



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

Overview of the Court's case-law 2020

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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Case-law overview

This overview contains a selection by the Jurisconsult of the most interesting cases from 2020.

In 2020¹, the Grand Chamber delivered ten judgments and two decisions and its second advisory opinion under Protocol No. 16 to the Convention.

In its decision in *Slovenia v. Croatia*, the Grand Chamber ruled on the Court's jurisdiction (Article 32 of the Convention) to hear an inter-State case (Article 33), concerning an alleged violation of the Convention rights of a legal entity, which could not be classified as "non-governmental" within the meaning of Article 34.

Under Article 1, the Grand Chamber looked at the case of foreign nationals who apply for a visa at an embassy or consulate abroad (*M.N. and Others v. Belgium*).

As to Article 34, the Grand Chamber reiterated the general principle and listed the exceptions on the question whether a company's shareholders have "victim status" (*Albert and Others*). It also clarified its case-law concerning the notion of "another procedure of international investigation or settlement" within the meaning of Article 35 § 2 (b) of the Convention (*Selahattin Demirtaş (no. 2)*).

In *S.M. v. Croatia* the Grand Chamber analysed for the first time the applicability of Article 4 specifically to the trafficking and exploitation of women for prostitution, and it ruled on the scope of the State's obligations in such matters.

In cases concerning Article 6 § 1, the Grand Chamber clarified in particular the scope and meaning of the "tribunal established by law" concept (*Guðmundur Andri Ástráðsson*) and of a "criminal charge" in accordance with the Engel criteria (*Gestur Jónsson and Ragnar Halldór Hall*); it also recognised the connection between the scope of "criminal" in Article 6 and that of the same adjective in Article 7 of the Convention (*ibid.*).

1. The overview is drafted by the Directorate of the Jurisconsult and is not binding on the Court.

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In its second advisory opinion under Protocol No. 16, this time in response to a request from the Armenian Constitutional Court, the Court clarified the significance of such opinions and addressed aspects of its Article 7 case-law (*Advisory opinion*, request no. P16-2019-001).

In its *Magyar Kétfarkú Kutya Párt* judgment, the Grand Chamber examined under Article 10 the question of the foreseeability of a law on freedom of expression for political parties in the context of an election or referendum.

Under Article 3 of Protocol No. 1, it defined the scope of the “adequate and sufficient safeguards” required for the effective examination of electoral disputes (*Mugemangango*). It also clarified in that context the notion of national “authority” within the meaning of Article 13 of the Convention.

In *Selahattin Demirtaş (no. 2)* it ruled on the lifting of the immunity of an opposition member of parliament and his prolonged pre-trial detention related to his political speeches, under Articles 5, 10 and 18 of the Convention and Article 3 of Protocol No. 1.

N.D. and N.T. v. Spain concerned the immediate and forcible return of aliens from a land border, following an attempt by a large number of them to cross it in an unauthorised manner by taking advantage of their large numbers; the Grand Chamber found that their removal had been compatible with Article 4 of Protocol No. 4 taken separately and in conjunction with Article 13 of the Convention.

Under Article 1 of Protocol No. 7 it ruled on the expulsion of lawfully resident aliens on national-security grounds, based on classified information that had not been disclosed to them (*Muhammad and Muhammad*).

Lastly, concerning Article 41 of the Convention, the Grand Chamber looked at an award of just satisfaction in respect of property, including when it is outside the territory of the respondent State (*Molla Sali*).

This year the Court has seen the further development of its case-law in other judgments, including on its jurisdiction to hear (and the admissibility of) complaints in the contexts of the transfer of a convicted prisoner from one member State to another to serve the rest of his sentence (*Makuchyan and Minasyan*) and of an arbitral award (*Platini*); it has also examined the concepts of direct and indirect victims under Article 34 of the Convention (*Akbay and Others*) and the exhaustion of domestic remedies (Article 35 § 1) in the case of a non-governmental organisation acting at domestic level to represent the interests of applicants (*Beizaras and Levickas*).

Concerning the various Convention rights and freedoms, the Court has developed a number of new and important principles under Article 2 concerning the transfer of prisoners from one State to another

(*Makuchyan and Minasyan*) and the implementation of a witness protection scheme by national authorities (*A and B v. Romania*).

Under Article 3, the Court has addressed the conditions of access to drinking water in Roma camps (*Hudorovič and Others*), and the poor living conditions of adult asylum-seekers who were deprived of decent accommodation (*N.H. and Others v. France*). On the issue of domestic violence, the case-law has been extended to cyberbullying (*Buturuğā*) and has established the State's obligations to protect children from ill-treatment by their parents (*Association Innocence en Danger and Association Enfance et Partage*). In *M.K. and Others v. Poland*, the Court examined the situation of applicants who, having arrived at a border crossing, were not allowed to apply for asylum and were returned to the third State from which they had come, with a risk of chain *refoulement* to their country of origin; the Court also emphasised the obligations of the respondent State following the indication of an interim measure under Rule 39. For the first time the Court found that that an expulsion would carry a risk of a violation of Article 3 on account of ill-treatment on grounds of sexual orientation to which a homosexual applicant would be exposed in his country of origin (*B and C v. Switzerland*).

Under Article 5 § 1 (f), the Court ruled on the specific situation of an applicant who had been granted refugee status in one EU State, and had then been detained in a different State pending the examination of an extradition request from his country of origin (*Shikhsaitov*).

Other cases of jurisprudential interest have been examined under Article 6 concerning the limitation period for a compensation claim in respect of physical harm (*Sanofi Pasteur*) and the use of police entrapment in securing a criminal conviction (*Akbay and Others*). For the first time the Court examined the admission in evidence, in criminal proceedings, of statements that had been forcibly obtained from individuals by means of ill-treatment, without the participation or approval of State agents (*Ćwik*). Lastly, in the *Farzaliyev* judgment, it clarified its case-law on the applicability of Article 6 § 2.

It also shed light on its case-law concerning the foreseeability of a criminal conviction under Article 7 of the Convention (*Baldassi and Others*) and on the right of appeal in criminal matters as guaranteed by Article 2 of Protocol No. 7 (*Saqueti Iglesias*).

Regarding Article 8 of the Convention, it addressed the limits to the concept of "private and family life" (*Evers*), data protection (*Breyer*), and, for the first time, the issue of cyberbullying as an aspect of violence against women (*Buturuğā*), access to drinking water in a Roma camp (*Hudorovič and Others*) and, lastly, a professional sanction in the world of sport (*Platini*).

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The Court ruled on the compatibility with Article 10 of an organised boycott (*Baldassi and Others*), on the right to freedom of expression of a defendant in criminal proceedings (*Miljević*), and on the right to an effective remedy under Article 13 of the Convention (*M.K. and Others v. Poland*, *Beizaras and Levickas*, and *Association Innocence en Danger and Association Enfance et Partage*).

It also examined the failure by a State to enforce a prison sentence handed down in another State for a racially motivated hate crime (*Makuchyan and Minasyan*). It emphasised the need for a criminal-law response to verbal aggression and direct physical threats driven by homophobia (*Beizaras and Levickas*).

In *M.K. and Others v. Poland*, the Court ruled on Article 4 of Protocol No. 4 in relation to asylum-seekers. Lastly, it examined for the first time an alleged discrimination in the workplace on grounds of pregnancy, under Article 1 of Protocol No. 12 (*Napotnik*).

In addition, the case-law took account of the interactions between the Convention and EU law in cases concerning, in particular, asylum-seekers (*N.H. and Others v. France*), the expulsion of a homosexual (*B and C v. Switzerland*), data protection (*Breyer*) and the right of a pregnant woman not to be subjected to discrimination (*Napotnik*).

The Court has also, in a number of cases, taken account of the interactions between the Convention and international law or international and European organisations (for example, *Slovenia v. Croatia*, *M.N. and Others v. Belgium*, *Mugemangango*, and *Napotnik*) and in the contexts of human trafficking (*S.M. v. Croatia*), migrants and asylum-seekers (*N.D. and N.T. v. Spain*, *N.H. and Others v. France*), domestic violence (*Association Innocence en Danger and Association Enfance et Partage*), and the transfer of convicted prisoners to another State (*Makuchyan and Minasyan*).

The Court has referred in particular to the work of the UNHCR (*B and C v. Switzerland*, *Shiksaitov*), the ILO (*S.M. v. Croatia*), the Venice Commission (*Mugemangango*, *Selahattin Demirtaş (no. 2)*), and ECRI (*Beizaras and Levickas*).

The Grand Chamber has reiterated the principle of the harmonious interpretation of the Convention and other international law instruments (*S.M. v. Croatia*).

It is also noteworthy that this year the Court has developed its case-law on the positive obligations of member States under the Convention, especially in the area of violence against women (*Buturugä*), and incitement to hatred and violence (*Beizaras et Levickas*), the protection of children from ill-treatment by their parents (*Association Innocence en Danger and Association Enfance et Partage*) and protection from ill-treatment at the hands of individuals (*Ćwik*), forced prostitution (*S.M. v.*

Croatia), access to drinking water (*Hudorovič and Others*) and sanctions in the area of professional sport (*Platini*).

Lastly, the Court once again ruled on the extent of the margin of appreciation to be afforded to States Parties to the Convention (*Mugemangango, Sanofi Pasteur, Saquetti Iglesias, Breyer, Platini, Hudorovič and Others, Miljević, Association Innocence en Danger and Association Enfance et Partage, and Napotnik*).

JURISDICTION AND ADMISSIBILITY

Jurisdiction of States (Article 1)²

The *M.N. and Others v. Belgium*³ decision concerned whether a State's ruling on a visa application and an applicant's challenge against that refusal in the State's courts can create a jurisdictional link.

The applicants, a Syrian couple and their two minor children, travelled to Beirut where they submitted short-term visa requests to the Belgian embassy in Beirut to allow them to travel to Belgium to apply for asylum because of the conflict in Aleppo. Their requests were processed and refused by the Aliens Office in Belgium and, after being notified by the Belgian embassy of those decisions, the applicants lodged unsuccessful appeals before the Belgian courts.

The applicants complained under Articles 3 and 13 of the Convention that the refusal to grant them visas had exposed them to a risk of ill-treatment for which they did not have an effective remedy, and under Articles 6 § 1 and 13 about the unjustified failure to enforce certain court decisions delivered initially in their favour. Following relinquishment, the Grand Chamber declared the application inadmissible as regards their complaints under Articles 3 and 13 of the Convention, finding that the applicants had not been within the jurisdiction of Belgium. It then recharacterised the second complaint under Article 6 § 1 and found that, regardless of the issue of jurisdiction, Article 6 § 1 was inapplicable because the enforcement proceedings in question did not concern a "civil" right within the meaning of the Court's settled case-law.

This Grand Chamber decision is interesting because it examined whether a State exercises control and authority, and thus jurisdiction, over individuals lodging visa applications in embassies and consulates abroad. It found that the respondent State was not exercising jurisdiction extraterritorially by processing the visa applications and that the applicants' appeals had not created a jurisdictional link.

2. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020. See also under Article 2 (Right to life – Obligation to protect life) below.

3. *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, 5 May 2020.

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(i) The first question to be examined was whether, in processing the visa applications, the State effectively exercised authority or control over the applicants, particularly through the acts or omissions of its diplomatic or consular agents posted abroad. The Court's analysis was informed by a number of factors: the applicants had never been within the national territory of Belgium; they had no pre-existing family or private-life ties with that State; and it had not been alleged before the Court that a jurisdictional link arose from any control exercised by the Belgian authorities in Syrian or Lebanese territories. In addition, the Court found it irrelevant who (whether the Belgian authorities in the national territory or diplomatic agents abroad) was responsible for taking the visa decisions and it thus attached no significance to the fact that the diplomatic agents in this case fulfilled merely a "letter box" role. It was, however, crucial that, when comparing the present case and the case-law of the European Commission on Human Rights on the acts and omissions of diplomatic agents (*X v. Germany*⁴; *X v. the United Kingdom*⁵; *S. v. Germany*⁶; and *M. v. Denmark*⁷), the Court found that none of the connecting links which characterised those cases was present in the present one. In particular, the applicants were not Belgian nationals seeking to benefit from the protection of their embassy. In addition, at no time had diplomatic agents exercised *de facto* control over the applicants, who had freely chosen to present themselves at the Belgian embassy in Beirut, rather than approaching any other embassy, to submit their visa applications. They had then been free to leave the premises of the Belgian embassy without any hindrance.

Furthermore, having regard to the Court's case-law concerning situations in which the officials of a State operating outside its territory, through control over buildings, aircraft or ships in which individuals were held, exercised power and physical control over those persons (*Issa and Others v. Turkey*⁸; *Al-Saadoon and Mufdhi v. the United Kingdom*⁹; *Medvedyev and Others v. France*¹⁰; *Hirsi Jamaa and Others v. Italy*¹¹; and

4. *X v. Germany*, no. 1611/62, Commission decision of 25 September 1969, unreported.

5. *X v. the United Kingdom*, no. 7547/76, Commission decision of 15 December 1977, Decisions and Reports 12, p. 73.

6. *S. v. Germany*, no. 10686/83, Commission decision of 5 October 1984, Decisions and Reports 40, p. 291.

7. *M. v. Denmark*, no. 17392/90, Commission decision of 14 October 1992, Decisions and Reports 73, p. 193.

8. *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004.

9. *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010.

10. *Medvedyev and Others v. France* [GC], no. 3394/03, ECHR 2010.

11. *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.

*Hassan v. the United Kingdom*¹²), the administrative control exercised by the Belgian State over the premises of its embassies was not sufficient to bring every person who entered those premises within its jurisdiction. Finally, the present context was considered to be fundamentally different from the numerous expulsion cases in which the applicants were, in theory, on the territory of the State concerned – or at its border – and thus clearly fell within its jurisdiction. No exercise of extraterritorial jurisdiction could therefore be established on this ground in the present case.

(ii) Secondly, the Court found that the applicants could not create, unilaterally, an extraterritorial jurisdictional link between them and Belgium merely by challenging the visa decisions before the Belgian courts.

The Grand Chamber considered the applicants' submission to have no basis in the case-law of the Court. It referred, firstly, to the judgment in *Markovic and Others v. Italy*¹³, which concerned civil proceedings for damages brought by nationals of the former Serbia and Montenegro before the Italian courts in respect of the deaths of relatives during NATO air strikes: in that case, the Court declared inadmissible for lack of jurisdiction all the applicants' substantive complaints, other than the one raised under Article 6. The Court then referred to the judgment in *Güzelyurtlu and Others v. Cyprus and Turkey*¹⁴ in which the proceedings in question – which created a jurisdictional link with Turkey in respect of deaths which had occurred in the Cypriot Government-controlled area of the island – were criminal proceedings which had been opened on the initiative of Turkey (who had control over the "Turkish Republic of Northern Cyprus") in the context of its procedural obligations under Article 2. This was considered by the Court to be very different from the present case, which concerned administrative proceedings brought by private individuals who had no connection with the State except for proceedings which they had freely initiated and without the choice of the State, in this case Belgium, being imposed on them by any treaty obligation.

In contrast, the position of the Government was supported by the Court's decision in *Abdul Wahab Khan v. the United Kingdom*¹⁵, on which the Grand Chamber relied:

12. *Hassan v. the United Kingdom* [GC], no. 29750/09, ECHR 2014.

13. *Markovic and Others v. Italy* [GC], no. 1398/03, ECHR 2006-XIV.

14. *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019.

15. *Abdul Wahab Khan v. the United Kingdom* (dec.), no. 11987/11, 28 January 2014.

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The Court made clear in that decision that the mere fact that an applicant brings proceedings in a State Party with which he has no connecting tie cannot suffice to establish that State's jurisdiction over him ... The Court considers that to find otherwise would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction ...

The Grand Chamber added that precisely such an obligation would be created were the State's ruling on an immigration application to be sufficient to bring the individual making the application under its jurisdiction: the individual could create a jurisdictional link by submitting an application and thus give rise, in certain scenarios, to an obligation under Article 3 which would not otherwise exist. Such an extension of the scope of the Convention would also have the effect of negating the well-established principle of public international law according to which the States Parties, subject to their treaty obligations, have the right to control the entry, residence and expulsion of aliens (*Ilias and Ahmed v. Hungary*¹⁶).

(iii) Finally, the Grand Chamber nevertheless clarified that the above conclusion did not prejudice the endeavours made by the States to facilitate access to asylum procedures through their embassies and/or consular representations (see, for example, *N.D. and N.T. v. Spain*¹⁷, where the Court examined under Article 4 of Protocol No. 4 whether the possibility for the applicants in that case to claim international protection in Spanish embassies and consulates was genuinely and effectively accessible to them).

Admissibility (Articles 34 and 35)

Victim status (Article 34)

The judgment in *Albert and Others v. Hungary*¹⁸ concerned the victim status of shareholders who had lost control over their banks, which had been placed under supervision.

The applicants are 237 individual shareholders in two savings banks. They held a total of 98% of the shares in one bank and approximately 88% of the shares in the other. They complained under Article 1 of

16. *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, § 125, 21 November 2019.

17. *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15, § 222, 3 October 2017.

18. *Albert and Others v. Hungary* [GC], no. 5294/14, 7 July 2020.

Protocol No. 1 that, as a result of the 2013 Integration Act, they had suffered a permanent and drastic loss in the level of control over the banks in favour of two central bodies which were indirectly owned by the State. In particular, their rights to establish and amend memorandums of association, adopt annual reports, appoint board members and take decisions on share capital and the payment of dividends had, in their view, been excessively restricted. They did not complain about any specific exercise of power by the two central bodies or about any resulting economic detriment to the business of the banks. In January 2019 a Chamber of the Court held that the applicants had not pointed to any circumstance justifying lifting the corporate veil and that they could therefore not claim to be victims of the alleged violation, and concluded there had been no violation of Article 1 of Protocol No. 1. The Grand Chamber endorsed the Chamber's finding regarding the applicants' victim status and rejected the complaint as incompatible *ratione personae* with the provisions of the Convention.

The Grand Chamber judgment is noteworthy because, firstly, it clarifies the distinction between acts considered to affect the rights of shareholders and those affecting the company and it confirms the crucial importance of this distinction for the purposes of determining the victim status of shareholders. Secondly, while reiterating the general principle that shareholders cannot claim to be victims of acts and measures affecting their companies, the Court clarified two situations which constitute an exception to this principle. The present judgment contains therefore a comprehensive outline of the Court's case-law in this regard.

(i) The Court identified a number of cases where the victim status of applicant shareholders had been implicitly accepted as regards measures which had directly and adversely affected those shareholders' ownership or freedom to dispose of their shares, or obliged them to sell their shares, or where the measures had decreased their power to influence the company *vis-à-vis* other shareholders, to act as the company's manager or to vote. Those cases were consistent with and illustrated the general principle which distinguished between measures directed at *the applicant's* rights as a shareholder and infringements of *the company's* rights (see the leading cases of *Agrotexim and Others v. Greece*¹⁹ and *Olczak v. Poland*²⁰). On this basis, the Court clarified as follows:

19. *Agrotexim and Others v. Greece*, 24 October 1995, Series A no. 330-A.

20. *Olczak v. Poland* (dec.), no. 30417/96, ECHR 2002-X (extracts).

... acts affecting the rights of the shareholders are distinct from measures or proceedings affecting the company in that both the nature of such acts and their alleged effect impact the shareholders' legal rights both directly and personally and go beyond merely disturbing their interests in the company by upsetting their position in the company's governance structure.

(ii) The first exception to the general principle excluding the victim status of shareholders in respect of measures affecting their companies is the situation "where the company and its shareholders are so closely identified with each other that it is artificial to distinguish between the two". This can be seen in cases brought by the shareholders of small or family-owned or run companies or cooperatives, notably where the sole owner of a company complains about the measures taken in respect of his or her company, or where all the shareholders of a small cooperative have applied to the Court as applicants, or where one shareholder in a family-owned firm has lodged an application under the Convention and the remaining shareholders have at least not objected to the lodging. In this respect, the Court pointed out, with reference to *Ankarcrona v. Sweden*²¹, that the reason for having accepted victim status in such cases was that there had been no risk of a difference of opinion among shareholders or between shareholders and a board of directors as to the alleged infringement of Convention rights or as to the most appropriate way of reacting thereto.

(iii) The second type of situation in which the Court may disregard the company's distinct legal personality and allow its shareholders to bring complaints about the company's rights, concerns the existence of "exceptional circumstances, in particular where it is clearly established that it is impossible" for the affected company to bring the case to the Court in its own name (*Agrotexim and Others*, cited above). In cases falling within this category, the mere existence of measures of outside supervision or control, imposed on the company in issue due to its financial or other difficulties, was generally viewed as an important factor, but not the only one. In the instant case, the Court was therefore called upon to clarify the nature of the circumstances which may be considered as "exceptional" for the purposes of granting victim status to shareholders. When analysing the relevant case-law examples in this respect, the Court pointed out that the burden had been on the shareholders to demonstrate either that an official who had been tasked

21. *Ankarcrona v. Sweden* (dec.), no. 35178/97, ECHR 2000-VI.

with looking after the company's interests had been unable or unwilling to raise the grievances in issue either at the domestic or Strasbourg level, or that the Convention complaint had concerned a matter – such as the removal of a regular manager and the appointment of a trustee – in respect of which there had been a difference of opinion between the trustee and the shareholders, or relating to various actions of the trustee affecting the interests of the shareholders. In each case, the matter had been such that its potential impact could have had a serious effect on the shareholders' situation, directly or indirectly. In the present judgment, the Court nuanced its approach as follows:

... in order for applicants to satisfy the Court that their pursuit, as shareholders, of a matter affecting the company is justified by “exceptional circumstances”, they ought to give *weighty and convincing reasons demonstrating that it is practically or effectively impossible* for the company to apply to the Convention institutions through the organs set up under its articles of association and that they should therefore be allowed to proceed with the complaint on the company's behalf. [Emphasis added.]

(iv) The Court went on to apply this three-tier test to the applicants' situation, finding that they could not be considered victims of the impugned acts against the companies. In the first place, while the reform had considerably impacted the banks and their statutory bodies, its effect on the rights of the applicant shareholders had been incidental and indirect. There had been no artificial dilution of their voting power or the outright cancellation of shares. The size of the applicants' individual shareholdings did not allow them to control either of the banks and their influence as a group, not consolidated by any agreement, had been fragmented and weak. Secondly, the banks, which were public liability limited companies with numerous shareholders and a fully delegated management, were not found to be “closely identified with” the applicants. The fact that the latter could have owned “almost 100%” of the shares in the banks was not decisive. Thirdly, there had been no exceptional circumstances precluding the banks from applying to the Court in their own names: the banks had remained operational; the applicants, who had collectively held voting majorities, could have directed the banks to bring legal proceedings on their behalf; the reform and the supervising authorities' decisions had been open to judicial review; and there was no evidence of any undue pressure on the banks in this respect.

In the inter-State judgment in *Slovenia v. Croatia*²² the Court reiterated its case-law to the effect that a legal entity “claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto” may submit an individual application to the Court, provided that it is a “non-governmental organisation” within the meaning of Article 34 of the Convention.

The *Akbay and Others v. Germany*²³ judgment concerned persons convicted as a result of incitement by the police to commit offences. In it the Court clarified its case-law on the transferability of an Article 6 complaint of entrapment.

More generally, the judgment contains a comprehensive overview of the case-law concerning the notions of direct and indirect victims under Article 34 of the Convention (§§ 67-77 of the judgment). The Court reiterated, in particular, that where the direct victim has died before the application was lodged with the Court, the Court’s approach to accepting victim status has been generally restrictive. As regards complaints under, *inter alia*, Article 6, it has acknowledged the victim status of close relatives where they have shown a moral interest in having the late victim exonerated of any finding of guilt or in protecting their own reputation and that of their family, or where they have shown a material interest on the basis of the direct effect on their pecuniary rights. The existence of a general interest which necessitated proceeding with the consideration of the complaints has also been taken into consideration (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*²⁴).

Exhaustion of domestic remedies (Article 35 § 1)

The judgment in *Beizaras and Levickas v. Lithuania*²⁵ is noteworthy in that it clarifies whether the applicants can be considered to have exhausted domestic remedies, since it was a non-governmental organisation (NGO) which made the criminal complaints in pursuit of the applicants’ interests.

