COUNCIL OF EUROPE CONSEIL DE L'EUROPE
Committee of Ministers
Comité des Ministres

Ministers' Deputies

Notes on the Agenda

(Restricted) 29 November 2016

COMPILATION OF REVISED NOTES ON THE AGENDA

1273rd meeting (DH)
6-8 December 2016

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-1 9 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-1 Luli and others v. Albania (Application No. 64480/09)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1188, DH-DD(2015)171

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
64480/09+	LULI AND OTHERS	01/04/2014	01/07/2014	Complex problem
10508/02	GJONBOÇARI AND OTHERS	23/10/2007	31/03/2008	
3738/02	MARINI	18/12/2007	07/07/2008	
5250/07	BICI	03/12/2015	03/03/2016	

Case description

These cases concern the excessive length of proceedings before civil courts and administrative bodies, typically the Commission for Restitution and Compensation of Properties, civil courts and the Constitutional Court, between 1996 and the present. The European Court criticised, in particular, the failure of the judicial system to manage properly a multiplication of proceedings before various courts on the same issue and repeated referrals of a case to a lower level of jurisdiction (violations of Article 6 § 1). The cases *Marini* and *Gjonbocari* also concern the lack of effective remedy to raise the problem of length of proceedings (violation of Article 13).

Under Article 46 in the *Luli and others* judgment the European Court noted that the excessive length of proceedings was becoming a serious deficiency in domestic legal proceedings in Albania and that general measures at national level were undoubtedly called for in the execution of the judgment, in particular, introducing a domestic remedy as regards undue length of proceedings.

The case *Marini* also concerns a lack of access to the Constitutional Court, which effectively declined to take a decision in the applicant's case following a tied vote (violation of Article 6 § 1).

The issue of non-enforcement of domestic decisions in the cases of *Marini* (violation of Article 6 § 1 and Article 1 of Protocol No. 1) and *Gjonbocari* (violation of Article 6 § 1) is followed under the *Puto and others* and *Driza* groups of cases.

[1] This document has been classified restricted until examination by the Committee of Ministers.

Status of execution

This group of cases was initially examined under the standard procedure and was transferred to the enhanced procedure when the European Court issued the judgment in the *Luli and others* case in 2014. The authorities submitted an action plan for this group of cases on 23/01/2015 (DH-DD(2015)171) and an updated action plan on 20/10/2016 (DH-DD(2016)1188).

Individual measures:

The applicants were awarded just satisfaction for non-pecuniary damage by the European Court. Proceedings are still pending for two applicants in the *Luli and others* case and *Gjonbocari*. On 20/10/2016 the authorities submitted that the trial courts were aware of violations found by the European Court in these cases and of the necessity to bring the proceedings rapidly to an end.

General measures:

At the 1072nd meeting (December 2009) the Committee noted the extensive information provided on the measures planned to accelerate judicial proceedings and to improve the execution of judgments in civil cases (decision adopted under *Marini* case[2]). It encouraged the authorities to continue their efforts to find adequate solutions to these problems and underlined the importance of elaborating domestic remedies in conformity with Article 13 of the European Convention in respect of excessive length of judicial proceedings. Finally, it encouraged the adoption of legislative measures, so as to ensure the provision of rapid acceleratory and/or compensatory redress in all situations in which parties have not obtained final judgments within a reasonable time. The progress in adoption of these measures was further discussed with the authorities during consultations with the Department for Execution of Judgments in Tirana in 2012 and 2014.

The measures presented in the action plan of 20/10/2016 may be summarized as follows:

As regards excessive length of proceedings

In 2001 the Code of Civil Proceedings was amended with the aim of improving the administration of justice, in particular with respect to summoning of parties. In 2007 the Constitutional Court issued decisions further unifying the domestic practice in this respect. Further, to decrease the workload of civil courts, administrative courts were established in 2012, with strict statutory deadlines for examination of cases. In 2013, the number of judges of the Supreme Court was raised and an electronic database system for management of civil cases set. In the same year, the Code of Civil Procedure was amended with a view to limiting the number of orders of retrial and to provide procedures to be followed in case of a retrial.

The action plan provides statistics for 2014 and 2015 of cases processed by the Supreme Court and for 2013-2014 for influx and output of cases before district and appellate courts. According to the authorities, the backlog before the Supreme Court is being reduced.

In November 2014 a working group was established with the task of preparing a package of draft laws necessary for a comprehensive reform of the justice system, including amendments to the codes of procedure. Within this reform, a substantial number of laws related to the organisation and functioning of the justice system was passed by Parliament on 6/10/2016.

As regards the creation of an effective remedy

A draft law has been elaborated for the acceleration of proceedings and just satisfaction in case of excessive length of proceedings before all ordinary courts and levels of jurisdiction, and was included in October 2015 in the work of the Special Parliamentary Committee on the Justice System Reform. The authorities have committed themselves to keeping the Committee informed about developments in this respect.

As regards access to Constitutional Court in case of a tied vote

On 6/10/2016 the provisions on tied votes, criticised by the European Court in the *Marini* case, were repealed. An application can no longer be rejected on the ground of a tied vote without examination of the merits.

[2] CM/Del/Dec(2009)1072

Analysis by the Secretariat

As to the individual measures

Proceedings with respect to three applicants have not yet been terminated. The Committee may wish to invite the authorities to supervise their speedy conduct and to keep it informed about the developments.

As to the general measures

a) Excessive length of proceedings

A number of legislative and practical measures have been adopted as of 2001, which culminated in 2016 in a broad justice system reform. It appears that they resulted in reduction of a backlog before the Supreme Court and increased its case-processing capacity. The establishment of administrative courts should help decrease the workload of civil courts. Measures addressing the problem of repeated remittals have also been adopted.

The measures adopted are promising, but the information submitted does not allow a full assessment of their impact, noted or expected, on the length of proceedings before domestic courts and administrative bodies. Additional information (in particular statistics) is thus necessary in this respect.

Similarly, it would be useful to know if the measures taken to prevent repeated referrals of a case have had an impact in practice.

Finally, no explanations have been provided as to how the authorities have addressed the problem of multiplication of proceedings before various courts on the same issue, criticised by the European Court in its judgments. Information is necessary on this subject.

b) Absence of effective remedy

A general remedy of both acceleratory and compensatory nature for excessively long civil and criminal[3] proceedings is still in the drafting stage. It is essential that the authorities continue their efforts to introduce it rapidly, in line with the indication made by the European Court under Article 46 in the *Luli and others* judgment.

c) Lack of access to court

The legislative amendment discontinuing the practice of rejection of an application in case of a tied vote is to be welcomed. The problem of access to court discerned in the judgment *Marini* having been addressed, the Committee may close its supervision of this case and continue the examination of the issues related to the length of proceedings in the context of the remaining cases (*Luli and others*, *Gjonbocari* and *Bici)*.

Financing assured: YES

[3] It is recalled that the case *Kaciu and Kottori* (33192/07), which concerned among others the length of criminal proceedings, was closed by the Final Resolution CM/ResDH(2016)272 and appears to have been a one-off case. The issue of remedy continues to be followed under the present group of cases.

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-1

Luli and others v. Albania (Application No. 64480/09)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1188, DH-DD(2015)171

Decisions

The Deputies

As regards individual measures:

1. invited the authorities closely to supervise the proceedings still pending in this group of cases before the domestic courts and to keep it informed of all developments;

As regards general measures:

2. welcomed the general measures taken to address the issue of the lack of access to the Constitutional Court in case of a tied vote found in the *Marini* case; adopted Final Resolution CM/ResDH(2016)…closing its supervision of this case;

3. noted with interest the legislative and practical measures adopted so far to address the problem of excessive length of proceedings and invited the authorities to submit information on their impact, as well as on measures taken or envisaged to address multiplication of proceedings on the same issue;

4. strongly encouraged the authorities to finalise rapidly the adoption of an effective remedy for excessive length of proceedings, in line with the indication made by the European Court under Article 46 in the *Luli and others* judgment;

5. decided to continue the examination of the cases *Luli and others*, *Gjonbocari* and *Bici* in the light of the additional information requested, which the authorities are invited to submit by 31 March 2017.

Resolution CM/ResDH(2016)…
Execution of the judgment of the European Court of Human Rights
Marini against Albania

Application	Case	Judgment of	Final on
3738/02	MARINI	18/12/2007	07/07/2008

(Adopted by the Committee of Ministers on … December 2016
at the 1273rd meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 46, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that the Committee supervises the execution of final judgments of the European Court of Human Rights (hereinafter "the Convention" and "the Court"),

Having regard to the final judgment transmitted by the Court to the Committee in this case and to the violations of Article 6, paragraph 1, Article 13 and of Article 1 Protocol No.1 to the Convention established therein on account of the excessive length of criminal proceedings, failure of the authorities to enforce the decisions in the applicant's favour and lack of effective remedy in this respect;

Recalling the respondent State's obligation, under Article 46, paragraph 1, of the Convention, to abide by all final judgments in cases to which it has been a party and that this obligation entails, over and above the payment of any sums awarded by the Court, the adoption by the authorities of the respondent State, where required:

- of individual measures to put an end to violations established and erase their consequences so as to achieve as far as possible *restitutio in integrum*; and

- of general measures preventing similar violations;

Having noted that the just satisfaction has been paid by the government of the respondent State and that the impugned proceedings at issue in this case were terminated;

Noting with satisfaction the general measures taken to address the issue of the lack of access to the Constitutional Court in case of tied vote, reported in the action plan in the *Luli* group of cases (DH-DD(2016)1188);

Noting finally that the general measures required in response to the other aspects of violations of Article 6, 13 and Article 1 Protocol No. 1 of the Convention established in this case are examined in the group of cases *Luli* and in the group *Puto;*

DECLARES that it has exercised its functions under Article 46, paragraph 2, of the Convention in this case and

DECIDES to close the examination thereof.

COMMITTEE OF MINISTERS
COMITÉ DES MINISTRES

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-2-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-2 Virabyan group v. Armenia (Application No. 40094/05)

Supervision of the execution of the European Court's judgments

Reference documents:
H/Exec(2015)14, DH-DD(2016)1142, DH-DD(2015)206, DH-DD(2014)328, CM/Del/Dec(2015)1230/2

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
40094/05	VIRABYAN	02/10/2012	02/01/2013	Complex problem
9935/06+	NALBANDYAN	31/03/2015	30/06/2015	

Case description

Material violations of Article 3

In the *Virabyan* case the applicant at the material time (a member of one of the main opposition parties) was, while in police custody on 23 April 2004, subjected to ill-treatment characterised as torture by the European Court.

In the *Nalbandyan* case two (mother and daughter) of three applicants' (husband, wife and daughter) on suspicion of murdering third applicant's classmate were subject to ill-treatment in police custody in June and July 2004 characterised as torture by the European Court. On 23 August 2004 the criminal proceedings concerning the third applicant were terminated for lack of evidence of her involvement in the crime. On 4 February 2005 the Regional Court found the first and second applicants guilty of murder and sentenced them to nine and fourteen years' imprisonment respectively. This decision was later upheld by the Court of Appeal and the Court of Cassation. As regards the first applicant, the European Court found no medical evidence in the case file that would enable to conclude that he had been subjected to ill-treatment.

Procedural violations of Article 3

No effective investigations were carried out into the applicants' allegations of ill-treatment.

In the *Virabyan* case the motion of the applicant to start criminal proceedings regarding his ill-treatment was dismissed by the Erebuni and Nubarashen district prosecutor; that decision was upheld by the Appeal Court and the Court of Cassation on 22 July 2004.

In the *Nalbandyan* case, the European Court criticised the investigation as neither independent, nor impartial and objective due to the fact that the authorities were called upon to investigate the actions of employees of the same prosecutor's office and their subordinates. The authorities also failed to secure a proper and objective collection and assessment of medical and other evidence vital for the effective outcome of the investigation.

[1] This document has been classified restricted until examination by the Committee of Ministers.

Violation of Article 14 taken in conjunction with Article 3 in its procedural limb and violation of Article 6 § 2 (Virabyan case)

The applicant alleged that his ill-treatment was politically motivated. Despite the existence of plausible information which was sufficient to alert the authorities to the need to carry out an initial verification and, depending on the outcome, investigate, no steps were taken to investigate whether or not discrimination may have played a role in the applicant's ill-treatment. He was formally charged with inflicting violence on a public official.

The grounds on which the criminal proceedings against the applicant were terminated violated the presumption of innocence. The prosecutor's decision of 30 August 2004 on termination of the proceedings taken at the pre-trial stage and up-held by the courts was couched in terms leaving no doubt that the applicant had committed an offence.

Violation of Article of 6 § 3 (c) and 6 § 1 (Nalbandyan case)

The hearings in July and August 2005 in the criminal case of the applicants before both the Regional Court and the Court of Appeal were held in an atmosphere of constant threats and verbal and physical abuse, addressed at the applicants, their family members and lawyers. The Court of Cassation acted with excessive formalism and lack of due diligence in refusing to admit the appeal filed by the lawyer, which resulted in a disproportionate limitation on the first applicant's access to that court.

Status of execution

The last examination of *Virabyan* case was in June 2015.[2] The Deputies noted with interest the reopening of the criminal proceedings against the applicant as well as the reopening of the investigation into the applicant's allegations and invited to keep Committee updated about further developments in the light of the shortcomings indicated by the Court. As to the general measures, the draft amendments to the Criminal Code in respect of criminalisation of torture and new draft Criminal Procedure Code foreseeing safeguards against ill-treatment were noted with interest: the adoption of those legal acts without delay was encouraged. At the same time, relying on different reports, the Deputies noted with serious concern that ill-treatment by the police appeared to persist. The creation of the Special Investigative Service (SIS) was considered as an important step forward to combat ill-treatment. Further information about the latter's effectiveness was expected. Finally the abolition of the relevant provisions in the Criminal Procedure Code that led to the violation of the principle of the presumption of innocence was noted with satisfaction and it was considered that no further measures appeared necessary in this respect.

More detailed assessment of the measures taken by the authorities in *Virabyan* case is presented in Document H/Exec(2015)14 summarised for the last examination by the Committee of Ministers.

An updated action plan was submitted on 14 October 2016 (DH-DD(2016)1142).

Individual measures:

In both cases the just satisfaction was paid within the deadline.

- *Virabyan case:*

Re-opened investigation (procedural violations of Article 3 alone and in conjunction with Article 14): After the re-opening of the case, to ensure a thorough investigation, apart from the new forensic examination assigned, 22 witnesses (including the police officers concerned) have been interrogated by the SIS. Furthermore, four confrontations have been organised with the participation of Mr. Virabyan.

On 10 May 2016, a new investigation was opened in respect of especially serious injury to the health of Mr.Virabyan inflicted by police officer on 23 April 2004. In the course of these proceedings police officers have been interrogated, the instance was instructed to carry out an effective investigation, victim status was granted to Mr. Virabyan and he gave testimony regarding the facts. The investigation is underway.

Criminal proceedings (violation of Article 6 § 2): On 20 May 2016 a decision was made to terminate criminal proceedings and discontinue the criminal prosecution in respect of Mr. Virabyan for the lack of *corpus delict.*

[2] CM/Del/Dec(2015)1230/2

- *Nalbandyan case:*

Re-opening of the criminal case on alleged murder: Following the European Court's judgment and by decision of the Court of Cassation of 24 June 2016 the criminal case has been reopened at national level.

All the judgments of the first instance court, Court of Appeal and Court of Cassation concerning the alleged murder committed by the second applicant and assisted by the first applicant were reviewed and quashed. At the same time the Court of Cassation left the detention as a means of preventive measure applied to the second applicant unaltered. The case was sent to Gegharkunik Regional First Instance Court for re-examination.

Re-opening of the criminal proceedings concerning the applicants' allegations of ill-treatment: All the judgments of first instance court and Criminal and Military Court of Appeal concerning the dismissal of the applicants' allegations of ill-treatment were quashed by the Court of Cassation on 24 June 2016 and the case was sent to Kentron and Nork-Marash District Court of Yerevan for re-examination. The applicants were present at the court hearing.

General measures:

Substantive violation of Article 3
The amendments to the Criminal Code criminalising torture by public officials were adopted by Parliament on 9 June 2015 and entered into force on 18 July 2015. The article defining torture was totally changed and brought into conformity with Article 1 of the UN Convention against Torture (UNCAT).

The draft Code of Criminal Procedure (CCP) aimed at introducing safeguards against torture has been finalised and submitted to the National Assembly. Furthermore, from 15 to 17 April 2016 a second round of consultation meetings were held with international experts on the draft CCP and the proposals made were incorporated in the text of the draft. It was further harmonised with the Constitution amended on 6 December 2015 and submitted to the Council of Europe expertise.[3] On 11 October 2016 the finalised draft was sent to the Government of Armenia further to submit it to the National Assembly for voting. Moreover, as an additional safeguard against ill-treatment, proposals to introduce a system of audio-video recording of police interrogations and drawing up an electronic record regarding the deprivation of person's liberty from the very outset of deprivation have been submitted to the government.

As regards the serious concern expressed by the Committee of Ministers in its recent decision that ill-treatment by the police appears to persist, the authorities make reference to the Committee for the Prevention of Torture (CPT) report on the visit to Armenia in 2015 (hereinafter, the CPT Report (2015)) ~~publication of which they have requested~~[4] which was published on 22 November 2016. This report indicated that during its visit the CPT had received a small number of complaints of police ill-treatment, most of them referring to excessive use of force upon apprehension, and stated that this would suggest that there had indeed been an improvement in this area since its 2010 periodic visit and 2013 *ad hoc* visit. However, the CPT delegation did also note other indications, including of a medical nature, that the phenomenon of ill-treatment had not yet been entirely eradicated. The CPT therefore recommended that the Armenian authorities continue to deliver, at regular intervals and from the highest level, a firm message of "zero tolerance" of ill-treatment by any police officer.

Procedural violation of Article 3 (alone, and in conjunction with Article 14)
Concerning the effectiveness of the SIS the CPT Report (2015) noted that, with the aim of strengthening its independence and capacity, a new unit of eight investigators (the Department for Investigation of Torture) was created. Action had also been taken to make the SIS more directly accessible to members of the public, new guidance was produced with detailed reference to CPT standards and the procedural requirements of the European Court related to the investigation of cases of ill-treatment. In addition, the CPT delegation examined in detail a number of cases involving allegations of ill-treatment under active investigation by the SIS and formed a generally positive view of the professionalism with which SIS investigators carried out their tasks, but called upon the Armenian authorities significantly to reinforce the SIS in terms of operational staff.

~~In addition~~ Moreover, according to the instructions of the Prosecutor General and the Head of Police, complaints of ill-treatment shall be immediately transferred to the SIS.

[3] The consultations and further working process were organised in the framework of the EU/CoE joint project *Supporting the Criminal Justice Reform and Combating Ill-treatment and Impunity in Armenia.*
[4] ~~The authorities indicated that, on 12 October 2016 the Armenian authorities requested for the publication of the Report together with the Government Response pursuant to Article 11 § 2 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.~~

Furthermore, the Council of Europe Action Plan for Armenia 2015-2018 gives particular importance to the consolidation of the independence and capacities of the SIS, as well as the training of investigators on human rights issues. In particular, in the context of the project *Supporting the Criminal Justice Reform and Combating Ill-treatment and Impunity in Armenia* the course on *Investigation of Cases of Torture and Other Forms of Ill-treatment and of Right to Life* is specifically designed to strengthen both the academic knowledge and practical skills of the investigators of the SIS.

As to the problem of discrimination, under the new definition of torture in the Criminal Code, any discriminatory reason for carrying out torture is considered as a separate purposive element. This change aims at widening the scope of situations where the incident can be qualified as torture, and, which more importantly, at stressing the importance of criminalisation and adequate sanctioning of discrimination-based torture.

Analysis by the Secretariat

Individual measures:

Reopening of investigations: The recent developments in the re-opened investigation in *Virabyan* case as well as the reopening of the criminal case in *Nalbandyan* case on the allegations of ill-treatment are notable steps. Therefore, the Committee might wish to take note of progress achieved in those cases and invite the authorities to continue the new investigations fully in compliance with the principles of effectiveness, independence and speediness. The investigation should also shed light on the possible political motives for the applicant's torture in the *Virabyan* case.

Reopening and termination of proceedings: The information regarding the termination of the criminal proceedings and discontinuation of the criminal prosecution in respect of Mr. Virabyan for the lack of *corpus delict (*exculpatory reasons*)* might be welcomed by the Committee.

The re-opening of proceedings regarding the alleged murder in the *Nalbandyan* case should be mentioned with interest. The Committee might wish to call the authorities to conduct the re-opened proceedings in compliance with the findings of the European Court and to submit further information on the progress, including the concrete steps taken.

Violation of Article of 6 § 3 (c) and 6 § 1:
The Committee might note with concern that no information has been provided regarding the security of participants in court hearings. To this regard the Committee might wish to recall that, according to the *Nalbandyan* judgment (§ 142), neither the government nor the domestic courts ever indicated any specific measures that were allegedly taken to ensure security in the courtroom. Nor is there any other evidence in the case file to suggest that any of the protective measures specified in Section 98 of the Code of Criminal Procedure were ever taken.

Regarding access to court, the Court of Cassation acted with excessive formalism and lack of due diligence in refusing to admit the appeal filed by the applicant's lawyer. In this context the Committee might call on the authorities to send the information concerning the measures taken or envisaged to guarantee the security of applicants in court hearings as well as their access to court.

General measures:

Substantive violation of Article 3:
The Committee might wish to welcome the criminalisation of acts of torture by public officials in the Criminal Code. The adoption of such a provision appears to respond to the indication in the Guidelines of the Committee of Ministers on eradicating impunity that criminal law provisions be introduced effectively to punish serious human rights violations. In addition, the absence of such a provision had been extensively criticised by relevant international bodies, including the European Commissioner for Human Rights, the CPT, the United Nations Committee against Torture, and civil society.[5]

The safeguards foreseen in the draft Criminal Procedure Code are also promising. The recent progress in the final elaboration of the draft should be noted with interest. The authorities should be invited to indicate the next steps as well as time-table foreseen for the adoption of the draft.

~~The information on ill-treatment in police custody as well as the developments in the activity of the SIS could usefully be assessed at a later stage, in particular in the light of the most recent CPT visit report.~~

[5] See H-Exec document

Concerning the cases of ill-treatment in police custody, the Committee might wish to note with interest that, according to the most recent CPT Report (2015), the number of allegations of police ill-treatment has decreased, even if the phenomenon has not yet been entirely eradicated, and might wish to call on the authorities to continue their efforts in this respect.

Procedural violations of Article 3 taken alone and in conjunction with Article 14:
The criminalisation of an act of torture by a public official (already mentioned under the substantive violation of Article 3, see above) is an important step in responding to procedural violations, as the absence of this provision had meant that "no law enforcement agent or member of the security services had ever been convicted of the crime of torture in Armenia".[6]

The Committee might also wish to note with interest the recent generally positive assessment by the CPT of the activity of the SIS, and invite the authorities to continue their efforts in this respect as well as to keep the Committee informed about further steps taken to ensure the full effectiveness of the SIS.

Concerning the procedural violation of Article 3 in conjunction with Article 14, the information provided by the authorities on changes to the legislative framework is interesting. However, as the action plan itself states, the source of the violation arose from practice, rather than the legislative framework, and the information provided does not appear to relate to any changes in investigation practices. Therefore, the Committee might wish to reiterate its request to be provided with information on the measures taken or envisaged to ensure that future investigations of alleged police ill-treatment and torture take full account in practice of any plausible suggestion that treatment was politically motivated.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-2

Virabyan group v. Armenia (Application No. 40094
Supervision of the execution of the European Court's judgments
H/Exec(2015)14, DH-DD(2016)1142, DH-DD(2015)206, DH-DD(2014)328, CM/Del/Dec(2015)1230/2

Decisions

The Deputies

Individual measures

1. welcomed the termination of the criminal proceedings and prosecution in respect of Mr. Virabyan for lack of *corpus delict* (exculpatory reasons) in compliance with the principle of presumption of innocence, and noted with interest the reopening of the criminal ~~case~~ proceedings in the *Nalbandyan* case;

2. noted with interest the recent developments in the investigation into the applicant's allegations of ill-treatment in the *Virabyan* case ~~as well as~~ and the reopening of the examination into the allegations of ill-treatment in the *Nalbandyan* case and invited the authorities to ensure that those proceedings are conducted in an effective and independent ~~adequate and objective~~ manner, recalling that in the *Virabyan* case the investigation should aim *inter alia* at examining the possible political motives for the applicant's ill-treatment;

3. invited the authorities to keep the Committee updated on the progress of the re-opened procedures, including the concrete steps that have been taken to address the shortcomings indicated by the European Court;

4. noted with concern that no information has been provided concerning the security of the participants in the court proceedings and the access to the court and invited the authorities to ~~present~~ provide information about the measures taken or envisaged.

[6] §62 CommDH(2015)2 of 10 March 2015

General measures

5. welcomed the criminalisation in the Criminal Code of acts of torture by public officials, and noted with interest the progress in adoption of the new Code of Criminal Procedure which will stipulate the safeguards against ill-treatment; invited the authorities to indicate the next steps and time-table for its adoption and encouraged them to adopt it without delay;

6. noted with interest that, according to the latest report of the European Committee for the Prevention of Torture (CPT), the number of allegations of police ill-treatment has decreased, even if the phenomenon has not yet been entirely eradicated, and called on the authorities to continue their efforts in this respect;

7. noted also with interest the generally positive assessment by the CPT of the Special Investigative Service's activity and encouraged the authorities to continue their efforts in respect of it and to keep the Committee informed about further steps taken;

~~6~~ 8. called on the authorities to provide information on the measures taken or envisaged to ensure that future investigations into alleged police ill-treatment and torture take full account of any plausible suggestion that ill-treatment was politically motivated.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-3-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-3 Ilgar Mammadov v. Azerbaijan (Application No. 15172/13)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1296, DH-DD(2016)1126-rev, DH-DD(2016)1069, CM/Del/Dec(2016)1265/H46-3, CM/ResDH(2016)144, CM/ResDH(2015)156, CM/ResDH(2015)43

Action – Item proposed with debate
To debate the case on the basis of the points for consideration with a view to the preparation of a draft decision.

Application	Case	Judgment of	Final on	Indicator for the classification
15172/13	ILGAR MAMMADOV	22/05/2014	13/10/2014	Complex problem and urgent individual measure

Case description

This case concerns several violations (Articles 5 § 1(c), 5 § 4, 6 § 2, as well as Article 18 taken in conjunction with Article 5) suffered by the applicant, a political opposition activist, which took place in the context of the criminal proceedings instituted against him in February 2013 for denouncing on his blog the authorities' version of the Ismayilli riots of 23 January 2013. These events were provoked by an incident implicating the son of the Minister of Labour and the nephew of a local politician.

The applicant was arrested and placed in custody on 4 February 2013, effective until the first-instance court's judgment of 17 March 2014, which sentenced him to seven years' imprisonment. According to the latest information, the proceedings are still on-going (see status of execution).

The European Court found, in particular, that the arrest and detention of the applicant took place in the absence of any reasonable suspicion that he had committed an offence. It also found that the domestic courts, both at first instance and on appeal, had limited themselves in all their decisions to an automatic endorsement of the prosecution's requests without having conducted a genuine review of the lawfulness of the detention (violations of Article 5 §§ 1(c) and 4).

Recalling that the charges brought against the applicant were not based on reasonable suspicion, the Court further found that the actual purpose of the impugned measures was to punish the applicant for having criticised the government and for having attempted to disseminate what he believed to be true information which the government was trying to hide. The Court thus established that the restriction of the applicant's liberty was applied for purposes other than bringing him before a competent legal authority on reasonable suspicion of having committed an offence (violation of Article 18 taken in conjunction with Article 5).

Finally, this case concerns the violation of the applicant's right to the presumption of innocence on account of the statements made to the press by the Prosecutor General and the Minister of the Interior encouraging the public to believe that the applicant was guilty (violation of Article 6 § 2).

[1] This document has been classified restricted until examination by the Committee of Ministers.

Status of execution

An action plan was provided by the authorities on 26 November 2014 (DH-DD(2014)1450), indicating that a training event would be organised with a view to the successful implementation of the regulations on pre-trial detention, and that another would be organised for prosecutors regarding respect for the presumption of innocence.

In view of the absence of adequate information and of any signs of progress in the execution of the judgment, the Committee adopted three Interim Resolutions: CM/ResDH(2015)43 in March 2015, CM/ResDH(2015)156 in September 2015 and CM/ResDH(2016)144 in June 2016.

Individual measures:

(1) Measures required and examination by the Committee

Since its first examination of this case in December 2014, the Committee has underlined that the violations found by the Court, in particular that of Article 18 taken in conjunction with Article 5, cast doubt on the merits of the criminal proceedings instituted against the applicant and that it follows that the authorities are required to ensure the applicant's immediate release and to adopt the other individual measures necessary to erase for him the consequences of the violations. The Committee also repeatedly and strongly urged the authorities to guarantee the applicant's physical integrity pending his release.

The Committee's three interim resolutions can be summarised as follows:

- Interim Resolution CM/ResDH(2015)43 (March 2015): it reiterated with insistence its call to the authorities to ensure without further delay the applicant's release and to adopt the other individual measures necessary to erase the consequences of the violations for him;
- Interim Resolution CM/ResDH(2015)156 (September 2015): the Committee called on the authorities of the member States and the Secretary General to raise the applicant's situation with the highest authorities in Azerbaijan and invited the observer States to the Council of Europe and international organisations to do the same; it also exhorted the authorities to resume dialogue with the Committee and underlined, in view of the continuing absence of progress, the obligation of every member State of the Council of Europe to comply with its obligations under Article 3 of the Statute of the Council of Europe;
- Interim Resolution CM/ResDH(2016)144 (June 2016): the Committee considered intolerable that, in a State subject to the rule of law, a person should continue to be deprived of his liberty on the basis of proceedings engaged, in breach of the Convention, with a view to punishing him for having criticised the government; the Committee insisted that the highest competent authorities of the respondent State take all necessary measures to ensure without further delay Ilgar Mammadov's release and declared its resolve to ensure, with all the means available to the Organisation, Azerbaijan's compliance with its obligations under this judgment.

The Committee has examined this case at each of its Human Rights meetings since the judgment became final. In its interim resolution adopted in June 2016, it decided to examine Ilgar Mammadov's situation at each regular and Human Rights meeting of the Committee until such time as he is released[2].

At the last Human Rights meeting (September 2016), the Committee notably underlined that the applicant's continuing detention entirely fails to satisfy the obligation under Article 46 § 1, and recalled once again the commitment freely undertaken by Azerbaijan under the said Article, as well as the requirement for each member State to comply with its obligations under Article 3 of the Statute of the Council of Europe. The Committee expressed its grave concern about the continuing silence of the Azerbaijan authorities as regards the implementation of the individual measures required. It noted further that the applicant's appeal against conviction was still pending before the Supreme Court, and underlined the urgent need for the appeal to be examined rapidly and urged the authorities to specify the relevant time-table.

(2) The applicant's current situation

Despite the Committee's repeated calls, the applicant is still detained.

[2] 1260th (15 June 2016), 1261st (29 June 2016), 1262nd (6 July 2016), 1263rd (6 September 2016), 1264th (14 September), 1265th (20-21 September) (DH), 1266th (28 September 2016), 1267th (5 October 2016), 1268th (18 October 2016), 1269th (26 October 2016), 1270th (9 November 2016), and 1271st (16 November 2016) meetings.

The impugned criminal proceedings, initiated in February 2013, are still ongoing. The applicant was sentenced to seven years' imprisonment~~; this sentence is not yet final (see below)~~. At the time of finalisation of the present Notes, he has been imprisoned for approximately three years and nine months, including more than two years subsequent to the final judgment of the European Court.

It is recalled that on 13 October 2015 the Supreme Court quashed the Court of Appeal judgment delivered against the applicant on 24 September 2014 without, however, addressing the consequences of the violations of Article 18 combined with Article 5, nor ordering the applicant's release (DH-DD(2016)121). The case was referred to the Sheki Court of Appeal for re-examination, which on 29 April 2016 confirmed Ilgar Mammadov's conviction (DH-DD(2016)705). In June 2016, the applicant ~~'s representative informed the Secretariat that he had~~ introduced an appeal before the Supreme Court against the decision of the Sheki Court of Appeal.
On 18 November 2016 the Supreme Court rejected the applicant's appeal against his conviction.

~~On 13 October 2016, he informed the Committee that the Supreme Court would examine the cassation appeal on 18 November 2016 (DH-DD(2016)1126).~~

Concerning the applicant's physical integrity pending his release, it is recalled that in July/August 2015, the applicant's lawyer alleged that Mr Mammadov had been assaulted in prison. On 3 August 2015 the Secretary General sent a letter to the Minister of Justice of Azerbaijan regarding these allegations. He urged him to investigate the matter thoroughly and rapidly, to put in place with immediate effect the necessary measures to ensure the applicant's personal security and to ensure that his conditions of detention were fully in line with the standards of the Convention. The Secretary General also recalled the necessity of ensuring that the judgment of the European Court in the case of *Ilgar Mammadov* be fully and effectively implemented without delay. The response of the Minister of Justice of Azerbaijan was distributed to the Deputies (DH-DD(2015)859). Subsequently, further allegations of ill-treatment of the applicant in prison were transmitted by the applicant's representative in October 2015 (DH-DD(2015)1112). The Department for the Execution of Judgments asked for the authorities' comments on these allegations by 26 October 2015 (DH-DD(2015)1178). Afterwards, the Committee repeatedly sought guarantees as to the applicant's physical integrity pending his liberation and insisted on the need for the authorities to respond as a matter of urgency to all Rule 9 submissions concerning the applicant's situation. No written answer has been received so far. In September 2016, the applicant alleged having been subjected to verbal abuse by prison staff (DH-DD(2016)1069).

General measures:

During the first examination of the case in December 2014, the Committee recalled the general problem of the arbitrary application of criminal law to restrict freedom of expression and conveyed its particular concern regarding the finding of a violation of Article 18 in conjunction with Article 5, to the extent that the proceedings against the applicant were engaged in order to silence or punish him for criticising the government.

Therefore, it called upon the authorities to furnish, without delay, concrete and comprehensive information on the measures taken and/or planned to avoid criminal proceedings being instituted without a legitimate basis and to ensure effective judicial review of such attempts by the Prosecutor General's Office.
The Committee also expressed concern about the repetitive nature of the breach of the presumption of innocence (Article 6 § 2) by the Prosecutor General's Office and members of the government, despite several judgments of the Court which, since 2010, had indicated the precise requirements of the Convention in this regard, and insisted on the necessity of rapid and decisive action to prevent similar violations in the future.

The Committee has repeated these requests at every examination of this case. In its interim resolution of September 2015, it expressed its deepest concern regarding the absence of general measures to avoid any circumvention of legislation for purposes other than those prescribed, which represents a danger for the respect of the rule of law.

At its 1265th meeting (September 2016) (DH), the Committee again expressed its deepest concern about the absence of any information from the authorities concerning the general measures taken or envisaged to prevent violations of the rule of law through abuse of power of the kind established in the Court's judgment.

It is recalled that the general problem of arbitrary application of criminal law to limit freedom of expression is dealt with in the *Mahmudov and Agazade* group of cases (35877/04). The violations of Article 5 of the Convention concerning arrest and detention on remand are examined in the context of the *Farhad Aliyev* group of cases (37138/06).

Analysis of the Secretariat / Points for consideration

In accordance with the interim resolution of June 2016, the applicant's situation continues to be discussed at the regular meetings of the Committee.

On 18 November 2016 the Supreme Court rejected the applicant's appeal against his conviction, and he is still detained.

At the time of the preparation of these Notes, despite repeated requests, no information has been provided regarding general measures taken and / or envisaged to prevent further cases of circumvention of legislation by prosecutors and/or judges for purposes other than those prescribed, or to prevent new violations of the presumption of innocence.

It can be noted that on 20 September 2016, the Court communicated to the authorities a second application by Mr Mammadov, raising among other things[3] a new complaint under Article 18 in conjunction with Article 6[4].

As already indicated at the 1265th meeting, by a judgment that became final in July 2016, the European Court has found another abuse of power against a civil society activist (*Rasul Jafarov*). The Court ruled that Mr Jafarov's arrest and detention were intended to silence and punish him for his activities in the field of human rights (§ 162). It noted that his situation was not isolated. In fact, several notable human rights activists who had co-operated with international organisations for the protection of human rights, including the Council of Europe, had similarly been arrested and charged with serious criminal offences entailing heavy sentences of imprisonment (§ 161). On 17 March 2016, the day of the adoption of the judgment, Mr Jafarov was pardoned and released by the Decree of the President of Azerbaijan.

Having regard to the similarities between the *Rasul Jafarov v. Azerbaijan* case and the *Ilgar Mammadov v. Azerbaijan* case, it is proposed to examine them jointly as of the present meeting (see draft decision on the classification of new cases).

Revised Notes for the 1273rd meeting will be prepared on the basis of the information available after the 1272nd regular meeting (30 November 2016) and distributed as addendum ~~before the 1273rd meeting~~.

Financing assured: YES

[3] Article 6 §§ 1 and 3 (b), Article 13, Article 14 in conjunction with Articles 6 and 13, Article 17.

[4] Since 2014, 12 applications were communicated by the European Court to the Azerbaijani authorities, with questions including the respect of Article 18: *Intigam Aliyev*, No. 68762/14, communicated on 19 November 2014 (Article 18 in conjunction with Articles 5 and 8); *Yunusova and Yunusov*, No. 68817/14, communicated on 5 January 2015 (Article 18 in conjunction with Article 5); *Khadija Ismayilova*, No. 30778/15, communicated on 26 August 2015 (Article 18 in conjunction with Article 5); *Uzeyir Mammadli*, No. 65597/13 and *Rashad Hasanov*, No. 48653/13, both communicated on 14 December 2015 (Article 18 in conjunction with Article 5); *Novruzlu*, No. 70106/13, *Azizov*, No. 65583/13, *Gurbanli*, No. 52464/13, the three communicated on 3 March 2016 (Article 18 in conjunction with Article 5); *Abdul Abilov*, No. 41105/14, communicated on 21 April 2016 (Article 18 in conjunction with Article 5); *Omar Mammadov*, No. 54846/14, communicated on 27 April 2016 (Article 18 in conjunction with Article 5); *Khalid Bagirov*, No. 28198/15, communicated on 24 June 2016 (Article 18 in conjunction with Articles 8 and 10); *Ilgar Mammadov (II)*, No. 919/15, communicated on 20 September 2016 (Article 18 in conjunction with Article 6).

