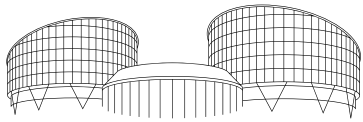

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Overview of the Court's case-law

1 January-15 June 2019

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

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Case-law overview

This overview[1] contains a selection by the Jurisconsult of the most interesting cases from 2019.

"CORE" RIGHTS

Right to life (Article 2)

Obligation to protect life

The judgment in *Fernandes de Oliveira v. Portugal*[2] concerned the nature of the substantive obligations under Article 2 owed to a voluntary psychiatric patient, as well as the length of the proceedings (procedural limb of Article 2).

The applicant's adult son, A.J., had a history of serious mental illness as well as of addiction to alcohol and prescription drugs. He was hospitalised on a voluntary basis on several occasions in a psychiatric hospital ("the HSC"). During his last stay (necessitated by a suicide attempt with prescription drugs), his initial restrictive regime was relaxed, then he was allowed home, but was subsequently readmitted following excessive alcohol intake. Two days later A.J. left the HSC without permission, jumped in front of a train and died. The applicant complained under Article 2 of a failure to protect her son and under Article 6 of the length of her civil action against the HSC. The Grand Chamber found no violation of Article 2 as regards the substantive aspect and that there had been a violation of the procedural aspect of that Article.

(i) The judgment is interesting because the Grand Chamber clarified the content of the positive obligations, in the present case two, on the State as regards the care of psychiatric patients at risk of suicide in hospital.

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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 This provisional version will be superseded by the final version covering all of 2019.
2. *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, 31 January 2019.

In the first place, and as recently clarified in *Lopes de Sousa Fernandes v. Portugal*[3] as regards medical negligence, the State has a positive obligation to put in place an effective regulatory framework compelling hospitals to adopt appropriate measures for the protection of patients' lives. Secondly, the Court imposes, in certain circumstances, a positive obligation to take preventive operational measures to protect an individual from the criminal acts of others and from himself[4] (*Osman v. the United Kingdom*[5]), an obligation extended to cases concerning detainees (*Keenan v. the United Kingdom*[6], and *Renolde v. France*[7]) and involuntary psychiatric patients (*Hiller v. Austria*[8]). The Grand Chamber extracted and listed the factors that the case-law indicated were relevant in applying the *Osman* test and assessing the suicide risk of a detainee which could trigger the need to take preventive measures: history of mental-health problems; the gravity of the mental illness; previous attempts to commit suicide or self-harm; suicidal thoughts or threats; and signs of physical or mental distress. The Grand Chamber considered that both obligations were applicable to the case in question and, further, that both had been complied with. In particular:

(a) The manner in which the regulatory framework had been implemented did not give rise to a violation of Article 2. It is worth noting that the Grand Chamber agreed that the approach of the HSC – where patients' rights were restricted as little as possible and there existed a therapeutic desire to create an open regime – was in line with international standards[9] developed in recent years, and it endorsed the view expressed in *Hiller*[10] that a more intrusive regime could have

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

4. As described in paragraph 125 of the judgment: "whether the authorities knew or ought to have known that A.J. posed a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to prevent that risk by putting into place the restrictive measures available ... The Court will bear in mind the operational choices which must be made in terms of priorities and resources in providing public healthcare and certain other public services in the same way as it bears in mind the difficulties involved in policing modern societies ..."

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

6. *Keenan v. the United Kingdom*, no. 27229/95, ECHR 2001-III.

7. *Renolde v. France*, no. 5608/05, ECHR 2008 (extracts).

8. *Hiller v. Austria*, no. 1967/14, 22 November 2016.

9. UN General Assembly Resolution 46/119 on the protection of persons with mental illness and the improvement of mental health care, 17 December 1991, UN Doc. A/RES/46/119; the Convention on the Rights of Persons with Disabilities (CRPD), 2515 UNTS 3, as well as CRPD Committee Guidelines and statement of the OHCHR on Article 14 of the CRPD; UN Human Rights Committee General Comment No. 35 on Article 9 of the ICCPR; and Report of 2 April 2015 of the UN Special Rapporteur on the right to the enjoyment of the highest attainable standard of physical and mental health.

10. *Hiller*, cited above, §§ 54-55.

violated Articles 3, 5 or 8. It also found the three surveillance measures in the HSC for voluntary patients to be adequate: a regular daily timetable with monitoring of presence at key times; a more restrictive regime if required; and an emergency procedure (for example, restraint procedures) if necessary. Finally, the applicant had been able to have recourse to a judicial system: despite its excessive length (see below), "nothing ... suggest[ed] a systemic deficiency in the functioning of the judicial system which denied the applicant an effective review of her civil claim".

(b) As to the application of the *Osman* operational obligation in this context, two aspects are worth noting. In the first place, the Grand Chamber confirmed for the first time that the positive obligation to take preventive operational measures extends to *voluntary* patients (it had already been recognised that it extended to involuntary patients, see above). While the Court reached this finding by noting that all psychiatric patients are vulnerable, with any form of hospitalisation involving a certain level of necessary restraint, the Grand Chamber did nuance its findings by adding that "the Court, in its own assessment, may apply a stricter standard of scrutiny" in the case of involuntary patients. Secondly, the Court went on to apply the *Osman* test by measuring the care and decisions of the HSC against the five factors noted above and, drawing heavily on domestic expert reports and decisions, found that it had not been established that the HSC knew or ought to have known that there was an immediate risk to A.J.'s life in the days before his death. In particular, the Court accepted that, while a risk of suicide could not be excluded in inpatients such as A.J., whose psychopathological conditions were based on a multiplicity of diagnoses, the immediacy of the risk could vary and the Court endorsed the approach of the HSC, which was to vary the monitoring regime in place in accordance with these changes based on a philosophy which optimised patient freedom, patient responsibility and thus their chances of discharge. There being therefore no established "real and immediate risk", it was not necessary to proceed to examine the second limb of the *Osman* test, namely whether or not preventive measures had been required.

(ii) The applicant also complained that her civil action against the hospital was excessively long. She had originally relied on Article 6 § 1 in that respect and the Grand Chamber recharacterised this complaint under the procedural limb of Article 2 (*Radomilja and Others v. Croatia*[11]), finding a violation of this provision on the basis of the excessive length

11. *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, 20 March 2018.

of the proceedings alone. As to whether it must be shown that that delay impacted on the effectiveness of the proceedings before it can constitute a violation of the procedural limb of Article 2 (see *Mustafa Tunç and Fecire Tunç v. Turkey*[12], and, for example, *Sarbyanova-Pashaliyska and Pashaliyska v. Bulgaria*[13]), the Grand Chamber relied on paragraph 219 of *Lopes de Sousa Fernandes* (cited above):

> This is why the Court has held that, in Article 2 cases, particularly in those concerning proceedings instituted to elucidate the circumstances of an individual's death in a hospital setting, the lengthiness of proceedings is a strong indication that the proceedings were defective to the point of constituting a violation of the respondent State's positive obligations under the Convention, unless the State has provided highly convincing and plausible reasons to justify the length of the proceedings (see, for example, *Bilbija and Blažević v. Croatia*, no. 62870/13, § 107, 12 January 2016).

The Grand Chamber went on to find that the applicant's civil action was excessively long, a strong indicator therefore of defective proceedings, and that the Government had not provided "convincing and plausible" reasons to justify the delay. The importance of avoiding delay was explained (the passage of time affecting witness memory and the importance of ensuring deficiencies are remedied quickly and thereby avoided in the future), before it concluded that there had been a violation of the procedural limb of Article 2.

Effective investigation[14]

Güzelyurtlu and Others v. Cyprus and Turkey[15] concerned the duty of Contracting States to cooperate in transnational investigations.

The case concerns the investigation into the murder in January 2005 of three Cypriot nationals of Turkish Cypriot origin in the part of Cyprus controlled by the Cypriot government. The suspects fled to the "Turkish Republic of Northern Cyprus" (the "TRNC"). Parallel investigations were conducted by Cypriot and "TRNC" authorities. The Cypriot authorities identified eight suspects: domestic and European arrest warrants were issued and Red Notice requests were sent to Interpol. The "TRNC" authorities arrested all of the suspects by the end of January 2005 but released them some weeks later. The Cypriot authorities refused to

12. *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 31, 14 April 2015.
13. *Sarbyanova-Pashaliyska and Pashaliyska v. Bulgaria*, no. 3524/14, §§ 41-44, 12 January 2017.
14. See also, under Article 2 (Right to life – Obligation to protect life) above, *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, 31 January 2019.
15. *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019.

surrender the case file to the "TRNC" authorities, seeking rather to obtain the suspects' surrender from the "TRNC" through mediation (United Nations Peacekeeping Force in Cyprus (UNFICYP)) and then through extradition requests (to the Turkish embassy in Athens), which were returned without reply. Since then both investigations are at an impasse. The applicants, the victims' relatives, complained under Articles 2 and 13 of the failure of both Turkey and Cyprus to cooperate in the investigation.

The Grand Chamber found that Cyprus had not breached Article 2 (procedural limb) as it had used all means reasonably available to it to obtain the suspects' surrender/extradition from Turkey (paragraphs 241-45) and that it had not been under an obligation to submit its case file or to transfer the proceedings to the "TRNC" or to Turkey (paragraphs 246-55). However, it found that Turkey had breached Article 2 (procedural limb) on account of its failure to cooperate with Cyprus and, in particular, for not providing a reasoned reply to the extradition requests submitted by its authorities (paragraphs 258-66).

The Grand Chamber has developed in this judgment certain novel and important principles concerning the duty of Contracting States to cooperate in the context of transnational criminal investigations.

(i) The case gave the Grand Chamber the opportunity to clarify its case-law on the issue of jurisdiction (Article 1) and compatibility *ratione loci* of an Article 2 complaint (procedural limb) where the death occurs outside the jurisdiction of the respondent State. Since the deaths occurred in territory controlled by and under the jurisdiction of Cyprus, Turkey maintained that it had no "jurisdictional link" with the victims. The Grand Chamber found that there was a jurisdictional link to Turkey, on two grounds:

(a) The Grand Chamber established the principle that the institution of investigation/proceedings concerning a death which occurred outside the jurisdiction of that State is sufficient to establish a jurisdictional link for the purposes of Article 1 between that State and the victim's relatives who later brought Convention proceedings. The Court interestingly drew in this connection on Article 2 cases in which it had already followed a similar approach, either explicitly (*Aliyeva and Aliyev v. Azerbaijan*[16]) or implicitly (*Gray v. Germany*[17]). The Court also relied *mutatis mutandis* on the approach previously followed in an Article 6 case concerning a civil action (*Markovic and Others v. Italy*[18]), emphasising the separate and detachable nature of the procedural obligation arising out of Article 2

16. *Aliyeva and Aliyev v. Azerbaijan*, no. 35587/08, §§ 56-57, 31 July 2014.
17. *Gray v. Germany*, no. 49278/09, 22 May 2014.
18. *Markovic and Others v. Italy* [GC], no. 1398/03, §§ 54-56, ECHR 2006-XIV.