The applicants, two young men, posted a photograph of themselves kissing on Facebook. The photograph received hundreds of serious

22. *Slovenia v. Croatia* (dec.) [GC], no. 54155/16, 18 November 2020. See also under Article 33 (Inter-State cases) below.

23. *Akbay and Others v. Germany*, nos. 40495/15 and 2 others, 15 October 2020. See also under Article 6 § 1 (Right to a fair hearing in criminal proceedings – Fairness of the proceedings) below.

24. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 100, ECHR 2014.

25. *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020. See also under Article 13 (Right to an effective remedy) and Article 14 taken in conjunction with Article 8 below.

homophobic comments (for example, calls for the applicants to be “castrated”, “killed” and “burned”). On the applicants’ request, an NGO (of which they were members and which protected the interests of homosexual persons) requested a prosecutor to begin criminal proceedings for incitement to hatred and violence against homosexuals (under Article 170 of the Criminal Code, which established criminal liability for incitement of discrimination on the basis, *inter alia*, of sexual orientation). The prosecutor and the courts refused to prosecute. The two men were the only applicants in the case before the Court.

The Court emphasised that the legal action brought by the NGO in pursuit of the applicants’ interests was not an *actio popularis*, since the NGO had acted in response to specific facts affecting the rights of the two applicants, who were members of the NGO. The NGO’s standing had never been questioned or challenged at the domestic level. The Court also took into account the applicants’ statement that they had preferred the NGO to initiate the criminal proceedings for fear that the Internet commenters would retaliate should they launch such proceedings themselves. Bearing in mind the serious nature of the allegations, it was therefore open to the NGO to act as a representative of the applicants’ interests in the domestic criminal proceedings. To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at the national level, given that in modern-day societies recourse to collective bodies is one of the accessible means, sometimes the only means, available to citizens to defend their particular interests effectively (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*²⁶, and *Gorraiz Lizarraga and Others v. Spain*²⁷). The Court also observed that the present application had been lodged by the applicants, acting for themselves, after the domestic courts had adopted decisions in the case that dealt with their particular situation. The Government’s plea of non-exhaustion was therefore dismissed.

Matter already submitted to another international body (Article 35 § 2 (b))

The judgment in *Selahattin Demirtaş v. Turkey (no. 2)*²⁸ is noteworthy because the Court further developed the criteria for determining whether

26. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, ECHR 2014.

27. *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, ECHR 2004-III.

28. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020. See also under Article 10 (Freedom of expression), Article 3 of Protocol No. 1 (Right to free elections – Free expression of the opinion of the people) and Article 18 (Restrictions not prescribed by the Convention) below.

a procedure before a given international body is similar to the Convention mechanism within the meaning of Article 35 § 2 (b) of the Convention.

In particular, the Court rejected the Government's argument that a complaint lodged with a particular Committee on behalf of the applicant amounted to a procedure of international investigation or settlement within the meaning of Article 35 § 2 (b) of the Convention. In so doing, the Court developed the criteria that an international body must satisfy in order to be regarded as "another procedure of international investigation or settlement" within the meaning of that provision. The requirement of judicial or quasi-judicial proceedings similar to the Convention mechanism means that the examination must be clearly defined in scope and limited to certain rights based on a legal instrument whereby the relevant body is authorised to determine the State's responsibility and to afford legal redress capable of putting an end to the alleged violation. It must also afford institutional and procedural safeguards, such as independence, impartiality and an adversarial procedure.

"CORE" RIGHTS

Right to life (Article 2)

Obligation to protect life

*Makuchyan and Minasyan v. Azerbaijan and Hungary*²⁹ concerned the threshold for State responsibility for an act otherwise not attributable to a State, and Contracting States' duties in the context of the transfer of sentenced persons. It also concerned the discriminatory nature of the failure to enforce a prison sentence imposed abroad for an ethnically biased crime.

While taking part in a NATO-sponsored course in Budapest, an Azerbaijani officer (R.S.) murdered an Armenian officer (the second applicant's nephew) and threatened to kill another Armenian soldier, the first applicant. R.S. was sentenced to life imprisonment in Hungary. Having served eight years of his sentence there, he was transferred to Azerbaijan under the [Council of Europe Convention on the Transfer of Sentenced Persons](#)³⁰. On his return to Azerbaijan he was released, pardoned and promoted at a public ceremony. He was also paid salary arrears for the time he had spent in prison, and given the use of a flat. Comments, approving of R.S.'s conduct and his pardon, were made by various high-ranking Azerbaijani officials.

29. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020. See also under Article 14 in conjunction with Article 2 (Prohibition of discrimination) below.

30. Convention on the Transfer of Sentenced Persons, ETS 112.

The applicants complained under Article 2 of the Convention, taken alone and in conjunction with Article 14. The Court found that the manifest “approval” and “endorsement” by Azerbaijan of the crimes committed by a member of its armed forces in a private capacity did not engage that State’s responsibility under the substantive limb of Article 2 of the Convention. However, Azerbaijan’s unjustified failure to enforce the prison sentence imposed in Hungary, coupled with the “hero’s welcome” and various benefits given to R.S. without any legal basis, was considered to be incompatible with its procedural obligation under Article 2 and, in addition, to constitute ethnically motivated discrimination within the meaning of Article 14 in conjunction with the procedural limb of Article 2. The Court found no violation of the procedural limb of Article 2 as regards Hungary, noting that it had followed the Transfer Convention procedure to the letter to ensure R.S. completed his sentence in Azerbaijan.

The Court has developed in this judgment certain novel and important principles concerning the threshold for State responsibility for an act otherwise not attributable to a State, and Contracting States’ duties in the context of the transfer of sentenced persons.

(i) The first question the Court considered was whether Azerbaijan could be held responsible for the crimes in question and thus of a substantive violation of Article 2 of the Convention. The Court attached crucial importance to the fact that R.S. was not acting in the exercise of his official duties or on the orders of his superiors. It also rejected the applicants’ argument based on Article 11 of the [UN Draft Articles on the Responsibility of States of Internationally Wrongful Acts](#)³¹. The Court noted that Article 11 set a very high threshold for State responsibility in this context, a threshold not limited to the mere “approval” and “endorsement” of the relevant act, but one which required that two cumulative conditions be fulfilled: clear and unequivocal “acknowledgement” and “adoption” of the act in issue as having been perpetrated by the State itself. Although the measures taken by the Azerbaijani government manifestly demonstrated its “approval” and “endorsement” of R.S.’s criminal acts, it had not been convincingly demonstrated (on the basis of the very stringent standards under international law) that the State of Azerbaijan had “clearly and unequivocally” “acknowledged” and “adopted” R.S.’s acts “as its own”, thus directly and categorically assuming, as such, responsibility for the actual killing of one victim and the attempted murder of another. Those

31. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd Session (2001), UN Doc. A/56/10.

measures could rather be interpreted as having the purpose of publicly addressing and remedying R.S.'s adverse personal, professional and financial situation, which the authorities had perceived, unjustifiably in the Court's view, as being the consequence of the allegedly flawed criminal proceedings in Hungary.

(ii) The case also gave the Court the opportunity to apply its case-law on the issue of jurisdiction (Article 1) and compatibility *ratione loci* of an Article 2 complaint (procedural limb) against a home State (Azerbaijan), where a convicted prisoner is transferred from a sentencing State to the home State with the aim of continuing his or her sentence in the home State. The Court emphasised that the enforcement of a sentence imposed in the context of the right to life had to be regarded as an integral part of a State's procedural obligation under Article 2. Regardless of where the crimes had been committed, and since Azerbaijan had agreed to and assumed the obligations under the Transfer Convention to continue the enforcement of R.S.'s prison sentence, it was bound to do so in compliance with its procedural obligations under Article 2. There were therefore "special features" that triggered the existence of Azerbaijan's jurisdictional link to the procedural obligation under Article 2 (*Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*³², and *Güzelyurtlu and Others v. Cyprus and Turkey*³³). The acts of Azerbaijan, which had in effect granted R.S. impunity for a very serious ethnically biased crime without any convincing reason, were not compatible with its obligation under Article 2 to effectively deter the commission of offences against the lives of individuals.

(iii) Moreover, the Court examined, for the first time, the scope of the obligation of the sentencing State (Hungary) to ensure the completion of a prisoner's sentence after his or her transfer to another State, particularly in the light of the protection of the rights of victims of a crime or their next of kin. It found that the Hungarian authorities had taken sufficient steps in this respect, by following the procedure set out in the Transfer Convention to the letter. They had requested the Azerbaijani authorities to specify which procedure would be followed in the event of R.S.'s return. Although the Azerbaijani's authorities' reply had admittedly been incomplete and worded in general terms, there was no tangible evidence to show that the Hungarian authorities had unequivocally been or should have been aware that R.S. would be released upon his return to Azerbaijan. Indeed, given the time already served by R.S. in a

32. *Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*, no. 2319/14, 13 October 2016.

33. *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019.

Hungarian prison, the Court did not see how the competent Hungarian bodies could have done anything other than respect the procedure and the spirit of the Transfer Convention and proceed on the assumption that another Council of Europe member State would act in good faith.

(iv) Finally, the judgment is also noteworthy for the manner in which the Court examined the question of whether the State's failure to enforce a prison sentence imposed abroad for an ethnic hate crime amounted to a discriminatory difference in treatment within the meaning of Article 14 in conjunction with the procedural limb of Article 2 and, in particular, for the manner in which the Court distributed the burden of proof in this respect (*Nachova and Others v. Bulgaria*³⁴). In view of the special features of the case (R.S.'s promotion, the award of several benefits without any legal basis, his glorification as a hero by a number of high-ranking officials, as well as the creation of a special page on the website of the President in appreciation of R.S.), the applicants were considered to have put forward sufficiently strong, clear and concordant inferences as to make a convincing prima facie case that the measures in issue had been racially motivated. Given the difficulty for the applicants to prove such bias beyond reasonable doubt, the Court, in the particular circumstances of the case, reversed the burden of proof so that it became incumbent on Azerbaijan to disprove the arguable allegation of discrimination, which it had failed to do.

The judgment in *A and B v. Romania*³⁵ concerned the application and implementation of a witness protection programme.

The applicants, who had been called as witnesses in a corruption case involving highly placed officials, were included in the witness protection programme. They were given the status of "threatened witnesses" following the statements they had made to the prosecution. Under the protection protocols signed by the applicants, they were required to refrain from activity which would compromise the protection measures, or disclose their status or the identity of the police officers involved. A number of difficulties were experienced in the application and implementation of the protection programme. On the one hand, there had been delays in putting in place certain aspects of the programme: the authorities had lacked a coherent strategy and, on the ground, the protection officers had been badly briefed and negligent in their

34. *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 157, ECHR 2005-VII.

35. *A and B v. Romania*, nos. 48442/16 and 48831/16, 2 June 2020.

duties on certain occasions. On the other hand, the applicants had been uncooperative and difficult with the protection officers and the measures put in place. Their demands, particularly concerning their protection, were considered unattainable. In addition, they had maintained a social media and television presence to complain about their protection, thus risking compromising their protected-witness status. Despite attempts by the authorities to remove the applicants from the witness protection programme, the competent court maintained the protection measures.

The applicants complained under Article 2 of the Convention about the implementation of the witness protection programme and the Court found no violation of that Article.

(i) The judgment is noteworthy in that, while the Court has already applied the principles set out in *Osman v. the United Kingdom*³⁶ to the question of whether individuals should have been put in a witness protection programme (in *R.R. and Others v. Hungary*³⁷), this is the first time the Court has had to apply those principles to examine the implementation of a witness protection programme.

(ii) Key to its assessment was finding a balance between, on the one hand, the State's duty to protect under Article 2 of the Convention and, on the other, the individuals' duty to protect themselves and not to contribute to the risk. In particular:

- The Court examined whether the authorities had done all that could reasonably be expected of them to avoid a real and immediate risk to the applicants' lives. As soon as a risk had been identified, a series of concrete measures had been taken to protect the applicants, but it took long periods of time (in total more than one year and four months) before the applicants were formally included in the programme. The Court stressed, however, that the applicants had not been left without protection during this time – even if that protection was, at least initially, mostly improvised and carried out in the absence of regulations – and that the inevitable deficiencies had been corrected by the authorities. As to the other failures identified as regards the police officers on duty (and notably the absence of clear instructions from their superiors concerning the scope and aim of their mission and several omissions while on duty entailing risks to the applicants' safety), the Court noted that they had been investigated and promptly corrected.

- The Court also emphasised the applicants' duty to cooperate with the authorities and to abstain from any action that might compromise

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

37. *R.R. and Others v. Hungary*, no. 19400/11, 4 December 2012.

the safety of the mission, which had been clearly set out in the protection protocols to which they had consented. The Court considered that the above-mentioned flaws did not justify the applicants' provocative behaviour, repeated disregard of their responsibilities for their own protection and their failure to comply with the obligations on them. They were not only uncooperative with the protection team but also risked compromising their protected-witness status through their presence on social media and on television. Finally, the applicants potentially exposed themselves to a serious risk as they unilaterally decided to change their residence and move abroad.

The Court emphasised the authorities' efforts to continue the applicants' protection, despite the applicants' behaviour and even when they were abroad, as well as their willingness to find alternative solutions instead of withdrawing the applicants from the witness programme, which was an option open to them in domestic law. Consequently, the Court concluded that the authorities had done what could reasonably be expected of them to protect the applicants' lives and that they had not failed in their obligation under Article 2 of the Convention to protect them.

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

Inhuman or degrading treatment

*Hudorovič and Others v. Slovenia*³⁸ concerned the conditions of access to safe drinking water. The applicants belonged to Roma communities residing in two illegal and unserviced settlements. They complained that the authorities had not taken sufficient measures to provide them with access to safe drinking water and sanitation.

It is of interest that the Court stated that it did not exclude the applicability of Article 3 in such a context (*O'Rourke v. the United Kingdom*³⁹, and *Budina v. Russia*⁴⁰). However, the positive measures undertaken by the domestic authorities had provided the applicants with the opportunity to access safe drinking water, and the way in which they had access and whether they had actually accessed it was irrelevant. Accordingly, even assuming that the alleged suffering had reached the minimum threshold and that Article 3 was applicable, the Court found no violation of this provision.

38. *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 10 March 2020. See also under Article 8 (Positive obligations) below.

39. *O'Rourke v. the United Kingdom* (dec.), no. 39022/97, 26 June 2001.

40. *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009.

Degrading treatment

*N.H. and Others v. France*⁴¹ concerned the impossibility for adult asylum-seekers to benefit from reception conditions provided for by domestic and EU law.

The applicants, including four young adult men in good health, arrived in France independently of each other in 2013 and 2014 with the intention of seeking asylum. To this end, they submitted their requests at the prefecture. At the time, an asylum-seeker was entitled to obtain an *autorisation provisoire de séjour* ("APS") within fifteen days, although the waiting times at the time were significantly longer. After an APS had been issued, the asylum application was registered and the individual received a receipt (*récépissé*) confirming this. The APS served as proof that the recipient was entitled to accommodation and offered protection against removal, and the *récépissé* provided access to financial assistance. In practice, either document certified asylum-seeker status under domestic law. All of the applicants in the present case obtained such documents and status but three of them had to wait several months. Prior to that, they lived in fear of expulsion and could not avail themselves of the reception conditions (accommodation and financial assistance) foreseen for asylum-seekers by domestic law (and by the [EU Reception Conditions Directive](#)⁴²). Once they had obtained the documents certifying their asylum-seeker status they were still not housed in reception centres (due to a lack of places available) and the financial benefits they had the right to claim were either considerably delayed or not received at all. Relying on Article 3, the applicants complained, *inter alia*, that they had been unable to benefit from the reception conditions foreseen by domestic law and that they had been forced to live on the street in inhuman and degrading conditions for several months.

The Court found a breach of Article 3 in respect of three of the applicants, considering that the situation of a fourth did not meet the threshold for the applicability of that provision. The Court rejected their request under Article 46 to outline to the State measures to be taken as regards the reception conditions of asylum-seekers: since the lodging of the applications, domestic law had evolved to considerably shorten the time-limit for the registration of asylum applications and to reform the framework for accommodation and financial assistance for asylum-seekers.

41. *N.H. and Others v. France*, nos. 28820/13 and 2 others, 2 July 2020.

42. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

The judgment is noteworthy as it is only the second time – after the judgment in *M.S.S. v. Belgium and Greece*⁴³, and later follow-up cases against Greece – that the Court has found a breach of Article 3 in respect of the living conditions of adult asylum-seekers with no specific vulnerabilities who were, because of the acts or omissions of the authorities, unable to access accommodation or decent living conditions or to provide for their essential needs. While noting that the events in the present case unfolded during a progressive increase in asylum applications in France, the Court observed that they had not taken place during a humanitarian emergency caused by a major migration crisis.

(i) The Court noted that those seeking asylum are considered to be a “particularly underprivileged and vulnerable population group in need of special protection”, there being a broad consensus in that regard at an international and European level (*ibid.*, § 251). The question was therefore whether, given the inherent vulnerability of asylum-seekers, the situation of the present applicants (young, single, in good health and without children) could be considered one of “extreme material poverty” raising an issue under Article 3 of the Convention.

(ii) In this respect, the Court noted that the applicants were not allowed to work during the asylum procedure and were fully dependent on the authorities for accommodation and material living conditions. They had been forced to live on the streets for months, with no resources or access to sanitary facilities, without any means of providing for their essential needs, in fear of assault from third parties and of expulsion (prior to obtaining a document certifying their status as asylum-seekers, as far as their fear of expulsion was concerned). The applicants, who had on rare occasions benefited from emergency accommodation, could not be reproached for not soliciting the emergency accommodation shelters more often: given the insufficient capacities of those shelters and the applicants’ profile they would have been refused, priority being given to asylum-seekers who had a particular vulnerability (such as age, health or family situation). Accordingly, the Court found that three of the applicants had been placed in a situation contrary to Article 3 given the living conditions they had experienced, combined with the absence of an adequate response by the authorities whom they had repeatedly alerted to their situation, and since the domestic courts had systematically denied them the means at the disposal of the competent authorities because they were single adult men in good health. No violation of Article 3 was found as regards a fourth applicant:

43. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 235-64, ECHR 2011.

even though he had also lived in a tent for months, he had received documents certifying his asylum-seeker status and financial assistance within a comparatively shorter period of time.

(iii) The present judgment can be usefully compared to that in *N.T.P. and Others v. France*⁴⁴. The applicants (a woman and her three children) had been accommodated (in view of their vulnerability) in a privately run shelter funded by the authorities while they waited for their appointment to lodge their asylum application, they had been given food and medical care and the children had been schooled, which factors had led the Court to find that they had not been in a situation of “extreme material poverty” raising an issue under Article 3 of the Convention.

Positive obligations

*Buturugă v. Romania*⁴⁵ is noteworthy in that the Court, for the first time, addressed the phenomenon of cyberbullying as an aspect of violence against women. It held in this connection that the State had failed to comply with its positive obligations under Articles 3 and 8 of the Convention.

The *Association Innocence en Danger and Association Enfance et Partage v. France*⁴⁶ judgment concerned the failure by the State to take necessary and appropriate measures to protect a child from ill-treatment by her parents leading to her death.

An eight-year-old child, M., was subjected to repeated barbaric acts by her parents, leading to her death in August 2009. Following her death it transpired that the parents’ domination over the child had been such as to prevent the reality of the abuse from being revealed. The authorities had nevertheless already been warned in June 2008, in a report from a head teacher, that teachers had noticed wounds on M.’s body and face. Following a police investigation, the public prosecutor’s office had discontinued the case in October 2008. The applicants, two child-protection associations, brought civil proceedings against the State for a series of failings and negligence. Their case was dismissed.

44. *N.T.P. and Others v. France*, no. 68862/13, 24 May 2018.

45. *Buturugă v. Romania*, no. 56867/15, 11 February 2020. See also under Article 8 (Positive obligations) below.

46. *Association Innocence en Danger and Association Enfance et Partage v. France*, nos. 15343/15 and 16806/15, 4 June 2020. See also under Article 13 (Right to an effective remedy) below.

In the Convention proceedings, the applicant associations complained, mainly under the substantive limb of Articles 2 and 3 of the Convention, of the French authorities' failure to fulfil their positive obligations to protect the child from parental abuse. In addition, under Article 13 of the Convention, they complained that there had been no effective domestic remedy on account of the need to prove "gross negligence" (*faute lourde*) in order for the State to be found liable.

The Court found that there had been a violation of Article 3, as the domestic system had failed to protect M. from the severe abuse to which she had been subjected by her parents. It also found that there had been no violation of Article 13.

(i) The interest of the judgment lies, firstly, in the Court's characterisation of the facts of the case as falling under Article 3 and Article 13 in conjunction with Article 3, even though the victim died from her treatment. The Court took the view that the subject matter of the dispute lay in the question whether the domestic authorities should have been aware of the ill-treatment and should have protected her from the abuse which led to her death.

(ii) Secondly, the Court reiterated its case-law on the State's positive obligation under Article 3 to take specific measures in order to protect children or other vulnerable persons from criminal abuse perpetrated by third parties. It emphasised in this connection the need to secure rights that were practical and effective, and the need for the authorities' response to be adapted to the situation in order to fulfil that obligation, as explained in *Opuz v. Turkey*⁴⁷.

In the present case, while recognising the difficulties faced by the domestic authorities, the Court pointed out the following, in particular: while the public prosecutor's office had reacted immediately (on the very day of the report), the case had only been entrusted to a police investigator thirteen days later; no inquiries had been conducted with the specific aim of shedding light on M.'s family environment (especially in view of the family's frequent relocations) and the teachers who had reported their suspicions had not been interviewed; and, while not mandatory, the participation of a psychologist when M. was examined would have been appropriate. The Court further found that the combination of the total discontinuance of the case (in 2008) and the lack of any mechanism to centralise information had seriously reduced the chances of special monitoring of the child and prevented any useful exchange of information between the justice system and the social services. Moreover, while those services had certainly taken some steps

47. *Opuz v. Turkey*, no. 33401/02, ECHR 2009.

(home visits), they had not engaged in any really meaningful action to establish the child's actual condition.

(iii) Thirdly, as regards the specific issue of parental abuse of children, the Court seems to have consolidated its approach, which consists of characterising such acts as "domestic violence", with reference to the scope of this concept as defined in the [Council of Europe Convention on preventing and combating violence against women and domestic violence](#)⁴⁸ (*M. and M. v. Croatia*⁴⁹, and *D.M.D. v. Romania*⁵⁰).

Expulsion

*M.K. and Others v. Poland*⁵¹ concerned the refusal of border guards to lodge the applicants' asylum applications, the summary removal of the applicants to a third country, and the risk of *refoulement* to their country of origin.

The applicants were Russian nationals of Chechen origin. In 2017 they went to checkpoints on the Polish-Belarusian border on numerous occasions. They alleged that on each occasion they expressed their wish to lodge asylum applications, claiming to be at risk of ill-treatment in the Russian Federation and indicating to the border guards that they could not remain in Belarus as their visas had expired and that it was in practice impossible for them to obtain international protection there. On each occasion, the applicants were issued with administrative decisions refusing them entry and turned away on the grounds that they were not in possession of documents allowing them entry into Poland and had neither expressed a wish to apply for asylum nor claimed a risk of ill-treatment. The Court granted interim measures under Rule 39 of the Rules of Court, indicating to the Government that the applicants' asylum applications should be lodged and that the authorities should refrain from removing them to Belarus pending their examination. However, the applicants were returned to Belarus. They were also turned away from border checkpoints on later occasions. Eventually, the asylum applications of some of them were lodged by the Polish authorities and they were placed in a reception centre.

The applicants complained under Article 3 of the Convention and Article 4 of Protocol No. 4 (each alone and in conjunction with Article 13), as well as Article 34 of the Convention.

48. Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS 210.

49. *M. and M. v. Croatia*, no. 10161/13, ECHR 2015 (extracts).

50. *D.M.D. v. Romania*, no. 23022/13, 3 October 2017.

51. *M.K. and Others v. Poland*, nos. 40503/17 and 2 others, 23 July 2020. See also under Article 4 of Protocol No. 4 (Prohibition of collective expulsion of aliens) below.

The Court found, *inter alia*, a violation of Article 3 on account of the applicants having been denied access to the asylum procedure and removed to Belarus, a violation of Article 4 of Protocol No. 4, and a violation of Article 13 in conjunction with the aforementioned Articles owing to the absence of a remedy with automatic suspensive effect. It also found that the respondent State had failed to discharge its obligations under Article 34: it had either not complied with the interim measures indicated by the Court at all, or had complied with a significant delay.

