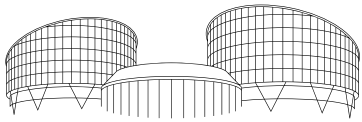

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Overview of the Court's case-law 2022

January-June 2022

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Table of Contents

Case-law overview

This overview[1] contains a selection by the Jurisconsult of the most interesting cases from 2022.

"CORE" RIGHTS

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

Extradition

The judgment in *Khasanov and Rakhmanov v. Russia*[2] concerned the scope and nature of the risk assessment in removal cases, as well as the methodology for cases brought by members of vulnerable groups allegedly exposed to systematic ill-treatment.

The applicants, nationals of Kyrgyzstan, faced extradition to that country where they were wanted on charges of aggravated misappropriation of funds (first applicant) and several counts of aggravated robbery, destruction of property and murder (second applicant). The applicants complained that in the event of their extradition they would face a real risk of ill-treatment because they belonged to a vulnerable ethnic group – the Uzbek minority. These allegations were dismissed in the proceedings concerning their extradition and refugee status. The applicants' extradition was stayed on the basis of an interim measure granted by the Court under Rule 39 of the Rules of Court. In 2019, a Chamber of the Court found that there would be no violation of Article 3 if the applicants were extradited. The Grand Chamber endorsed this conclusion.

The Grand Chamber judgment is noteworthy in that the Court clarified matters relating to the risk assessment under Article 3 in the context of removals, in particular: the level of scrutiny required in extradition cases; the scope of the assessment and specific methodology to be applied

1. The overview is drafted by the Directorate of the Jurisconsult and is not binding on the Court. This provisional version will be superseded by the final version covering all of 2022.
2. *Khasanov and Rakhmanov v. Russia* [GC], nos. 28492/15 and 49975/15, 29 April 2022.

in cases concerning members of a targeted vulnerable group; and the nature of, and the material point in time for, such an assessment. The judgment also provided a useful summary of the Court's case-law principles in this area.

(i) The Court underlined that, in extradition cases, a Contracting State's obligation to cooperate in international criminal matters was subject to the obligation also on that State to respect the absolute nature of the prohibition under Article 3 of the Convention. Therefore, any claim of a real risk of treatment contrary to that provision must be subjected to the same level of scrutiny regardless of the legal basis for the removal.

(ii) As to the scope of the assessment in removal cases, the Court clarified that its examination is not limited to an applicant's specific claims but may cover all three groups of risks, namely: (a) those arising from the general situation in the destination country; (b) those stemming from the alleged membership of a targeted vulnerable group; and (c) those linked to the individual circumstances of the applicant.

(a) As to the general situation, regard must be had, where relevant, to whether there is a general situation of violence existing in the destination country. The existence of such a situation would not normally, in itself, entail a violation of Article 3 in the event of a removal to the country in question, unless the level of intensity of the violence was sufficient to conclude that any removal to that country would necessarily breach that provision. The Court would adopt such an approach only in the most extreme cases (*Sufi and Elmi v. the United Kingdom*[3]);

(b) With regard to claims of systematic ill-treatment of members of a vulnerable group, the Court emphasised that the assessment of such claims was different from the assessment of the other two groups of risk, and explained its methodology for the examination of such cases. In the first place, the Court has to examine whether the existence of a group systematically exposed to ill-treatment, falling under the "general situation" part of the risk assessment, has been established. Applicants belonging to an allegedly targeted vulnerable group should not describe the general situation in a given country but the existence of a practice or of a heightened risk of ill-treatment for the group of which they claim to be members. As a next step, they should establish their individual membership of the group concerned, without having to demonstrate any further individual circumstances or distinguishing features (*J.K. and Others v. Sweden*[4]).

---

3. *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 218, 28 June 2011.
4. *J.K. and Others v. Sweden* [GC], no. 59166/12, §§ 103-05, 23 August 2016.

(c) As to the risks stemming from an applicant's individual circumstances, the Court may examine these particularly in cases where, despite a possible well-founded fear of persecution in relation to certain risk-enhancing circumstances, it cannot be established that a given group was systematically exposed to ill-treatment. In such cases, the applicants are under an obligation to demonstrate the existence of further special distinguishing features which would place them at a real risk of ill-treatment, and a failure to demonstrate such individual circumstances will lead the Court to find no violation of Article 3 of the Convention.

(iii) The Court also confirmed the material point in time for the risk assessment in cases where an applicant has not already been removed: in line with the *ex nunc* principle, it must be that of the Court's consideration of the case. A full and present-day evaluation is therefore required where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken. The primary purpose of the *ex nunc* principle is to serve as a safeguard in cases where a significant amount of time has passed between the adoption of the domestic decision and the consideration of an applicant's Article 3 complaint by the Court and therefore where the situation in the receiving State might have developed (deteriorated or improved).

(iv) Importantly, the Court emphasised the factual nature of the risk assessment in this context and confirmed the competence of the Chambers of the Court in this respect:

> 107. ... Any finding in such cases regarding the general situation in a given country and its dynamic as well as the finding as to the existence of a particular vulnerable group, is in its very essence a factual *ex nunc* assessment made by the Court on the basis of the material at hand.
>
> 108. ... Accordingly, any examination of whether there has been an improvement or a deterioration in the general situation in a particular country amounts to a factual assessment and it is amenable to revision by the Court in the light of changing circumstances. There is therefore nothing to preclude such a re-examination of the general situation from being carried out by a Chamber in a judgment dealing with an individual case.

(v) Applying the above principles, the Court examined the applicants' up-to-date situation against all three groups of risks and not only through the prism of their membership of an allegedly vulnerable ethnic group. In its view, the relevant material did not support a finding that

the general situation in Kyrgyzstan had either deteriorated, as compared to the previous assessments, or reached a level calling for a total ban on removals to that country. Considering the situation of ethnic Uzbeks there, the Court noted its previous findings (2012-16) of a targeted and systematic practice of ill-treatment against this group. However, recent reports no longer provided a basis for such a conclusion. Turning, finally, to the applicants' individual circumstances, the Court found that they had failed to demonstrate the existence of ulterior political or ethnic motives behind their prosecution in Kyrgyzstan or further special distinguishing features which would expose them to a real risk of ill-treatment. In sum, substantial grounds had not been shown for believing that the applicants would face a real risk of being subjected to treatment contrary to Article 3 in the event of their extradition to Kyrgyzstan.

PROCEDURAL RIGHTS

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

Applicability

The judgment in *Grzęda v. Poland*[5] concerned the applicability of Article 6 § 1 to the premature termination, following a legislative reform, of a judge's term of office as a member of the National Council of the Judiciary (NCJ).

The applicant is a judge of the Supreme Administrative Court. In 2016, he was elected by an assembly of judges for a four-year term as a member of the NCJ. Subsequently, and in the context of wide-scale judicial reform, the relevant legislation was amended to the effect that judicial members of the NCJ were to be elected by Parliament (the *Sejm*), that is, no longer by judges, and that the terms of office of the NCJ's judicial members elected on the basis of the previous provisions would continue until the beginning of the term of office of its new members. In 2018 the *Sejm* elected fifteen new members of the NCJ and the applicant's term of office was therefore prematurely terminated *ex lege*.

The applicant complained that he had been denied access to a court to contest this measure. The Grand Chamber considered that, at the time of his election, there had been in domestic law an arguable right for a judge elected to the NCJ to serve a full term of office and the new legislation constituted the object of a genuine and serious dispute over that right. Further, applying the test developed in *Vilho Eskelinen and Others v. Finland*[6], the Grand Chamber left open the first condition (whether domestic law expressly excluded access to a court) since, in any

5. *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022.