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-4-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-4 Mahmudov and Agazade Group v. Azerbaijan (Application No. 35877/04)

Supervision of the execution of the European Court's judgments

Reference documents:
CM/ResDH(2016)145, CM/ResDH(2015)250, CM/ResDH(2014)183, CM/ResDH(2013)199, CDL-REF(2013)022, CDL-AD(2013)024, SG/Inf(2015)37, Statement by the Secretary General (22/10/2014), Statement by the Secretary General (11/08/2014), Statement by the Secretary General (01/08/2014), CommDH(2014)10, Statement by the Commissioner for Human Rights (24/10/2014), Statement by the Commissioner for Human Rights (07/08/2014), DH-DD(2016)445, DH-DD(2016)343, DH-DD(2016)202, CM/Del/Dec(2016)1259/H46-4

Action – Item proposed with debate
To debate the cases on the basis of the points for consideration with a view to the preparation of a draft decision.

Application	Case	Judgment of	Final on	Indicator for the classification
35877/04	MAHMUDOV AND AGAZADE	18/12/2008	18/03/2009	Complex problem
40984/07	FATULLAYEV	22/04/2010	4/10/2010	

Case description

These cases concern violations of the right to freedom of expression (violations of Article 10) of the applicant journalists due, in particular, (in both cases) to unjustified use of imprisonment as a sanction for defamation (the Court found no special circumstances justifying such a sanction, such as incitement to violence or racial hatred); and (in the *Fatullayev* case) to insufficient reasons invoked to justify defamation as regards some statements and to the arbitrary application of anti-terror legislation to sanction other subsequent statements.

The *Fatullayev* case also concerns violations of the right to an impartial tribunal as the judge in the first defamation case had already found against the applicant in a civil defamation case based on the same statements (violation of Article 6 § 1). Declarations made by the public prosecutor in this case, relating to the application of anti-terror legislation, were also found to violate the applicant's right to presumption of innocence (violation of Article 6 § 2).

In the first case, the applicants never served their prison sentences as a result of an amnesty. In the *Fatullayev* case, the applicant was still serving his eight-year prison sentence when the Court's judgment was delivered and the Court accordingly ordered his immediate release.

Status of execution

The Committee of Ministers has been examining these cases since 2010 and has adopted four interim resolutions (CM/ResDH(2013)199, CM/ResDH(2014)183, CM/ResDH(2015)250 and CM/ResDH(2016)145).

[1] This document has been classified restricted until examination by the Committee of Ministers.

Individual measures:

In the Mahmudov and Agazade case, in the light of the actions taken (exemption from serving the sentence, absence of any mention of the sentence in the criminal records, payment of the just satisfaction), the Committee closed its supervision of the individual measures at the December 2011 meeting.

In the Fatullayev case, the convictions were quashed following the Court's judgment and the question related to the time unjustly spent in detention was resolved as a result of the applicant's early release, following a presidential pardon in the context of another offense. The just satisfaction has been paid. The Committee closed its supervision of the individual measures at the December 2011 meeting.

General measures:

The Committee considered that the execution of these judgments required three main sets of measures to be taken by the Azerbaijani authorities: those related to defamation; those aiming to prevent the arbitrary application of the legislation; and those aiming to prevent violations of Article 6 §§ 1 and 2 similar to those found in the case *Fatullayev.* In December 2014, in view of the number of outstanding questions, the Committee considered that it was essential to obtain urgently and as a matter of priority tangible results in the areas of defamation and the arbitrary application of the criminal law to limit freedom of expression.

Defamation
The provisions defining the scope of criminal responsibility for defamation, including the possibility to impose lengthy prison sentences (Articles 147 §§ 1 and 2 of the Criminal Code), remain unchanged since the events here in question.

However, the government has informed the Committee about the practice developed by the courts since 2011 of not resorting to criminal convictions for defamation, about a guiding ruling of the Plenum of the Supreme Court of 21 February 2014 setting out the Convention requirements in the area of defamation and about different training measures adopted. In addition, the government has referred to a legislative proposal made by the Plenum in connection with its guiding ruling with a view to limiting the possibility of imposing prison sentences. No specific information has been submitted as to the more general overhaul of the legislation on defamation first set in motion with the Venice Commission (in 2011 – see opinion of the Venice Commission CDL-AD(2013)024). In response to the Committee's questions about the progress of the legislative initiatives, the government committed itself in June 2014 to bring these forward in early 2015. In December 2014, the Committee reiterated its call for progress in the adoption of the necessary legislative amendments and stressed the importance of co-operation with the Venice Commission.

Since then no information has been provided concerning progress in the adoption of the legislative amendments.

Arbitrary application of the criminal law to limit freedom of expression
The Committee noted in June 2014 extensive information about measures to enhance the independence of judges (see below) and on-going reflection on further measures. However, in view of recent developments revealing continuing serious problems in the enjoyment of freedom of expression in Azerbaijan, the Committee urged the authorities rapidly to enhance their efforts, including by further strengthening judicial independence vis à vis the executive and prosecutors, and by providing further targeted training and better practical guidance, notably from the Supreme Court and the Prosecutor General's Office.

In September 2014, the Committee reiterated that the situation continued to raise serious concern. It noted with interest, nevertheless, certain additional legislative amendments of June 2014, notably to strengthen the independence of the Judicial-Legal Council, but urged the authorities to explore further measures to ensure the independence of the judiciary. The Committee also emphasised the need for the highest authorities to intervene to provide the necessary guidance to prevent this type of violation, including a new general decision by the Plenum of the Supreme Court to guide judges and prosecutors, as well as for a strengthening of relevant training activities for judges and prosecutors (see notably CM/ResDH(2014)183).

The extensive information submitted in response to the interim resolution (see DH-DD(2014)907) did not relieve the Committee's concerns. When resuming its examination in December 2014 the Committee stressed the importance of obtaining as a matter of priority tangible results and stressed anew the necessity of action by the highest authorities.

General developments and assessment by the Committee of Ministers since 2015
In 2015, the Committee repeatedly called on the authorities to adopt without further delay measures demonstrating their determination to solve the problem. It underlined that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress, and that efficient guarantees against the arbitrary application of criminal legislation are capital for the respect of the rule of law.

In response, the authorities sent an action report in February 2016 (DH-DD(2016)202) asking the Committee to find that Azerbaijan had met its obligations under Article 46 of the Convention.

They recalled as regards *defamation* the guidance given by the Plenum of the Supreme Court in 2014 and the training events and seminars that took place between 2012 and 2014. They also provided statistical data confirming that no journalist had been sentenced to imprisonment for libel or insult in the last five years. As regards the *arbitrary application of the criminal law to limit freedom of expression* they recalled the measures taken up to 2014 to strengthen the independence and efficiency of the judiciary, notably improved the independence of the Judicial-Legal Council, the creation of the Judges Selection Committee, improved staffing and working conditions (including increased wages in the judiciary) and training events and seminars in 2012-2014 and as foreseen in the Council of Europe Action Plan for Azerbaijan 2014-2016.

At the 1250th meeting (March 2016) (DH), the Committee regretted that this information was to a large extent a repetition of what had already been submitted and which had been deemed insufficient. The Committee stressed anew the importance of achieving rapid and tangible progress to secure freedom of expression and ensure respect for the rule of law in Azerbaijan. It urged the authorities to take concrete steps to achieve such progress, in particular by further strengthening judicial independence and through reinforced action under the Action Plan for Azerbaijan 2014-2016 as well as constructive dialogue with all relevant Council of Europe bodies/institutions, including the Venice Commission.

Following certain questions asked by delegations after the 1250th meeting (DH-DD(2016)343), the authorities provided additional information on 14 April 2016 (DH-DD(2016)445), in particular on further training activities held in 2014-2016 for judges and prosecutors and cooperation activities with the Europoean Commission for the Efficiency of Justice (CEPEJ) to improve the efficiency of the courts, many of which fall within the Council of Europe Action Plan for Azerbaijan 2014-2016.

At the 1259th meeting (June 2016) (DH), the Committee adopted a fourth interim resolution (CM/ResDH(2016)145). It noted with interest the latest information provided by the authorities, regarding recent measures of awareness-raising and confirming the practice developed by the courts not to resort to criminal convictions for defamation. It also noted the conditional release of the applicants' lawyer in the case of *Mahmudov and Agazade* (see below). The Committee however considered that this information was not such as to relieve the concerns expressed by the Committee in the face of the problems identified in these cases or to remove the necessity for further reforms.

Recalling its previous decisions and resolutions, the Committee called on the highest competent authorities to appreciate fully the requirements of the European Convention concerning the respect for freedom of expression and the rule of law. It reiterated its call to the authorities to strengthen judicial independence *vis-à-vis* the executive and prosecutors, ensure the legality of the action of prosecutors and ensure the adequacy of the legislation on defamation. The Committee insisted on the necessity to strengthen without further delay the dialogue with all the relevant bodies / institutions of the Council of Europe, including in the framework of the Action Plan for Azerbaijan.

Other cases raising issues of arbitrary application of law
As regards the question of the arbitrary application of the criminal law to limit freedom of expression, this group of cases has links with the cases of *Ilgar Mammadov* (No. 15172/13) and *Rasul Jafarov* (No. 69981/14).

A number of further cases have been communicated with similar complaints[2]. As regards the more general question of the arbitrary application of the legislation, this group of cases has links with a number of other cases, including the *Namat Aliyev* group of cases (No. 18705/06) as regards the electoral legislation.

Situation of the lawyer of the applicants in the case Mahmudov and Agazade
The Committee repeatedly expressed its concern regarding the criminal conviction of Mr Intigam Aliyev, the applicants' representative in the *Mahmudov and Agazade* case and in other cases. In June 2016, the Committee took note of his conditional release following a mitigation of sentence. Mr Aliyev's complaints about these criminal proceedings are still pending before the Court.

Analysis by the Secretariat / points for consideration

As matters stand, the arbitrary application of criminal law to limit freedom of expression appears to be the most pressing issue in these cases.

Indeed concerning defamation, it is recalled that in June 2016, while reiterating its call to the authorities to ensure the adequacy of the legislation on defamation (which was deemed necessary by the Plenum of the Supreme Court and the government in 2014), the Committee also took note with interest of updated information from the authorities, confirming the practice developed by the courts not to resort to criminal convictions for defamation.

At the time of finalisation of these Notes, no new information had been communicated by the Azerbaijan authorities, in response to the June 2016 interim resolution, demonstrating concrete progress in remedying the above problem of arbitrary application of criminal law, whether as regards measures to strengthen judicial independence vis-à-vis the executive and prosecutors or to ensure the legality of the action of prosecutors. Nor has the Committee received any information aimed at ensuring the adequacy of the legislation on defamation.

It is still expected that information will be provided for the meeting. A draft decision will be prepared following the debate, in the light of developments.

~~At the time of finalisation of these Notes, no new information had been communicated by the authorities in response to the June 2016 interim resolution.~~

~~Revised Notes will be finalised in the light of the information available before the 1273rd meeting.~~

Financing assured: YES

[2] Since 2014, 12 other applications were communicated by the European Court to the Azerbaijani authorities, with questions including the respect of Article 18: *Intigam Aliyev*, No. 68762/14, communicated on 19 November 2014 (Article 18 in conjunction with Articles 5 and 8); *Yunusova and Yunusov*, No. 68817/14, communicated on 5 January 2015 (Article 18 in conjunction with Article 5); *Khadija Ismayilova*, No. 30778/15, communicated on 26 August 2015 (Article 18 in conjunction with Article 5); *Uzeyir Mammadli*, No. 65597/13 and *Rashad Hasanov*, No. 48653/13, both communicated on 14 December 2015 (Article 18 in conjunction with Article 5); *Novruzlu*, No. 70106/13, *Azizov*, No. 65583/13, *Gurbanli*, No. 52464/13, the three communicated on 3 March 2016 (Article 18 in conjunction with Article 5); *Abdul Abilov,* No. 41105/14, communicated on 21 April 2016 (Article 18 in conjunction with Article 5); *Omar Mammadov*, No. 54846/14, communicated on 27 April 2016 (Article 18 in conjunction with Article 5); *Khalid Bagirov*, No. 28198/15, communicated on 24 June 2016 (Article 18 in conjunction with Articles 8 and 10); *Ilgar Mammadov (II)*, No. 919/15, communicated on 20 September 2016 (Article 18 in conjunction with Article 6).

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-5-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-5 Sejdić and Finci group v. Bosnia and Herzegovina (Application No. 27996/06)

Supervision of the execution of the European Court's judgments

Reference documents:
CM/ResDH(2013)259, CM/ResDH(2012)233, CM/ResDH(2011)291, DH-DD(2016)1154, DH-DD(2015)541, CM/Del/Dec(2015)1230/7

Action – Item proposed with debate
To debate the cases in the light of the draft decision below

Application	Case	Judgment of	Final on	Indicator for the classification
27996/06	SEJDIĆ AND FINCI	22/12/2009	Grand Chamber	Complex problem
3681/06	ZORNIĆ	15/07/2014	15/12/2014	
56666/12	ŠLAKU	26/05/2016	26/05/2016	
41939/07	PILAV	09/06/2016	09/09/2016	

Case description

These cases concern general discrimination against the applicants on account of their ineligibility to stand for election to the Presidency of Bosnia and Herzegovina due to their lack of affiliation with a constituent people (i.e. Bosniacs, Croats or Serbs) or due to their failure to meet a combination of the requirements of ethnic origin and place of residence (violations of Article 1 of Protocol No. 12).

In accordance with the Constitution of Bosnia and Herzegovina only persons declaring affiliation with a "constituent people" are entitled to stand for election to the Presidency, which consists of three members: one Bosniac and one Croat, each directly elected from the Federation of Bosnia and Herzegovina, and one Serb directly elected from the Republika Srpska.

The applicants in these cases were ineligible to stand for election because, in the case of *Sejdić and Finci,* they are of Roma[2] and Jewish origin, in *Šlaku* and *Zornić,* of Albanian and undeclared origin respectively, and in *Pilav,* because the applicant is a Bosniac living in the Republika Srpska.

The cases of *Sejdić and Finci*, *Šlaku* and *Zornić* also concern violations of the right to free elections and discrimination against the applicants who were ineligible to stand for election to the House of Peoples of Bosnia and Herzegovina due to their lack of affiliation with a constituent people (violations of Article 14 taken in conjunction with Article 3 of Protocol No. 1).

[1] This document has been classified restricted until examination by the Committee of Ministers.
[2] The terms "Roma and Travellers" are being used at the Council of Europe to encompass the wide diversity of the groups covered by the work of the Council of Europe in this field: on the one hand a) Roma, Sinti/Manush, Calé, Kaale, Romanichals, Boyash/Rudari; b) Balkan Egyptians (Egyptians and Ashkali); c) Eastern groups (Dom, Lom and Abdal); and, on the other hand, groups such as Travellers, Yenish, and the populations designated under the administrative term *"Gens du voyage"*, as well as persons who identify themselves as Gypsies.

In the *Zornić* and *Šlaku* judgments, the Court indicated, under Article 46 of the Convention, that "the finding of a violation in the present case was the direct result of the failure of the authorities of the respondent State to introduce measures to ensure compliance with the judgment in *Sejdić and Finci*". The Court furthermore indicated that "the failure of the respondent State to introduce constitutional and legislative proposals to put an end to the current incompatibility of the Constitution and the electoral law with [the Convention] is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs but also represented a threat to the future effectiveness of the Convention machinery" (§ 40 in *Zornić* and § 37 in *Šlaku*).

Status of execution

Necessity to amend the Constitution and the electoral legislation: The Committee of Ministers has always considered that a number of amendments to the Constitution of Bosnia and Herzegovina and its electoral legislation should be adopted for the execution of the *Sejdić and Finci* judgment. However, in order for these amendments to be adopted, it was necessary for the political leaders to reach a consensus on their content.

The Committee of Ministers' examination of the case of Sejdić and Finci: The Committee of Ministers has been examining the *Sejdić and Finci* case very closely since the judgment of the Court became final and has adopted three interim resolutions calling on the authorities and political leaders to ensure that the constitutional and legislative framework be brought in line with the Convention requirements. The Committee has also stressed, both in these interim resolutions and its numerous decisions, that the execution of this judgment constitutes a legal obligation of Bosnia and Herzegovina.

The Committee's latest decision: In the decision adopted at its 1230th meeting (June 2015) (DH), the Committee noted with satisfaction the written commitment to devote special attention to the execution of the *Sejdić and Finci* group of cases adopted by the Presidency of Bosnia and Herzegovina, which was signed by the leaders of the major political parties and endorsed by Parliament on 23 February 2015. It encouraged the authorities and political leaders of Bosnia and Herzegovina to ensure that this written commitment led to concrete results and, consequently, invited them again to intensify their efforts to reach rapidly a consensus on the content of the constitutional and legislative amendments required to execute these judgments and to ensure that the necessary amendments were adopted as a matter of priority. The Committee also invited the authorities to provide regularly information on the concrete steps taken, together with an indicative time-table, to execute these judgments.

The position of the European Union (EU): The EU decided that the Stabilisation and Association Agreement (SAA) with Bosnia and Herzegovina would enter into force once credible efforts to bring the Constitution into compliance with the *Sejdić and Finci* judgment had been made by the respondent State. To this end, the then Commissioner Füle carried out extensive consultations with the country's political leaders. In December 2014, the EU Foreign Affairs Council agreed on a renewed EU approach towards Bosnia and Herzegovina on its EU accession path, notably to decide on the entry into force of the SAA once a written commitment to undertake reforms to the EU accession had been made. In line with these conclusions, the Written Commitment to EU Integration was adopted by the Presidency of Bosnia and Herzegovina on 29 January 2015 and endorsed by Parliament on 23 February 2015, indicating that special attention would be given to the execution of the *Sejdić and Finci* judgment. Taking this into account, the EU signed the SAA with Bosnia and Herzegovina (in force since 1 June 2015). On 15 February 2016, Bosnia and Herzegovina submitted its application to join the EU. In its resolution of 14 April 2016, the European Parliament regretted that no progress had been made with regard to the implementation of these judgments and stressed once again that the failure to implement them might hinder Bosnia and Herzegovina's EU accession path. On 20 September 2016, the EU Council adopted conclusions inviting in particular the EU Commission to prepare its opinion on the membership application of Bosnia and Herzegovina while paying particular attention to the implementation of the *Sejdić and Finci* judgment.

In their updated action plan dated 18 October 2016 (DH-DD(2016)1154), the authorities indicated that in September 2015 the Council of Ministers adopted an action plan setting out the measures to be taken to execute these judgments. The action plan, which was prepared by the Ministry of Justice, provided that a high level task force would be set up to prepare the draft amendments to the Constitution and electoral laws before the end of 2015. Subsequently, its members have been appointed, including three ministers of Bosnia and Herzegovina and representatives of all caucuses of the House of Representatives and one caucus of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

The task force has not yet been constituted because the two remaining caucuses of the House of Peoples have not yet appointed their representatives. In view of this, in June 2016, the Council of Ministers commissioned the Ministry of Justice to prepare a revised action plan with an adjusted implementation time-frame and composition of the task force.

Analysis by the Secretariat

No information has been provided to the Committee on the steps taken to prepare the revised action plan, in particular on the alternative measures envisaged to start actively the preparations to draw up the necessary constitutional amendments.

Likewise, it does not appear that the written commitment to devote special attention to the execution of the present judgments has been honored. No information has been provided as to what efforts have been invested by the leaders of the political parties to reach a consensus on the constitutional and legislative amendments.

It has to be highlighted that the Court referred to the three interim resolutions adopted so far by the Committee of Ministers and noted that "in light of the lengthy delay which has already occurred, the Court, like the Committee of Ministers, is anxious to encourage the speediest and most effective resolution of the situation in a manner which complies with the Convention's guarantees" (§ 42 in *Zornić*). Noting that the impugned constitutional provisions were put in place under special circumstances and were designed to end a brutal conflict, the Court stressed that the approval of the "constituent peoples" was necessary to ensure peace at that time. However, now, more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of these provisions. The Court therefore "expects that democratic arrangements will be made without further delay. In view of the need to ensure effective political democracy, the Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina" (§ 43 in *Zornić*).

It should be recalled that, since the judgment in the case of *Sejdić and Finci* became final, not only the Committee of Ministers and the other relevant institutions of the Council of Europe but also the international community have been investing considerable efforts to facilitate a consensus among the country's political leaders on the content of the constitutional and legislative amendments. These efforts have not succeeded so far. As a consequence, similar violations of the Convention continue to occur as explained above.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-5

Sejdić and Finci group v. Bosnia and Herzegovina (Application No. 27996/06)
Supervision of the execution of the European Court's judgments
CM/ResDH(2013)259, CM/ResDH(2012)233, CM/ResDH(2011)291, DH-DD(2016)1154, DH-DD(2015)541, CM/Del/Dec(2015)1230/7

Decisions

The Deputies

1. noted with deep concern that no tangible progress has been made in the execution of this group of cases since its last examination by the Committee of Ministers at the 1230th meeting (June 2015) (DH) and that the European Court continues to deliver judgments finding similar violations;

2. noted that the Court in the *Zornić* judgment highlighted that it "expects that democratic arrangements be made without further delay" and stressed that, "in view of the need to ensure effective political democracy, the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina";

3. noted that the efforts made so far by the authorities of Bosnia and Herzegovina to put in place appropriate measures to start preparing the necessary constitutional amendments continue to be blocked as a consequence of the absence of consensus between the leaders of the political parties;

4. firmly recalled the unconditional obligation of respondent States to abide by the judgments of the European Court and exhorted the political leaders, without further delay, to intensify their dialogue to enable the adoption of the necessary changes to the Constitution and electoral legislation;

5. invited the member States and the European Union to raise in their contacts with Bosnia and Herzegovina the issue of the implementation of the judgments in the *Sejdić and Finci* group of cases;

6. decided to resume consideration of these cases at their 1288th meeting (June 2017) (DH) at the latest.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-6 9 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-6 Nencheva and others v. Bulgaria (Application No. 48609/06)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1111, DH-DD(2015)1216, DH-DD(2014)1418, DH-DD(2014)504

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
48609/06	NENCHEVA AND OTHERS	18/06/2013	18/09/2013	Complex problem

Case description

This case concerns the death of 15 children and young adults between 15 December 1996 and 14 March 1997 in a home for children with severe mental disorders in the village of Dzhurkovo. During the period in question, Bulgaria was experiencing a serious economic crisis and the living conditions in the home were extremely poor (not enough food, medicine, medical care, clothes or heating). The European Court noted that, with the exception of the staff working in the home, the authorities had not taken swift, practical and sufficient measures to prevent the deaths, despite having precise knowledge of the real danger to the health of the children three months prior to the first death. The Court also found that the investigation into these events had not been sufficiently thorough and had not met the requirements of diligence and promptness. Consequently it held that the authorities had failed to fulfil their positive obligation to protect the lives of vulnerable children for whom they were responsible and had failed to implement appropriate procedural mechanisms to shed light on the circumstances surrounding the particularly tragic events of the case (violation of Article 2).

Status of execution

A revised action report was submitted on 3 October 2016 (see DH-DD(2016)1111).

Individual measures:

The Dzhurkovo home has not been in operation as a children's home since 1 January 2006.[2] The Prosecutor's Office established that it was impossible to carry out a fresh investigation into the events that had given rise to the case, on account of the time-limit on criminal prosecution.

General measures:

1) Material conditions in establishments caring for children with mental disorders: The authorities stated that the living conditions of children suffering from mental disorders have improved considerably. The quality of care is monitored by several domestic bodies, including the Ombudsman's Office, which acts as a national prevention mechanism.

[1] This document has been classified restricted until examination by the Committee of Ministers.
[2] According to the available information, this home has been renovated and converted into a home for adults with mental health problems.

More particularly, in late 2015, all social welfare institutions for children with mental disorders over three years of age were closed and the children were placed with foster families or in family-type residential centres. In June 2016, there were 130 such centres, catering for up to 1 753 children. Children under three years of age with health problems are placed in medico-social care homes under the responsibility of the Ministry of Health. Some of these homes have recently been converted into socio-medical centres offering multiple services, including day-care centres and family type residential centres.[3]

The municipality, represented by the mayor, provides welfare accommodation in family type residential centres but for out of the national budget. The financing of these centres has increased over the years. The authorities' intention, in the long term, is to reduce the number of children brought up in institutions and to increase the number of children brought up by families with the assistance of day-care centres.

In the reports concerning 2014 and 2015, the Ombudsman noted that children living in new residential centres were not always supervised by a sufficient number of qualified carers. He also criticised the practice of placing children and young adults together, given the risks of violence against the younger residents. The reports do not contain any criticism of the actual material conditions in these new residential centres or in medico-social centres.

2) Medical care: The authorities provided information on the regulations governing the medical care of children in out-of-home care. They pointed out that the regional health inspectorates monitor the quality of the medical care provided for such children.

In the reports concerning 2014 and 2015, the Ombudsman expressed his concern at the lack of medical staff at night in family type residential centres, which meant that carers without appropriate training were administering high doses of medicine. The Ombudsman was of the opinion that this situation could endanger children's lives. With regard to the closing down of homes for children under three years of age, the Ombudsman noted there were not enough residential centres capable of providing suitable care for children with severe disabilities.

In August 2015, the authorities amended the relevant regulations to set up family-type residential centres for children[4] and young adults requiring complex and constant medical care. These medical centres are situated in towns and cities. A nurse is always present and a doctor can be consulted at any time. At the end of June 2016, there were nine such centres in the medico-social centres, offering medical care on a 24-hour basis and a total of 64 places.

3) Measures to ensure the effectiveness of investigations: Since 2010, an autopsy is mandatory if a child dies in a children's home. In 2010 the Prosecutor's Office opened 238 criminal investigations into the deaths of disabled children in children's homes over a period of ten years. The purpose of the investigations was to determine whether these deaths had been caused by professional negligence (an offence under Article 123.1 of the Criminal Code). The authorities state that the decisions to close these investigations were monitored by higher prosecutors and that an appeal could have been brought before the courts. Article 243.9 of the Code of Criminal Procedure stipulates that if the decision to close an investigation is not challenged before the courts, it may be revoked *ex officio* by the higher prosecutor within a time-limit of one or two years (depending on the degree of seriousness of the offence). Once this time-limit has expired, the Chief Public Prosecutor may, in "exceptional cases", quash the decision. The authorities state that the possibility of resuming the investigation is an additional safeguard, in particular in cases where the parents have lost interest in a child placed outside the family and do not themselves have recourse to the remedies available in the context of the criminal investigation.

Analysis by the Secretariat

Individual measures:

It should be noted with regret that the time-limit on criminal prosecution means that it is now impossible to open a fresh criminal investigation into the 15 deaths that took place in the Dzhurkovo children's home in 1996 and 1997.

[3] Among other things, these centres offer families and mothers consultation services, medical care, etc.
[4] These centres seem to cater for children of all ages.

General measures:

- *With regard to the material living conditions and the medical care provided*

Most of the problems relating to inadequate material conditions seem to have been solved following the closure of the previously existing homes and the transfer of children to new family- type residential centres. This positive development is to be noted with satisfaction. It would however be useful to know whether domestic law provides for procedures for granting additional resources to mitigate possible difficulties in meeting the children's basic needs.

With regard to medical care: It is important that the authorities indicate whether they think there are enough medical centres to cater for all the children who require complex medical care and that they provide information on the additional measures envisaged in this field, where necessary. Finally, it would be helpful to have information on the number and frequency of visits made by regional health inspectors to family-type residential centres and on the outcome of such visits.

Furthermore, in his report on his visit to Bulgaria in February 2015, the Council of Europe Commissioner for Human Rights highlighted the inadequacy of the resources for internal monitoring of residential centres and other establishments for children.[5] It would therefore be useful to have information on the number and frequency of inspections carried out in family-type residential centres and medico-social centres by the different domestic bodies responsible, the outcome of these inspections and, where appropriate, the steps taken to monitor the care provided for children more closely.

Finally, with respect to the States' positive obligation to put in place a legal framework which protects the right to life, it is important that the authorities ensure that children with mental disorders placed outside of their families are afforded independent representation, enabling them to have Convention complaints relating to their health and treatment examined before a court or other independent body. Information on measures envisaged in this regard is therefore awaited.

- *With regard to the effectiveness of investigations concerning vulnerable children placed outside the family*

The legislative reform making it mandatory systematically to carry out an autopsy in the event of the death of a child placed outside the family is an important development. However, as shown by the information provided by the authorities concerning the 238 investigations opened in 2010,[6] other questions remain as regards the adequacy of the guarantees for effective investigation.

Furthermore, if the family of a child who has died does not challenge the refusal to open or the decision to close an investigation, no other party is legally authorised to do so. In practice, parents frequently lose interest in their child if he or she is placed in an institution, with the result that they do not take advantage of the remedies offered to victims in criminal proceedings. It would therefore be useful if the authorities considered the possibility of establishing a mechanism whereby a person with no connection to the child (but acting as an *ad hoc* representative or in another capacity) could have recourse to such remedies so that the protection offered in domestic law is effectively applied, including in cases where the parents have lost interest in their child.

Moreover, the information so far submitted does not make it possible to assess the effectiveness of internal investigations in situations similar to that highlighted in the instant case. Indeed, the aim of all the investigations carried out in 2010 appears to have been only to verify whether the persons directly responsible for caring for the children might have caused their deaths through professional negligence. Considering the context of this case, it would be useful to receive information on the avenues available to carry out, where necessary, effective criminal investigations against other public authorities at different levels of responsibility for the proper functioning of family type residential homes.

Financing assured: YES

[5] See the "Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Bulgaria, from 9 to 11 February 2015 ", CommDH(2015)12, §§ 30 and 40

[6] For relevant information concerning the period 2013 – 2014, see "Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Bulgaria, from 9 to 11 February 2015", CommDH(2015)12, §§ 28 and 40. In particular, the Commissioner noted that only one investigation had been opened in the period 2013-2014 against an unknown perpetrator in respect of the death of a child living in a home and that the investigation had not yet been completed on the date of his visit to Bulgaria in February 2015.

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-6

Nencheva and others v. Bulgaria (Application No. 48609/06)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1111, DH-DD(2015)1216, DH-DD(2014)1418, DH-DD(2014)504

Decisions

The Deputies

As concerns the individual measures

1. noted with regret that due to the statute of limitations it is no longer possible to carry out a fresh criminal investigation into the 15 deaths which occurred between December 1996 and March 1997 in the Dzhurkovo children's home; accept that no further individual measures are possible in this case;

As concerns the general measures

2. noted with satisfaction that the material living conditions of children with mental disorders have been improved since the closure of the previously existing care homes and the opening of new family-type residential homes;

3. noted with interest that nine family type residential centres offering medical care for children with serious disabilities have been opened; nevertheless invited the authorities to indicate whether there are enough of these centres to cater for all children who require permanent medical care;

4. also invited the authorities to provide precise information on the frequency and outcome of the inspections made by the different domestic bodies to assess the living conditions and medical care given to children in family-type residential centres and medico-social care homes;

5. encouraged the authorities to adopt measures to ensure that children with mental disorders placed outside their families are afforded independent representation, enabling them to have complaints relating to their health and treatment examined before a court or other independent body;

6. took note with interest of the reform making it mandatory systematically to carry out an autopsy in the event of the death of a child placed outside the family; encouraged the authorities to introduce additional guarantees to ensure the effectiveness of investigations in the event that the parents lose interest in a child once he or she is placed in an institution and to provide information on internal practices with regard to the criminal liability of the officials responsible for the running or monitoring of residential centres;

7. invited the authorities to submit information on the progress made in all of these fields before 1 September 2017.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-7-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-7 United Macedonian Organisation Ilinden and others group v. Bulgaria (Application No. 59491/00)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1314, DH-DD(2016)1315, DH-DD(2016)1190, DH-DD(2016)364, CM/Del/Dec(2016)1265/H46-9

Action – Item proposed with debate
To debate the cases in the light of the draft decision below

Application	Case	Judgment of	Final on	Indicator for the classification
59491/00	UNITED MACEDONIAN ORGANISATION ILINDEN AND OTHERS	19/01/2006	19/04/2006	Complex problem
34960/04	UNITED MACEDONIAN ORGANISATION ILINDEN AND OTHERS	18/10/2011	08/03/2012	

Case description

These cases concern the unjustified refusals of the courts, in 1998-99 and 2002-04, to register an association aiming at achieving "the recognition of the Macedonian minority in Bulgaria". The refusals were based on considerations of national security, protection of public order and the rights of others (alleged separatist ideas) and on the constitutional prohibition on associations pursuing political goals (violations of Article 11).

As concerns the considerations related to security and protection of the rights of others, the Court found that the applicants had not advocated the use of violence or other undemocratic means to achieve their aims and that the expression of separatist ideas in speeches and programme documents should therefore benefit from the protection of Article 11 of the Convention.

Concerning the considerations related to the prohibition on pursuing political goals, the Court found that the fact that the goals of the association were labelled as "political" – and therefore, according to the Bulgarian courts, relating solely to political parties – was not a sufficient ground for refusing registration. It underlined that domestic law did not allow the association to participate in elections and that therefore there was no "pressing social need" to require it to register as a political party.

Status of execution

On 20/10/2016 the authorities provided a revised action plan (see DH-DD(2016)1190).

[1] This document has been classified restricted until examination by the Committee of Ministers.

Individual measures:

- *Registration proceedings of 2010-2013:* A request for registration from an association named UMO Ilinden was introduced by some of the applicants on 27/10/2010.

By a judgment of 03/02/2012, the Blagoevgrad Regional Court refused to register the association on the ground that the file submitted to it did not fulfil some formal requirements and that the goals of the association could incite national hatred.

On 23 April 2012, the Sofia Court of Appeal confirmed the judgment and added that some of the aims of the association had a political character and were also directed against the unity of the nation, as they openly intended to put groups of Bulgarian citizens in opposition with one another, in breach of Article 44 § 2 of the Constitution.

By decisions of 30 April 2013 and 15 July 2013, the Supreme Court of Cassation declared inadmissible the cassation appeal of UMO Ilinden, on the ground that legislative changes had removed its competence to review judgments concerning the registration of associations.

- Registration proceedings of 2014 - 2015: On 30 June 2014, the Regional Court of Blagoevgrad refused to register an association called UMO Ilinden.

On 20/11/2015, the Sofia Court of Appeal confirmed this refusal in a final judgment for the following reasons: it considered, in particular, that the activity of the association could lead to considerable tension in a region where the local sensitivities were very intense and cause disruption of public order. It also noted in this respect that the supporters of the association had caused, or taken part in, disturbances in the past. The association had declared that it would pursue its goals through peaceful means, but this declaration was at odds with the known behaviour of certain members and supporters. In addition, the Court of Appeal recalled that the statutes of UMO Ilinden contained virulent statements and considered that the registration of the association could breach the rights of other Bulgarian citizens who did not share its outlook. Finally, it considered that it is necessary on preventive grounds to refuse registration, despite the possibility foreseen in the law to order the dissolution of an association after its registration on grounds of unlawful activity.

General measures: The main relevant information can be summarised as follows:

- *Dissemination and awareness-raising measures taken between 2006 and 2012*: the authorities disseminated the judgments and a manual concerning the right to freedom of association and organised training activities.

- *Refusals to register associations similar to UMO Ilinden*: in judgments which became final in December 2009 and July 2011, the domestic courts refused to register two associations aiming at the defence of the interests of persons who considered themselves "Macedonians" *("Macedonian Ccultural and Educational Association Nikola Vaptzarov"* and *"Union of Macedonians from Bulgaria who experienced repression"*). The articles of these two associations were almost identical and the grounds given by the Sofia Court of Appeal to refuse registration in the two proceedings are also similar.

The Court of Appeal held that there was no Macedonian minority in Bulgaria and that suggesting the existence of such a minority was a threat to national unity and territorial integrity. In addition, it considered that the association wished to pursue aims reserved solely for political parties. The associations did not introduce valid cassation appeals in either of the two cases.

In 2014, an association called the "*Union of Macedonians from Bulgaria who experienced repression, victims of the communist terror*" filed a request for registration. This request was rejected at first instance by the Blagoevgrad Court, on the ground that the association's goals could adversely affect national unity, in breach of Article 44 § 2 of the Constitution. On 02/02/2015, the Sofia Court of Appeal confirmed this refusal. It considered that the association pursued goals which were contrary to national unity and territorial integrity and that Article 12 § 2 of the Constitution reserved these goals for political parties.

- *Technical consultations in 2013*: meetings took place in Sofia in March and October 2013, with the participation of representatives of the Sofia Court of Appeal, the Supreme Court of Cassation, the Ministry of Justice and the Department for Execution, in order to discuss the questions raised by the recent refusals to allow registration linked to the execution of this group of cases.

- *Additional awareness-raising measures taken by the authorities as of 2013:* In 2013 and 2014, in view of the difficulties identified in the execution of these judgments, the authorities continued to take additional focused measures with regard to the relevant courts aimed at clarifying that :
1. under Bulgarian law the registration of an association does not imply that the court seized approves the goals and the statements of the association or accepts their validity;
2. the result of the registration procedure, whether positive or negative, does not have an impact on the question of the existence or not of a particular minority, or the recognition thereof;
3. the expression of positions which are shocking for the majority of the population does not, in itself, justify a refusal of registration.

After the 1186th meeting (December 2013) (DH), the authorities disseminated to the Blagoevgrad Court and the Sofia Court of Appeal the decision adopted by the Committee of Ministers in these cases, translated into Bulgarian, together with a legal analysis related to the main findings of the European Court in the judgments and their action plan of 28 November 2013. In March 2014, the authorities organised a seminar for judges from the courts directly competent to examine requests for registration of associations similar to UMO Ilinden, with the participation of representatives of the Execution Department and the Registry of the European Court. Finally, the main questions raised by the judgments under consideration were also included in all annual reports on the execution of judgments of the European Court adopted by the Bulgarian Council of Ministers and presented to the Parliament between 2014 and 2016.

- *Legal reform adopted in September 2016:* Early in 2015, the authorities started working on a reform of the Non-Profit Legal Entities Act aimed at transferring competence for the registration of associations from the courts to the Registration Agency within the Ministry of Justice. On 09/09/2016, the authorities informed the Secretariat that the Bulgarian Parliament had finalised the adoption of the draft law on 08/09/2016. The amendments will enter into force on 01/01/2018.