(i) While the judgment does not develop the Court's case-law, it is noteworthy as it comprehensively examines complaints under several Convention provisions typically arising when individuals, with an arguable claim under Articles 2 or 3 to be at risk if returned to their country of origin, present themselves at a border crossing point to apply for asylum, but are denied that opportunity and removed to the third country from which they arrived, with a risk of *refoulement* to their country of origin.

Importantly, in determining whether or not the applicants had expressed a wish to apply for asylum when they presented themselves at the border checkpoints, the Court considered the applicants' version of the events to be more persuasive (contrast *Asady and Others v. Slovakia*⁵²). It found their account was corroborated by a large number of accounts collected by the national human rights institutions, whose reports indicated the existence of a practice of misrepresenting statements of asylum-seekers in the official notes of the border guards at checkpoints between Poland and Belarus, and by documents submitted by them to the Court at all stages of their applications, including copies of the asylum applications they had with them when they presented themselves at the border checkpoints, as well as by their numerous attempts to cross the border and to seek legal representation. Moreover, the authorities had been aware of the applicants' fears of being returned, as their asylum applications had been shared electronically with the authorities by the applicants' representatives and by the Court (in particular when granting interim measures under Rule 39).

(ii) As to the finding under Article 3, the judgment can be usefully compared to that in *Ilias and Ahmed v. Hungary*⁵³. The applicants in that case were able to lodge asylum applications at the border, which were, however, not examined on the merits because the third country from which they had arrived (Serbia) was deemed to be a safe third

52. *Asady and Others v. Slovakia*, no. 24917/15, 24 March 2020.

53. *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019.

country where their asylum applications could be examined. In the present case, on the other hand, the authorities refused to lodge the applicants' asylum applications. In both cases the Court concluded that the authorities of the respondent States had failed to discharge their obligations under Article 3, which, in cases of removal to a third country, required an assessment of whether there was a real risk of the asylum-seeker being denied access to an adequate asylum procedure protecting him or her against *refoulement* (namely, against being removed, directly or indirectly, to his or her country of origin without a proper evaluation of the risks he or she faced from the standpoint of Article 3). If the guarantees in this regard are insufficient, Article 3 obliges a State not to remove the asylum-seeker to the third country concerned. In order for the State's obligation under Article 3 to be effectively fulfilled, a State cannot deny access to its territory to a person presenting at a border checkpoint alleging that he or she may be subjected to ill-treatment if he or she remains on the territory of the neighbouring State, unless adequate measures are taken to eliminate such a risk.

*B and C v. Switzerland*⁵⁴ concerned the impossibility of requiring a homosexual person to conceal his sexual orientation to avoid ill-treatment upon removal to his country of origin, and the distribution of the burden of proof.

The first applicant, a Gambian national, arrived in Switzerland in 2008 and unsuccessfully applied for asylum. In 2014 he and the second applicant, a Swiss national, registered their same-sex partnership. They lived together until the second applicant's death in 2019. On 12 August 2014 the second applicant lodged a request for family reunification, namely for a residence permit to be granted to the first applicant in view of their registered partnership. That request was denied by the competent authority and the first applicant was ordered to leave the country and to await from abroad the outcome of the appeal proceedings he had initiated. On 2 August 2016 the Court granted his request for interim measures under Rule 39 of the Rules of Court, indicating that the first applicant was not to be deported for the duration of the proceedings before it. The domestic courts then rejected the appeal, finding that the first applicant was not entitled to a residence permit in view of, *inter alia*, his criminal record and the fact that he had not integrated well. As to the alleged risk of ill-treatment contrary to Article 3 in the Gambia, they

54. *B and C v. Switzerland*, nos. 889/19 and 43987/16, 17 November 2020.

considered that the first applicant had not shown substantial grounds for believing that he faced such a real risk: the situation for homosexuals had improved following a change in government, there was no reason to assume that the Gambian authorities knew of his sexual orientation and no homosexual acts would come to the attention of persons or the authorities in the Gambia since the applicants could enjoy their relationship during visits in Switzerland.

The Court found that the domestic courts did not sufficiently assess either the risks of ill-treatment for the first applicant as a homosexual person in the Gambia or the availability of State protection against any ill-treatment by non-State actors. The first applicant's deportation to the Gambia, without a fresh assessment of those aspects, would give rise to a violation of Article 3 of the Convention.

(i) The judgment is noteworthy as it is the first time that the Court has found that a deportation would breach Article 3 of the Convention in view of the risk of ill-treatment in the country of origin on the basis of sexual orientation, even if the present violation is of a procedural nature. The Court:

(a) reiterated that a person's sexual orientation formed a fundamental part of his or her identity so that no one could be obliged to conceal his or her sexual orientation in order to avoid persecution (confirming the approach taken in *I.K. v. Switzerland*⁵⁵, and in line with the case-law of the Court of Justice of the European Union (CJEU) and the position of the UNHCR);

(b) considered, disagreeing with the domestic authorities' finding to the contrary, that the first applicant's sexual orientation – the veracity of which was not disputed – could be discovered subsequently in the Gambia if he were removed there;

(c) took the view, in line with the approach it took in *I.I.N. v. the Netherlands*⁵⁶ and with the case-law of the CJEU, that the mere existence of laws criminalising homosexual acts in the country of destination did not render an individual's removal to that country contrary to Article 3 of the Convention: what was decisive was whether there was a real risk that these laws would be applied in practice, which according to the information available was not the case in the Gambia at present; and

(d) observed that the first applicant claimed that he would also face a real risk of ill-treatment at the hands of non-State actors; that recent country information indicated widespread homophobia and discrimination against LGBTI persons; that the Gambian authorities were

55. *I.K. v. Switzerland* (dec.), no. 21417/17, § 24, 19 December 2017.

56. *I.I.N. v. the Netherlands* (dec.), no. 2035/04, 9 December 2004.

generally unwilling to provide protection to LGBTI persons; and that the UNHCR was of the view that laws criminalising same-sex relations were normally a sign that State protection of LGBTI individuals was not available. It concluded that the domestic courts, having taken the view that it was not likely that his sexual orientation would come to the attention of the Gambian authorities or other persons, had not engaged in an assessment of the availability of State protection against harm emanating from non-State actors and had not sufficiently assessed the risks of ill-treatment for the first applicant as a homosexual person in the Gambia.

(ii) The judgment also applied the principles, set out in *J.K. and Others v. Sweden*⁵⁷, concerning the distribution of the burden of proof in Article 3 removal cases where the risk of ill-treatment emanates from non-State actors. In such cases, the burden of proof lies with the applicant in respect of his or her personal circumstances (in the present case, his sexual orientation), but it is for the authorities to establish *proprio motu* the general situation in the country of origin, including the availability of State protection against ill-treatment emanating from non-State actors.

Prohibition of slavery and forced labour (Article 4)

*S.M. v. Croatia*⁵⁸ concerned trafficking and exploitation for the purposes of prostitution.

The applicant lodged a criminal complaint against T.M., a former policeman, alleging that he had physically and psychologically forced her into prostitution. The criminal court acquitted him on the grounds that, although it had been established that he had organised a prostitution ring to which he had recruited the applicant, it had not been established that he had forced her into prostitution. The criminal court found that, since he had only been indicted on charges of forcing others to prostitute themselves, that is, the aggravated offence of organising prostitution, he could not be convicted of the more minor version of the same offence.

The Grand Chamber found that the applicant had made an arguable claim supported by *prima facie* evidence that she had been subjected to treatment contrary to Article 4, that is, human trafficking and/or forced prostitution. The Government's preliminary objection concerning the applicability of Article 4 was therefore dismissed. Noting that the

57. *J.K. and Others v. Sweden* [GC], no. 59166/12, §§ 91-98, 23 August 2016.

58. *S.M. v. Croatia* [GC], no. 60561/14, 25 June 2020.

applicant's complaint raised issues of impunity and was essentially of a procedural nature, the Grand Chamber focused on the domestic authorities' compliance with their procedural obligations and found a breach of Article 4 in this respect.

The issue of human trafficking has already been addressed in several judgments of the Court (for example, *Rantsev v. Cyprus and Russia*⁵⁹ and *Chowdury and Others v. Greece*⁶⁰). In the instant case, the Grand Chamber had the opportunity, for the first time, to consider the applicability of Article 4 specifically to the trafficking and exploitation of women for the purposes of prostitution. The judgment is noteworthy because the Court clarified how the concepts of "trafficking in human beings" and "exploitation of prostitution" were incorporated within the material scope of Article 4 and how these two concepts were related to each other. The Court also clarified whether the principles regarding the States' positive, and in particular procedural, obligations in the field of human trafficking were applicable to instances of forced prostitution.

(i) In *Rantsev* (cited above, § 282), the Court had considered it unnecessary to identify whether the impugned treatment amounted to "slavery", "servitude" or "forced or compulsory labour", concluding instead that the *trafficking* itself, within the meaning of the relevant international instruments, fell within the scope of Article 4 of the Convention. On this basis and in keeping with the principle of the harmonious interpretation of the Convention and other instruments of international law, the Grand Chamber clarified in the present judgment that conduct or a situation will only give rise to an issue of human trafficking under Article 4 of the Convention if all three constituent elements of the international definition of human trafficking, as defined in the *Anti-Trafficking Convention*⁶¹ and the *Palermo Protocol*⁶², are present: (1) an action (the recruitment, transportation, transfer, harbouring or receipt of persons); (2) the means (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person); (3) an exploitative purpose (including, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced

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

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

61. Council of Europe Convention on Action against Trafficking in Human Beings, CETS 197.

62. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

labour or services, slavery or practices similar to slavery, servitude or the removal of organs). As there is a difference between the Palermo Protocol and the Anti-Trafficking Convention as regards the scope of their application, the Grand Chamber followed the approach under the Anti-Trafficking Convention and further clarified that, from the perspective of Article 4, the concept of human trafficking related to all forms of trafficking in human beings, whether national or transnational, and irrespective of whether it was connected with organised crime or not. Lastly, while human trafficking fell within the scope of Article 4, this did not exclude the possibility that, in the particular circumstances of a case, a particular form of conduct related to human trafficking might raise an issue under another provision of the Convention.

(ii) Regarding the *“exploitation of prostitution”*, it follows from the Grand Chamber judgment that this concept is not subsumed under that of human trafficking. Having analysed the relevant case-law, the Grand Chamber concluded that the notion of “forced or compulsory labour” under Article 4 aimed to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they were related to the specific human-trafficking context. Any such conduct could have elements qualifying it as “slavery” or “servitude” under Article 4, or could raise an issue under another provision of the Convention. In that context, “force” could encompass the subtle forms of coercive conduct identified in the Court’s case-law on Article 4, as well as by the International Labour Organization (ILO) and in other international materials (for instance, the concept of “a penalty” which “may go as far as physical violence or restraint, but [which] can also take subtler forms, of a psychological nature”). The question whether a particular situation involved all the constituent elements of “human trafficking” and/or gave rise to a separate issue of forced prostitution was, in the Grand Chamber’s view, a factual question to be examined in the light of all the relevant circumstances of a case.

(iii) Considering the *scope of the States’ positive obligations* in this domain, the Grand Chamber clarified that, given the conceptual proximity of the two phenomena, the relevant principles relating to human trafficking were applicable in cases concerning forced prostitution. Turning to the scope of the procedural obligation in particular, the Grand Chamber found no reason to revisit the Court’s approach, well established ever since the judgment in *Siliadin v. France*⁶³, according to which the converging principles of the procedural

63. *Siliadin v. France*, no. 73316/01, ECHR 2005-VII.

obligation under Articles 2 and 3 of the Convention informed the specific content of the procedural obligation under Article 4 of the Convention. It further held that those principles were applicable also to instances of forced prostitution. When assessing the State's compliance with its procedural obligation in this context, the Grand Chamber confirmed that it was not concerned with allegations of errors or isolated omissions but only with significant shortcomings, namely those that were capable of undermining the investigation's capability of establishing the circumstances of the case or the person responsible.

Examining the facts of the case against the three constituent elements of human trafficking, the Court pinpointed the applicant's "recruitment" via Facebook, the use of force against her and possible harbouring and debt bondage. Moreover, T.M., a former policeman, had been in a position to abuse her vulnerability. The Court thus found that the applicant had made an arguable claim supported by prima facie evidence that she had been subjected to human trafficking and/or forced prostitution. The Court considered that the domestic procedural response to that claim had suffered from significant flaws, such as the failure to follow obvious lines of inquiry capable of elucidating the true nature of the relationship between both parties and the heavy reliance on the applicant's testimony without taking account of the possible impact of psychological trauma on her ability to consistently and clearly relate the circumstances of her exploitation.

Right to liberty and security (Article 5)⁶⁴

Extradition/Expulsion (Article 5 § 1 (f))

*Shiksaitov v. Slovakia*⁶⁵ concerned the detention in an EU member State of the applicant, who had already been recognised as a refugee in another EU member State, in order to examine the admissibility of his extradition to his country of origin.

The applicant, a Russian national of Chechen origin, was granted asylum (and permanent leave to remain) in Sweden in 2011 on account of his political opinions. In January 2015 he was arrested in Slovakia on the basis of an international arrest warrant which had been issued against him in 2007 by a court in the Chechen Republic on charges of terrorism allegedly committed in Grozny. The Slovak courts examined the admissibility of the request for his extradition to the Russian Federation

64. See also, under Article 3 of Protocol No. 1 (Right to free elections – Free expression of the opinion of the people), *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020.

65. *Shiksaitov v. Slovakia*, nos. 56751/16 and 33762/17, 10 December 2020.

and he was detained to ensure his presence in those proceedings. On 2 November 2016 the Supreme Court found his extradition to be inadmissible and ordered his immediate release: the applicant had been granted refugee status in Sweden and therefore enjoyed protection as a refugee on Slovak territory; the provisions contained in the [1951 Refugee Convention](#)⁶⁶ and [Directive 2011/95/EU](#)⁶⁷ (providing for the exclusion from refugee status) were not applicable to him; and the action serving as the initial impetus for his criminal prosecution had to be regarded as “political” and the applicant’s political views could give rise to bias on the part of the requesting State’s authorities, within the meaning of Article 3 §§ 1 and 2 of the [European Convention on Extradition](#)⁶⁸.

In the Convention proceedings the applicant complained that his detention in Slovakia had been unlawful because his refugee status precluded his extradition to the Russian Federation. The Court found a violation of, *inter alia*, Article 5 § 1 because the grounds for the applicant’s detention had not remained valid for the entire period of detention and because the authorities had failed to conduct the proceedings with due diligence.

The judgment concerns a novel factual matrix – the applicant, who had been recognised as a refugee in one EU member State, was detained in another EU member State in order to examine the admissibility of his extradition to his country of origin, where he claimed to face persecution – and thus the issue of the extraterritorial effect of the granting of asylum. In particular:

(i) The case concerned the extraterritorial effects in Slovakia, from where his extradition was requested, of refugee status granted to the applicant in Sweden. Emphasising the importance of the relevant rules of international law, with which the Convention should in so far as possible be interpreted in harmony, the Court relied on [Conclusion No. 12 \(XXIX\) of the UNHCR’s Executive Committee](#)⁶⁹ and considered that the refugee status awarded to the applicant in Sweden could be called into question by Slovakia only in exceptional circumstances, notably if information came to light showing that he fell within the terms of an exclusion provision and was thus not entitled to refugee

66. 1951 Geneva Convention relating to the Status of Refugees.

67. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

68. European Convention on Extradition, ETS 024.

69. Conclusion No. 12 (XXIX) Extraterritorial Effect of the Determination of Refugee Status, Executive Committee 29th session, 17 October 1978, UN Doc. A/33/12/Add.1.

status. Observing that the Swedish authorities had neither checked Interpol's database during the asylum proceedings nor examined the nature of the criminal charge brought against the applicant in the Russian Federation, the applicability of an exclusion clause had not been examined in the asylum proceedings in Sweden. The Slovak authorities could not therefore be blamed for examining the extradition request, despite the applicant's refugee status in Sweden. Consequently, his detention had not therefore been, *ab initio*, contrary to domestic law or to Article 5 § 1 (f) of the Convention.

The present factual scenario can therefore be contrasted with that in *Eminbeyli v. Russia*⁷⁰, where the Court found that the applicant's detention for the purposes of extradition had been arbitrary *from the outset* owing to his refugee status in the country from which extradition had been requested, since domestic law prohibited the extradition of a refugee.

(ii) The applicant's detention had not, however, remained justified under Article 5 § 1 (f) throughout its entire duration (more than one year and nine months). In particular, information about the applicant's refugee status (which constituted the main reason for the Supreme Court's judgment of 2 November 2016), as well as documents relating to his criminal prosecution in Russia (which allowed for an assessment as to the political nature of the alleged crimes) had been available to the Slovak authorities since February 2015. It had not therefore been established that the Slovak authorities had proceeded in an active and diligent manner as required by Article 5 § 1 (f) of the Convention.

PROCEDURAL RIGHTS

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

Fairness of the proceedings⁷¹

The judgment in *Sanofi Pasteur v. France*⁷² concerned the starting-point of the prescription period for an action for damages in respect of bodily harm.

Following an injection with a vaccine manufactured by the applicant company, an individual contracted various illnesses, including multiple sclerosis. She brought civil liability proceedings against the applicant company and was awarded compensation. The applicant company argued that the legal prescription period (ten years) had begun to run

70. *Eminbeyli v. Russia*, no. 42443/02, 26 February 2009.

71. See also, under Article 8 (Applicability), *Evers v. Germany*, no. 17895/14, 28 May 2020.

72. *Sanofi Pasteur v. France*, no. 25137/16, 13 February 2020.

from the date of purchase of the vaccine. The court of appeal found, however, that the period in question had began to run from the date that the illness stabilised. In the present case, however, given that stabilisation of the illness was impossible in that the pathology in question was a progressive one, the proceedings had not become time-barred. In support of its appeal on points of law, the applicant company requested, in particular, that the case be referred to the Court of Justice of the European Union (CJEU). The Court of Cassation dismissed the appeal on points of law and indicated that it was not necessary to refer a question to the CJEU for a preliminary ruling.

In the Convention proceedings, the applicant company argued, in particular, that by fixing the starting-point of the prescription period for proceedings on the date at which the damage had stabilised – even though the underlying illness was not amenable to stabilisation – the action had in effect become not subject to limitation, in breach of the principle of legal certainty protected by the Convention. The Court did not share that view and found no violation of Article 6 § 1. It is interesting to note that it did hold that there had been a violation of Article 6 § 1 on account of the failure to give reasons for the refusal to refer the case for a preliminary ruling.

The judgment is interesting in so far as it concerns the starting-point to be fixed for the prescription period in respect of an action for damages in a case concerning bodily harm, which, in the applicant company's submissions, meant that this action was in reality not subject to limitation.

In this case the Court was not examining an application which had been lodged by a victim seeking compensation (*Howald Moor and Others v. Switzerland*⁷³; *Eşim v. Turkey*⁷⁴; and *Stubbings and Others v. the United Kingdom*⁷⁵), but instead one lodged by the respondent to the action (see, in another context, *Oleksandr Volkov v. Ukraine*⁷⁶). The situation was thus that a right derived by one person from the Convention was in conflict with a right, also derived from the Convention, enjoyed by another person: on the one hand, the victim's right of access to a court; on the other, the applicant company's right to legal certainty. This implied a balancing of the competing interests. The Court afforded a wide margin of appreciation to the State in this difficult balancing exercise. In the

73. *Howald Moor and Others v. Switzerland*, nos. 52067/10 and 41072/11, 11 March 2014.

74. *Eşim v. Turkey*, no. 59601/09, 17 September 2013.

75. *Stubbings and Others v. the United Kingdom*, 22 October 1996, *Reports of Judgments and Decisions* 1996-IV.

76. *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 138-40, ECHR 2013.

present case, it noted that the French legislation was intended to enable the victim to obtain full compensation for the bodily harm sustained, the extent of which could only be ascertained after his or her condition had stabilised. The Court found that it could not call into question, as such, the choice made in the national legislation to attach greater weight to the right of access to a court of individuals who had sustained physical injury than it attached to the right to legal certainty of the persons who were liable for those injuries. In this connection, it reiterated the importance attached by the Convention to the protection of physical integrity, which was covered by Articles 3 and 8 of the Convention. The approach in issue also made it possible to take account of the needs of persons suffering from a progressive illness, such as multiple sclerosis.

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

Applicability⁷⁷

In its judgment in *Gestur Jónsson and Ragnar Halldór Hall v. Iceland*⁷⁸, the Grand Chamber ruled on the applicability of the criminal limb of Article 6 § 1 to a fine, with no statutory upper limit, for the non-attendance of defence counsel at a hearing.

The applicants are lawyers. Despite the District Court rejecting their request to revoke their appointment as defence counsel for defendants in a criminal trial, they decided not to attend the trial and were later convicted, in their absence, of contempt of court and of delaying the proceedings. They were each fined approximately 6,200 euros (EUR). The Supreme Court upheld the fines: the impugned fines were “by nature” a penalty, having regard to the absence in relevant law provisions of an express upper limit on such fines and to the size of the fines imposed in the instant case.

In the Convention proceedings the applicants complained that their trial *in absentia* and the penalty imposed had breached Articles 6 and 7 of the Convention. In October 2018 a Chamber of the Court, attaching weight to the above reasoning of the Supreme Court, found that Article 6 was applicable under its criminal limb but that there had been no violation of either Article 6 or of Article 7 of the Convention. The Grand Chamber disagreed with the Chamber on the question of the applicability of Article 6, considering that the proceedings in

77. See also, under Article 6 § 2 (Presumption of innocence) below, *Farzaliyev v. Azerbaijan*, no. 29620/07, 28 May 2020.

78. *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, 22 December 2020. See also under Article 7 (No punishment without law) below.

issue did not involve the determination of a “criminal charge” within its autonomous meaning and thus rejected the applicants’ complaints under Articles 6 and 7 as incompatible *ratione materiae* with the provisions of the Convention.

This judgment is noteworthy in three respects. In the first place, it reviews the application of the *Engel and Others v. the Netherlands*⁷⁹ criteria to determine whether contempt-of-court proceedings or proceedings concerning misconduct of legal professionals could be considered “criminal”. Secondly, and as to the third Engel criterion (the nature and degree of severity of the penalty the applicants risked incurring), the judgment clarifies that the absence of an upper statutory limit on the amount of the fine is not of itself dispositive of the question of the applicability of Article 6 under its criminal limb and that the Court will have regard to certain other factors (described below). Thirdly, in finding Article 7 inapplicable simply because of the inapplicability of Article 6, the Grand Chamber acknowledged the link between the notion of “criminal” in Article 6 and Article 7 of the Convention.

(i) On the facts, the Court found that the first and second Engel criteria had not been met: it had not been demonstrated that the offence had been classified as “criminal” under domestic law; nor was it clear, despite the seriousness of the breach of professional duties in question, whether the applicants’ offence was to be considered criminal or disciplinary in nature.

(ii) The third Engel criterion was therefore of key importance for the determination of the applicability of Article 6 of the Convention. When examining the nature and degree of the severity of the penalty, the Court did not consider itself bound by the finding of the Icelandic Supreme Court in this respect, noting, however, that it was open to the Contracting States to adopt a broader interpretation entailing a stronger protection of the rights and freedoms in question. The Court proceeded to distinguish the instant case from the other relevant cases, before finding that Article 6 was not applicable under its criminal limb.

In the first place, in contrast to previous contempt-of-court cases in which Article 6 was found to apply, notably on account of the third criterion (*Kyprianou v. Cyprus*⁸⁰, and *Zaicevs v. Latvia*⁸¹), the kind of misconduct for which the applicants had been held liable was not punishable by imprisonment.

Secondly, the fines in issue could not be converted into a deprivation of liberty in the event of non-payment, unlike in other relevant cases.

79. *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.

80. *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII.

81. *Zaicevs v. Latvia*, no. 65022/01, 31 July 2007.