(*Šilih v. Slovenia*[19]) capable of binding a State even when the death had occurred outside its jurisdiction.

(b) The Grand Chamber also clarified that, if no investigation or proceedings are instituted in respect of a death outside a respondent State's jurisdiction, the Court would have to determine whether a jurisdictional link could in any event be established. Although the procedural obligation under Article 2 would in principle only be triggered for the State under whose jurisdiction the deceased was to be found, "special features" in a given case would justify a departure from this approach, according to the principles laid down in *Rantsev v. Cyprus and Russia*[20].

Each of these two grounds was sufficient for the Court to establish a jurisdictional link to Turkey engaging therefore its free-standing procedural obligation to investigate in compliance with Article 2: the "TRNC" authorities had instituted a criminal investigation under its domestic law; and "special features" existed related to the situation in Cyprus, based on the fact that the murder suspects were known to have fled to the part of Cypriot territory which was under the effective control of Turkey, the "TRNC", therefore preventing Cyprus from fulfilling its Convention obligations.

(ii) This is the first time that the Court has found a violation of Article 2 under its procedural limb on the sole basis of a failure to cooperate with another State, the case allowing the Grand Chamber to define and develop therefore the duty to cooperate as a component of the procedural obligation under Article 2. After reviewing the cases in which the Court addressed an obligation to cooperate in a cross-border or transnational context under Article 2 (paragraphs 223-28), the Court found as follows:

> 232. ... In cases where an effective investigation into an unlawful killing which occurred within the jurisdiction of one Contracting State requires the involvement of more than one Contracting State, the Court finds that the Convention's special character as a collective enforcement treaty entails in principle an obligation on the part of the States concerned to cooperate effectively with each other in order to elucidate the circumstances of the killing and to bring the perpetrators to justice.
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> 233. The Court accordingly takes the view that Article 2 may require from both States a two-way obligation to cooperate with each other, implying at the same time an obligation to seek assistance

19. *Šilih v. Slovenia* [GC], no. 71463/01, § 159, 9 April 2009.
20. *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 243-44, ECHR 2010 (extracts).

> and an obligation to afford assistance. The nature and scope of these obligations will inevitably depend on the circumstances of each particular case ...

The Court noted, however, that this obligation to cooperate could only be one of means, not of result:

> 235. ... This means that the States concerned must take whatever reasonable steps they can to cooperate with each other, exhausting in good faith the possibilities available to them under the applicable international instruments on mutual legal assistance and cooperation in criminal matters. ...
>
> 236. ... Therefore, the procedural obligation to cooperate under Article 2 should be interpreted in the light of international treaties or agreements applicable between the Contracting States concerned, following as far as possible a combined and harmonious application of the Convention and those instruments, which should not result in conflict or opposition between them ... In this context, the procedural obligation to cooperate will only be breached in respect of a State required to seek cooperation if it has failed to trigger the proper mechanisms for cooperation under the relevant international treaties; and in respect of the requested State, if it has failed to respond properly or has not been able to invoke a legitimate ground for refusing the cooperation requested under those instruments.

Applying these principles to the specific context of extradition and in support of the finding of a violation of the duty to cooperate by Turkey, the Court interestingly noted that the obligation to cooperate under Article 2 should be read in the light of the European Convention on Extradition[21] (in particular Article 18 thereof) and should therefore entail for a State an obligation to examine and provide a reasoned reply to any extradition request from another Contracting State regarding suspects wanted for murder or unlawful killings who are known to be present in its territory or within its jurisdiction.

(iii) Lastly, the Court took into account a special feature of the present case: the duty to cooperate involved a Contracting State and a *de facto* entity under the effective control of another Contracting State.

In such a situation, and in the absence of formal diplomatic relations between the two Contracting States involved, the Court might be required to examine the informal or *ad hoc* channels of cooperation used by the States concerned outside the cooperation mechanisms

21. European Convention on Extradition, ETS 24.

foreseen by the relevant international treaties, while at the same time being guided by the provisions of those treaties as an expression of the norms and principles applied in international law. This led the Court to examine whether Cyprus and Turkey had taken all reasonable steps to cooperate with one another within the framework of the UNFICYP mediation, as well as in the light of the provisions of the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters[22] (Council of Europe Conventions ratified by both respondent States), irrespective of whether those treaties applied to the specific circumstances of the case and to the situation in northern Cyprus.

As to the extent of the cooperation required under Article 2 with *de facto* entities, the Court considered that supplying the whole investigation file to the "TRNC" with the possibility that the evidence would be used for the purposes of trying the suspects there would go beyond mere cooperation between police or prosecuting authorities (contrast *Ilaşcu and Others v. Moldova and Russia*[23]) and would amount in substance to the transfer of the criminal case by Cyprus to the "TRNC" courts. In such a specific situation, the duty to cooperate under Article 2 could not have required Cyprus to waive its criminal jurisdiction over a murder committed in its controlled area in favour of the courts of a *de facto* entity set up within its territory. However, the Court did not address in those findings the more general issue of cooperation in criminal matters with *de facto* or unrecognised entities and its lawfulness under international law, in particular with regard to the principle of non-recognition (as codified in Article 41 § 2 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts[24]).

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

Inhuman or degrading treatment

In *Tomov and Others v. Russia*[25], the Court set out the criteria to be met in order for the transport of prisoners to comply with Article 3.

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22. European Convention on Mutual Assistance in Criminal Matters, ETS 30.

23. *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 177 and 345, ECHR 2004-VII.

24. 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.

25. *Tomov and Others v. Russia*, nos. 18255/10 and 5 others, 9 April 2019. See also under Article 37 (Striking out) and Article 46 (Execution of judgments) below.

The applicant prisoners complained of the inhuman and degrading conditions in which they had been transported by road and rail and of the lack of effective means of redress for their complaints. Of relevance is the fact that the Court has already found in more than fifty judgments against the respondent State that it was in breach of Article 3 on account of prisoners' transport conditions (acute lack of space, inadequate sleeping arrangements, lengthy journeys, restricted access to sanitary facilities, dysfunctional heating and ventilation, etc.). In many of these cases it also found a breach of Article 13 because of the absence of an effective remedy.

In the instant case, the Court once again found that there had been a breach of Articles 3 and 13. It is noteworthy that the Court, with reference to the approach taken by the Grand Chamber when dealing with prison overcrowding in the case of *Muršić v. Croatia*[26], outlined the approach it would take in its consideration of transport-of-prisoners cases, thereby sending a signal to the respondent State on how to bring its domestic law into line with Article 3 standards.

With that in mind, the Court indicated among other factors that a strong presumption of a violation would arise when detainees are transported in conveyances offering less than 0.5 square metres of space per person and in the case of overnight travel by rail, every detainee must have his or her own place to sleep. It also set out a number of aggravating considerations including low ceiling height, restricted access to toilets and to drinking water or food during long trips and sleep deprivation. It further set out a number of circumstances which, of themselves, would not give rise to a violation of Article 3. It observed, for example, that a short or occasional transfer (for example, one or two transfers, not exceeding thirty minutes each) may not reach the threshold of severity under Article 3 but more than one or two transfers would constitute a "continuing situation" and their overall effect had to be assessed.

It is further significant that, on this occasion, and having regard to the respondent State's modest progress in the execution of its earlier judgments, the Court decided to engage with the respondent State on the urgent need for remedial action to deal with what it found to be a structural problem relating to the inhuman conditions of transport of prisoners.

Degrading treatment

The judgment in *Rooman v. Belgium*[27] concerned a mentally ill person who was sentenced to a term of imprisonment and detained in a

26. *Muršić v. Croatia* [GC], no. 7334/13, §§ 136-41, 20 October 2016.

27. *Rooman v. Belgium* [GC], no. 18052/11, 31 January 2019. See also under Article 5 § 1 (e) (Right to liberty and security – Persons of unsound mind) below.

psychiatric institution with no German-speaking personnel, whereas he spoke only German (one of the three official languages of Belgium). Relying on Articles 3 and 5, the applicant complained of not having received the appropriate psychiatric treatment due to the unavailability of German-speaking therapists.

The judgment contains a comprehensive review of the Court's case-law under Article 3 on the medical treatment of ill and vulnerable detainees. The Court also clarified the relationship between Articles 3 and 5 as regards the assessment of the adequacy of the medical treatment. As regards communicating with foreign detainees undergoing treatment for mental-health issues, the Court clarified its case-law on the linguistic element with a view to assessing whether the appropriate pysychiatric care had been provided.

Khan v. France[28] concerned the obligation to protect unaccompanied foreign minors exposed to degrading living conditions.

The applicant, a young unaccompanied Afghan aged between 11 and 12, spent almost seven months in conditions of squalor in the Calais region in the hope of getting to England. It would appear that it was never his intention to apply for asylum status in France. During this period, he lived in makeshift huts in deplorable conditions alongside thousands of other migrants trying to cross the English Channel. Individuals and families living in the shanty towns which grew up in the Calais region lacked among other things adequate shelter, security, food, basic hygiene and access to healthcare. Non-governmental organisations eventually made a successful application to a children's judge on behalf of the applicant (and other minors) to require the French authorities to take the applicant into care. According to the authorities it proved impossible to enforce this measure since the applicant did not contact them and he could not be located. The applicant eventually succeeded in getting to England. In the Convention proceedings he essentially contended that the authorities had not done everything that could reasonably be expected of them to ensure his welfare. The Court agreed and found that there had been a breach of Article 3. The following aspects of the judgment are noteworthy.

The applicant's particular plight had not come to the authorities' attention prior to the decision of the children's judge. He was unknown to the authorities up until that date. He had not sought asylum and he had not been in immigration detention awaiting expulsion. The

28. *Khan v. France*, no. 12267/16, 28 February 2019.

applicant's situation therefore differed from that of the applicant, also an unaccompanied foreign minor, in the case of *Rahimi v. Greece*[29]. In that case, the Court found a breach of Article 3 because the authorities had released the applicant from immigration detention pending his expulsion from the territory, effectively leaving him to fend for himself on the streets. Importantly, in the instant case the Court stressed the extreme vulnerability of the applicant, a child living for months in precarious conditions and at all times exposed to the threat of physical, including sexual, violence. The authorities had not made sufficient efforts to identity unaccompanied minors, like the applicant, in the makeshift encampments, although their presence there was well documented. Importantly, the Court, as in other cases concerning migrants (see, for instance, *Muskhadzhiyeva and Others v. Belgium*[30]; *M.S.S. v. Belgium and Greece*[31]*; Rahimi*, cited above; *Kanagaratnam v. Belgium*[32]; and *Tarakhel v. Switzerland*[33]), had regard in this connection to the findings of domestic (such as the Defender of Rights and the National Consultative Commission on Human Rights) and international bodies (such as the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees and UNICEF).

