applicant company's right not to be forced to join an association (negative right to freedom of association).

The applicant company was engaged in the building industry. It objected to having to pay additional contributions to the Social Welfare Fund established in that sector. Such obligation was based on the fact that a collective agreement concluded between the relevant employers' associations and the trade union was declared by the Federal Ministry for Labour and Social Affairs to be of general application in the building industry, which meant that all employers in the industry, even if they were not members of an employer's association, were required to make additional contributions to the Fund. The applicant company is not a member of an employers' association, and therefore did not take part in the negotiation of the collective agreement, and does not wish to join one.

In the Convention proceedings, the applicant company complained that the obligation to participate financially in the Fund violated its right to freedom of association, essentially because, not being a member of an employers' association, it had no say in the running of the Fund and no means to protect its own interests. In its view, these factors put it under pressure to join an employers' association so as to enable it to defend its interests.

The Court examined the applicant company's complaint from the standpoint of the negative aspect of the right to freedom of association, namely the right not to be forced to join an association. Its inquiry was directed at establishing whether the circumstances of the case were such as to constitute an interference with the applicant company's Article 11 right and in particular whether the alleged pressure to become a member of an employers' association could be said to have struck at the very substance of that right.

The Court ruled against the applicant company. The judgment is of interest in that it was required to distinguish the facts of the applicant company's case from those in previous cases in which it found that an obligation to contribute financially to an association can resemble an important feature in

113. *Geotech Kancev GmbH v. Germany*, no. 23646/09, 2 June 2016.

common with that of joining an association and can constitute an interference with the negative aspect of the right to freedom of association (see, in particular, *Vörður Ólafsson v. Iceland*[114]). The Court highlighted the following points which undermined the applicant company's view that the scheme was tantamount to compulsory membership of an employers' association. In so doing it had close regard to the social purpose underpinning the creation of the scheme.

In the first place, the applicant company's contributions to the Fund could only be used to implement and administer the Fund and to pay out benefits to employees in the building industry. For that reason, the contributions which the applicant company was required to pay could not be considered to be a membership contribution to an employers' association.

Secondly, all contributing companies, whether members of an employers' association or not, received full information about the use to which their contributions were put. There was a high level of transparency surrounding the operation of the Fund.

Thirdly, unlike in the above cited case of *Vörður Ólafsson*, cited above, there was a significant degree of involvement and control by public authorities of the scheme.

In view of the above considerations, the Court concluded that any *de facto* incentive for the applicant company to join an employers' association was too remote to strike at the very substance of its Article 11 right.

The judgment confirms the established case-law regarding the negative right to freedom of association and the importance of conducting a fact-specific inquiry into whether or not the facts of a particular case disclose a violation of Article 11 in cases of alleged compulsion to join an association.

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The *Unite the Union v. the United Kingdom*[115] decision examined the question whether a State has a positive obligation to provide for a mandatory system of collective bargaining.

The applicant trade union represents around 18,000 employees in the agricultural sector. Following a series of consultations with interested parties, including the applicant trade union, the British government succeeded in having adopted new legal provisions abolishing the Agricultural Wages Board for England and Wales, a statutory body which for many years had set minimum wages and conditions in the agricultural sector. The Board comprised among its members representatives of employers and employees, the latter being nominated most recently by the applicant trade union.

In the Convention proceedings, the applicant trade union argued that the abolition of the Board was contrary to Article 11 of the Convention in that it infringed its right to engage in collective bargaining in the interests of its members, that being an essential element of the right to form and join a trade union. The Court found the complaint to be manifestly ill-founded. The decision is of interest for the following reasons.

In the first place, the Court noted that the abolition of the Board did not prevent the applicant trade union from engaging in collective bargaining. Employers and trade unions were not prevented from entering into voluntary collective agreements and the enforceability of such agreements was provided for in domestic law. For that reason the abolition of the Board could not be seen as an interference with the applicant trade union's Article 11 rights.

Secondly, the Government could not be said to have failed to comply with any possible positive obligation which may be derived from Article 11 to have in place a mandatory statutory forum for collective bargaining in the agricultural sector. The respondent State enjoyed a wide margin of

114. *Vörður Ólafsson v. Iceland*, no. 20161/06, § 48, ECHR 2010.
115. *Unite the Union v. the United Kingdom* (dec.), no. 65397/13, 3 May 2016.

appreciation in determining whether a fair balance had been struck between the protection of the public interest in the abolition of the Board and the applicant trade union's competing rights under Article 11 of the Convention. It is of interest that the Court had regard to the European Social Charter, the Charter of Fundamental Rights of the European Union and several ILO Conventions concerning the right to bargain collectively, particularly in the agricultural sector, in order to show that there did not exist an international consensus in favour of the applicant trade union's position.

Thirdly, the Court pointed out the extent of the consultation on the Government's proposal to abolish the Board as well as its assessment of the impact, including financial, of the abolition on workers in the agricultural sector. It is noteworthy that the Court found that the fact that the government had considered the human rights implications of the proposal, including the extent of their positive obligations in the area of collective bargaining, was "a factor which carries some weight for [its] assessment as to the fair balance to be struck between the competing interests at stake in the light of the principle of subsidiarity".