- Latest examination by the Committee in September 2016: During the 1265th meeting, the Committee noted with concern that the new refusals to register UMO Ilinden and one similar association, delivered by the Bulgarian courts in 2015, were still at least partially based on grounds already criticised by the European Court. In this context the Committee welcomed the adoption by the Bulgarian Parliament of a legislative reform which aimed to put in place a simplified administrative procedure for registration of associations. The Committee requested to be provided with the relevant provisions, as well as additional information on their implementation, in order to proceed with the in-depth assessment of the new legal framework. The Deputies also invited the authorities to provide additional information on the time-limit for the entry into force of the new provisions, foreseen for 01/01/2018. Finally, the Committee invited the authorities to ensure the examination, within the new mechanism, of any future request for registration by the applicant association in full compliance with the requirements of Article 11 of the Convention.

- Information provided by the authorities concerning the new registration mechanism: The provisions adopted in September 2016 provide specific rules aimed at ensuring the impartiality and objectivity of the registration process. Thus, it will be possible to file a request for registration of an association with any territorial unit of the Registration Agency and the request will be examined by an officer chosen randomly among all officers working in all territorial units of the Agency.

The officer who has received the request will have to verify, *inter alia*, whether the name of the organisation is unique, whether the documents required by law have been submitted and whether it is possible to establish on the basis of these documents that the creation of the association had taken place and in compliance with the law. In this respect, the authorities recall that Article 2 of the Non-Profit Legal Persons Act provides that associations may chose freely their goals. If there is an omission to submit certain documents, the applicant will receive instructions to supplement his or her request. If, after a period of three days, the request is still incomplete, it will have to be rejected. However, the applicant will be entitled to introduce a new request using the documents already submitted in a previous procedure.

As concerns the date of entry into force of the new mechanism, the authorities have specified that it is necessary to develop software for the new database through a public procurement procedure. Thereafter the new database will have to undergo tests. Furthermore, new secondary legislation has to be prepared and recruitment will have to take place to reinforce the Registration Agency.

The authorities have provided translations of the Non-Profit Legal Persons Act and the Registration of Commercial Societies and Non-Profit Organisations Act, as amended in September 2016. It is apparent from the reading of the relevant provisions that in the event of a refusal to register an association, it will be possible to lodge an appeal with the Regional Court which corresponds to the headquarters of the association within seven days. The appeal will have to be examined *in camera* and the decision of the Regional Court will be appealable to the relevant Court of Appeal, whose decision will be final.

Analysis by the Secretariat

- *As concerns the general measures*

In their revised action plan, the authorities indicated the technical steps required for the implementation of the new mechanism for registration of associations. These steps seem to explain in an objective manner the long period of *vacatio legis*.

The authorities have also provided information on the functioning of the new mechanism. Several positive points can already be highlighted at this stage, although additional clarification seems necessary in some respects.

As concerns the positive points, the new mechanism contains useful safeguards for the impartiality of the procedure which could also reduce the risk of a refusal to register motivated by local sensitivities. Moreover, in case of a refusal, the association will be entitled to submit a new request by reusing documents already submitted in a previous procedure, an arrangement which should facilitate the preparation of a file which is complete and complies with the requirements of the domestic legislation. It is also to be noted that most of the criteria which have to be met for the registration of an association are purely formal.

As concerns the crucial question concerning the nature of the future review of the lawfulness of a request for registration, it is necessary that the authorities submit clarifications on its exact scope.

Also, it should be noted that the right to register en association is a civil one.[2] Thus, the question whether a public hearing was needed would depend on the issues which had to be determined by the court in the event of an appeal against a refusal to register. If the questions examined were technical, an examination *in camera* could be justified. However, it would be useful to have the authorities' assessment of the question whether the domestic legal framework allows for an exception to the rule according to which an appeal against a refusal to register an association should be examined *in camera.*[3]

Finally, as the authorities are currently preparing secondary legislation for the application of the new registration mechanism, the Committee should be provided, in due time, with a translation or a summary. It would also be useful to indicate whether the officers of the Registration Agency will benefit from awareness-raising measures, through guidelines or other means, concerning the need to examine registration requests in line with Article 11 of the Convention.

- *As concerns the individual measures*

It should be recalled that in its decision of September 2016 the Committee invited the authorities to ensure the examination, within the new mechanism, of any future request for registration by the applicant association in full compliance with the requirements of Article 11 of the Convention. The first information provided by the authorities on the functioning of the new registration mechanism seems encouraging. However, additional clarification would be useful to assess the capacity of the new legal framework to create all the conditions for the adoption of the individual measures required.

Financing assured: YES

[2] See *Apeh Üldözötteinek Szövetsége and Others v. Hungary*, No. 32367/96, 5 October 2000
[3] See, inter alia, *Martinie v. France* [GC], No. 58675/00, 12 April 2006, §§ 39 – 44

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-7

United Macedonian Organisation Ilinden and others group v. Bulgaria (Application No. 59491/00)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1314, DH-DD(2016)1315, DH-DD(2016)1190, DH-DD(2016)364, CM/Del/Dec(2016)1265/H46-9

Decisions

The Deputies

1. noted with interest the information provided by the authorities on the functioning of the new system for registration of associations by the Registration Agency and the positive aspects emerging from it;

2. in this context, took note of the steps which should allow the entry into force of this new mechanism on 1 January 2018 and reiterated their invitation to the authorities to ensure that any future registration request from the applicant association will be examined in full compliance with the requirements of Article 11 of the Convention;

3. invited the authorities to provide, by 31 March 2017 at the latest , clarifications as to the precise scope of the future review of the lawfulness of a registration request, to enable an assessment of the safeguards which will be implemented in this area;

4. also invited the authorities to provide, as soon as possible, and in any event by 30 June 2017, information on the secondary legislation prepared for the implementation of the new registration mechanism, as well as with regard to any awareness-raising measures foreseen in respect of the officials in charge of registration, in order to draw their attention to the need to ensure an examination which is in line with the requirements of Article 11 of the Convention.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-8 8 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-8 S.Z. group v. Bulgaria (Application No. 29263/12)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1186, DH-DD(2016)1185, DH-DD(2016)32

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for classification
29263/12	S.Z.	03/03/2015	03/06/2015	Structural problem
81260/12	VASIL HRISTOV	16/06/2015	16/09/2015	
2092/08	MULINI	20/10/2015	20/01/2016	
1108/02	KOLEVI	05/11/2009	05/02/2010	Proposal to transfer under the enhanced procedure

Case description

S.Z. Group: The cases in this group concern ineffective investigations into murder, bodily harm, rape, unlawful confinement and incitement to prostitution (procedural violations of Articles 2 and 3). The European Court found a "systemic problem" of ineffectiveness of criminal investigations in Bulgaria with regard to shortcomings which affect investigations[2] regardless of the identity of the alleged facts and which are revealed by a large number of repetitive cases concerning members of law enforcement agencies[3] or private individuals.

Affaire Kolevi: This case relates primarily to the ineffectiveness of the investigation into the murder of the first applicant (a high-ranking prosecutor) which occurred in 2002, on account of the lack of guarantees in Bulgarian law for the independence of criminal investigations against the Chief Prosecutor (procedural violation of Article 2).[4]

Status of execution

The authorities submitted revised action plans in the S.Z. group of cases and in the *Kolevi* case on 20 October 2016 (see DH-DD(2016)1185 and DH-DD(2016)1186), which state the following:

Individual measures:

1) S.Z. group: In the *S.Z.* case, prior to the judgment of the European Court, some of the accused had been sentenced to terms of imprisonment ranging from three to five years, whilst others could not be prosecuted because of the statute of limitations. The authorities are currently gathering information in the *Vasil Hristov* case in which the investigation had not been terminated at the date of the judgment of the Court.

[1] This document has been classified restricted until examination by the Committee of Ministers.
[2] Such as delays, lack of thorough and objective investigation, omission de shed light on the participation of a particular person in the offence, a refusal of the prosecutor to comply with a judicial decision quashing his decision to terminate the investigation.
[3] The specific measures related to investigations against law enforcement agents (concerning the independence of the preliminary investigation, safeguards against ill-treatment and identification of officers from special units) are considered in the *Velikova* group.
[4] The measures relating to violations of Article 5, §§ 1, 3 and 4 were considered in the cases of *Svetoslav Hristov* and *Evgeni Ivanov*.

2) Kolevi case*:* Numerous investigative measures have been carried out following the reopening of the criminal investigation in 2009, but the former Chief Prosecutor, Mr F., accused by the applicants, has not been heard. On 16 December 2015, the criminal proceedings were suspended on the ground that the perpetrators of the murder had not been identified and the file was sent to the police to continue their investigations.

General measures:

1) Measures to ensure the effectiveness of investigations in general (S.Z. group): The action plan describes a number of measures adopted or in the process of being adopted, aiming in particular at:

- ensuring timely and effective criminal investigations: Since 2006, the domestic law has contained time-limits within which the investigation must be completed and a reform in 2016 laid down a deadline for completing the preliminary inquiry (the stage preceding the investigation). In addition, a Bill of 2016 provided for the introduction of an acceleratory remedy applicable at all stages of criminal proceedings and also available to victims of a criminal offence. Finally, the authorities foresee examining the advisability of introducing judicial review of the refusal by a prosecutor to open an investigation and to analyse the practice in the area of judicial review of decisions by the prosecution service to terminate an investigation.

- eliminating certain procedural obstacles to the effectiveness of investigations: A 2016 bill seeks to abolish the obligation for courts automatically to terminate criminal proceedings if, one or two years (depending on the seriousness of the charge) have elapsed after a person has been charged with an offence without any valid committal to trial. The authorities foresee also analysing the application of a rule whereby once one or two years (depending on the seriousness of the charge) have elapsed, criminal proceedings terminated by the prosecution service may not be re-opened except “in exceptional circumstances” and further to a decision by the Chief Prosecutor.

- ensuring the effectiveness of judicial examination of criminal cases*:* The possibility of modifying the charges before a court of first instance was extended in 2010 and a 2016 Bill provides for the holding of a preliminary hearing to avoid cases being referred back to a prosecutor at the trial stage.

In addition to the measures above, the authorities are currently carrying out an in-depth analysis of the causes of the ineffectiveness of investigations. In particular, the Supreme Prosecution Office is currently analysing the relevant judgments of the European Court and a mission by prosecutors from European Union countries is currently under way to analyse the functioning of the Bulgarian prosecution service and make recommendations.

2) Legal framework concerning investigations against the Chief Public Prosecutor (Kolevi case): Under Bulgarian law, any prosecutor may initiate an investigation into the conduct of the Chief Prosecutor. The action plan therefore presents measures aimed at strengthening the autonomy of prosecutors working on a criminal case. However, the Chief Prosecutor or his or her deputies can still annul decisions taken by any prosecutor in the country, where the said decisions have not been reviewed by a judge, including decisions to open an investigation or bring charges against a particular person. The Bulgarian law still does not contain specific rules for the temporary suspension from his or her functions of the Chief Prosecutor within the context of criminal proceedings against him.

Analysis by the Secretariat

Individual measures:

1) S.Z. group: No measure seems necessary in the *S.Z.* case. By contrast it is necessary for the authorities to provide rapidly information on recent developments in the criminal proceedings giving rise to the *Vasil Hristov* case, as well as the assessment of the competent authorities of the possibility to carry out a new investigation in the *Mulini* case.

2) Kolevi case: The European Court has explicitly called into question the choice not to hear Mr F. in the criminal investigation giving rise to this case.[5] It is therefore important to specify whether this shortcoming can still be remedied in the context of the new investigation.

[5] See § 203 of the judgment

General measures:

1) Preliminary observations

The cases from the *S.Z.* group concern a systemic problem of ineffectiveness of investigations into alleged acts contrary to Articles 2 and 3 of the Convention. The Court urged the authorities to identify, in co-operation with the Committee of Ministers, the different causes of these shortcomings and the general measures capable of preventing similar violations.[6] The *Kolevi* case concerns a particular aspect, namely the lack of safeguards for the independence of criminal investigations regarding the Chief Prosecutor. The analysis of the underlying causes of these problems shows that there is a link at the level of the general measures required in response to these judgments. Therefore, it seems appropriate to continue their examination jointly.

2) Systemic problem of ineffectiveness of investigations (S.Z.)

Following the *S.Z.* judgment, the authorities adopted and elaborated certain reforms and are currently carrying out activities to enhance their analysis of the causes of the systemic problem identified by the Court. These positive developments should be encouraged, in particular the authorities' intention to introduce an acceleratory remedy and to abolish the possibility of terminating an investigation solely on the grounds of its duration.

In this context, it would be useful to have the results of the analysis carried out by the authorities as concerns:
- the need for strengthening guarantees concerning the initiation of criminal investigations and bringing charges,[7] in the light of the relevant Council of Europe instruments;[8]
- the application in practice of the rule whereby once one or two years have elapsed, criminal investigation terminated by the prosecution service may not be re-opened except "in exceptional circumstances" and further to a decision by the Chief Prosecutor; in this context, it would be useful to know how the concept of "exceptional circumstances" is applied and in particular whether it includes the discovery of new facts and new evidence;
- the need to take measures to avoid the expiry of the statute of limitations while proceedings are pending;
- the need to adopt measures to make the examination of criminal cases at the judicial stage more effective (in particular in view of the reforms envisaged to limit the possibility to send back a case to a prosecutor).

3) Lack of guarantees for the independence of an investigation against the Chief Prosecutor (Kolevi)

The domestic law still contains a set of rules which, according to the *Kolevi* judgment, can compromise the independence of an investigation against the Chief Prosecutor. In particular, the prosecution service is assigned exclusive competence to initiate prosecution and the Chief Prosecutor and his or her deputies can annul any decision taken by another prosecutor (not reviewed by a judge). Consequently, it continues to be unlikely that a Chief Prosecutor could be charged against his or her will, in view also of the rules governing the temporary suspension of magistrates.[9] It is therefore clear that complex general measures are required to execute the *Kolevi* judgment, which has already been final for six years. In order to support the efforts of the authorities in this regard, the Committee might wish to pursue the examination of the *Kolevi* case under the enhanced supervision procedure.

Financing assured: YES

[6] See *S.Z.,* §§ 54-58, *Vasil Hristov*, § 49 and *Mulini*, § 52
[7] See, amongst others, the *S.Z., Abdu* (No. 26827/08), *Boris Kostadinov* (No. 61701/11), *Dimitrova and Others* (No. 44862/04) cases.
[8] See paragraph 34 of Committee of Ministers Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system, and Part V, paragraph 5 of the "Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations" on the duty to investigate.
[9] See §§ 205 – 209 of the judgment.

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-8

S.Z. group v. Bulgaria (Application No. 29263/12)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1186, DH-DD(2016)1185, DH-DD(2016)32

Decisions

The Deputies

1. noted that no individual measure is possible in the *S.Z.* case; invited the authorities to specify whether it is still possible to hear the former Chief Prosecutor Mr F. in the context of the new investigation in the *Kolevi* case and to provide information on the current state of the investigation in the *Vasil Hristov* case, as well as the assessment of the competent authorities of the possibility to reopen the investigation in the *Mulini* case;

2. noted with interest the adopted or planned measures to ensure the effectiveness of investigations and the in-depth analysis under way; in this context encouraged the measures to introduce an acceleratory remedy in criminal matters and to eliminate the possibility of terminating an investigation solely on the ground of its duration;

3. invited the authorities to provide information on the results of their analysis concerning the other concrete measures which could be taken to address the causes of the systemic problem of ineffectiveness of investigations; in this context encouraged them in particular to assess the need for strengthening guarantees regarding the opening of investigations and bringing charges, in the light of the relevant Council of Europe instruments;

4. noted with interest the reforms adopted to enhance the autonomy of prosecutors responsible for a case, but noted that they have not solved the problem of the lack of independence regarding investigations against the Chief Public Prosecutor, as highlighted in the *Kolevi* case*;* given the complexity of the measures required to this end, decided to pursue consideration of this case under the enhanced supervision procedure;

5. invited the authorities to submit information on the progress made in all these areas by 1 September 2017.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-9 8 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-9 I.M. v. France (Application No. 9152/09)

Supervision of the execution of the European Court's judgments

Reference document:
DH-DD(2016)1059

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
9152/09	I.M.	02/02/2012	02/05/2012	Structural problem

Case description

This case concerns the absence of an effective remedy for a Sudanese national who, in January 2009, wished to challenge a removal measure (violation of Article 13 taken together with Article 3).

The applicant was able to use two remedies:

- an application for asylum, automatically classified under the priority procedure, because he had submitted it after having being detained. Under this procedure, the applicant had only five days to lodge his application with the Office for the Protection of Refugees and Stateless Persons (OFPRA), instead of 21 days, as under the normal procedure. This period was brief and binding, and the applicant had to prepare a comprehensive asylum application with supporting documents in French (without any linguistic support), responding to the same high standards as asylum applications submitted from outside detention under the normal procedure;
- an application before an administrative court for annulment of the decision to remove him from France. The European Court accepted that this remedy, with fully suspensive effect, was exercised before a judge whose jurisdiction to examine the complaints under Article 3 could not be questioned. However, it underlined the obstacles faced by the applicant in submitting a reasoned and documented application in a very short time (48 hours), without linguistic or legal assistance in drafting it, and with only the limited assistance of a court appointed lawyer whom he had met shortly before the hearing.

The Court found that, while these remedies were theoretically available, their accessibility in practice had been limited by several factors related mainly to the automatic classification of the application for asylum under the priority procedure, the short deadline for appeal and material and procedural difficulties related to the submission of evidence, while the applicant was deprived of liberty (including inadequate conditions for the preparation of appeal and insufficient legal and linguistic assistance). The quality of the examination provided by OFPRA and the administrative courts depends partly on the quality of the referral, which was lowered by these shortcomings.

[1] This document has been classified restricted until examination by the Committee of Ministers.

The Court underlined that these shortcomings could not be remedied by an appeal. It noted in particular the absence of suspensive effect of the remedy lodged before the National Court (CNDA) on an OFPRA decision of refusal of asylum, falling under the priority procedure.

Status of execution

The measures adopted are presented in the action report provided on 15/09/2016 (DH-DD(2016)1059).

Individual measures:

As the Court noted in its judgment, the applicant obtained political refugee status. The Court held that the finding of violation provided a sufficient just satisfaction for the non-pecuniary damage suffered. The amount awarded by the Court for costs and expenses has been paid. The authorities thus consider that the necessary individual measures have been taken.

General measures:

The judgment was published and disseminated to the administrative courts and to the authorities in charge of immigration.

The Law of 29 July 2015 removed the automatic nature of the application of priority procedure (which became accelerated procedure) in respect of applications for asylum submitted from applicants' detention. The choice of the procedure (normal or accelerated) and whether the asylum seeker should stay in detention is now subject to individual examination by the prefect on the basis of objective criteria. OFPRA may oppose a decision to use the accelerated procedure for reasons related to the nature of the case or the particular vulnerability of the person.

The decision to uphold the detention of the asylum seeker (bringing the possibility of the application of the accelerated procedure) can be challenged within 48 hours before an administrative court by a new remedy with a suspensive effect. If the administrative court annuls the decision, the foreigner's detention shall cease immediately and his request will be dealt under the normal procedure.

A circular of 2 November 2015 was communicated to prefects with instructions as to the implementation of this reform. In particular, the circular aimed at informing the asylum seeker of the right to receive legal and linguistic assistance in a detention centre and specified the criteria to be applied for the examination of the asylum seeker's individual situation to assess objectively whether the application could be considered dilatory, and could serve as a basis for a decision on continued detention, which include: date of entry into France, duration and conditions of the asylum seeker's stay on the territory, initiatives relating to asylum and residency permit, and statements following his questioning.

Analysis by the Secretariat

Individual measures:

Since the applicant has been granted the status of a political refugee and the just satisfaction awarded by the Court has been paid, no further individual measure is necessary.

General measures:

The French authorities have adopted measures aimed at addressing the shortcomings identified by the Court, which arose because the priority asylum procedure became an accelerated procedure.

In this regard, it should be recalled that the Court accepted that accelerated asylum procedures, developed in many European States, could facilitate the processing of applications which are clearly abusive or manifestly ill-founded. It confirmed its jurisprudence according to which a review of an application for asylum under an accelerated procedure does not deprive a foreigner in detention of a detailed examination, as long as the first application was the subject of a comprehensive examination under a normal asylum procedure. It is not the existence of an accelerated procedure in itself which has been questioned by the Court, but the automatic application of this procedure for an asylum application submitted by an applicant in detention, the shortness of the deadlines for appeal and the material and procedural difficulties related to the submission of evidence while the applicant was deprived of liberty and making his first application for asylum.

The removal, by the legislative reform of 29 July 2015, of the automatic classification under accelerated procedure of applications for asylum submitted from detention, in favour of an individual assessment, is therefore a welcome development, which addresses the Court's findings. This positive assessment is reinforced by the circular of 2 November 2015 and the bilateral consultations with the authorities according to which the prefect has to demonstrate the dilatory nature of an application for asylum, assuming the good faith of the applicant.

The fact that OFPRA may object to the classification in accelerated procedure of an application for asylum and request reclassification under normal procedure constitutes an additional guarantee. Improvements provided in legal and linguistic assistance are also positive aspects of the reform.

However, clarification is needed regarding the implementation of this legislative reform, so that the Committee can assess the effectiveness of modified remedies, in the light of the Court's findings.

First, as regards the case-by-case assessment of classification under the accelerated procedure, the Secretariat's analysis, supported in bilateral consultations with the authorities, is that to decide the accelerated procedure, the prefect has to prove that the application has a dilatory nature (conversely, there is a presumption of good faith of the applicant). It would be useful for this analysis to be confirmed by the authorities, together with evidence in support.

Moreover, it would be useful if the authorities could explain how the new remedy before an administrative court to challenge continued detention offers more guarantees than the existing remedy before the administrative Tribunal to challenge an expulsion measure(besides the fact that it offers an additional remedy). Indeed, this new remedy is restricted to the same period of 48 hours, which was held too short by the Court for the applicant to prepare his defence.

In addition, the authorities should clarify whether the appeal of an OFPRA decision before the CNDA became suspensive following the reform, including applications for asylum submitted in detention, since this is not clear from the texts.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-9

I.M. v. France (Application No. 9152/09)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1059

Decisions

The Deputies

1. recalling that the violations found by the Court mainly result from the automatic classification under priority procedure of the applicant's application for asylum, the short deadlines for the remedies available to him and the material and procedural difficulties involved in submitting evidence while he was deprived of his liberty and making his first asylum application;

2. noted with satisfaction that the applicant obtained political refugee status, the just satisfaction awarded by the Court was paid and that no further individual measure is required;

3. noted with interest the removal of automatic classification under accelerated procedure of applications for asylum submitted by an applicant in detention, in favour of an individual examination, as well as the possibility for the Office for the Protection of Refugees and Stateless Persons (OFPRA) to oppose the classification of an application for asylum under accelerated procedure and request reclassification under normal procedure, which is an additional guarantee;

4. to assess the effectiveness of the new mechanism, invited the authorities to confirm the allocation of the burden of proof and provide clarification regarding the proof of the dilatory nature of an asylum application submitted by an applicant in detention; explain how the new remedy before the administrative court to challenge continued detention offers more guarantees that the existing remedy to challenge an expulsion, criticised by the Court; clarify whether the remedy to appeal an OFPRA decision before the National Asylum Court became suspensive following the reform, including applications for asylum submitted in detention;

5. invited the authorities to provide a revised action report, answering these questions, as soon as possible and at the latest by the end of March 2017.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-10-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-10 Gharibashvili group v. Georgia (Application No. 11830/03)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1262, DH-DD(2016)1206, DH-DD(2016)701, DH-DD(2016)324, DH-DD(2016)114, DH-DD(2015)625, DH-DD(2015)113, DH-DD(2014)956, DH-DD(2014)955, DH-DD(2014)1099, Public Defender of Georgia Special Report, CommDH(2014)9, ODGProg/Inf(2013)15, CM/Del/Dec(2016)1259/H46-12

Action – Item proposed with debate
To debate the case on the basis of the points for consideration with a view to the preparation of a draft decision.

Application	Case	Judgment of	Final on	Indicator for the classification
11830/03	GHARIBASHVILI	29/07/2008	29/10/2008	Complex problem and urgent individual measures
18183/05	KHAINDRAVA AND DZAMASHVILI	08/06/2010	08/09/2010	
35403/06	TSINTSABADZE	15/02/2011	18/03/2011	
25091/07	ENUKIDZE AND GIRGVLIANI	26/04/2011	26/07/2011	
18996/06	MIKIASHVILI	09/10/2012	09/01/2013	
19634/07	DVALISHVILI	18/12/2012	18/03/2013	
4728/08	Ramin KIZIRIA	11/03/2014	Decisions with undertakings	Proposal to transfer under the enhanced procedure
5168/06	Vazha BAGHASHVILI	18/03/2014		
11323/08	Otar SURMANIDZE AND OTHERS	24/06/2014		
39726/04	Sulkhan MOLASHVILI	30/09/2014		
8177/12	Malkhaz MZEKALISHVILI	10/02/2015		
58228/09	Emzar KOPADZE	10/03/2015		
28103/11	Lasha LANCHAVA	23/06/2015		
22318/10	STUDIO MAESTRO LTD AND OTHERS	30/06/2015		
60864/10	Davit CHANTLADZE	30/06/2015		
312/10	Giorgi BEKAURI AND OTHERS	15/09/2015		
65128/10	Vazha GEGENAVA AND OTHERS	20/10/2015		

Case description

This group concerns the lack of effective investigations into allegations of breaches of the right to life and ill-treatment allegedly imputable or linked to action or negligence of law enforcement officers (Ministry of Internal Affairs ("MIA"), Department of Constitutional Security, Ministry of Corrections, Ministry of Justice) or of the Public Prosecutor's Office (procedural violations of Articles 2 and 3). It is composed of six judgments on the merits and eleven decisions (friendly settlements with undertakings).

As regards the judgments, three cases (*Khaindrava and Dzamashvili, Tsintsabadze, Enukidze and Girgvliani*) concern the failure of the authorities to fulfil their obligation to carry out effective investigations into the death of the applicants' next-of-kin and into the assault on the life of one applicant by private individuals, and into the death of the applicants' next-of-kin in prison or following kidnapping and beating by officials from the MIA (procedural violations of Article 2). The other three cases (*Gharibashvili, Mikiashvili, Dvalishvili*) concern the lack of effective investigations into allegations of ill-treatment during arrest or/and in custody.

[1] This document has been classified restricted until examination by the Committee of Ministers.

In addition, in two of the cases the Court found a substantive violation of Article 3 due to the excessive use of force by the police in the course of the applicant's arrest and/or in custody (*Mikiashvili* and *Dvalishvili,* respectively).

The Court identified the following procedural shortcomings:

1) *in the investigation carried out by the Ministry of Interior:* lack of the requisite independence and impartiality due to the institutional connection, and even hierarchical subordination, between the implicated senior ministry officers and the investigators in charge of the case (*Enukidze and Girgvliani*).

2) *in the investigations carried out by the Office of the Public Prosecutor:*
a) no investigations were initiated *propio motu* despite the existence of sufficient evidence that there had been an assault on the life of one of the applicants (*Khaindrava and Dzamashvili*);
b) absence of appropriate forensic/handwriting expertise to identify the origin of the injuries (*Tsintsabadze, Gharibashvili, Mikiashvili*, *Dvalishvili*);
c) the investigations lacked the requisite independence and impartiality:
- in all the cases of this group, the conclusions of the investigative bodies were mainly based on the statements of the persons involved in the incidents (police officers, inmates, prison staff) without having identified or interviewed a number of other potential witnesses;
- the applicants were denied access to the investigative procedure and were not informed about investigative steps taken, or even about the findings made in the course of the investigation (*Tsintsabadze, Enukidze and Girgvliani*);
- there was an institutional connection between the state agents allegedly involved in the incidents and the investigative bodies (*Gharibashvili, Khaindrava and Dzamashvili, Tsintsabadze, Enukidze and Girgvliani*);
- the prosecution authority and the prisons department failed to ensure that the four accused were remanded in separate cells, to avoid collusion (*Enukidze and Girgvliani*).

3) *in the judicial proceedings brought against state agents*:
a) in the case of *Gharibashvili,* no adversarial public proceedings were carried out and a final decision was rendered *in camera*;
b) in the cases of *Mikiashvili* and *Dvalishvili*, the domestic courts based their conclusions mainly on testimony given by the police officers involved in the incidents;
c) in the case of *Enukidze and Girgvliani*, the domestic courts refused to provide the applicants with sufficient time and facilities to study the case materials and disregarded their numerous requests for the collection of additional evidence directly relevant to the establishment of the truth. As regards the punishment of the convicted persons, the European Court concluded that the sentences initially imposed and those finally implemented by the relevant domestic authorities did not constitute adequate punishment (the offenders had their sentences halved by presidential pardon and were then released on licences by the Tbilisi City Court).

Other violations: In the case of *Enukidze and Girgvliani,* the Court also found that the authorities had not complied with their obligations to furnish all necessary facilities to the European Court (violation of Article 38).

A series of decisions based on friendly settlements are added to these judgments. The government acknowledged the existence of similar procedural violations of Articles 2 and 3 and undertook to conduct effective investigations into allegations of violations of the right to life and ill-treatment by law enforcement officers ~~(procedural violations of Articles 2 and 3)~~.

Status of execution

The authorities provided a revised action plan concerning the six judgments on 1 June 2016 (DH-DD(2016)701). The Committee expressed regret that this plan was submitted so close to the start of the 1259th meeting (June 2016) (last examination of the group) that no detailed assessment was possible for that meeting. It decided to resume consideration of this group at the 1273rd meeting (December 2016) (DH).

The Committee also invited the authorities to submit as soon as possible and, in any event before 1 September 2016, an updated and comprehensive action plan/report in respect of 11 friendly settlements. It indicated that, in the event of failure by the authorities to submit, within the above deadline, information attesting tangible progress, these cases would be transferred from the standard to the enhanced supervision procedure and joined with the *Gharibashvili* group. ~~On 5 September 2016, the Georgian authorities indicated that they would be able to provide this information on 15 September.~~

Action plans were finally submitted in respect of nine friendly settlements on 28 October 2016 (DH-DD(2016)1206) and in respect of the *Gharibashvili* group (judgments) on 15 November 2016 (DH-DD(2016)1262).

Individual measures: ~~In 2014-2015,~~

The Committee has noted with interest the reopening of the investigations in the cases in this group. It requested the Georgian authorities to ensure that the pending investigations were completed rapidly and diligently, and to keep the Committee informed of the progress made in that regard, including the outcome of all the investigations and, ~~if need be~~ where appropriate, any further judicial/disciplinary actions.

Information is still awaited regarding friendly settlements in the cases of *Surmanidze* and *Artmeladze and Molashvili*.

The state of investigations is as follows. ~~*Information provided in the consolidated action plan of 1 June 2016*~~

Closed investigations:

- *Gharibashvili and Khaindrava and Dzamashvili*, ~~*Mikiashvili* (2nd episode) and *Dvalishvili*~~: All possible investigative measures have been taken. However, given the time which has elapsed since the facts (15 years in *Gharibashvili* and 19 years in *Khaindrava and Dzamashvili*) and other objective reasons (impossibility to carry out forensic examinations, death of certain witnesses, lack of interest by the applicant, Mr. Khaindrava, in the continuation of the investigation etc.) ~~it was not possible to conduct complete investigations.~~, no further evidence could be found to confirm the allegations of ill-treatment in *Gharibashvili* and it was not possible to conduct complete investigations in *Khaindrava and Dzamashvili*. Therefore, the investigations were ~~as~~ closed on 15/09/2015 in *Gharibashvili* and on 20/07/2016 in *Khaindrava and Dzamashvili*. No information is available as to whether the applicants complained about the closure of the investigations.

Investigations leading to conclusions contrary to the European Court's findings:

- *Mikiashvili*: Following the new investigation into ill-treatment during the applicant's arrest on 29 October 2005 (substantive violation of Article 3) ~~- following the new investigation concerning the alleged ill-treatment,~~ it was concluded that the police used proportionate force. According to the action plan of 1 June 2016, the investigation was closed on 27 May 2016 by the Prosecutor's Office. However in the revised action plan of 15 November 2016, the authorities indicated that further measures would be adopted in this case. As regards the new investigation on alleged ill-treatment on 14-15 August 2006, the investigative authorities have already exhausted all planned investigative measures and the final decision will soon be adopted by the Prosecutor's Office.

- *Dvalishvili*: The investigation on ill-treatment suffered by the applicant in police custody (substantive violation of Article 3), has been completed but the final decision has not yet been adopted. The prosecution relied on the testimony of two police officers, according to which no ill-treatment took place.

Investigations pending:

The authorities provided detailed information on the investigative steps carried out following the other judgments and in all the friendly settlement cases except *Surmanidze* and *Artmeladze and Molashvili*. Concerning the progress achieved in *Enukidze and Girgvliani*, see also the Notes and decision for the 1222nd meeting (March 2015) (DH).

In all the cases, the authorities indicated that the investigations had been reopened by investigative bodies independent "institutionally and in practice" from those implicated in the events (the Chief Prosecutor's Office in almost all the cases), and they provided information on the relevant legal provisions in this regard (see general measures). Also, according to the action plans, the applicants have been involved to different degrees in the investigations. The authorities also presented a very detailed description of the investigative steps taken in each case.

~~The investigations are still pending in the cases of *Tsintsabadze* and *Enukidze and Girgvliani*. On 28 October 2016 (DH-DD(2016)1206) , the Georgian authorities provided information on nine friendly settlements. The investigations are pending in all these cases.~~

General measures:

~~At the 1222nd meeting (March 2015), the Committee noted with interest the information provided (DH-DD(2015)113) on: the amendments to the Code of Criminal Procedure to ensure that the victim is involved in the investigation procedure; amendments to the Prison Code to prohibit the placement in the same cell of persons accused in the same case and to exclude any kind of communication between them; and the introduction by the Georgian High School of Justice ("HSoJ") of a special training programme.~~

~~The Committee called upon the authorities to intensify their efforts to remedy the deficiencies in domestic legislation regarding the requirements of impartiality of investigative bodies in investigations to which Articles 2 and 3 apply. It also invited the authorities to provide clarifications on the possibility of appealing decisions refusing or revoking the status of victim and on training measures. The Committee reiterated its call to the authorities to submit, without further delay, a comprehensive action plan on the work in progress and/or completed with a view to addressing all the deficiencies identified by the Court in this group of cases at all stages of the proceedings (investigative and judicial), and to include therein a thorough analysis of the necessary general measures to fight impunity and prevent similar violations.~~

~~In response, in June 2015, the authorities submitted an up-dated action plan of (DH-DD(2015)625, pp. 25-30 for the detail), informing the Committee on the following measures:~~

1. Measures aimed at ensuring effective investigations into allegations of ill-treatment:

A) ~~The~~ Adoption of the 2015-2016 Action Plan "on Combating Torture, Inhumane or Degrading Treatment or Punishment"~~, which envisages~~

This plan tackles the issues both of investigation and prevention of ill-treatment (see point 2., below). Concerning investigation, it envisages, *inter alia*, the elaboration of ~~the~~ terms of reference for an effective investigation into allegations of ill-treatment by law enforcement officials in prisons, police stations, military and other closed establishments; the introduction of tactical guidelines regarding this kind of investigation, taking into consideration the best practices of different states; training for relevant civil servants. The action plan identified the authorities responsible for these measures, but without indicating the calendar for their implementation or concrete measures taken. In their revised action plan of 15 November 2016, the authorities confirmed that training activities had been carried out.

B) Measures aimed at ensuring institutional independence of investigating bodies

Following its previous examinations of these cases, the Committee called upon the authorities to intensify their efforts to remedy the deficiencies in domestic legislation regarding the requirements of independence and impartiality of investigative bodies in investigations under Articles 2 and 3. In 2012, the authorities had admitted that the legislation then in force did not ensure the impartiality of investigating bodies.

In the revised action plan of November 2016, the authorities explained that, according to Article 34 of the Criminal Procedure Code ("CPC"), criminal cases can be investigated by different bodies.[2] In conformity with Articles 35-36 of this law, an order was issued by the Minister of Justice on 7 July 2013 ("Order No. 34"), to set the rules on territorial and material jurisdiction for criminal investigations. According to this order, crimes allegedly committed by police officers have to be investigated by the Prosecutor's Office.[3] In cases where both the Prosecutor's Office and another investigative agency would be competent under the rules on territorial jurisdiction, the investigation has to be carried out by the Prosecutor's Office. In addition, Article 33 of the CPC allows the Chief Prosecutor or a deputy to remove a case from one agency and assign it to the Prosecutor's Office for investigation.

In September 2015, the authorities also adopted *amendments to the law on the Prosecutor's Office*. According to the authorities, these amendments prevent any interference from the government in the Prosecutor's Office's work. First, they modified the rules concerning the appointment and removal of the Chief Prosecutor, the introduction of the institution of a Special Prosecutor whose role is to examine allegations of crimes committed by the Chief Prosecutor, and the creation of the Prosecutorial Council chaired by the Minister of Justice. According to Article 8 § 1(b) of the Law, the Minister of Justice is authorised to issue normative and individual acts, orders, instructions and directives, "based on and for the enforcement of the law". According to the explanations provided by the Government, this provision cannot be understood as giving the Minister a right to interfere in individual criminal cases. Article 8 § 2 provides a rule of non-interference of the Minister of Justice in the actions and decisions of the Prosecutor's Office concerning investigation of individual criminal cases or criminal prosecution.

[2] Ministry of Justice; Ministry of Internal Affairs; Ministry of Defense; Ministry of Corrections; Ministry of Finance; State Security Service.
[3] More generally, crimes committed among others under Articles 332 (Abuse of official powers), 333 (Exceeding official powers), 334 (Unlawful discharge of the accused from criminal liability) and 335 (Providing explanation, evidence or opinion under duress) of the Criminal Code are also investigated by the Prosecutor's Office

The authorities provided statistical data concerning criminal cases initiated in 2013-2016 against employees (among them senior officials) of penitentiary institutions and the MIA in respect of alleged ill-treatment: 52 cases under Article 144 (torture) and 40 cases under Article 144 (degrading treatment or ill-treatment).[4]

C) Measures to provide for the involvement of the victim in the investigation procedure

As noted with interest by the Committee in March 2015, the CPC has been amended to provide for the victim to be involved in the investigation procedure and to have a right of access to at least the non-confidential materials of the case-file.~~: The authorities also responded to the Committee's questions concerning victim status and training measures:~~ The alleged victim has a right to appeal to a domestic court when victim status is refused or revoked in cases of especially grave crimes ~~(Article 56 §§ 5 and 6 of the amended CCP)~~. An appeal to the domestic court is possible only in such cases ~~of especially grave crimes reflects the State's need~~ to prevent the overburdening of the system and ensure its effective and expeditious operation.