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

event, its second condition had not been met: such an exclusion could not be justified on objective grounds in the State's interest. Article 6 § 1 was therefore applicable under its civil head.

The judgment is noteworthy in that the Court considered a novel issue: the applicability of Article 6 § 1 to a dispute arising out of the premature termination of the term of office of a member of a judicial council while he still remained a serving judge. In doing so, the Court developed the first condition of the Vilho Eskelinen test and, as regards the second condition, the Court clarified the relevance of considerations relating to judicial independence where a case concerns not a judge's principal professional activity (adjudicating role), but other official functions (such as membership of a judicial council).

(i) Regarding the first condition of the Vilho Eskelinen test, the Court noted that it was deliberately strict and was satisfied only in very rare cases where domestic law contained an explicit exclusion of access to a court. As the two conditions of the test are cumulative, where the first one is not met, that suffices to find Article 6 applicable, without considering the second one. The Court, however, considered that a straightforward application of the first condition would not be entirely suitable in all situations. It was therefore prepared to accept that it could be regarded as fulfilled where, even without an express provision to this effect, it had been clearly shown that domestic law excluded access to a court for the type of dispute concerned: in other words, where the exclusion in question was of an implicit nature, in particular where it stemmed from a systemic interpretation of the applicable legal framework or the whole body of legal regulation.

(ii) The Court also clarified the factors relevant for the second condition of the Vilho Eskelinen test. In the first place, for national legislation excluding access to a court to have any effect under Article 6 § 1 in a particular case, it must be compatible with the rule of law. This means that such an exclusion must, in principle, be based on an instrument of general application, rather than target specific persons (in the instant case, judicial members of the NCJ elected under the previous regulation). Secondly, where the dispute in issue concerns a judge, due account must be taken of the necessity to safeguard the independence of the judiciary, which is a prerequisite for the proper functioning of the Convention system and the upholding of the rule of law. In this connection, the Court clarified that judicial independence had to be understood in an inclusive manner and apply not only to a judge in his or her adjudicating role, but also to his or her other official functions that were closely connected with the judicial system. Considering specifically a judge's membership in a judicial council, the Court attached weight to the role of such a body (responsible for the selection of judges) in

safeguarding judicial independence. For a judicial council to be able to perform this role, the State's authorities should be under an obligation to ensure its independence from the executive and legislative powers in order to safeguard the integrity of the judicial appointment process. However, the removal, or threat of removal, of a council's judicial member during his or her term of office has the potential to adversely affect his or her personal independence and, by extension, the council's mission. In this regard, the Court reiterated its case-law concerning the special role in society of the judiciary as the guarantor of justice. Just as this consideration weighed heavily in cases concerning access to a court for judges in matters concerning their status or career (*Gumenyuk and Others v. Ukraine*[7], and *Bilgen v. Turkey*[8]), the Court considered it should also apply as regards the tenure of judges, such as the applicant, who were elected to serve on judicial councils, in view of the particular role played by the latter. As concerns the NCJ, the Court observed that its independence had been undermined as a result of the fundamental change in the manner of electing its judicial members (by the *Sejm* instead of by the assemblies of judges), considered jointly with the early termination of the terms of office of the previous judicial members. It followed that the applicant's exclusion from access to a court to assert an arguable civil right closely connected with the protection of judicial independence could not be justified on objective grounds in the interest of a State governed by the rule of law. Article 6 § 1 was therefore applicable.

Access to a court

The judgment in *Grzęda v. Poland*[9] concerned the premature termination, following a legislative reform, of a judge's term of office as a member of the National Council of the Judiciary.

The applicant complained that he had been denied access to a court to contest this measure. The Grand Chamber found that the lack of judicial review had impaired the very essence of the applicant's right of access to a court, in breach of Article 6 § 1.

The Court considered that procedural safeguards, similar to those that should be available in cases of dismissal or removal of judges, should likewise be available where a judge was removed from his position as a member of a judicial council. In assessing any justification for excluding access to a court with regard to membership of judicial governance

7. *Gumenyuk and Others v. Ukraine*, no. 11423/19, 22 July 2021.
8. *Bilgen v. Turkey*, no. 1571/07, 9 March 2021.
9. *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022.

bodies, it was necessary to take into account the strong public interest in upholding the independence of the judiciary and the rule of law. In this connection, the Court had regard to the overall context of the reforms of the judicial system, starting with the grave irregularities in the election of judges to the Constitutional Court in 2015, then the remodelling of the NCJ and the setting up of new chambers in the Supreme Court, extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline. Referring to prior judgments (*Xero Flor w Polsce sp. z o.o. v. Poland*[10]; *Reczkowicz v. Poland*[11]; *Dolińska-Ficek and Ozimek v. Poland*[12]; and *Broda and Bojara v. Poland*[13]), relevant analysis by the Court of Justice of the European Union, the Polish Supreme Court and the Supreme Administrative Court, the Court found that, as a result, the judiciary had been exposed to interference by the executive and legislative powers, and its independence and adherence to rule-of-law standards had been substantially weakened. While the present case involved a number of domestic constitutional issues, the Court emphasised that, under the Vienna Convention on the Law of Treaties, a State could not invoke its domestic law, including the Constitution, as justification for its failure to respect its international-law commitments and to comply with the rule of law.

Rights in criminal proceedings

No punishment without law (Article 7)

In response to the request submitted by the Armenian Court of Cassation under Protocol No. 16 to the Convention, the Court delivered its advisory opinion[14] on 26 April 2022, which concerned the applicability of statutes of limitation to the prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture.

In *Virabyan v. Armenia*[15], the Court found that the applicant had been subjected to torture and that the authorities had failed to carry out an effective investigation, in violation of Article 3. In the context of the supervision of the execution of this judgment by the Committee

10. *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021.
11. *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021.
12. *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021.
13. *Broda and Bojara v. Poland*, nos. 26691/18 and 27367/18, 29 June 2021.
14. *Advisory opinion on the applicability of statutes of limitation to the prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, 26 April 2022. See also under Article 1 of Protocol No. 16 (Advisory opinions) below.
15. *Virabyan v. Armenia*, no. 40094/05, 2 October 2012.

of Ministers under Article 46 § 2 (not as yet closed), new criminal proceedings were instituted and charges were brought against the police officers implicated in Mr Virabyan's ill-treatment (Article 309 § 2 of the Criminal Code). The trial court found that the defendants had committed an offence under that provision, but held that they were exempt from criminal responsibility by virtue of the ten-year limitation period provided in Article 75 § 1 (3) of the Criminal Code, which had expired in 2014. This decision was upheld by the Court of Appeal. The prosecutor lodged an appeal on points of law with the Court of Cassation, seeking for it to determine whether the ten-year limitation period was applicable or whether the proceedings in issue were covered by the exception set out in Article 75 § 6 of the Criminal Code, according to which no limitation period could apply to certain types of offences (crimes against peace and humanity or those for which international treaties to which Armenia is a Party prohibit the application of limitation periods).

In this context, the Court of Cassation requested the Court to give an advisory opinion on the following question:

> Would non-application of statutes of limitation for criminal responsibility for torture or any other crimes equated thereto by invoking the international law sources be compliant with Article 7 of the European Convention, if the domestic law provides for no requirement for non-application of statutes of limitation for criminal responsibility?