Fourthly, in examining compliance with the fair-balance requirement, the Court reiterated that the applicant trade union was not prevented from negotiating voluntary collective and legally enforceable agreements. Even accepting its submission that voluntary collective bargaining in the agricultural sector was virtually non-existent and impractical, this was not, in the Court's view, sufficient to lead to the conclusion that a mandatory mechanism should be recognised as a positive obligation.

Prohibition of discrimination (Article 14)

Article 14 taken in conjunction with Article 8

The judgment in *Biao v. Denmark*[116] related to a restriction on family reunification, which indirectly discriminated against persons such as the applicant on the grounds of ethnic origin and nationality.

The first applicant, who was born in Togo, lived much of his formative years in Ghana before entering Denmark in 1993 and acquiring Danish nationality in 2002. He then married the second applicant in Ghana. A residence permit, to allow the second applicant to join him in Denmark, was refused since the applicants' aggregate ties to Denmark were not stronger than their attachment to any other country, Ghana in their case ("the attachment requirement").

They complained under Article 8 alone, and in conjunction with Article 14 that a legislative amendment which provided an exception to the attachment requirement for those who had been Danish nationals for twenty-eight years ("the twenty-eight-year rule"), resulted in a discriminatory difference in treatment against those, such as the first applicant, who had acquired Danish nationality later in life. The Grand Chamber found a violation of Article 14 in conjunction with Article 8 and that no separate issue arose under Article 8 of the Convention alone.

(i) The case is noteworthy for the finding that a domestic immigration measure, regulating family reunification, had an indirect discriminatory impact in breach of Article 14 on grounds of ethnicity and nationality.

In particular, the question was whether the twenty-eight-year rule, creating as it did an exception to the attachment requirement, had disproportionately prejudicial effects on persons such as the first applicant who had acquired Danish nationality later in life and was of ethnic origin other than Danish, compared to Danish-born nationals of Danish ethnic origin, so as to amount to indirect discrimination on the basis of ethnic origin or nationality in violation of Article 14. In finding a violation, the Grand Chamber:

116. *Biao v. Denmark* [GC], no. 38590/10, ECHR 2016.

– confirmed that, while Article 8 does not impose general family-reunification obligations (*Jeunesse v. the Netherlands*[117]), an immigration-control measure compatible with Article 8 could amount to discrimination and a breach of Article 14 (for example, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*[118]);

– confirmed that the Court will look behind the text and aim of a measure and examine whether it has disproportionately prejudicial effects on a particular group and will find it discriminatory if it has no "objective and reasonable justification", even if the policy or measure was not aimed at that group and even if there was no discriminatory intent (for example, *Hugh Jordan v. the United Kingdom*[119], and *D.H. and Others v. the Czech Republic*[120];

– identified that the relevant comparator in the applicants' case was "Danish nationals of Danish ethnic origin" and reiterated that no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin was capable of being justified in a contemporary society and that a difference of treatment based on nationality was only allowed for "compelling or very weighty reasons"; and

– concluded that the Government had failed to show that there were such "compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the twenty-eight-year rule".

(ii) It is not clear whether this judgment has any impact on the Court's finding in 1985 in *Abdulaziz, Cabales and Balkandali*. While the Grand Chamber did note that the majority of the Danish Supreme Court had relied on *Abdulaziz, Cabales and Balkandali*, it clarified that the Supreme Court had assessed this case as a difference of treatment based on length of citizenship whereas this Court assessed this case as an indirect discrimination based on nationality and ethnic origin, so that the Grand Chamber's proportionality test was stricter than that applied by the Supreme Court. Hence the Grand Chamber appears to have distinguished the *Abdulaziz, Cabales and Balkandali* case from the present one.

(iii) It is also worth noting that the Court gathered information on, and took into account, other international trends and views. In assessing justification for the twenty-eight-year rule, the Grand Chamber referred to Article 5 § 2 of the European Convention on Nationality of the Council of Europe, a declaration of intent to eliminate discrimination between those who are nationals at birth and other nationals (including naturalised). The Court considered it demonstrated a trend towards a European standard which was relevant for the present case. The relevant EU provisions and case-law on family reunification also indicated that no distinction should be made between those who acquired citizenship by birth or otherwise. Moreover, the Grand Chamber judgment reflects the fact that various independent bodies had specifically condemned the twenty-eight-year rule: European Commission against Racism and Intolerance (Council of Europe), the Committee on the Elimination of Racial Discrimination (United Nations) and the Commissioner for Human Rights (Council of Europe). The Court's own comparative law survey (covering twenty-nine member States) on the basic requirements for family reunification of nationals with third-country nationals indicated that none of those States distinguished between different groups of their own nationals in laying down conditions for family reunification.