~~The training measures for judges and judicial assistants include intensive training on the European Court's case-law, with a special emphasis on the *Enukidze and Girgvliani* judgment. In 2012-2014, the HSoJ organised 13 training events for 168 judges and 11 training events for 226 judicial assistants. In 2013-2014, four seminars were organised for 65 judges. Two seminars were scheduled in 2015, with the participation of 30-40 judges.~~

~~2. Measures aimed at avoiding ill-treatment:~~
~~The action plan also describes a series of measures envisaged for 2015-2016 to prevent ill-treatment, notably: an analysis and amendment of the legislation related to the prohibition of ill-treatment; strengthening procedural and institutional guarantees for protection of prisoners and detained persons; measures allowing timely detection of ill-treatment, and ensuring effective investigation of all ill-treatment cases (see above). Training and capacity building activities were also foreseen. As above, the action plan indicates which authorities are responsible for these measures but not the calendar for their implementation, or concrete measures taken.The authorities also provided information on combatting ill-treatment and prison conditions (summary of the reports of the Committee for the Prevention of Torture (CPT) and the Ombudsman of Georgia) in prisons and on the reform of the prosecutor's office (appointment and removal of the Chief Prosecutor, the introduction of the institution of a Special Prosecutor whose role is to examine allegations of crimes committed by the Chief Prosecutor, the creation of the Prosecutorial Council chaired by the Minister of Justice).~~

D) New rules to avoid undue pressure on witnesses

~~They also presented information on a legislative amendment to the CCP concerning n~~ New rules for witness interrogation~~, which~~ entered into force on 20/02/2016. ~~Under the new rules,~~ No witness may be compelled to testify and witnesses may be invited for interview on a voluntary basis. The refusal to attend will not incur criminal liability ~~by the witness~~. If the prosecutor considers that a witness may have important information for the investigation, he/she can ask a judge to summon this witness. The authorities provided information on the implementation of these rules in practice. A majority of witnesses voluntarily agreed to be interrogated and it was only in exceptional cases that the prosecutor requested a witness to be summoned. Witnesses can be assisted by their representatives, who have the right to pose questions. Prosecutors and investigators have been trained in the new rules.

E) Measures vis-à-vis the judiciary

A special training programme is implemented by the High School of Justice ("HSoJ"), with emphasis on the judgments in this group. In 2012-2014, the HSoJ organised 13 training events for 168 judges and 11 training events for 226 judicial assistants. In 2013-2014, four seminars were organised for 65 judges. Two seminars were scheduled in 2015, with the participation of 30-40 judges.

F) Placement of accused persons in separate cells

As noted with interest by the Committee in March 2015, the Prison Code was amended to prohibit the placement in the same cell of persons accused in the same case and to exclude any possibility for collusion.

[4] Beyond the scope of the execution of this group, also: 35 cases under Article 333 (exceeding official powers); seven cases under Article 332 (abuse of official authority); seven cases under Article 147 (unlawful detention)

2. Measures aimed at preventing excessive use of force by the police in the course of arrest and ill-treatment in custody

The 2015-2016 Action Plan "on Combating Torture, Inhumane or Degrading Treatment or Punishment" (see above, point 1.) ~~also describes a series of measures envisaged for 2015-2016 to prevent ill-treatment~~ notably foresaw: an analysis and amendment of the legislation related to the prohibition of ill-treatment; the strengthening of procedural and institutional guarantees for the protection of prisoners and detained persons; and measures allowing timely detection of ill-treatment~~, and ensuring effective investigation of all ill-treatment cases (see above~~). Training and capacity building activities were also foreseen. ~~As above, the action plan indicates which authorities are responsible for these measures but not the calendar for their implementation, or concrete measures taken.~~

Concerning the concrete measures taken to implement this Action Plan, the authorities referred to: the creation of a working group on the medical examination form to be completed when a person is placed in custody; the creation of a "Human Rights and Monitoring Division" within the MIA, entitled to perform unexpected visits on temporary detention facilities; the installation of video control systems in temporary detention facilities.

~~The authorities also provided information on combatting ill-treatment and prison conditions (summary of the reports of the Committee for the Prevention of Torture (CPT) and the Ombudsman of Georgia) in prisons and on the reform of the prosecutor's office (appointment and removal of the Chief Prosecutor, the introduction of the institution of a Special Prosecutor whose role is to examine allegations of crimes committed by the Chief Prosecutor, the creation of the Prosecutorial Council chaired by the Minister of Justice).~~

3. Measures aimed at preventing violations of Article 38

No information has been provided on the measures aimed at preventing breaches of the respondent State's obligation to furnish all necessary facilities to the European Court.

Analysis by the Secretariat / Point for consideration

It has to be stressed that, again, the Georgian authorities submitted the information required at a very late stage.

Individual measures:

The reopening of the investigations was confirmed in all the cases, except for two friendly settlements where information is still awaited.[5]

However, it is a source of concern that in the vast majority of the cases, investigations have now been pending for years without any tangible results, even if the authorities claim that investigative efforts have been reinforced. Also, it is regrettable that in two cases the investigations were closed without result notably on grounds of passage of time. This shows the importance of speeding up the investigations still pending, in order to avoid prescription.

Two cases raise special concern (~~of~~ *Mikiashvili* and *Dvalishvili*), since the Prosecutor's Office refuted the existence of ill-treatment although such treatment had been established by~~. However, in its judgments concerning these cases,~~ the Court ~~established the existence of ill-treatment~~ (substantive violations of Article 3)~~: the new investigations should not put this fact into question, but rather seek to identify and, if appropriate, punish those responsible. Further information therefore appears is thus necessary on the response to this situation~~. Clarifications are necessary in this respect, including on whether the credibility of the testimony given by the police officers in the renewed investigations has been questioned (see *Mikiashvili* judgment § 82; *Dvalishvili* judgment § 50).

It thus remains necessary that the authorities keep the Committee informed of what is being done to bring the pending proceedings to an end in conformity with Convention requirements. They are also invited to take the above concerns into consideration and to indicate if the decision to close the investigation can be challenged and, if so, before what authority.

General measures:

Concerning the *measures aimed at ensuring effective investigations*, the latest information provided describes the legal framework for the investigation into crimes allegedly committed by police officers, and the 2015 legislative amendments to the law on the Prosecutor's Office.

[5] *Surmanidze and Others* and *Molashvili*.

Further information appears necessary on how the institutional independence of investigating bodies, in particular the Prosecutor's Office, is guaranteed in law and in practice. Concerning the law, it would be important to receive details of the procedures and guarantees of independence for investigations concerning facts allegedly imputable not only to the police, but also to other categories of law enforcement officers (Ministry of Corrections, Department of Constitutional Security etc.), as well as to prosecutors (for example, who is responsible for the investigation, who are the investigators, what are the guarantees of their of independence etc.).

Additional elements are also needed to support the authorities' interpretation of the Law on the Prosecutor's Office to protect against ministerial interference in individual criminal cases (e.g. case law etc.)[6].

The evaluation of the effectiveness of the measures taken to avoid undue investigative pressure on witnesses will depend notably on the guarantees offered as regards the independence of prosecutors.

Concerning the practice, it is difficult to draw conclusions from the statistics provided, that show only the number of proceedings against agents of penitentiary institutions and the MIA, but not their outcome. Also, the general measures adopted do not seem to have had a visible impact on the individual measures.

It is to be noted that these questions are also pursued in other *fora* and that concerns have been repeatedly expressed about the effectiveness of investigations, notably by the Georgian Public Defender (e.g. in his 2015 report[7]) or by the Council of Europe Commissioner for Human Rights (CommDH(2016)2[8]).

As regards the role of the judiciary, the continued training measures are noted. In order to assess whether they are apt to avoid a repetition of the procedural shortcomings found in certain judicial proceedings brought against state agents, it would be necessary to demonstrate that these shortcomings have been addressed and overcome (notably lack of adversarial public proceedings and decisions rendered *in camera*, court decisions based mainly on testimony given by the police officers involved in the incidents, lack of sufficient time and facilities to study the case materials etc.).

Concerning the *measures aimed at preventing excessive use of force by the police in the course of arrest and ill-treatment in custody*, little information was provided to the Committee and the scope of the concrete measures adopted is limited. The authorities should submit further information on the measures taken and / or envisaged in this field and on the results achieved. In this respect too, problems are reported, notably by the Public Defender and the Commissioner (see above).

Finally, information is still awaited on the measures taken/envisaged to prevent *violations of Article 38*.

Grouping of cases

In accordance with the Committee's decision of June 2016, given the failure by the Georgian authorities to submit before 1 September 2016 information attesting tangible progress in respect of the 11 friendly settlements,[9] these cases should be transferred from the standard to the enhanced supervision procedure and joined with the *Gharibashvili* group.

A draft decision will be prepared in the light of the debate.

Financing assured: YES

[6] The Venice Commission, CCPE and OSCE/ODIHR proposed that this should be clarified in the Law on the Prosecutors Office, but this recommendation does not seem to have been followed by the Georgian authorities: see their Joint Opinion on the draft Amendments to the Law on the Prosecutor's Office of Georgia, endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015).
[7] Annual Report of the Public Defender of Georgia - *The situation of Human Rights and Freedoms in Georgia*, 2015, pp. 329-348.
[8] *Observations on the human rights situation in Georgia: An update on justice reforms, tolerance and non-discrimination*, §§ 11-14.
[9] *Kiziria* (4728/08), *Baghashvili* (5168/06), *Surmanidze and others* (11323/08), *Molashvili* (39726/04), *Mzekalishvili* (8177/12), *Kopadze* (58228/09), *Lanchava* (28103/11), *Studio Maestro Ltd and Others* (22318/10), *Chantladze* (60864/10), *Bekauri and Others* (312/10) and *Gegenava and Others* (65128/10).

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-11-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-11 Identoba and others group v. Georgia (Application No. 73235/12)

Supervision of the execution of the European Court's judgments

Reference document:
DH-DD(2016)1303, DH-DD(2016)1261, DH-DD(2016)631, CRI(2016)2

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
73235/12	IDENTOBA AND OTHERS	12/05/2015	12/08/2015	Complex problem
71156/01	97 MEMBERS OF THE GLDANI CONGREGATION OF THE JEHOVA'S WITNESSES AND 4 OTHERS	03/05/2007	03/08/2007	Proposal to transfer these cases under the enhanced procedure
28490/02	BEGHELURI AND OTHERS	07/10/2014	07/01/2015	

Case description

These cases concern the failure of the Georgian authorities to provide adequate protection against inhuman and degrading treatment inflicted by private individuals to LGBT activists (in May 2012) and Jehovah's witnesses (in 1999-2001), who were attacked during marches/meetings (substantive violations of Article 3, taken separately and in conjunction with Article 14), as well as the absence of any effective investigation in that respect (procedural violations of Article 3, taken separately and in conjunction with Article 14).

In *Indentoba and Others*, the homophobic attacks, by representatives of two religious groups, took place during a march in May 2012 to mark the International Day against Homophobia. In addition to the violations of Articles 3 and 14, the Court held that the authorities had breached their obligation to ensure that the march could take place peacefully by sufficiently containing homophobic and violent counter-demonstrators (violation of Article 11 taken in conjunction with Article 14).

Having regard to the reports of negative attitudes towards sexual minorities in some parts of society, as well as the fact that the organiser of the march specifically warned the police about the likelihood of abuse, the law-enforcement authorities were under a compelling obligation to protect the demonstrators, including the applicants, which they failed to do. The authorities also fell short of their procedural obligation to determine the discriminatory motive and identify those responsible for committing the homophobic violence. In the absence of a meaningful investigation, it would be difficult for the respondent State to implement measures aimed at improving the policing of similar peaceful demonstrations in the future, thus undermining public confidence in the State's anti-discrimination policy.

[1] This document has been classified restricted until examination by the Committee of Ministers.

In the *Gldani Congregation* and *Begheluri and Others* cases, religiously motivated attacks, by a group of extremist Orthodox believers, took place repeatedly during meetings of the applicants in 1999-2001. In addition to the violations of Articles 3 (substantive and procedural) and 14, the Court held that the authorities failed in their duty to take the necessary measures to ensure that Jehovah's Witnesses were able to exercise their right to freedom of religion (violation of Article 9 separately and in conjunction with Article 14).

In the case of *Begheluri and Others*, the Court considered that the authorities were ineffective in preventing religiously motivated violence. Through the conduct of their agents, who either participated directly in the attacks on Jehovah's Witnesses or showed acquiescence and complicity with the unlawful activities of private individuals, the Georgian authorities created a climate of impunity, which ultimately encouraged other attacks against Jehovah's Witnesses throughout the country. This was compounded by the clear unwillingness to ensure the prompt and fair prosecution and punishment of those responsible.

Status of execution

The authorities submitted ~~an~~ a revised action plan ~~in April 2016 (DH-DD(2016)631)~~ on 15 November 2016 (DH-DD(2016)1261) which focused on the case of *Identoba and Others.*

Individual measures:

In the three cases, the government paid the just satisfaction, including the costs and expenses awaited in the cases of *Gldani Congregation* and *Begheluri and Others.*

On 4 July 2016, a new investigation was initiated in the case of *Identoba and Others* on the basis of the judgment of the European Court. A series of investigative activities have been carried out – witnesses have been questioned, documentations and video footages have been examined. The investigation is still pending and the authorities indicate that they will provide updated information regarding the outcome of the investigation by mid-December 2016 approximately.

General measures:

Case of Identoba and Others:

The authorities indicated that no similar incidents occurred in the context of the celebrations of the International Day against Homophobia and Transphobia (IDAHOT - 17 May) in 2014, 2015 and 2016.

On 30/04/2014 the Parliament adopted Georgia's first National Human Rights Strategy - 2014-2020, as well as the first Action Plan for the implementation of this strategy (2014-2015). The latter planned notably: legislative changes to bring the national legislation with international standards on freedom of assembly and association; and measures to ensure better preparation of mass demonstrations/crowd control. In 2015, the government started elaborating a second Action Plan (2016-2017).

The authorities also referred to legislative measures.

First, Article 53 of the Criminal Code was amended on 27/03/2012. According to this amendment, discrimination on the grounds of, *inter alia*, sexual orientation and gender identity was recognised as a discriminatory motive and an aggravating circumstance in the commission of all criminal offences envisaged by the Criminal Code (Article 53§3).

In order to foster the good implementation of this provision in January 2016, the Chief Prosecutor's Office issued an instruction for prosecutors on its use in practice. Since then, discriminatory motives under Article 53 § 3 were raised in eight criminal cases (four cases concerning sexual orientation, one case concerning gender identity and three cases concerning religious intolerance); leading to criminal convictions in six cases.

Also, the Law on the Elimination of All Forms of Discrimination ("the anti-discrimination law") was adopted in 2014. Pursuant to this law, which prohibits any form of discrimination, any person considering him/herself to be a victim of discrimination may bring a court action against the person/institution which he/she considers to have committed the discrimination and may claim for moral and/or material damages. The law also vests the authority to monitor its implementation with the Public Defender's Office of Georgia. The Public Defender has four avenues to implement of his functions in that regard: examining cases of discrimination; developing legislative proposals; implementing public awareness raising campaigns; maintaining database of discrimination cases and preparing special annual reports.

To fulfil his task under this law, the Public Defender created a Department for Equality, and the Public Defender's Office's budget was increased by 68% in 2015 and by 12.5% in 2016. Since the adoption of the anti-discrimination law in 2014, he examined 247 cases of alleged discrimination, including 20 cases concerning sexual orientation and eight concerning gender identity.

Furthermore, since May 2014, 23 civil/administrative claims have been lodged before the domestic courts on the basis of the anti-discrimination law. 11 cases have been decided on the merits: one claim has been decided in favour of the applicant, two claims have been partially satisfied and eight claims have been rejected.

On 23/12/2014, the Minister of Internal Affairs (MIA) issued an instruction on *"Implementing special measures for the aim of prevention of discrimination and providing effective responses to the offences committed on such grounds".* The instruction introduces special directives to the relevant authorities of the Ministry: to conduct prompt and effective investigations into hate crimes; to carry out electronically disaggregated statistics of such crimes (including the specific ground of discrimination); to form a specialised group on investigation into hate crimes and to take into account the standards and requirements established by the new Anti-Discrimination Law.

On 30/12/2015, the MIA adopted additional instructions "*Regulating the conduct of police officers during assemblies and manifestations*". It introduces specific mechanisms for policing demonstrations and crowd control: drawing security action plans of demonstrations by the police officers; carrying out negotiations with the participants to prevent violence; regulating counter-demonstrations and recourse to special measures by police officers.

Training and awareness-rising measures

The Georgian translation of the *Identoba and Others* judgment has been published in the Legislative Herald and on the official websites of the Ministry of Justice and the Supreme Court. It also has been sent to the MIA and the Prosecutors Office for further dissemination among law enforcement officers.

Numerous training measures were also taken. The Academy of the MIA has introduced several training programmes for law enforcement officials: a new course on the Anti-Discrimination Law, including investigation into hate crimes (791 officers attended such courses in 2014 and 746 in 2015); special professional educational programmes for police inspectors covering, *inter alia*, the issues of mass management and crowd control (246 and 406 police officers had undergone the mentioned course in 2014 and 2015 respectively); a course on "Human Rights and Police" covering freedom of assembly and demonstrations in domestic and international regulations, the conduct of police officers during demonstrations (course completed by 976 officers in 2014 and 1844 in 2015).

Periodic training sessions on discrimination are also organised for the representatives of the MIA and the Prosecutor's Office (e.g. in February 2014, on topics including gender identity and sexual orientation, as well as the prohibition of discrimination in exercising the right of freedom of assembly).

During May-October 2015 several training sessions took place covering the issues of discrimination in light of the European Convention and the European Court's case-law. With EU assistance, the MIA published a bulletin on the prohibition of discrimination. In 2015 the Prosecutor's Office commenced training its personnel on investigation of hate crimes. With the assistance of the Council of Europe and the European Union, 90 staff members of the Prosecutor's Office were trained within eight educational programmes. The training was delivered by Georgian and foreign experts and encompassed the issues of domestic and international legislation with regard to discrimination, collection of evidence and investigation tactics/strategies into the hate crimes. The trainings also covered the case-law of the European Court concerning Article 14 of the Convention.

In 2016, 42 prosecutors and investigators attended three-day training sessions covering the standards for investigations into hate crime and ill-treatment under the European Court's case law. Moreover, in cooperation with the Council of Europe, 22 prosecutors and investigators will be involved in a distance learning course regarding the issues of discrimination, carried out within the Council of Europe Human Rights Education of Legal Professionals (HELP) platform.

In their conclusion, the government underlined that it was maintaining and strengthening its efforts to combat discrimination and intolerance. They also noted that with the effective implementation of legislation, continuing training for the representatives of state organs, *inter alia,* law-enforcement personnel, and national awareness-raising campaigns would contribute to peaceful exercising the right of freedom of assembly.

Communication from NGOs to the Committee (Rule 9.2)

On 16 November 2016, the NGOs Identoba, the Women's Initiatives Support Group (WISG), Amnesty International, and ILGA-Europe submitted a communication (DH-DD(2016)1303) assessing the action plan provided by the Georgian authorities to the Committee of Ministers on 26 April 2016.

According to this communication, in 2013 Identoba attempted to hold a peaceful demonstration to mark IDAHOT. They were attacked by thousands of counter-demonstrators, led by clergymen. 28 people were injured including three policemen. In 2014 no IDAHOT event was held, due to the traumatising effects of the 2013 events and concern that the safety of participants could not be ensured. In 2015 Identoba moved their demonstration to another location for security reasons and the event took place with police protection and without any incident. In 2016 it was impossible to hold an IDAHOT demonstration. Two factors contributed to this: heightened anti-LGBTI sentiments encouraged by homophobic discourse by politicians and the continued hostility of the Orthodox Church. The communication formulates recommendations to the Georgian authorities based *inter alia* of the 2015 ECRI report on Georgia to tackle homophobic and transphobic discrimination, to secure the right to freedom of assembly and to provide protection from bias-motivated violence.

Cases of Gldani Congregation and Begheluri and Others:

On 22 January 2010 the authorities submitted information concerning the provisions of the Georgian Criminal Code on criminal liability for unlawful interference with the performance of divine service and persecution of persons, *inter alia*, on grounds of their conscience, confession, faith or creed, or religious activities (Article 155 and 156).

Analysis by the Secretariat

First, it is to be noted that the cases of *Identoba and Others* (examined under the enhanced procedure), *Gldani Congregation* and *Begheluri and Others* (examined separately under the standard procedure) have a number of similarities as regards individual and general measures. Taking into account the same complex issues raised in all three cases, it is proposed to examine them jointly under the enhanced procedure as of the present meeting, in order to support the efforts of the Georgian authorities in the adoption of the necessary measures.

As regards individual measures: In the three cases, the just satisfaction has been paid. As regards the procedural violation of Article 3, a new investigation is pending in the case of Identoba and Others. It is important that this investigation progresses swiftly and in conformity with the Court's case law and the Committee's practice. No information has been provided as to whether measures have been adopted to remedy the shortcomings identified by the Court in the cases of *Gldani Congregation* and *Begheluri and Others*. The authorities should be invited to submit, without further delay, detailed information in this regard.

As regards general measures, it appears from the latest action plan for the *Identoba and Others* case that the authorities have adopted a series of legislative and other measures to comply with the judgment of the European Court. Note can also be taken of the statistical data regarding claims of alleged discrimination, lodged before the Public Defender of Georgia and the domestic courts.

In this regard, it may be noted that, as appears from the report (CRI(2016)2) of the European Commission against Racism and Intolerance (ECRI) on Georgia, published on 1 March 2016 (it covers the situation at 17 June 2015), progress has been made in a number of areas, which was welcomed by ECRI. However, ECRI also identified a number of issues that remain source of concern and some appear to be directly linked to the general measures identified for the execution of this group of cases.

The recent NGO submission to the Committee also raises a series of concerns (DH-DD(2016)1303).

In order to allow the Committee fully to assess the responses given by the authorities to the judgments of the Court, it appears necessary to request them to provide detailed and concrete information on the practical impact of the measures already adopted and, in the light of this impact, the additional measures they envisage to take, in particular, in the light of the recommendations made by the expert bodies and the cooperation projects with the Council of Europe and other international organisations. This information should further ~~include the following points~~: indicate how investigations into allegations of this nature are conducted. In this regard, it may be noted that ECRI recommended setting up a specialised unit within the police to deal specifically with racist and homo-/transphobic hate crime. It would be useful to know whether the authorities have implemented (or are planning to implement) this recommendation.

Information is awaited on the implementation of the Action Plan 2016-2017.

- ~~statistical information on the number of demonstrations which took place in 2015-2016, the number of recorded incidents and the response of the law-enforcement bodies;~~
- ~~the number of investigations conducted following complaints of homophobic attacks and the follow-up given;~~
- ~~statistical information on the number of complaints for attacks on religious grounds and the follow-up given for the period 2015-2016;~~
- ~~concrete information on how investigations into allegations of this nature are conducted. In this regard, it may be noted that ECRI recommended setting up a specialised unit within the police to deal specifically with racist and homo-/transphobic hate crime. It would be useful to know whether the Georgian authorities have implemented (or are planning to implement) this recommendation.~~

~~It is recalled that the authorities indicated that they will provide up-to-date information by the beginning of November 2016.~~

~~Revised Notes for the 1273rd meeting and an up-dated analysis with a draft decision will be prepared on the basis of the information available by then.~~

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-11

Identoba and others v. Georgia (Application No. 73235/12)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1303, DH-DD(2016)1261, DH-DD(2016)631, Report of the European Commission against Racism and Intolerance (ECRI) on Georgia (CRI(2016)2)

Decisions

The Deputies

1. given the similarities between the cases of *Identoba and Others*, *Gldani Congregation* and *Begheluri and Others*, decided to examine them jointly under the enhanced procedure as of the present meeting;

Individual measures

2. noting that a new investigation has been opened in the case of *Identoba and Others*, invited the authorities to ensure that it is conducted in a prompt and effective manner and to keep the Committee informed of the progress accomplished in this respect;

3. invited the authorities to provide, without further delay, information on the individual measures taken or envisaged concerning the cases of *Gldani Congregation* and *Begheluri and Others*;

General measures

4. noted with interest the information provided, notably on the legislative and training measures undertaken;

5. at the same time, bearing in mind the conclusions of the latest ECRI report on Georgia and the concerns expressed by NGOs, invited the authorities to provide further information on the practical impact of these measures and on possible additional measures envisaged, notably in the light of ECRI's recommendations.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-12-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-12 Gazsó and Tímár group v. Hungary (Applications Nos. 48322/12 and 36186/97)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1182, DH-DD(2015)1377, DH-DD(2015)631, DH-DD(2015)50, DH-DD(2014)8, CM/Del/Dec(2016)1250/H46-12

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
48322/12	GAZSÓ	16/07/2015	16/10/2015	Pilot judgment
36186/97	TÍMÁR GROUP (list of cases CM/Notes/1273/H46-12-app)	25/02/2003	09/07/2003	Structural problem

Case description

This group of cases concerns the excessive length of civil and criminal proceedings and the lack of an effective remedy in this respect (violations of Articles 6 § 1 and 13).

In view of the scale of the problem, the European Court delivered a pilot judgment finding the above-mentioned violations in the case of *Gazsó*, concerning civil proceedings, and requested the respondent State to "introduce without delay, and at the latest within one year from the date on which the judgment becomes final", that is by 16 October 2016, "an effective domestic remedy or combination of such remedies capable of addressing, in an adequate manner, the issue of excessively long court proceedings, in line with the Convention principles as established in the Court's case-law".

The Court had already found in the case of *Barta and Drajkó* (No. 35729/12, final on 17/03/2014), concerning criminal proceedings, that "in view of the systemic situation which it has identified, … general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the large number of persons affected. … To prevent future violations of the right to a trial within a reasonable time, the respondent State should take all appropriate steps, preferably by amending the existing range of legal remedies or creating new ones, to secure genuinely effective redress for violations similar to the present one."

Status of execution

Individual measures:

According to the information received, all the proceedings have been terminated except for seven cases which were still pending at domestic level when the European Court delivered its judgments.

[1] This document has been classified restricted until examination by the Committee of Ministers.

~~Information is still awaited as regards the payment of just satisfaction in the cases of *Patyi* (No. 1936/10) and *Gazsó* (No. 48322/12), where the payment deadline expired on 15/01/2016 and 16/01/2016, respectively. Further, in the case of *Szechenyi* (No. 4153/10) information relating to payment of default interest is missing.~~

General measures:

The Committee of Ministers has been supervising cases concerning excessive length of judicial proceedings in Hungary since 2003, when the first judgment in this group of cases was delivered by the Court. The Hungarian authorities have informed the Committee of the measures taken on a number of occasions. Most importantly, a law providing for acceleratory remedies aimed at expediting pending proceedings entered into force in April 2006 (Act XIX of 2006). The authorities have also indicated that a number of legislative measures have been adopted with a view to enhancing the effective functioning of the judiciary.

At its 1136th meeting (March 2012) (DH), the Committee decided to transfer the group of cases for examination under the enhanced procedure, given the structural nature of the problem they reveal. It noted with concern that, despite the measures taken by the authorities, the situation as regards excessive length of judicial proceedings did not appear to have improved in Hungary and it invited the authorities to take measures to reduce the length of domestic proceedings and to introduce effective domestic remedies in compliance with the Convention's standards, as set out in the Court's case law.

In response to the Committee's decision, the authorities again indicated a number of measures taken to solve the problem of lengthy court proceedings and the lack of an effective remedy in this respect. Besides the measures mentioned above, they referred, in particular, to a liability mechanism introduced in July 2003 (Act CX of 1999) as regards civil proceedings, different legislative amendments introduced to ensure the timely completion of criminal proceedings (Act LXXXIII of 2009; Act CLXXXIII of 2010; Act LXXXIX of 2011), and judicial reform restructuring the organisation and administration of justice (Act CLXI of 2011 and Act CLXII of 2011).

In their updated action plan of January 2015 (DH-DD(2015)50), the authorities acknowledged that general measures were required to shorten the length of judicial proceedings, improve the effectiveness of existing acceleratory remedies and create a compensatory remedy for excessively lengthy proceedings or a combination of the two types of remedies. A comparative analysis on best practices in this area was had been carried out in December 2014. At its 1222nd meeting (March 2015) (DH), the Committee noted with interest the authorities' acknowledgment and urged them to intensify their efforts in this respect; it further invited them to provide by the end of April 2015 information on the content of the decisions announced and a calendar setting out the next steps envisaged.

In their action plan of May 2015 (DH-DD(2015)631), the authorities submitted that a new remedy for criminal cases would be introduced in the new Code of Criminal Procedure. In their updated action plan of December 2015 (DH-DD(2015)1377), they submitted that new procedural Codes were being drafted for criminal and civil proceedings in order to expedite and streamline proceedings, define stricter rules of conduct for all parties and prevent delaying tactics. The new procedural Codes are expected to be submitted to Parliament in 2016 and to enter into force in 2017. Furthermore, a separate Act introducing a compensatory remedy for excessively lengthy civil, criminal and administrative proceedings will be established. The remedy will have no retroactive effect and will be based essentially on the German model (compare DH-DD(2013)1234, pp. 5-6). It was planned for the Act to be adopted by Parliament in October 2016.

At its 1250th meeting (March 2016) (DH), the Committee welcomed the authorities' indication that they would introduce a compensatory remedy for excessively lengthy civil, criminal and administrative proceedings, and strongly encouraged them to respect the deadline of 16 October 2016 set in the Court's judgment for the introduction of an effective domestic remedy or combination of such remedies. In view of that time-limit, the Committee decided to examine the cases at the latest at its1273rd meeting (December 2016) (DH).

In their latest submission of 20 October 2016, the authorities confirmed that they intended to take the legislative measures as announced in December 2015. They indicated that the regulatory options concerning the new compensatory remedy had been elaborated at expert level and that the government would decide on the way to proceed by the end of 2016. It is foreseen that the Act providing for the new compensatory remedy would be adopted by Parliament by 1 July 2017 and enter into force on 1 January 2018. The government announced its intention to submit an updated action plan in July 2017.

The judgments were translated and published on the website of the government.

Analysis by the Secretariat

I. Pilot judgment:

It is reiterated at the outset that, according to the indications given by the Court in its pilot judgment in the case of *Gazsó*, an effective domestic remedy or combination of such remedies had to be put in place by 16 October 2016. It appears from the authorities' latest submission that it was not possible to meet this deadline. The Committee might wish to note with regret that the authorities did not meet the deadline set in the Court's pilot judgment.

However, the legislative process is on-going and the authorities provided a new calendar indicating that the new remedy will be adopted by Parliament by 1 July 2017. They further submitted that it was planned for the law to enter into force on 1 January 2018, i.e. with a delay of more than one year and two months. The Committee might wish to take note of the new calendar provided but also strongly encourage the authorities to review their calendar so that the required compensatory remedy enters into force as soon as possible. The Committee might further wish to invite the authorities to provide information on the content and functioning of the draft law for introducing a compensatory remedy for excessively lengthy proceedings before civil, criminal and administrative courts by 1 February 2017 at the latest, and to keep the Committee informed on the further steps taken in the legislative process.

II. Individual measures:

At its 1250th meeting, the Committee invited the authorities to provide an update on the current state of those proceedings still pending at the domestic level (see Appendix) and on the measures taken to accelerate them ~~as well as information on the outstanding questions on payment of just satisfaction~~. Since then, no information has been received on these questions. The Committee might therefore wish to reiterate these requests.

III. General measures:

At its 1250th meeting, the Committee invited the authorities to provide information on a number of aspects concerning general measures. Since then, no information has been received on these aspects. The Committee might therefore wish to also reiterate its requests.

In particular with regard to the increasingly large number of cases pending with the Court (see *Gazsó* §§ 35-36), the Committee might wish to note with regret that still no concrete results or tangible progress have been achieved as regards shortening the length of judicial proceedings and the introduction of effective legal remedies in compliance with the Convention's standards as set out in the Court's case law, and reiterate its urgent call on the authorities further to intensify their efforts in this respect and to provide the Committee of Ministers with the outstanding information without further delay.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-12

Gazsó and Tímár group v. Hungary (Applications Nos. 48322/12 and 36186/97)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1182, DH-DD(2015)1377, DH-DD(2015)631, DH-DD(2015)50, DH-DD(2014)8, CM/Del/Dec(2016)1250/H46-12

Decisions

The Deputies

1. recalled that the Court's new pilot judgment in the case of *Gazsó* concerning the structural problem of excessive length of civil proceedings and lack of effective domestic remedies required the authorities to "introduce without delay, and at the latest by 16 October 2016", "an effective domestic remedy or combination of such remedies capable of addressing, in an adequate manner, the issue of excessively long court proceedings, in line with the Convention principles as established in the Court's case law";

2. noted with regret that the authorities did not meet the deadline set in the Court's pilot judgment, took note of the new calendar provided and strongly encouraged the authorities to review it so that the required compensatory remedy enters into force as soon as possible;

3. *as regards individual measures*, reiterated their request to the authorities to provide an update to the Committee on the current state of those proceedings still pending at domestic level and on the measures taken to accelerate these proceedings ~~as well as~~ and welcomed the information on the outstanding questions on payment of just satisfaction;

4. *as regards general measures*, noted with regret that still no tangible progress has been achieved as regards shortening the length of judicial proceedings and reiterated their call on the authorities further to intensify their efforts in this respect and to provide without further delay the outstanding information, in particular as regards the content of the relevant position of the new draft procedural codes, their applicability to administrative proceedings as well as detailed statistical information on the impact of the measures taken as regards the length of domestic judicial proceedings (civil, criminal and administrative);

5. invited the authorities to provide by 1 February 2017 at the latest information on the content ~~and functioning~~ of the draft law setting up a compensatory remedy in respect of excessively lengthy civil, criminal and administrative proceedings and as to whether the remedy will also be applicable for cases already pending before the European Court as well as to keep them informed on the further steps taken in the legislative process;

6. decided to examine these cases ~~at the latest~~ at their 1294th meeting (September 2017) (DH).

Appendix

List of cases of excessive length of judicial proceedings which were still pending at domestic level at the time the European Court rendered its judgment and in which information is awaited on the current state of the proceedings

a. Proceedings concerning civil rights and obligations

Application	Case	Judgment of	Final on
25065/09	DÖMÖTÖR	22/10/2013	22/10/2013
36999/08	GUEST ZRT	11/06/2013	11/06/2013
47902/08	ILONA KOVACS	17/02/2015	17/02/2015
33795/08	MAGYAR CEMENT KFT	28/05/2013	28/05/2013
25411/10	NEMETH	17/02/2015	17/02/2015
5766/05	SCHWARTZ AND OTHERS	03/11/2009	01/12/2009
19478/03	TARDI AND OTHERS	23/10/2007	23/01/2008

b. Criminal proceedings

Application	Case	Judgment of	Final on
–	–	–	–

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-13-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-13 Abenavoli group v. Italy (Application No. 25587/94)

Supervision of the execution of the European Court's judgments

Reference documents:
CM/ResDH(2010)224, CM/ResDH(2009)42, CM/ResDH(2007)2, ResDH(2005)114, ResDH(2000)135, DH-DD(2016)1204, DH(99)437, DH(99)436, DH(97)336, DH-DD(2016)1204, CM/Del/Dec(2015)1243/H46-11

Action – Item proposed with debate
To debate the cases on the basis of the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
25587/94	ABENAVOLI GROUP (List of cases CM/Notes/1273/H46-13-app)	02/09/1997	02/09/1997	Complex problem

Case description

The *Abenavoli* case and 119 other cases concern excessive length of proceedings before the administrative courts since the 1990s (violations of Article 6 § 1).

Status of execution

At its 1172nd meeting (DH) (June 2013), the Committee of Ministers examined the execution of these cases within the framework of the *Ceteroni* and *Luordo* group of cases, which comprised all the cases concerning excessive length of judicial proceedings. Since December 2015, in order to focus better on the issues still pending, it has been monitoring the execution of these cases in four separate groups: *Abenavoli* for administrative proceedings, *Ledonne* for criminal proceedings, *Ceteroni* for civil proceedings and *Luordo* for bankruptcy proceedings.

As far as administrative proceedings are concerned, the entry into force in 2010 of the new Code of Administrative Procedure (which the Deputies noted with interest at their 1157th meeting (DH) in December 2012) made it possible to note, as from the end of 2011, an overall decrease in the backlog of administrative proceedings. On the basis of the developments since, as highlighted in the information provided by the authorities on 21 October 2016 (DH-DD(2016)1204), and of information available in the public domain, the current situation can be described as follows.

Individual measures:

Just satisfaction was paid in all cases in which it was due. In 75 cases the domestic proceedings have been concluded. The authorities have said they will quickly provide the missing information concerning the remaining proceedings.

[1] This document has been classified restricted until examination by the Committee of Ministers.

General measures:

a) Legislative measures

The Code of Administrative Procedure adopted in 2010 provides for effective procedural tools that have enabled the backlog of pending cases to be tackled and incoming cases to be dealt with more efficiently. In particular, it provides for the possibility of adopting a short-form decision with a summary of the underlying reasons when the court notes that an application is manifestly well-founded or, conversely, manifestly ill-founded.

Moreover, other measures were adopted following the last examination by the Committee of Ministers in June 2013. Law Decree No. 90 of 2014 introduced measures into the Code of Administrative Procedure to speed up judicial proceedings in matters of public procurement, in view of the fact that this is a significant source of incoming cases. In particular, it confirms the possibility of determining the procedure during the hearing on interim/urgent measures and at any rate provides for the proceedings to be concluded by a short-form decision delivered within 45 days of the expiry of the deadline for parties to join the proceedings.

In April 2016, Italy transposed into domestic law European directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, the award of public contracts and procurement by entities operating in the water, energy, transport and postal services sectors. In this context, measures to reduce administrative litigation have been adopted, for example the introduction of simplified proceedings held in chambers and several alternative dispute resolution methods.

Moreover, a major reform of the public administration was adopted with Act No. 124 of 2015. This reform is currently being implemented and aims, among other things, to make the organisation of the public administration simpler and more efficient and to facilitate its interaction with citizens and businesses. This will help lower the risk of disputes and reduce administrative litigation as a result.

Furthermore, in order to enhance the efficiency of the regional administrative courts, the President of the Council of Ministers has signed a decree concerning the organisation of competitions for the recruitment of 78 administrative court judges for the period 2016/2018. In May 2016, a competition was launched to fill five posts of councillor of the Council of State. In addition, a number of members from outside, appointed directly by the government, will soon bolster the ranks of the Council of State.