(i) In this its fourth advisory opinion under Protocol No. 16, the Court provided a useful summary of its case-law relating to limitation periods under Article 3 of the Convention. The Court reiterated, in particular, that the prohibition of torture had achieved the status of *jus cogens* or a peremptory norm in international law (*Al-Adsani v. the United Kingdom*[16]). In cases concerning torture or ill-treatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of a limitation period and the manner in which the limitation period is applied has to be compatible with the requirements of the Convention. It is thus difficult to accept inflexible limitation periods admitting of no exceptions (*Mocanu and Others v. Romania*[17]). Moreover, the Court observed that it had found a violation of the procedural aspect of Article 3 in cases where the application of limitation periods had been caused by the failure of the authorities to act promptly and with due

16. *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, §§ 60-61, ECHR 2001-XI.

17. *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 326, ECHR 2014 (extracts).

diligence; in cases where prosecutions had become time-barred owing to the inadequate characterisation by the domestic authorities of acts of torture or other forms of ill-treatment as less serious offences, leading to shorter limitation periods and allowing the perpetrator to escape criminal responsibility; and on account, chiefly, of the absence of appropriate provisions in the national law capable of adequately punishing acts amounting to torture. In that connection, the Court has already held that the fact that the offences in question were subject to a statute of limitation was "a circumstance which in itself [sat] uneasily with its case-law concerning torture or other ill-treatment".

(ii) Furthermore, the Court addressed the issue of possible conflict between the States' positive obligations under Article 3 and the guarantees provided for in Article 7, notably in the process of the execution of its judgments. The Court confirmed its usual approach whereby it would be unacceptable for national authorities to compensate for the failure to discharge their positive obligations under Article 3 at the expense of the guarantees of Article 7, one of which was that the criminal law must not be construed extensively to an accused's detriment (*Kononov v. Latvia*[18], and *Del Río Prada v. Spain*[19]). In particular, and for the purposes of the present Advisory Opinion, the Court noted that it did not follow from the current state of the Court's case-law that a Contracting Party was required under the Convention not to apply an applicable limitation period and thereby effectively to revive an expired limitation period.

In this connection, the Court reiterated that, in the context of the reopening of proceedings, there might be situations where it was *de jure* or *de facto* impossible to reopen criminal investigations into the incidents giving rise to the applications being examined by the Court. Such situations may arise, for example, in cases in which the alleged perpetrators were acquitted and could not be put on trial for the same offence (which would be in conflict with the *ne bis in idem* principle set out in Article 4 of Protocol No. 7), or in cases in which the criminal proceedings had become time-barred on account of the statute of limitation set out in the national legislation. Indeed, the reopening of criminal proceedings that had been terminated on account of the expiry of the limitation period may raise issues concerning legal certainty and may thus have a bearing on a defendant's rights under Article 7 (*Taşdemir v. Turkey*[20]).

---

18. *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010.
19. *Del Río Prada v. Spain* [GC], no. 42750/09, § 78, ECHR 2013.
20. *Taşdemir v. Turkey* (dec.), no. 52538/09, § 14, 12 March 2019.

(iii) The Court went on to clarify whether the revival of a prosecution in respect of a criminal offence which is time-barred is compatible with the guarantees enshrined in Article 7 of the Convention. To this end, the Court provided a summary of its case-law concerning the requirements of legal certainty and foreseeability under this provision. It also reiterated the purposes served by limitation periods, in particular, ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time (*Coëme and Others v. Belgium*[21]). The Court further deduced from the relevant case-law that where criminal responsibility had been revived after the expiry of a limitation period, it would be deemed incompatible with the overarching principles of legality (*nullum crimen, nulla poena sine lege*) and foreseeability enshrined in Article 7 (*Antia and Khupenia v. Georgia*[22]). On this basis, the Court concluded that

> where a criminal offence under domestic law was subject to a statute of limitation and became time-barred so as to exclude criminal responsibility, Article 7 would preclude the revival of a prosecution in respect of such an offence on account of the absence of a valid legal basis. To hold otherwise would be tantamount to accepting "the retrospective application of the criminal law to an accused's disadvantage".

(iv) In the present context, the Court was presented with a situation where the requesting court had to determine whether to apply a ten-year limitation period (Article 75 § 1 (3) of the Criminal Code) or an exception whereby no limitation period was to apply, in particular, to certain types of offences envisaged by international treaties (Article 75 § 6 of the Criminal Code). In other words, the Court was asked to clarify whether it would be compatible with the defendants' rights under Article 7 if the domestic courts were to refrain from applying the limitation period applicable in their case pursuant to the international rules, including Article 3 of the Convention, relating to the prohibition of torture and other forms of ill-treatment and the requirement to punish such acts. The question so framed implicitly recognises the hierarchy of laws in the Armenian domestic system as enunciated particularly in Article 5 § 3 of the Armenian Constitution, which stipulates that, in the event of a conflict between international treaties ratified by Armenia and

21. *Coëme and Others v. Belgium*, nos. 32492/96 and 4 others, § 146, ECHR 2000-VII.
22. *Antia and Khupenia v. Georgia*, no. 7523/10, §§ 38-43, 18 June 2020.

Armenian laws, the provisions of the international treaties are to apply. Relying on the principle of subsidiarity, the Court replied as follows:

> [I]t is first and foremost for the national court to determine, within the context of its domestic constitutional and criminal-law rules, whether rules of international law having legal force in the national legal system, in the present instance pursuant to Article 5 § 3 of the Constitution ..., could provide for a sufficiently clear and foreseeable legal basis within the meaning of Article 7 of the Convention to conclude that the criminal offence in question is not subject to a statute of limitation.

OTHER RIGHTS AND FREEDOMS

Freedom of expression (Article 10)

Freedom of expression

The judgment in *OOO Memo v. Russia*[23] concerned the question of whether the measures aimed at protecting the reputational interests of a public body can be regarded as pursuing a "legitimate aim" under Article 10 § 2.

A regional administration (the executive body of a constituent entity of the Russian Federation) brought successful civil defamation proceedings against an online media outlet – the applicant company – which was ordered to publish a retraction of several statements made in an article criticising the actions of the administration.

The applicant company complained under Article 10 that the impugned measure had not pursued any legitimate aim because public authorities could not claim to enjoy any "business reputation". The Court found a breach of this provision, considering that the defamation proceedings had indeed not pursued any of the legitimate aims thereunder.

The judgment is noteworthy in that the Court clarified matters concerning the question of whether the ambit of the "protection of the reputation ... of others" aim in Article 10 § 2 extends to public bodies, and, more specifically, to bodies of the executive vested with State powers.

(i) In the first place, the Court explained in what circumstances it was appropriate to examine in greater detail the question of whether the impugned interference was in pursuance of the legitimate aim of "protection of the reputation ... of others", where the interests of a public body were involved. While the Court generally deals with the question

23. *OOO Memo v. Russia*, no. 2840/10, 15 March 2022.

of legitimate aim summarily and with a degree of flexibility (*Merabishvili v. Georgia*[24]), and focuses on the assessment of the proportionality of the interference, including in this particular context (*Lombardo and Others v. Malta*[25]; *Romanenko and Others v. Russia*[26]; and *Margulev v. Russia*[27]), the Court attached significance to the risks for democracy stemming from court proceedings instituted with a view to limiting public participation. With this in mind, the Court outlined two factors warranting a stricter, more detailed examination of the existence of the above-mentioned legitimate aim: the existence of a dispute between the parties in this regard and the power imbalance between the claimant and the defendant in the domestic proceedings.