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117. *Jeunesse* v. *the Netherlands* [GC], no. 12738/10, § 107, 3 October 2014.
118. *Abdulaziz*, *Cabales and Balkandali v. the United Kingdom*, 28 May 1985, §§ 70-80, Series A no. 94.
119. *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001.
120. *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 175 and 184-85, ECHR 2007-IV.

The *Di Trizio v. Switzerland*[121] judgment concerned social allowances and their relevance for family and private life.

Before giving birth to twins, the applicant had been forced to give up her full-time job on account of back problems and was thereby entitled to an invalidity allowance. Following the birth, she informed the relevant authorities that she wished to go back to work on a part-time basis for financial reasons. The applicant expected that the amount of invalidity allowance she received would be reduced by 50%, however, she did not receive an allowance at all. In their assessment the authorities relied on the applicant's declaration that she only wanted to work part-time. The special method used to assess the applicant's entitlement, which was only applied in cases of individuals engaged in part-time work, resulted in a decision to refuse the applicant any allowance since she did not satisfy the minimum 40% level of disability.

In the Convention proceedings, the applicant complained that the special method of assessment applied to her case by the domestic authorities discriminated against her in the enjoyment of her right to respect for her private and family life. She maintained that, even if the same method of calculation was applied to both men and women, it operated to the disadvantage of women since it overlooked the fact that in the vast majority of cases women, rather than men, often worked part-time after the birth of children. In other words, the method was based on the view that the male member of a couple went out to work while the female member looked after the house and children.

The judgment is of interest in that the Court had first to decide whether the facts of the case fell within the ambit of family and private life (Switzerland not having ratified Protocol No. 1). It concluded that they did.

As to family life, it noted that the application of the method of calculation criticised by the applicant was capable of having an impact on the manner in which she and her husband organised their family and working life and divided up their time within the family.

As to private life, the Court observed that Article 8 guaranteed the right to personal autonomy and development. Given that the method used to calculate entitlement to an invalidity allowance placed individuals wishing to work part-time at a disadvantage, it could not be excluded that its application restricted such individuals in their choice of the means to reconcile their private life with work, household duties and bringing up children.

Article 14 of the Convention was therefore applicable.

As to the merits, the Court found for the applicant: the method of calculation indirectly discriminated against women since it was almost exclusively women who were affected by it (in 97% of cases) and the Government had failed to adduce any reasonable justification for the difference in treatment. It observed that the applicant would likely have obtained an allowance had she declared to the authorities that it was her intention to work full-time or not to work at all.

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The *Pajić v. Croatia*[122] judgment concerned the recognition of a homosexual couple in an immigration context.

The applicant, a national of Bosnia and Herzegovina, was in a stable same-sex relationship with a woman living in Croatia. They travelled regularly to see each other. After two years the applicant lodged a request with the Croatian authorities for a residence permit with a view to family reunification. She stated that she had lived in Croatia for a number of years and had been in a relationship with her Croatian partner, with whom she wanted to establish a household and start a

121. *Di Trizio v. Switzerland*, no. 7186/09, 2 February 2016.
122. *Pajić v. Croatia*, no. 68453/13, 23 February 2016.

business. In a decision that was upheld by the Croatian courts, the immigration authorities refused her request on the ground that the Aliens Act expressly restricted the right to a temporary residence permit to heterosexual couples and made no mention of same-sex couples.

In the Convention proceedings, the applicant complained of discrimination on the basis of her sexual orientation. The Court found a violation of Article 14 read in conjunction with Article 8. The judgment is of interest for the following reasons.

(i) It extends the *Vallianatos and Others v. Greece*[123] case-law on non-cohabiting same-sex couples living in the same country to couples of different nationalities who are prevented from cohabiting on a permanent basis by immigration restrictions. In principle, the fact of not cohabiting does not deprive same-sex couples living in different countries of the stability required to bring them within the scope of "family life" within the meaning of Article 8. The case thus fell within the notion of "family life" as well as "private life" as the couple had been in a stable relationship for several years and met up regularly.

(ii) It confirms that member States must show that differences in treatment under the immigration rules based solely on sexual orientation – such as a rule providing that only different-sex couples and not same-sex couples may apply for a residence permit with a view to family reunification – must be shown to be justified in accordance with the Court's case-law. This applied even though the member States enjoy a wide margin of appreciation on matters relating to immigration.

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The judgment in *Aldeguer Tomás v. Spain*[124] raised the question whether same and different-sex couples were in an analogous situation as regards the differing legislative choices previously made in their regard.

Spain introduced divorce legislation in 1981, allowing a person or both persons in a different-sex union to remarry where one or both had previously been legally married to a third person. The legislation also entitled the surviving partner of a different-sex couple to obtain a survivor's pension where the other partner had died before the entry into force of the 1981 law.

Spain recognised same-sex marriage in 2005. However, no provision was made for the retroactive payment of a survivor's pension in a situation where one member of the same-sex couple had died before the entry into force of the 2005 law.

The applicant is the surviving partner of a stable same-sex union who is not entitled to a survivor's pension. He complained under Article 14 read in conjunction with Article 8 that heterosexual unmarried couples are treated more favourably on account of the operation of the retroactive survivor's pension clause provided for in the 1981 divorce law.