From 1 January 2017, the digitisation of administrative proceedings, currently being trialled, will be implemented at all administrative courts and the Council of State.

b) Impact of the measures adopted

It emerges from the report by the President of the Council of State presented to the National Authorities on the occasion of the ceremony to open the judicial year on 16 February 2016 that very positive results were noted in the period 2011-2015.

In particular, a significant, constant and consolidated fall in the number of cases pending before the Council of State and the regional administrative courts was recorded: the backlog of pending applications fell from 467,419 in 2011 to 268,246 in 2015.

Moreover, as far as the average duration of proceedings before the Council of State is concerned, the information provided shows that it is less than a year in the case of public procurement matters and about a year and a half for proceedings relating to decisions by independent administrative authorities. Moreover, the average duration of proceedings to obtain an interim/urgent measure is about 30 days before the Council of State and 45 days before the regional administrative courts (30 days in cases relating to public procurement).

2015 was also marked by a reversal of the trend with regard to the number of applications filed with the Council of State and the regional administrative courts. After an increase in this number in 2013 and 2014 (64.483 applications in 2013, 74,484 in 2014), there was a decrease in 2015 (72,546 applications). The rise noted between 2013 and 2014 largely concerned proceedings brought in public procurement cases and cases involving the execution of decisions delivered in “Pinto” proceedings. In this connection, it can be noted that these types of proceedings have been the subject of specific measures aimed at reducing their impact on the number of incoming cases. Those adopted in the field of public procurement are described above. As far as “Pinto” proceedings are concerned, measures providing for the allocation of significant additional funds to the Ministry of Justice for paying “Pinto” compensation in 2015-2017 were adopted in December 2014. The Committee of Ministers noted these measures with interest at its 1236th meeting (September 2015) in connection with its examination of the *Giuseppe Mostacciuolo No. 1* group of cases.

c) *Mechanism for monitoring the situation of administrative justice*

In 2014, in order to remedy the lack of detailed empirical analyses on the situation of administrative proceedings, the authorities launched a research project in co-operation with the universities of Bologna, Florence and Rome (LUISS), the Italian National Institute of Statistics (ISTAT) and the Bank of Italy. One aim of this research, whose priority status was confirmed in 2015, is to provide updated and reliable statistical data on the number of applications filed, processed and pending before the administrative courts and on their average duration. The first phase of the research, involving the retrieval of data, has been completed. The second phase, which involves carrying out targeted surveys on crucial aspects of the administrative process (such as interim/urgent measures and short-form decisions), is well advanced. A document setting out the results of the research will be published in the near future. However, the statistical data already available (see "impact of the measures adopted" above) show how effective such research is for monitoring the situation of administrative justice in Italy.

Analysis by the Secretariat

a) Measures adopted

The measures under way and adopted by the Italian authorities since the last examination by the Committee demonstrate their determination to pursue efforts to deal with the problem of the excessive length of administrative proceedings. The approach followed seems to be tackling the issue from all sides. The measures were aimed, *inter alia*, at reorganising the public administration system, modernising and streamlining administrative justice, limiting the number of new proceedings, restoring the efficiency of administrative proceedings and speeding up absorption of backlogs. In addition, some of the measures being implemented (especially the recruitment of judges and the digitisation of court proceedings) will in the near future enable the positive results already obtained to be consolidated and the average duration of administrative proceedings to be further reduced.

b) Impact of the measures adopted

On the basis of the statistical data and other information available it can be confirmed that, following the entry into force of the new Code of Administrative Procedure in 2010, significant and particularly encouraging results have been obtained and consolidated since 2011 with regard to reducing the backlog at domestic level, with an overall reduction of about 200,000 cases (-42%) over the last four years. This positive trend should enable the process of eliminating the backlog to be completed in the next few years and lead to the more efficient management of incoming cases.

In this last respect, it can be noted that the reduction in the number of incoming cases already recorded in 2015 is encouraging. The legislative measures adopted with regard to public procurement and the increased funds available to pay "Pinto" compensation in 2015-2017 (see the *Mostacciuolo* group*)* seem to be having a positive impact on two major sources of litigation.

Moreover, as far as the average duration of proceedings is concerned, the information available shows positive results regarding certain categories of proceedings before the Council of State, especially in the field of public procurement. Equally welcome is the information concerning the average duration of proceedings to obtain an interim/urgent measure at first instance and on appeal.

Conversely, in the absence of data and relevant information, it is impossible at this stage to assess the situation of other types of administrative proceedings before the Council of State and of first-instance proceedings in general. It is therefore crucial that the Committee of Ministers receive complete statistical data so as to be able to make a full assessment of the impact of the measures adopted on the average duration of all proceedings.

c) *Mechanism for monitoring the situation of administrative justice*

Mention should be made of the research project launched by the authorities in co-operation with other public and private institutions, since its aim is to provide updated statistical data on the situation of administrative justice and on the impact of the measures adopted so far. Moreover, the introduction of the digitisation of proceedings, scheduled for January 2017 and currently being trialled, will enable the authorities to have a complete and up-to-date database at their disposal on the situation of administrative proceedings in order to take any additional and/or corrective measures that might be needed.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-13

Abenavoli group v. Italy (Application No. 25587/94)
Supervision of the execution of the European Court's judgments
CM/ResDH(2010)224, CM/ResDH(2009)42, CM/ResDH(2007)2, ResDH(2005)114, ResDH(2000)135, DH-DD(2016)1204, DH(99)437, DH(99)436, DH(97)336, DH-DD(2016)1204, CM/Del/Dec(2015)1243/H46-11

Decisions

The Deputies

1. noted the significant measures adopted by the Italian authorities, which show their determination to continue their efforts to solve the problem of the excessive length of administrative proceedings;

2. noted with satisfaction that the positive trend observed with respect to reducing the backlog of cases has been consolidated since 2011 and that encouraging results were obtained regarding the average length of certain proceedings before the Council of State;

3. in the light of these positive developments, decided to end the monitoring of the execution of 75 cases in which the question of individual measures has been settled and adopted Final Resolution CM/ResDH(2016)…;

4. decided to continue the examination of the issues still pending in connection with the framework of the remaining cases and, in this context, encouraged the Italian authorities to continue closely monitoring the impact of the measures adopted, especially with regard to the average length of administrative proceedings at first instance;

5. invited them to provide the Committee with their analysis of the situation based on complete statistics as soon as possible, so as to enable it fully to assess the status of execution of this group of cases.

Resolution CM/ResDH(2016)…
Execution of the judgments of the European Court of Human Rights
75 cases against Italy
(See Appendix for the list of cases)

(Adopted by the Committee of Ministers on …
at the 1273rd meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of former Article 32 and those of Article 46, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention"),

Having regard to its decisions adopted under former Article 32 of the Convention and to the final judgments transmitted by the Court to the Committee in these cases, as well as the violations established on account of the excessive length of administrative proceedings;

Recalling the respondent State's obligation, under Article 46, paragraph 1, of the Convention, to abide by all final judgments in cases to which it has been a party and that this obligation entails, over and above the payment of any sums awarded by the Court, the adoption by the authorities of the respondent State, where required:

- of individual measures to put an end to violations established and erase their consequences so as to achieve as far as possible *restitutio in integrum*; and
- of general measures preventing similar violations;

Having examined the information provided by the government (see document DH-DD(2016)1204);

Having noted that the just satisfaction awarded by the Court has been paid by the government of the respondent State and that the proceedings at issue in these cases are now completed;

Having noted the general measures adopted by the Italian authorities which demonstrate their commitment to pursue their efforts to resolve the problem of excessive length of administrative proceedings;

Noting with satisfaction the positive results obtained and consolidated with regard to the reduction of the backlog of administrative proceedings, which has decreased by 42% since 2011;

Noting also the first encouraging results concerning the average length of certain types of administrative proceedings, in particular before the Council of State;

Noting finally that the outstanding questions concerning the excessive length of administrative proceedings continue to be monitored within the framework of the *Abenavoli* group of cases;

DECLARES that it has exercised its functions under Article 46, paragraph 2, of the Convention in the cases listed below and

DECIDES to close the examination thereof.

Appendix – list of cases

Application No.	Case	Decision of the Committee under former Article 32	Judgment/ Decision of	Final on
14147/88	DI BONAVENTURA	Decision[2]	-	-
15080/89	MAGNAGHI	DH(96)379	-	-
17814/91	MORI-PUDDU	DH(97)177	-	-
18908/91	P.P.	DH(97)111	-	-
19977/92	VITTORIA AND ELEONORA CARRIERO	DH(96)26	-	-
25450/94	MICHELE SPERA	DH(97)372	-	-
25574/94	DE SANTA	-	02/09/1997	02/09/1997
25577/94	COSMA	DH(96)216	-	-
25579/94	B.Q.	DH(96)213	-	-
25580/94	GIORGINI	DH(96)219	-	-
25583/94	STRACUZZI	DH(96)241	-	-
25586/94	LAPALORCIA	-	02/09/1997	02/09/1997
26865/95	RUBBO AND OTHERS	DH(96)613	-	-
27189/95	BEVILACQUA	DH(97)524	-	-
27484/95	SERINO AND OTHERS	DH(97)133	-	-
27994/95	MANZINI AND BENET	DH(97)129	-	-
29125/95	BIANCA AND ENRICO CHIERICI	DH(97)331	-	-
29170/95	CERRUTO	DH(97)368	-	-
29171/95	ABBATE	DH(97)367	-	-
29301/95	VITALI II	DH(97)332	-	-
29302/95	VITALI III	DH(97)333	-	-
30322/96	NANI	DH(98)193	-	-
30423/96	SALINI COSTRUTTORI Spa	DH(99)673	-	-
30600/96	G.D.P.	DH(97)525	-	-
31620/96	U.P.	DH(97)656	-	-
31625/96	SANTORO	DH(97)655	-	--
31631/96	PROCACCINI	-	30/03/2000	30/03/2000
33804/96	MENNITTO	-	05/10/2000	Grand Chamber
34283/96	STAMPACCHIA	DH(98)272	-	-
34882/97	CECAMORE	DH(99)203	-	-
35343/97	BERTOZZI AND OTHERS	DH(99)642	-	-
35956/97	GALATA AND OTHERS	-	27/02/2001	27/05/2001
38150/97	GIUSEPPE AND ENRICO MAZZONE II	DH(99)307	-	-
38152/97	ULLO	DH(99)308	-	-
39170/98	ZAPPALA'	DH(99)523	01/02/1999	01/05/1999
41804/98	CIOTTA	-	27/02/2001	27/05/2001
41805/98	ARIVELLA	-	27/02/2001	27/05/2001
41806/98	ALESIANI AND OTHERS	-	27/02/2001	27/05/2001
41809/98	A.B.	-	08/02/2000	08/05/2000
41810/98	MOSCA	-	08/02/2000	08/05/2000
41811/98	COMITINI	-	27/02/2001	27/05/2001
41816/98	PARADISO	-	08/02/2000	08/05/2000
41817/98	CALIRI	-	08/02/2000	08/05/2000
44332/98	CECCHINI	-	21/11/2000	21/02/2001
44333/98	V.P. ET F.D.R.	-	12/02/2002	12/05/2002
44334/98	LATTANZI AND CASCIA	-	28/03/2002	28/06/2002
44337/98	DELLI PAOLI	-	09/07/2002	09/10/2002
44338/98	MIELE	-	21/11/2000	21/02/2001
44340/98	GAUDENZI	-	09/07/2002	09/10/2002
44341/98	CANNONE	-	09/07/2002	09/10/2002
44342/98	GATTUSO	-	06/12/2001	06/03/2002
44345/98	RINAUDO AND OTHERS	-	25/10/2001	25/01/2002
44346/98	VENTURINI	-	25/10/2001	25/01/2002
44347/98	CARAPELLA	-	09/07/2002	09/10/2002
44348/98	NAZZARO	-	09/07/2002	09/10/2002
44349/98	FRAGNITO	-	09/07/2002	09/10/2002
44350/98	DOMENICO CECERE	-	09/07/2002	09/10/2002
44351/98	PACE AND OTHERS	-	09/07/2002	09/10/2002
44352/98	MASSIMO (No. 2)	-	25/10/2001	25/01/2002

[2] Decision adopted under former Article 32 at the 546th meeting (October 1995).

Application No.	Case	Decision of the Committee under former Article 32	Judgment/ Decision of	Final on
44525/98	FERRARI (No. 2)	-	25/10/2001	25/01/2002
56201/00	SARDO	-	19/02/2002	19/05/2002
56203/00	GINOCCHIO	-	19/02/2002	19/05/2002
56204/00	LIMATOLA	-	19/02/2002	19/05/2002
56206/00	COLONNELLO AND OTHERS	-	19/02/2002	19/05/2002
56207/00	LUGNAN IN BASILE	-	19/02/2002	19/05/2002
56208/00	CONTE AND OTHERS	-	19/02/2002	19/05/2002
56211/00	GIUSEPPE NAPOLITANO	-	19/02/2002	19/05/2002
56212/00	FOLLETTI	-	19/02/2002	19/05/2002
56213/00	PIACENTI	-	19/02/2002	19/05/2002
56218/00	STABILE	-	19/02/2002	19/05/2002
56219/00	PRESEL	-	19/02/2002	19/05/2002
56221/00	DONATO	-	19/02/2002	19/05/2002
56224/00	D'AMORE ALBA	-	19/02/2002	19/05/2002
56225/00	DI PEDE (No. 2)	--	19/02/2002	19/05/2002
56226/00	ABATE AND FERDINANDI	-	19/02/2002	19/05/2002

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-14 9 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-14 Group Agrati and others v. Italy (Application No. 43549/08)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1153, DH-DD(2013)267

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
43549/08+	AGRATI AND OTHERS	07/06/2011 08/11/2012	28/11/2011 08/02/2013	Complex problem
52888/08+	ANNA DE ROSA AND OTHERS	11/12/2012	11/03/2013	
3601/08+	BIASUCCI AND OTHERS	25/03/2014	25/03/2014	
39180/08+	MONTALTO AND OTHERS	14/01/2014	14/01/2014	
6069/09+	BORDONI AND OTHERS	13/05/2014	13/05/2014	
61273/10	CAPONETTO	13/05/2014	13/05/2014	
45869/08+	MARINO AND COLACIONE	13/05/2014	13/05/2014	
18166/09	PEDUZZI AND ARRIGHI	13/05/2014	13/05/2014	
657/10+	CALIGIURI AND OTHERS	09/09/2014	16/02/2015	

Case description

These cases concern the retroactive application of Law No. 266/2005 on the budget for 2006 to judicial proceedings on-going at the time of its adoption, concerning the applicants' length of service as local government civil servants and the pecuniary rights deriving therefrom.

In 1999, the State transferred administrative, technical and auxiliary school staff ("ATA staff") from the local government civil service to the national civil service within the Ministry of Education. In this context, the legislative texts in force at the time along with the jurisprudence of the national courts, including the Court of Cassation, required the Ministry to recognise, for all juridical and economic purposes, the length of service completed by the staff within local government (§§ 37-39 of the *Agrati and Others* judgment).

In 2005, the legislator intervened by adopting a provision which interpreted the legislative texts in force. Under this provision the ATA staff were to be integrated within the ranks of the Ministry of Education based not on length of service but on their salary at the moment of the transfer. As the application of this provision was excluded only for disputes definitively settled at the date of its adoption, the national jurisdictions, including the Court of Cassation, applied it to disputes that were on-going at that time, such as those brought to the applicants against their new employer.

[1] This document has been classified restricted until examination by the Committee of Ministers.

The European Court considered that the adoption of the disputed provision definitively settled, in favour of the State, the outcome of the judicial proceedings pending at the date of its adoption. This intervention of the legislator in the administration of justice was not justified by compelling public-interest reasons as it aimed, only at preserving the financial interests of the State. Thus, in all these cases, it gave ride to violations of the applicants' right to a fair trial. Moreover, in certain cases, it amounted also to a disproportionate interference with the applicants' right to the peaceful enjoyment of their possessions (violations of Article 6 in all the cases and of Article 1 of Protocol No. 1 in the cases of *Agrati and Others*, *Marino* and *Caligiuri*).

Status of execution

The authorities submitted an action report on 18 October 2016 (DH-DD(2016)1153) which is summarised below. The applicants in the case of *Peduzzi and Arrighi* submitted for their part a communication on 9 April 2015.[2]

Individual measures:

The European Court awarded just satisfaction in some of the cases, the payment of which was confirmed in all cases except *Bordoni and Others*, *Caponnetto* and *Caligiuri*. In the other cases, the Court did not award just satisfaction as the applicants either did not submit any claim or did not substantiate it. The authorities consider that no individual measure is necessary apart from the payment of the just satisfaction awarded by the European Court in certain cases of this group.

In their communication, Ms Peduzzi and Mr Arrighi indicated that, in execution of the final decision in their case, issued by the Court of Cassation in 2009, the authorities are now recovering the sums they had previously paid to the applicants, in respect of salary difference, notwithstanding the judgment of the European Court issued in the meantime (2014). The authorities had paid such amounts in execution of a judicial decision in favour of the applicants given before the legislative intervention at issue.

General measures:

The issue of the transfer of the ATA staff from the local authorities to the Ministry of Education was the object of a reference for a preliminary ruling before the Court of Justice of the European Union ("CJEU") in the case C-108/2010. In its judgment of 6 September 2011, the CJEU held that the relevant EU law precluded the transferred workers from suffering, in comparison with their situation immediately before the transfer, a substantial loss of salary by reason of the fact that their length of service with the transferor, equivalent to that completed by workers in the service of the transferee, was not taken into account when determining their starting salary position with the latter. The CJEU also found that it was for the national court to examine whether, at the time of transfer, there was a loss of salary. The CJEU further noted that there was no longer any need to examine the compatibility of the law on finances for 2006 with the general principles of law, such as the principles of effective judicial protection and judicial certainty, as the European Court had meanwhile answered this question in its *Agrati and Others* judgment.

The Italian authorities indicated that the domestic courts had complied with the principles arising from the judgments of the European Court and the CJEU in cases similar to those of the group *Agrati and Others*. More specifically, the domestic courts, including the Court of Cassation (decisions No. 10034 of 2012 and No. 23257 of 2015), had returned to the interpretation prevailing before the adoption of the law No. 266/2005 in determining the length of service and the pecuniary rights deriving thereof for ATA staff.

Moreover, the Constitutional Court reinforced its requirements for the validation of laws of retroactive application. Thus, in a decision of 2012, by reference to the judgment of the European Court in the case of *Agrati and Others*, it annulled such a provision (decision No. 78 of 2012).

[2] The communication, submitted in Italian only, was transmitted to the authorities.

Analysis by the Secretariat:

Individual measures:

The authorities consider that, apart from the payment of the just satisfaction awarded by the European Court, no other measure is required. However, in the light of the judgments and of the information submitted by the applicants in the case of *Peduzzi and Arrighi*, several questions appear to remain open:

1) The just satisfaction awarded in the cases of *Agrati and Others*, *De Rosa and Others* and *Bordoni and Others* covered only the pecuniary damage sustained by the applicants until 31 December 2011. The European Court found that the question of the damage sustained for the period subsequent to that date should be reserved, where appropriate, to the competence of national courts, because the calculation of the amount would have been speculative for the Court[3]. Information is therefore necessary on the procedures available to the applicants to bring this matter before the national courts.

2) In the dispute at issue in the case of *Peduzzi and Arrighi*, following the legislative intervention, the Court of Cassation annulled a decision given in appeal which had awarded to the applicants an amount corresponding to the loss of salary suffered following the transfer to the national civil service. Currently, notwithstanding the judgment of the European Court meanwhile issued, the authorities are retaining from the applicants' pensions the sums received under the appellate court's decision. The fact that the authorities continue to require the enforcement of the decision of the Court of Cassation, which applied the disputed retroactive provision to the applicants, appears to render the subsequent judgment of the European Court ineffective. The authorities should therefore indicate the possibilities available to resolve this issue.

3) In the other cases, the pecuniary damage possibly sustained by the applicants was not compensated by the awarding of just satisfaction. Clarifications are therefore necessary as to the existence of such damage and, where appropriate, on the possibility to compensate it.

General measures:

1) Application of the disputed legislative provisions to proceedings which were on-going at the date of their adoption

The authorities consider that the current case law of the national courts fully complies with the findings of the European Court in the judgments of the group *Agrati and Others*, insofar as it corresponds to the domestic case law as established before the disputed legislative intervention.

However, it appears from the decisions submitted in support of this position that, before the adoption of the retroactive provision, the case law of the civil courts, including at the level of the Court of Cassation, was consistent in considering that ATA staff had to be ranked among the staff of the Ministry of Education on the basis of the length of service completed with the local government (§ 38 of the *Agrati and Others* judgment). The decisions of the Court of Cassation subsequent to *Agrati and Others*, cited in the action report, do not seem to operate an outright return to that case law. Indeed, according to these decisions, the domestic courts may rank ATA staff on the basis of their global salary at the moment of the transfer, as provided by Law No. 266/2005, when no substantial loss of salary is incurred by the applicant.

In such circumstances, it appears that there may remain situations in which it is still possible to apply retroactively Law No. 266/2005, which is problematic with regard to the requirements of Article 6 as specified by the European Court in these judgments. Indeed, the violation of this provision found in the judgments under examination stems from the mere application of this law to proceedings that were on-going at the date of its adoption regardless of whether it may have caused any pecuniary damage to the applicants. The Italian authorities should therefore provide their assessment in this regard, specifying the measures taken or envisaged, where appropriate, to solve this problem.

[3] § 15 of the *Agrati and Others* judgment (just satisfaction) final on 8 February, § 60 of the *De Rosa and Others* judgment, final on 11 March 2013, and § 36 of the *Bordoni and Others* judgment, final on 13 May 2014.

b) Regarding more generally the adoption of laws applied retroactively

In the action report, the authorities confirmed that, following the *Agrati and Others* judgment, the Constitutional Court had reinforced its requirements with regards to the validation of laws of retroactive application. However, insofar as the review by the Constitutional Court takes place only after the adoption of such a law and is not assured in every case of retroactive legislative intervention, it cannot prevent its application to proceedings on-going at the date of its adoption, at least not unless or until the law is invalidated by the Constitutional Court. In such circumstances, information is necessary on the measures adopted or envisaged to ensure that the legislator takes into account the requirements of the Convention referred to in these judgments when it considers it necessary to enact laws of retroactive application.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-14

Group Agrati and others v. Italy (Application No. 43549/08)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1153, DH-DD(2013)267

Decisions

The Deputies

1. *regarding the individual measures*, invited the authorities to clarify, first, the procedures available under national law to determine and remedy the consequences stemming from the retroactive application of Law No. 266/2005 for the applicants in the cases of *Agrati and Others*, *De Rosa and Others* and *Bordoni and Others*, for the period subsequent to 31 December 2011 and, secondly, the possibility to ensure that the benefit of the internal decision in favour of Ms Peduzzi and Mr Arrighi which was delivered before the application of the disputed legislation, is retained;

2. invited moreover the authorities to clarify whether the other applicants suffered pecuniary damage and, where appropriate, it is possible to seek compensation in this respect at domestic level;

3. *with respect to the general measures*, noted that the practice of the national courts concerning the application of the disputed provisions of Law No. 266/2005 does not appear to be fully aligned with the requirements of Article 6 highlighted in these cases; invited the authorities to provide the Committee with their assessment in this respect as well as clarifications on how they envisage, if appropriate, to solve this problem;

4. invited moreover the authorities to provide information on the measures adopted or envisaged to ensure that laws with retroactive effect are adopted in strict conformity with the requirements of the Convention, as underlined in the present cases;

5. lastly, invited the authorities to provide the Committee of Ministers with a revised action plan containing clarifications on the outstanding questions identified in this group of cases.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-15-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-15 Ledonne No. 1 group v. Italy (Application No. 35742/97)

Supervision of the execution of the European Court's judgments

Reference documents:
CM/ResDH(2010)224; CM/ResDH(2009)42; CM/ResDH(2007)2, ResDH(2005)114, ResDH(2000)135, DH(99)437, DH(99)436, DH(97)336, DH-DD(2016)1242, CM/Del/Dec(2015)1243/H46-11

Action – Item proposed with debate
To debate the group of cases on the basis of the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
35742/97	LEDONNE No. 1 GROUP (List of cases CM/Notes/1273/H46-15-app)	12/05/1999	12/08/1999	Complex problem

Case description

The case *Ledonne (No. 1)* and 162 other cases concern the excessive length of criminal proceedings since the 1990s (violations of Article 6 § 1).

Status of execution

At its 1172nd meeting (June 2013) (DH), the Committee of Ministers examined the execution of these cases within the framework of the groups of cases *Ceteroni* and *Luordo,* which included all cases concerning the excessive length of judicial proceedings. Since December 2015, in order better to target the outstanding questions, it has followed the execution of these cases within the framework of four distinct groups: *Ledonne* for criminal proceedings, *Abenavoli* for administrative proceedings, *Ceteroni* for civil proceedings and *Luordo* for bankruptcy proceedings.

At its 1172nd meeting, the Committee noted that, in particular as regards criminal proceedings, additional information and precise and updated statistical data were still necessary for a full assessment of the situation.

~~The authorities have not provided any information for the purpose of to the 1273rd meeting.~~ In a communication of 8 November 2016, the authorities indicated that a criminal justice reform bill, introduced by the government, which aims, among other things, at ensuring the reasonable length of trials was approved by the Chamber of Deputies on 23 September 2015 and is currently pending before the Senate (for more details see DH-DD(2016)1242).

Analysis by the Secretariat

The outstanding questions in this group of cases have been brought to the attention of the authorities on many occasions by the Secretariat within the framework of bilateral contacts and continue to be the object of strict cooperation in order to achieve a permanent solution to the problems raised by these judgments.

[1] This document has been classified restricted until examination by the Committee of Ministers.

However, given the absence of information and updated statistical data, it is not possible at this stage to assess the progress achieved since the last examination by the Committee.

In this context~~, it can nevertheless be useful to note that, according to the information available in the public domain, a~~ it is worth noting the criminal justice reform bill ~~concerning both substantive and procedural criminal law and aiming at ensuring the reasonable length of criminal trials is in the process of approval. This text, presented by the Minister of Justice to the Chamber of Deputies on 12 January 2015, was approved by the latter on 23 September 2015 and it is~~ currently pending before the Senate. The authorities could be invited to inform the Committee of the outcome of the legislative process.

At the same time, ~~To be able~~ to have a clear picture of the current situation, it is indispensable for the Committee to receive, by April 2017, an evaluation by the authorities of the situation on the ground and, where appropriate, information on the other measures adopted or in the process of being adopted to accelerate and streamline criminal law procedure, since its last examination (June 2013).

It is also essential, ~~in order~~ to assess the impact of such measures, that the authorities provide, within the same time-limit, updated statistical data on criminal proceedings relating in particular to (i) the average length of proceedings, in days and by level of jurisdiction; (ii) the ratio between incoming and completed cases, by year and by level of jurisdiction; (iii) the overall number of cases pending at the end of each year by level of jurisdiction.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-15

H46-15 Ledonne (No. 1) group v. Italy (Application No. 35742/97)
Supervision of the execution of the European Court's judgments
CM/ResDH(2010)224; CM/ResDH(2009)42; CM/ResDH(2007)2, ResDH(2005)114, ResDH(2000)135, DH(99)437, DH(99)436, DH(97)336, DH-DD(2016)1242, CM/Del/Dec(2015)1243/H46-11

Decisions

The Deputies

1. noting with interest the criminal law reform bill currently being examined by the Senate, invited the authorities to inform the Committee of the outcome of the legislative process and, where appropriate, of any other measure adopted, since June 2013, or in the process of being adopted, aimed at solving the problem of excessive length of criminal proceedings;

2. further invited the authorities to provide, by April 2017, a thorough evaluation of the situation on the ground together with statistical data for the period 2011-2016 particularly as regards the average length of criminal proceedings, the ratio between incoming cases and cases solved and the number of cases pending at the end of each year by level of jurisdiction.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-16 8 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-16 Paksas v. Lithuania (Application No. 34932/04)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)884, DH-DD(2016)853, DH-DD(2015)1162, DH-DD(2016)28, DH-DD(2015)1162, DH-DD(2015)931-add, DH-DD(2015)843, DH-DD(2015)73, CM/Del/Dec(2016)1250/H46-13

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
34932/04	PAKSAS	06/01/2011	Grand Chamber	Complex problem

Case description

The case concerns the violation of the applicant's right to free elections due to the permanent and irreversible nature of his disqualification from standing for elections to Parliament as a result of his removal from presidential office following impeachment proceedings against him in accordance with the Constitutional Court's ruling of 25 May 2004 and the Seimas Elections Act of 15 July 2004 (Article 3 of Protocol No. 1).

Status of execution

Individual measures:

The Court held that the finding of a violation was sufficient just satisfaction but reiterated that the authorities had an "obligation to determine, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be taken in [their] domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences, in such a way as to restore as far as possible the situation existing before the breach" (see § 119). The necessary individual measures in the instant case are linked to the general measures, as the applicant's possibility to stand for parliamentary elections depends on the adoption of general measures (see below).

General measures:

It is recalled that in September 2012 the Constitutional Court held that constitutional amendments were necessary in order to bring the legal situation in line with Article 3 of Protocol No. 1. In November 2012 a draft law (No. XIP-5001) was submitted to Parliament with the necessary constitutional amendments. In December 2012, Parliament preliminarily approved it, and parliamentary committees were appointed for its consideration. During these considerations, certain amendments were agreed upon and in September 2013 the amended draft law (No. XIP-5001(2)) was submitted to Parliament.

[1] This document has been classified restricted until examination by the Committee of Ministers.

The first of the two requisite ballots was scheduled for an extraordinary session in January 2014. At the request of parliamentarians belonging to the applicant's party, the adoption was postponed to a later date. The draft law was scheduled for Parliament's spring session in 2014.

In the meantime, the Constitutional Court, in January 2014, adopted a ruling on procedural questions in the legislative process for constitutional amendments, from which it could be concluded that, in case of its adoption, the draft law would most likely contravene the Constitution.

In May 2014, following the adoption of the UN Human Rights Committee's views in respect of certain similar complaints (communication No. 2155/2012), notably regarding the applicant's inability to stand for presidential elections (which fall outside of Article 3 of Protocol No. 1), Parliament also established an "Ad hoc Investigation Commission" (Res. No. XII-877) tasked, *inter alia*, with examining and submitting conclusions on the reasons for the failure, to date, to implement the present judgment. Following several meetings, the Commission adopted its conclusions (No. XIIP-2300) in September 2014, containing different proposals on how to proceed.

At its 1208th meeting (September 2014) (DH), the Committee urged the authorities to achieve tangible progress regarding the required constitutional changes and decided to transfer the case to its enhanced supervision procedure.

These developments resulted in the preparation of a new legislative proposal (Draft Law No. XIIP-2841) registered in March 2015. The proposed constitutional amendment consists of adding a paragraph to Article 56 of the Constitution to limit the ban from standing for elections to the Seimas to ten years for a person removed from office through impeachment proceedings.

At its 1222nd meeting (March 2015) (DH), the Committee renewed its "urgent call for concrete results without further delay and invited the Lithuanian authorities to provide updated information by 31 July 2015, at the latest". In line with this deadline, the authorities indicated that the new draft law had been preliminarily approved by the Seimas and scheduled for adoption in June 2015. However, at the request of members of the applicant's party, the Seimas again decided to postpone the vote.

On 10 September 2015, the draft law amending the Constitution was adopted in the first reading. In their submissions the authorities explained that if, after the necessary interval of three months between the two votes (Article 148 § 3 of the Constitution), the draft law was adopted at the second reading by the end of the spring session 2016 (i.e. 30 June 2016, at the latest), it would be possible for the applicant to stand in the upcoming parliamentary elections in October 2016.

At its 1243rd meeting (December 2015) (DH), the Committee "stressed the importance of the second voting as regards the respondent State's compliance with its obligations under the Convention and strongly encouraged the Lithuanian authorities to complete the legislative process in accordance with the calendar presented."

On 15 December 2015, the Seimas rejected the draft law amending the Constitution at the second reading.

In response to these developments, the authorities submitted that the same constitutional amendment could only be resubmitted to the Seimas one year after it had initially been rejected (Article 148 § 4 of the Constitution). However, another previously registered legislative proposal aimed at resolving the issue (Draft Law No. XIIP-2850) or a slightly amended legislative proposal could be presented earlier and it was, therefore, theoretically still possible to enact constitutional amendments enabling the applicant to stand in the parliamentary elections in October 2016. The latter option would require that a new legislative proposal be put forward by a quarter of the members of the Seimas or by a petition signed by 300,000 voters. It would have to be adopted at the first reading in March 2016 and at the second reading before the end of the spring session, i.e. by 30 June 2016.

The authorities further underlined their highest commitment to the Convention system and undertook that all necessary further joint efforts would be put in place to ensure the execution of the present judgment.

At its 1250th meeting (March 2016) (DH), the Committee anew "urged the Lithuanian authorities to adopt the necessary constitutional amendments" and in view of the possibility that the issue could still be resolved during the Seimas' spring session invited them to provide updated information by 15 July 2016 at the latest.

On 18 July 2016, the authorities informed the Committee that no progress had been achieved in the legislative process during the Seimas' spring session. Hence, the applicant was not able to stand in the parliamentary elections held in October 2016. The authorities further submitted that no initiatives in this regard were proposed at the spring session even by the representatives of the applicant's own political party due to a corruption scandal involving the applicant. Pre-trial investigations in this respect had been opened in February 2016 and, in March 2016, the Prosecutor General requested the President of the European Parliament to lift the applicant's immunity. The matter is still pending before the European Parliament.

Analysis by the Secretariat

It is reiterated at the outset that for the execution of the present judgment the applicant's permanent ban must be transformed into a ban limited in time. The efforts made by the authorities, in particular the government, to achieve this result have, however, so far failed. It is notably recalled that at its 1243rd meeting, the Committee of Ministers assessed positively the government's proposal (Draft Law No. XIIP-2841) – limiting the ban from standing for elections to the Seimas to ten years – noting that it appeared "to provide for a viable solution to remedy the violation found in the European Court's judgment both on the individual and on the general level."

Against this background, the Committee might wish to express its deep concern that despite its repeated calls and the initiatives taken by the government, the legislative process has failed once again before Parliament. For the second time since the judgment became final, the applicant has thus been unable to stand in parliamentary elections.

It should further be noted that the on-going investigation against the applicant is not relevant for the execution of the present judgment which only concerns the excessive impeachment sanction provided for in the Constitution – a sanction in force against the applicant since for over 12 years (since 2004).

Despite the present situation, it is salutary that the authorities have provided assurances that all necessary further joint efforts will be undertaken to ensure execution. The Committee might therefore wish to support these efforts by renewing its urgent call on all competent authorities to intensify them, in order to find ways and means (including possible further action by political leaders and/or the Constitutional Court) rapidly to lift the permanent and irreversible nature of the applicant's disqualification from standing for elections to Parliament, so that he can stand in future elections, thereby putting an end without further delay to the violation found by the Court and preventing similar violations in the future.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-16

Paksas v. Lithuania (Application No. 34932/04)
Supervision of the execution of the European Court's judgments
DH-DD(2016)884, DH-DD(2016)853, DH-DD(2015)1162, DH-DD(2016)28, DH-DD(2015)1162, DH-DD(2015)931-add, DH-DD(2015)843, DH-DD(2015)73, CM/Del/Dec(2016)1250/H46-13

Decisions

The Deputies

1. expressed their deep concern that, despite the Committee's repeated calls and the constructive initiatives already taken, the legislative process engaged by the government with a view to remedying the violation through the adoption of constitutional amendments has, once again, failed before Parliament and that in consequence the applicant was not able to stand in the parliamentary elections held in October 2016;

2. emphasised, in face of this situation, that the authorities are under an unconditional obligation to find without further delay the necessary ways and means to lift the permanent and irreversible nature of the applicant's disqualification from standing for elections to Parliament, and that, accordingly, all competent Lithuanian authorities have to rapidly take all necessary remedial actions within their competence to enable him to stand in future elections and thereby put an end to the violation found by the Court, as well as any additional action necessary in order to effectively prevent similar violations in the future;

3. welcomed consequently the authorities' commitment to undertake all necessary further joint efforts to ensure execution of the present judgment and renewed their urgent call on all competent authorities to intensify their actions to this effect so as to ensure execution without further delay;

4. invited the authorities to provide updated information on actions taken and progress made by 31 March 2017 at the latest.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-17 9 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-17 Corsacov group and Levinţa v. Republic of Moldova (Applications Nos. 18944/02, 17332/03)

Supervision of the execution of the European Court's judgments

Reference documents:
H/Exec(2016)8, CPT/Inf(2016)16, DH-DD(2016)1200, DH-DD(2016)1110, DH-DD(2014)1245, DH-DD(2014)1244, DH-DD(2014)836, DH-DD(2014)316, DH-DD(2014)230, CM/Del/OJ/DH(2014)1208/12

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
18944/02	CORSACOV	04/04/2006	04/07/2006	Complex problem
6888/03	PRUNEANU	16/01/2007	23/05/2007	
12544/08	BREABIN	07/04/2009	07/07/2009	
7045/08	GURGUROV	16/06/2009	16/09/2009	
28653/05	BUZILOV	23/06/2009	23/09/2009	
41704/02	ROŞCA VALERIU AND ROŞCA NICOLAE	20/10/2009	20/01/2010	
33134/03	PĂDUREŢ	05/01/2010	05/04/2010	
29772/05	POPA	21/09/2010	21/12/2010	
38281/08	MATASARU AND SAVITCHI	02/11/2010	02/02/2011	
53710/09	PASCARI	20/12/2011	20/03/2011	
27763/05	LIPENCOV	25/01/2011	25/04/2011	
42973/05	BISIR AND TULUS	17/05/2011	17/08/2011	
23750/07	IPATE	21/06/2011	21/09/2011	
52643/07	BUZILO	21/02/2012	21/05/2012	
32520/09	GHIMP AND OTHERS	30/10/2012	03/01/2013	
40131/09	STRUC	04/12/2012	04/03/2013	
39441/09	GASANOV	18/12/2012	18/03/2013	
55408/07	IPATI	05/02/2013	05/05/2013	
17008/07	EDUARD POPA	12/02/2013	12/05/2013	
42434/06	FEODOROV	29/10/2013	29/01/2014	
22741/06	GAVRILIŢĂ	22/04/2014	22/07/2014	
3473/06	TCACI	15/07/2014	15/10/2014	
35840/09	BULGARU	30/09/2014	30/12/2014	
13421/06	MORGOCI	12/01/2016	12/04/2016	
7232/07	CIORAP No. 5	15/03/2016	15/06/2016	
17332/03	LEVINTA	16/12/2008	16/03/2009	Complex problem

[1] This document has been classified restricted until examination by the Committee of Ministers.
Internet : http://www.coe.int/cm

Case description

This group of cases concerns mainly ill-treatment and torture in police custody, including with a view to extracting confessions, lack of effective investigations in this respect (**substantial and procedural violations of Article 3**) and lack of an effective remedy (**violations of Article 13**). The cases *Ghimp and Others* and *Eduard Popa* also concern violations of the right to life while in police custody and ineffective investigation in this respect (**substantial and procedural violations of Article 2**). The case *Levinţa* also concerns the authorities' refusal to provide the applicants with adequate medical assistance for security reasons while in police custody (**substantive violation of Article 3**) and conviction of the applicants based on their confessions obtained by means of torture (**violation of Article 6 § 1**).