(ii) In some cases about the reputational interests of public bodies, the Court had been prepared to assume that the aim of the "protection of the reputation" was "legitimate" (*Romanenko and Others*, cited above, § 39; *Savva Terentyev v. Russia*[28]; *Freitas Rangel v. Portugal*[29]; and *Goryaynova v. Ukraine*[30]). At the same time, a mere institutional interest did not necessarily attract the same level of guarantees as that accorded to "the protection of the reputation ... of others" within the meaning of Article 10 § 2 (*Margulev*, cited above, § 45, and *Kharlamov v. Russia*[31]). The Court had also stressed that the limits of permissible criticism were wider with regard to a public authority than in relation to a private citizen, or even a politician (*Margulev*, § 53, and *Lombardo*, § 54, both cited above).

(iii) In the instant case, the Court clarified the matter by distinguishing between two types of public body: on the one hand, public entities that engaged in direct economic activities and, on the other, bodies of the executive vested with State powers.

As to the former, the Court observed that public or State-owned corporations engaged in competitive activities in the marketplace relied on their good reputation to attract customers with a view to making a profit. In this respect, the Court reiterated its earlier findings recognising a legitimate "interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also

---

24. *Merabishvili v. Georgia* [GC], no. 72508/13, §§ 297 and 302, 28 November 2017.
25. *Lombardo and Others v. Malta*, no. 7333/06, § 50, 24 April 2007.
26. *Romanenko and Others v. Russia*, no. 11751/03, § 39, 8 October 2009.
27. *Margulev v. Russia*, no. 15449/09, § 45, 8 October 2019.
28. *Savva Terentyev v. Russia*, no. 10692/09, § 60, 28 August 2018.
29. *Freitas Rangel v. Portugal*, no. 78873/13, § 48, 11 January 2022.
30. *Goryaynova v. Ukraine*, no. 41752/09, § 56, 8 October 2020.
31. *Kharlamov v. Russia*, no. 27447/07, § 29, 8 October 2015.

for the wider economic good" (*Steel and Morris v. the United Kingdom*[32], and *Uj v. Hungary*[33]).

However, those considerations were inapplicable to the latter, a body of the executive vested with State powers which did not engage as such in direct economic activities but was funded by taxpayers and existed to serve the public. By virtue of its role in a democratic society, the interests of such a body in maintaining a good reputation differed from the reputational interests of natural persons and of legal entities, whether private or public, that competed in the marketplace. In particular, the interests of a public authority were indissociable from the need to prevent abuse of power or corruption of public office by subjecting its activities to close scrutiny, not only of the legislative and judicial authorities but also of public opinion, and shielding bodies of the executive from media criticism would run counter to this objective in so far as it might seriously hamper freedom of the media. Allowing executive bodies to bring defamation proceedings against members of the media would place an excessive and disproportionate burden on the latter and would have an inevitable chilling effect (*Dyuldin and Kislov v. Russia*[34], and *Radio Twist a.s. v. Slovakia*[35]).

(iv) In view of the specific features and role of a public authority, the Court set forth a new general rule to the effect that civil defamation proceedings brought in its own name by a legal entity that exercises public power may not be regarded to be in pursuance of the legitimate aim of "the protection of the reputation ... of others" under Article 10 § 2 of the Convention. However, this general rule did not apply to individual members of a public body, who could be "easily identifiable": they may be entitled to bring defamation proceedings in their own individual name. The Court drew inspiration from *Thoma v. Luxembourg*[36] and *Lombardo and Others* (cited above) to indicate the factors that would make individual members of a public body "easily identifiable": the nature of the allegations made against them, the limited number of officials working in a given public body and the scale of its operations (notably in terms of the size of the population concerned by its activities).

(v) On the facts of the case, the Court found that the claimant in the domestic defamation proceedings was the highest body of the regional executive. It was hardly conceivable that it had had an interest

32. *Steel and Morris v. the United Kingdom*, no. 68416/01, § 94, ECHR 2005-II.
33. *Uj v. Hungary*, no. 23954/10, § 22, 19 July 2011.
34. *Dyuldin and Kislov v. Russia*, no. 25968/02, § 43, 31 July 2007.
35. *Radio Twist a.s. v. Slovakia*, no. 62202/00, § 53, ECHR 2006-XV.
36. *Thoma v. Luxembourg*, no. 38432/97, § 56, ECHR 2001-III.

in protecting its commercial success and viability. Nor could it be said that its members had been "easily identifiable". In any event, the defamation case had been brought on behalf of the legal entity and not of its individual members. Accordingly, the civil defamation proceedings instituted by the regional administration against the applicant media company had not pursued any of the legitimate aims enumerated in Article 10 § 2 of the Convention.

Freedom of the press

The judgment in *NIT S.R.L. v. the Republic of Moldova*[37] concerned the statutory obligation on broadcasters to observe political pluralism.

The applicant company had a television channel (NIT) which it broadcast nationally. In 2009, following a change of government, NIT became a platform for criticism of the government and the promotion of the Party of the Communists (PCRM – the only opposition party at the material time). It was sanctioned for repeated and serious breaches of the statutory requirement to ensure political balance and pluralism, including for: broadcasting distorted news items; favouring the PCRM and covering its opponents (including the government) in a negative light without giving them a platform to reply; and using aggressive journalistic language (comparing one leader of the other political parties to "Hitler", and referring to all of the leaders as "criminals, "bandits", "crooks" and "swindlers"). In 2012 their broadcasting licence was revoked.

The applicant company relied on Article 10 and Article 1 of Protocol No. 1. The Court found no violation of either of these provisions. In its view, Moldova's licensing system was capable of contributing to the quality and balance of programmes and was thus consistent with the third sentence of Article 10 § 1. The manner in which the regulatory framework was designed did not exceed the State's margin of appreciation, the news reporting in issue did not warrant the enhanced protection afforded to press freedom, and the revocation of the licence was considered to be justified, exempt of political motivation, accompanied by adequate safeguards and proportionate to the legitimate aims pursued.

The Grand Chamber judgment is noteworthy in that the Court developed its case-law on pluralism in the media. In particular, the Court dealt, for the first time, with restrictions imposed on a broadcaster with the aim of enabling diversity in the expression of political opinion and enhancing the protection of the free-speech interests of others in

37. *NIT S.R.L. v. the Republic of Moldova* [GC], no. 28470/12, 5 April 2022.

the audiovisual media (existing standards had been elaborated in the context of unjustified State interferences with an applicant's Article 10 rights in breach of the principle of pluralism). In this regard, the Court clarified the interrelationship between the internal and external aspects of media pluralism, the scope of the margin of appreciation afforded to States, and the level of scrutiny applicable to restrictions in this area. It also outlined the factors for assessing a regulatory framework and its application.

(i) While previous cases were concerned with the external aspect of media pluralism[38], in the present case the Court considered its internal aspect (obligation on broadcasters to present different political views in a balanced manner, without favouring a particular party or movement). The Court clarified that both aspects had to be considered in combination with each other, rather than in isolation. This meant that in a national licensing system involving a certain number of broadcasters with national coverage, what might be regarded as a lack of internal pluralism in the programmes offered by one broadcaster might be compensated for by the existence of effective external pluralism. However, it is not sufficient to provide for the existence of several channels. What was required was to guarantee the diversity of overall programme content, reflecting as far as possible the variety of opinions in society. Having surveyed different approaches in member States to achieve this objective, the Court was of the view that Article 10 did not impose a particular model.

(ii) The Court further clarified that the States' margin of discretion, in determining the means of ensuring political pluralism in the area of licensing audiovisual media, should be wider than normally afforded to restrictions on freedom of the press to report on matters of public interest or political opinion, which traditionally called for a strict scrutiny. However, that discretion would be narrower, depending on the nature and seriousness of any restriction on editorial freedom. In particular, the severity of the present sanction imposed on a media company called for closer scrutiny by the Court and for a narrower margin of appreciation.