The Court found against the applicant. Its reasons for doing so are noteworthy.

The Court accepted that the applicant's relationship with his late partner fell within the notions of "private life" and "family life", thus confirming earlier case-law on this point (*Schalk and Kopf v. Austria*[125], and *Vallianatos and Others*[126], cited above).

However the central question was whether the applicant had been treated less favourably in the enjoyment of his rights under Article 8 and Article 1 of Protocol No. 1 by reason of the fact that the domestic authorities had not extended to him the same advantage given to the surviving partner of a heterosexual couple on the introduction of the divorce law. The answer to that question depended

123. *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, ECHR 2013 (extracts).
124. *Aldeguer Tomás v. Spain*, no. 35214/09, 14 June 2016.
125. *Schalk and Kopf v. Austria*, no. 30141/04, § 94, ECHR 2010.
126. *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 73, ECHR 2013 (extracts).

on whether the applicant's situation was comparable "to the situation that had arisen in Spain a quarter of a century earlier, of a surviving partner of a different-sex cohabiting couple, in which one or both partners were unable to remarry because they were still married to another person whom they were prevented from divorcing under the legislation in force at the material time" (paragraph 85 of the judgment). The Court replied in the negative: same-sex couples were unable to marry before 2005 since the institution of marriage was restricted to different-sex couples; different-sex couples in which one or both partners were legally married to a third party could not remarry before 1981 on account of the absence of divorce legislation. The legal impediments confronting the applicant and the comparator relied on by him were therefore fundamentally different. For that reason there had been no discrimination. The Court also noted that Spain could not be faulted for not having legislated for the recognition of the right to a survivor's pension for same-sex couples at an earlier stage, for example before the death of the applicant's partner. The timing for the introduction of such laws fell within the State's margin of appreciation (see *Schalk and Kopf,* cited above, §§ 105 and 108, and, more recently, *Oliari and Others v. Italy*[127]).

Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1[128]

The judgment in *Guberina v. Croatia*[129] related to a failure to take account of the needs of a disabled child when determining a father's eligibility for tax relief on the purchase of property adapted to those needs.

The applicant is the father of a severely disabled child who required constant attention. He sold the family's third-floor flat in a building without a lift, and purchased a house so as to provide the child with facilities which were better suited to his and the family's needs. The applicant sought tax relief on the purchase of the house under the relevant legislation but his request was refused on the ground that the flat he had sold met the needs of the family, since it was sufficiently large and equipped with the necessary infrastructure such as electricity and heating. No consideration was given to the plight of the child and the absence of a lift in the building.

The applicant essentially complained in the Convention proceedings that the manner of application of the tax legislation to his situation amounted to discrimination, having regard to his child's disability. The Court found a breach of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1. The judgment is noteworthy for the following reasons.

In the first place, the Court held that the applicant could complain of discriminatory treatment on account of his child's disability. In its view, Article 14 also covered situations in which an individual is treated less favourably on the basis of another's status within the meaning of the case-law under that provision. As the father of a disabled child for whom he provided care, the applicant could rely on Article 14.

Secondly, the Court considered that the authorities had treated the applicant like any other person who purchased property and sought tax relief on the ground that their previous property failed to meet basic infrastructure requirements of the type mentioned above. For the Court, the essential question was to determine whether there was objective and reasonable justification for not treating the applicant's situation differently, having regard to the factual inequality between his situation and that of other claimants of tax relief on purchased property (see in this connection, *Thlimmenos v. Greece*[130]). In its view, even if the relevant tax legislation did not on the face of it appear to allow the decision-maker to find a solution for the applicant's situation, it was noteworthy that other provisions of domestic law did address the problems facing disabled persons in having access to buildings. The availability of a lift was seen in domestic law as a basic requirement in this connection.

127. *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, § 163, 21 July 2015.
128. *Aldeguer Tomás v. Spain*, no. 35214/09, 14 June 2016.
129. *Guberina v. Croatia*, no. 23682/13, ECHR 2016.
130. *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV.

Furthermore, the Court observed that the authorities had not taken into account Croatia's relevant obligations under the UN Convention on the Rights of Persons with Disabilities. The failure to have regard to these wider disability-based considerations and obligations had resulted in the application of an overly restrictive and mechanical approach to the interpretation of the tax legislation as regards the meaning of basic infrastructure requirements. It is of interest that the Court was not prepared to accept by way of objective and reasonable justification for the failure to take account of the applicant's specific situation the Government's plea that the tax law was intended to assist financially disadvantaged purchasers of property. Its response was that this argument had never been invoked by the authorities as a reason for rejecting the applicant's claim for tax relief and for that reason it could not speculate on its relevance.

Finally, the judgment can be viewed as a significant contribution to the Court's existing case-law on disability and is illustrative of the Court's readiness to have regard to a State's obligations under other international instruments when deciding on compliance with Convention obligations in the area of discrimination.

Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1

The case of *Çam v. Turkey*[131] concerned a visually impaired child who was denied access to music studies.

The applicant was refused admission to the music section of a Turkish academy. She had satisfied the academy that she had the technical ability to pursue her education in her chosen instrument. However, she was refused a place because she was unable to produce a medical certificate drawn up in compliance with the necessary administrative requirements and confirming to the academy's satisfaction her physical ability to follow its courses.

In the Convention proceedings, the applicant alleged that, because of her disability, she had been discriminated against in her right to education, contrary to Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1.

The Court agreed with the applicant that she was refused access to the academy solely on account of her visual disability. It was persuaded that the academy was not in a position to provide education to disabled persons regardless of the nature of their particular disability. The academy's insistence on a medical certificate compliant with its own internal regulations could not disguise this fact.

The judgment is noteworthy for the following reasons.

In the first place, the Court ruled that the right guaranteed by Article 2 of Protocol No. 1 was engaged on the facts of the case even though the primary focus of the education provided by the academy was on the development of the applicant's musical talent.

Secondly, in finding that Article 14 had been breached the Court drew on the provisions of the UN Convention on the Rights of Persons with Disabilities (which Turkey had ratified) and, in particular, the provisions of its Article 2 on the requirement of "reasonable accommodation", meaning the adoption of "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

Significantly, the Court reasoned, with reference to the particular vulnerability of disabled children such as the applicant, that discrimination based on an individual's disability also arises when the authorities refuse to examine the possibility of introducing measures which could bring about a "reasonable accommodation".

131. *Çam v. Turkey*, no. 51500/08, 23 February 2016.

In finding that there had been a breach of the Convention, the Court noted that the academy had neither sought to identify how the applicant's visual impairment could have impeded her ability to follow music lessons nor examined the sort of measures which could be taken in order to accommodate her disability.

The judgment reflects the importance which the Court attaches to international-law developments when it comes to issues submitted to its consideration and its willingness to interpret the scope of Convention rights in the light of such developments.

Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1

The issue in *Partei Die Friesen v. Germany*[132] was alleged discrimination against a political party representing the interests of a minority group.

The applicant was a political party. It claimed to represent the interests of the Frisian minority in Germany and was particularly active in the *Land* of Lower Saxony. It failed to attain the 5% threshold for the 2008 parliamentary elections in Lower Saxony, obtaining only 0.3% of the votes cast. In the Convention proceedings, the applicant party argued that the imposition of the 5% threshold requirement amounted to an interference with its right to participate in elections without being discriminated against, as guaranteed by Article 14 of the Convention read in conjunction with Article 3 of Protocol No. 1.

The Court found that these provisions had not been violated. The judgment may be seen as a noteworthy contribution to the case-law on the scope of a Contracting Party's obligations with regard to the protection of minorities in the electoral sphere and the role of the margin of appreciation in this connection.

The Court observed that the forming of an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights (see *Gorzelik and Others v. Poland*[133]). The applicant party was formed to represent the interests of a national minority. The Court accepted its argument that the number of Frisians in Lower Saxony was not high enough to reach the statutory electoral threshold for obtaining a mandate.

Should it be treated differently on that account to other special-interest parties representing the interests of a small part of the population? On that point, the Court had regard to the Council of Europe's Framework Convention for the Protection of National Minorities, Article 15 of which emphasised the participation of national minorities in public affairs. It observed, however, that the possibility of exemption from minimum electoral threshold requirements was presented as one of many options to attain this aim, and no clear and binding obligation could be derived from that Convention to exempt national minorities from electoral thresholds. States Parties to the Framework Convention enjoyed a wide margin of appreciation as regards the implementation of its Article 15. Accordingly, even if certain of the *Länder* in Germany exempted national minorities from the threshold requirement, and even if the Convention were to be interpreted in the light of the Framework Convention, it could not be concluded that the Convention required a different treatment in favour of minority parties in this context.

132. *Partei Die Friesen v. Germany*, no. 65480/10, 28 January 2016.
133. *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 93, ECHR 2004-I.

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

Enjoyment of possessions

In issue in the judgment in *Philippou v. Cyprus*[134] was the automatic loss of the applicant's civil-service pension entitlements following disciplinary proceedings resulting in his dismissal.

The applicant, a civil servant of thirty-three years' standing, was convicted, among other serious offences, of dishonesty, obtaining money by false pretences and forging cheques. In subsequent disciplinary proceedings, and following a hearing at which the applicant was legally represented, the Public Service Commission imposed on the applicant the most severe of the range of penalties available to it, namely dismissal, which automatically entailed the forfeiture of the applicant's civil-service pension.

In the Convention proceedings, the applicant complained that the forfeiture of his pension breached Article 1 of Protocol No. 1.