Other violations found by the Court in these cases:
- Article 3: poor conditions of detention, including lack of proper medical assistance while in police custody (*Lipencov, Valeriu and Nicolae Rosca, Pascari*, *Struc, Ipati*, *Morgoci*);
- Article 5 § 1: unlawful detention following the applicant's detention for a period longer than was authorised by law (*Lipencov*) and on account of arrest and detention several days before the official beginning of police custody (*Gavriliță*);
- Article 8: home search not in accordance with the law (*Bisir and Tulus*) and censorship of correspondence (*Ipati*).

Status of execution

During its last examination at the 1208th meeting (September 2014) (DH), the Committee urged the authorities quickly to finalise the pending domestic investigations and strongly encouraged them to reopen investigations in the cases in which no fresh investigation has been carried out following the Court's judgments, irrespective of any initiative by the applicants. As regards general measures, the Committee noted with satisfaction the important legislative changes introduced to fight impunity and the creation of the special prosecution unit mandated with investigation into allegations of ill-treatment. The Committee further invited the authorities to provide detailed statistics as concerns complaints, prosecutions and convictions of ill-treatment and to take initiatives aimed at enhancing judicial control over the effectiveness of investigations.

Individual measures:

1) Concerning violations of Article 3

Detailed information on the state of the domestic investigations into the applicants' allegations of ill-treatment in the individual cases can be found in document H/Exec(2016)8. The following summary can be made.

In three cases,[2] those responsible were brought to trial and convicted and in one case,[3] the proceedings are pending before the court of first instance. In eight cases,[4] the new investigations did not permit the identification of the authors of the criminal offences or the applicants' allegations could not be confirmed by the evidence gathered. In two cases,[5] the new inquiries led to the conclusion that the shortcomings identified by the Court in the initial investigations could not be remedied given their nature and the passage of time since the events or the death of the applicant. In one case,[6] the applicant's request for the reopening of criminal proceedings was refused by the Supreme Court as lodged outside the deadline provided by law. In another case,[7] the investigation was reopened by the prosecutor but subsequently terminated at the decision of the investigative judge on account of procedural flaws found in the reopening procedure.

In three cases,[8] the investigations are still ongoing. In two cases,[9] the domestic courts had acknowledged the violations but had awarded insufficient amounts of compensation in comparison with the amounts usually granted by the European Court in similar cases. In three new cases, information is still awaited.[10]

[2] *Buzilo*, *Corsacov*, *Struc* and *Ghimp and Others* cases.
[3] *Pascari* case.
[4] *Ipati*, *Buzilov*, *Mătăsaru and Saviţchi*, *Gasanov*, *Pruneanu* (event of 10/05/2001), *Pădureţ* (investigation against police officer R.B.), *Lipencov and Levinţa* cases.
[5] *Popa* and *Feodorov* cases.
[6] *Ipate* case.
[7] *Breabin* case.
[8] *Eduard Popa*, *Gurgurov and Bisir* and *Tulus* cases.
[9] *Gavriliță* and *Morgoci* cases.
[10] *Tcaci*, *Bulgaru* and *Ciorap* (No. 5) cases.

2) Concerning the violation of Article 6 § 1 in the Levinţa case

In April 2009, the applicants seized the Supreme Court with an extraordinary appeal seeking the annulment of their convictions. In February 2010, the Supreme Court accepted their request, reopened the criminal proceedings and ordered a re-hearing by the Chişinau Court of Appeal. At the re-hearing in November 2012, the court excluded the applicants' self-incriminating statements obtained by torture, found them guilty on other evidence and re-convicted them. The applicants lodged an appeal with the Supreme Court. In May 2013, the Supreme Court reviewed the case on its merits and confirmed the applicants' conviction.

3) Concerning violations of Article 5 § 1

The applicants in the *Lipencov* and *Gavriliță* cases, in which the Court also found violations of Article 5 (see case description), were released from police custody in 2004 and 2006, respectively.

General measures:

- Legislative amendments and changes in the domestic case law

The amendment introduced in Article 313 to the *Code of Criminal Procedure (CCP)* in March 2014 provides that the decisions of the investigative judge concerning refusal to initiate criminal proceedings, closure and reopening of criminal proceedings, can be appealed (before this amendment, these decisions were final). In May 2016, a new provision was added to Article 262 of the CCP to provide that any declaration, complaint or other information known to an investigation authority which gives reason to assume that a person was ill-treated shall be sent immediately to the prosecutor for examination and decision.

As regards judicial review of the effectiveness of investigations, the authorities submitted several examples[11] of domestic judicial decisions from 2015 and 2016 in which investigative judges and appeal instances considered in detail decisions by prosecutors to refuse the initiation of or to close criminal investigations into ill-treatment and gave specific instructions to prosecutors on further actions to be taken.

- Measures to strengthen capacities of domestic bodies

In recent years, the prosecution service underwent a comprehensive reform process which resulted in the adoption by Parliament of a new *Law on the Prosecution Service* (in force since 1 August 2016). Before its adoption, the draft law was reviewed jointly by the Venice Commission, the Directorate General "Human Rights and Rule of Law" (DG I) of the Council of Europe and the OSCE/ODIHR, which welcomed it and noted that it reflected a genuine effort to modernise the existing legal framework, in line with relevant European standards and best practices. The new law aims, *inter alia*, at consolidating the independence and efficiency of the prosecution service and ensuring the respect of human rights in criminal proceedings. Disciplinary proceedings against a prosecutor can be initiated by any interested person.

In July 2015, the Superior Council of Prosecutors adopted a new *Code of Ethics of Prosecutors* which requires, in particular, that a prosecutor shall act in compliance with the Convention requirements and the Court's case law.

The Law on the Ombudsman, adopted in April 2014, establishes, *inter alia*, the legislative basis for the functioning of the *Council for the Prevention of Torture*, which is a national preventive mechanism (NPM). In July 2016, the Ombudsman adopted a regulation on the organisation and operation of this Council which will carry out monitoring visits in all types of detention facilities.

In recent years, a number of training activities on preventing and combating ill-treatment were carried out by the National Institute of Justice for judges and prosecutors. Thus, in 2015-2016, 40 judges and 30 prosecutors were trained on issues related to the effective investigation of ill-treatment cases. In co-operation with the Soros Foundation Moldova, 120 police officers were trained in 2016 on issues related to the respect of human rights during arrest.

[11] These examples were annexed to the Action Report but not published because they were in original language and not translated. They are available upon request at the Department for Execution.

- Statistical data

The data of the General Prosecutor's Office shows a decrease in recent years in the number of complaints received concerning ill-treatment (from 992 complaints in 2009 to 633 in 2015). In 2015, 63 persons were brought to justice with ill-treatment charges, 49 of them were convicted, 13 were acquitted and the criminal proceedings in respect of one person was closed. As concerns the sanctions applied, they include imprisonment in respect of nine persons, conditional suspended imprisonment in respect of 29 persons and criminal fine in respect of 11 persons.

- Other violations

The general measures in response to poor conditions of detention and censorship of correspondence found in some cases in this group (see case description) are examined in the *Ciorap* / *Becciev* / *Paladi* groups.

Analysis by the Secretariat

At the outset, it is recalled that the issues raised by this group of cases have been under the Committee's supervision for a decade.

Individual measures:

1) Violations of Article 3[12]

No additional individual measures appear necessary in the case[13] in which those responsible for ill-treatment were convicted and the court's decision is final, as well as in the cases in which the domestic courts acknowledged the violations of Article 3 arising from ill-treatment and lack of effective investigations but did not award sufficient compensation (adequate compensation was subsequently awarded by the European Court).[14]

No additional individual measures appear possible in the cases in which, following a new inquiry, it was impossible to identify the authors of the criminal offence or the applicants' allegations could not be confirmed by the evidence gathered and in which it was impossible to rectify the shortcomings identified by the Court.[15] It appears from the detailed information provided by the authorities that, despite all the reasonable steps taken in the course of the new inquiries and investigations, it was not possible to bring those responsible to justice and that no further measures could be taken. This conclusion applies also to the *Ipate* case in which the time-limit to request the reopening of the criminal proceedings has expired.

As concerns the investigations under way in the *Eduard Popa*, *Gurgurov* and *Bisir and Tulus* cases, it is crucial that all necessary actions are carried out with promptness before the expiration of the statute of limitations. The Moldovan authorities should thus be urged to complete them without further delay and to inform the Committee in detail of the progress made. Information is also awaited on the individual measures taken in the *Tcaci*, *Bulgaru* and *Ciorap (No. 5)* cases, as well as on the outcome of the court proceedings in the *Pascari*, *Struc* and *Ghimp and Others* cases.

As regards the *Pruneanu* case, specifically the alleged incident of ill-treatment on 10-11 July 2002, clarification should be requested as to whether the review of the Prosecutor General's Office was carried out after the Court's judgment and the reasoning for the confirmation of the decision not to initiate a criminal investigation. Further clarification is also awaited in the *Breabin* case, in particular as to whether the flaws found by the investigative judge in the procedure of the reopening of the criminal investigation can be rectified and, if so, whether any steps have been taken for this purpose by the prosecution authority.

[12] For full details concerning each individual case, see document H/Exec(2016)8.
[13] *Buzilo* case.
[14] *Gavriliță* and *Morgoci* cases.
[15] *Ipati*, *Buzilov*, *Mătăsaru and Saviţchi*, *Gasanov*, *Pruneanu* (event of 10/05/2001), *Pădureţ* (investigation against police officer R.B.), *Lipencov*, *Popa*, *Feodorov* cases.

It is noted that in the *Levinţa* case, a new investigation was conducted by the prosecution service following the Court's judgment which led to the decisions to discontinue the criminal proceedings against the police officers. The applicants complained in their communication to the Committee that the new investigation was in effective and that a new application in this regard had been lodged with the Court.

2) Violation of Article 6 § 1 in the Levinţa case (conviction based on evidence obtained by torture)

It is noted that, according to the information submitted by the authorities, following the reopening of the criminal proceedings against the applicants, their case was examined *de novo* by the domestic courts and the evidence obtained by means of torture was excluded from the file. As a result, the domestic courts found the applicants guilty and re-convicted. In their communication to the Committee, the applicants submitted that, although the reopening of proceedings appeared to be in compliance with the Court's judgment and the Committee's Recommendation Rec(2000)2, the applicants had been finally convicted in breach of Article 6 § 1.

In order to enable the Committee to assess whether the shortcomings identified by the Court in its first judgment were properly remedied following the reopening of proceedings and the re-hearing of the case, the authorities should be invited to submit all the relevant decisions of the domestic courts.

3) Violations of Articles 5 § 1 and 8

As regards the violations of Article 5 § 1 concerning the unlawful detention of the applicants in the *Lipencov* and *Gavriliță* cases and the violation of Article 8 concerning the home search in breach of domestic law in the *Bisir and Tulus* case, no individual measure is required, as the interference with the applicants' rights ended before the Court delivered its judgments and the harm was covered by the just satisfaction.

General measures:

1) General state of play

The statistical data forwarded by the authorities show a decrease of 36% in complaints of ill-treatment. In this context, reference should be made to the latest report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the Republic of Moldova[16] which pointed out that the treatment of persons detained by the police improved since 2011 ill-treatment. The CPT considered however that the situation was not entirely reassuring and recommended the authorities to continue their vigorous action to stamp out ill-treatment by the police.

2) Effectiveness of investigations

The information provided on the reform of the prosecution service can be noted with interest as it appears further to strengthen its independence. It is also observed from the information on the individual measures that several criminal cases on ill-treatment were transferred for further investigation to the newly created specialised *prosecutor's office on special cases and fighting organised crime*. Further information is requested on whether the Anti-Torture Unit created several years ago in the Prosecutor General's Office is still competent for the supervision of investigations into ill-treatment and whether the network of specialised anti-torture prosecutors is still in place. If the reform amended the previous system put in place to supervise and investigate ill-treatment cases, detailed information is necessary on the current state of affairs, including on the units/prosecutors responsible for these types of cases, their mandate and hierarchy (and, in particular, how their independence is ensured).

As regards judicial review of the effectiveness of investigations, the information provided is noted with interest. The examples given of judicial decisions show that investigative judges are now taking a more proactive role in the supervision of investigations and give specific instructions to prosecutors on further action to be taken. These improvements are positive. The authorities should be encouraged to take steps for the further development and consolidation of this new judicial practice.

[16] CPT/Inf(2016)16, §§ 16, 20.

3) Safeguards against ill-treatment

The Court found in the *Tcaci* case that the applicant's medical examination was not independent because of the presence of the prosecutor. It should be noted that in its latest report, the CPT expressed its concern on the continuing lack of medical confidentiality in police detention facilities.[17] Information is thus required on the measures adopted by the authorities for ensuring medical confidentiality during regular medical examinations in police detention facilities as well as during forensic medical examinations.

Also, in view of the violation of Article 3 in the ***Levinţa*** case on account of the refusal to provide medical assistance to the applicants for security reasons, the authorities could be invited to inform the Committee of the measures adopted to ensure that security considerations do not limit detainees' access to medical assistance.

4) Domestic remedy

It follows from the Court's judgments in the *Gavriliță* and *Morgoci* cases that the compensation awarded to the applicants in 2012 for non-pecuniary damage on account of their ill-treatment and ineffective investigation was considerably lower than the compensation awarded by the Court in similar cases. The authorities could be invited to provide recent examples of judicial decisions to show that the Supreme Court's explanatory decisions and recommendations[18] on awarding adequate monetary compensation for violations of Article 3 are being followed in practice.

5) Other violations

As concerns the violations of Article 5 § 1 in the *Lipencov* and *Gavriliță* cases and of Article 8 in the *Bisir and Tulus* case, given that they are not covered by other groups of cases, the authorities could be requested to submit information on the general measures adopted in their respect.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-17

Corsacov group and Levinţa v. Republic of Moldova (Applications Nos. 18944/02, 17332/03)
Supervision of the execution of the European Court's judgments
H/Exec(2016)8, CPT/Inf(2016)16, DH-DD(2016)1200, DH-DD(2016)1110, DH-DD(2014)1245, DH-DD(2014)1244, DH-DD(2014)836, DH-DD(2014)316, DH-DD(2014)230, CM/Del/OJ/DH(2014)1208/12

Decisions

The Deputies

as regards individual measures:

1. noted that no further individual measures are required in the *Buzilo* case in which the police officers responsible for ill-treatment were convicted by the domestic courts, and in the *Gavriliță* and *Morgoci* cases in which the domestic courts acknowledged the violations of Article 3;

2. noted with regret that no further individual measures are possible in the *Ipate* case in which the time-limit to request the reopening of the criminal proceedings in the specific circumstances expired;

[17] Idem, § 31.
[18] See the general measures reported in the action plan on the *Corsacov group* of cases (DH-DD(2014)836), June 2014, §§ 78-80.

3. further noted that, notwithstanding all the reasonable steps taken by the competent authorities, no further individual measures are possible in the cases in which it was established that it was impossible to rectify the shortcomings identified by the Court or to identify the authors of the ill-treatment following a new investigation;

4. urged the authorities promptly to complete the pending investigations in the *Eduard Popa*, *Gurgurov*, *Bisir and Tulus* cases and invited them to submit, by 30 June 2017, information on the progress made in these cases as well as on the measures adopted in the *Tcaci*, *Bulgaru* and *Ciorap (no. 5)* cases and outstanding information on the *Breabin*, *Pruneanu*, *Struc*, *Ghimp and Others* and *Pascari* cases;

5. invited the authorities to submit all the relevant decisions of the domestic courts adopted during the re-hearing of the criminal case against the applicants in the *Levinţa* case;

as regards general measures

6. noted with satisfaction the progress made by the authorities in recent years in preventing and combating police ill-treatment and strongly encouraged them to pursue their efforts, taking inspiration from the CPT's recommendations and the Committee's guidelines in respect of the fight against impunity;

7. invited the authorities to provide information on any changes made to the system of specialised unit/prosecutors mandated with investigating ill-treatment allegations following the recent reform of the prosecution service;

8. further invited the authorities to provide information on the outstanding issues, notably as concerns the confidentiality of medical examinations and access to medical assistance in police detention facilities, the practice of awarding monetary compensation by the domestic courts, as well as the measures taken to remedy the violations of Articles 5 § 1 in the *Gavriliță* and *Morgoci* cases and of Article 8 in the *Bisir and Tulus* case.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-18-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-18 Al Nashiri group v. Poland (Application No. 28761/11)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1164, DH-DD(2016)1007, DH-DD(2016)957, DH-DD(2016)942, DH-DD(2016)834, DH-DD(2016)627, DH-DD(2016)191, DH-DD(2015)1300, DH-DD(2015)1250, DH-DD(2015)839, DH-DD(2015)586, DH-DD(2015)585, DH-DD(2015)515, CM/AS(2008)Rec1801-final, Rec(2005)10, Parliamentary Assembly Resolution 1562(2007), Parliamentary Assembly Resolution 1507(2006), CDL(2007)082 updated in 2015 (CDL-AD(2015)006), CDL-AD(2006)009, relevant documents from the European Parliament[2], relevant documents from the United Nations[3], United States Senate, OSCE report 2014 "Human Rights Situation of Detainees at Guantanámo", CM/Del/Dec(2016)1265/H46-19

Action – Item proposed with debate
To debate the cases on the basis of the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
28761/11	AL NASHIRI	24/07/2014	16/02/2015	Urgent individual measures and complex problem
7511/13	HUSAYN (ABU ZUBAYDAH)	24/07/2014	16/02/2015	

Case description

The cases concern the violation of a number of Convention rights arising from the fact that the applicants were victims of a secret "rendition" operation. The European Court found it established beyond reasonable doubt that the applicants arrived in Poland on board CIA rendition aircraft on 5 December 2002; were detained in a CIA detention facility in Stare Kiejkuty where they were subjected to ill-treatment and torture; and were subsequently transferred from Poland, respectively in June and September 2003.

The Court found that their transfer from Poland exposed them to a real risk of a flagrant denial of justice due to the possibility they would face trials before United States' military commissions using evidence obtained under torture. In this context, the Court also noted that no case against Mr Husayn had been listed for trial and found that his indefinite detention without charge in itself amounted to a flagrant denial of justice.
Mr Al Nashiri has been charged with capital offences before the military commissions and the Court found that he faced a real risk of being subjected to the death penalty.

Detailed summary of the violations found by the European Court:

- Failure to comply with Article 38 because the authorities refused to furnish all the necessary facilities in the proceedings before the European Court;
- Violation of Article 3 (procedural) on account of the authorities' failure to carry out an effective investigation into the applicants' allegations of serious violations of the Convention, including torture, ill-treatment and undisclosed detention;

[1] This document has been classified restricted until examination by the Committee of Ministers.
[2] 2013/2702(RSP; 2012/2033(INI); 2006/2200(INI)
[3] Opening Statement by UN High Commissioner for Human Rights 2013; A/HRC/22/52; A/HRC/19/61; A/HRC/14/46

- Violation of Article 3 (substantive) on account of the authorities' complicity in the CIA high-value detainees (HVD) programme, which enabled the United States authorities to subject the applicants to torture and ill-treatment on the respondent State's territory and to transfer the applicants from its territory despite the existence of a real risk that they would be subjected to treatment contrary to Article 3;
- Violation of Article 5 on account of the applicants' undisclosed detention on the respondent State's territory and the fact that the Polish authorities enabled the United States authorities to transfer the applicants from its territory, despite the existence of a real risk that they would be subjected to further undisclosed detention;
- Violation of Article 8 because the interference with the applicants' private and family life was not in accordance with the law;
- Violation of Article 13 taken in conjunction with Article 3, and in *Husayn* also in conjunction with Articles 5 and 8, on account of the lack of effective remedies in respect of the applicants' grievances;
- Violation of Article 6 § 1 on account of the transfer of the applicants from the respondent State's territory despite the existence of a real risk they could face a flagrant denial of justice;
- In the *Al Nashiri* case, violation of Articles 2 and 3 of the Convention and Article 1 of Protocol No. 6 on account of the transfer of the applicant from the respondent State's territory despite the existence of a real risk that he could be subjected to the death penalty.

Status of execution

Urgent individual measures: *requests for diplomatic assurances to the United States authorities*

The applicants are currently detained in the Internment Facility at the United States Guantánamo Bay Naval Base in Cuba.

Proceedings against Mr Al Nashiri before a military commission, and in which he faces the death penalty, were initiated in 2008 and are pending. According to the judgment, the trial was set to begin on 2 September 2014.[4] In response to the applicant's request, the European Court indicated under Article 46 that the actions and inactions of the Polish authorities had exposed him to the risk of the death penalty. The proceedings against him before the military commission were pending and that risk continued. Accordingly, the Convention required the authorities to seek to remove that risk as soon as possible by seeking assurances from the United States authorities that the applicant would not be subjected to the death penalty. As also indicated by the European Court, there was a real risk that proceedings before the military commission would use evidence obtained under torture, exposing the applicant to a flagrant denial of justice.[5]

In the context of the military commission proceedings against Mr Al Nashiri, two questions are currently being litigated:
- whether and in what circumstances Mr Al Nashiri should undergo an MRI scan of his brain (his lawyers argue that treatment suffered in CIA detention has caused him a severe brain injury);
- the appropriate forum in which to try him (depending on the classification of his alleged offences he should either be tried before the military commission or in the ordinary criminal courts).

This litigation could ultimately impact on the forum in which he is tried and the sentence imposed on him; his lawyers argue that proving he has suffered a severe brain injury could exclude the possibility of the death penalty being imposed.

According to the judgment and the information submitted, Mr Husayn has not been listed for trial before a military commission; he has been detained without charge since 2002 and was transferred to Guantánamo in 2006. The last review of the legality of his detention took place on 27 March 2007.[6]

At its 1222nd meeting (March 2015) (DH), the Committee expressed its deep concern about the applicants' situation and called upon the Polish authorities:
- to seek urgently assurances from the United States authorities that Mr Al Nashiri would not be subjected to the death penalty;

[4] § 572 *Al Nashiri.*
[5] § 567 *Al Nashiri,* § 557 *Husayn (Abu Zubaydah)* (see also § 77 *Al Nashiri,* § 75 *Husayn).*
[6] § 559 *Husayn (Abu Zubaydah).*

- to seek urgently assurances that the applicants would not be exposed to flagrant denials of justice.

The Committee of Ministers has examined the urgent individual measures at each of its Human Rights meetings since then. In the initial stages of its examination, the Committee noted with satisfaction the actions of the Polish authorities in requesting and following up their requests for assurances from the United States authorities.

However, on 19/02/2016, the Polish authorities indicated that the United States authorities had informed them that their request for diplomatic assurances could not be supported. The United States authorities had further indicated to them that the European Convention on Human Rights and decisions of the European Court of Human Rights did not reflect the obligations of the United States under international law.

They also underlined that international law does not prohibit capital punishment when imposed and carried out in a manner that is consistent with international obligations, and the United States has many additional procedural safeguards for individuals facing capital punishment. Moreover, in the opinion of the United States authorities, military commissions and federal courts were appropriate and properly equipped to address the cases of the applicants in a manner that complied with all applicable international and domestic law.

At its 1250th meeting (March 2016) (DH), the Committee expressed deep concern about the United States authorities' decision not to support the request for diplomatic assurances against the imposition of the death penalty and flagrant denials of justice in the applicants' cases and welcomed, in this connection, the readiness of the Polish authorities to repeat their request for assurances. It urged them to raise the issue at high political levels, calling also on the Secretary General and representatives of the member States of the Council of Europe to raise the issue of the diplomatic assurances in their contacts with the United States authorities. Moreover, it invited the Secretary General to transmit its decision to the Permanent Observer of the United States to the Council of Europe, which was done on 17 March 2016. Responding to the Committee's decision, the authorities indicated that a new request for diplomatic assurances was being prepared by the Chancellery of the President of Poland to be sent to its United States counterpart. At its last examination of the cases at the 1259th meeting (June 2016) (DH), the Committee noted this with satisfaction and urged the authorities to submit this request without delay. It also urged the United States authorities to reconsider their previous response to the Polish authorities in the context of any future requests for assurances.

On 18th July, the Polish authorities confirmed[7] that the latest request for assurances had been sent from the Secretary of State of the Chancellery of the President of the Republic of Poland to the Deputy Secretary of State of the United States of America. In that request, the Polish authorities recalled the content of the judgments of the European Court and that they were binding on Poland; the previous efforts of Poland to obtain assurances; and the Committee of Ministers' decisions in these cases. In a letter of 30 August the authorities provided the information that the United States Embassy had confirmed the receipt of the request by a diplomatic note of 1 August and that they were currently awaiting a reply from the United States Deputy Secretary of State. In addition, the authorities confirmed that a hearing had taken place in Guantanámo on 23 August concerning an application for release submitted by Abu Zubaydah. A decision in this respect was expected within 30 days of the hearing.

At its 1265th meeting (September 2016) (DH), the Committee of Ministers noted the above request with satisfaction and reiterated that further action by the Polish authorities was crucial to follow it up, including raising the issue at the highest political level. It also called on the Secretary General and representatives of the member States to continue to raise the issue of diplomatic assurances in their contacts with the United States authorities. By a letter of 17 October 2016 to the Consul General, Deputy Permanent Observer of the United States of America in Strasbourg, the Secretary General transmitted the Committee of Ministers' decision and indicated that he very much hoped that the United States authorities would be able to provide the requested assurances to the Polish authorities.

In their latest update to the action plan, provided on 20 October 2016 (DH-DD(2016)1164), the Polish authorities indicated that they were making efforts to include the issue of diplomatic assurances and the situation of the applicants on the agenda of every relevant meeting with their United States counterparts.

[7] See DH-DD(2016)834.

They have not received as yet a reply to their July 2016 request for assurances but are ready to renew it, should the lack of such reply persist.

As to the applicants' current situation, no decision on Mr Abu Zubaydah's motion for release has been published as yet and there are no major changes in the procedural situation of Mr Al Nashiri.

Other individual measures: *domestic investigation*

A criminal investigation into allegations concerning the existence of a CIA secret detention facility in Poland was opened by the Prosecutor's Office on 11 March 2008. The investigation is apparently against persons unknown. It has been extended a number of times, most recently until 11 October 2016, and remains pending.[8] In the action plan (updated on 13 May 2016, DH-DD(2016)627), the authorities presented information on the most recent activities taken and planned, which include obtaining documents from the office of the President of the Republic.

The authorities have also submitted another comprehensive application for mutual legal assistance to the relevant United States' authorities following the United States' refusal in November 2015 to grant earlier requests for assistance.[9] In addition, they are taking steps to obtain a reply from the Romanian authorities to the outstanding request for mutual legal assistance made in January 2014.[10] At the 1259th meeting the Committee reiterated its concern that concrete results had not been achieved in the domestic investigation and urged the authorities to ensure that it is completed without further delay.

In October 2016, the authorities indicated that certain investigative steps had been undertaken and were still envisaged, including collecting classified documents and hearing persons bound to an obligation of secrecy. Owing to their classified nature, the result of these activities cannot be made public, but the applicants' lawyers have access to the case-file, including its classified parts, and they can take part in each investigative activity, of which they are given notice in advance.

In addition the authorities indicated that the United States authorities had rejected their latest application for mutual legal assistance, stating that any further motions concerning alleged CIA detention spots for persons suspected of terrorist activities would not be processed.

General measures:

The authorities presented information on the legal framework in three main areas: first, concerning the existence of parliamentary control over the activities of the intelligence services through a Parliamentary Commission for Special Services; second, on the Police Act which, according to the action plan, introduced enhanced judicial and prosecutorial oversight of special services; third, they mentioned the oversight of the intelligence services by the executive through the appointment of a new Minister as Coordinator of Special Services. That Minister ordered the heads of services to audit their actions with respect to human rights. The results of the audit will form the basis for future work aimed at increasing control over the intelligence services.

However, indicating that this information does not convincingly address the root causes of the violations,[11] the Committee called on the authorities to reflect not only on the oversight of the daily operational work of the intelligence services, but also to scrutinise high-level decision making in this area.

In October 2016, the authorities indicated that the abovementioned audit had not yet been completed. Irrespective of its outcome, they recognised some shortcomings in the operation of the current system of intelligence services, without specifying them. The authorities intend improving this system as well as strengthening and broadening the supervision of the activities of these services. However, the concrete scope and direction of the measures envisaged to this effect are still to be determined.

[8] § 482 *Husayn (Abu Zubaydah).*
[9] A first request was refused in 2009, the remaining five were refused in November 2015 (see the Action Plan DH-DD(2015)1250 for more details).
[10] The applicant was transferred by the CIA to Guantanámo via a detention facility in Romania: see § 109 of the Court's judgment.
[11] For a detailed analysis see the presentation of the case at the 1259th Meeting (June 2016).

Concerning the violation of Article 38, the authorities indicated that they continue to reflect on how to ensure unhindered communication and exchange of documents with the European Court. At this stage they are considering introducing amendments to the Law on the protection of classified information (having already ruled out the possibility of introducing such amendments to the Code of Criminal Proceedings). They also suggested a reflection under the auspices of the Committee of Ministers on improvements to the provisions governing the processing by the European Court of classified information from member States.

On 25/08/2016, the Helsinki Foundation for Human Rights submitted comments, expressing its concern about the course of the domestic investigation; the independence of prosecutors, following a reform of the prosecution service earlier this year and the merger of the positions of the Minister of Justice and the Prosecutor General; and the lack of any independent expert body to oversee the intelligence services. The authorities replied to this submission by indicating that merging the positions of the Prosecutor General and the Minister of Justice would not lead to politicisation of the prosecution service and that the government intended to strengthen control over the secret services, although at this stage the direction and scope of the reform were still to be settled. In a submission of 06/09/2016 (DH-DD(2016)1007), the Open Society Justice Initiative reiterated its position on the need for an effective investigation into Poland's role in the CIA extraordinary rendition operations and an official acknowledgement at the highest level of government that Poland hosted a secret detention facility on its territory in 2002 and 2003.

Analysis by the Secretariat

~~In response to the Committee of Ministers' decisions adopted in June and September 2016 in these cases, the Polish authorities presented information on the individual and general measures on 20 October 2016 (DH-DD(2016)1164). The Secretariat is currently assessing this information and will circulate shortly revised Notes in these cases.~~

Urgent individual measures: requests for diplomatic assurances

The absence of any response to the Polish authorities' latest request (of July 2016) for diplomatic assurances from the United States, despite the strong support expressed by the Committee, is a cause of serious concern. This is all the more so considering that one of the applicants continues to face a real risk of being subjected to the death penalty, both applicants are subjected to a flagrant denial of justice in the United States, and that this situation results from an "extraordinary rendition" organised by a United States body, the CIA, to the United States.

The willingness of the Polish authorities to renew their request is welcome. It should, however, be recalled that the Committee has stressed, most recently, in September 2016, the necessity of making and following up such requests at the highest political levels.

In the meantime it is noted that there appears to remain a possibility to achieve a measure of redress for Mr. Abu Zubaydah in the context of the examination by the United States authorities of his request for release.

Individual measures: domestic investigation

It is regrettable that the domestic investigations to clarify the circumstances of the applicants' detention and "extraordinary rendition" in the light of the Court's conclusions, notably as to the acquiescence or connivance of the Polish authorities, have so far not provided any tangible results. It is noted in this context that the United States authorities have rejected the latest request for international legal assistance and also indicated a lack of willingness to respond to further similar requests concerning alleged CIA detention spots for persons suspected of terrorism. This position is also a matter of concern, especially given the facts at the origin of the violations found in these cases.

It is now for the Polish authorities to draw conclusions, as regards the future conduct of the investigation, from the United States' refusal to support their request and to seek avenues to counter this situation. In this context it appears essential for the authorities to inform the Committee of what further means will be deployed to overcome existing obstacles and within what timeframe. It should be underlined that the mere listing of the steps taken and the indications that the investigation in the case is still pending do not permit an assessment of the progress in the implementation of necessary individual measures.

The authorities should also keep in mind that it is now essential to achieve substantial progress in this investigation as it has been pending for more than eight years without any tangible result. Their investigatory efforts to complete it should therefore be redoubled.

The information that the applicants' lawyers have access to the case-file, including its classified parts, and that they can take part in each investigative activity, of which they are given notice in advance, is positive. Equally, the classified character of certain parts of the investigation should not prevent the Polish authorities from informing the Committee about achievements made.

General measures:

Concerning the violation of Article 38, no concrete solution has yet been identified. The authorities should thus complete their reflection without further delay and inform the Committee of the concrete measures chosen to ensure unhindered communication and exchange of documents with the European Court. In this context, they might wish to bear in mind that the argument as to the need to improve the provisions governing the processing of classified information by the European Court has already been addressed in the *Al Nashiri* judgment.[12]

As to safeguards needed to prevent violations of Convention rights by the intelligence services, measures taken should aim, over and above enhancing the oversight of the daily operational work, at finding adequate means to scrutinise the high-level decision-making processes within these services. The authorities should therefore introduce this aspect also in their on-going reflection. In view of time passed it appears important to complete this work without further delay and provide concrete information on the scope of reforms envisaged and a time-table for their adoption.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-18

Al Nashiri group v. Poland (Application No. 28761/11)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1164, DH-DD(2016)1007, DH-DD(2016)957, DH-DD(2016)942, DH-DD(2016)834, DH-DD(2016)627, DH-DD(2016)191, DH-DD(2015)1300, DH-DD(2015)1250, DH-DD(2015)839, DH-DD(2015)586, DH-DD(2015)585, DH-DD(2015)515, CM/AS(2008)Rec1801-final, Rec(2005)10, Parliamentary Assembly Resolution 1562(2007), Parliamentary Assembly Resolution 1507(2006), CDL(2007)082 updated in 2015 (CDL-AD(2015)006), CDL-AD(2006)009, relevant documents from the European Parliament,[13] relevant documents from the United Nations,[14] United States Senate, OSCE report 2014 "Human Rights Situation of Detainees at Guantanámo", CM/Del/Dec(2016)1265/H46-19

Decisions

The Deputies

Individual measures

1. recalled that, under the jurisdiction of the United States, Mr Al Nashiri continues to face a real risk of being subjected to the death penalty and both applicants are subjected to a flagrant denial of justice and that this situation results from an "extraordinary rendition" operation organised by a United States body;

2. expressed serious concern at the absence of reply from the United States authorities to the latest Polish request for diplomatic assurances, submitted in July 2016, to prevent the application of the death penalty to Mr Al Nashiri and to put an end to the flagrant denial of justice to which both applicants remain exposed;

3. recalled that the United States has observer status with the Council of Europe and as such shares its ideals and values and once again invited the authorities of the United States to heed the Polish request for diplomatic assurances;

[12] § 366 *Al Nashiri* (see also § 371)
[13] 2013/2702(RSP; 2012/2033(INI); 2006/2200(INI)
[14] Opening Statement by UN High Commissioner for Human Rights 2013; A/HRC/22/52; A/HRC/19/61; A/HRC/14/46

4. recalling the crucial importance for the Polish authorities to follow-up actively their request for diplomatic assurances at the highest political levels, urged them to inform regularly the Committee of the concrete steps taken to this effect;

5. also called on the Secretary General and the representatives of the member States of the Council of Europe to continue raising the issue of assurances in their contacts with the United States authorities and invited the Secretary General to transmit this decision to the Permanent Observer of the United States;

6. as regards the domestic investigation into the events, noted with concern the continuing absence of tangible results and called upon the Polish authorities to increase their efforts, without further delay, in order to make progress;

7. in this context, expressed regret at the response given by the United States authorities to the latest Polish request for mutual legal assistance and, in particular, at their declared unwillingness to process any further similar request and invited the Polish authorities to reflect upon means to counter the consequences of this situation;

General measures

8. invited the Polish authorities to complete rapidly their reflection on the measures required to strengthen supervision over the intelligence services, including over the high-level decision-making process;

9. invited the Polish authorities to do the same as regards the necessity of putting in place a procedure for unhindered communication and exchange of documents with the European Court;

10. decided to resume consideration of the urgent individual measures in these cases at their 1280th meeting (March 2017) (DH) and invited the authorities to provide updated information concerning the other individual and general measures in good time for their 1288th meeting (June 2017) (DH).

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-19 8 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-19 Fuchs group v. Poland (Application No. 33870/96)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1160, DH-DD(2016)514, DH-DD(2016)484, DH-DD(2015)493, DH-DD(2014)145, DH-DD(2014)102, DH-DD(2011)1073, CM/Del/OJ/DH(2013)1179/12

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
33870/96	FUCHS GROUP	11/02/2003	11/05/2003	Complex problem

Case description

This group of cases concerns excessive length of proceedings before administrative courts and bodies (violations of Article 6 § 1). It also concerns the lack of an effective remedy against the excessive length of proceedings (violation of Article 13).

Status of execution

Individual measures:

In most cases, the proceedings are closed. In certain cases, information is awaited on the state of the proceedings and their acceleration, if need be.

General measures:

The Committee of Ministers examined the execution of this group of cases during its 1179th meeting (September 2013) (DH). Following the decision adopted at that meeting, an updated action plan was submitted by the authorities on 02/01/2014 (DH-DD(2014)102). It was discussed in bilateral contacts; updated action plans were submitted on 27/04/2015 (DH-DD(2015)493) and on 20/10/2016 (DH-DD(2016)1160).

It should be noted at the outset that this group concerns both the excessive length of proceedings before administrative bodies, and also before administrative courts. Accordingly, different sets of measures targeting both domains are examined within the group.

a) Measures aimed at reducing the length of proceedings:
Regarding the length of proceedings before administrative courts and bodies, the most recent action plan refers first of all to an amendment to the Law Proceedings before Administrative Courts, which entered into force on 16/08/2015.

[1] This document has been classified restricted until examination by the Committee of Ministers.