(iii) As to assessing the relevant regulatory framework and its application in the concrete circumstances of a given case, the Court will analyse whether the effects they have produced, seen as a whole, are

38. Concerning issues such as the existence of a variety of outlets, each with a different point of view, and the concentration of media in the hands of too few, such as a monopoly, duopoly, etc., see *Manole and Others v. Moldova*, no. 13936/02, ECHR 2009 (extracts)*; Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, ECHR 2012; and *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Series A no. 276.

compatible with the guarantees of Article 10 and have been attended by effective safeguards against arbitrariness and abuse. The fairness of proceedings and procedural guarantees afforded are factors of particular relevance for the proportionality assessment, especially where the impugned measures are severe.

(iv) Considering specifically the obligation on broadcasters to observe the principle of political balance and pluralism, as enshrined in domestic law, the Court based its analysis on the following factors:

– the scope and generality of the obligation (in the instant case, it extended only to news bulletins, concerned all broadcasters and did not require them to give an equal amount of airtime to all political parties, but to offer an opportunity to comment or reply);

– the degree of external pluralism (it was quite limited in the present case; the existence of four other TV broadcasters with nationwide coverage was insufficient to call into question the strictness of the internal pluralism policy);

– the domestic media context (following the post-2001 election of the PCRM as the only governing party and the ensuing media situation, which had been criticised in *Manole and Others v. Moldova*[39], the authorities had been under a strong positive obligation to put in place legislation ensuring the transmission of accurate and balanced news and information reflecting the full range of political opinions); and

– the existence of safeguards to secure the independence of a media regulator and its protection from undue government influence and political pressures (such as the rules on its structure and the selection, appointment and functioning of its members).

(v) When assessing the proportionality of the impugned licence revocation, which was the most severe sanction under domestic law that had immediate effect, the Court attached particular importance to the fairness of the proceedings and the procedural safeguards, including: the public nature of, and the representation of the NIT at, the meetings of the media regulator; the ability to submit comments on the monitoring findings, to challenge the media regulator's decision before the competent courts and to ask for a stay of execution; and the provision of reasons by the courts when dismissing such a request and, generally, the thoroughness of the judicial review.

The Court also had regard to the following elements: the gravity and persistence of NIT's transgressions and its defiant attitude despite a series of previous milder sanctions; the considerable impact of NIT's

39. *Manole and Others v. Moldova,* no. 13936/02, ECHR 2009 (extracts).

news bulletins broadcast nationwide; and the remaining possibilities for NIT to broadcast on the Internet, to pursue other income-generating activities and to reapply for a licence one year after its revocation.

Freedom of assembly and association (Article 11)

Applicability

The decision in *Barış and Others v. Turkey*[40] concerned the applicability of Article 11 to dismissal based on participation in unofficial strike action.

The applicants, company employees, were dismissed for having stopped working throughout a period of strike action which had not been initiated by a trade union, but instead by a large number of employees who had resigned *en masse* from their previous trade union, in which they had no longer had confidence. Many of their number, including the applicants, decided to join another trade union. The purpose of their action was to protest against the procedure by which the previous (recognised) trade union had negotiated the collective-bargaining agreement concluded with the employer, and against the pressure allegedly exerted by the employer to join this trade union, or to remain in it. The applicants challenged their dismissal before the courts, but without success. According to the facts as established by the Court of Cassation, their dismissal had been based on participation in a strike that was not part of trade-union action, rather than on their wish to leave the trade union in question and join another one.

The Court declared the application inadmissible (incompatible *ratione materiae*), on the grounds that the disputed procedure did not come within the scope of Article 11 of the Convention.

The decision is noteworthy in that the Court addressed a new question, namely the applicability of Article 11 to a strike conducted by individual employees, outside the framework of official trade-union action.

The cases which the Court has examined to date concerned actions that had always been initiated by a trade union, whether they involved strike action or actions comparable to it (*Karaçay v. Turkey*[41]; *Dilek and Others v. Turkey*[42]; and the case-law summarised in *Association of Academics v. Iceland*[43]). In its settled case-law, the Court has considered strike action as an important and powerful tool available to trade unions

40. *Barış and Others v. Turkey* (dec.), nos. 66828/16 and 31 others, adopted on 14 December 2021 and delivered on 27 January 2022.

41. *Karaçay v. Turkey*, no. 6615/03, 27 March 2007.

42. *Dilek and Others v. Turkey*, nos. 74611/01 and 2 others, 17 July 2007.

43. *Association of Academics v. Iceland* (dec.), no. 2451/16, 15 May 2018.

in order to defend the professional instruments of their members (*Schmidt and Dahlström v. Sweden*[44]; *Wilson, National Union of Journalists and Others v. the United Kingdom*[45]; and *Hrvatski liječnički sindikat v. Croatia*[46]). While the Court recognises, in principle, that the protection of Article 11 extends to this tool of trade-union action, it has, however, never accepted that a strike that is called not by a trade union, but by a trade union's members, or even non-members, is also entitled to the same protection. In the present decision, the Court clarified that it is specifically as a tool in the arsenal of trade unions that the right to strike is protected by Article 11. In other words,

> strike action is, in principle, protected by Article 11 only in so far as it is called by trade-union organisations and considered as being effectively – and not only presumed to be – part of trade-union activity.

In this connection, the Court referred to the case-law of the European Committee on Social Rights, which has found that reserving the right to strike to trade unions is compatible with Article 6 § 4 of the European Social Charter, provided that setting up a trade union is not subject to excessive formalities.

On this basis, and for the purpose of examining the applicability of Article 11 to the present case, the Court focused its attention on one particular aspect of the case, namely the applicants' negative right to freedom of association, having regard, in particular, to their wish to leave the trade union in question and the related allegations of pressure from their employer. However, as follows from the analysis by the Court of Cassation and the Constitutional Court, all of the measures taken by the employer were related to the employees' failure to resume working, and were not based on their membership, or non-membership, of a specific trade union. In addition, the conditions for membership of the trade union were not at all the subject matter of the strike action in which the applicants took part. Thus, the question of whether or not the applicants had the possibility to leave a trade union and to join another trade union did not seem to be in issue in the present case.

In the light of all these factors, the Court concluded that the applicants could not effectively claim a right to the freedom of association that is protected under Article 11, in so far as they had not been dismissed:

---

44. *Schmidt and Dahlström v. Sweden*, 6 February 1976, § 36, Series A no. 21.

45. *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96 and 2 others, § 45, ECHR 2002-V.

46. *Hrvatski liječnički sindikat v. Croatia*, no. 36701/09, § 49, 27 November 2014.

– for having taken part in a demonstration organised by a trade union;

– for having asserted professional rights as part of the activities of a trade union;

– for having withdrawn from a specific trade union; or

– for having chosen not to join a specific trade union.

Freedom of peaceful assembly

The judgment in *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*[47] concerned a general ban on public gatherings for two and a half months at the beginning of the COVID-19 pandemic, without any judicial review of proportionality.

The applicant is an association whose declared aim is to defend the interests of workers and of its member organisations, especially in the sphere of trade union and democratic freedoms. Between 17 March and 30 May 2020 all the events by means of which the applicant association might have conducted its activities were subject to an outright ban under a federal ordinance enacted to tackle the COVID-19 pandemic. Although federal ordinances could normally be the subject of a preliminary ruling on constitutionality, the Federal Supreme Court, in the very particular circumstances of the general lockdown, had not examined any freedom-of-assembly applications on the merits and had not assessed the compatibility of the ordinance in question with the Constitution.