For example, in *Ravnsborg v. Sweden*⁸² and *Putz v. Austria*⁸³, the existence of such a possibility, subject to certain fair-hearing guarantees, was an important consideration even if not sufficient in those circumstances to attract the application of Article 6 under its criminal head. In *T. v. Austria*⁸⁴, it was the punitive nature and the high amount of the penalty at stake (the fine imposed amounting to around EUR 2,000 and the maximum fine being around EUR 30,000), together with the possibility of converting it into a prison term without the guarantee of a hearing, that warranted considering the matter as “criminal”.

Thirdly, the fines had not been entered on the applicants’ criminal record, as in other cases where Article 6 under its criminal limb was not found to apply (*Ravnsborg* and *Putz*, both cited above, and *Žugić v. Croatia*⁸⁵).

Fourthly, the Court compared the amount of the penalty at stake in the instant case with those in issue in other relevant cases⁸⁶, before concluding that the size of the present fines (EUR 6,200) and the absence of an upper statutory limit on their amount did not suffice for the Court to deem the severity and nature of the sanction as “criminal” within the autonomous sense of Article 6 of the Convention.

(iii) Finally, having noted that the proceedings in question did not involve the determination of a “criminal charge” within the meaning of Article 6, the Grand Chamber went on, for “reasons of consistency in the interpretation of the Convention taken as a whole”, to find that the impugned fines could not be considered a “penalty” within the meaning of Article 7 of the Convention either (citing *Kafkaris v. Cyprus*⁸⁷; *Del Rio*

82. *Ravnsborg v. Sweden*, 23 March 1994, Series A no. 283-B.

83. *Putz v. Austria*, 22 February 1996, *Reports of Judgments and Decisions* 1996-I.

84. *T. v. Austria*, no. 27783/95, ECHR 2000-XI.

85. *Žugić v. Croatia*, no. 3699/08, 31 May 2011.

86. For instance, in *Müller-Hartburg v. Austria* (no. 47195/06, 19 February 2013), the size of the potential fine (approximately EUR 36,000), though having a punitive effect, had not been so severe as to bring the matter within the “criminal” sphere. Similarly, in *Ramos Nunes de Carvalho e Sá v. Portugal* ([GC], nos. 55391/13 and 2 others, 6 November 2018), the maximum penalty (ninety day-fines) and the fine imposed on the applicant (twenty day-fines, which allegedly corresponded to EUR 43,750) did not render Article 6 applicable under its criminal limb. The Court further had regard to the scale of the fines at issue in the cases where the penalties applied had been considered criminal in nature: the fine imposed in *Mamidakis v. Greece* (no. 35533/04, 11 January 2007) was over EUR 3,000,000; in *Grande Stevens and Others v. Italy* (nos. 18640/10 and 4 others, 4 March 2014), the fines ranged from EUR 500,000 to EUR 3,000,000, with a maximum fine of up to EUR 5,000,000; in *Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia* (no. 47072/15, 23 October 2018), the applicant company was fined EUR 105,000 and the maximum fine risked amounting to more than EUR 500,000.

87. *Kafkaris v. Cyprus* [GC], no. 21906/04, §§ 137-42, ECHR 2008.

*Prada v. Spain*⁸⁸; and *Ilmseher v. Germany*⁸⁹). The complaint under Article 7 was consequently also found to be incompatible *ratione materiae* with the Convention provisions.

Fairness of the proceedings

The *Akbay and Others v. Germany*⁹⁰ judgment concerned persons convicted as a result of incitement by the police to commit offences.

N.A. (the first applicant's husband) and the second and third applicants were convicted of drug offences in the context of a smuggling operation. The domestic courts found that N.A., and indirectly through him the second but not the third applicant, had been incited by State authorities to commit the offences. They therefore considerably reduced N.A.'s and the second applicant's sentences, and also took the State's influence into account as a general mitigating factor when imposing a sentence on the third applicant.

In the Convention proceedings the applicants claimed, in particular, that their right to a fair trial under Article 6 § 1 had been violated as N.A. and the second and third applicants had been convicted of offences following entrapment by the police. The Court found a violation of Article 6 § 1 with respect to the first and second applicants' complaints and no violation of that provision in respect of the third applicant.

The judgment is noteworthy because the Court (i) clarified its case-law on the transferability of an Article 6 complaint of entrapment; (ii) set out the Convention test to be applied with respect to indirect police incitement; and (iii) reaffirmed its methodology for examining entrapment cases.

(i) As to the transferability of the Article 6 entrapment complaint in the first applicant's case, the judgment contains a comprehensive overview of the case-law concerning the notions of direct and indirect victims under Article 34 of the Convention (§§ 67-77 of the judgment). The Court reiterated, in particular, that where the direct victim has died before the application was lodged with the Court, the Court's approach to accepting victim status has been generally restrictive. As regards complaints under, *inter alia*, Article 6, it has acknowledged victim status of close relatives where they have shown a moral interest in having the late victim exonerated of any finding of guilt or in protecting their own reputation and that of their family, or where they have shown a material

88. *Del Río Prada v. Spain* [GC], no. 42750/09, § 81, ECHR 2013.

89. *Ilmseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 203, 4 December 2018.

90. *Akbay and Others v. Germany*, nos. 40495/15 and 2 others, 15 October 2020. See also under Articles 34 and 35 (Applicability – Victim status) above.

interest on the basis of the direct effect on their pecuniary rights. The existence of a general interest which necessitated proceeding with the consideration of the complaints has also been taken into consideration (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*⁹¹).

In the present case, the Court found that a potential violation of Article 6 based on unlawful incitement to an offence that would otherwise not have been committed raised issues which went beyond purely procedural flaws resulting in a finding that the proceedings at issue were unfair. Given that according to the Court's established case-law a finding of incitement must result in the exclusion of all evidence obtained thereby or similar consequences (*Furcht v. Germany*⁹²), the Court's conclusion that there has been a breach of Article 6 on that ground will enable the person concerned to substantively challenge, at the national level, the validity of the conviction itself which was based on such evidence. In these circumstances, the Court accepted that the first applicant might have a legitimate interest to seek, by means of the present proceedings, to ultimately have N.A.'s conviction, pronounced on the basis of such evidence, set aside. It further noted that N.A. was a close relative of the first applicant who had been convicted of a serious drug offence and died soon afterwards, shortly before the present application had been lodged: as such, the first applicant might be considered to have a certain *moral* interest for the purposes of Article 34 (§§ 81-82 of the judgment). However, the first applicant did not have the requisite *material* interest under Article 34 to pursue the application: a potential just satisfaction award under Article 41 of the Convention could not constitute such a material interest (§§ 83-85 of the judgment). Lastly, the Court considered that the main issue raised by the case brought by the first applicant transcended the interests of the first applicant in that it concerned the legal system and practice of the respondent State (§§ 86-88 of the judgment). In sum, on the basis of an overall assessment, the Court found that the first applicant had the requisite standing under Article 34 of the Convention (§§ 89-90 of the judgment).

(ii) With respect to the issue of indirect entrapment – namely a situation where a person was not directly in contact with the police officers working undercover, but was involved in the offence by an accomplice (in the present case, N.A.) who had been directly incited to commit an offence by the police – on the basis of a detailed analysis of its

91. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 100, ECHR 2014.

92. *Furcht v. Germany*, no. 54648/09, § 64, 23 October 2014.

earlier case-law, the Court set out the following test for its assessment: (a) whether it was foreseeable for the police that the person directly incited to commit the offence was likely to contact other persons to participate in the offence; (b) whether that person's activities were also determined by the conduct of the police officers; and (c) whether the persons involved were considered as accomplices in the offence by the domestic courts (§ 117 of the judgment).

(iii) Finally the Court reaffirmed and applied its methodology for the examination of entrapment cases (*Bannikova v. Russia*⁹³ and *Matanović v. Croatia*⁹⁴). Accordingly, and when faced with a plea of entrapment, the Court will attempt to establish, as a first step, whether there has been such incitement or entrapment (substantive test of incitement). Where, under the substantive test of incitement, on the basis of the available information, the Court can find with a sufficient degree of certainty that the domestic authorities investigated the applicant's activities in an essentially passive manner and did not incite him or her to commit an offence, that would normally be sufficient for the Court to conclude that the subsequent use in the criminal proceedings in respect of the applicant of the evidence obtained by the undercover measure does not raise an issue under Article 6 § 1 of the Convention. If the Court's findings under the substantive test are inconclusive (owing to a lack of information in the file or to the lack of disclosure or contradictions in the parties' interpretations of events) or confirm that the applicant was subjected to incitement, then it will be necessary to proceed, as a second step, to the procedural test of incitement, that is to say, the Court will assess whether the domestic courts have drawn the relevant inferences in accordance with the Convention. This includes, as already found in the above-cited *Furcht* case, excluding all evidence obtained as a result of entrapment or applying a procedure with similar consequences (§§ 111-24 of the judgment).

Applying this methodology to the first and second applicants' complaints, the Court agreed with the domestic courts that N.A. (directly) and the second applicant (indirectly) had been subjected to police incitement to commit the offences of which they were later convicted. However, merely reducing sentences – without excluding all the evidence obtained as a result of entrapment or applying a procedure with similar consequences – did not satisfy the requirements of the entrapment test and the Court concluded that there had been a

93. *Bannikova v. Russia*, no. 18757/06, §§ 37-65, 4 November 2010.

94. *Matanović v. Croatia*, no. 2742/12, §§ 131-35, 4 April 2017.

violation of Article 6 § 1 of the Convention. By contrast, on the basis of the evidence available to it, the Court agreed with the domestic courts that the third applicant had not been subjected to entrapment, and there had therefore been no violation of Article 6 § 1 in respect of him.

The admission of statements obtained through ill-treatment by private individuals was the subject of the judgment in *Ćwik v. Poland*⁹⁵.

The applicant and K.G. were part of a criminal group involved in drug trafficking. K.G. was abducted and tortured by a rival gang to obtain information and his statements were recorded. The police freed K.G. and seized the recording. Some years later, the applicant was convicted of drug-trafficking offences. The trial court relied, *inter alia*, on the recording of the statements made by K.G. during his ill-treatment at the hands of the gang members. The applicant unsuccessfully challenged the admissibility of the recording. The Court of Appeal found that the recording had been obtained lawfully by the police and that the rule excluding evidence obtained by coercion concerned the authorities conducting the investigation and not private persons. The Supreme Court dismissed the applicant's cassation appeal as manifestly ill-founded without providing any reasons.

In the Convention proceedings the applicant complained, under Article 6 § 1, that his trial had been unfair. The Court found a violation of this provision.

The judgment is noteworthy because the Court examined, for the first time, the admission in evidence in criminal proceedings of statements obtained through ill-treatment inflicted by private individuals, without the involvement or acquiescence of State agents.

The Court's consistent case-law indicates that the use in criminal proceedings of statements obtained from the accused or a witness by any form of treatment in breach of Article 3 automatically renders the criminal proceedings unfair as a whole (see, among many other authorities, *Gäfgen v. Germany*⁹⁶). This is irrespective of whether that treatment is classified as torture or inhuman or degrading treatment, and irrespective of the probative value of the statements and of whether their use was decisive in securing the defendant's conviction (the admissibility of real evidence was not in issue in the present case; see, in that regard, *Gäfgen*, cited above, § 178).

95. *Ćwik v. Poland*, no. 31454/10, 5 November 2020.

96. *Gäfgen v. Germany* [GC], no. 22978/05, §§ 165-66, ECHR 2010.

These principles, developed in cases where State agents were involved in obtaining the statements in question, were found by the Court in the present case to be equally applicable to the admission of statements obtained as a result of ill-treatment inflicted by private individuals.

In applying those principles, the Court determined, on the basis of the available material, that the treatment inflicted on K.G. by private individuals had attained the threshold of severity necessary to fall within the scope of Article 3 and to trigger the State's positive obligation under this provision to protect persons from ill-treatment by private individuals. The Court did not find it necessary to determine whether that ill-treatment might be qualified as torture. Having ascertained that the domestic courts had indeed relied on statements made by K.G. during this ill-treatment, the Court found that the admission of the statements in evidence rendered the criminal proceedings as a whole unfair and violated Article 6 § 1 of the Convention.

Tribunal established by law

*Guðmundur Andri Ástráðsson v. Iceland*⁹⁷ concerned the participation of a judge whose appointment had been vitiated by undue executive discretion, and compliance with the "established by law" requirement.

The Court of Appeal rejected the applicant's appeal against his criminal conviction. He complained that one of the judges on the bench of that court had been appointed in breach of domestic procedures. The Supreme Court acknowledged that the judge's appointment had been irregular in two respects. In the first place, the Minister of Justice had replaced four of the candidates (from the fifteen considered by the Evaluation Committee to be the best qualified) with four others (including the impugned judge who had not made it into the top fifteen) without carrying out an independent evaluation or providing adequate reasons for her decision. Secondly, Parliament had not held a separate vote on each individual candidate, as required by domestic law, but instead voted in favour of the Minister's list *en bloc*. The Supreme Court held, nevertheless, that these irregularities could not be considered to have nullified the appointment and that the applicant had received a fair trial. The Grand Chamber found that there had been a violation of the right to a tribunal "established by law".

This Grand Chamber judgment is noteworthy in two respects. In the first place, it clarified the scope of, and the meaning to be given to, the

97. *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020.

concept of a “tribunal established by law” and it analysed its relationship with other “institutional requirements” (notably, independence and impartiality). Secondly, while the Grand Chamber endorsed the logic of the “flagrant breach” test of the Chamber, it developed it further into a three-step threshold test.

(i) The Grand Chamber analysed how each of the three individual components of the concept of a “tribunal established by law” should be interpreted so as to best reflect its purpose and to ensure that the protection it offers is truly effective. As to a “tribunal”, in addition to the judicial function and the applicable requirements of independence, impartiality, and so on, it is inherent in its very notion that it be composed of judges selected on the basis of merit through a rigorous process to ensure that the most qualified candidates – both in terms of technical competence and moral integrity – are appointed: the higher the tribunal in the judicial hierarchy, the more demanding the applicable selection criteria should be. As to “established”, the Grand Chamber noted its purpose which was to protect the judiciary against unlawful external influence, from the executive in particular. In this light, the process of appointing judges necessarily constituted an inherent element of the requirement that a tribunal be “established by law”, with the result that breaches of the law regulating this process may render the participation of the relevant judge in the examination of a case “irregular”. The Grand Chamber further clarified that the third component – “by law” – also meant “in accordance with the law”, so that provisions on judicial appointments should be couched in unequivocal terms, to the extent possible, to prevent arbitrary interferences, including by the executive. At the same time, the mere fact that the executive has decisive influence on appointments may not as such be considered problematic. Finally, in view of a very close interrelationship and common purpose shared by the requirements of independence/impartiality and “tribunal established by law”, an examination under the latter must systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the fundamental principles of the rule of law and the separation of powers, and to compromise the independence of the court in question.

(ii) On the basis of the above, the Grand Chamber developed the following three cumulative criteria to be applied to assess whether there has been a breach of the right to a “tribunal established by law”, in light of the object and purpose of this concept (namely, to ensure the ability of the judiciary to perform its duties free of undue interference). In the first place, there must, in principle, be a *manifest* breach of domestic

law in the sense that it must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation, since a procedure that is seemingly in compliance with the rules may nevertheless produce results that are incompatible with the above object and purpose. Secondly, only those breaches that relate to the *fundamental rules* of the procedure for appointing judges (that is, breaches that affect the essence of the right in question) are likely to result in a violation: for example, the appointment of a person as judge who did not fulfil the relevant eligibility criteria or breaches that may otherwise undermine the purpose and effect of the “established by law” requirement. Accordingly, breaches of a purely technical nature fall below the relevant threshold. Thirdly, *the review by domestic courts*, of the legal consequences of a breach of a domestic rule on judicial appointments, must be carried out on the basis of the relevant Convention standards. In particular, a fair and proportionate balance has to be struck to determine whether there was a pressing need, of a substantial and compelling character, justifying the departure from competing principles of legal certainty and irremovability of judges, as relevant, in the particular circumstances of a case. With the passage of time, the preservation of legal certainty would carry increasing weight in the balancing exercise.

(iii) On the facts of the case, the Grand Chamber found that the very essence of the applicant’s right to a “tribunal established by law” had been impaired on account of the participation in his trial of a judge whose appointment procedure had been vitiated by a manifest and grave breach of a fundamental domestic rule intended to limit the influence of the executive and strengthen the independence of the judiciary. The first and second criteria were thereby satisfied. In particular in this regard, the Minister of Justice had failed to explain why she had picked one candidate over another. Given the alleged political connections between her and the husband of the impugned judge, her actions were of such a nature as to prompt objectively justified concerns that she had acted out of political motives. Moreover, the Minister was a member of one of the political parties composing the majority in the coalition government, by whose votes alone her proposal had been adopted in Parliament. As to the procedure before Parliament, not only had it failed to demand that the Minister provide objective reasons for her proposals, but Parliament had not complied with the special voting rules, which had undermined its supervisory role as a check against the exercise of undue executive discretion. The applicant’s belief that Parliament’s decision had been driven primarily by party political

considerations might not therefore be considered to be unwarranted. This was sufficient to taint the legitimacy and transparency of the whole appointment procedure. As to the third criterion, the Supreme Court had in turn failed to carry out a Convention-compliant assessment and to strike the right balance between the relevant competing principles, although the impugned irregularities had been established even before the judges at issue had taken office. Nor had it responded to any of the applicant's highly pertinent arguments. The restraint displayed by the Supreme Court in examining the applicant's case had undermined the significant role played by the judiciary in maintaining the checks and balances inherent in the separation of powers. However, the finding of a violation in the present case could not, as such, be taken to impose on the respondent State an obligation to reopen all similar cases that had since become *res judicata*.

Presumption of innocence (Article 6 § 2)

*Farzaliyev v. Azerbaijan*⁹⁸ concerned the existence of a "criminal charge" and the applicability of Article 6 § 2.

The applicant is the former Prime Minister of an autonomous region in Azerbaijan whose term of office ended in the early 1990s. In November 2005 a criminal investigation for embezzlement was opened relating to his time in office. Two months later, in January 2006, the investigation was discontinued as time-barred. The following month the prosecutor who had led the criminal investigation instituted civil proceedings against the applicant for embezzlement. The domestic courts ordered the applicant to pay compensation for – as was clearly indicated – his "crime" of embezzlement. The applicant had never been questioned or charged during the brief criminal investigation and, indeed, only discovered that there had been such an investigation later during the civil proceedings.

He complained to the Court under Article 6 § 1 about the unfairness of the civil proceedings and under Article 6 § 2 that the domestic courts in the civil proceedings had breached his right to be presumed innocent by declaring him guilty of the crime of embezzlement. The Court found a violation of both provisions.

The judgment is noteworthy for two reasons: first, because it confirmed that the moment from which a "criminal charge" exists is to be interpreted in the same way under both Article 6 § 1 and Article 6 § 2 and, further, because it confirmed and applied a narrow exception to

98. *Farzaliyev v. Azerbaijan*, no. 29620/07, 28 May 2020.

this rule (recently recognised in *Batiashvili v. Georgia*⁹⁹) to find Article 6 § 2 applicable in the particular circumstances of the case. In particular:

(i) The Court confirmed that a “criminal charge” exists within the meaning of Article 6 § 2 from the moment an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been “substantially affected” by actions taken by the authorities as a result of a suspicion against him (as regards Article 6 § 1, see, in the context of the fairness of the proceedings, *Simeonovi v. Bulgaria*¹⁰⁰, with further references, and, in the context of the length of proceedings, *Mamič v. Slovenia (no. 2)*¹⁰¹, and *Liblik and Others v. Estonia*¹⁰²).

(ii) According to *Allen v. the United Kingdom*¹⁰³, Article 6 § 2 would be violated if, without having been convicted in earlier criminal proceedings, a later judicial statement reflects the view that the applicant was guilty. According to the above-described definition of a “criminal charge”, for Article 6 § 2 to apply to such a complaint to protect the applicant from statements made in later linked proceedings (the civil action in the present case), the applicant would need to have been previously actually charged or “substantially affected”, the latter generally meaning he or she had been aware of an investigation when it was taking place (through, for example, being questioned by the police).

However, neither event occurred in the present case: the applicant was never actually charged and was not made aware of the criminal investigation until it was over. Finding – as it had done recently in *Batiashvili*, cited above, in the rather unique circumstances of that case – an exception to the above-described principles concerning the applicability of Article 6 §§ 1 and 2 given the very particular circumstances of the present case, the Court nonetheless concluded that the applicant could be considered to have been “substantially affected” by the conduct of the investigating authorities (and thus “charged with a criminal offence”). In particular, the Chamber found that:

48. ... The question before it is whether the applicant was a person “charged with a criminal offence” within the autonomous meaning of Article 6 § 2 of the Convention. In order to answer that question, the Court is compelled to look behind the appearances and investigate the realities of the situation before it (see *Batiashvili v. Georgia*, no. 8284/07, § 79, 10 October 2019). It notes once again

99. *Batiashvili v. Georgia*, no. 8284/07, 10 October 2019.

100. *Simeonovi v. Bulgaria* [GC], no. 21980/04, §§ 110-11, 12 May 2017.

101. *Mamič v. Slovenia (no. 2)*, no. 75778/01, § 24, ECHR 2006-X (extracts).

102. *Liblik and Others v. Estonia*, nos. 173/15 and 5 others, § 94, 28 May 2019.

103. *Allen v. the United Kingdom* [GC], no. 25424/09, ECHR 2013.

that it is true that the applicant was never formally charged with a criminal offence in the discontinued criminal proceedings and that he became aware of the allegations made against him in those proceedings only ... after the civil claim ... had been lodged against him on 16 February 2006, less than a month after their discontinuation on 21 January 2006. However, having regard to the case-specific sequence of closely interconnected events ... considered as a whole, as well as to the relatively close temporal proximity between the relevant events in question, the Court considers that, in the particular circumstances of the present case, the combined effect of the authorities' actions taken as a result of a suspicion against the applicant was that his situation was "substantially affected" by the conduct of the authorities (compare, *mutatis mutandis*, *Batiashvili*, cited above, § 94) and that therefore, for the purposes of the present complaint, he must be considered as a person "charged with a criminal offence" within the autonomous meaning of Article 6 § 2.

Other rights in criminal proceedings

No punishment without law (Article 7)

In response to the request submitted by the Armenian Constitutional Court under Protocol No. 16 to the Convention, the Court delivered its advisory opinion¹⁰⁴ on 29 May 2020, which further defines the scope of advisory opinions. The opinion concerned Article 7 and the use of certain referencing techniques when defining an offence and comparing the criminal provisions in force at the time of the commission of an alleged offence with the subsequently amended provisions.

In 2018 a former President of Armenia, Mr R. Kocharyan, was charged with overthrowing the constitutional order, essentially on account of having declared a state of emergency and used the armed forces to quell post-election protests in February and March 2008. By the time he was charged in 2018 the provisions of the Criminal Code had been amended (in 2009) so that the definition of the offence in issue had become broader in one respect and narrower in another, when compared to the provision which had been in force at the time of the commission of the alleged offences in 2008. Both the first-instance court and Mr Kocharyan lodged applications with the Constitutional Court, which then requested this Court to give an advisory opinion on the following questions:

104. *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], request no. P16-2019-001, Armenian Constitutional Court, 29 May 2020. See also under Article 1 of Protocol No. 16 (Advisory opinions) below.

1. Does the concept of “law” under Article 7 of the Convention and referred to in other Articles of the Convention, for instance in Articles 8 to 11, have the same degree of qualitative requirements (certainty, accessibility, foreseeability and stability)?
2. If not, what are the standards of delineation?
3. Does the criminal law that defines a crime and contains a reference to certain legal provisions of a legal act with supreme legal force and higher level of abstraction meet the requirements of certainty, accessibility, foreseeability and stability?
4. In the light of the principle of non-retroactivity of criminal law (Article 7 § 1 of the Convention), what standards are established for comparing the criminal law in force at the time of committal of the crime and the amended criminal law, in order to identify their contextual (essential) similarities or differences?

(i) In this its second advisory opinion under Protocol No. 16, the Court, prompted by two specific features of the present request, has further defined the scope of its opinions.