According to the authorities, this amendment should contribute to reducing the length of administrative proceedings through simplifying the procedure before administrative courts and the Supreme Administrative Court and allowing administrative courts to give judgments on the substance of the cases. The latter power aims at eliminating the practice of frequent remittals, sometimes several times in the same set of proceedings, being one of the major factors contributing to the excessive length of administrative proceedings.

The authorities also referred to legislative measures aiming at increasing the effectiveness of particular types of administrative proceedings, providing the example of simplifications introduced to construction law, through reducing the number of situations in which a building permit is required. According to the authorities the number of complaints against inactivity or the excessive length of proceedings concerning building permit and other aspects of construction procedure has decreased, as well as the number of complaints found justified. In addition, the average time for proceedings in this field has been decreasing.

They also made a reference to a number of organisational measures taken, aimed at accelerating proceedings before administrative courts, in particular, the supervision over their work exercised by the President of the Supreme Administrative Court, presidents of regional administrative courts and the Case-law Bureau of the Supreme Administrative Court. Those measures have been accompanied by a continuous increase in the budget for the administrative court system and stable numbers of employees.

However, the statistics presented in the action plan indicate that the backlog of cases is increasing before administrative courts and the Supreme Administrative Court, despite a growing number of cases completed each year. According to the authorities, this problem should be resolved by the changes to the Law on Proceedings before Administrative Courts. From the statistics collected following the adoption of this amendment it appears that there has recently been an increase in the number of cases completed, suggesting that the recent legislative changes have already brought results.

b) Measures aimed at putting in place an effective remedy:
According to the action plans, the remedy against excessive length of judicial proceedings, introduced in 2004, presented in the *Bąk* and *Majewski* groups of cases, applies to proceedings before administrative courts and the Supreme Administrative Court. In the most recent action plan the authorities made a reference to the ongoing legislative process aiming at improving this remedy, in line with the indications given by the European Court in the pilot judgment in *Rutkowski and others v. Poland*, concerning excessive length of proceedings before ordinary courts.

As to the remedy against excessive length of proceedings before administrative bodies, in the most recent action plan the authorities presented detailed information, including administrative review before higher administrative authority against inactivity or excessive length of proceedings, pursuant to the Code of Administrative Procedure and similar complaints to administrative courts, pursuant to the Law on Proceedings before Administrative Courts.

In the framework of the latter complaints, an administrative court may impose on the administrative body an obligation to act within a given time frame, declare whether inactivity or excessive length of administrative proceedings amounted to a flagrant violation of law and, upon request from a party or *ex officio,* impose a fine on the responsible body. Moreover, the most recent amendment to the Law on Proceedings before Administrative Courts, provides administrative courts with a new power to order payment of compensation by the responsible administrative body to the applicant.

The Polish Bar Council made two submissions under Rule 9(2) of the Committee's rules in this group of cases, one in 2014 (DH-DD(2014)145) and one in 2016 (DH-DD(2016)514). They pointed to certain deficiencies in the application of the remedy against excessive length of judicial proceedings, in particular the so-called fragmentation of the proceedings; insufficient levels of just satisfaction granted at domestic level; and excessive formalism of the courts. The authorities replied to both submissions and confirmed that legislative amendment of this remedy is progressing.

Analysis by the Secretariat

Assessment of the measures taken concerning the excessive length of proceedings

From the outset the important amendment to the Law on Proceedings before Administrative Courts that entered into force in August 2015 should be noted with interest. It should not only simplify, through various procedural changes, the proceedings before administrative courts, but should also have a direct impact on the length of proceedings before administrative bodies, by making it possible for administrative courts to give judgments on merits which they were not able to do before.

This legislative change is particularly important, as the main source of the problem with excessive length of administrative proceedings in a significant number of cases in this group was the quashing of decisions of administrative bodies by administrative courts, which then remitted the case for a new decision, sometimes several times in one set of proceedings. As this source of violation appears to be remedied, the Committee could consider closing its supervision of this type of case.

More generally, it may be recalled that, during the last examination of this group of cases, the Committee noted that the situation before the administrative courts was of concern. The backlog of cases awaiting processing remains static, but it appears that this trend is related to the increase in the number of new cases than to a decrease in the efficiency of the administrative courts. In addition, the statistics presented by the authorities in the last update to the action plan, in particular as to the proceedings before the Supreme Administrative Court, show a recent increase in the number of completed cases, which the authorities link to the abovementioned legislative changes. Additional information is necessary on the evolution of these trends as well as on any other measures envisaged, in order to allow for a full assessment of the situation before the administrative courts.

With regard to proceedings before administrative bodies, the statistics provided by the authorities as to the number of complaints against inactivity or excessive length of the proceedings concerning construction procedures and the average time of proceedings in this field demonstrate positive trends. Nevertheless, the Committee still has no information allowing for a more general assessment of the situation before administrative bodies and could invite the authorities to provide this.

Assessment of the measures taken concerning the remedies

Remedies concerning excessive length of proceedings before administrative bodies
The information submitted by the authorities is positive. The wide catalogue of remedies appears promising, but only if they prove effective not only in law but also in practice, and therefore the Committee might wish to receive additional information on the functioning of these remedies.

Remedy concerning excessive length of proceedings before administrative courts
Concerning the remedy against the excessive length of proceedings, applied also to proceedings before administrative courts, it should be underlined that the pilot judgment in the case of *Rutkowski and others*, concerning the same remedy in the context of proceedings before civil and criminal courts, confirms that there remain certain problems in its application (fragmentation, excessively low levels of compensation, formalism), which it falls to the authorities to resolve. The authorities, apart from the awareness-rising measures already implemented, have also chosen further to amend the legislation, as they consider this will guarantee that the practice of domestic courts fully conforms with the Convention and jurisprudence of the Court. The legislative process is ongoing and the Committee could invite the authorities to keep it informed of all the developments in this respect.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-19

Fuchs group v. Poland (Application No. 33870/96)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1160, DH-DD(2016)514, DH-DD(2016)484, DH-DD(2015)493, DH-DD(2014)145, DH-DD(2014)102, DH-DD(2011)1073, CM/Del/OJ/DH(2013)1179/12

Decisions

The Deputies

1. noted with interest the recent legislative changes in the Law on Proceedings before Administrative Courts introduced to simplify the procedure before these courts, provide them with power to give judgment on the merits and to reform the system of remedies against excessive length of proceedings before administrative bodies;

2. finding that these measures have enabled the practice of remittals of cases after annulment of administrative decisions, a cause of many delays in proceedings, to be brought to an end, decided to close the supervision of those cases in which this practice was a primary source of violation and adopted the final resolution CM/ResDH(2016)..;

3. considering however that additional information is necessary for a full assessment of the status of execution in the remaining cases; accordingly invited the authorities to submit to the Committee their assessment of the impact of the adopted measures on the length of proceedings before administrative bodies and courts and on the necessity for additional measures;

4. invited the authorities to submit to the Committee clarifications as to the functioning in practice of the remedies concerning administrative bodies and to keep it informed of any developments in the reform of remedies concerning courts.

Resolution CM/ResDH(2016)…
Execution of judgments of the European Court of Human Rights
34 cases against Poland
(See the annex for the list of cases)

(Adopted by the Committee of Ministers on …
at the .. meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 46, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention"),

Having regard to the final judgment transmitted by the Court to the Committee in these cases and to the violations established due to excessive length of administrative proceedings;

Recalling the respondent State's obligation, under Article 46, paragraph 1, of the Convention, to abide by all final judgments in cases to which it has been a party and that this obligation entails, over and above the payment of any sums awarded by the Court, the adoption by the authorities of the respondent State, where required:

- of individual measures to put an end to violations established and erase their consequences so as to achieve as far as possible *restitutio in integrum*; and
- of general measures preventing similar violations;

Having examined the information provided by the government (see document DH-DD(2016)1160);

Having noted that just satisfaction awarded by the Court has been paid by the government of the respondent State and that domestic proceedings in these cases are now terminated;

Having noted the general measures adopted by the Polish authorities, which demonstrate their commitment to continue the efforts to solve the problem of the excessive length of administrative proceedings;

Noting with satisfaction that the amendments to the Law on proceedings before administrative courts which entered into force in August 2015 have allowed for termination of the practice of remittals of cases after annulment of administrative decisions, a reason for numerous delays in the proceedings;

Noting that outstanding issues concerning the length of administrative proceedings and the functioning of the remedies remain under supervision in the framework of the *Beller group* of cases;

DECLARES that it has exercised its functions under Article 46, paragraph 2, of the Convention in the cases enlisted below and

DECIDES to close the examination thereof.

Appendix

Application	Case	Judgment of	Final on
33870/96	FUCHS	11/02/2003	11/05/2003
28940/08	ANDRZEJCZAK	22/01/2013	22/01/2013
15629/02	BARTCZAK	04/11/2008	04/02/2009
22305/06	BŁASZCZYK	08/01/2008	08/04/2008
4054/03	BOSZKO	05/12/2006	05/03/2007
19171/03	CHMIELECKA	16/12/2008	16/03/2009
26764/08	GAWLIK	11/10/2011	11/10/2011
1730/08	GLOWACKA AND KROLICKA	07/12/2010	07/12/2010
21246/05	GRACZYK	04/11/2008	04/02/2009
33550/02	HELWIG	21/10/2008	06/04/2009
62506/00	KAMECKI AND OTHERS	09/06/2009	09/09/2009
12605/03	KANIA LEON AND AGNIESZKA	21/07/2009	21/10/2009
27710/05	KITA LIDIA	22/07/2008	22/10/2008
43161/04	KLEWINOWSKI	09/12/2008	06/04/2009
11522/03	KLIBER	13/01/2009	13/04/2009
42797/06	KOSINSKA	14/12/2010	14/03/2011
11700/04	KRZEWSKI	02/12/2008	06/04/2009
13024/05	OLSZEWSKA	18/12/2007	18/03/2008
7153/07	ORLIKOWSCY	04/10/2011	04/01/2012
77741/01	PIEKARA	15/06/2004	15/09/2004
8362/02	PIÓRO AND ŁUKASIK	02/12/2008	05/06/2009
23759/02	PRZEPAŁKOWSKI	22/07/2008	01/12/2008
10392/04	PUCHALSKA	06/10/2009	01/03/2010
36980/04	SERAFIN AND OTHERS	21/04/2009	21/07/2009
51123/07	SERAFIN AND OTHERS No. 2	02/12/2008	02/03/2009
19607/03	SITO	09/01/2007	09/04/2007
13568/02	STEVENS	24/10/2006	24/01/2007
9399/03	TOMASZEWSKA	14/04/2009	14/07/2009
33777/96	URBAŃCZYK	01/06/2004	01/09/2004
12134/02	URBAŃSKA	13/11/2007	13/02/2008
17949/03	WESOŁOWSKA	04/03/2008	04/06/2008
28983/02	WILCZKOWSKA AND OTHERS	08/01/2008	08/04/2008
33017/03	WÓJCICKA-SURÓWKA	27/11/2007	27/02/2008
35965/03	ZJEDNOCZONE BROWARY WARSZAWSKIE HABERBUSCH I SCHIELE S.A.	14/12/2010	14/12/2010

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-20 9 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-20 Grabowski v. Poland (Application No. 57722/12)

Supervision of the execution of the European Court's judgments

Reference document:
DH-DD(2016)1123-rev

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
57722/12	GRABOWSKI	30/06/2015	30/09/2015	Complex problem

Case description

The case concerns the unlawful deprivation of liberty of a juvenile offender, between 2012 and 2013, in the framework of correctional proceedings. The applicant continued to be detained without any legal basis in a shelter for juveniles for a period of five months and two days after the expiry of the initial decision ordering his placement. The Court found a practice of the part of the domestic courts of not issuing a separate decision to extend such placement once the juvenile's case had been referred for examination in correctional proceedings. The practice resulted from the lack of precision in Article 27 of the Act on the Procedure in Juvenile Cases. Consequently, Mr Grabowski's detention was not only based on legal provisions which did not satisfy the test of the "quality of a law" for the purposes of Article 5 § 1, but was also contrary to the principle of legal certainty, as it was not based on a concrete legal provision or on any judicial decision (violation of Article 5 § 1).

The case also concerns the lack of an adequate remedy allowing the applicant to obtain a review of the lawfulness of his detention. The European Court found in this respect that in dismissing Mr Grabowski's application for release, the domestic courts had given perfunctory reasons and had failed to address his crucial argument that his continued placement was unlawful as was not based on a separate judicial decision (violation of Article 5 § 4).

Under Article 46 of the Convention, the European Court indicated that Poland should undertake legislative or other appropriate measures with a view to eliminating the practice developed under the above Act as applicable at the relevant time and ensuring that each and every period of the deprivation of liberty of a juvenile is authorised by a specific judicial decision (see § 68 of the judgment).

Status of execution

The Polish authorities submitted a revised action plan on 18 of October 2016 (DH-DD(2016)1123-rev), the main points of which may be summarised as follows:

Individual measures: The applicant was released on 9 January 2013 and just the satisfaction awarded by the European Court was paid to him.

[1] This document has been classified restricted until examination by the Committee of Ministers.

General measures:

a) Violation of Article 5 § 1

The authorities initiated a legislative process to amend Article 27 of the Act on the Procedure in Juvenile Cases which according to the European Court, did not satisfy the test of the "quality of a law" for the purposes of Article 5 § 1 of the Convention.

In order to address the source of the problem before amendments are adopted, the authorities also implemented various awareness-rising measures (translation, publication, extensive dissemination and training sessions). In addition, the authorities introduced new rules governing the internal functioning of common courts on 1 January 2016 (the "Rules"). These rules, *inter alia*, require family courts to send a copy of a decision extending the placement of a juvenile to the administration of the shelter at least three working days before the expiry of a detention period specified in a decision in force. According to the authorities, this rule indirectly confirms that a new decision on the placement in detention has to be given before the expiry of the detention period set in a previous decision.

According to queries conducted by the Ministry of Justice after the implementation of the awareness-rising measures and the adoption of the new Rules, almost all domestic courts now apply Article 27 in a Convention-compliant manner, by giving a separate decision on each extension of the placement in a juvenile shelter, even though Article 27 has not been yet amended. In addition, the authorities continue monitoring the problem: the Ministry of Justice is waiting for the conclusions of an additional report on the relevant practice of the courts, which is to be prepared by the Justice Institute.

b) Violation of Article 5 § 4

The government, which considers this aspect of the case to be a one-off situation, underlined that the measures envisaged to address the violation of Article 5 § 1 of the Convention would ensure that each prolongation of detention in a juvenile shelter is based on a specific judicial decision, so there will be no reason to complain about the absence of such decision. In addition, even if such a request is submitted, the lack of a decision prolonging the detention, contrary to what took place in this case, will be duly taken into account by the domestic courts in the assessment of the lawfulness of the detention. Therefore, the government concludes that there is no need for separate general measures in response to the violation of Article 5 § 4 found by the Court in the present case.

Analysis by the Secretariat

Individual measures: No other measure appears necessary.

General measures

a) Violation of Article 5 § 1

The measures taken and envisaged to respond to the Court's judgment could be noted with interest and the authorities could be encouraged to complete the initiated legislative process with a view to consolidate a practice compliant with the requirements of the Convention. In this context the Committee might wish to receive additional information on the content of the envisaged legislative amendment, together with a time-table for its adoption.

b) Violation of Article 5 § 4

As for the reasons considered too superficial by the European Court, taking into account the authorities` reassurance that this was an isolated case, the adopted awareness-rising measures appear sufficient. Moreover, pending measures to ensure that an obligation to adopt specific decision for each extension of detention in a juvenile shelter is clearly inscribed in the domestic law should guarantee that the argument about the illegality of detention based on the absence of such decision will no longer be disregarded in the future.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-20

Grabowski v. Poland (Application No. 57722/12)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1123-rev

Decisions

The Deputies

1. recalled that the violations established by the Court in this case resulted from continuing to detain the applicant in the juvenile shelter in the absence of a decision extending his initial detention (violation of Article 5 § 1) and the lack of an effective remedy (violation of Article 5 § 4);

2. concerning individual measures, noted that the applicant is no longer detained, the just satisfaction awarded by the Court has been paid and, in consequence, no other individual measure is necessary;

3. with regard to the violation of Article 5 § 4, noted the authorities' assurance that this was an isolated case, which the awareness-rising measures already adopted and the pending measures concerning Article 5 § 1 appear sufficient to remedy;

4. concerning the violation of Article 5 § 1, recalled that the Court found that Article 27 of the Act on the Procedure in Juvenile Cases did not satisfy the test of the "quality of a law" for the purposes of Article 5 § 1 of the Convention and that its imprecision was the source of the domestic courts' practice of not issuing separate decisions for extending the placement of juvenile offenders in juvenile shelters;

5. noted therefore with interest the authorities' intention to amend this provision, as well as the measures implemented in meantime, which had allowed for a change in the practice of almost all the relevant courts; invited the authorities to provide the Committee with the content of the legislative amendment envisaged together with a time-table for its adoption.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-21-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-21 Bucur and Toma v. Romania (Application No. 40238/02)

Supervision of the execution of the European Court's judgments

Reference documents:
H/Exec(2016)6, DH-DD(2016)1284, DH-DD(2016)1152, DH-DD(2014)636, DH-DD(2014)592

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
40238/02	BUCUR AND TOMA	08/01/2013	08/04/2013	Complex problem

Case description

This case concerns the disclosure by the first applicant – a military official within the Romanian Intelligence Service (the "SRI") – of information on wide-scale illegal telephone tapping on the part of the SRI and of the content of some of the communications thus intercepted, including telephone conversations between the second and third applicants. The first applicant's disclosure of the above during a press conference in 1996 resulted in his conviction, in last instance by the Supreme Court of Justice on 13 May 2002, and to a suspended sentence of two years' imprisonment for theft and unlawful collection and transmission of secret information and disclosure and use of personal data.

In relation to the above, the European Court found:

- a violation of Article 10 in respect of Mr Bucur, as the interference with his freedom of expression resulting from his conviction had not been necessary in a democratic society: the domestic courts had failed to balance the pre-eminence of the interest of the public to have knowledge of the information disclosed over the interest in maintaining its confidentiality and, in this context, to verify whether the "top-secret" classification of the information was justified (§ 111 of the judgment); in doing so, the courts had disregarded the fact that the information disclosed concerned alleged abuse in office by high ranking officials and failed to give weight to the applicant's defence that he had acted in good faith and had had reasonable grounds to believe that the information was authentic and no other effective channels by which to disclose it;
- a violation of Article 6 § 1 in respect of Mr Bucur, on account of the domestic courts' omission to address the crucial argument for the defence as regards the pre-eminence of the public interest in having knowledge of the disclosed information and, in this context, to verify its classification status;
- violations of Articles 8 and 13 in respect of Mr and Ms Toma, on account of the lack of safeguards in the Romanian legislation on secret surveillance measures justified on national security grounds, in particular as regards the collecting and storing of personal data by the SRI, and the absence of a remedy in domestic law to challenge the storing of such data by the same;

[1] This document has been classified restricted until examination by the Committee of Ministers.

- a failure to comply with Article 38, as by refusing to provide the European Court with the entire criminal investigation file concerning Mr Bucur without a satisfactory explanation, Romania had breached its obligation to provide the Court with all the necessary facilities allowing it to establish the facts.

Status of execution

The measures adopted and under adoption by Romania are presented in the revised action plan submitted on 18 October 2016 (DH-DD(2016)1152) ~~and~~ Clarifications on its content were submitted by the authorities on 15 November 2016 (DH-DD(2016)1284). The information presented can be summarised as follows:

Individual measures:

The just satisfaction awarded to the applicants by the European Court was duly paid.

1) Violations of Articles 10 and 6 § 1: The domestic courts reopened the impugned criminal proceedings at Mr Bucur's request. In doing so, they found that the consequences of the criminal conviction had not been erased by legal rehabilitation, as it had amounted to a grave violation of his human rights and had seriously affected his career. They also took into account that the applicant's conviction had had a dissuasive effect on other whistle-blowers. In these circumstances, only the recognition of the lawfulness of his actions could provide adequate redress to the first applicant.

Upon retrial, the Bucharest Military Court, at first instance, and then the Military Court of Appeal, examined the applicant's actions against the criteria highlighted by the European Court in its judgment, and acquitted him of all charges, finding that he had not acted with the required *mens rea* when he had disclosed the information. The final decision in these proceedings, updating the acquittal, was delivered by the High Court of Cassation and Justice on 11 February 2016. This court underlined that, in accordance with the Romanian Constitution, the applicant's actions should have been examined from the start in light of the relevant requirements of the Convention, which had been in force in respect of Romania at the time of his initial conviction and had direct effect in domestic law. It further considered that, by adopting a specific law to protect public servants who disclose illegal actions of the administration (see below), Parliament had also retrospectively legitimated the applicant's actions.

2) Violations of Articles 8 and 13: The authorities indicated that the SRI had erased the recordings of the telephone conversations between Mr and Ms Toma.

General measures:

The European Court's judgment was published in the Official Gazette and disseminated to the domestic courts and the intelligence services. The authorities also disseminated the decision delivered by the High Court of Cassation and Justice in the context of the reopened proceedings against Mr Bucur.

1) Violation of Article 10: The offences for which the applicant was convicted continue to be criminalised under Law No. 51/1991 on national security (the "National Security Act") and the new Criminal Code. That being said, under Article 12 § 3 of the National Security Act, the prohibition on disclosing confidential information regarding national security cannot restrict freedom of expression and the right to impart information, when these rights are exercised in accordance with domestic law.

Having regard to the above, in the authorities' view, the awareness-raising measures adopted are sufficient to ensure that the domestic courts will henceforth interpret the relevant legal provisions in the light of the requirements of the Convention, as detailed in the European Court's judgment. In this respect, the authorities underline that in the judgment of the High Court of Cassation and Justice cited above, the balancing exercise between freedom of expression and national security concerns, required by Article 10, was at the core of the decision to acquit the applicant.

On 15 November 2016, the authorities moreover indicated that Law No. 182/2002 on classified information forbids classifying information for the purpose, inter alia, of concealing unlawful acts. The same Law allows interested parties to challenge the classification status of information before the administrative courts, whose decisions on this matter are binding on the criminal courts (for details, see DH-DD(2016)1284).

The authorities further underlined that persons in Mr Bucur's situation can now effectively alert the prosecuting authorities of suspicion of illegal activities by their employers and cannot be held criminally liable for disclosing classified or privileged information in the process (for more details, see DH-DD(2016)1152). In response to a survey carried out by the Government Agent's office, the domestic courts specified that they had not identified any criminal case regarding the disclosure of classified or privileged information by whistle-blowers.

On a more general note, the authorities indicated that in 2004 Parliament had enacted a law for the protection of persons who report breaches of the law within public bodies, including the SRI. Under this law, employees of public bodies can report acts amounting to misconduct in public office through a variety of channels, such as judicial authorities, parliamentary committees, mass-media and NGOs. It provides for a presumption of good faith in the absence of proof to the contrary and for a number of safeguards for whistle-blowers in any disciplinary proceedings that may be brought against them.

In the light of the above, the authorities consider that no further general measures are required.

2) Violation of Article 6 § 1: The authorities consider that the awareness-raising measures presented above are sufficient to prevent similar violations in the future.

3) Violations of Article 8 and 13: Law No. 255/2013, in force as of 1 February 2014, amended the legal framework, namely the National Security Act and Law No. 14/1992 on the organisation and operation of the SRI. These amendments introduced a number of safeguards to remedy the deficiencies identified by the European Court in the *Bucur and Toma* case and also in previous cases raising the same issues. These amendments, presented in detail in document DH-DD(2014)592, notably:

- introduced the requirement for judicial authorisation for secret surveillance measures on national security grounds, except in emergency situations, when such authorisation can be granted by the prosecutor for a duration of 48 hours; in this latter case, the prosecutor's authorisation is submitted to an *ex officio* judicial review and the judge can order the intelligence services to cease their activities and destroy the data collected when the authorisation was unduly granted;
- laid down an overall limit of two years on the duration of secret surveillance measures based on the same information indicating the existence of a threat to national security, in addition to the existing six-months' limit on the duration of the initial authorisation and three-months' limit on the duration of each prolongation thereof;
- introduced a requirement for the intelligence services to notify the persons concerned of the secret surveillance measures affecting them, except when such notification would be detrimental to ongoing operations, national security or the rights of third parties;
- introduced specific provisions on remedies available to persons concerned by secret surveillance measures, allowing them to seek redress in court under the relevant provisions of the Civil Code, the Code of Criminal Procedure or the Law on the protection of personal data, as the case may be.

On 15 November 2016, the authorities indicated that the assessment of the above measures, contained in document H/Exec(2006)6 prepared by the Secretariat, was already under their consideration and that they would provide clarification in response to the outstanding issues identified in this assessment by the end of December 2016.

4) Failure to comply with Article 38: The authorities emphasised that their refusal to provide the documents required by the European Court was an isolated incident and underlined their continuous and unrelenting efforts to cooperate with the Court. Following the dissemination of the judgment in this case, the relevant authorities identified two avenues to be followed for the transmission of similar documents to the European Court: (i) declassification of such documents, when national security considerations no longer come into play or (ii) transmission of classified documents, upon the assurance of the strict application of the rules on confidentiality provided for by Article 33 (3) of the Rules of the Court. The Romanian authorities have already made use of the first avenue in one case.

Analysis by the Secretariat

Individual measures:

The measures adopted enabled the consequences of the violations found to be fully erased. As regards Mr Bucur, the impugned proceedings were reopened although the applicant had been rehabilitated in the meantime and the national courts acquitted him of all charges, giving effect to the principles resulting from the European Court's judgment. As regards Mr and Ms Toma, the measures adopted ensure that the authorities are no longer in possession of illegal recordings of their private communications. In these circumstances, no other individual measure appears necessary in this case.

General measures:

1) As regards the violations of Article 10 and Article 6 § 1:
It is important to establish whether the domestic law allows the courts to balance the conflicting interests at stake in cases of disclosure, in good faith, of information related to possible misconduct in public office within the SRI and whether when deciding on the weight to be given to the interest of maintaining confidentiality the courts have the power to review the classification status of the impugned information.

The decisions delivered in the applicant's case upon retrial show that the domestic courts are not prevented from balancing the conflicting interest at stake in such a case. This was clearly confirmed by the High Court of Cassation and Justice, which strongly affirmed the direct effect of the Convention in Romanian law and offered the domestic courts clear guidance on the manner in which such balancing should be carried out. ~~This being said, the information provided thus far does not clarify whether in these proceedings the domestic courts reviewed the classification status of the impugned information nor whether the domestic law authorises them to do so. The authorities should be invited to clarify this point.~~ At the same time, the administrative courts at the request of any interested party, have the power to review the classification status of the impugned information, and their decisions in this respect are binding on the criminal courts. Accordingly, no further measure appears required in this respect.

2) As regards the violations of Articles 8 and 13: The problem of lack of safeguards in the legislative framework concerning secret surveillance measures arose first in the case of *Rotaru,*[2] and was then reiterated in other judgments of the European Court.[3] The Committee of Ministers now examines it in the context of its supervision of the execution of this judgment.

Document H/Exec(2016)6 outlines the deficiencies in the legal framework identified by the European Court and assesses in detail the amendments brought to this framework in 2013. These amendments are to be welcomed, as they corrected some of the deficiencies, such as those related to the authorisation of secret surveillance measures based on considerations of national security. However, other deficiencies still need to be addressed, for example, the scope of secret surveillance measures authorised under this legal framework should be circumscribed, to ensure that the provisions on the notification of the persons concerned by such measures are effectively applied and, most importantly, ensure an independent and effective oversight of the activity of the intelligence services.

In addition to the above, as detailed in document H/Exec(2016)6, the authorities have yet to provide clarifications on a number of questions related *inter alia* to the safeguards applied in respect of the processing of data collected through secret surveillance measures, including the conditions in which such data is to be destroyed, and the remedies available in domestic law to persons concerned by such measures. Information is therefore awaited on these points.

3) As regards the failure to comply with Article 38: Having regard to the example relied upon by the authorities, it appears that the awareness-raising measures adopted are sufficient to ensure that the authorities competent to decide on the declassification of privileged information make use of this avenue, when possible, in order to ensure compliance with Romania's obligations under Article 38. Where considerations of national security prevent declassification, the authorities indicated that they will provide documents to the European Court if assured that its rules on confidentiality will be strictly observed. The avenues thus identified appear to allow compliance by Romania with its obligations under Article 38, irrespective of the classification status of the information requested by the European Court. Accordingly, no further measure is required in this regard.

[2] Application No. 28341/95, judgment of 4 May 2000 [GC].
[3] The cases in the group of *Dumitru Popescu (No. 2)* (No. 71525/01) and the case of *Association "21 December 1989" and others* (No. 33810/07).

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-21

Bucur and Toma (Application No. 40238/02)
Supervision of the execution of the European Court's judgments
H/Exec(2016)6, DH-DD(2016)1284, DH-DD(2016)1152, DH-DD(2014)636, DH-DD(2014)592

Decisions

The Deputies

As regards the individual measures

1. noted with satisfaction that, in response to the European Court's judgment, the domestic courts reopened the criminal proceedings at issue and acquitted the first applicant of all the charges related to his public disclosure of wide-scale illegal telephone tapping by the Romanian Intelligence Service; noted also with satisfaction that the relevant authorities no longer retain recordings of the telephone conversations between the second and third applicants;

2. considered, in the light of the above, that no other individual measure is required in this case;

As regards the general measures

3. noted with interest the important guidance offered by the High Court of Cassation and Justice in its judgment of 11 February 2016 on the balancing of the competing interests in criminal proceedings triggered by the public disclosure of information evidencing misconduct in public office within the intelligence services; ~~invited the authorities to clarify whether, in the context of such proceedings~~, noting further that the domestic courts can review the classification status of the information disclosed in order to assess the importance of maintaining its confidentiality; considered that no other measure is required in response to the European Court's findings under Articles 10 and 6 § 1;

4. while noting with interest the amendments brought by Law No. 255/2013 to the legal framework on secret surveillance measures justified on considerations of national security, considered that additional measures are required to ensure that this framework fully complies with the requirements of Articles 8 and 13 resulting from the European Court's relevant case law;

5. underlining in particular the crucial importance of independent and effective oversight of the activity of the intelligence services, invited the authorities to inform the Committee of Ministers of the additional measures envisaged to remedy the remaining deficiencies in the legal framework, as identified in document H/Exec(2016)6, and also encouraged them to provide clarifications on the other outstanding issues highlighted in this document;

6. lastly, noted with satisfaction the commitment of the Romanian authorities to continue fully to cooperate with the European Court and, in this context, the avenues identified by them for the transmission of information requested by the Court irrespective of its classification status; considered that no other measure is required in response to the European Court's findings under Article 38.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-22 9 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-22 Ţicu Group v. Romania (Application No. 24575/10)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1143, DH-DD(2016)564, DH-DD(2015)818, DH-DD(2015)418, DH-DD(2015)203, CM/Del/Dec(2015)1230/13

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
24575/10	ŢICU	01/10/2013	01/01/2014	complex problem
19696/10	GHEORGHE PREDESCU	25/02/2014	25/05/2014	

Case description

These cases concern the ill-treatment suffered by the applicants in prison due to the inadequate management of their severe psychiatric conditions. They highlight several deficiencies: the placement of the applicants in ordinary severely overcrowded detention facilities; the lack of adequate medical care in prisons and penitentiary hospitals, including the failure to ensure to the first applicant constant psychiatric supervision and to the second applicant assistance and counselling to help him accept and deal with his illness; the failure to submit the second applicant to a forensic psychiatric examination, despite his repeated requests (violations of Article 3).

The case of *Ţicu* also concerns the lack of an investigation into the repeated acts of violence the applicant claimed to have suffered from other prisoners during his detention at the Iaşi prison (2009-2010). Despite medical findings attesting to abuse, the prosecutor's office took no action on the applicant's complaints and the information provided by the prison director, completely ignoring the applicant's vulnerability (procedural violation of Article 3).

Status of execution

The measures that have been and are being adopted by Romania are set out in the revised action plan of 12 October 2016 (DH-DD(2016)1143).

Individual measures:

1) Violations of Article 3: The authorities have continued to monitor the applicants' situation, which may be summarised as follows.

Mr Ţicu is being held under a closed regime at Iaşi prison, where he shares a cell with two other persons with individual space of 5.3 m². In June 2016, a psychiatric examination by an external doctor concluded that he did not need any psychiatric treatment at that time.

[1] This document has been classified restricted until examination by the Committee of Ministers.

Mr Predescu is being held at Târgu-Jiu prison under a semi-open regime. He shares a cell with two other inmates with individual space of 4.75 m². In the context of the periodical assessment of his mental health, he was hospitalised in August 2016 in the psychiatric section of the Jilava prison hospital and prescribed a psychotropic drug, which the applicant refused to take. The medical staff at Târgu-Jiu prison have him under constant supervision and have noted no deterioration in his mental health.

2) *Procedural violation of Article 3 (Ţicu case)*: The competent public prosecutor's office assessed the possibility of opening investigations into the incidents brought to its notice by the Iaşi prison administration in 2009–2010, and established that the expiry of the limitation period precluded any action being taken. The authorities consider that no other individual measure is required in this regard.

General measures: *1) Violations of Article 3*: Of the 1,487 prisoners under medical supervision for mental health problems at the end of August 2016, 218 had a serious psychiatric condition and therefore needed immediate medical help. The measures to provide these individuals with proper care may be summarised as follows.

a) Establishment of specialised psychiatric sections: This measure is provided for by Act No. 254/2013 on the execution of sentences and custodial measures and by its implementing regulations, adopted in April 2016. An order for the application of these provisions is currently pending adoption by the National Prison Administration (the "NPA"). These sections can become operational as soon as this order is adopted.

The draft order, which has been subject to public debate, provides that sections designed to accommodate inmates with serious mental health problems but in a stable condition are to be established within the medical units of each detention wing receiving such inmates. Like the medical units, these sections will be under the authority of the medical staff, who will decide on the placement of detainees. The permanent supervision of inmates placed there will be carried out by nurses, and medical treatment will be provided under strict medical supervision. These sections will be completely separated from the common detention areas, and out-of-cell activities for inmates placed there will also be separated from those for other inmates.

In the event of psychiatric deterioration, inmates will immediately be transferred to the psychiatric units of prison or civilian hospitals. Of the existing six prison hospitals, four already possess such units and another is in the process of receiving authorisation to set one up.

The Ministries of Health and Justice are currently drawing up a joint order on the provision of medical assistance for prisoners. It will contain specific provisions on the medical supervision of inmates with serious psychiatric problems.

b) Recruitment of specialised medical staff*:* In 2016 the NPA held a recruitment exercise in respect of nine vacant posts for psychiatrists four of which were filled. The recruitment procedure for the remaining five posts was resumed in October 2016. The prison authorities are also in the process of increasing the number of prison nurses and psychologists (for details, see DH-DD(2016)1143).

The authorities have pointed out that the difficulties faced by the NPA in recruiting psychiatrists are due to a shortage of psychiatrists in Romania owing to the emigration of medical staff. In order to overcome these difficulties, the administrations of Aiud, Arad, Colibaşi and Oradea prisons have concluded contracts with external psychiatrists. The prison medical system (detention facilities and prison hospitals) can currently call on the services of thirteen full-time or part-time psychiatrists. The authorities' ultimate objective is to ensure that each prison's medical service has a psychiatric post.

In order to counter the problem posed by the lack of psychiatrists, the NPA's Medical Directorate obtained accreditation to hold a specialised psychiatry training course at the end of October 2016 for nurses working in the prison system.

c) Other measures: The revised action plan provides detailed information on the organisation of mental health care in prisons. It further describes the measures adopted and envisaged to ensure the early detection of mental health problems among inmates, to develop procedures and methodologies enabling medical staff to deal with these problems appropriately and to work with private associations of psychiatrists (for details, see document DH-DD(2016)1143).

d) Communication under Rule 9.2 and authorities' response: In a communication dated 20 April 2016 (DH-DD(2016)564), the Association for the Defence of Human Rights in Romania–Helsinki Committee emphasised in particular that the lack of psychiatrists had an adverse effect on the management of mental health problems in prison and that prison hospital psychiatric units did not have the capacity to accommodate all inmates with such problems. The authorities' revised action plan responds to the concerns expressed by this NGO.

2) Procedural violation of Article 3 (Ţicu case): The general measures required to remedy this violation are examined in the *Pantea* v. *Romania* group of cases.

Analysis by the Secretariat

Individual measures:

At its last examination of these cases (June 2015), the Committee noted the assurances given by the authorities that the applicants were provided with medical care and conditions of detention adapted to their health conditions, as well as followed medically to ensure that these remained compatible with the requirements of the Convention. Considering that the applicants' situation no longer required urgent individual measures, the Committee decided to continue the examination of these cases in the light of the information awaited on general measures and on the assessment of the possibility to open an investigation into the alleged acts of violence Mr Ţicu suffered at the Iaşi prison.

The information provided in the revised action plan indicates that the authorities continue to monitor closely the applicants' situation, thereby complying with their undertaking in this respect. Furthermore, it must be noted that according to the assessment of the relevant prosecutor's office, the statute of limitation precludes opening an investigation into the acts of violence Mr Ţicu allegedly suffered from other prisoners in 2009-2010.

Having regard to the above, the Committee might consider closing its supervision of the individual measures in these cases.

General measures:

The measures adopted and envisaged in response to these judgments are part of a comprehensive action to improve the care afforded in prisons to persons with mental health problems.

Thus, it should be noted that the authorities will shortly organise specialised sections for prisoners with serious mental health problems. It is still necessary to adopt the order for putting these sections in place.

For these sections to be fully operational and capable of effectively fulfilling their mission, it is important that they are provided with sufficient resources, including qualified medical and nursing staff. Given the current shortage of psychiatrists, it would be useful to know if, in addition to the proposal to offer specialised training in psychiatry to prison nursing staff, the authorities have explored or envisage exploring the possibility of incentives to attract psychiatrists both in the specialised sections and the penitentiary system.

It should be further noted with interest that the Ministry of Justice and the Ministry of Health envisage enacting jointly specific provisions on the medical supervision of prisoners with serious psychiatric problems. It is therefore important for the authorities to confirm the adoption of these provisions and to provide information on their content.