The Court ruled against the applicant. Its finding that there had been no breach of Article 1 was based on its assessment of the concrete impact of the forfeiture on the applicant, having regard to the circumstances of the case. The issue of proportionality was therefore central to the outcome of the case. The Court had previously observed in general (see the decision in *Da Silva Carvalho Rico v. Portugal*[135], and *Stefanetti and Others v. Italy*[136]) that the deprivation of the entirety of a pension was likely to breach Article 1 of Protocol No. 1 (see, for example, *Apostolakis v. Greece*[137]) and that, conversely, the imposition of a reduction which it considers to be reasonable and commensurate would not (see, for example, among many other authorities, *Da Silva Carvalho Rico*, cited above; *Arras and Others v. Italy*[138]; and *Poulain v. France*[139]).

Among other factors, the Court gave weight to the following:

(i) The applicant had benefited from extensive procedural guarantees in the disciplinary proceedings, his personal situation was considered in depth in those proceedings and he was able to challenge the forfeiture decision before the Supreme Court at two levels of jurisdiction.

(ii) The disciplinary proceedings followed and were separate from the criminal proceedings.

(iii) The applicant was not left without any means of subsistence since he remained entitled to receive a social-security pension to which he and his employer had contributed.

(iv) A widow's pension was paid to the applicant's wife on the assumption that he had died rather than been dismissed.

Weighing the seriousness of the offences committed by the applicant against the effect of the disciplinary measures, the Court found that the applicant was not made to bear an individual and excessive burden by reason of the forfeiture of his civil-service pension.

Control of the use of property

The judgment in *Ivanova and Cherkezov*[140], cited above, concerned the imminent execution of a demolition order and the scope of the protection afforded to the peaceful enjoyment of one's possessions in that context.

134. *Philippou v. Cyprus*, no. 71148/10, 14 June 2016.
135. *Da Silva Carvalho Rico v. Portugal* (dec.), no. 13341/14, 1 September 2015.
136. *Stefanetti and Others v. Italy*, nos. 21838/10 and others, 15 April 2014.
137. *Apostolakis v. Greece*, no. 39574/07, 22 October 2009.
138. *Arras and Others v. Italy*, no. 17972/07, 14 February 2012.
139. *Poulain v. France* (dec.), no. 52273/08, 8 February 2011.
140. *Ivanova and Cherkezov v. Bulgaria*, no. 64577/15, 21 April 2016.

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

The Court found that the circumstances of the case gave rise to a breach of Article 8 of the Convention but not to a breach of Article 1 of Protocol No. 1. Its reasoning for so doing is interesting in that it illustrates the difference between the interests protected by both provisions and hence the particular nature of the protection afforded by each of those Articles.

As to the complaint under Article 1 of Protocol No. 1, the Court's primary concern was to determine whether the implementation of the demolition order would strike a fair balance between the first applicant's interest in keeping her possessions intact and the general interest in ensuring the effective implementation of the prohibition against building without a permit. This was an area in which States enjoyed a wide margin of appreciation. For the Court, unlike Article 8 of the Convention[141], Article 1 of Protocol No. 1 did not inevitably require a proportionality-sensitive assessment to be made in each individual case of the necessity of enforcement measures in the planning field. The Court found support for this proposition in *James and Others v. the United Kingdom*[142] and in its decision in *Allen and Others v. the United Kingdom*[143], where it had made similar rulings, albeit in somewhat different contexts. It noted that the intensity of the interests protected under the two Articles, and the resultant margin of appreciation left to the domestic authorities, were not necessarily coextensive. On that understanding, the Court concluded that the demolition order was intended "to put things back in the position in which they would have been if the first applicant had not disregarded the requirements of the law". The first applicant's proprietary interest in the house could not outweigh the authorities' decision to order its demolition. Significantly, the Court also observed that the order and its enforcement would also serve to deter other potential lawbreakers, which was a relevant consideration in view of the apparent pervasiveness of the problem of illegal construction in Bulgaria.

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

Right to free elections

The case of *Paunović and Milivojević v. Serbia*[144] concerned the controlling of parliamentary seats by political parties.

In 2003 the applicants had been elected to Parliament for their political party in the general election organised under the proportional representation system, in which votes are for a political party rather than for individual candidates. Before the election all the candidates, including the applicants, had been required by their party to sign undated resignation letters to be entrusted to the party. Those documents also authorised the party to appoint other candidates to replace them if necessary. In early 2006, following political disagreements within the party, the applicants expressly declared, in a signed and authenticated statement of early May, their wish to retain their seats in the National Assembly. In spite of that declaration, ten days later the leader of the party dated the applicants' resignation letters and remitted them to the President of the Assembly. On the same day, Mr Paunović, producing his authenticated statement from early May, personally informed the parliamentary committee on administrative affairs that he had no intention of resigning and that he

141. See under Article 8 above.
142. *James and Others v. the United Kingdom*, 21 February 1986, § 68, Series A no. 98.
143. *Allen and Others v. the United Kingdom* (dec.), no. 5591/07, § 66, 6 October 2009.
144. *Paunović and Milivojević v. Serbia*, no. 41683/06, 24 May 2016.

considered null and void the resignation letter remitted by the leader of the party. The committee concluded, however, that the two applicants had genuinely resigned and that they were no longer in office. The applicants were replaced by other candidates from the same party.