In the first place, since the Court considered the questions to be at least in part broad and general, it reiterated that its opinions must be confined to issues directly connected to the pending domestic proceedings, inferring therefrom the power to reformulate and combine the submitted questions having regard to the specific factual and legal circumstances in issue in the domestic proceedings. It also clarified that the panel’s decision to accept the request as a whole could neither deprive the Court of the possibility of employing the full range of the powers conferred upon it, including in relation to the Court’s jurisdiction, nor preclude the Court itself from assessing (on the basis of the request, the observations received and all the other material before it) whether each of the submitted questions fulfilled the requirements of Article 1 of Protocol No. 16. On this basis, the Court decided not to answer the first and second questions, which were found to have no direct link with the domestic proceedings and could not be reformulated so as to enable the Court to discharge its advisory function effectively and in accordance with its purpose.

Secondly, a particular feature of the present request was the preliminary nature of the proceedings before the Constitutional Court, so that the relevant facts had not yet been the subject of domestic judicial determination. In accordance with the principle of subsidiarity, the Grand Chamber proceeded on the basis of the facts provided by the Constitutional Court and indicated that its opinion should inform the Constitutional Court’s interpretation of domestic law in the light of

the Convention; this interpretation should then be applied by the first-instance court to the concrete facts of the case.

(ii) The Court went on to respond to the remaining questions (the third and fourth) in the request and, in so doing, further developed certain aspects of its case-law under Article 7 of the Convention.

(a) The third question referred to the fact that Mr Kocharyan had been accused of an offence which was defined by reference to certain provisions of the Constitution. In responding to this question in the light of the requirements of clarity and foreseeability arising out of Article 7, the Court, for the first time, explicitly ruled on the technique of “blanket reference” or “legislation by reference”, that is, where substantive provisions of the criminal law (“referencing provisions”) referred, when defining the constituent elements of criminal offences, to legal provisions outside the criminal law (“referenced provisions”):

Using the “blanket reference” or “legislation by reference” technique in criminalising acts or omissions is not in itself incompatible with the requirements of Article 7 of the Convention. The referencing provision and the referenced provision, read together, must enable the individual concerned to foresee, if need be with the help of appropriate legal advice, what conduct would make him or her criminally liable. This requirement applies equally to situations where the referenced provision has a higher hierarchical rank in the legal order concerned or a higher level of abstraction than the referencing provision.

The most effective way of ensuring clarity and foreseeability is for the reference to be explicit, and for the referencing provision to set out the constituent elements of the offence. Moreover, the referenced provisions may not extend the scope of criminalisation as set out by the referencing provision. In any event, it is up to the court applying both the referencing provision and the referenced provision to assess whether criminal liability was foreseeable in the circumstances of the case.

In reaching this conclusion, the Court drew on case-law in which this technique had been implicitly accepted (*Kuolelis and Others v. Lithuania*¹⁰⁵, and *Haarde v. Iceland*¹⁰⁶) and on the comparative material available to it. It also specified that constitutional provisions were often developed further through acts of lower hierarchical levels, through non-codified constitutional customs and through jurisprudence. The Court thus confirmed its previous finding that Article 7 did not exclude that evidence of existing constitutional practice might form part of the national court’s overall analysis of foreseeability of an offence based on a

105. *Kuolelis and Others v. Lithuania*, nos. 74357/01 and 2 others, 19 February 2008.

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

constitutional provision. Furthermore, both of the above-cited cases, in which no breach of Article 7 had been found, indicated that the status of the accused was a relevant consideration so that particular caution may be required from professional politicians/holders of high office in assessing whether conduct could entail criminal liability.

(b) Finally, the fourth question in the request concerned the amendment of the definition of the offence in issue, which became broader in one respect and narrower in another, compared to the provision which had been in force at the time of the commission of the alleged offence. While its case-law did not offer a comprehensive set of criteria for comparing successive criminal laws, the Court drew upon its approach in cases relating to the reclassification of charges (*G. v. France*¹⁰⁷; *Ould Dah v. France*¹⁰⁸; *Berardi and Mularoni v. San Marino*¹⁰⁹; and *Rohlena v. the Czech Republic*¹¹⁰), emphasising in particular that the Court has regard to the specific circumstances of the case, the formal classification of the offences in issue being of no concern. The Court thereby extended the application of the “principle of concretisation” – developed in the context of the amendment of penalties (*Maktouf and Damjanović v. Bosnia and Herzegovina*¹¹¹) – to cases, such as the present one, involving an amendment of the definition of the offence itself. Based on that principle, if the subsequent law is considered more severe than the law in force at the time of the alleged commission of the offence, it may not be applied.

In its judgment in *Gestur Jónsson and Ragnar Halldór Hall v. Iceland*¹¹², the Grand Chamber ruled on the applicability of the criminal limb of Article 6 § 1 to a fine, with no statutory upper limit, for the non-attendance of defence counsel at a hearing.

The applicants are lawyers. Despite the District Court rejecting their request to revoke their appointment as defence counsel for defendants in a criminal trial, they decided not to attend the trial and were later convicted, in their absence, of contempt of court and of delaying the

107. *G. v. France*, 27 September 1995, Series A no. 325-B.

108. *Ould Dah v. France* (dec.), no. 13113/03, ECHR 2009.

109. *Berardi and Mularoni v. San Marino*, nos. 24705/16 and 24818/16, 10 January 2019.

110. *Rohlena v. the Czech Republic* [GC], no. 59552/08, ECHR 2015.

111. *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, ECHR 2013 (extracts).

112. *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, 22 December 2020. See also under Article 6 § 1 (Right to a fair hearing in criminal proceedings – Applicability) above.

proceedings. They were each fined approximately 6,200 euros (EUR). The Supreme Court upheld the fines: the impugned fines were “by nature” a penalty, having regard to the absence in relevant law provisions of an express upper limit on such fines and to the size of the fines imposed in the instant case.

In the Convention proceedings the applicants complained that their trial *in absentia* and the penalty imposed had breached Articles 6 and 7 of the Convention. In October 2018 a Chamber of the Court, attaching weight to the above reasoning of the Supreme Court, found that Article 6 was applicable under its criminal limb but that there had been no violation of either Article 6 or of Article 7 of the Convention. The Grand Chamber disagreed with the Chamber on the question of the applicability of Article 6, considering that the proceedings in issue did not involve the determination of a “criminal charge” within its autonomous meaning and thus rejected the applicants’ complaints under Articles 6 and 7 as incompatible *ratione materiae* with the provisions of the Convention.

This judgment is noteworthy because, in finding Article 7 inapplicable simply because of the inapplicability of Article 6, the Grand Chamber acknowledged the link between the notion of “criminal” in Article 6 and Article 7 of the Convention.

Having noted that the proceedings in question did not involve the determination of a “criminal charge” within the meaning of Article 6, the Grand Chamber went on, for “reasons of consistency in the interpretation of the Convention taken as a whole”, to find that the impugned fines could not be considered a “penalty” within the meaning of Article 7 of the Convention either (citing *Kafkaris v. Cyprus*¹¹³; *Del Río Prada v. Spain*¹¹⁴; and *Ilseher v. Germany*¹¹⁵). The complaint under Article 7 was consequently also found to be incompatible *ratione materiae* with the Convention provisions.

*Baldassi and Others v. France*¹¹⁶ concerned the existence of a case-law precedent rendering the likelihood of a criminal conviction foreseeable.

The case concerned the criminal conviction of activists in the Palestinian cause who were involved in the international campaign “Boycott, Divestment and Sanctions” launched by Palestinian non-

113. *Kafkaris v. Cyprus* [GC], no. 21906/04, §§ 137-42, ECHR 2008.

114. *Del Río Prada v. Spain* [GC], no. 42750/09, § 81, ECHR 2013.

115. *Ilseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 203, 4 December 2018.

116. *Baldassi and Others v. France*, nos. 15271/16 and 6 others, 11 June 2020. See also under Article 10 (Freedom of expression) below.

governmental organisations following the publication by the International Court of Justice of an opinion concerning the unlawfulness of the Israeli separation barrier, with a view to putting pressure on Israel to comply with international law. The applicants were convicted of incitement to economic discrimination under section 24(8) of the Law of 29 July 1881 on freedom of the press on account of their involvement in actions to boycott Israeli products.

They complained to the Court of violations of Articles 7 and 10 of the Convention, emphasising in particular that the general nature of the words “incitement to discrimination” in the provision under which they had been convicted was contrary to Article 7, because a very broad term was being applied to an ambivalent concept, namely discrimination. The Court found no violation of Article 7 of the Convention and a violation of Article 10.

The most interesting feature of this judgment is the Court’s finding concerning the conformity with Article 7 of the application of the Law on freedom of the press to the present case. While expressing reservations about the foreseeability of the references among different legislative texts underpinning the applicants’ conviction, that is to say, on the one hand, between various subsections of the 1881 Law and, on the other, between the latter and the Criminal Code, the Court concluded that as the case-law had stood at the material time, the applicants should have known that they were likely to be convicted on that basis for calling for a boycott of products imported from Israel.

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

In *Saqueti Iglesias v. Spain*¹¹⁷ the Court set out the criteria for characterising an offence as “minor”.

The case concerned an applicant’s inability to secure a higher-court assessment of an administrative decision penalising him for failing to declare a sum of money on passing through customs at an airport. Despite the fact that the Spanish Law on the prevention of money-laundering and the funding of terrorism provides for escalating scales of punishment depending on the circumstances, the authorities confiscated virtually the whole amount, that is 153,800 euros (EUR), without considering the specific circumstances of the case. The domestic authorities subsequently imposed on the applicant a fine corresponding to the amount confiscated.

117. *Saqueti Iglesias v. Spain*, no. 50514/13, 30 June 2020.

The applicant complained before the Court of a violation of Article 2 of Protocol No. 7 to the Convention on the grounds that he had been unable to obtain an assessment by the Supreme Court of the judgment delivered by the Madrid Higher Court of Justice, as the threshold for an appeal on points of law had been raised to EUR 600,000. The applicant's last-instance *amparo* appeal had been dismissed by the Constitutional Court.

(i) The most interesting feature of this judgment is that it develops the case-law on the applicability of Article 2 of Protocol No. 7, in the light of the "Engel criteria" and the judgment in *A and B v. Norway*¹¹⁸.

As regards the first criterion, that is to say the domestic classification, Spanish law deemed it a "serious administrative offence" which was not subject to a custodial sentence.

As regards the second criterion, namely the nature of the offence, the Court emphasised that the Law on the prevention of money-laundering and the funding of terrorism was general in scope, that it had already had occasion to hold that the criminal limb of Article 6 of the Convention could be applicable to customs offences, and that the imposition of the fine had necessarily pursued the aim of deterrence and prevention in response to the applicant's failure to comply with the obligation to make a customs declaration. That consideration alone was sufficient to confer a criminal nature on the offence in issue. The Court also drew a distinction between the present case and those of *Butler v. the United Kingdom*¹¹⁹, which concerned smuggling, and *Inocêncio v. Portugal*¹²⁰, in which the penalty imposed had been far less severe than that in the instant case and which had not concerned the customs sphere.

Finally, in connection with the third criterion, to wit the severity of the penalty incurred for the "serious" offence with which the applicant had been charged, it was such as to confer a criminal nature on the proceedings. Having regard to the various aspects of the case, the Court concluded that Article 2 of Protocol No. 7 was applicable to the case in hand.

(ii) Secondly, the Court considered the relevance of the exceptions set forth in Article 2 § 2 of Protocol No. 7. It sought to ascertain whether the offence of which the applicant had been convicted had not in fact amounted to a "minor offence" and whether, consequently, an appeal

118. *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, §§ 105 and 107, 15 November 2016.

119. *Butler v. the United Kingdom* (dec.) no. 41661/98, ECHR 2002-VI.

120. *Inocêncio v. Portugal* (dec.), no. 43862/98, ECHR 2001-I.

should have been available in the instant case. In that regard, the Court reiterated that an important criterion was whether or not the offence was subject to a custodial sentence.

The Court, emphasising that it realised that the legislations of the Contracting States diverged widely on the matter of failure to declare sums of money, held that the relevance and weighting afforded to each element should be determined on the basis of the specific circumstances of the individual case, leaving a margin of appreciation to States to assess proportionality and any particularly serious consequences in accordance with an applicant's personal situation. Therefore, the existence of a custodial sentence became an important factor which the Court had to consider in determining whether or not an offence was minor, although it could not be a decisive factor in itself.

Having regard to the circumstances of the case (virtually the whole amount discovered, which was equivalent to the applicant's entire personal savings, had been confiscated; the money did not originate in practices linked to money-laundering, the amounts having been declared on the applicant's return to Spain; and the fact that the applicant had no police record) and reiterating that the penalty should match the seriousness of the infringement found, that is to say the failure to honour the declaration obligation, the Court concluded that the offence could not be considered "minor" within the meaning of Article 2 of Protocol No. 7 and that the exception was not applicable. The Court also noted that the domestic authorities had not conducted a proportionality assessment, even though such an assessment was required under Spanish law.

(iii) Finally, having regard to the limited powers of the Constitutional Court in the framework of the *amparo* appeal, the Court found, for the first time, that it could not be regarded as a "higher tribunal" for the purposes of Article 2 of Protocol No. 7. The Court also noted that according to the explanatory report to Protocol No. 7 to the Convention, courts of appeal and courts of cassation could be considered as fulfilling the requirements of a second level of jurisdiction, and that no mention was made of constitutional courts. The applicant had therefore not had access to a system of appeal.

In the light of all the specific circumstances of the case, including the severity of the penalty imposed on the applicant, the failure by the domestic authorities to examine his personal circumstances and the lack of access to a higher-level court, the Court found that there had been a violation of Article 2 of Protocol No. 7 to the Convention.

OTHER RIGHTS AND FREEDOMS

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

Applicability¹²¹

In *Evers v. Germany*¹²² the Court concluded that Article 8 was not applicable to the applicant's challenge against a contact ban concerning a disabled woman whom he had sexually abused.

The applicant had sexually abused, and had a child with, the mentally disabled daughter of the woman with whom he was living. Criminal proceedings, initiated against him for sexual abuse of a person incapable of resistance, were discontinued. The disabled woman was placed in specialised residential care. The District Court appointed a guardian and issued a contact ban against the applicant, who wished to continue his sexual relationship with the disabled woman. The applicant's appeal against the contact ban was dismissed by the Regional Court.

The applicant complained under Article 8 about the contact ban. He also alleged certain shortcomings in the domestic proceedings, including that he had not been heard in person, in particular, before the Regional Court. The Court found the complaint under Article 8 to be inadmissible and that there had been a violation of Article 6 § 1 owing to the Regional Court's refusal to hear the applicant in person.

The judgment is noteworthy for its finding that the applicant's complaint did not fall within the scope of Article 8 and, in particular, of "private life", which is generally considered to be a broad term not susceptible to exhaustive definition. In particular:

In the first place, the Court considered that the mere fact that the applicant had been living in a common household with the disabled woman and had been the biological father of her child did not constitute, in the circumstances of the case, a family link which would fall under the protection of "family life".

Secondly, and as regards the "private life" aspect of Article 8, the Court reiterated that, while this provision protected the right to establish and develop relationships with other human beings and the outside world (*Denisov v. Ukraine*¹²³), a broad construction of Article 8 did not mean that it protected every activity in which a person might

121. See also, under Article 8 (Positive obligations), *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 10 March 2020.

122. *Evers v. Germany*, no. 17895/14, 28 May 2020.

123. *Denisov v. Ukraine* [GC], no. 76639/11, § 95, 25 September 2018.

seek to engage with other human beings in order to establish and develop such relationships (*Friend and Others v. the United Kingdom*¹²⁴, and *Gough v. the United Kingdom*¹²⁵). The Court explained that it had generally assumed contact with a specific other person to constitute a fundamental element of Article 8 mainly under the family-life limb (see, for example, *Elsholz v. Germany*¹²⁶ (concerning parents and children); *Kruškić v. Croatia*¹²⁷ (concerning grandparents and their grandchildren); and *Messina v. Italy (no. 2)*¹²⁸ (regarding prisoners and close members of their family)). However, the Court emphasised that private life did not as a rule come into play in situations where a complainant did not enjoy family life within the meaning of Article 8 in relation to a person with whom he or she wanted to establish contact and where that person did not share the wish for contact. This was all the more so if that person had been the victim of behaviour which had been deemed detrimental by the domestic courts.

Since, moreover, Article 8 could not be relied upon to complain about, *inter alia*, personal or psychological loss which was the foreseeable consequence of one's own actions, such as a criminal offence or other misconduct entailing a measure of legal responsibility with foreseeable negative effects on private life (*Denisov*, cited above, § 98), the Court concluded that the applicant's challenge against the contact ban did not fall within the scope of the "private life" aspect of Article 8 and was thus incompatible *ratione materiae* with that provision of the Convention.

Private life¹²⁹

The domestic legal obligation on service providers to store the personal data of users of their prepaid mobile phone SIM cards was examined in *Breyer v. Germany*¹³⁰.

In June 2004 amendments to the Telecommunications Act introduced a legal obligation for telecommunication providers to acquire and store personal details of all their customers, including customers whose details were not needed for billing purposes or other contractual reasons, such as those who purchased prepaid mobile phone SIM cards. These

124. *Friend and Others v. the United Kingdom* (dec.), nos. 16072/06 and 27809/08, § 41, 24 November 2009.

125. *Gough v. the United Kingdom*, no. 49327/11, § 183, 28 October 2014.

126. *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII.

127. *Kruškić v. Croatia* (dec.), no. 10140/13, § 111, 25 November 2014.

128. *Messina v. Italy (no. 2)*, no. 25498/94, § 61, ECHR 2000-X.

129. See also, under Article 8 (Positive obligations), *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 10 March 2020.

130. *Breyer v. Germany*, no. 50001/12, 30 January 2020.

amendments were considered necessary by the domestic authorities to comply with obligations arising from EU law. The applicants purchased prepaid mobile phone SIM cards and were required to register certain personal details (including the phone number and their name, address and date of birth) with their respective service providers when activating those SIM cards. The applicants challenged this obligation before the Federal Constitutional Court, which found that such an obligation was not incompatible with the Basic Law. The Court found that the legal obligation under section 111 of the Telecommunications Act was not contrary to Article 8 of the Convention.

The judgment is noteworthy as it concerns a novel data-protection issue. It also contains a comprehensive overview of the case-law under Article 8 relating to the protection of private life when compiling personal data, in particular as regards the principle of informational self-determination (*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*¹³¹).

(i) As regards the nature of the interference with Article 8 rights, the Court reiterated that the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (*Leander v. Sweden*¹³²). In this connection, the Court also took note of the finding of the Federal Constitutional Court to the effect that the extent of protection of the right to informational self-determination under domestic law was not restricted to information which by its very nature was sensitive and that, in view of the processing possibilities, there was no item of personal data which was of itself (namely, regardless of the context of its use) insignificant.

(ii) As regards the lawfulness of the interference, the Court found that the storage of data itself had a basis in the law (section 111 of the Telecommunications Act), which was sufficiently clear and foreseeable. Moreover, the duration of the storage was clearly regulated and the technical side of the storage was clearly outlined. In so far as safeguards, access of third parties and further use of the stored data were concerned, section 111 had to be read in conjunction with other provisions of that Act, which the Court found more appropriate to examine in its proportionality assessment.

(iii) In its proportionality assessment, a number of issues were of importance to the Court.

131. *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 137, 27 June 2017.

132. *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116.

It acknowledged that the pre-registration of mobile-phone subscribers substantially simplified and accelerated investigation by law-enforcement agencies and was capable of contributing to effective law enforcement and prevention of disorder or crime. In this connection it also reiterated that in a national-security context national authorities enjoyed a certain margin of appreciation when choosing the means for achieving a legitimate aim and that there was no consensus between the Council of Europe member States as regards the retention of subscriber information of prepaid SIM card customers. Thus, the Court accepted that the obligation to store subscriber information under section 111 of the Telecommunications Act was, in general, a suitable response to changes in communication behaviour and in the means of telecommunications.

It was significant that the storage of data in issue concerned only a limited data set: this data did not include any highly personal information or allow the creation of personality profiles or the tracking of the movements of mobile-phone subscribers. Moreover, no data concerning individual communication events were stored. The Court thus distinguished this level of interference from previous cases concerning the collection of more sensitive data or cases in which the registration in a particular database led to frequent checks or further collection of private information. In this connection, the Court also referred to the findings of the Court of Justice of the European Union in the case of *Ministerio Fiscal*¹³³. In sum, the Court concluded that the interference was, while not trivial, of a rather limited nature.

Certain safeguards were highlighted by the Court in this context.

In the first place, the Court observed that there were no technical insecurities as regards the storage of data, that the duration of the storage was limited to the expiry of the calendar year following the year in which the contractual relationship ended, and that the stored data appeared limited to the information necessary to clearly identify the relevant subscriber.

Secondly, the Court examined the possibilities for future access to and use of the data stored and, notably, information requests which could be made under sections 112 and 113 of the Telecommunications Act. It found it important that the named authorities who could request access to the stored data under section 112 of the Act were concerned with law enforcement or the protection of national security. While under section 113 of the Act the authorities who could request access to the

133. *Ministerio Fiscal*, C-207/16, 2 October 2018, EU:C:2018:788.

data were identified only by reference to the tasks they performed and were not therefore explicitly enumerated, those authorities had to make a written request and the wording of the provision was detailed enough to clearly foresee which authorities were empowered to request information. In each case, the stored data were further protected against excessive or abusive information requests by the fact that the requesting authority required an additional legal basis to retrieve the data. Moreover, these information requests under sections 112 and 113 were also subjected to review and supervision. The Court explained that the level of review and supervision was an important, but not a decisive, element in the proportionality assessment of the collection and storage of a limited data set, such as that in the present case. As regards the applicable regime, in particular, the Court noted that the Federal Network Agency was competent to examine the admissibility of the transmission of data when needed; that each retrieval and the relevant information regarding the retrieval were recorded for the purpose of data-protection supervision by the relevant independent data-protection authorities; that these authorities could also be seized in an individual appeal relating to the collection, processing or use of personal data by public bodies; and that legal redress against information retrieval could be sought under general rules of domestic law, and was available against the final decisions of the authorities.

The decision in *Platini v. Switzerland*¹³⁴ concerned the protection of private life in connection with an arbitral decision in professional sport that resulted in a suspension of activity for the applicant.

The applicant was a former professional football player who had been captain and coach of the France national team. He had served as President of UEFA (Union of European Football Associations) and Vice-President of FIFA (*Fédération Internationale de Football Association*). Disciplinary proceedings were brought against him in respect of a salary “supplement” of 2 million Swiss francs which had been granted to him by FIFA’s former President, against whom proceedings had also been brought, both criminal and disciplinary. The FIFA sanction consisted of his suspension from any football-related professional activity for six years plus a fine. The applicant appealed against the decision to the Court of Arbitration for Sport (CAS), which reduced the suspension period from

134. *Platini v. Switzerland* (dec.), no. 526/18, 11 February 2020.

six years to four and decreased the amount of the fine. The Swiss Federal Court upheld that decision.

In the Convention proceedings, the applicant complained in particular that the sanction was incompatible with his freedom to exercise a professional activity, in breach of Article 8. The Court rejected the complaint as manifestly ill-founded.

The decision is of interest as the Court provided clarification under Article 8, firstly, on its jurisdiction *ratione personae* in such matters and, secondly, for the first time, on the applicability of Article 8 (private life) to this type of professional dispute and on the State's positive obligations and margin of appreciation.

(i) As regards the Court's jurisdiction: in the case of *Mutu and Pechstein v. Switzerland*¹³⁵, the respondent State's responsibility under the Convention was acknowledged when it came to the Article 6 compliance of the CAS proceedings as validated by the Federal Court. However, the issue in the present case was the State's responsibility under Article 8 for the substance of the decisions by those organs. The Court took the view that the relevant decisions engaged the State's responsibility for two reasons: firstly, Swiss law provides for the legal effects of CAS awards and for the jurisdiction of the Federal Court to examine their validity; secondly, that apex court had dismissed the applicant's appeal, thereby giving the arbitral decision the force of *res judicata* in the Swiss legal order. The Court thus found it had jurisdiction to entertain the application against Switzerland.

(ii) As to the applicability of Article 8 to the professional dispute in question, the Court applied the Denisov approach, based on the consequences of the professional sanction for the applicant's private life (*Denisov v. Ukraine*¹³⁶). Having regard to the concrete and convincing arguments submitted by the applicant, it found that the threshold of severity required to engage Article 8 had been attained (*ibid.*, § 116). It acknowledged that the applicant, who had spent his whole career in football, could indeed feel significantly affected by the four-year ban on any football-related activity.