The applicant association relied in this regard on Article 11. The Court found a violation of that provision, holding that such a drastic measure, in force for such a lengthy period and accompanied by very severe criminal penalties, was not proportionate to the legitimate aims pursued, notwithstanding the very serious threat to society and public health. The Court attached considerable weight to the absence of effective judicial review of the measure.

This judgment is noteworthy in that the Court ruled, for the first time, that a restriction imposed as part of efforts to tackle the COVID-19 pandemic was incompatible with the Convention. The Court clarified the factors to be taken into consideration in this very complex context and the extent of States' margin of appreciation and their procedural obligations from the standpoint of Article 11 of the Convention, with particular reference to the judicial review at national level of the necessity of the measures.

---

47. *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, no. 21881/20, 15 March 2022.

(i) In line with its decision in *Terheş v. Romania*[48], the Court reaffirmed that the threat to public health posed by COVID-19 was very serious and was to be considered in the light of the positive obligation for the States Parties to the Convention to protect the lives and health of the persons within their jurisdiction, under Articles 2 and 8 of the Convention in particular. The Court also emphasised the particular circumstances prevailing in the early stages of the pandemic, namely the urgent need to respond swiftly and appropriately to the unprecedented threat, against a background of very limited knowledge of the characteristics and dangerousness of the virus.

(ii) The Court went on to address the nature of the impugned restriction, while bearing in mind the importance of freedom of peaceful assembly in a democratic society and the topics and values promoted by the applicant association under its constitution. The Court noted:

– the blanket nature of the measure, which prohibited all public or private events without any possibility of exemption;

– the lengthy duration (two and a half months); and

– the severity of the possible penalties, which were criminal in nature and could entail a three-year custodial sentence.

(iii) Taking the same approach as in *Terheş*, cited above, the Court applied the general principles established in its case-law to this unprecedented situation involving a pandemic. It observed in that connection that Switzerland had not made use of Article 15 of the Convention (derogating measures) and had therefore been required to comply fully with the requirements of Article 11. Referring to its well-established case-law (*Kudrevičius and Others v. Lithuania*[49]), the Court held that:

– Switzerland enjoyed a certain but not unlimited margin of appreciation;

– the absence of any review by the Federal Supreme Court was worrying, as such a drastic measure, applicable over a lengthy period, required strong reasons to justify it and called for particularly thorough scrutiny by the courts empowered to weigh up the interests at stake;

– the penalties were very severe and liable to have a chilling effect, even though a peaceful gathering should not, as a rule, entail a risk of criminal sanctions; and

– the Government had not explained why access to workplaces had continued to be allowed even when they were occupied by hundreds of people, whereas the organisation of an event in a public space, outdoors,

48. *Terheş v. Romania* (dec.), no. 49933/20, 13 April 2021.

49. *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, ECHR 2015.

was not allowed even if the same public-health protocols were adhered to.

It is worth noting that the Court reiterated, in this novel context, that for a measure to be considered proportionate and necessary in a democratic society, there had to be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned.

(iv) As to the extent of any procedural obligation in this regard, the Court observed that the quality of the parliamentary and judicial review at the national level of the necessity of the measure was of particular importance in determining the proportionality of a general measure, including to the operation of the relevant margin of appreciation (*Animal Defenders International v. the United Kingdom*[50]).

Nevertheless, the Court clarified the scope of this general principle in the context of the adoption of the urgent measures deemed necessary to tackle this global scourge. In particular, while it was not necessarily to be expected that very detailed discussions would be held at the domestic level, and especially involving Parliament, in such circumstances independent and effective judicial review of the measures taken by the executive was all the more vital. There had been no such review in the present case.

The Court concluded, in view of all the above-mentioned considerations, that the interference with the exercise of the rights protected by Article 11 had not been proportionate to the legitimate aims of the protection of health and of the rights and freedoms of others, and that the respondent State had overstepped the margin of appreciation afforded to it in the present case.

Prohibition of discrimination (Article 14)

Article 14 taken in conjunction with Article 8

The judgment in *Arnar Helgi Lárusson v. Iceland*[51] concerned a lack of wheelchair access to two public buildings, cultural and social, in the applicant's place of residence and the State's positive obligations in this regard.

The applicant, a wheelchair user, unsuccessfully brought proceedings with a view to improving the accessibility of arts and cultural centres in his town. The domestic courts noted that the municipality had worked

50. *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts).

51. *Arnar Helgi Lárusson v. Iceland*, no. 23077/19, 31 May 2022.

towards improving such access further to domestic legislation which had taken into account the State's international obligations under the United Nations Convention on the Rights of Persons with Disabilities (CRPD): the municipality had devised and put into action a strategy to improve access to some of its buildings within its wide margin of appreciation as to the prioritisation of such projects and the allocation of funds available.

The applicant complained under Article 14 in conjunction with Article 8 (private life) about the inaccessibility of those two public buildings which had led to him being unable to attend cultural and arts events therein and put him on an uneven footing with other inhabitants of the town. The Court found that there had been no violation of the Convention.

The judgment is noteworthy in that, for the first time, a complaint about a lack of accessibility of public buildings for disabled persons was considered to fall within the ambit of "private life", allowing the Court to go on to examine, under Article 14 in conjunction with Article 8, whether the State had fulfilled its positive obligations, given international standards, to take sufficient measures to correct factual inequalities impacting on the applicant's equal enjoyment of his right to private life.

(i) Distinguishing the applicant's case from prior cases (*Botta v. Italy*[52]; *Zehnalová and Zehnal v. the Czech Republic*[53]; and *Glaisen v. Switzerland*[54]) and finding that the present lack of wheelchair access did fall within the "ambit" of "private life" and Article 8, the Court: (i) stressed that the applicant had clearly identified two particular public buildings playing an important part in local life, the lack of access to which had hindered him attending a substantial part of the cultural activities, social events and parties offered by his community; (ii) underlined European and international standards to the effect that people with disabilities should be enabled to fully integrate into society and have equal opportunities for participation in the life of the community; and (iii) considered that the situation in issue was liable to affect the applicant's rights to personal development and to establish and develop relationships with the outside world, thereby falling within the "ambit" of Article 8.

(ii) As to whether there had been discrimination due to a lack of positive measures by the State, the Court specified, first, that a certain threshold is required for the Court to find that such a difference in treatment is significant. Secondly, it clarified that the States' margin of

52. *Botta v. Italy*, 24 February 1998, *Reports of Judgments and Decisions* 1998-I.

53. *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V.

54. *Glaisen v. Switzerland* (dec.), no. 40477/13, 25 June 2019.

appreciation is a wide one as regards a lack of access to public buildings in the context of the right to respect for private and family life. Thirdly, as Article 14 had already been read in the light of the requirements of the CRPD, the Court extended its previous considerations, regarding "reasonable accommodation" which people with disabilities are entitled to expect, to their social and cultural life, by reference to Article 30 of the CRPD which requires that such persons are guaranteed the opportunity to take part on an equal basis with others in cultural life. Lastly, the relevant test to be applied was whether the State had made the "necessary and appropriate modifications and adjustments" to accommodate and facilitate persons with disabilities, like the applicant, which did not impose "a disproportionate or undue burden" on the State.