Furthermore, the Court was not persuaded that the authorities had reacted decisively to the decision of the children's judge. It accepted the difficulties which faced them in identifying and locating the applicant in the encampments and further accepted that those difficulties had been compounded by the applicant's lack of cooperation. However, it remained the case that the focus of the case was the plight of a vulnerable child exposed over several months to degrading, dangerous and precarious living conditions. Even if the respondent State had not created those conditions, it nevertheless had an obligation under Article 3 to protect the applicant from being subjected to them.

Inhuman or degrading punishment

Marcello Viola v. Italy (no. 2)[34] concerned a life prisoner who was required to cooperate with the authorities in their fight against Mafia crime in order to obtain a review of his sentence and a possibility of release.

The applicant was convicted in separate trials of Mafia-related crimes including active leadership of a Mafia clan, kidnapping and murder. At the

29. *Rahimi v. Greece*, no. 8687/08, 5 April 2011.

30. *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07, 19 January 2010.

31. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011.

32. *Kanagaratnam v. Belgium*, no. 15297/09, 13 December 2011.

33. *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014 (extracts).

34. *Marcello Viola v. Italy (no. 2)*, no. 77633/16, 13 June 2019. See also under Article 46 (Execution of judgments) below.

close of the second trial, the court sentenced him to life imprisonment. He alleged under Article 3 of the Convention that his life sentence was neither *de jure* nor *de facto* reducible since the so-called "*ergastolo ostativo*" regime was applied to him on account of the offences of which he was convicted. He argued that other categories of life prisoners had the prospect of release when they had served twenty-six years of their sentence, and benefited from a possibility of release in advance of that term by demonstrating their suitability for reintegration into society. Referring to the relevant provisions of the Criminal Code, the applicant claimed that he could only work towards rehabilitation and thus enjoy a review of his sentence – and a prospect of release – if he succeeded in rebutting the statutory presumption that he no longer had any links with the Mafia and was therefore no longer to be considered dangerous. To do that, he contended, he had to cooperate with the authorities by becoming an informant, thereby putting his and his family's lives at risk of reprisals.

The Court found for the applicant and held that there had been a breach of Article 3 given that the sentencing regime applied to him amounted to an excessive curtailment of his Convention right to a review of his life sentence with the possibility of release. The judgment is noteworthy given the manner in which the Court applied to the circumstances of the applicant's case the principles it had developed in *Vinter and Others v. the United Kingdom*[35], as summarised recently in *Murray v. the Netherlands*[36] and *Hutchinson v. the United Kingdom*[37]. In *Hutchinson*, the Court observed (paragraph 43) among other things that

> ... respect for human dignity requires prison authorities to strive towards a life sentenced prisoner's rehabilitation ... It follows that the requisite review must take account of the progress that the prisoner has made towards rehabilitation, assessing whether such progress has been so significant that continued detention can no longer be justified on legitimate penological grounds ...

Importantly, the Court had due regard to the reasons which led the legislator to place the onus on offenders such as the applicant to prove to the authorities' satisfaction that they had broken their links with the Mafia, failing which they continued to be considered dangerous and ineligible on that account for a review of their sentence. According to the Government, the very nature of Mafia membership justified

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

36. *Murray v. the Netherlands* [GC], no. 10511/10, 26 April 2016.

37. *Hutchinson v. the United Kingdom* [GC], no. 57592/08, 17 January 2017.

the imposition of a requirement that a prisoner cooperate with the authorities in the fight against Mafia-related crime as proof of his or her rehabilitation, and the prisoner had a choice in the matter.

The Court was not however persuaded that the choice between cooperating and refusing to cooperate could be considered voluntary. It referred in this connection to the applicant's fears for his and his family's security if he were to provide assistance to the authorities. In addition, it observed that it could not be excluded that a prisoner's decision to collaborate was in reality nothing more than an opportunistic move on his or her part aimed at securing a sentence review, rather than signifying a genuine resolve to put an end to his or her ties with the Mafia. The Court was particularly concerned by the fact that the law did not afford prisoners like the applicant other ways of proving that they had severed for good their links with the Mafia. It noted that the applicant had successfully followed the reintegration-into-society programme offered by the prison that, had he been an ordinary life prisoner, would have entitled him to a five-year reduction of his sentence. However, by refusing to cooperate with the authorities, the progress the applicant had made while in prison could not be taken into consideration, with the result that he was denied the possibility of demonstrating that his continued imprisonment was no longer justified on legitimate penological grounds.

It is of interest that the Court in its concluding remarks under Article 46 indicated that Italy should provide for the possibility of introducing a review of the life sentence imposed on individuals sentenced under the same regime as the applicant. Such review should take account of the progress prisoners have made during their incarceration towards their rehabilitation. The domestic authorities should assess on that basis whether or not a particular prisoner has severed his or her links with the Mafia, rather than automatically equating a failure to cooperate with continuing dangerousness. Importantly, the Court stressed that Article 3 required a prospect of release but not a right to be released if the prisoner was deemed at the close of the review to still be a danger to society.

Right to liberty and security (Article 5)

Persons of unsound mind (Article 5 § 1 (e))

The judgment in *Rooman v. Belgium*[38] concerned the applicant's deprivation of liberty in a psychiatric institute. Since this detention served

38. *Rooman v. Belgium* [GC], no. 18052/11, 31 January 2019. See also under Article 3 (Degrading treatment) above.

a dual role (social and therapeutic), the Court stated that "appropriate and individualised treatment" was a condition of its lawfulness.

The applicant, a German-speaking Belgian national, was sentenced for serious sexual and other offences. While in prison, he committed further offences and, based on expert reports, his detention in a psychiatric institution was ordered. Since 2004 he has therefore been detained in a social protection facility ("EDS") in the French-speaking region of Belgium: medical reports attest to a psychotic and paranoid personality representing a danger to society. He complained, under Articles 3 and 5, of the failure to provide him with the necessary psychiatric treatment in the EDS. The Chamber found that the applicant's detention without appropriate treatment due to the unavailability of German-speaking therapists for thirteen years (apart from some short periods) violated Article 3. However, it also found that this lack of treatment did not sever the link with the aim of his detention or render his detention unlawful, so that there had been no violation of Article 5.

Further to the delivery of the Chamber judgment, in August 2017 fresh efforts were made to provide the applicant with treatment in German. The Grand Chamber found a violation of Articles 3 and 5 given the lack of treatment prior to August 2017 and no violation of those Articles as regards the care proposed since then.

(i) The principal issue was whether Article 5 § 1 (e) had, in addition to its social role of ensuring the protection of society, a therapeutic one which required appropriate treatment to ensure the detention remained lawful. In its earlier judgments (*Winterwerp v. the Netherlands*[39], and *Ashingdane v. the United Kingdom*[40]), the Court had found that a right to appropriate treatment could not be derived from Article 5 § 1 (e): indeed, the former Commission stated that, while compulsory admission to a psychiatric hospital should fulfil a "dual function, therapeutic and social", the Convention dealt only with the social function of protection in authorising the deprivation of liberty of a person of unsound mind (*Winterwerp v. the Netherlands*[41]). Later, beginning with *Aerts v. Belgium*[42], the case-law began to recognise a link between the lawfulness of a deprivation of liberty and the conditions of its execution so that it was the treatment received, rather than the aim of the detention facility, that

39. *Winterwerp v. the Netherlands*, 24 October 1979, Series A no. 33.

40. *Ashingdane v. the United Kingdom*, 28 May 1985, Series A no. 93.

41. *Winterwerp v. the Netherlands*, no. 6301/73, Commission's report of 15 December 1977, § 84, Series B no. 31.

42. *Aerts v. Belgium*, 30 July 1998, § 49, *Reports of Judgments and Decisions* 1998-V.

was important[43]. This led to a series of judgments against Belgium[44] where the Court found the psychiatric wings of Belgian prisons inappropriate for the lengthy detention of mentally ill persons as they did not receive appropriate care and treatment for their conditions and were thus deprived of any realistic prospect of rehabilitation. That deficiency severed the necessary link with the purpose, and thus the lawfulness, of the detention, leading to a violation of Article 5 § 1.

The Grand Chamber confirmed in the present case that, in light of these case-law developments and current international standards[45], the deprivation of liberty contemplated by Article 5 § 1 (e) can be considered to have a dual function: as well as the social function of protection emphasised in *Winterwerp* and *Ashingdane* (both cited above), it also has a therapeutic one so that the administration of "appropriate and individualised treatment" to such a detainee has become a condition of the lawfulness of that detention. The presence of "appropriate and individualised treatment" is therefore the "essential part" of a decision as to whether a detaining facility is an appropriate one for such detention. The treatment should aim to improve the individual's condition and reduce his dangerousness with a view to his release.

(ii) The Grand Chamber also clarified the relationship between Articles 3 and 5 as regards the assessment of the adequacy of medical treatment for mentally ill detainees. The question of a continued link between the purpose of detention and the conditions in which it is carried out (Article 5 § 1 (e)) and the question of whether those conditions attain a particular threshold of gravity (Article 3) were considered by the Grand Chamber to be of "differing levels of intensity". Accordingly, a finding of no violation of Article 3 does not automatically lead to no violation of Article 5 § 1 and, equally, a care path that could violate Article 3 could also result in a finding that there has been a violation of Article 5 § 1 on the same grounds.

(iii) The applicant, who had legal capacity, had not been receptive to the treatment plan offered since August 2017 and domestic law

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43. *Hutchison Reid v. the United Kingdom*, no. 50272/99, §§ 52 and 55, ECHR 2003-IV, and *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, §§ 139 and 141, 4 December 2018.

44. The four leading judgments: *L.B. v. Belgium*, no. 22831/08, 2 October 2012; *Claes v. Belgium*, no. 43418/09, 10 January 2013; *Dufoort v. Belgium*, no. 43653/09, 10 January 2013; and *Swennen v. Belgium*, no. 53448/10, 10 January 2013; eight judgments of 9 January 2014: *Van Meroye v. Belgium*, no. 330/09; *Oukili v. Belgium*, no. 43663/09; *Caryn v. Belgium*, no. 43687/09; *Moreels v. Belgium*, no. 43717/09; *Gelaude v. Belgium,* no. 43733/09; *Saadouni v. Belgium*, no. 50658/09; *Plaisier v. Belgium,* no. 28785/11; and *Lankester v. Belgium*, no. 22283/10; as well as, more recently, the pilot judgment in *W.D. v. Belgium*, no. 73548/13, 6 September 2016.

45. Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, and Recommendation Rec(2004)10 of the Committee of Ministers to member States concerning the protection of the human rights and dignity of persons with mental disorder.

prohibited its imposition. Drawing on Recommendation Rec(2004)10[46], the Grand Chamber confirmed that, while his disorder weakened his discernment and rendered him vulnerable, this did not imply that treatment was to be imposed. Rather treatment was to be proposed, thereby including the applicant as much as possible in developing his care path and providing him with a choice of treatment. Having regard to the significant efforts made by the authorities to provide the applicant with access to treatment which was, on the face of it, coherent and adapted to his situation, to the short period during which they had an opportunity to implement these treatment measures (since August 2017), and to the fact that the applicant had not always been receptive to them, the Grand Chamber was able to conclude that the treatment available since August 2017 corresponded to the therapeutic aim of the applicant's compulsory confinement.

(iv) Finally, it was accepted that the applicant did not receive treatment because it was not available in German and it is interesting to note how the Court dealt with this language issue under both Articles 3 and 5, with a view to assessing its relevance in any future cases concerning the provision of treatment to foreign detainees.

The Grand Chamber emphasised that the Convention did not guarantee a detainee the right to treatment in his or her own language. As regards Article 3, the question was whether, "in parallel with other factors, necessary and reasonable steps were taken to guarantee communication that would facilitate the effective administration of appropriate treatment". However, it was accepted that as regards psychiatric treatment "the purely linguistic element could prove to be decisive as to the availability or the administration of appropriate treatment, but only where other factors [did] not make it possible to offset the lack of communication". In the context of Article 5, the Social Protection Board (which had committed the applicant to compulsory confinement) had confirmed his right to speak, be understood and to receive treatment in German, a national language in Belgium, so the finding of a violation of Article 5 in the present case could be confined to those very particular facts.

Speediness of review (Article 5 § 4)

The judgment in *Aboya Boa Jean v. Malta*[47] provided an answer to the question whether procedural irregularities in the review of lawfulness automatically result in a violation of Article 5 § 4.

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46. Cited above.

47. *Aboya Boa Jean v. Malta*, no. 62676/16, 2 April 2019.

The applicant was in immigration detention awaiting examination of his asylum application (the Court found the detention to be justified under Article 5 § 1 (f)). Under Maltese law an automatic review of the lawfulness of immigration detention had to take place within seven working days of an individual's placement in detention, and the review period could be extended by a further seven working days. In the applicant's case, and contrary to domestic-law requirements, the automatic review was only carried out after a period of twenty-five calendar days had elapsed. This was due to difficulties in convening the Immigration Appeals Board within the first seven working days (and also because the applicant had requested an adjournment when the Board was ready to consider the case on the twentieth calendar day following his detention, which was within the maximum domestic time-limit of seven plus seven working days).

The applicant complained in the Convention proceedings that the Article 5 § 4 procedure in his case had not been speedy because of the breach of the statutory deadline obliging the Board to carry out an automatic review of the lawfulness of his detention. The Court disagreed and found that there had been no breach of Article 5 § 4.

The judgment is noteworthy as regards the treatment of the nature and scope of Article 5 § 4 proceedings, the Court observing in this connection that the forms of judicial review which satisfy the requirements of Article 5 § 4 may vary from one domain to another "and will depend on the type of deprivation of liberty in issue". Importantly, it pointed out (paragraph 76):

> ... It is not excluded that a system of automatic periodic review of the lawfulness of detention by a court may ensure compliance with the requirements of Article 5 § 4 (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A). ...

One such requirement is that a review must be speedy. On that issue, and having regard to its case-law in this area, the Court observed that the question whether the periods of time which elapse between automatic periodic reviews comply with the speediness requirement had to be determined in the light of the circumstances of each case, bearing in mind the nature of the detention (for example, detention after conviction, detention of persons of unsound mind, detention pending expulsion or, as in the instant case, detention pending the determination of an asylum request).

The Court then went on to address the impact of the procedural irregularities identified above on the Article 5 § 4 proceedings. Importantly, it stressed that although a deprivation of liberty may

be found to be unlawful under Article 5 § 1 because it was not "in accordance with a procedure prescribed by law", breaches of mandatory procedural requirements do not of themselves give rise to a breach of Article 5 § 4. The decisive question in the applicant's case (he did not contest the Board's independence and impartiality or the fairness of the proceedings) was whether the review satisfied the speediness test. It observed on the facts of the applicant's case (paragraph 80):

> ... The Court further considers that while under Article 5 § 1 detention which is not compliant with domestic law induces a violation of that provision, a breach of time-limits for automatic reviews established in law does not necessarily amount to a violation of Article 5 § 4, if the proceedings by which the lawfulness of an applicant's detention were examined were nonetheless decided speedily. The Court notes that, in the present case, despite certain irregularities (the fact that the applicant did not have his initial automatic review within seven working days of the start of his detention as provided by domestic law, nor was this period extended in line with the regular practice) the time which elapsed until his first review, i.e. twenty running days – which due to a postponement became twenty-five running days – cannot be considered unreasonable.

PROCEDURAL RIGHTS

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

Applicability

In *Altay v. Turkey (no. 2)*[48] the Court ruled that oral communication between a lawyer and his or her client is a matter which falls within the notion of "private life" and is a "civil" right.

The applicant is serving a life sentence. Since September 2005 he has had to conduct his consultations with his lawyer in the presence of a prison officer. The measure was imposed by a court when it was discovered that the lawyer had acted in a manner incompatible with the standards of her profession by trying to send the applicant reading material which did not relate to his defence rights. The applicant alleged that the restriction of the privacy of his consultations with his lawyer was incompatible with his rights under Article 8 and that the domestic proceedings in which he had attempted to challenge this measure had not complied with the fairness requirements of Article 6 § 1 since,

48. *Altay v. Turkey (no. 2)*, no. 11236/09, 9 April 2019. See also under Article 8 (Private life) below.

among other things, he had not been afforded an oral hearing. The Court agreed on both counts.

The judgment is noteworthy in that the Court ruled for the first time that an individual's oral communications with his or her lawyer in the context of legal assistance falls within the scope of private life since the purpose of such interaction is to allow that individual to make informed decisions about his or her life.

It is also noteworthy that the Court's view of the nature of the lawyer-client relationship weighed heavily in its assessment of whether the applicant could rely on the civil limb of Article 6 to complain of the fairness of the proceedings which he brought to challenge the restriction. The Government argued that the restriction on the consultation with his lawyer was a preventive measure imposed in the interests of maintaining order and security within the prison and was therefore of a public-law nature. The Court did not agree and replied in the following terms (paragraph 68):

> ... To begin with, the Court finds it appropriate to refer to its findings under Article 8 of the Convention, namely that the lawyer-client confidentiality is privileged and that oral communication with a lawyer falls under the notion of "private life". Thus the substance of the right in question, which concerns the applicant's ability to converse in private with his lawyer, is of a predominately personal and individual character, a factor that brings the present dispute closer to the civil sphere. Since a restriction on either party's ability to confer in full confidentiality with each other would frustrate much of the usefulness of the exercise of this right, the Court concludes that private-law aspects of the dispute predominate over the public-law ones.

The Court's conclusion on the applicability of the civil limb of Article 6 in the applicant's case can be viewed as complementary to its existing case-law in which the Court has held in respect of proceedings instituted in the prison context that some restrictions on prisoners' rights fall within the sphere of "civil rights" (*De Tommaso v. Italy*[49]; *Enea v. Italy*[50]; and *Ganci v. Italy*[51])

The Court's reasoning on the merits of the Article 6 complaint contains an interesting review of the case-law on the right to an oral hearing in the context of civil proceedings. In the applicant's case, it found that there were no exceptional circumstances which justified dispensing with an oral hearing in the impugned proceedings.

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49. *De Tommaso v. Italy* [GC], no. 43395/09, § 147, 23 February 2017.
50. *Enea v. Italy* [GC], no. 74912/01, § 119, ECHR 2009.
51. *Ganci v. Italy*, no. 41576/98, §§ 20-26, ECHR 2003-XI.

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

Tribunal established by law

Guðmundur Andri Ástráðsson v. Iceland[52] concerned compliance with the requirement of "a tribunal established by law".

The applicant's criminal appeal was rejected by the Court of Appeal, a new judicial institution which became operational in 2018. He complained to the Supreme Court that one of the judges on the bench had been appointed to the Court of Appeal in breach of the appointment procedures specified in the applicable legislation. He contended that the Minister of Justice had removed four candidates from the list of the fifteen best qualified proposed by the Evaluation Committee to sit on the new Court of Appeal and, in non-conformity with the proper procedure, replaced them by four others from further down the list, including the impugned judge. Moreover, Parliament, contrary to the relevant rules, approved the amended list *en bloc* without voting on each candidate separately. The Supreme Court acknowledged that the appointment of the judge in question had been irregular, but such irregularity could not, in its view, be considered to have nullified the appointment. The Supreme Court therefore found that the applicant had received a fair trial and refused to quash the conviction and remit the case for a new hearing. The applicant complained in the Convention proceedings that Article 6 had been breached since the Court of Appeal which determined the charges against him was not a "tribunal established by law" as provided for by Article 6 § 1. The Court agreed.

The main issue for the Court was to assess whether the Supreme Court had taken due account of relevant Convention case-law when addressing the applicant's claim that the Court of Appeal had not complied with the "established by law" requirement. Importantly, it observed that it may not question national courts' interpretation of domestic law in this context "unless there has been a flagrant violation of domestic law". According to the relevant case-law, the impugned breach of national law must be of a "flagrant" nature (for the "flagrancy test", see *Lavents v. Latvia*[53], and *DMD GROUP, a.s. v. Slovakia*[54]). It is noteworthy that the Court observed in this connection (paragraph 102) that

> only those breaches of applicable national rules in the establishment of a tribunal that are of a fundamental nature, and form an integral

52. *Guðmundur Andri Ástráðsson v. Iceland*, no. 26374/18, 12 March 2019.
53. *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002.
54. *DMD GROUP, a.s., v. Slovakia*, no. 19334/03, § 61, 5 October 2010.

> part of the establishment and functioning of the judicial system, can be considered to fulfil this criterion. In this context, the concept of a "flagrant" breach of domestic law therefore relates to the nature and gravity of the alleged breach. Furthermore, in the Court's examination of whether the establishment of a tribunal was based on a "flagrant" violation of domestic law, the Court will take into account whether the facts before it demonstrate that a breach of the domestic rules on the appointment of judges was deliberate or, at a minimum, constituted a manifest disregard of the applicable national law ...

The Supreme Court had not taken an explicit position on the question whether the acknowledged breaches of the applicable domestic law were "flagrant". Its interpretation of domestic law had led it to conclude that the defects in the appointment procedure did not mean that the judge concerned had not been legally appointed as a judge. It found that the appointment had not been a nullity, and the applicant had received a fair hearing before the Court of Appeal.