(iii) Concerning the positive obligations imposed on the respondent State and the extent of its margin of appreciation, the Court first pointed out that, unlike the applicants in *Mutu and Pechstein* (cited above, §§ 114 and 122), the present applicant had not claimed before the Court that he had been forced to sign compulsory arbitration clauses excluding the possibility of submitting disputes to an ordinary domestic court.

135. *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, §§ 65-67, 2 October 2018.

136. *Denisov v. Ukraine* [GC], no. 76639/11, §§ 115-17, 25 September 2018.

Moreover, he had expressly accepted the jurisdiction of the CAS. The Court, having examined the procedure and the decisions, found that the applicant had, in his dispute with FIFA, been afforded adequate institutional and procedural safeguards in the context of both private (CAS) and State (Federal Court) adjudicatory organs, as required by Article 8. Lastly, it took account of the State's significant margin of appreciation in the present case.

Positive obligations

*Buturugă v. Romania*¹³⁷ is noteworthy in that the Court, for the first time, addressed the phenomenon of cyberbullying as an aspect of violence against women under Articles 3 and 8 of the Convention.

The applicant complained to the authorities about the violent behaviour of her ex-husband. He received an administrative fine. The criminal proceedings against him were discontinued, essentially on the ground that his conduct had not been sufficiently serious to be designated as a criminal offence. Moreover, the authorities did not address the acts in issue from the perspective of domestic violence. As part of the proceedings, the applicant requested an electronic search of the family computer, alleging that her ex-husband had wrongfully consulted her electronic accounts, including her Facebook account, and had copied her private conversations, documents and photos. This request was refused on the ground that the evidence likely to be gathered by such a search was unrelated to the offences allegedly committed by her ex-husband. A further complaint by the applicant, alleging a breach by her ex-husband of the secrecy of correspondence, was dismissed without an examination on the merits. The Court held in this connection that there had been a failure to comply with the positive obligations arising under Articles 3 and 8 of the Convention.

The judgment is noteworthy in that the Court, for the first time, addressed the phenomenon of cyberbullying as an aspect of violence against women.

The Court reiterated in this context that the phenomenon of domestic violence was not perceived as being limited to incidents of physical violence alone, but that it included, among other forms, psychological violence or harassment (compare *Opuz v. Turkey*¹³⁸; *T.M. and C.M. v. the*

137. *Buturugă v. Romania*, no. 56867/15, 11 February 2020. See also under Article 3 (Positive obligations) above.

138. *Opuz v. Turkey*, no. 33401/02, §§ 132 and 138, ECHR 2009.

*Republic of Moldova*¹³⁹; and *Talpis v. Italy*¹⁴⁰). In addition, cyberbullying was currently recognised as one aspect of violence against women and girls and could take on a variety of forms, including cyber-breaches of privacy, intrusion into the victim's computer and the capture, sharing and manipulation of data and images, including private data. In the context of domestic violence, cyber-surveillance was often carried out by the person's intimate partner. The Court therefore accepted that acts such as illicitly monitoring, accessing or saving one's partner's correspondence could be taken into account by the domestic authorities when investigating cases of domestic violence.

The Court also emphasised the need to address comprehensively the phenomenon of domestic violence in all its forms (see *Talpis*, cited above, § 129), which was of particular relevance in the present case. In examining the applicant's allegations of cyberbullying and her request to have the family computer searched, the national authorities had been overly formalistic in dismissing any connection with the domestic violence which she had already reported to them. The applicant had thus later been obliged to submit a new complaint alleging a breach of the confidentiality of her correspondence. In dealing with it separately, the authorities had failed to take into consideration the various forms that domestic violence could take.

In contrast, the Court adopted a comprehensive approach, by examining, under Articles 3 and 8 of the Convention, the allegations of physical violence and cyberbullying taken as a whole.

*Hudorovič and Others v. Slovenia*¹⁴¹ sets out the criteria for determining the existence of a State's positive obligation under Article 8 to provide access to safe drinking water

The applicants belonged to Roma communities residing in illegal and unserviced settlements. They complained that they had not been provided with access to basic public utilities, in particular, to safe drinking water and sanitation. The municipal authorities had taken some steps to provide the applicants with the opportunity to access safe drinking water. In one settlement, at least one water tank co-financed by the municipality had been installed and filled with drinking water. In another settlement, the municipality had installed and financed a

139. *T.M. and C.M. v. the Republic of Moldova*, no. 26608/11, § 47, 28 January 2014.

140. *Talpis v. Italy*, no. 41237/14, §§ 129-30, 2 March 2017.

141. *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 10 March 2020. See also under Article 3 (Inhuman or degrading treatment) above.

public water point to which individual connections could be installed. The applicants considered these measures insufficient. The Court found that, even assuming they were applicable, there had been no violation of Articles 8 and 3 of the Convention, taken alone and in conjunction with Article 14.

The judgment is noteworthy in that the Court, for the first time, clarified the conditions which could trigger the applicability of Article 8 with regard to the provision by the State of basic public utilities, in particular, safe drinking water. The Court also developed criteria for determining the existence of a State's positive obligation under this provision and its eventual content.

(i) Relying on the consequence-based approach outlined in *Denisov v. Ukraine*¹⁴², the Court defined as follows the threshold of severity which could bring Article 8 into play in this context: a “persistent and long-standing lack of access to safe drinking water” with “adverse consequences for health and human dignity effectively eroding the core of private life and the enjoyment of a home”.

(ii) The existence of any positive obligation in this respect and its eventual content are to be determined by the specific circumstances of the persons affected, by the legal framework and by the economic and social situation of the State in question. In the Court's view, States must be accorded a wide discretion in such matters, including as regards the concrete steps to ensure everyone has adequate access to water.

– As to the economic and social position in Slovenia, the Court noted that a non-negligible proportion of the Slovenian population living in remote areas did not have access to the public water supply and sewerage systems;

– As to the comprehensive regulatory framework in place, the Court considered it reasonable that the State or its local authorities assumed responsibility for the provision of that service while it was left to the owners to install individual house connections at their own expense. Likewise, it appeared reasonable that alternative solutions such as the installation of individual water tanks or systems for harvesting rainwater were proposed in those areas not yet covered by a public water supply system.

– As regards the applicants' specific circumstances, the key consideration for the Court was the fact that they belonged to a socially disadvantaged group which faced greater obstacles than the majority in accessing basic utilities.

142. *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018.

In the first place, the Court took note of all the affirmative action measures already taken by the domestic authorities with a view to improving the living conditions of the Roma community, including concrete actions to provide the applicants with the opportunity to access safe drinking water. While not an ideal or permanent solution, these positive steps demonstrated that the authorities had acknowledged the disadvantages suffered by the applicants as members of a vulnerable community and had shown a degree of active engagement with their specific needs.

Secondly, the applicants, who remained in their respective settlements by choice, were not living in a state of extreme poverty. They received social benefits which could have been used towards improving their living conditions by, for instance, installing private water and septic tanks, systems for collecting rainwater or other alternative solutions. In sum, the Court took the view that, while it fell upon the State to address the inequalities in the provision of access to safe drinking water which disadvantaged Roma settlements, this could not be interpreted as including an obligation to bear the entire burden of providing running water to the applicants' homes.

Thirdly, the applicants had not convincingly demonstrated that the State's alleged failure to provide them with access to safe drinking water had resulted in adverse consequences for their health and human dignity, effectively eroding their core rights under Article 8. Even assuming that Article 8 was applicable, and having regard to the State's wide margin of appreciation in such matters, the Court found that the measures adopted by the State in order to ensure access to safe drinking water and sanitation for the applicants had taken account of their vulnerable position and satisfied the requirements of Article 8 of the Convention.

Freedom of expression (Article 10)

Freedom of expression

*Magyar Kétfarkú Kutya Párt v. Hungary*¹⁴³ concerned the foreseeability of restrictions on the freedom of expression of political parties in the context of an election or a referendum.

In 2016 a referendum concerning the European Union was held in Hungary. Immediately prior thereto the applicant political party had made available to voters a mobile-phone application which they could use to anonymously upload and share photographs of their ballot

143. *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], no. 201/17, 20 January 2020.

papers. Following complaints by a private individual to the National Election Commission (NEC), the applicant party was fined for infringing principles concerning the fairness and secrecy of elections as well as the principle of the “exercise of rights in accordance with their purpose”. The *Kúria* upheld the finding of the NEC as regards the latter principle but dismissed its conclusions regarding voting secrecy and the fairness of the referendum. The applicant party’s constitutional complaint was declared inadmissible.

The Grand Chamber examined the case from the standpoint of the lawfulness of the measure under Article 10. It found that the legislation setting out the principle concerning the “exercise of rights in accordance with their purpose” was not formulated with sufficient precision to rule out any arbitrariness and enable the applicant party to regulate its conduct accordingly and found a breach of Article 10.

The judgment is noteworthy in that it clarified the extent of the Court’s scrutiny of restrictions on the freedom of expression of political parties in an electoral context and, in particular, the level of foreseeability required of the legal basis for such a restriction.

(i) Restrictions on the freedom of expression of political parties in an electoral context must be subjected to rigorous supervision. The same applies, *mutatis mutandis*, in the context of a referendum aimed at identifying the will of the electorate on matters of public concern.

(ii) Such rigorous supervision naturally extends to the assessment of whether the legal basis, relied upon by the authorities to restrict the freedom of expression of a political party, was sufficiently foreseeable to rule out any arbitrariness in its application. As well as protecting democratic political parties from arbitrary interferences by the authorities, rigorous supervision serves to protect democracy itself, since any restriction on freedom of expression in this context without sufficiently foreseeable regulations could harm open political debate, the legitimacy of the voting process, its results and, ultimately, the confidence of citizens in the integrity of democratic institutions and their commitment to the rule of law.

In the present case, the Court noted that the applicant party had been seeking not only to provide a forum for voters to express an opinion, but also to convey a political message on the referendum (the name of the application was “Cast an invalid ballot”). There had therefore been an interference with its freedom of expression in relation to both of these aspects: providing a forum for third-party content and imparting information and ideas.

The salient issue was whether the applicant party – in the absence of a binding provision of domestic legislation explicitly regulating the taking of photographs of ballot papers and the uploading of those photographs in an anonymous manner to a mobile-phone application for dissemination while voting was ongoing – knew or ought to have known, if need be after taking appropriate legal advice, that its conduct would breach the existing electoral procedure law.

The Court observed that the vagueness of the principle of the “exercise of rights in accordance with their purpose” relied on by the authorities had been noted by the Constitutional Court. The relevant legislation did not define what constituted a breach of that principle, it did not establish any criteria for determining which situation constituted a breach and it did not provide any examples. The relevant domestic regulatory framework allowed the restriction of voting-related expressive conduct on a case-by-case basis and therefore conferred a very wide discretion on the electoral bodies and on the domestic courts called upon to interpret and apply it. While the Constitutional Court had restricted the reach of the said principle to voting-related conduct that entailed “negative consequences”, it had not been established how the restriction in issue “related to, and addressed, a concrete ‘negative consequence’, whether potential or actual”, particularly since the applicant party had not been found to have infringed the fairness of the referendum or the secrecy of the ballot.

Having regard to the particular importance of the foreseeability of law when it came to restricting the freedom of expression of a political party in the context of an election or a referendum, the Court concluded that the considerable uncertainty about the potential effects of the legal provisions in issue had exceeded what was acceptable under Article 10 § 2 of the Convention.

In *Selahattin Demirtaş v. Turkey (no. 2)*¹⁴⁴, the Court examined the loss of immunity and prolonged pre-trial detention of an opposition member of parliament (MP) as a result of his political speeches.

The applicant was an elected MP and one of the co-chairs of the Peoples’ Democratic Party (HDP), a left-wing pro-Kurdish political party. On 20 May 2016 an amendment to the Constitution was adopted

144. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020. See also under Article 35 § 2 (b) (Matter already submitted to another international body) above and Article 3 of Protocol No. 1 (Right to free elections – Free expression of the opinion of the people) and Article 18 (Restrictions not prescribed by the Convention) below.

whereby parliamentary immunity was lifted in all cases where requests for its lifting had been transmitted to the National Assembly prior to the date of adoption of the amendment. This reform had its origin in clashes in Syria between Daesh and forces with links to the PKK as well as in the serious violence in Turkey in 2014 and 2015 following the breakdown of negotiations aimed at resolving the “Kurdish question”. The applicant, who was actively involved through his speeches and statements on these issues, was one of 154 MPs (including 55 HDP members) affected by the constitutional amendment. In November 2016 he was arrested on suspicion of membership of an armed terrorist organisation and of inciting others to commit a criminal offence. Further to an additional investigation (concerning the aforementioned violence), the applicant remains in detention awaiting trial. His parliamentary mandate expired in June 2018.

The Grand Chamber found a violation of Article 10.

This judgment is noteworthy in that it considered the compatibility of the impugned constitutional amendment with the foreseeability requirement of Article 10 and articulated the impact of a finding of a breach of Article 10 on the examination of a complaint under Article 3 of Protocol No. 1.

In particular:

(i) When a State provides for parliamentary immunity from prosecution/deprivation of liberty, the domestic courts must verify whether the MP concerned is entitled to immunity for the acts of which he or she has been accused. Where charges/pre-trial detention are linked to speech, the domestic courts’ task is to determine whether this speech is covered by the principle of “non-liability” of MPs in that regard. In the instant case, the domestic courts failed to comply with this procedural obligation arising under both Article 10 and Article 3 of Protocol No. 1.

(ii) The Court fully subscribed to the finding of the Venice Commission that the impugned unprecedented and one-off constitutional amendment had been aimed expressly at specific statements of MPs, particularly those of the opposition, and that it was thus a “misuse of the constitutional amendment procedure”. MPs could not reasonably have expected that such a procedure would be introduced during their term of office. The interference with the freedom of expression had not therefore been foreseeable, in violation of Article 10 of the Convention.

(iii) The Court stressed that the importance of the freedom of expression of MPs (especially of the opposition) is such that, where the detention of an MP is not compatible with Article 10, it will also be considered to breach Article 3 of Protocol No. 1.

*Baldassi and Others v. France*¹⁴⁵ concerned the right to call for a boycott as a specific form of expression.

The case concerned the criminal conviction of activists in the Palestinian cause who were involved in the international campaign “Boycott, Divestment and Sanctions” launched by Palestinian non-governmental organisations following the publication by the International Court of Justice of an opinion concerning the unlawfulness of the Israeli separation barrier, with a view to putting pressure on Israel to comply with international law. The applicants were convicted of incitement to economic discrimination under section 24(8) of the Law of 29 July 1881 on freedom of the press on account of their involvement in actions to boycott Israeli products.

They complained to the Court of violations of Articles 7 and 10 of the Convention, emphasising in particular that the general nature of the words “incitement to discrimination” in the provision under which they had been convicted was contrary to Article 7, because a very broad term was being applied to an ambivalent concept, namely discrimination. The Court found no violation of Article 7 of the Convention and a violation of Article 10.

The Court has seldom had occasion to consider the issue of the compatibility of a call for a boycott with Article 10 of the Convention, one previous case being *Willem v. France*¹⁴⁶. The judgment in the present case is the first time the Court has designated boycotts as a means of expressing protest opinions, while reiterating the limits which should not be overstepped in the framework of Article 10 of the Convention:

63. A boycott is first and foremost a means of expressing a public protest. A call for a boycott, which is intended to communicate protest opinions while calling for specific related actions, is therefore, in principle, protected by Article 10 of the Convention.

64. However, a call for a boycott is a special mode of exercise of freedom of expression in that it combines the expression of a protest opinion with incitement to differential treatment such that, depending on the particular circumstances, it is liable to amount to a call to discriminate against others. Incitement to discrimination is a form of incitement to intolerance, which, together with incitement to violence and hatred, is one of the limits which should never be overstepped in the framework of the exercise of freedom of expression (see, for example, *Perinçek*, cited above, § 240). However,

145. *Baldassi and Others v. France*, nos. 15271/16 and 6 others, 11 June 2020. See also under Article 7 (No punishment without law) above.

146. *Willem v. France*, no. 10883/05, 16 July 2009.

incitement to different treatment is not necessarily the same as incitement to discrimination.”

In its analysis of the necessity of the interference (the conviction of the applicants), the Court adopted a three-stage approach:

(i) First of all, it decided that the judgment in *Willem* (cited above), in which it had found no violation of Article 10 of the Convention, could not serve as a precedent here, having noted that Mr Willem had not been convicted on the basis of his political opinions but of incitement to a discriminatory act.

In that case the applicant had been a mayor who, in 2002, at a municipal council meeting with journalists in attendance and subsequently on the municipal website, had announced that he had asked the municipal catering services to boycott Israeli foodstuffs in protest against the Israeli Prime Minister’s policy *vis-à-vis* the Palestinians. In announcing his decision, the applicant had been acting in his capacity as mayor and using his mayoral powers, in disregard of the concomitant duties of neutrality and discretion. He had made the announcement without a prior debate or vote in the municipal council, and therefore could not claim to have encouraged free discussion of a subject of public interest.

The Court drew the following distinctions between the circumstances of the present case and those in *Willem*: the applicants here were ordinary citizens who were not restricted by the duties and responsibilities arising from a mayoral mandate and whose influence on consumers was not comparable to that of a mayor on the services in his municipality; and it had manifestly been in order to trigger or stimulate debate among supermarket customers that the applicants had issued the calls for a boycott which had led to the criminal proceedings of which they complained before the Court.

(ii) Reiterating the limits which should never be overstepped in the framework of exercising freedom of expression (see above), the Court emphasised that the applicants had not been convicted of making racist or antisemitic remarks or of inciting to hatred or violence; nor had they been convicted of engaging in violence or causing damage.

(iii) Without calling into question the interpretation of the law on which the applicants’ conviction was based, that is to say incitement to economic discrimination, the Court assessed, in particular, the reasoning of the domestic court in convicting the applicants. It noted that French law, as interpreted and applied in the present case, prohibited any call for a boycott of products on account of their geographical origin whatever the tenor, grounds and circumstances of such a call.

The Court noted that by adjudicating on that legal basis, the domestic court had failed to give detailed reasons, which would have been all the more vital in this case as it concerned a situation in which Article 10 of the Convention required a high level of protection of the right to freedom of expression. Indeed, on the one hand, the actions and remarks imputed to the applicants had concerned a subject of public interest, that is to say, compliance by the State of Israel with public international law and the human rights situation in the occupied Palestinian territories, and had been part of a contemporary debate, in France and throughout the international community. On the other hand, the actions and words had fallen within the ambit of political or militant expression.

The Court deduced that the applicants' conviction had not been based on relevant and sufficient grounds, applying rules in conformity with the principles set out in Article 10 and relying on an appropriate assessment of the facts. It found that there had been a violation of Article 10 of the Convention.

In *Miljević v. Croatia*¹⁴⁷ the Court examined a conviction for defamation on account of statements made while defending criminal proceedings, about someone not participating in those proceedings.

During his trial for war crimes, the applicant made statements in his defence, accusing I.P. (who was not participating in the proceedings) of instigating his prosecution, witness tampering and leading a criminal enterprise aiming to have him convicted. The applicant was acquitted of war crimes, but later convicted in criminal defamation proceedings brought against him by I.P. on account of the impugned statements. The Court found a violation of Article 10 of the Convention.

(i) The judgment is noteworthy because it gave the Court the opportunity, for the first time, to balance the right to freedom of expression of an accused in criminal proceedings (Article 10) against the right to respect for reputation (Article 8), in a novel context where the offending statements were made against a third party not having any formal role in the relevant proceedings (compare with previous cases concerning either a lay accused making disparaging statements against judges or prosecutors (for example, *Lešník v. Slovakia*¹⁴⁸, and *Skalka v. Poland*¹⁴⁹) or a defence lawyer making such statements against judges,

147. *Miljević v. Croatia*, no. 68317/13, 25 June 2020.

148. *Lešník v. Slovakia*, no. 35640/97, ECHR 2003-IV.

149. *Skalka v. Poland*, no. 43425/98, 27 May 2003.

prosecutors, witnesses or police officers (for example, *Nikula v. Finland*¹⁵⁰, and *Kyprianou v. Cyprus*¹⁵¹)).

(ii) The Court observed that Articles 8 and 10 normally enjoy equal protection, so that the outcome of the application should not, in principle, vary according to whether it has been lodged under Article 8 by the person who was the subject of the offending statement or under Article 10 by the author of the statement in question. However, in cases where the right to freedom of expression is to be read in the light of an accused's right to a fair trial under Article 6, the margin of appreciation afforded to the domestic authorities under Article 10 ought to be narrower. Importantly, the Court set out the following principles for balancing the relevant competing rights at stake in this context:

In particular, in the Court's view, having regard to an accused's right to freedom of expression and the public interest involved in the proper administration of criminal justice, priority should be given to allowing the accused to speak freely without the fear of being sued in defamation whenever his or her speech concerns the statements and arguments made in connection with his or her defence. On the other hand, the more an accused's statements are extraneous to the case and his or her defence, and include irrelevant or gratuitous attacks on a participant in the proceedings or any third party, the more it becomes legitimate to limit his or her freedom of expression by having regard to the third party's rights under Article 8 of the Convention.

The Court emphasises that an accused's statements and arguments are protected in so far as they do not amount to malicious accusations against a participant in the proceedings or any third party. As it follows from the Court's case-law, the defendant's freedom of expression exists to the extent that he or she does not make statements that intentionally give rise to false suspicions of punishable behaviour concerning a participant to the proceedings or any third party ... In practice, when making this assessment, the Court finds it important to examine in particular the seriousness or gravity of the consequences for the person concerned by those statements ... The more severe the consequences are, the more solid the factual basis for the statements made must be ...

(iii) Applying these principles to the present case, the Court found that the domestic authorities had failed to strike a fair balance between the competing rights at stake for the following reasons.

150. *Nikula v. Finland*, no. 31611/96, 21 March 2002.

151. *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII.

Considering, in the first place, the *nature and context* of the impugned statements, the Court found that they had had a sufficiently relevant bearing on the applicant's defence during the criminal trial and had therefore deserved a heightened level of protection under the Convention. If the applicant had succeeded in convincing the trial court of his arguments, this would have seriously called into question the credibility and reliability of the witness evidence and the overall nature and background of the prosecution's case. As a matter of principle, the defendant had to have the opportunity to speak freely about his impression concerning possible witness tampering and the improper motivation of the prosecution without the fear of subsequently being sued for defamation. Furthermore, I.P., who was a well-known public figure and activist as regards the prosecution of crimes committed during the war, had entered the public arena on the subject and had therefore in principle been required to display a higher level of tolerance of acceptable criticism than another private individual.

Secondly, the Court was unable to find that the applicant's allegations against I.P. lacked any *factual basis*. I.P. had attended the public hearings in the applicant's case and admitted to having met some of the witnesses, including the witness who had lodged a criminal complaint against the applicant on charges of war crimes. Moreover, I.P. had advised the editors of a television show in their preparation of several reports on the war in Croatia without, however, being involved in the broadcast concerning the applicant. The domestic courts had failed to take these factual elements into account.

Thirdly, the Court examined the *consequences* of the impugned statements for I.P. and found them to be limited. Although the applicant had accused I.P. of witness tampering, which was punishable under domestic law, the competent authorities had never investigated I.P. for that offence. Though excessive, the statements in issue were not malicious accusations. Moreover, there was no conclusive evidence that I.P. had suffered, or could have objectively suffered, any profound or long-lasting health or other consequences.

Fourthly, regarding the *severity of the sanction* imposed, the Court observed that, although the applicant had been ordered to pay the minimum fine possible under domestic law, that sanction had nevertheless amounted to a criminal conviction which, in such a context, could only in exceptional circumstances be accepted as necessary in a democratic society.

Right to an effective remedy (Article 13)¹⁵²

In *Beizaras and Levickas v. Lithuania*¹⁵³ the Court decided to examine separately the applicants' complaint under Article 13 after finding a violation of Article 14 of the Convention taken in conjunction with Article 8.

The issue to be considered was whether a complaint under Article 13, based on discriminatory attitudes impacting on the effectiveness of remedies in the application of domestic law, gave rise to a separate issue to that already examined under Article 14 of the Convention and which had already given rise to a violation under that Article. In this regard, the Court noted that, in cases involving complaints under Article 13 based on such allegations, the Court had not usually considered it necessary to examine separately the complaints under that provision if a violation of Article 14 taken in conjunction with other Convention provisions had already been found (*Opuz v. Turkey*¹⁵⁴). However, considering the nature and substance of the violation found in the applicants' case on the basis of Article 14 taken in conjunction with Article 8, the Court considered that a separate examination of the applicants' complaint was warranted.