(iii) When applying the above principles, the Court had regard to the following factors:

– the considerable efforts already made following a parliamentary resolution to improve accessibility of public buildings in the municipality, having regard to the available budget and the necessary protection of the old buildings in question;

– the priority which had been given to educational and sports facilities, as regards improvements already made, which was neither arbitrary nor unreasonable; and

– the resulting general commitment of the State to work towards the gradual realisation of universal access in line with the relevant international materials (Recommendation Rec(2006)5 of the Council of Europe[55] and the CRPD).

In the circumstances and having regard to the positive obligation to reasonably accommodate the applicant, requiring the State to put in place further measures would amount to imposing a "disproportionate or undue burden" on it. The applicant's lack of access to the two buildings in question did not therefore amount to a discriminatory failure by the State to take sufficient measures to correct factual inequalities in order to enable the applicant to exercise his right to private life on an equal basis with others.

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

The judgment in *Savickis and Others v. Latvia*[56] concerned the justification for a difference in treatment based on nationality, in the

55. Recommendation Rec(2006)5 of the Council of Europe to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015.

56. *Savickis and Others v. Latvia* [GC], no. 49270/11, 9 June 2022.

context of the restoration of a State's independence after unlawful occupation and annexation.

Following the restoration of Latvia's independence, a new system of occupational retirement pensions was put in place, which allowed for periods of employment accrued outside its territory to be counted towards the pension for Latvian nationals. Since the applicants were "permanently resident non-citizens", their years of service outside Latvia during the Soviet era were not taken into account for the calculation of their pensions. In *Andrejeva v. Latvia*[57], the Court found this difference of treatment to amount to a breach of Article 14 taken in conjunction with Article 1 of Protocol No. 1. Several of the present applicants unsuccessfully applied to have their pensions recalculated. In 2011 the Constitutional Court declared the impugned rule compatible with the Constitution and the Convention, drawing a clear distinction between the case in *Andrejeva* and the applicants' case: while Ms Andrejeva had resided in the territory of Latvia over the disputed periods, the applicants had worked outside it before establishing any legal ties with Latvia. In this connection, the Constitutional Court relied on the doctrine of State continuity, which had informed the setting up of the system of retirement pensions. According to this doctrine, while Latvian statehood had *de facto* been lost as a result of aggression (1940), it had nevertheless remained in place *de jure* throughout the five decades of unlawful occupation and annexation on the part of the former Soviet Union: Latvia was not therefore the successor of the rights and obligations of the USSR. The Grand Chamber (after relinquishment) considered the above arguments to amount to "very weighty reasons" justifying the contested difference in treatment. It found no violation of Article 14 in conjunction with Article 1 of Protocol No. 1, thus reaching a different conclusion from that in the *Andrejeva* case.

This Grand Chamber judgment is an example of judicial dialogue with a national superior court. It is also noteworthy for the manner in which the Court assessed the justification for the difference in treatment based on nationality in the specific context of the restoration of the State's independence after decades of unlawful occupation and annexation. Of particular interest are the factors relevant for determining the appropriate scope of the margin of appreciation, as well as the significance given to personal choice concerning legal status or citizenship in matters relating to financial benefits.

(i) The Court drew a clear distinction between the context of State succession and the specific context in issue, thus agreeing with

57. *Andrejeva v. Latvia* [GC], no. 55707/00, ECHR 2009.

the Constitutional Court that Latvia was not obliged to assume the responsibilities of the USSR upon the restoration of its independence. Indeed, having undergone unlawful occupation and subsequent annexation, a State is not required to assume the public-law obligations accrued by the illegally established public authorities of the occupying or annexing power. Latvia was thus neither automatically bound by such obligations based on the Soviet period nor obliged to undertake those emanating from obligations of the occupying or annexing State. In this connection, the Court accepted the legitimacy of the aim of safeguarding the constitutional identity of the State and avoiding retrospective approbation of the consequences of the immigration policy practised in the period of unlawful occupation and annexation of the country. In the Court's view, the preferential treatment accorded to those possessing Latvian citizenship in respect of past periods of employment performed outside Latvia was in line with this legitimate aim.

(ii) While the justification of a difference in treatment based exclusively on nationality requires "very weighty reasons", thus indicating a narrow margin, the Court clarified the application of this principle in a field where a wide margin is, and must be, granted to the State in formulating general measures (notably of economic and social policy). In particular, even the assessment of what may constitute "very weighty reasons" for the purposes of the application of Article 14 may have to vary in degree depending on the context and circumstances. In the instant case, the Court carried out this assessment against the background of a wide margin of appreciation and eventually concluded that the grounds relied upon by the Latvian authorities could be deemed to amount to "very weighty reasons". The Court based its analysis on the following factors.

In the first place, the Court reiterated its case-law acknowledging that there may be valid reasons for giving special treatment to those whose link with a country stemmed from birth within it or who otherwise had a special link with a country (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*[58]). The Court had previously accepted a difference in treatment based on nationality for reasons relating to the date from which the applicants had developed ties with the respondent State (*British Gurkha Welfare Society and Others v. the United Kingdom*[59]).

Secondly, drawing upon *Bah v. the United Kingdom*[60], the Court accepted that, in the context of a difference in treatment based on

58. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94.

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

60. *Bah v. the United Kingdom*, no. 56328/07, § 47, ECHR 2011.

nationality, there may be certain situations where the element of personal choice linked with the legal status in question may be of significance, especially where privileges, entitlements and financial benefits were at stake. The status of "permanently resident non-citizens" had been devised as a temporary instrument so that the individuals concerned could obtain Latvian or another citizenship. However, despite the considerable time frame available to the applicants, it did not appear that any of them had ever tried to obtain Latvian citizenship or that they had been met with obstacles in doing so. Even though naturalisation depends on the fulfilment of certain conditions and may require certain efforts, the question of legal status is largely a matter of personal aspiration rather than an immutable situation.

Thirdly, the Court attached weight to the particular context of the difference in treatment in issue, holding that it warranted a substantial degree of deference to be afforded to the Government. The complex policy choices made by the Latvian legislature were directly linked to the specific historical, economic and demographic circumstances, including the severe economic difficulties, prevailing in the wake of the restoration of Latvia's independence and during its transition from a totalitarian regime to a democracy. In particular, the special status of "permanently resident non-citizens" had been created with a view to addressing the consequences of five decades of unlawful occupation and annexation.

Fourthly, the Court took note of the temporal scope of the preferential treatment in issue: it only concerned past periods of employment completed outside Latvia prior to the restoration of independence and the introduction of the pension scheme. The Court also endorsed the manner in which the Constitutional Court had distinguished the present case from that in *Andrejeva*: the disputed periods had been completed before the applicants settled in, or established any other links with, Latvia.

Finally, the impugned difference in treatment neither left the applicants without social cover (such as basic pension benefits unrelated to employment history), nor entailed any deprivation, or other loss, of benefits based on financial contributions.

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

Stand for election

In response to the request submitted by the Lithuanian Supreme Administrative Court under Protocol No. 16 to the Convention, the Court

delivered its advisory opinion[61] on 8 April 2022, which concerned the assessment of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings.