The Court did not agree with that conclusion, for several reasons. Its own conclusion based on those reasons is noteworthy (paragraph 123):

> [T]he process by which A.E. was appointed a judge of the Court of Appeal, taking account of the nature of the procedural violations of domestic law as confirmed by the Supreme Court of Iceland, amounted to a flagrant breach of the applicable rules at the material time. Indeed, the Court finds that the process was one in which the executive branch exerted undue discretion, not envisaged by the legislation in force, on the choice of four judges to the new Court of Appeal, including A.E., coupled with Parliament failing to adhere to the legislative scheme previously enacted to secure an adequate balance between the executive and legislative branches in the appointment process. Furthermore, the Minister of Justice acted, as found by the Supreme Court, in manifest disregard of the applicable rules in deciding to replace four of the fifteen candidates, considered among the most qualified by the Committee, by other four applicants, assessed less qualified, including A.E. The process was therefore to the detriment of the confidence that the judiciary in a democratic society must inspire in the public and contravened the very essence of the principle that a tribunal must be established by law, one of the fundamental principles of the rule of law. The Court emphasises that a contrary finding on the facts of the present case would be tantamount to holding that this fundamental guarantee provided for by Article 6 § 1 of the Convention would be devoid of meaningful protection. ...

Defence rights (Article 6 § 3)

Adequate time and facilities for the preparation of his defence (Article 6 § 3 (b))

Sigurður Einarsson and Others v. Iceland[55] concerned a situation where the defence had been denied access to a mass of data and involvement in its electronic sifting by the prosecution when the latter was gathering relevant information for investigation.

The applicants occupied senior positions in a bank that collapsed in the wake of the 2008 banking crisis in Iceland. They were prosecuted for breach of trust or market manipulation and found guilty. Their defence was given access to the documents included in the investigation file, as well as to the material selected from that file and presented to the trial court. However, the applicants complained that the defence had not been given access to the vast amount of data collected indiscriminately by the prosecution and not included in the investigation file, comprising the particular category of data "tagged" as a result of searches using the Clearwell e-Discovery system. Furthermore, they maintained that the defence had been unable to have a say in the prosecution's electronic sifting of that data and denied the possibility of carrying out a Clearwell search in order to identify evidence that could potentially be exculpatory.

The judgment is noteworthy in three respects.

Firstly, it clarifies the content of the right to have adequate facilities for the preparation of the defence with regard to a vast volume of unprocessed material collected indiscriminately by the prosecution and *a priori* not relevant to the case. For the Court, the data in question were more akin to any other evidence which might have existed but had not been collected by the prosecution at all than to evidence of which the prosecution had knowledge but which it refused to disclose to the defence. Since the prosecution had in fact not been aware of what the content of the mass of data was, and to that extent it had not held any advantage over the defence, the denial of access to such raw data was not a situation of withholding evidence or "non-disclosure" in the classic sense.

Secondly, regarding the processing or sifting of such raw material by the prosecution, the Court specified the nature of the procedural safeguards which should be in place so as to guard against the concealment of information of relevance to the defence. The Court stressed that a possibility of a review by a court was an important safeguard in determining whether access to data should be ensured. Also, an important safeguard in a sifting process would be to ensure

55. *Sigurður Einarsson and Others v. Iceland*, no. 39757/15, 4 June 2019.

that the defence was provided with an opportunity to be involved in the laying-down of the criteria for determining what might be relevant to the case. Particularly, concerning access to the intermediate results of such sifting, for instance to the "tagged" data in question in the instant case, the Court emphasised that it would have been appropriate for the defence to have been afforded the possibility of conducting a search for potentially exculpatory evidence and that any refusal to allow the defence to have further searches of the "tagged" documents carried out would in principle raise an issue under Article 6 § 3 (b).

Finally, it is of interest that the Court took into account the following factors when assessing the overall fairness of the proceedings in issue:

– whether the applicants had pointed to any specific issue which could have been clarified by further searches;

– whether the applicants had formally sought a court order for access to the mass of data collected by the prosecution or for further searches to be carried out;

– whether they had suggested further investigative measures – such as a fresh search using specific keywords.

In the instant case, the Court found no breach of Article 6 §§ 1 and 3 (b) because the lack of access to the data in question was not such that the applicants had been denied a fair trial overall, since they had not provided any specification of the type of evidence they had been seeking and, importantly, it was open to them to seek a judicial review.

OTHER RIGHTS AND FREEDOMS

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

Private life

In response to the first request for an advisory opinion under Protocol No. 16 to the Convention, from the French Court of Cassation, the Court delivered its opinion in April 2019[56]. The issue under consideration was the private life of a child born of surrogacy abroad and the recognition of the legal relationship between that child and the intended mother who has no genetic link to the child.

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56. *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], request no. P16-2018-001, French Court of Cassation, 10 April 2019. See also under Article 1 of Protocol No. 16 (Advisory opinions) below.

In the judgment in *Mifsud v. Malta*[57], the Court examined the obligation to provide a genetic sample in paternity proceedings.

The case concerns a mandatory domestic-law requirement to provide a genetic sample in the context of paternity proceedings. The applicant was approximately 88 years of age when a woman (who was approximately 55 years of age at the time and believed the applicant to be her father) began a civil action to obtain an order for a paternity test for, it was later accepted, moral and financial reasons. He defended the proceedings and the civil courts transferred the matter to the constitutional courts. Despite the mandatory nature of the domestic provision in question, those courts carried out a detailed review of the facts and, notably, of the competing interests involved before deciding to order the test.

The applicant complied, took the test, which confirmed he was the father, and the court ordered the amendment of her birth certificate. The applicant complained under Article 8 of being required to undergo the paternity test. The Court concluded that there had been no violation of the Convention.

Most applications concerning paternity tests are brought by putative daughters or sons seeking to establish the identity of their parents, or by putative parents seeking to disavow or determine paternity. Such applications are therefore brought by the plaintiffs in the domestic proceedings.

This is the first time the Court has dealt with a complaint by a defendant in domestic proceedings on whom a paternity test was imposed and, in finding no violation, the first time the Court has accepted that one can indeed be compelled to give a genetic sample in disputed paternity proceedings. The question for the Court was whether the domestic courts asked the right questions and carried out an adequate balancing of the competing interests involved (the bodily integrity and privacy of the father versus the moral and financial interest of the child in knowing her biological reality). The Court found (paragraph 77) that

> in the present case, by ordering the applicant to undergo a DNA test, after having carried out the requisite balancing exercise of the interests at stake, in judicial proceedings in which the applicant participated via counsel of his choice and in which his rights of defence were respected on a par with those of his adversary, the domestic courts struck a fair balance between the interests of X. to have paternity established and that of the applicant not to undergo the DNA tests.

57. *Mifsud v. Malta*, no. 62257/15, 29 January 2019.

Given the existence in Maltese law of a mandatory requirement, the present judgment did not address the question of any positive obligation on a State to put in place such mandatory tests so that the position remains that outlined in *Mikulić v. Croatia*[58]: the protection of third parties may preclude their being compelled to undergo medical testing of any kind and a system with no means to compel an alleged father to undergo a DNA test could be considered compatible with the obligations deriving from Article 8.

It remains nevertheless interesting to note the reasoning of the Court in the present judgment. In particular, the Court observed that Article 8 did not "as such prohibit recourse to a medical procedure in defiance of the will of a suspect, or in defiance of the will of a witness, in order to obtain evidence" and that such methods, including, the Court noted, in the civil sphere, were "not in themselves contrary to the rule of law and natural justice". The Court went on to point out the "particular importance" in such cases of the legitimate aim of fulfilling the State's positive obligations arising under Article 8 *vis-à-vis* a child (seeking to discover the biological reality of his or her birth).

In *Beghal v. the United Kingdom*[59] the Court ruled on the authorities' stop, search and questioning powers at border controls pursuant to terrorism legislation.

The applicant is a French national, ordinarily resident in the United Kingdom. She visited her husband, also a French national, in a prison in Paris where he was awaiting trial on terrorism charges. On her return to the United Kingdom, the applicant was stopped by border officials at the airport. Acting pursuant to powers granted under Schedule 7 of the Terrorism Act 2000, exercisable in respect of persons passing through United Kingdom ports of entry and exit, the officials informed the applicant that they needed to speak to her to establish if she might be "a person concerned in the commission, preparation or instigation of acts of terrorism". She was further informed that she was not suspected of being a terrorist and that she was not under arrest. The applicant and her luggage were searched. The applicant refused to answer most of the questions put to her. After about two hours, she was told that she was "free to go". The applicant was subsequently charged with, among other offences, wilfully failing to comply with a duty under Schedule 7

58. *Mikulić v. Croatia*, no. 53176/99, ECHR 2002-I.

59. *Beghal v. the United Kingdom*, no. 4755/16, 28 February 2019.

by refusing to answer questions. The Supreme Court ultimately rejected the applicant's challenge to the measures applied to her[60].

In the Convention proceedings the applicant complained among other things that the exercise of the above-mentioned Schedule 7 powers breached her rights under Article 8 of the Convention. The Court agreed with the applicant, finding that, in the absence of adequate safeguards, the interference with her rights was not "in accordance with the law". The following points are noteworthy.

In the first place, the Court accepted (and the Government conceded this) that there had been an interference with the applicant's right to respect for her private life. Significantly, the Court distinguished the applicant's situation from "the search to which passengers uncomplainingly submit at airports" (*Gillan and Quinton v. the United Kingdom*[61]), finding that the Schedule 7 powers exercised in the applicant's case were clearly wider than the immigration powers to which travellers might reasonably expect to be subjected.

Secondly, the Court situated its analysis of the impugned powers in the context of the legitimate need of States to combat international terrorism and the importance of controlling the international movement of terrorists, reiterating that States enjoy a wide margin of appreciation when it comes to matters of national security. Importantly, it stressed that ports and border controls will inevitably provide a crucial focal point for detecting and preventing the movement of terrorists and/or foiling terrorist attacks.

Thirdly, and crucially, it found that the safeguards provided by domestic law at the time the applicant was stopped were insufficient to curtail the Schedule 7 powers so as to offer her adequate protection against arbitrary interference with her right to respect for her private life. It highlighted the very broad discretion afforded to the authorities in deciding if and when to exercise the powers (see above for the manner in which the applicant was stopped). It is of some significance that the Court did not consider that the absence of a requirement of reasonable suspicion that a person was in some way involved in terrorism by itself rendered the exercise of the powers in the applicant's case unlawful within the meaning of Article 8 § 2. It noted for example that guidance had been provided to examining officers which attempted to clarify

60. Schedule 7 had been amended before the Supreme Court's examination of the applicant's appeal. The amending legislation, adopted in 2014, provided for more stringent safeguards. The Supreme Court considered the applicant's complaints in the light of the amended Schedule 7 power.