Mr Paunović took the view that the termination of their office was illegal and that there was no effective remedy by which to complain of the breach of their rights.

For the first time the Court examined the lawfulness under domestic law of the termination of parliamentary office in a context of party control of seats. There are two aspects to be highlighted.

(i) The Court confirmed its long-standing case-law to the effect that Article 3 of Protocol No. 1, in addition to the right to stand for election, also guarantees the right to sit as MP once elected.

(ii) Even though Article 3 of Protocol No. 1 did not expressly require a legal basis for the impugned measure, unlike other Convention Articles, the Court inferred from the principle of the rule of law inherent in the Convention as a whole that there was an obligation for States to introduce a legislative framework and, if need be, an intra-legislative framework, to comply with their Convention obligations.

In the present case, although there was a legal framework, the impugned measure was taken outside it. Under domestic law a resignation had to be handed in personally by the MP. Resignation letters presented by the party were thus illegal. Consequently, there had been a breach of Article 3 of Protocol No. 1.

The Court also found a violation of Article 13 of the Convention taken together with Article 3 of Protocol No. 1.

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

Freedom to choose residence

The case of *Garib v. the Netherlands*[145] concerned the compatibility with Article 2 §§ 1 and 4 of Protocol No. 4 to the Convention of an interference with the freedom to choose one's residence on public-interest grounds.

Seeking to reverse inner-city decay and related social and other problems, the Netherlands introduced legislation to enable major cities to limit the influx into such deprived areas of new inhabitants whose income was not related to "work" or "study". Rotterdam introduced a "housing permit" requirement for particularly deprived areas: such a permit would be refused to new residents who were dependent on social welfare and had not been residents of the Rotterdam metropolitan area for at least six years. Hardship clauses were introduced to ensure that no one was denied decent housing, though persons who did not meet the income and length-of-residency requirements might have to settle elsewhere.

The applicant was offered the tenancy of a property in a deprived area but was refused a housing permit because she was dependent on social welfare and, at the time, had not been resident in Rotterdam for six years. Ultimately she moved to an adjoining municipality, where she still lived five years later.

The applicant complained of a denial of her "freedom to choose her residence" (Article 2 § 1 of Protocol No. 4).

This judgment is noteworthy given the scarcity of case-law on the scope of the right to choose one's residence as guaranteed by Article 2 § 1 of Protocol No. 4 to the Convention.

145. *Garib v. the Netherlands*, no. 43494/09, ECHR 2016 (extracts).

The Court accepted that there had been an interference with the applicant's right and that the interference had a lawful basis. It is of interest that the Government sought to justify the interference with reference to considerations of *ordre public* as envisaged in paragraph 3 of Article 2. They contended, in line with the aim of the relevant legislative measures, that the inflow of underprivileged groups (among other things) placed a correspondingly greater demand on social-security structures, reduced support for economic activities and services, and led to an increase in crime. The Court, however, preferred to examine the case from the standpoint of paragraph 4 of Article 2, since the restriction complained of did not target any particular individual but was of general application in certain defined areas in Rotterdam. The test to be satisfied, therefore, was whether the restriction on the applicant's right to take up residence in her area of choice was "justified by the public interest in a democratic society".

On that point the Court, referring to (in particular) *Animal Defenders International v. the United Kingdom*[146], reiterated that a State can, consistently with the Convention, adopt general measures which apply to predefined situations regardless of the individual facts of each case, even if this might result in individual hard cases.

Next, noting the obvious interplay between Article 2 § 1 of Protocol No. 4 and Article 8 of the Convention (home), the Court pointed out that the test cannot be the same: Article 8 "cannot be construed as conferring a right to live in a particular location", whereas Article 2 § 1 of Protocol No. 4 "would be voided of all significance if it did not in principle require Contracting States to accommodate individual preferences in the matter".

The Court drew on certain principles found in the Court's case-law under Article 8 of the Convention and Article 1 of Protocol No. 1. Applying these, it took as its starting-point the policy underpinning the legislation in issue. It reviewed the drafting history of the legislation, which showed that Parliament actively intervened to limit cases of individual hardship and kept the implementation of the legislation under periodic review. The policy decisions taken by the domestic authorities were therefore not "manifestly without reasonable foundation".

Turning to the applicant's individual case, the Court noted that the applicant had not given any good reason for wishing to remain in the area in question. Moreover, she had moved to a different municipality in 2010 and remained there, despite having qualified for a Rotterdam housing permit in 2011 upon completing six years' residence in the Rotterdam metropolitan area. There was thus no disproportionality at the individual level of the applicant herself either.

Other Convention provisions

Limitation on use of restrictions on rights (Article 18)

The *Navalnyy and Ofitserov v. Russia*[147] judgment concerned the applicability of Article 18 of the Convention when relied on in conjunction with Articles 6 and 7 of the Convention.