The Court found a violation of Article 13 since the applicants had been denied an effective domestic remedy in respect of their complaint concerning a breach of their right to their private life, on account of their having been discriminated against because of their sexual orientation.

The *Association Innocence en Danger and Association Enfance et Partage v. France*¹⁵⁵ judgment concerned the failure by the State to take necessary and appropriate measures to protect a child from ill-treatment by her parents leading to her death.

An eight-year-old child, M., was subjected to repeated barbaric acts by her parents, leading to her death in August 2009. Following a police

152. See also, under Article 4 of Protocol No. 4 (Prohibition of collective expulsion of aliens), *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020, and, under Article 3 of Protocol No. 1 (Right to free elections – Stand for election), *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020.

153. *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020. See also under Article 35 § 1 (Exhaustion of domestic remedies) above, and Article 14 taken in conjunction with Article 8 below.

154. *Opuz v. Turkey*, no. 33401/02, § 205, ECHR 2009.

155. *Association Innocence en Danger and Association Enfance et Partage v. France*, nos. 15343/15 and 16806/15, 4 June 2020. See also under Article 3 (Positive obligations) above.

investigation, the public prosecutor's office had discontinued the case in October 2008. The applicants, two child-protection associations, brought civil proceedings against the State for a series of failings and negligence. Their case was dismissed.

In the Convention proceedings, the applicant associations complained, mainly under the substantive limb of Articles 2 and 3 of the Convention, of the French authorities' failure to fulfil their positive obligations to protect the child from parental abuse. In addition, under Article 13 of the Convention, they complained that there had been no effective domestic remedy on account of the need to prove "gross negligence" (*faute lourde*) in order for the State to be found liable.

The Court found that there had been a violation of Article 3, as the domestic system had failed to protect M. from the severe abuse to which she had been subjected by her parents. It also found that there had been no violation of Article 13.

The interest of the judgment lies, firstly, in the Court's characterisation of the facts of the case as falling under Article 3 and Article 13 in conjunction with Article 3, even though the victim died from her treatment. The Court took the view that the subject matter of the dispute lay in the question whether the domestic authorities should have been aware of the ill-treatment and should have protected her from the abuse which led to her death.

Secondly, the judgment is of interest with regard to the assessment of the margin of appreciation to be afforded to States in fulfilling their obligation under Article 13 (*De Souza Ribeiro v. France*¹⁵⁶, citing *Jabari v. Turkey*¹⁵⁷), in the light of Article 3. The Court found that the interpretation by the national courts of the minimum threshold of "gross negligence", within the meaning of Article L. 141-1 of the Code of Judicial Organisation, since it could be constituted by a series of more minor acts of negligence resulting in deficiencies in the justice system, thus fell within their margin of appreciation. The Court found that the fact that the applicant associations had not met the conditions laid down by Article L. 141-1 of that Code did not suffice for it to be concluded that the remedy, taken as a whole, was ineffective. The requirement to establish "gross negligence" had not negated the effectiveness of this remedy, which had been available to the applicant associations.

156. *De Souza Ribeiro v. France* [GC], no. 22689/07, §§ 77-78, ECHR 2012.

157. *Jabari v. Turkey*, no. 40035/98, § 48, ECHR 2000-VIII.

Prohibition of discrimination (Article 14)

Article 14 taken in conjunction with Article 2

The judgment in *Makuchyan and Minasyan v. Azerbaijan and Hungary*¹⁵⁸ is interesting for the way in which the Court examined the question whether the failure of the State to enforce a prison sentence imposed abroad for an ethnically biased crime could be considered a discriminatory difference in treatment within the meaning of Article 14 in conjunction with the procedural limb of Article 2.

Article 14 taken in conjunction with Article 8

In *Beizaras and Levickas v. Lithuania*¹⁵⁹ the Court emphasised the necessity of a criminal-law response to direct verbal assaults and physical threats based on homophobic attitudes.

The applicants, two young men, posted a photograph of themselves kissing on Facebook. The photograph received hundreds of serious homophobic comments (for example, calls for the applicants to be “castrated”, “killed” and “burned”). On the applicants’ request, a non-governmental organisation (NGO), of which they were members and which protected the interests of homosexual persons, requested a prosecutor to begin criminal proceedings for incitement to hatred and violence against homosexuals (under Article 170 of the Criminal Code, which established criminal liability for incitement of discrimination on the basis, *inter alia*, of sexual orientation). The prosecutor and the courts refused to prosecute, finding that the applicants’ behaviour had been “eccentric” and did not correspond to “traditional family values” in Lithuania and that the comments in issue had not reached a threshold which could be considered criminal. The Court found it established that the applicants had suffered discrimination on the ground of their sexual orientation, in breach of Article 14 taken in conjunction with Article 8. The Court also found a violation of Article 13 since the applicants had been denied an effective domestic remedy in respect of their complaint concerning the breach of their right to their private life, on account of their having been discriminated against because of their sexual orientation.

The judgment is noteworthy in that it clarified the following two issues:

158. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020. See also under Article 2 (Right to life – Obligation to protect life) above.

159. *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020. See also under Article 35 § 1 (Exhaustion of domestic remedies) and Article 13 (Right to an effective remedy) above.

i) Whether criminal-law measures are required with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes (*R.B. v. Hungary*¹⁶⁰; *Király and Dömötör v. Hungary*¹⁶¹; and *Alković v. Montenegro*¹⁶²);

ii) Whether a complaint based, under Article 13, on discriminatory attitudes impacting on the effectiveness of remedies in the application of domestic law gives rise to a separate issue to that raised under Article 14 of the Convention.

(i) Regarding the necessity of criminal-law measures in this context, the Court stressed that criminal sanctions, including against individuals responsible for the most serious expressions of hatred, inciting others to violence, could be invoked only as an *ultima ratio* measure. This applied equally to hate speech concerning a person's sexual orientation and sexual life. However, the instant case concerned undisguised calls for an attack on the applicants' physical and mental integrity, which required protection by the criminal law. While the Lithuanian Criminal Code did indeed provide for such protection, it had not been granted to the applicants, owing to the authorities' discriminatory attitude which was at the core of their failure to discharge their positive obligation to investigate in an effective manner whether the comments in issue constituted incitement to hatred and violence. The Court rejected the Government's claim that the applicants could have had recourse to other (civil law) remedies when the domestic courts refused to qualify the comments as criminal, considering that, in the circumstances, it would have been manifestly unreasonable to require the applicants to exhaust any other remedies and would have downplayed the seriousness of the comments.

(ii) The Court also examined whether Article 13 could be infringed in situations where generally effective remedies are considered not to have operated effectively in a particular case owing to discriminatory attitudes negatively affecting the application of national law. In this regard, the Court noted that, in cases involving complaints under Article 13 based on such allegations, the Court had usually not considered it necessary to examine separately the complaints under that provision if a violation of Article 14 taken in conjunction with other Convention provisions had already been found (*Opuz v. Turkey*¹⁶³). However, considering the

160. *R.B. v. Hungary*, no. 64602/12, §§ 80 and 84-85, 12 April 2016.

161. *Király and Dömötör v. Hungary*, no. 10851/13, § 76, 17 January 2017.

162. *Alković v. Montenegro*, no. 66895/10, §§ 8, 11, 65 and 69, 5 December 2017.

163. *Opuz v. Turkey*, no. 33401/02, § 205, ECHR 2009.

nature and substance of the violation found in the applicants' case on the basis of Article 14 taken in conjunction with Article 8, the Court considered that a separate examination of the applicants' complaint was warranted. Having regard to the general developments in the case-law of the national courts, conclusions by international monitoring bodies and statistical information provided, the Court concluded that there had been a violation of Article 13 mainly on the following grounds:

- it did not appear that the Supreme Court had had an opportunity to provide greater clarity on the standards to be applied in cases of hate speech of comparable gravity: the manner in which its case-law had been applied did not provide for an effective domestic remedy for complaints about homophobic discrimination;
- the growing level of intolerance against sexual minorities had remained largely unchecked;
- the failure by law-enforcement institutions to acknowledge bias as a motive for such crimes and to adopt an approach adequate to the seriousness of the situation; and
- the authorities' lack of a comprehensive strategy to tackle the issue of homophobic hate speech.

General prohibition of discrimination (Article 1 of Protocol No. 12)

*Napotnik v. Romania*¹⁶⁴ concerned the termination of a diplomat's posting due to pregnancy

While working as a consular officer at the Romanian embassy in Slovenia, the applicant became pregnant and gave birth to a child. Her posting was terminated when she announced that she was pregnant again shortly after giving birth to her first child. It was considered that her absences for medical appointments and maternity leave would have jeopardised the functional capacity of the consular section: during her first pregnancy, when she was absent from the office, consular services had been suspended and requests for assistance had been redirected to neighbouring States.

Relying on Article 1 of Protocol No. 12, in the Convention proceedings the applicant complained that she had been discriminated against at work. The Court found no violation of this provision.

The judgment is noteworthy because in it the Court examined, for the first time, allegations of discrimination at work on account of pregnancy and, in particular, the Court had to balance, on the one hand,

164. *Napotnik v. Romania*, no. 33139/13, 20 October 2020.

the right of a pregnant woman not to be discriminated against and, on the other, the legitimate aim of maintaining the functional capacity of a public service.

Referring to a similar approach taken by the Court of Justice of the European Union, the Court observed that only women can be treated differently on grounds of pregnancy and, for this reason, any such difference in treatment would amount to direct discrimination on grounds of sex if it was not justified. Having established that the applicant had been treated differently on grounds of sex, and notwithstanding the narrow margin of appreciation afforded to States in such cases, the Court went on to find that the domestic authorities had provided relevant and sufficient reasons to justify the measure.

In the first place, bearing in mind the nature of the applicant's work and the urgency of the requests with which she had been called upon to deal, her absence from the office had seriously affected consular services. The early termination of her posting abroad had therefore been necessary to ensure and maintain the functional capacity of the diplomatic mission and ultimately the protection of the rights of others, notably Romanian nationals in need of consular assistance in Slovenia.

Secondly, while the impugned decision had been motivated by the applicant's pregnancy, it had not been intended to put her in an unfavourable position and it had therefore been proportionate to the above legitimate aim. In particular, the resulting change in her conditions of work could not be equated with a loss of employment or a disciplinary measure. The consequences for the applicant had not been of the same nature as those expressly prohibited by domestic equal-opportunity laws and the State's international commitments in the field of the protection of pregnancy and maternity. Significantly, it did not appear that the applicant had suffered any long-term setbacks in her diplomatic career, since she had been promoted both during her first pregnancy and a year after the second one, despite her extended absence.

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

Free expression of the opinion of the people

In *Selahattin Demirtaş v. Turkey (no. 2)*¹⁶⁵, the Court examined the loss of immunity and prolonged pre-trial detention of an opposition member of parliament (MP) as a result of his political speeches.

165. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020. See also under Article 35 § 2 (b) (Matter already submitted to another international body) and

The applicant was an elected MP and one of the co-chairs of the Peoples' Democratic Party (HDP), a left-wing pro-Kurdish political party. On 20 May 2016 an amendment to the Constitution was adopted whereby parliamentary immunity was lifted in all cases where requests for its lifting had been transmitted to the National Assembly prior to the date of adoption of the amendment. This reform had its origin in clashes in Syria between Daesh and forces with links to the PKK as well as in the serious violence in Turkey in 2014 and 2015 following the breakdown of negotiations aimed at resolving the "Kurdish question". The applicant, who was actively involved through his speeches and statements on these issues, was one of 154 MPs (including 55 HDP members) affected by the constitutional amendment. In November 2016 he was arrested on suspicion of membership of an armed terrorist organisation and of inciting others to commit a criminal offence. Further to an additional investigation (concerning the aforementioned violence), the applicant remains in detention awaiting trial. His parliamentary mandate expired in June 2018.

In November 2018 the Chamber held, *inter alia*, that there had been a violation of Article 5 § 3, Article 18 (in conjunction with Article 5 § 3) and of Article 3 of Protocol No. 1. It found no violation of Article 5 §§ 1 and 4 and did not consider it necessary to examine the case under Article 10 of the Convention. The Grand Chamber followed the Chamber's finding of no violation of Article 5 § 4 and of a breach of Article 3 of Protocol No. 1. However, it examined separately the complaint under Article 10, finding a violation of this provision, and it held that there had been violations of Article 5 §§ 1 and 3 on account of the lack of a reasonable suspicion that the applicant had committed an offence. It also considered that the applicant's pre-trial detention had pursued an ulterior motive, that of stifling pluralism and limiting freedom of political debate, in breach of Article 18 of the Convention in conjunction with Article 5. Finally, the Court indicated under Article 46 that Turkey must take all necessary measures to secure the applicant's immediate release.

This Grand Chamber judgment is noteworthy in four respects: (i) by emphasising the link between parliamentary immunity (and the need for elevated protection of parliamentary speech, especially of the opposition) and the guarantee to sit as an MP once elected, the Court identified a procedural obligation on domestic courts examining charges against MPs; (ii) the Court considered the compatibility of the impugned constitutional amendment with the foreseeability

Article 10 (Freedom of expression) above and Article 18 (Restrictions not prescribed by the Convention) below.

requirement of Article 10; (iii) the Court has, for the first time, ruled on a complaint under Article 3 of Protocol No. 1 about the effects of the pre-trial detention of elected MPs on their performance of parliamentary duties. The Court defined the scope of a procedural obligation on domestic courts when ordering an MP's initial and/or continued pre-trial detention and, where such detention is linked to an MP's political speech, the Court articulated the impact of a finding of a breach of Article 10 on the examination of a complaint under Article 3 of Protocol No. 1; and (iv) finally, the Court further developed the criteria for determining whether a procedure before a given international body is similar to the Convention mechanism within the meaning of Article 35 § 2 (b) of the Convention.

(i) When a State provides for parliamentary immunity from prosecution/deprivation of liberty, the domestic courts must verify whether the MP concerned is entitled to immunity for the acts of which he or she has been accused. Where charges/pre-trial detention are linked to speech, the domestic courts' task is to determine whether this speech is covered by the principle of "non-liability" of MPs in that regard. In the instant case, the domestic courts failed to comply with this procedural obligation arising under both Article 10 and Article 3 of Protocol No. 1.

(ii) The Court stressed that the imposition of a measure depriving an MP/candidate in parliamentary elections of liberty does not automatically constitute a violation of Article 3 of Protocol No. 1. However, the procedural obligation under this provision requires the domestic courts to show that, in ordering an MP's initial and/or continued pre-trial detention, they have weighed up all the relevant interests, in particular those safeguarded by this provision. As part of this balancing exercise, they must protect the expression of political opinions by the MP concerned. The importance of the freedom of expression of MPs (especially of the opposition) is such that, where the detention of an MP is not compatible with Article 10, it will also be considered to breach Article 3 of Protocol No. 1. Another important element is whether the charges are directly linked to an MP's political activity. Moreover, a remedy must be offered by which an MP can effectively challenge his or her detention and have his or her complaints examined on the merits. Furthermore, the duration of an MP's pre-trial detention must be as short as possible and the domestic courts should genuinely consider alternative measures to detention and provide reasons if less severe measures are considered insufficient. In this context, whether there was a reasonable suspicion that the applicant had committed an offence, as required by Article 5 § 1, is equally relevant for the purposes

of Article 3 of Protocol No. 1. The domestic courts failed to duly consider all of these elements and to effectively take into account the fact that the applicant was not only an MP but also a leader of the opposition, the performance of whose parliamentary duties called for a high level of protection. Although the applicant retained his seat throughout his term of office, it was effectively impossible for him to take part in the activities of the National Assembly. His unjustified pre-trial detention was therefore incompatible with the very essence of his right under Article 3 of Protocol No. 1 to be elected and to sit in Parliament.

Stand for election

The scope of the procedural safeguards for the effective examination of electoral disputes and the impartiality of the decision-making body were examined in *Mugemangango v. Belgium*¹⁶⁶.

Under Belgian electoral law, the legislative assemblies alone are competent to verify any irregularities that may have taken place during elections to the exclusion of the jurisdiction of any external court or body. The applicant stood for election to the parliament of the Walloon Region in 2014 and lost the seat by fourteen votes. He did not ask for the election to be declared void or for fresh elections, but for a re-examination of the ballot papers that had been declared blank, spoiled or disputed (of which there were over 20,000) and for a recount of the votes validly cast in his constituency. Although the Committee on the Examination of Credentials (of the Walloon Parliament) found his complaint well founded and proposed a recount of the votes, Parliament (which had not yet been constituted at the material time) decided, by a simple majority, not to follow that conclusion and approved all the elected representatives' credentials. The members elected in the applicant's constituency, whose election could have been called into question as a result of the examination of his complaint, also voted on the applicant's complaint. The applicant complained under Article 3 of Protocol No. 1, both alone and in conjunction with Article 13, about the procedure for the examination of his complaint.

The Grand Chamber found violations of both provisions. It was satisfied that the applicant had put forward sufficiently serious and arguable allegations that could have led to a change in the distribution of seats. It found that his grievances had not been dealt with in a procedure offering adequate and sufficient safeguards to prevent arbitrariness and to ensure their effective examination in accordance with the

166. *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020.

requirements of Article 3 of Protocol No. 1. For the same reasons, the remedy before the Walloon Parliament could not be deemed “effective” within the meaning of Article 13.

The judgment is noteworthy because it clarifies the scope of the procedural safeguards for the effective examination of electoral disputes, particularly as regards the impartiality of a body charged with this task and the necessity of access to a judicial remedy. Moreover, the specific context of the present case, that of a regional parliament having exclusive jurisdiction to rule on the validity of electoral processes, gave the Court an opportunity to clarify the relationship between the above safeguards and the principle of parliamentary autonomy (*Karácsony and Others v. Hungary*¹⁶⁷).

(i) The Court emphasised that parliamentary autonomy can only be validly exercised in accordance with the rule of law. Procedural safeguards for the effective examination of electoral disputes serve to ensure the observance of the rule of law in this field, and hence the integrity of the election, so that the electorate’s confidence and the legitimacy of parliament are guaranteed. In that respect, these safeguards ensure the proper functioning of an effective political democracy and thus represent a preliminary step for any parliamentary autonomy. As to the weight to be attached to parliamentary autonomy in the context of the present case, involving a challenge to the result of the elections, the Court took into account the fact that the Walloon Parliament had examined and rejected the applicant’s complaint before its members had been sworn in and their credentials approved. The newly elected parliament had yet to be constituted and, in that regard, the present case differed from disputes that may arise in respect of a full member of parliament after the composition of the legislature has been approved.

(ii) The Court defined the scope of the adequate and sufficient procedural safeguards to prevent arbitrariness required by Article 3 of Protocol No. 1 in order to ensure the effective examination of electoral disputes (*Podkolzina v. Latvia*¹⁶⁸; *Kovach v. Ukraine*¹⁶⁹; *Kerimova v. Azerbaijan*¹⁷⁰; *Davydov and Others v. Russia*¹⁷¹; and *Riza and Others v. Bulgaria*¹⁷²). In the first place, the Court clarified the scope of the

167. *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, 17 May 2016.

168. *Podkolzina v. Latvia*, no. 46726/99, ECHR 2002-II.

169. *Kovach v. Ukraine*, no. 39424/02, ECHR 2008.

170. *Kerimova v. Azerbaijan*, nos. 17170/04 and 5 others, 3 May 2011.

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

172. *Riza and Others v. Bulgaria*, nos. 48555/10 and 48377/10, 13 October 2015.

requirement to provide sufficient guarantees of impartiality of a decision-making body and the importance of appearances in this respect. Such guarantees are intended to ensure that the decision taken is based solely on factual and legal considerations, and not political ones. The examination of a complaint about the result of an election must not become a forum for political struggle between different parties. Given that members of parliament cannot, by definition, be “politically neutral”, in a system where parliament is the sole judge of the election of its members, particular attention must be paid to the guarantees of impartiality laid down in domestic law as regards the procedure for examining challenges to election results. Secondly, the discretion enjoyed by the body concerned must not be excessive: it must be circumscribed with sufficient precision by the provisions of domestic law. Thirdly, the electoral-disputes procedure must guarantee a fair, objective and sufficiently reasoned decision. Complainants must have the opportunity to state their views and to put forward any arguments they consider relevant to the defence of their interests by means of a written procedure or, where appropriate, at a public hearing. In this way, their right to an adversarial procedure is safeguarded. In addition, it must be clear from the public statement of reasons by the relevant decision-making body that the complainants’ arguments have been given a proper assessment and an appropriate response.

On the facts of the present case, and having regard to the standards and recommendations of European and international bodies, the Court found that the Walloon Parliament had not provided sufficient guarantees of impartiality. Domestic law did not provide for the withdrawal of members of parliament who had been elected in the constituency concerned by an electoral complaint and, indeed, in the applicant’s case, his direct opponents had taken part in the voting on his complaint, together with all the newly elected members, whose credentials had not yet been approved. Moreover, the rule on voting by simple majority, which had been applied without any adjustment, had failed to avert the risk of a political decision and to protect the applicant – a candidate from a party not represented in the parliament prior to the elections in issue – from a partisan decision. Furthermore, the discretion enjoyed by that body had not been sufficiently circumscribed, given its exclusive jurisdiction in such matters and the lack of domestic provisions on the procedure and criteria for the examination of electoral complaints and the effects of decisions to be taken thereupon. Finally, the applicant had been afforded certain procedural safeguards on an *ad hoc* discretionary basis: however, in the absence of a procedure laid

down in domestic law, they were neither accessible nor foreseeable. Moreover, while Parliament had given reasons for its decision, it had not explained why it had not followed the view of its Committee on the Examination of Credentials, which had found the applicant's complaint to be well founded. The Court thus found a breach of Article 3 of Protocol No. 1.

(iii) Under Article 13 of the Convention, the Court indicated that the "authority" referred to in that Article did not necessarily have to be a judicial one in the strict sense: that question fell within the wide margin of appreciation afforded to Contracting States. The Court clarified, however, that a judicial or judicial-type remedy, whether at first instance or following a decision by a non-judicial body, would, in principle, satisfy the above-noted procedural requirements of Article 3 of Protocol No. 1.

Prohibition of collective expulsion of aliens (Article 4 of Protocol No. 4)

The immediate and forcible return of aliens from a land border, following an attempt by migrants to cross in an unauthorised manner and by taking advantage of the fact that there was a large number of them, was examined in *N.D. and N.T. v. Spain*¹⁷³.

In August 2014 a group of several hundred sub-Saharan migrants, including the applicants, attempted to enter Spain by scaling the barriers surrounding the town of Melilla, a Spanish enclave on the North African coast. Having climbed the fences, they were arrested by members of the Civil Guard (*Guardia Civil*), who handcuffed them and returned them to the other side of the border without conducting an identification procedure or providing them with the opportunity to explain their personal situation. The Grand Chamber found no violation of Article 4 of Protocol No. 4 or Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.

The judgment is noteworthy in two respects. In the first place, it addressed, for the first time, the applicability of Article 4 of Protocol No. 4 to the immediate and forcible return of aliens from a land border. Secondly, it established a two-tier test to assess the extent of protection to be afforded under this provision to persons who cross a land border in an unauthorised manner, deliberately taking advantage of their large numbers and using force.