In 2014, as a result of impeachment proceedings, Ms N.V. was removed from her position as a member of the *Seimas* given her non-participation without an excuse in the *Seimas*'s meetings (she had fled Lithuania as a result of pending criminal proceedings). In 2020 the Central Electoral Commission refused to register her as a candidate in the upcoming *Seimas* elections because of the statutory ban on standing for election after removal from office in impeachment proceedings. In its 2011 judgment in *Paksas v. Lithuania*[62], this Court held that the permanent and irreversible nature of such a ban was disproportionate and a breach of Article 3 of Protocol No. 1. The execution of this judgment is still pending before the Committee of Ministers. Ms N.V. challenged the decision of the Central Electoral Commission before the Supreme Administrative Court, which requested this Court to give an advisory opinion on the following questions:

> 1. Does a Contracting State overstep the margin of appreciation conferred to it by Article 3 of Protocol No. 1 to the Convention, if it does not guarantee the compatibility of the national law with the international obligations arising from the provisions of Article 3 of Protocol No. 1 to the Convention, which results in preventing a person, who has been removed from office of a Member of the *Seimas* under the impeachment proceedings, from implementing their "passive" right to elections for six years?
>
> In case of affirmative response, could such situation be justified by the complexity of the existing circumstances, directly related to providing an opportunity to the legislative body to align the national provisions of the constitutional level with the international obligations?
>
> 2. What are the requirements and criteria implied by Article 3 of Protocol No. 1 to the Convention, which determine the scope of the application of the principle of proportionality, and which the national court should take into account and verify whether they are complied with in the existing situation at issue?

61. *Advisory opinion on the assessment, under Article 3 of Protocol No. 1, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings* [GC], request no. P16-2020-002, Lithuanian Supreme Administrative Court, 8 April 2022. See also under Article 1 of Protocol No. 16 (Advisory opinions) below.

62. *Paksas v. Lithuania* [GC], no. 34932/04, ECHR 2011 (extracts).

> In such situation, when assessing the proportionality of a general prohibition restricting the exercise of the rights provided for in Article 3 of Protocol No. 1 to the Convention, should not only the introduction of the time-limit, but also the circumstances of each individual case, related to the nature of the office from which a person has been removed and the act which resulted in impeachment, be held crucial?

(i) In this its third advisory opinion under Protocol No. 16, the Court identified the limits of advisory opinions as regards issues relating to the execution of the Court's judgments.

In particular, the Court understood the first question to essentially be asking whether the Supreme Administrative Court should take into account the difficulties encountered by the Lithuanian authorities in executing the *Paksas* judgment. The Court also had regard to the most recent decision of the Committee of Ministers: the Deputies noted the Government's initial intention to await delivery of the present advisory opinion of the Court before proceeding with the execution of the *Paksas* judgment and to resume their examination after delivery. In this respect, the Court stressed that Protocol No. 16 had not been envisaged as an instrument to be used in the context of execution. The Court also noted recent developments within the *Seimas* as regards the constitutional amendment process: the draft amendment (replacing the permanent ban with a ten-year one) would be scheduled for a second voting during the *Seimas*'s spring session. Taking all these elements into account, the Court decided that it was not appropriate to give an answer to the first question.

(ii) Without prejudice to any legislative initiatives by the *Seimas* to remedy the problem created by the failure to execute the *Paksas* judgment, the Court answered the second question from the perspective of the requesting court, in keeping with the object and purpose of Protocol No. 16. In this regard, the Court clarified the requirements and criteria relevant for the assessment of whether, in the concrete circumstances of a given case, the ban preventing an impeached former member of parliament to stand for election to the *Seimas* had become disproportionate for the purposes of Article 3 of Protocol No. 1.

In this connection and with regard specifically to the facts relating to the present opinion, the Court reiterated its finding in *Paksas* according to which, in assessing the proportionality of a general measure restricting the exercise of the rights guaranteed by Article 3 of Protocol No. 1, decisive weight should be attached to the existence of a time-limit and the possibility of reviewing the measure in question. The need for such a

possibility was linked to the fact that the assessment of that issue must have regard to the evolving historical and political context in the State concerned. Furthermore, while States enjoyed considerable latitude to establish in their constitutional order rules governing the status of parliamentarians, these rules should not be such as to exclude some persons or groups of persons from participating in the political life of a country and in the choice of the legislature (*Aziz v. Cyprus*[63]). The Court also reiterated that, with the passage of time, general restrictions on electoral rights become more difficult to justify, thus requiring restrictive measures to be individualised (*Ādamsons v. Latvia*[64]). On this basis, the Court went on to clarify that the reference in *Paksas* to the weight to be attached to the existence of a time-limit and the possibility of reviewing the ban in question was not necessarily to be understood as requiring these two elements to be combined. Nor did it specify whether the time-limit applicable in a given case should be set in the abstract or on a case-by-case basis. What mattered in the end was for the ban in question to remain proportionate within the meaning of the *Paksas* judgment. This could be achieved by way of an appropriate legislative framework or judicial review of the duration, nature and extent of a ban applicable to the person concerned.

The Court developed a number of substantive and procedural requirements for a determination of the appropriate and proportionate length of a ban precluding an impeached person from being eligible for a given function. In the first place, it should be based on an individualised assessment, having regard to the particular circumstances of the person concerned. Secondly, it should have regard to the specific circumstances applicable at the time of the review. In this context, the findings in *Paksas* that a lifelong disqualification was a disproportionate restriction did not, in itself, imply that a decision to ban a person from standing for election, at the time of such a refusal, would necessarily amount to a disproportionate restriction: whether that was the case would depend on the assessment to be performed. Lastly, the relevant procedure should be surrounded by sufficient safeguards designed to ensure respect for the rule of law and protection against arbitrariness, including the need for an independent body as well as for the person concerned to be heard by the latter and to be provided with a reasoned decision.

Having regard to the primary purpose of the impeachment and the subsequent ban – to protect parliamentary institutions – the Court specified the relevant criteria for the proportionality assessment:

63. *Aziz v. Cyprus*, no. 69949/01, § 28, ECHR 2004-V.

64. *Ādamsons v. Latvia*, no. 3669/03, § 125, 24 June 2008.

> [They] should be objective in nature and allow relevant circumstances connected not only with the events which led to the impeachment of the person concerned but also – and primarily – with the functions sought to be exercised by that person in the future, to be taken into account in a transparent way. They should therefore be identified mainly from the perspective of the requirements of the proper functioning of the institution of which that person sought to become a member, and indeed of the constitutional system and democracy as a whole in the State concerned.

This comes down to evaluating the objective impact which that person's potential membership of the institution concerned would have on the latter's functioning, having regard to such considerations as the past and contemporary behaviour of the person who has been removed from office in impeachment proceedings, the nature of the wrongdoing which led to impeachment, and – more importantly – the institutional and democratic stability of the institution concerned, the nature of the latter's duties and responsibilities, and the likelihood of the person having the potential to significantly disrupt the functioning of that institution or indeed of democracy as a whole in the State concerned. Aspects such as that person's loyalty to the State, encompassing his or her respect for the country's Constitution, laws, institutions and independence, may also be relevant in this respect (*Tănase v. Moldova*[65]).

ADVISORY OPINIONS (ARTICLE 1 OF PROTOCOL NO. 16)

In response to the request submitted by the Lithuanian Supreme Administrative Court under Protocol No. 16 to the Convention, the Court delivered its advisory opinion[66] on 8 April 2022. It concerns the assessment of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings.

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

65. *Tănase v. Moldova* [GC], no. 7/08, §§ 166-67, ECHR 2010.

66. *Advisory opinion on the assessment, under Article 3 of Protocol No. 1, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings* [GC], request no. P16-2020-002, Lithuanian Supreme Administrative Court, 8 April 2022. See also under Article 3 of Protocol No. 1 (Stand for election) above.

opinion[67] on 26 April 2022, which concerned the applicability of statutes of limitation to the prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture.

67. *Advisory opinion on the applicability of statutes of limitation to the prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, 26 April 2022. See also under Article 7 (No punishment without law) above.