61. *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 64, ECHR 2010 (extracts).

when they could exercise their discretion to stop particular individuals. Nevertheless, the Court found that, at the time the applicant was stopped, the Schedule 7 scheme could not be considered Convention-compliant for the following reasons:

(i) persons could be examined for up to a maximum of nine hours and were compelled to answer questions put to them without the right to have a lawyer present;

(ii) the absence of any obligation on the part of the examining officer to show "reasonable suspicion" would appear to have made it difficult for persons to have the lawfulness of the decision to exercise the Schedule 7 power judicially reviewed;

(iii) although the use of the powers was subject to independent oversight by the Independent Reviewer of Terrorism Legislation, it did not appear to the Court that such oversight was capable of compensating for the otherwise insufficient safeguards applicable to the operation of the Schedule 7 regime.

In *Altay v. Turkey (no. 2)*[62] the Court ruled that oral communication between a lawyer and his or her client is a matter which falls within the notion of "private life".

The applicant is serving a life sentence. Since September 2005 he has had to conduct his consultations with his lawyer in the presence of a prison officer. The measure was imposed by a court when it was discovered that the lawyer had acted in a manner incompatible with the standards of her profession by trying to send the applicant reading material which did not relate to his defence rights. In the Convention proceedings the applicant alleged that the restriction of the privacy of his consultations with his lawyer was incompatible with his rights under Article 8. The Court agreed.

The judgment is noteworthy in that the Court ruled for the first time that an individual's oral communications with his or her lawyer in the context of legal assistance falls within the scope of private life since the purpose of such interaction is to allow that individual to make informed decisions about his or her life. Significantly, it observed in this connection (paragraph 49):

> ... More often than not the information communicated to the lawyer involves intimate and personal matters or sensitive issues.

62. *Altay v. Turkey (no. 2)*, no. 11236/09, 9 April 2019. See also under Article 6 § 1 (Right to a fair hearing in civil proceedings – Applicability) above.

> It therefore follows that whether it be in the context of assistance for civil or criminal litigation or in the context of seeking general legal advice, individuals who consult a lawyer can reasonably expect that their communication is private and confidential.

The Court had regard to its earlier case-law under Article 8, in particular regarding the privileged nature of the lawyer-client relationship in the context of correspondence between a prisoner and his lawyer. It will be recalled that in its judgment in *Campbell v. the United Kingdom*[63], the Court saw no reason to distinguish between the different categories of correspondence with lawyers. It observed that, whatever their purpose, they concerned matters of a private and confidential character. Importantly, in the instant case (paragraph 51) the Court observed that

> this principle applies *a fortiori* to oral, face-to-face communication with a lawyer. It therefore follows that in principle oral communication as well as correspondence between a lawyer and his or her client is privileged under Article 8 of the Convention.

Although the right to confidential communications with a lawyer is not absolute, any interference with that right has to be justified in accordance with the requirements of the second paragraph of Article 8. In the applicant's case the Court found that the impugned restriction failed to satisfy the "in accordance with the law" test. It noted that the domestic court had imposed the restriction in response to the lawyer's attempt to send reading material to the applicant that was not related to the rights of the defence. However, the interception of correspondence solely because it did not relate to the rights of the defence was not provided for in the law relied on by the domestic court as a ground for restricting the confidentiality of consultations with a lawyer. For the Court, the manner of interpretation and application of the relevant law to the circumstances of the applicant's case was manifestly unreasonable and thus not foreseeable within the meaning of Article 8 § 2.

Family life

The judgment in *Guimon v. France*[64] concerned the refusal to allow a prisoner convicted of terrorist offences to leave prison under escort in order to pay her respects to her late father.

The applicant, a member of the terrorist organisation ETA, had been in detention for eleven years for serious terrorist offences when she

63. *Campbell v. the United Kingdom*, 25 March 1992, § 46, Series A no. 233.
64. *Guimon v. France*, no. 48798/14, 11 April 2019.

requested escorted leave in order to travel to a funeral home to pay her respects to her late father. She had not seen her father for five years, since he had not been able to visit her in prison due to his ill health and the fact that the prison was very far away. The applicant had submitted her request for prison leave promptly, leaving the authorities six days in which to organise an escort. Her request was refused for logistical reasons, as were all her appeals.

The case is interesting in that it adds to and clarifies the case-law concerning prison leave under escort in order to attend funerals (*Płoski v. Poland*[65]; *Kubiak v. Poland*[66]; and *Kanalas v. Romania*[67]), transposing the relevant principles of the proportionality analysis to the terrorism context.

The Court concluded that there had been no violation of Article 8.

It noted that, according to the judicial authorities, the escort arrangements needed to be particularly robust, given the applicant's criminal profile (she was serving several prison sentences for acts of terrorism and continued to assert her membership of ETA), the context in which the leave would have to be organised (returning a convicted Basque activist to the Basque Country, where she had much support) and factual considerations such as the geographical distance of almost 650 km.

The Court saw no reason to question the Government's assertion that the time available had been insufficient to arrange an escort comprising officers specially trained in the transfer and supervision of a prisoner convicted of terrorist offences and to organise the prior inspection of the premises. The refusal had not, therefore, been disproportionate to the legitimate aims pursued, which were to prevent the risks of escape and disturbance of public order, to ensure public safety and to prevent disorder and crime.

ADVISORY OPINIONS (ARTICLE 1 OF PROTOCOL No. 16[68])

In response to the first request for an advisory opinion under Protocol No. 16 to the Convention, from the French Court of Cassation, the Court delivered its opinion in April 2019[69]. The issue under consideration was

65. *Płoski v. Poland,* no. 26761/95, 12 November 2002.

66. *Kubiak v. Poland*, no. 2900/11, 21 April 2015.

67. *Kanalas v. Romania*, no. 20323/14, 6 December 2016.

68. Protocol No. 16 to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

69. *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and*

the private life of a child born of surrogacy abroad and the recognition of the legal relationship between that child and the intended mother who has no genetic link to the child.

The judgment in *Mennesson v. France*[70] concerned applicant children born in the United States of America through a legal gestational surrogacy arrangement. Their biological father and intended mother, who were married, were unable to obtain recognition in France of the parent-child relationship. The Court found that, having regard to the consequences of this serious restriction on the identity and right to respect for the private life of the children, the prevention of both the recognition and establishment under domestic law of their legal relationship with their biological father meant that the State had exceeded its margin of appreciation. It found a violation of the children's right to respect for their private life guaranteed by Article 8. In so concluding, the Court considered that a serious question arose as to the compatibility of this restriction with the children's best interests, an analysis which took on a special dimension where one of the intended parents was a biological parent, having regard to the importance of biological parentage as a component of identity. In the wake of that judgment, domestic law changed; registration of the details of the birth certificate of a child born through surrogacy abroad became possible for the intended father where he was the biological father, and where the intended mother was married to the biological father, it became possible to adopt the child. It was during the re-examination of the later appeal of the Mennessons that the Court of Cassation requested this Court to give an advisory opinion under Protocol No. 16 on two questions concerning the intended mother:

> 1. By refusing to enter in the register of births, marriages and deaths the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the "intended mother" as the "legal mother", while accepting registration in so far as the certificate designates the "intended father", who is the child's biological father, is a State Party overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the "intended mother"?

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the intended mother [GC], request no. P16-2018-001, French Court of Cassation, 10 April 2019.

70. *Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts).

> 2. In the event of an answer in the affirmative to either of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?

(i) This is the first advisory opinion of the Court under Protocol No. 16 and the Court took the opportunity to define the boundaries of advisory-opinion requests and of the requests made in the present case. It confirmed that the Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in the light of Convention law, or to rule on the outcome of the domestic proceedings. Its role is limited to furnishing an opinion on the questions submitted and it is for the requesting court to draw, as appropriate, the conclusions which flow from the Court's opinion for the relevant provisions of national law and for the outcome of the case. Moreover, the opinion of the Court is to be confined to the issues directly connected to the pending domestic proceedings. Consequently, the Court clarified that the present request did not concern a surrogacy arrangement abroad using the eggs of the intended or surrogate mother, or the right to respect for family life of the children or of the intended parents, or the latter's right to respect for their private life.

In addition, the Court received several submissions, including from the Mennessons and their children, the French and other Governments, as well from certain organisations. The Court made it clear that its role was not to reply to all the grounds and arguments submitted, or to set out in detail the basis for its response or to rule in adversarial proceedings on contentious applications by means of a binding judgment. Rather, its role was, within as short a time-frame as possible, "to provide the requesting court or tribunal with guidance enabling it to ensure respect for Convention rights when determining the case before it".

(ii) In responding to the questions of the Court of Cassation, the Court has developed its case-law under Article 8. The *Mennesson* line of case-law[71] required domestic law to provide for a possibility of recognising the legal relationship between children born of surrogacy abroad and their intended and biological father. The present opinion extends that requirement to the intended mother who has no genetic link with the child, but to a more limited extent (emphasis added):

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71. *Labassee v. France*, no. 65941/11, 26 June 2014; *Foulon and Bouvet v. France*, nos. 9063/14 and 10410/14, 21 July 2016; and *Laborie v. France*, no. 44024/13, 19 January 2017.

> [When] a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent-child relationship with the intended father has been recognised in domestic law:
>
> 1. the child's right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a *possibility of recognition of a legal parent-child relationship with the intended mother*, designated in the birth certificate legally established abroad as the "legal mother";
>
> 2. the child's right to respect for private life within the meaning of Article 8 of the Convention does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; *another means, such as adoption* of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented *promptly and effectively*, in accordance with the child's best interests.

Two factors were of key importance in reaching these conclusions. The best interests of the child being paramount, the impact of not recognising a parent-child relationship on the private life of the child was a key factor in the affirmative response to the first question and it also allowed the Court, in response to the second question, to require that any alternative means of recognition had to be prompt and effective. The scope of the margin of appreciation was also central, as was, consequently, the existence of any common ground between the laws of Contracting States. In this respect, and while the Court noted "a certain trend towards the possibility of legal recognition of the relationship between children conceived through surrogacy abroad and the intended parents, there [was] no consensus in Europe on this issue" and, where such recognition was possible, there was no consensus on the procedure used.