(i) In the context of the applicability of Article 4 of Protocol No. 4, the Grand Chamber was, for the first time, called upon to ascertain

173. *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020.

whether the concept of “expulsion” as used in that Article also covered the non-admission of aliens at a State border or – in respect of States belonging to the Schengen area – at an external border of that area. Interpreting the relevant terms autonomously, it took the view that the protection of the Convention, particularly Article 3, which embraces the prohibition of *refoulement* as defined in the 1951 Refugee Convention¹⁷⁴, cannot be denied or rendered ineffective on the basis of purely formal considerations, for instance on the ground that the relevant persons could not make a valid claim for such protection as they had not crossed the State’s border lawfully. The Grand Chamber therefore confirmed the interpretation of the term “expulsion” in the generic meaning in current use (“to drive away from a place”; see *Khlaifia and Others v. Italy*¹⁷⁵, and *Hirsi Jamaa and Others v. Italy*¹⁷⁶). It further specified that this term refers to any forcible removal of an alien from a State’s territory, irrespective of the lawfulness of the person’s stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or asylum-seeker or his or her conduct when crossing the border. It is also of interest that the Grand Chamber confirmed the relevance of the recent judgments in *Hirsi Jamaa and Others* (cited above), *Sharifi and Others v. Italy and Greece*¹⁷⁷ and *Khlaifia and Others* (cited above), concerning applicants who had attempted to enter a State’s territory by sea, to the circumstances of the instant case, refusing to adopt a different interpretation of the term “expulsion” in the context of an attempt to cross a national border by land as in the present case. It follows from this case-law that Article 3 of the Convention and Article 4 of Protocol No. 4 have been found to apply to any situation coming within the jurisdiction of a Contracting State, including to situations or points in time where the authorities of the State in question had not yet examined the existence of grounds entitling the persons concerned to claim protection under these provisions. The Grand Chamber concluded that the applicants, who were within Spain’s jurisdiction when forcibly removed from its territory by members of the Civil Guard, had been subjected to an “expulsion” within the meaning of Article 4 of Protocol No. 4, which provision was therefore applicable.

(ii) The Grand Chamber then turned to the extent of the protection to be afforded under Article 4 of Protocol No. 4 to applicants, such as those in the present case, whose conduct created “a clearly disruptive

174. 1951 Geneva Convention relating to the Status of Refugees.

175. *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 243, 15 December 2016.

176. *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 174, ECHR 2012.

177. *Sharifi and Others v. Italy and Greece*, no. 16643/09, 21 October 2014.

situation which is difficult to control and endangers public safety". It decided to apply the principle drawn from the Court's well-established case-law according to which there is no violation of this provision if the lack of an individual expulsion decision can be attributed to the applicant's own conduct (see *Khlaifia and Others*, cited above, § 240; *Hirsi Jamaa and Others*, cited above, § 184; *M.A. v. Cyprus*¹⁷⁸; *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia*¹⁷⁹; and *Dritsas and Others v. Italy*¹⁸⁰). It also developed a two-tier test for the assessment of complaints in this particular context. In the first place, the Court considered it important to take account of whether the respondent State in a particular case has provided genuine and effective access to a means of legal entry, in particular border procedures. Such means should allow all persons who face persecution to submit an application for protection, based in particular on Article 3, under conditions which ensure that the application is processed in a manner consistent with international norms, including the Convention. Secondly, where the respondent State has provided such access but an applicant has not made use of it, the Court will consider, in the context of the case and without prejudice to the application of Articles 2 and 3, whether there were cogent reasons not to do so which were based on objective facts for which the respondent State was responsible. Only the absence of such cogent reasons preventing the use of these procedures could lead to this being regarded as the consequence of the applicants' own conduct, justifying the lack of individual identification.

Significantly, the Grand Chamber emphasised that where appropriate arrangements exist and secure the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner, the Convention does not prevent States, in the fulfilment of their obligation to control borders, from requiring applications for such protection to be submitted at the existing border crossing points. Consequently, they may refuse entry to their territory to aliens, including potential asylum-seekers, who have failed, without cogent reasons (as specified above), to comply with these arrangements by seeking to cross the border at a different location, especially, as happened in the present case, by taking advantage of the fact that there was a large number of them and using force in the context of an operation that had been planned in advance.

178. *M.A. v. Cyprus*, no. 41872/10, § 247, ECHR 2013.

179. *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* (dec.), no. 18670/03, ECHR 2005-VIII.

180. *Dritsas and Others v. Italy* (dec.), no. 2344/02, 1 February 2011.

In the instant case, the Grand Chamber was satisfied that Spanish law afforded the applicants several possible means of seeking admission to the national territory, in particular at the Beni Enzar border crossing point. On the facts, it was not persuaded that the applicants had demonstrated the required cogent reasons for not using it, which was sufficient of itself to conclude that there had been no breach of Article 4 of Protocol No. 4. The Grand Chamber also took note of the applicants' unexplained failure to apply to Spanish embassies or consulates in their countries of origin or transit, or in Morocco. In any event, their complaints under Article 3 had been declared inadmissible by the Chamber and they had been unable to indicate the slightest concrete factual or legal ground which would have precluded their removal had they been registered individually. Consequently, the lack of individual removal decisions had been a consequence of the applicants' own conduct, namely, their failure to use the official entry procedures. The Grand Chamber emphasised, however, that the finding of no violation of Article 4 of Protocol No. 4 in this case does not call into question the obligation and necessity for Contracting States to protect their borders in a manner which complies with the Convention guarantees, and in particular with the obligation of *non-refoulement*.

*M.K. and Others v. Poland*¹⁸¹ concerned the refusal of border guards to lodge the applicants' asylum applications, the summary removal of the applicants to a third country, and the risk of *refoulement* to their country of origin.

The applicants were Russian nationals of Chechen origin. In 2017 they went to checkpoints on the Polish-Belarusian border on numerous occasions. They alleged that on each occasion they expressed their wish to lodge asylum applications, claiming to be at risk of ill-treatment in the Russian Federation and indicating to the border guards that they could not remain in Belarus as their visas had expired and that it was in practice impossible for them to obtain international protection there. On each occasion, the applicants were issued with administrative decisions refusing them entry and turned away on the grounds that they were not in possession of documents allowing them entry into Poland and had neither expressed a wish to apply for asylum nor claimed a risk of ill-treatment. The Court granted interim measures under Rule 39 of the

181. *M.K. and Others v. Poland*, nos. 40503/17 and 2 others, 23 July 2020. See also under Article 3 (Prohibition of torture and inhuman or degrading treatment and punishment – Expulsion) above.

Rules of Court, indicating to the Government that the applicants' asylum applications should be lodged and that the authorities should refrain from removing them to Belarus pending their examination. However, the applicants were returned to Belarus. They were also turned away from border checkpoints on later occasions. Eventually, the asylum applications of some of them were lodged by the Polish authorities and they were placed in a reception centre.

In respect of Article 4 of Protocol No. 4, the judgment may usefully be compared to that in *N.D. and N.T. v. Spain*¹⁸². The applicants in that case, who did not have an arguable claim under Article 3 of the Convention, had not presented themselves at a border crossing point but had crossed the border in an unauthorised manner by climbing the fences. In the present case, by contrast, the applicants, who had an arguable claim under Article 3, presented themselves at the border checkpoints and tried to enter the respondent State in a legal manner by making use of the procedure to submit an asylum application that should have been available to them under domestic law. Even though they were interviewed individually by the border guards and received individual decisions refusing them entry into Poland, the Court considered that their statements concerning their wish to apply for asylum had been disregarded and that the decisions they were issued did not properly reflect the reasons given by the applicants to justify their fear of persecution. Moreover, the applicants were not allowed to consult lawyers and were even denied access to lawyers who were present at the border checkpoint. The Court concluded that the decisions refusing the present applicants entry to Poland had not been taken with proper regard to their individual situations and were part of a wider policy of refusing to lodge asylum applications from persons presenting themselves at the Polish-Belarusian border and of returning those persons to Belarus.

Procedural safeguards relating to expulsion of aliens (Article 1 of Protocol No. 7)

The judgment in *Muhammad and Muhammad v. Romania*¹⁸³ concerned an expulsion on national-security grounds which was based on classified information that was not disclosed to the applicants.

The applicants, who were Pakistani nationals living in Romania on student visas, were deported on national-security grounds. They did

182. *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020.

183. *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020.

not have access to the classified documents on which that decision was based and neither were they provided with any specific information as to the underlying facts and grounds for deportation.

The Grand Chamber found a breach of Article 1 of Protocol No. 7, concluding that the applicants had suffered a significant limitation of their right to be informed of the factual elements submitted in support of their expulsion and of the content of the relevant documents, a limitation which had not been counterbalanced in the domestic proceedings.

The judgment is noteworthy in three respects. In the first place, it clarifies whether and to what extent the right to be informed of the reasons for expulsion and the right to have access to documents in the case file are protected by Article 1 of Protocol No. 7. Secondly, it clarifies the extent to which limitations of these rights are permissible. Thirdly, the judgment outlines the methodology to be followed in assessing such limitations.

(i) As to the right to be informed of the reasons for expulsion, while the Court had not addressed the necessity of the disclosure of such reasons in previous cases, it had always found fault with a failure to provide any information in this respect to the alien concerned (*Lupsa v. Romania*¹⁸⁴; *Kaushal and Others v. Bulgaria*¹⁸⁵; *Baltaji v. Bulgaria*¹⁸⁶; and *Ljatifi v. the former Yugoslav Republic of Macedonia*¹⁸⁷). In the present case, the Court clarified that the provision of such information is limited to that which is essential to ensure the effective exercise by the alien of the right, enshrined in Article 1 § 1 (a) of Protocol No. 7, to submit reasons against his or her expulsion, that is, to the *relevant factual elements* which have led the domestic authorities to believe that the alien represents a threat to national security. As to a right of access to documents in the case file (not enshrined as such in the case-law to date), the Court delimited the scope of any such right by requiring that the alien concerned be informed, preferably in writing and in any event in a manner allowing an effective defence, of the *content of the documents and the information in the case file* relied upon by the competent authority when deciding on his or her expulsion, without prejudice to the possibility of imposing duly justified limitations on such information if necessary.

(ii) The above procedural rights of the alien not being absolute, the Court set a threshold not to be exceeded by any limitations: such

184. *Lupsa v. Romania*, no. 10337/04, ECHR 2006-VII.

185. *Kaushal and Others v. Bulgaria*, no. 1537/08, 2 September 2010.

186. *Baltaji v. Bulgaria*, no. 12919/04, 12 July 2011.

187. *Ljatifi v. the former Yugoslav Republic of Macedonia*, no. 19017/16, 17 May 2018.

restrictions must not negate the procedural protection guaranteed by Article 1 of Protocol No. 7 by impairing the very essence of the safeguards enshrined in it, such as the right of the alien to submit reasons against his or her expulsion and the protection against any arbitrariness.

(iii) While the scope of the alien's procedural rights is of a more limited nature compared to that of the corresponding safeguards under Articles 5 and 6 (*Regner v. the Czech Republic*¹⁸⁸; *Jasper v. the United Kingdom*¹⁸⁹; *Schatschaschwili v. Germany*¹⁹⁰; and *Ibrahim and Others v. the United Kingdom*¹⁹¹), the Court drew inspiration from that case-law to develop its methodology for assessing whether limitations of the procedural rights are compatible with Article 1 § 1 of Protocol No. 7. The Court will therefore apply a two-prong test to establish, in the first place, whether the impugned limitations have been found to be duly justified by the competent independent authority in the light of the particular circumstances of the case; and, secondly, whether the resulting difficulties for the alien have been sufficiently compensated for by counterbalancing factors, including by procedural safeguards. Accordingly, the lack of an examination, or an insufficient examination, of the need for the impugned limitations will not automatically entail a violation of Article 1 of Protocol No. 7, but will call for a stricter scrutiny of the counterbalancing factors by the Court: the more cursory the domestic examination, the stricter the Court's scrutiny. Two further guiding principles are relevant: the more the information available to the alien is limited, the more the safeguards will be important; and when the circumstances of a case reveal particularly significant repercussions for the alien's situation, the counterbalancing safeguards must be strengthened accordingly.

(a) As to the first part of the above two-prong test, the Court set out the requirements the domestic assessment of whether the limitation was imposed for "*duly justified reasons*" must satisfy (compare, for example, with the "*compelling reasons*" required in *Ibrahim and Others*, cited above, and *Beuze v. Belgium*¹⁹², and the "*good reasons*" required in *Schatschaschwili*, cited above). In the first place, such an assessment should weigh up the relevant competing interests and be surrounded by safeguards against arbitrariness, including the need for the relevant decision to be duly reasoned and for a procedure allowing such reasons to be properly scrutinised, particularly if not disclosed to the alien

188. *Regner v. the Czech Republic* [GC], no. 35289/11, 19 September 2017.

189. *Jasper v. the United Kingdom* [GC], no. 27052/95, 16 February 2000.

190. *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015.

191. *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016.

192. *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018.

concerned. Secondly, it should be entrusted to an authority, judicial or not, which is independent from the executive body seeking to impose the limitation. In this regard, weight is to be attached to the scope of the remit of that authority as well as to the powers vested in it: in this latter respect, it should be ascertained whether that authority would be entitled to declassify the relevant documents itself or to ask the competent body to do so.

(b) As to the second part of the above two-prong test, the Court provided a non-exhaustive list of counterbalancing factors: (i) *relevance of the information disclosed to the alien* – in particular, whether an independent authority, judicial or otherwise, determined what factual information could be disclosed; whether it was provided at a stage of the proceedings when it was still possible to challenge it; and whether it concerned the substance of the accusations (a mere enumeration of the numbers of legal provisions cannot suffice in this respect, not even *a minima*); (ii) *information as to the conduct of the proceedings and the domestic counterbalancing mechanisms* – whether the required information was provided at least at key stages in the proceedings, especially if aliens are not represented and domestic rules impose a certain expedition; (iii) *access to representation in the course of the proceedings*, and whether the representative had access to classified documents and was able to communicate with the alien after consulting them; (iv) *involvement of an independent authority in the proceedings to adopt or review the expulsion measure* – in particular, whether it had access to the classified documents; whether it had the power, and duly exercised it, to verify the authenticity, credibility and veracity of those documents and, if need be, to annul or amend the expulsion decision; whether the nature and the degree of the scrutiny applied are apparent, at least summarily, in the reasoning of its decision; whether the applicant was able to effectively challenge before it the allegations against him or her, it being understood that judicial scrutiny, especially by superior courts, will in principle have a greater counterbalancing effect than an administrative one. Article 1 of Protocol No. 7 does not necessarily require that all of these questions be answered cumulatively in the affirmative.

ADVISORY OPINIONS (ARTICLE 1 OF PROTOCOL No. 16¹⁹³)

In response to the request submitted by the Armenian Constitutional Court under Protocol No. 16 to the Convention, the Court delivered its

193. Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

advisory opinion¹⁹⁴ on 29 May 2020. The opinion concerned Article 7 and the use of certain referencing techniques when defining an offence and comparing the criminal provisions in force at the time of the commission of an alleged offence with the subsequently amended provisions. The Court further developed some aspects of its case-law relating to Article 7 of the Convention.

JUST SATISFACTION (ARTICLE 41)

In *Molla Sali v. Greece*¹⁹⁵ the Court examined the claims submitted by the applicant under Article 41 concerning property not covered by its finding in the principal judgment in the case and located in a State that was not the respondent party.

On the death of her husband, who was a Greek Muslim, the applicant inherited his entire estate under the terms of a will he had drawn up before a notary. The sisters of the deceased successfully challenged the will. The Court of Cassation found that matters of inheritance in the Muslim minority community were to be settled under Sharia law, according to which notarised wills drawn up by Greek nationals of Muslim faith were devoid of legal effect. As a result, the applicant lost three-quarters of the property her husband had bequeathed to her. In its principal judgment of 19 December 2018, the Court found a violation of Article 14 in conjunction with Article 1 of Protocol No. 1. It held, in particular, that the difference of treatment suffered by the applicant, the beneficiary of a will drawn up in accordance with the Civil Code by a Greek testator of Muslim faith, compared with a beneficiary of a will drawn up in accordance with the Civil Code by a Greek non-Muslim testator, had no objective and reasonable justification. At the time, the question of the application of Article 41 of the Convention was reserved and it is this that was examined in the present judgment of the Grand Chamber.

In her claims in respect of pecuniary damage in the context of the just satisfaction judgment, the applicant sought compensation for the loss of the property which was located both in Greece and Turkey. The Court noted, as regards the property located in Greece, that the land register had not yet been rectified (the deceased sisters' action to be

194. *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], request no. P16-2019-001, Armenian Constitutional Court, 29 May 2020. See also under Article 7 (No punishment without law) above.

195. *Molla Sali v. Greece* (just satisfaction) [GC], no. 20452/14, 18 June 2020.

recognised as co-owners of the property was still pending) and it found that Greece should take measures to ensure that the applicant retained ownership of that property or, in the event of an amendment of the land register, that her property rights be restored. In default of taking such measures within a year of the delivery of the just satisfaction judgment, Greece was to pay compensation to the applicant, namely, the value of the proportion (three-quarters) of the inherited property of which she had been deprived under Sharia law. However, if the outcome of the pending domestic proceedings was consistent with the Court's principal judgment and if compensation had been paid in the meantime, the applicant should repay that sum to the respondent State. The Court also found that the legal effects of the deceased's will, in so far as they related to the property located in Turkey, were the subject of pending proceedings in the Turkish courts and that it did not have jurisdiction to rule on the applicant's claims concerning that property. The Court also made awards in respect of non-pecuniary damage and costs and expenses.

The judgment is noteworthy for the Court's analysis of the effect of its principal judgment on a State (Turkey) that had not been a party to those proceedings, when dealing with the applicant's claims under Article 41 concerning property located in Turkey. The Court's reasoning in this regard was informed by the following three elements.

In the first place, the Turkish first-instance court had ruled that the judgment of the Greek Court of Cassation, declaring the applicant's late husband's will null and void, was binding on the Turkish courts under private international law, rendering it unnecessary for them to re-examine the case. The appeals against this judgment lodged by both the applicant and the testator's sisters are currently pending before the Istanbul Court of Appeal. There were no particular circumstances that could be said to amount to the exercise by Greece of its jurisdiction in respect of the proceedings taking place in Turkey.

Secondly, while the will in issue did not distinguish between properties located in Turkey and in Greece, the applicant's notarised deed accepting the will referred to and described the deceased's property in Greece alone. Importantly, the Court, when finding Article 1 of Protocol No. 1 applicable in its principal judgment, explicitly referred only to the Greek properties. It was on that basis alone that the Court had gone on to examine whether there had been a violation of Article 14 in conjunction with Article 1 of Protocol No. 1. Accordingly, the Court had taken no substantive position in the principal judgment on the applicant's alleged rights in relation to the property located in

Turkey. Consequently, this property could not form the basis of any just satisfaction claims against the respondent State in the present judgment concerning the reserved Article 41 proceedings.

Thirdly, while the Court reiterated that under Article 46 of the Convention any judgment of the Court was binding only on the States that were parties to the proceedings giving rise to it (Greece in the present case), it is noteworthy that the Court nevertheless went on to emphasise that

... there is nothing to prevent the Turkish courts from taking the principal judgment into account when giving their decision. ... The Court would further point out that the applicant will, if appropriate, have the opportunity to bring an application against Turkey in respect of the final decision delivered by the Turkish courts on the effects of her husband's will on the property in Turkey, should that decision not have regard to the Court's principal judgment holding Greece liable of violating Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1, and should it not draw from it the necessary consequences flowing from Turkey's status as Contracting Party to the Convention.

OTHER CONVENTION PROVISIONS

Restrictions not prescribed by the Convention (Article 18)

*Selahattin Demirtaş v. Turkey (no. 2)*¹⁹⁶ concerned the loss of immunity and prolonged pre-trial detention of an opposition member of parliament (MP) as a result of his political speeches.

The Grand Chamber considered that the applicant's pre-trial detention had pursued an ulterior motive, that of stifling pluralism and limiting freedom of political debate, in breach of Article 18 in conjunction with Article 5 of the Convention.

Inter-State cases (Article 33)

*Slovenia v. Croatia*¹⁹⁷ concerned the Court's jurisdiction to examine an inter-State application alleging a violation of Convention rights of a legal

196. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020. See also under Article 35 § 2 (b) (Matter already submitted to another international body), Article 10 (Freedom of expression) and Article 3 of Protocol No. 1 (Right to free elections – Free expression of the opinion of the people) above.

197. *Slovenia v. Croatia* (dec.) [GC], no. 54155/16, 18 November 2020. See also under Articles 33 and 34 (Applicability – Victim status) above.

entity which did not qualify as “non-governmental” for the purposes of Article 34 of the Convention.

The Slovenian Government lodged an inter-State application (Article 33 of the Convention) against the Croatian Government, alleging a series of violations of the Convention rights of Ljubljana Bank, a legal entity nationalised by the Slovenian State after its declaration of independence from the former Yugoslavia and currently controlled by the Succession Fund, a Slovenian government agency. In the decision in *Ljubljanska Banka D.D. v. Croatia*¹⁹⁸, a Chamber of the Court had already declared inadmissible *ratione personae* an individual application submitted by the Ljubljana Bank itself: although a separate entity, it was found that it did not enjoy sufficient institutional and operational independence from the State to be regarded as non-governmental for the purposes of Article 34 of the Convention.

In the present inter-State case, the Grand Chamber equally decided that Article 33 does not empower the Court to examine inter-State applications aimed at protecting the rights of entities which cannot be regarded as “non-governmental”. The Court lacked therefore jurisdiction to take cognisance of the application.

This Grand Chamber decision is noteworthy in two respects. In the first place, it clarified the distinction between “jurisdiction” and “admissibility” within the meaning of Articles 32 and 35 of the Convention, respectively. Secondly, the Grand Chamber clarified that a Contracting Party may not use the inter-State procedure to protect the interests of a legal entity which itself would not be entitled to lodge an individual application pursuant to Article 34 of the Convention.

(i) Before deciding on whether the present application was compatible with Article 33 of the Convention, the Grand Chamber had to ascertain whether it could examine this question at the admissibility stage of the proceedings. An inter-State application can be rejected as inadmissible pursuant to Article 35 only for a failure to exhaust domestic remedies or to comply with the six-month time-limit: the other admissibility criteria are reserved for the post-admissibility stage to be examined on the merits of the case. Nevertheless, referring to general principles governing the exercise of jurisdiction by international tribunals, the Grand Chamber found that nothing prevented it from establishing, already at the admissibility stage, whether it has any competence at all to deal with the matter laid before it. In other words, the Court could reject an inter-State application without declaring it admissible if it was clear,

198. *Ljubljanska Banka D.D. v. Croatia* (dec.), no. 29003/07, 12 May 2015.

from the outset, that it was wholly unsubstantiated or otherwise lacked the requirements of a genuine allegation in the sense of Article 33 of the Convention. The Grand Chamber considered that the key question before it – whether the Convention as a human rights treaty could create subjective rights for “governmental” entities – was not an “admissibility” one since it did not correspond to any of the admissibility criteria set out in Article 35 of the Convention but it was rather a question which went beyond the boundaries of the Convention mechanism and touched upon a general issue of international law. It was therefore a matter pertaining to the Court’s “jurisdiction” within the meaning of Article 32 and, as such, could be adjudicated upon at any stage of the proceedings.

(ii) As to that precise key question, the Grand Chamber found that Article 33 did not allow the Court to examine an inter-State application aimed at protecting the rights of an entity which would not be able to lodge an individual application under Article 34 because it could not be regarded as “non-governmental”. It did so for essentially three reasons. In the first place, the Grand Chamber applied the general principle according to which the Convention must be read as a whole and construed in such a way as to promote internal consistency between its provisions – including the jurisdictional and procedural provisions such as Articles 33 and 34 of the Convention. This implied that the meaning and scope of “non-governmental organisation” had to be the same for the purposes of both of these provisions. Secondly, the Grand Chamber took into account the specific nature of the Convention as a human rights treaty, universally recognised in international law. It observed that even in an inter-State case, it is always the individual who is directly or indirectly harmed and primarily “injured” by a violation of the Convention. In other words, only individuals, groups of individuals and legal entities which qualified as “non-governmental organisations” could be bearers of rights under the Convention, but not a Contracting State or any legal entity belonging to it. Thirdly, the Grand Chamber drew a logical conclusion from the principle defined in the just satisfaction judgment in *Cyprus v. Turkey*¹⁹⁹ according to which any just satisfaction afforded in an inter-State case must always be for the benefit of individual victims and not for the benefit of the State. If therefore the Court found a violation in an inter-State case brought on behalf of a “governmental” organisation, then the eventual beneficiary of any sum awarded under Article 41 would be the applicant State only. In the present case, the Grand Chamber saw no reason to depart from the findings of the Chamber in

199. *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, ECHR 2014.

the above-cited decision in *Ljubljanska Banka D.D.*, according to which the Bank did not constitute a “non-governmental organisation” for the purposes of Article 34 of the Convention. Consequently, the applicant Government were not entitled to lodge an inter-State application with a view to protecting its interests.