The applicants relied on Article 18 of the Convention in conjunction with Articles 6 and 7. In their view, they had been charged, prosecuted and convicted of conspiracy to steal assets for reasons other than determining their guilt. The first applicant was an anti-corruption campaigner, who had unsuccessfully stood for election as mayor of Moscow in 2011. The applicants contended that the first applicant's prosecution and conviction were intended to curtail his political activities. The Court found that Article 6 of the Convention had been violated on account of the unfairness of the proceedings, and that this conclusion dispensed it from having to examine separately the complaint under Article 7 of the Convention.

146. *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, §§ 106-08, ECHR 2013 (extracts).
147. *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, 23 February 2016.

The judgment is of interest in that the Court had to address the applicability of Article 18 in relation to the other Articles relied on. Article 18 states:

> "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

The Court has in previous cases found a breach of Article 18 in combination with Article 5, the latter provision setting out clear and exhaustive circumstances in which the liberty of the individual may be restricted with justification (see, for example, *Gusinskiy v. Russia*[148], *Cebotari v. Moldova*[149]; *Lutsenko v. Ukraine*[150]; *Tymoshenko v. Ukraine*[151]; and *Ilgar Mammadov v. Azerbaijan*[152]).

The structure of Article 6 (and Article 7) is different, as confirmed by the Court in the instant case. In finding that the applicants' complaint was incompatible *ratione materiae* with the provisions of the Convention relied on, it observed that Articles 6 and 7 did not contain any express or implied restrictions that could form the subject of the Court's examination under Article 18. At the same time, the Court added the caveat that this conclusion was to be seen as relevant to the applicants' case. It is noteworthy in this connection that, in finding a breach of Article 6, the Court highlighted the failure of the domestic courts to address the obvious link between the first applicant's public activities and the decision to prosecute him and the second applicant.

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The *Rasul Jafarov v. Azerbaijan*[153] judgment is interesting as regards the elements which can lead to a conclusion that a restriction under domestic law was applied for reasons other than those prescribed by the Convention.

The applicant, a prominent human rights activist in Azerbaijan, was arrested in 2014 on various financial charges. He was detained until his conviction and imprisonment in January 2015.

He mainly alleged, relying on Article 18 in conjunction with Article 5, that he had been arrested and detained to punish his criticism of the government, to silence him as an NGO activist and human rights defender and to discourage civil-society activity in Azerbaijan. His arrest came a few months after the delivery of the *Ilgar Mammadov*[154] judgment, cited above, in which the Court had found that the NGO activist in that case had been arrested and charged in order to silence or punish him, in violation of Article 18 of the Convention.

In the present case, the Court found, *inter alia*, that the charges against the applicant were not based on a "reasonable suspicion" (violation of Article 5 § 1) and that he had been arrested and detained for reasons other than those prescribed by the Convention (violation of Article 18 in conjunction with Article 5).

The judgment is of interest as regards the elements relied upon by the Court for finding, under Article 18, that the restrictions had been applied for reasons not prescribed by the Convention.

In previous cases, the Court was able to rely on a particular fact of the individual case to reach this conclusion: for example, the plea bargain concluded in *Gusinskiy*[155]; the application to this Court in

148. *Gusinskiy v. Russia*, no. 70276/01, ECHR 2004-IV.
149. *Cebotari v. Moldova*, no. 35615/06, 13 November 2007.
150. *Lutsenko v. Ukraine*, no. 6492/11, 3 July 2012.
151. *Tymoshenko v. Ukraine*, no. 49872/11, § 299, 30 April 2013.
152. *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014.
153. *Rasul Jafarov v. Azerbaijan*, no. 69981/14, 17 March 2016.
154. *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014.
155. *Gusinskiy v. Russia*, no. 70276/01, ECHR 2004-IV.

Cebotari[156]; particular features of the cases retained against the applicants in *Lutsenko*[157] and *Tymoshenko*[158]; and the applicant's blog entries in *Ilgar Mammadov*, all cited above.

In the present case, the Court relied on broader contextual factors (as well as on the absence of "reasonable suspicion") to find that the applicant had been arrested and detained for reasons other than those prescribed by the Convention. These factors were the "increasingly harsh and restrictive legislative regulation of NGO activity and funding"; the narrative of high-ranking officials and pro-government media to the effect that NGOs and their leaders (including the applicant) were foreign agents and traitors; and the fact that several notable human rights activists, who had also cooperated with international organisations protecting human rights, had been similarly arrested. The Court considered that these factors supported the applicant's and the third-party interveners' argument to the effect that the applicant's arrest and detention were part of a larger campaign to "crack down on human rights defenders in Azerbaijan, which had intensified over the summer of 2014". The Court concluded, therefore, that the applicant had been arrested and detained "in order to silence and punish [him] for his activities in the area of human rights" and found a violation of Article 18 in conjunction with Article 5 of the Convention.

156. *Cebotari v. Moldova*, no. 35615/06, 13 November 2007.
157. *Lutsenko v. Ukraine*, no. 6492/11, 3 July 2012.
158. *Tymoshenko v. Ukraine*, no. 49872/11, 30 April 2013.