While, as noted above, the Court confirmed that opinions under Protocol No. 16 are to be confined to the scenario raised by the requesting court, the present opinion may contain elements of broader application. In the first place, the Court noted that it had placed some emphasis in its case-law to date on the biological link with at least one intended parent and that that was the factual scenario before it: the Court went on to make clear that "it may be called upon in the future to further develop its case-law in this field, in particular in view of the evolution of the issue of surrogacy". In addition, the Court also

confirmed that the necessity to provide the possibility of recognising a mother-child relationship would apply with even greater force where the child was conceived using the eggs of the intended mother. Finally, and although the couple in the scenario before the Court were married, the Court observed that adoption, invoked as another means of recognising a parent-child relationship, was only available under French law when the intended parents were married and that it is for the French courts to decide whether domestic adoption law would satisfy Convention requirements, taking into account the vulnerable position of the children concerned while adoption proceedings are pending.

JUST SATISFACTION (ARTICLE 41)

Georgia v. Russia (I)[72] concerned the award of just satisfaction in an inter-State case.

In its principal judgment[73] of 3 July 2014 in the above-mentioned case, the Court held that in the autumn of 2006 a coordinated policy of arresting, detaining and expelling Georgian nationals had been put in place in the Russian Federation which amounted to an administrative practice for the purposes of Convention case-law. It also held that there had been a violation of, *inter alia*, Article 4 of Protocol No. 4, Article 5 §§ 1 and 4 and Article 3 of the Convention, and Article 13 of the Convention taken in conjunction with Article 5 § 1 and Article 3. The Court assumed in its judgment that "more than 4,600 expulsion orders were issued against Georgian nationals, of whom approximately 2,380 were detained or expelled".

The question of the application of Article 41 was reserved. The instant judgment was adopted at the close of the Court's examination of the parties' written submissions on that question, notably on the number of Georgian nationals alleged by the applicant Government to be victims of the violations established. In the latter connection, and within the framework of an adversarial procedure, the applicant Government submitted at the Court's request a detailed list of 1,795 alleged and identifiable victims, the accuracy of which was in turn challenged by the respondent Government.

The judgment is of interest given that this was the first time since the just-satisfaction judgment in *Cyprus v. Turkey*[74] that the Court had been required to examine the question of just satisfaction in an inter-State

72. *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, 31 January 2019.
73. *Georgia v. Russia (I)* [GC], no. 13255/07, ECHR 2014 (extracts).
74. *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, §§ 43-45, ECHR 2014.

case. In *Cyprus v. Turkey*, the Court concluded that Article 41 did, as such, apply to inter-State cases, and then proceeded to set out three criteria for establishing whether awarding just satisfaction was justified in an inter-State case, namely: (i) the type of complaint made by the applicant Government, which had to concern the violation of basic human rights of its nationals (or other victims); (ii) whether the victims could be identified; and (iii) the main purpose of bringing the proceedings.

Importantly, the Court confirmed in the instant case the conclusion reached in *Cyprus v. Turkey* (cited above) and found that the criteria triggering the applicability of Article 41 had been satisfied. The applicant Government were therefore entitled to submit a claim for just satisfaction. The key issue for the Court was to determine – in view of the information submitted by the applicant Government on alleged victims and the respondent Government's objections to its reliability – the "sufficiently precise and objectively identifiable" group of people which it would use as the basis for the purposes of making an award of just satisfaction. Significantly, the Court rejected the applicant Government's argument that it should take the figure referred to in paragraph 135 of the principal judgment as a basis to award just satisfaction. It noted among other matters (paragraph 52):

> The wording used by the Court in its reasoning in paragraph 135 of the principal judgment ... is cautious: ... In the second sentence of that paragraph the Court confines itself to indicating that it "therefore assumes" (in French: "*part donc du principe*") that more than 4,600 expulsion orders were issued against Georgian nationals, of whom approximately 2,380 were detained and forcibly expelled. It thus bases itself on an approximate number of expulsion and detention orders when examining whether there was an administrative practice, which is very different from establishing the identity of individual victims.

Contrasting the situation which obtained in *Cyprus v. Turkey*[75] (multiple violations of the Convention following a military operation by the respondent Government), the Court observed that in the instant case the finding of the existence of an administrative practice contrary to the Convention was based on *individual expulsion decisions*, which meant that the parties must be in a position to identify the Georgian nationals concerned and to furnish it with the relevant information. It had initiated an adversarial procedure to that end, underpinned by the duty of both parties to cooperate with the Court (see in this connection Article 38 of

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

the Convention and Rule 44A of the Rules of Court). The outcome of that procedure was the submission by the applicant Government of a list of 1,795 individual victims and the filing by the respondent Government of their response. The Court's treatment of the information supplied by the parties is noteworthy for the following reasons.

In the first place, it rejected the respondent Government's submission that the Court itself should identify each of the individual victims of the violations found by it in adversarial proceedings. It observed in this connection with reference to its established case-law "that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of specific facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions". Importantly, it also added that this was particularly true of requests for just satisfaction submitted in an inter-State case.

Secondly, the Court carried out a preliminary examination of the list of 1,795 alleged victims submitted by the applicant Government, having regard to the comments in reply submitted by the respondent Government (the methodology adopted is described in paragraphs 68-72). In short, it proceeded on the assumption that the individuals named in the applicant Government's list could be considered victims of violations of the Convention and, given the circumstances of the case, the burden of proof rested with the respondent Government to rebut this. This preliminary examination ultimately enabled the Court to conclude that, for the purposes of awarding just satisfaction, it could use as a basis a "sufficiently precise and objectively identifiable" group of at least 1,500 Georgian nationals who were victims of a violation of Article 4 of Protocol No. 4, among whom a certain number who were also victims of a violation of Article 5 § 1 and Article 3 of the Convention (see paragraph 70 for the Court's explanation for the exclusion of 290 persons from the list of victims).

Ruling on an equitable basis, the Court deemed it reasonable to award the applicant Government a lump sum of 10,000,000 euros in respect of non-pecuniary damage sustained by this group of at least 1,500 Georgian nationals, to be distributed to each of them in accordance with a number of criteria indicated in the judgment. The modalities of distribution and the obligations devolving on both parties are noteworthy. The Court considered (paragraph 79) that

> it must be left to the applicant Government to set up an effective mechanism for distributing the above-mentioned sums to the

> individual victims of the violations found in the principal judgment while having regard to the aforementioned indications given by the Court ..., and excluding the individuals who cannot be classified as victims according to the above-mentioned criteria ... This mechanism must be put in place under the supervision of the Committee of Ministers and in accordance with any practical arrangements determined by it in order to facilitate execution of the judgment. This distribution must be carried out within eighteen months from the date of the payment by the respondent Government or within any other period considered appropriate by the Committee of Ministers ...

BINDING FORCE AND EXECUTION OF JUDGMENTS (ARTICLE 46)

Execution of judgments

Tomov and Others v. Russia[76] concerned a structural problem relating to the inhuman conditions of transport of prisoners.

The applicant prisoners complained of the inhuman and degrading conditions in which they had been transported by road and rail and of the lack of effective means of redress for their complaints. Of relevance is the fact that the Court has already found in more than fifty judgments against the respondent State that it was in breach of Article 3 on account of prisoners' transport conditions (acute lack of space, inadequate sleeping arrangements, lengthy journeys, restricted access to sanitary facilities, dysfunctional heating and ventilation, etc.). In many of these cases it also found a breach of Article 13 because of the absence of an effective remedy. Equally relevant is the fact that there are more than 680 prima facie meritorious cases pending before the Court in which the main or secondary complaint relates to the alleged inhuman conditions of transport of prisoners, with the potential for many more such cases.

In the instant case, the Court once again found that there had been a breach of Articles 3 and 13. It is noteworthy that the Court, with reference to the approach taken by the Grand Chamber when dealing with prison overcrowding in the case of *Muršić v. Croatia*[77], outlined the approach it would take in its consideration of transport-of-prisoners cases, thereby

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76. *Tomov and Others v. Russia*, nos. 18255/10 and 5 others, 9 April 2019. See also under Article 3 (Inhuman or degrading treatment) above and Article 37 (Striking out) below.

77. *Muršić v. Croatia* [GC], no. 7334/13, §§ 136-41, 20 October 2016.

sending a signal to the respondent State on how to bring its domestic law into line with Article 3 standards.

It is significant that, on this occasion, and having regard to the respondent State's modest progress in the execution of its earlier judgments, the Court decided to engage with the respondent State on the urgent need for remedial action to deal with what it found to be a structural problem. Importantly, it noted in its reasoning under Article 46 of the Convention (paragraph 182):

> Taking into account the recurrent and persistent nature of the problem, the large number of people it has affected or is capable of affecting, and the urgent need to grant them speedy and appropriate redress at domestic level, the Court considers that repeating its findings in similar individual cases would not be the best way to achieve the Convention's purpose. It thus feels compelled to address the underlying structural problems in greater depth, to examine the source of those problems and to provide further assistance to the respondent State in finding appropriate solutions and to the Committee of Ministers in supervising the execution of the judgments ...

In line with its previous judgments on inhuman conditions of detention (see, for example, *Varga and Others v. Hungary*[78]; *Orchowski v. Poland*[79]; *Norbert Sikorski v. Poland*[80]; *Ananyev and Others v. Russia*[81]; and *Torreggiani and Others v. Italy*[82]), the Court outlined the measures that might help solve the structural problem it had identified, including the placement of prisoners as close to their home as possible (see *Polyakova and Others v. Russia*[83], on the placement of prisoners in remote facilities in Russia) and the replacement or refitting of prison vans and railway carriages in a manner which brings, for example, seating space into line with Article 3 requirements (see, under Article 3 above, the summary of the factors the Court considers to be incompatible with Article 3).

Importantly, the Court also stressed the need for preventive and compensatory remedies to be put in place that would allow all prisoners in the applicants' position to complain of their transport conditions. Significantly, the Court ruled that such remedies needed to take effect

78. *Varga and Others v. Hungary*, nos. 14097/12 and 5 others, § 102, 10 March 2015.

79. *Orchowski v. Poland*, no. 17885/04, § 154, 22 October 2009.

80. *Norbert Sikorski v. Poland*, no. 17599/05, § 161, 22 October 2009.

81. *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 197-203 and 214-31, 10 January 2012.

82. *Torreggiani and Others v. Italy*, nos. 43517/09 and 6 others, §§ 91-99, 8 January 2013.

83. *Polyakova and Others v. Russia*, nos. 35090/09 and 3 others, 7 March 2017.

in the domestic legal system without undue delay, and not later than eighteen months after the judgment becomes final.

Marcello Viola v. Italy (no. 2)[84] concerned a life prisoner who was required to cooperate with the authorities in their fight against Mafia crime in order to obtain a review of his sentence and a possibility of release.

The Court indicated under Article 46 that Italy should provide for the possibility of introducing a review of the life sentence imposed on individuals sentenced under the same regime as the applicant. Such review should take account of the progress prisoners have made during their incarceration towards their rehabilitation. The domestic authorities should assess on that basis whether or not a particular prisoner has severed his or her links with the Mafia, rather than automatically equating a failure to cooperate with continuing dangerousness. Importantly, the Court stressed that Article 3 required a prospect of release but not a right to be released if the prisoner was deemed at the close of the review to still be a danger to society.

Infringement proceedings

In *Ilgar Mammadov v. Azerbaijan*[85] the Court examined for the first time an application in the context of infringement proceedings. In this procedure, which is provided for by Article 46 § 4, the Court determines whether a State has fulfilled its obligation under Article 46 § 1 to abide by a final judgment of the Court.

In 2014 the Court delivered its first judgment in *Ilgar Mammadov v. Azerbaijan*[86]. It found a violation of, *inter alia*, Article 18 in conjunction with Article 5, the Court considering that the purpose of the charges against Mr Mammadov and of his pre-trial detention had been to silence and punish him for his stance against the Government. He was later convicted[87]. From the outset of the process of execution of the first *Ilgar Mammadov* judgment, the Committee of Ministers ("the CM") considered that the above-described violation cast doubt on the later criminal proceedings and called for Mr Mammadov's release. Since he

84. *Marcello Viola v. Italy (no. 2)*, no. 77633/16, 13 June 2019. See also under Article 3 (Inhuman or degrading punishment) above.

85. *Ilgar Mammadov v. Azerbaijan* [GC], no. 15172/13, 29 May 2019.

86. *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014.

87. Proceedings later found to violate Article 6 in *Ilgar Mammadov v. Azerbaijan (no. 2)*, no. 919/15, 16 November 2017.

was not released, on 5 December 2017 the CM referred a question to the Court under Article 46 § 4: whether the State had failed to abide by its obligations under Article 46 § 1 because Mr Mammadov had not been unconditionally released. Later, in August 2018, Mr Mammadov was released, by the court of appeal, on a conditional basis for good behaviour having served two-thirds of his sentence, conditions then set aside in March 2019 by the Supreme Court which deemed he had served his sentence in full.

The Grand Chamber has found that, having regard to these limited steps, the respondent State did not fulfil its obligation under Article 46 § 1 to abide by the first *Ilgar Mammadov* judgment.

(i) The question of the institutional balance between the Court and the CM has been central to many cases before the Court (for example, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*[88], and *Burmych and Others v. Ukraine*[89]) and the Court's position is that a State's compliance with a judgment falls outside of its jurisdiction, unless it is raised in the infringement procedure for which Article 46 § 4 provides (*Moreira Ferreira v. Portugal (no. 2)*[90]). As this is the first time that the Court has had to examine a request under this infringement procedure, the first novel aspect of this case lies in how the Court frames its role under this provision.

In the first place, the Grand Chamber examined the extent to which it is to be guided by the findings of the CM in the prior execution process. It confirmed that the infringement proceedings were not intended to upset the fundamental balance between the CM and the Court. While the Court was required by Article 46 § 4 to make a *de novo* and definitive legal assessment of compliance, it acknowledged the value of the extensive *acquis* of the CM in carrying out its tasks under Article 46 § 2 and concluded that in infringement proceedings it would "take into consideration all aspects of the procedure" before the CM including the measures indicated by it and the CM's conclusions in the supervision process. Secondly, an important question arose as to the point in time at which the Court should consider whether infringement had occurred: it was found to be the date on which the CM referred the question under Article 46 § 4 because the execution procedure was a process and it was on that date the CM had considered that the State's actions were not "timely, adequate and sufficient".

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88. *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, ECHR 2009.

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

90. *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 102, 11 July 2017.

(ii) The Court went on to outline and apply its existing case-law as regards the content of the obligations to implement a judgment contained in Article 46 § 1. In particular, the Court reaffirmed the obligation on the State to make restitution to the individual provided it is not "materially impossible" and does not "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation", principles reflected in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts[91], in the practice of the CM and in Rule 6 of the CM Rules for the supervision of the execution of judgments and of the terms of friendly settlements.

The relevant aspects of those principles concerning the need to make restitution were then applied to determine the key issue, namely the individual measures required to abide by the judgment finding a violation of Article 18 in conjunction with Article 5 in the first *Ilgar Mammadov* judgment. The Court observed that this violation had occurred because the authorities were driven by improper reasons, namely, to silence or punish Mr Mammadov. Consequently, and importantly, it considered that that violation of Article 18 in conjunction with Article 5 vitiated any later action resulting from the pursuit of the abusive criminal charges (his conviction and imprisonment). Accordingly, the Court found that to achieve restitution, the State had to eliminate the negative consequences of the abusive charges, including ensuring Mr Mammadov's release. Such restitution was considered achievable and, indeed, the State had not argued that restitution was "materially impossible" or involved "a burden out of all proportion to the benefit deriving from restitution instead of compensation". The finding that the violation of Article 18 in conjunction with Article 5 vitiated the later criminal proceedings is interesting in light of the observations of the Court as regards the complaint under Article 18 in conjunction with Article 6 in *Ilgar Mammadov v. Azerbaijan (no. 2)*[92].

Finally, the Grand Chamber rejected the argument that any of the domestic proceedings, including those which eventually led to Mr Mammadov's unconditional release, constituted restitution. The domestic courts had rejected the findings of this Court in the first *Ilgar Mammadov* judgment and upheld his conviction based on the abusive charges. As such, they did not eliminate the negative consequences of the imposition of the abusive charges: Mr Mammadov had served his

91. 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.
92. *Ilgar Mammadov (no. 2)*, cited above, §§ 260-62.

prison sentence and remained convicted on the basis of those charges. In any event, his release occurred after he had been detained for nearly four years and, importantly, after the CM had referred the case to the Court under Article 46 § 4, that latter date being the relevant one for the Court's examination. It concluded that the limited steps taken by the State did not permit it to find that the State Party had acted in "good faith", in a manner compatible with the "conclusions and spirit" of the first *Ilgar Mammadov* judgment, or in a way that would make practical and effective the protection of the Convention rights which the Court had found to have been violated.

Since the Court found that the State had failed to fulfil its obligation under Article 46 § 1, the judgment is final and will be referred back to the CM pursuant to Article 46 § 5 of the Convention.

OTHER CONVENTION PROVISIONS

Striking out (Article 37)

The decisions in *Taşdemir v. Turkey*[93], *Kutlu and Others v. Turkey*[94], and *Karaca v. Turkey*[95] concerned Article 2 and 3 cases in which unilateral declarations had been accepted with no undertaking to reopen the investigation, since there existed *de jure* or *de facto* obstacles to reopening.

The applicants alleged that their relatives had been unlawfully killed by State agents. In two of the applications (*Kutlu and Others* and *Karaca*), the accused had been acquitted on evidential and self-defence grounds, respectively. In *Taşdemir* the criminal proceedings had been discontinued at the appeal stage as time-barred.

In all three cases the Government submitted unilateral declarations acknowledging that there had been a breach of Article 2 and proposing compensation, but containing no undertaking to reopen or to continue the investigations. The Court struck the applications out of its list of cases on the basis of these declarations.

(i) The Court accepted that the obligation to investigate alleged ill-treatment by State agents subsists, even after a decision striking out, on the basis of a unilateral declaration, an applicant's substantive and procedural complaints under Articles 2 and 3 (*Tahsin Acar v. Turkey*[96]).

93. *Taşdemir v. Turkey* (dec.) (striking out), no. 52538/09, 12 March 2019.
94. *Kutlu and Others v. Turkey* (dec.), no. 18357/11, 12 March 2019.
95. *Karaca v. Turkey* (dec.), no. 5809/13, 12 March 2019.
96. *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 84, ECHR 2004-III.

Indeed, this is the case even if the State has not explicitly undertaken to continue/reopen the investigation in the terms of the unilateral declaration (*Jeronovičs v. Latvia*[97]).

The present decisions recognise an exception to that principle in that they accept that reopening an investigation cannot be required when there are *de jure* obstacles thereto. In *Karaca* a reopening obligation would be in conflict with the *ne bis in idem* principle (Article 4 of Protocol No. 7) since the village guards who had killed the applicant's son were known but had been acquitted on self-defence grounds and could not be put on trial a second time for the same offence. In *Taşdemir* the criminal proceedings against the police officers had been terminated on account of the expiry of the statute of limitations so that reopening the investigation despite that fact would be in conflict with the principle of legal certainty and the defendants' rights under Article 7 of the Convention.

Although not directly relevant to the present cases, the decisions also recognise that there may also be *de facto* obstacles to reopening or continuing an investigation. If a long time has passed since the incident, evidence might have disappeared, been destroyed or become untraceable and it might therefore in practice no longer be possible to reopen an investigation and conduct it in an effective fashion.

(ii) Having regard to the States' obligation to remove legal obstacles to providing adequate redress (*Maestri v. Italy*[98]), it is of significance that the Court stressed, as it did in *Jeronovičs,* that the unilateral-declaration procedure is not intended to allow a Government to escape their responsibility for breaches of the most fundamental rights contained in the Convention.

Importantly the Court indicated the sort of factors to which it would have regard in deciding whether, in the circumstances, it is *de jure* or *de facto* impossible to reopen an investigation, including:

– the nature and the seriousness of the alleged violation;

– the identity of the alleged perpetrator;

– whether other persons not involved in the proceedings may have been implicated;

– the reason the criminal proceedings have been terminated;

– the shortcomings and any defects in the criminal proceedings preceding the decision to bring the criminal proceedings to an end; and

97. *Jeronovičs v. Latvia* [GC], no. 44898/10, §§ 117-18, 5 July 2016.

98. *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I.

– whether the alleged perpetrator contributed to the shortcomings and defects that led to the criminal proceedings being brought to an end.

(iii) Finally, the decision in *Kutlu and Others* is quite specific. While the accused was acquitted on evidential grounds, there remained the possibility of investigating the involvement of other persons in the killing. Following the amendment of the Code of Criminal Procedure in 2018, an applicant can ask the relevant prosecutor to reopen the investigations even where his application to this Court has been struck out on the basis of a unilateral declaration. Hence the Court could strike the application out of its list of cases as there appeared to be no obstacle to reopening the investigation.

In *Tomov and Others v. Russia*[99] the Court identified a structural problem relating to the inhuman conditions of transport of prisoners.

The Court rejected the Government's request to strike out three of the applications on the strength of unilateral declarations in which they acknowledged breaches of Articles 3 and 13 and proposed to pay compensation to the applicants concerned. Interestingly, the Court reasoned (paragraph 100):

> ... Acceptance of the Government's request to strike the present applications out of the Court's list would leave the current situation unchanged, without any guarantee that a genuine solution would be found in the near future ... Nor would it advance the fulfilment of the Court's task under Article 19, that is to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto" ...

99. *Tomov and Others v. Russia*, nos. 18255/10 and 5 others, 9 April 2019. See also under Article 3 (Inhuman or degrading treatment) and Article 46 (Execution of judgments) above.