Lastly, it is also important for the Committee to be regularly informed by the authorities of the progress achieved in the implementation of all the proposed measures and of their impact.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-22

Ţicu Group v. Romania (Application No. 24575/10)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1143, DH-DD(2016)564, DH-DD(2015)818, DH-DD(2015)418, DH-DD(2015)203, CM/Del/Dec(2015)1230/13

Decisions

The Deputies

1. concerning the individual measures, having regard to the information provided by the authorities, considered that no further measure is required in response to these judgments;

2. noted with interest the comprehensive action envisaged by the authorities to improve the care afforded to prisoners with mental health problems; noted in this regard the ongoing measures aimed at putting in place, in prisons, separate medical sections for prisoners with severe mental health problems, and strongly encouraged the authorities to deploy all efforts for these sections rapidly to become operational;

3. in order for the specialised medical sections to be fully operational and capable of effectively fulfilling their mission, urged the authorities to ensure that they are equipped with the necessary resources, including qualified medical and nursing staff;

4. noting further the shortage of psychiatrists mentioned by the authorities, asked whether, in addition to the proposal to offer training in psychiatric care to nursing staff working in prisons, the authorities have explored or intend to explore the possibility of taking measures to attract psychiatrists to work in prisons;

5. invited the authorities to keep the Committee of Ministers informed of the adoption of the provisions to be elaborated jointly by the Ministries of Justice and Health on the medical supervision of prisoners with severe psychiatric problems;

6. also invited the authorities to continue regularly to inform the Committee about the progress in the implementation of all the envisaged measures and their impact.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-23-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-23 Alekseyev v. Russian Federation (Application No. 4916/07)

Supervision of the execution of the European Court's judgments

Reference documents:
H/Exec(2016)7, H/Exec(2016)1, H/Exec(2015)13, H/Exec(2014)5rev, CDL-AD(2013)022, DH-DD(2016)1319, DH-DD(2016)1302, DH-DD(2016)1198, DH-DD(2016)253, DH-DD(2016)159, DH-DD(2016)47, DH-DD(2015)565, DH-DD(2015)564, DH-DD(2015)405, CM/Del/Dec(2016)1250/H46-19

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
4916/07	ALEKSEYEV	21/10/2010	11/04/2011	Complex problem

Case description

The case concerns the disproportionate interference with the applicant's right to freedom of assembly due to the repeated bans, over a period of three years (2006, 2007 and 2008), on the holding of gay rights marches and pickets imposed by the Moscow authorities and due to their failure adequately to assess the risk to the safety of the participants and public order, including an acceptable assessment of relevant facts (violation of Article 11); lack of an effective remedy in this respect, on account of the absence of any legally binding time-frame for the authorities and the courts, requiring them to give a final decision before the planned date of the march or the picketing (violation of Article 13 in conjunction with Article 11); discrimination against the applicant and other participants in the proposed events on the grounds of their sexual orientation, since the authorities failed to justify the bans in a way compatible with Convention requirements (violation of Article 14 in conjunction with Article 11).

In its judgment, the Court also referred to the facts, *inter alia*, that the gay pride parade organised by the applicant was to call for promotion of the respect of human rights and tolerance towards sexual minorities and would not have involved any demonstration of obscenity; its participants had not intended to exhibit nudity, engage in sexually provocative behaviour or criticise public morals or religious views.

Status of execution

Individual measures:

The individual measures in this case are closely linked to general measures. The applicant has lodged many requests to hold public events since the judgment became final. However, the local authorities did not agree to the proposed times and venues. Some of these decisions by the authorities were recognised as being unlawful by the domestic courts. In one of these court decisions, concerning a public event proposed for June 2013, the applicant was also granted compensation for non-pecuniary damage.

[1] This document has been classified restricted until examination by the Committee of Ministers.

At the same time, it follows from a NGO communication (see DH-DD(2016)159) that the applicant was administratively arrested for 10 days and fined by the Tverskoy District Court of Moscow after he organised a protest (a public gathering) in Moscow in support of LGBT rights and against the local authorities' refusal to agree to his requests for holding events in May 2015. The court found him guilty of disobeying a police order and breaching the rules for the organisation of public assemblies. The Moscow City Court dismissed the applicant's appeal. It appears that the applicant continues to try to organise public events to promote LGBT rights in different Russian cities and regions. It follows further from the most recent NGO communication received (see DH-DD(2016)1302) that the applicant has also been faced with an increasing number of death threats in connection with his attempts to organise such events.

General measures:

During its last examination at its 1250th meeting (March 2016) (DH), the Committee of Ministers expressed serious concern about the current domestic practice and invited the Russian authorities to provide information regarding all requests to hold public events similar to the one in the present judgment between 1 October 2015 and 30 June 2016 in Moscow and St. Petersburg, as well as in the Kostroma, Arkhangelsk, Murmansk and Tyumen regions. It also requested the authorities to confirm in each case the date of the request, whether the request was granted, the reasons for the refusal (where applicable), whether the reasons for refusal included reference to the Federal Law prohibiting "propaganda of non-tradition sexual relations" among minors, details of any subsequent appeals, including details of the appeal decisions, and whether the event proceeded in line with the original request. The Committee also invited the authorities to submit a comprehensive action plan setting out the concrete and targeted measures that should be taken for the execution of this judgment.

In response, the authorities provided a new action plan on 24 October 2016 (DH-DD(2016)1198). In it they informed the Committee about additional measures taken to increase the awareness of the competent bodies and officials responsible for examining requests to hold public events submitted by sexual minorities for example, training events and seminars on a regular basis for local authorities and officials in charge of approving requests to hold public assemblies and an electronic database on the relevant legal questions for the prosecutors' offices, as well as other measures undertaken by the Supreme Court and other courts with a view to harmonising judicial practice and increasing the Russian courts' awareness. For these purposes, an information system "International Law", composed of relevant Council of Europe and UN acts, and databases relevant to cases of the present category have been set up within the judicial system. Judges and court officials receive regular training on the protection of the rights of persons of "non-traditional sexual orientation"; and the Moscow City Court has arranged an additional subscription to relevant printed media. Further, the authorities reiterated that the public had been informed about the equality of the rights of all citizens and that, in the Russian Federation, there are no laws against representatives of the LGBT community.

In addition to the statistical information presented below, the authorities also informed the Committee that the annual international LGBT film festival "Side by Side" took place in St. Petersburg (from 19 to 29 November 2015) and in Moscow (from 21 to 24 April 2016). Between 7 and 9 November 2015, a forum organised by LGBT activists was held in the Moscow region, with more than 150 participants from 26 cities of Russia. Finally, the authorities pointed out that the Russian LGBT Sports Federation (with more than 27 branches in Russia) holds regular sport events including sport and tourist rallies.

Statistical information on the organisation of public events similar to those at issue as requested by the Committee (i.e. in Moscow and St. Petersburg, as well as in the Kostroma, Arkhangelsk, Murmansk and Tyumen regions between 1 October 2015 and 30 June 2016):

Requests made to hold public events: One out of a total of 51 requests lodged within the selected period was granted (for holding a picket dedicated to the international day against homophobia on 22/05/2016 in the Tyumen region). The authorities considered this one event as complying with domestic law. It proceeded as requested, and the police secured the safety of its participants.

As concerns the other 50 requests lodged in the other cities and regions, the authorities did not agree to the time and venue for various reasons, including e.g. road works and incompatibility of the requests with the legal requirements or the legal ban on "propaganda of non-traditional sexual relations" among minors. In respect of five requests lodged in the Murmansk region, the organisers agreed to change the venue to a specially designated area, as proposed by the authorities. However, other public events had already been planned there on the dates chosen by the organisers. A further three applications for holding events in a specially designed area in St. Petersburg were also not agreed with reference to other mass events planned earlier.

In addition to the aforementioned picket in Tyumen region which took place in agreement with the authorities, four solo pickets[2] were carried out in St. Petersburg and the Murmansk region and one flash mob in Arkhangelsk City.

Appeals lodged against decisions of rejection by the authorities: All the appeals lodged against the authorities' refusals of the requests were dismissed by the domestic courts, including the Supreme Court. The courts found the authorities' decisions justified in each case. In certain cases, the courts referred to the legal ban on "propaganda of non-traditional sexual relations" among minors.

Administrative liability: No-one was held administratively liable for "propaganda of non-traditional sexual relationships" among minors in any of the cities and regions under review.

For all details on the information provided by the authorities by region and city, see the Memorandum prepared by the Department for the Execution in document H/Exec(2016)7.

Analysis by the Secretariat

~~In response to the Committee of Ministers' decisions adopted in March 2016 in this case, the Russian authorities provided information on 24 October 2016, after expiry of the deadline in the time-table for the preparation of the 1273rd meeting. A full analysis of the information provided, together with the points for consideration / draft decisions, will be proposed to the Committee as soon as possible.~~

It appears from the most recent action plan that the Russian authorities have taken a number of additional measures aimed at harmonising judicial practice and raising the awareness of the local authorities competent for ensuring the right to peaceful assembly and of the domestic courts, as the Committee had invited them to do.

The additional measures are welcome. However, their effectiveness can be assessed only in the light of the development of practice on the basis of statistical information.

Requests made to hold public events: As reported, only one of all the requests for holding public events similar to those described in the judgment was granted between 1 October 2015 and 30 June 2016 in the specified cities and regions. This event also took place. In comparison to previous reference periods, the information submitted does not show any tangible improvement and the situation thus remains a source of serious concern.[3]

It is noted that the authorities also opposed the holding of public events in specially designated areas where events should in principle be allowed (three events in total). This suggests a worrying trend that local authorities are extending their practice of refusal to events planned in such specially designated areas.

It is further noted that the local authorities, when justifying their refusals, continue in a number of cases to rely on the legal ban on "propaganda of non-traditional sexual relations" among minors (as to judicial review see below). The recent information contains no explanation as to how these decisions take into account the rulings of the Constitutional Court of 23 September 2014 and 27 October 2015 on the constitutionality of the "propaganda" ban and/or the Court's case law.

[2] According to domestic legislation, a solo picket does not require prior notification/agreement by the authorities.
[3] Seven requests granted between 1 July 2013 and 1 May 2014; two requests granted between 1 May 2014 and 1 February 2015; no request granted between 1 October 2014 and 30 September 2015.

As to the other events described in the recent action plan (solo pickets and a flash mob,[4] as well as the film festival, a LGBT forum and activities of the LGBT Sports Federation), they are not similar to those at issue in the present case and, while positive, are not therefore relevant for the execution of the present judgment.

Judicial review proceedings: The information provided shows that no appeal against a refusal was successful during the selected period. In each case, as reported by the authorities, the domestic courts confirmed that the refusal was justified and lawful, including in those cases where the refusals were based on the legal provisions prohibiting "propaganda of non-traditional sexual relations" among minors. The authorities specified that, when delivering their decisions, the courts of the Kostroma region took into account, *inter alia*, the provisions of the European Convention and the legal positions of the Constitutional Court and the European Court. No similar details were provided in respect of courts in other cities and regions. Whereas this approach of the Kostroma region courts is welcome, the effectiveness of judicial review remains an open question.

Timing of judicial review: It appears that since the new Code of Administrative Procedure entered into force (in September 2015), the domestic courts deliver their decisions on the lawfulness of the authorities' refusals within the deadline set by law, i.e. prior to the date planned for holding the relevant public events (in cases in which the appeals were lodged before that date). This development appears to be a positive achievement in terms of the execution of the present Court judgment, addressing an important problem under Article 13 taken in conjunction with Article 11. This development could be noted with satisfaction.

Administrative liability: It is also noted with satisfaction that, since 2014, no-one has been held administratively liable for "propaganda of non-traditional sexual relations" among minors in the selected cities and regions.[5]

It appears, however, that other legal provisions are applied to sanction organisers of public events concerning LGBT rights. The applicant was thus arrested and fined for holding a public event in breach of the Assembly Act, i.e. without the prior agreement of the local authorities, and for disobeying a police order.[6] Further, it follows from NGO submissions that the police interrupted several solo-pickets (which do not require the authorities' prior agreement and which were held in public places without any link to schools, kindergartens etc.) and arrested their holders for "propaganda of non-traditional sexual relations among minors", although they released them afterwards and immediately dismissed the charges.[7] Also, participants of a flash mob in Moscow were arrested by the police.[8] The authorities did not comment on these events.

Financing assured: YES

[4] Flash mobs are not necessarily considered public assemblies under Russian law.
[5] The last example of holding the applicant administratively liable for "propaganda", as reported by the Russian authorities, dates back to December 2013 (see the action plan of 15 July 2014, DH-DD(2014)914).
[6] Rule 9.2 submission of the NGO GayRussia.Ru of 3 February 2016 (DH-DD(2016)159).
[7] Rule 9.2 submission of the NGO Union of Independent LGBT Activists of Russia, February 2016, §§ 15-17 (DH-DD(2016)253).
[8] Ibid., § 42.

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-23

Alekseyev v. the Russian Federation (Application No. 4916/07)
Supervision of the execution of the European Court's judgments
H/Exec(2016)7, H/Exec(2016)1, H/Exec(2015)13, H/Exec(2014)5rev, CDL-AD(2013)022, DH-DD(2016)1319, DH-DD(2016)1302, DH-DD(2016)1198, DH-DD(2016)253, DH-DD(2016)159, DH-DD(2016)47, DH-DD(2015)565, DH-DD(2015)564, DH-DD(2015)405, CM/Del/Dec(2016)1250/H46-19

Decisions

The Deputies

1. noted with interest the additional measures presented in the updated action plan, notably the actions of the Supreme Court intended to harmonise judicial practice in line with the requirements of the Constitution, the European Court's judgments and the Committee of Ministers' decisions, the creation within the judiciary of a database of relevant international materials and continued training and other awareness-raising activities for local authorities and judges;

2. noted also the authorities' declaration that Russian law affords the LGBT community the opportunity fully to exercise the rights guaranteed by the Constitution and the Convention, including by using the "mass event format";

3. noted with satisfaction that the courts appear now to be deciding on the lawfulness of refusals to allow public events of the kind here at issue before the date planned for events;

4. expressed, however, serious concern that notwithstanding the measures presented, the situation does not attest to any improvement, as the number of public events allowed continues to be very limited: only one of all requests to hold an assembly, deposited during the last period examined by the Committee (1 October 2015 to 30 June 2016), was allowed;

5. noted with concern that the courts regularly uphold the refusal decisions of the local authorities and that the emerging signs of improvement in judicial practice, including compliance with the Convention requirements in some cases and an award in 2013 of non-pecuniary damages to compensate for an unlawful refusal to allow an event, do not appear to have been followed;

6. urged thus the authorities to adopt all further necessary measures to ensure that the practice of local authorities and the courts develops so as to respect the right to freedom of assembly and to be protected against discrimination, including by ensuring that the law on "propaganda of non-traditional sexual relations" among minors does not pose any undue obstacle to the effective exercise of these rights;

7. in view of the above, invited the authorities to continue action to address effectively the outstanding questions with a view to achieving concrete results;

8. noted that, among measures which could be considered, figure reinforced training of all the authorities involved, elaboration of a code of conduct for local authorities in charge of handling notifications for public events and for the police when handling assemblies and the possibility of further guidance by the highest courts to prevent violations of the kind at issue in the present case, as well as further measures to address the continued widespread negative attitudes towards LGBT persons;

9. invited also the authorities, in accordance with the existing practice, to continue providing statistical information on developments, now for the period 1 July 2016 to 31 March 2017.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-24-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-24 Catan and others v. Russian Federation[2] (Application No. 43370/04)

Supervision of the execution of the European Court's judgments

Reference documents:
CM/ResDH(2015)157, CM/ResDH(2015)46, CM/ResDH(2014)184, DH-DD(2016)686, DH-DD(2016)260, DH-DD(2016)250, DH-DD(2015)936, DH-DD(2015)599, DH-DD(2015)267, DH-DD(2015)265, DH-DD(2015)255, DH-DD(2013)287, CM/Del/Dec(2016)1259/H46-26

Action – Item proposed with debate
To debate the case on the basis of the points for consideration with a view to the preparation of a draft decision.

Application	Case	Judgment of	Final on	Indicator for the classification
43370/04+	CATAN AND OTHERS	19/10/2012	Grand Chamber	Complex problem

Case description

The case concerns the violation of the right to education of 170 children or parents of children from Latin-script schools located in the Transdniestrian region of the Republic of Moldova (violation of Article 2 of Protocol No. 1 by the Russian Federation). Pursuant to the "Moldavian Republic of Transdniestria" (the "MRT") "law" on languages, they had suffered from the forced closure of these schools between August 2002 and July 2004, as well as from measures of harassment.

The European Court observed that there was no evidence of any direct participation by Russian agents in the measures taken against the applicants, nor of Russian involvement in or approbation for the "MRT"'s language policy in general. Nonetheless, it held that the Russian Federation exercised effective control over the "MRT" during the period in question and that by virtue of its continued military, economic and political support for the "MRT", which could not otherwise survive, the Russian Federation incurred responsibility under the Convention for the violation of the applicants' rights to education.

Status of execution

Since the first examination of the merits of this case in December 2013, the Deputies have repeatedly expressed their deep concern in view of the reports of continuous violations of the applicants' and other school children's right to education, and requested the authorities of the respondent State to provide concrete information on the individual or general measures taken or envisaged to give effect to the Court's judgment, including on the payment of the just satisfaction.

The Russian authorities informed the Committee that the European Court's judgment in the *Catan* case raised a number of problematic issues for them and that consultations had therefore been organised with the competent State authorities. These consultations were reflected in the decision of the Committee of Ministers (document CM/Del/OJ/DH(2014)1201/18 of 6 June 2014).

[1] This document has been classified restricted until examination by the Committee of Ministers.
[2] Case against the Republic of Moldova and the Russian Federation but the European Court found no violation in respect of the Republic of Moldova.

The Russian authorities also informed the Committee that, upon the results of the consultations, a round-table was organised in Moscow for a more detailed examination of the issues. The Russian authorities submitted the results of the round-table to the Committee on 5 March 2015 (documents CM/Del/OJ/DH(2014)1214/17, DH-DD(2015)265). Further, in co-operation with the Council of Europe (see document CM/ResDH(2015)157), a high-level conference was held in St. Petersburg, discussing inter alia problematic issues arising from the *Catan* case and its execution. The results of the conference have not yet been communicated.

Since the Committee's requests for concrete information on the individual or general measures taken or envisaged to give effect to the Court's judgment, including on the payment of the just satisfaction, have not been followed, the Committee has adopted three interim resolutions.

In its two first resolutions, adopted in September 2014 and March 2015, the Committee insisted on the fact that, as for all Contracting Parties, the Russian Federation's obligation to abide by judgments of the Court was unconditional. It exhorted the Russian Federation to pay, without further delay, the sums awarded by the Court in respect of just satisfaction, as well as the default interest due, and to inform the Committee of Ministers when this payment had been made. The Committee also strongly invited the Russian Federation fully to co-operate with the Committee of Ministers and the Secretariat with a view to executing this judgment, in compliance with Article 46 of the Convention, and consequently firmly reiterated its call to the Russian authorities to provide as soon as possible an action plan/report detailing its strategy for the implementation of the judgment.

In its third resolution (1236th meeting, September 2015), the Committee, recalling its previous decisions and resolutions, insisted anew on the unconditional nature of the obligation to pay just satisfaction and on the need for the Russian Federation to comply with this obligation. It also urged the Russian authorities to explore all appropriate avenues for the full and effective implementation of this judgment; in this context, it noted that the International conference on the effective implementation of the European Convention on Human Rights, that was to take place in Saint Petersburg on 22-23 October 2015, could be an opportunity to make progress towards a common understanding as to the scope of the execution measures flowing from this judgment and their modalities.

In March 2016, the Committee recalled the unconditional obligation of every respondent State, under Article 46 § 1, to abide by final judgments in cases to which it is a party, including by paying any just satisfaction awarded by the Court. It underlined the fundamental importance of primary and secondary education for each child's personal development and future success and insisted upon the applicants' right to continue to receive education in the language of their country, which is also their mother tongue, without hindrance or harassment. It called upon the Russian authorities to redouble their efforts to explore all appropriate avenues for the full and effective implementation of the judgment and to continue the dialogue with the Committee and the Secretariat in this regard.

On 26 May 2016 (DH-DD(2016)686), the Russian authorities informed the Committee that, in addition to the October 2015 International conference on the effective implementation of the Convention, additional high-level conferences and other events took place in Saint Petersburg in May 2016 (the VIth Saint Petersburg International Legal Forum; the international conference "Modern Constitutional Justice: Challenges and Prospects"; and a round-table on "Interaction between the Institutions of Constitutional Justice and other Courts of Law"). The authorities indicated that they intended to elaborate on the conclusions of these events with a view to seeking an acceptable response in relation to the Court's judgment;

At the last examination of this case in June 2016, the Committee noted this information and decided to resume consideration at the 1273rd meeting (December 2016) (DH).

Several communications have been sent to the Committee of Ministers since the beginning of its examination of this case. The Republic of Moldova has repeatedly indicated that there had been a deterioration of the situation of the Latin-script schools in the Transdniestrian region (most recently on 8 June 2015, DH-DD(2015)599). The applicants' representatives complained about the lack of payment of the just satisfaction granted by the Court and alleged that acts of intimidation and pressure were still affecting the functioning of the schools (most recently on 14 September 2015, DH-DD(2015)936). In March 2013, NGOs also sent a communication on the question of general measures (DH-DD(2013)287).

1273rd meeting – Points for consideration

At the time of finalisation of these Notes, no new information had been communicated regarding ~~any~~ developments in the work that the Russian authorities intended to carry out on the basis of the various events and high-level conferences that had taken place, with a view to seeking an acceptable response in relation to the Court's judgment;

~~Revised Notes for the 1273rd meeting will be prepared on the basis of the information available by then.~~
It is expected that information will be provided for the meeting. A draft decision will be prepared following the debate, in the light of developments.

Financing assured: YES

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-25-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-25 Khashiyev and Akayeva group v. Russian Federation (Application No. 57942/00)

Supervision of the execution of the European Court's judgments

Reference documents:
CM/ResDH(2015)45, CM/ResDH(2011)292, H/Exec(2016)5-rev, H/Exec(2015)5-rev, DH-DD(2016)1208, DH-DD(2016)752, DH-DD(2016)556, DH-DD(2015)934, DH-DD(2015)845, DH-DD(2015)773, DH-DD(2015)257, DH-DD(2015)23, CM/Del/Dec(2016)1259/H46-27

Action – Item proposed with debate
To debate the case on the basis of the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
57942/00+	KHASHIYEV AND AKAYEVA GROUP (list of cases CM/Notes/1273/H46-25-app)	24/02/2005	06/07/2005	Complex problem
57950/00	ISAYEVA	24/02/2005	06/07/2005	Complex problem
27065/05	ABUYEVA AND OTHERS	02/12/2010	11/04/2011	

Case description

A) Cases concerning the events which took place between 1999 and 2006:

Violations resulting from, or relating to, the actions of Russian security forces during anti-terrorist operations, mostly in Chechnya, between 1999 and 2006 (mainly unjustified use of force, disappearances, unacknowledged detentions, torture and ill-treatment, unlawful search and seizure operations and destruction of property), lack of effective investigations into the alleged abuses and absence of effective domestic remedies in these respects (violations of Articles 2, 3, 5, 6, 8 and 13 and of Article 1 of Protocol No. 1). Several cases also concern the failure to co-operate with the Convention organs as required under Article 38 of the Convention.

Case of *Aslakhanova and Others*

The Court underlined in the *Aslakhanova and Others* judgment (final on 29 April 2013) that the violations found "must be characterised as resulting from systemic problems at the national level, for which there was no effective domestic remedy". The Court's conclusion was based not only on its findings in the circumstances of this case and the similar cases pending before it, but also on a general assessment of the progress in the execution of *Khashiyev* group of cases, notably in the light of the Committee of Ministers' Interim Resolution CM/ResDH(2011)292.

In view of the above, the Court felt compelled to provide some guidance on certain measures that had to be taken, as a matter of urgency, by the Russian authorities to address the systemic failure to investigate disappearances in the Northern Caucasus. The Court therefore indicated under Article 46 that a number of urgent and result-oriented measures appeared inevitable in order to put an end to, or at the very least to alleviate, the continuing violation of Articles 2 and 3 resulting from the disappearances that had occurred in the Northern Caucasus since 1999.

[1] This document has been classified restricted until examination by the Committee of Ministers.

The Court considered it necessary that a comprehensive and time-bound strategy to address a number of specific problems as enumerated in §§ 223 to 237 of the *Aslakhanova and Others* judgment should be prepared by the Russian Federation without delay and should be submitted to the Committee of Ministers (§ 238).

The Court considered that the measures required to redress the systemic failure to investigate disappearances in the region fell into two principal groups:

a) The first and most pressing group of measures concerned the continued suffering of the relatives of the disappeared persons (see §§ 223-228). Remedying this would entail:

- investigations of abductions in circumstances suggesting the carrying out of clandestine security operations should be capable of revealing the fate of the disappeared persons (§ 224), including the circumstances of the death and the location of the grave (§ 223);
- a sufficiently high-level body in charge of solving disappearances in the region could be created. This body should enjoy unrestricted access to all relevant information, work on the basis of trust and partnership with the relatives of the disappeared and compile and maintain a unified database of all disappeared (§ 225);
- specific and adequate resources should be allocated to carry out large-scale forensic and scientific work on the ground (§ 226);
- the payment of substantial financial compensation should be coupled with a clear and unequivocal admission of State responsibility for the relatives' "frustrating and painful situation" (§ 227) (in addition, the Court did not rule out the possibility of unilateral remedial offers combined with an undertaking by the respondent government to conduct, under the supervision of the Committee of Ministers, an investigation in compliance with Convention principles (§ 228)).

b) The second group of measures concerns the ineffectiveness of the criminal investigations and the resulting impunity for the perpetrators of the most serious human rights abuses (see §§ 229-237). This would entail:

- a time-bound general strategy or action plan to be adopted in cases where it is suspected that the abductions were carried out by State servicemen. This plan should also include an evaluation of the adequacy of the existing legal definitions of the criminal acts leading to the specific and widespread phenomenon of disappearances (§ 232);
- investigations into operations, where it is suspected that military and security servicemen were involved, should have the following features in order to be considered effective: the relevant agencies involved in special operations should be identified (§ 233); investigators should have unhindered access to the relevant data of the military and security agencies (§ 234); investigations or their supervision should not be entrusted to persons or structures who could be suspected of being implicated in the events at issue (§ 235); and a rule should be set to ensure that victims have access to case files (§ 236);
- pending investigations into abductions should not be terminated solely on the ground that the prescription period has expired (§ 237).

Cases of *Isayeva* (judgment final on 06/07/2005), *Abuyeva and Others* (judgment final on 11/04/2011) and *Abakarova* (judgment final on 14/03/2016)

These cases concern the security operation conducted by Russian military forces between 4 and 7 February 2000 in the village of Katyr-Yurt following its capture by a large group of Chechen fighters who had escaped from Grozny. During the operation, the Russian forces used heavy aviation bombs and missiles. As a result, dozens of people were killed or wounded.

In the case of *Isayeva*, the Court found that, while the operation pursued a legitimate aim, it was not planned and executed with requisite care for the lives of civilians. In doing so, the Court disagreed with the conclusions of the army experts who found the commanders' actions legitimate (two expert reports were not communicated to the Court) and concluded that the authorities had failed properly to organise the evacuation of civilians from the combat area (substantive violation of Article 2). The Court further found that the domestic investigation terminated in 2002 was not effective (procedural violation of Article 2).

In the case of *Abuyeva and Others*, the Court held that the second investigation which was carried out after the above *Isayeva* judgment and terminated in 2007 suffered from the same defects as those previously identified by the Court (substantive and procedural violations of Article 2). The Court under Article 46 of the Convention noted that, in carrying out the new (second) investigation, the Russian authorities "manifestly disregarded the specific findings of the binding judgment delivered in the *Isayeva* case". The Court considered it "inevitable that a new and independent investigation should take place, which would bear due regard to the conclusions in respect of the failures of the investigation carried out to date".

In the case of *Abakarova,* the Court examined the third investigation which was carried out after the above *Abuyeva and Others* judgment and terminated in 2013 and concluded that "since 2007 none of the issues raised in the *Abuyeva and Others* judgment have been resolved" (§ 95) (substantive and procedural violations of Article 2). Under Article 46 of the Convention, the Court held that the situation in the present case "raises great concern about the impunity with respect to a serious human rights violation and thus demands actions over and above those set out in the *Abuyeva and Others* judgment" (§ 112). In this context, the Court indicated that "the specific measures required of the Russian Federation in order to discharge its obligations under Article 46 should focus on the continued criminal investigation, but also on non-judicial mechanisms aimed at learning lessons and ensuring the non-repetition of similar occurrences in the future, and ensuring adequate protection of the applicant's rights in any new proceedings, including access to measures for obtaining reparation for the harm suffered" (§ 114).

B) Cases concerning the events which took place after 2006: Six cases under this group concern the abduction of the applicants' relatives by law enforcement officers and their subsequent disappearance (cases of *Umarovy*, *Askhabova*,*Turluyeva, Makayeva, Khava Aziyeva and Others* and *Abdurakhmanova and Abdulgamidova*) and the lack of an effective investigation in this respect (violations of Articles 2, 3, 5 and 13).

In the cases of *Turluyeva* and *Makayeva*, the Court also found a violation in respect of the State's positive obligation under Article 2. In the *Turluyeva* case, the Court held that the authorities had failed to take operative measures to protect the applicant's son's life despite the fact that "the authorities were apprised not only of [his] unacknowledged detention, but of its exact location and the identities of those who had carried it out" (§ 99). In the *Makayeva* case, the Court also found "regrettable the absence of any operative response, where the authorities were apprised of relatively precise details of unacknowledged detention [of the applicant's son]" (§ 103). In both cases, the Court underlined that "the fact that the suspected perpetrators were police officers [or State agents] does not relieve the competent investigating and supervising authorities of their obligation [to protect life]" (*Turluyeva*, § 100; *Makayeva*, § 104).

One case (*Albakova)* concerns the killing of the applicant's son and the lack of an effective investigation (substantive and procedural violations of Articles 2).

Lastly, five cases (*Shafiyeva*, *Kagirov Buzurtanova, Zarkhmatova* and *Salikhova and Magomedova)* concern a procedural violation of Article 2 on account of the ineffective investigation carried out into the disappearance of the applicants' relatives.

Status of execution

The Committee is called upon to focus at the present meeting[2] on the following issues which were already raised at the 1236th meeting (September 2015) (DH):

> *- examination of specific cases in which criminal proceedings were terminated or which resulted in refusals to initiate criminal proceedings;*
> *- issues related to the re-qualification of crimes and the application of provisions related to prescription periods.*

The detailed status of execution with respect to the above issues is presented in the notes of the 1236th meeting (September 2015) (DH) (CM/Del/Dec(2015)1236).

[2] See the timetable regarding the future examination of the specific aspects of the *Khashiyev* group of cases adopted by the Committee at its 1250th meeting (March 2016) (DH) (Item A: Adoption of the Order of Business)).

It is further recalled that at its 1259th meeting (June 2016) (DH), the Committee examined the issues under this group concerning the search for missing persons. In view of the forthcoming examination of the issue concerning the effectiveness of criminal investigations in December 2016, the Committee invited delegations to provide written questions to the Russian authorities and the Russian authorities to provide the answers in writing in due time for the 1273rd meeting.

In the light of the above decision, delegations submitted a number of questions concerning the state of play as regards the criminal investigations in all the cases under this group.[3] These questions were transmitted by the Secretariat to the Russian authorities by a letter of 24 June 2016 (see DH-DD(2016)752).

~~At the time of the preparation of these Notes, the Russian authorities had indicated that the required information would be submitted shortly. They submitted the required information on 7 November 2016.~~

~~Revised detailed Notes will be prepared as soon as possible and at the latest for the revised draft Order of Business.~~

On 7 November 2016, the Russian authorities submitted an updated action plan and attached two tables updated in the light of the Committee's previous decisions and the questions submitted by delegations (DH-DD(2016)1208).

The information provided may be summarised as follows:

I. Measures taken for the detection, preservation and exhumation of burial sites and graves in the Chechen Republic (table no. 1 – see the above-mentioned decision of the 1259th DH meeting, item 7)

The authorities provided updated details on the causes and established circumstances of the victims' deaths (see updated table no. 1).[4] Furthermore, the authorities noted that, since June 2016, it had not appeared possible to establish the fate of missing persons (besides those already identified) in the cases in the *Khashiyev* group. However, the Ministry of the Interior and other competent authorities continued to conduct the search for missing persons and the identification of unknown corpses. According to this Ministry, the available statistics demonstrate the efficiency of this work. For instance, the whereabouts of 898 missing persons were established and 21 unknown corpses were identified in the North Caucasus Federal District in the first half of 2016. In order to enhance the effectiveness of the search and identification of missing persons, this information is being included in the Federal Genome Database. As of September 2016, the Federal Genome Database contained information on about 13,500 unknown corpses, including 284 corpses found in the North Caucasus Federal District. According to the authorities, while these statistics do not relate to the individual measures being examined under the *Khashiyev* group, they attest to the effectiveness of the general measures taken.

II. State of the criminal investigations in all the cases under this group (table No. 2 – submitted in response to the questions put by delegations following the 1259th meeting (DH))

The authorities also updated table no. 2[5] and included information on the reasons for the termination and suspension of criminal proceedings, or for the refusal to institute them, as well as information about the notification of the applicants and/or their representatives of the investigation results and/or the provision to them of copies of the relevant criminal case-files.

1. As regards the information about the dates of expected resumption of the investigation

The authorities noted that this information was not included in the table since it was impossible to do so. They explained that the suspension of an investigation does not mean that the work is stopped. Operational-search activities aimed at establishing the crimes and bringing the alleged perpetrators to justice continue to be performed in all suspended cases. The competent departments of the Investigative Committee, including the department for the Chechen Republic, continue to take all the measures possible in the absence of suspects. The resumption of the investigation is not a mechanical process: the grounds for the resumption of an investigation are determined on a case-by-case basis in the light of new information, in particular in the context of ongoing operational-search activities.

[3] See the table contained in the appendix to the action plan submitted by the Russian authorities on 26 December 2014.
[4] For the previous version, see the appendix to the action plan submitted by the authorities on 26 April 2016 (DH-DD(2016)556).
[5] For the previous version, see the appendix to the action plan submitted by the authorities on 26 December 2014 (DH-DD(2015)23).

2. As regards the victims' families' access to the criminal case-files

In accordance with the provisions of the Code of Criminal Procedure, the investigating body shall inform victims and/or their representatives of the conclusion of the investigation, the decisions to terminate or suspend the investigation and the decision to refuse the initiation of criminal proceedings. At the same time, victims can study the criminal case-file at their own motion. It appears from the table provided by the authorities that all the victims were informed of the procedural decisions taken. Those victims or their representatives who submitted a motion to study the case-file or to obtain copies from the case-files were provided with the relevant documents. The refusals to grant access to case-files were exceptional and were due to particular circumstances related to information protected by law or information unconnected to the victim and his/her interests (for instance, cases affecting the rights of multiple victims). According to the authorities, at present the problem of access to criminal case-files in the cases in the *Khashiyev* group no longer exists.

III. Detailed information as regards the cases in which criminal proceedings were terminated or which resulted in refusals to initiate criminal proceedings (see the decision adopted at the 1236th DH meeting, item 7)

1. Isayev and Others (No. 43368/04)

The previous procedural decision was quashed and additional measures were taken by the investigating authorities to remedy the shortcomings identified by the European Court: all persons involved in the arrest of the applicants' relative and persons possessing information about the circumstances of his arrest, including officers of the FSB division for the Urus-Martan district and the Department of the FSB for the Chechen Republic, were questioned. The applicants were granted victim status in the criminal case and are regularly informed about the progress of the investigation. As a result, it was established that N., the former head of the FSB division for the Urus-Martan district, abused his powers during the victim's arrest which resulted in his sustaining the injuries which caused to his death. The suspect N. was put on the wanted list and the search for him is under way. The investigation remains pending.

2. Nakayev (No. 29846/05)

The previous procedural decision was quashed and additional measures were taken by the investigating authorities to remedy the shortcomings identified by the European Court, in particular with a view to establishing the origin of the fragment of the "Grad" shell found at the crime scene: several servicemen from the military unit involved at the relevant time in the anti-terrorist operation on the territory of the Urus-Martan district were identified and questioned. The whereabouts of one of the witnesses, who had not previously been questioned, was also established and his questioning was scheduled. Information was obtained that, since 1994, illegal armed units in the Chechen Republic had at their disposal 18 "Grad" systems and more than 1000 shells for them, which corresponded to the finding that the applicant could have been wounded as a result of the explosion of a mine or shell launched by an illegal armed group. The investigation and operational search activities are currently underway.

3. Khatsiyeva and Others (No. 5108/02)

Following the European Court's judgment, a new investigation was carried out and measures were taken by the Investigative Committee to remedy the shortcomings identified: the applicants were granted victim status and informed of the progress of the investigation. It was established that the attack from the helicopter was carried out under the command of Major M.; the investigating authority analysed and assessed the order to use force and the actions taken by the helicopter pilots. As a result, they found that the order to use force and M.'s actions were lawful and justified by the particular circumstances of the case. The investigation was therefore terminated for lack of *corpus delicti*. The applicants were informed of this decision. They neither submitted a request to study the criminal case-file nor appealed against this decision.

4. Chitayev and Chitayev (No. 59334/00)

Following the European Court's judgment, an additional inquiry was carried out to remedy the shortcomings identified: a request was sent to the hospitals where the applicants had allegedly been examined. These hospitals denied that the applicants had been admitted at the time of the events. The authorities attempted to establish the applicants' whereabouts but to no avail as the first applicant had left the Russian Federation, the second applicant had left the Chechen Republic and their current addresses were unknown. As a result of the additional inquiry, no information was obtained as regards the applicants' ill-treatment during their detention. Consequently, on 8 October 2008, the investigating authorities refused to initiate criminal proceedings into the applicants' allegations. This decision was sent to the applicants' last known addresses. On 7 August

2012, the applicants' representative was granted access to the materials of the inquiry, including this decision. Neither the applicants nor their representative lodged an appeal against it.

IV. Information as regards the re-qualification of crimes and prescription periods (see the decision adopted at the 1236th meeting (DH), item 5)

The authorities stressed that a criminal case is opened under a specific article of the Criminal Code on the basis of existing and established evidence and circumstances at the time of taking the decision to initiate a criminal investigation. In the course of the investigation, the qualification is changed if new facts and evidence come to light. The authorities further reiterated that the termination of a criminal case because of the expiration of limitation periods, and absolving a person from criminal responsibility, are possible only after all factual circumstances and guilty persons have been established. Accordingly, the final qualification of a criminal act is made only once the relevant circumstances have been established. Furthermore, if there are grounds for the termination of the criminal proceedings because of the expiration of limitation periods, victims and/or their representatives are entitled to appeal against this decision to a court, including on the ground of incorrect qualification of a criminal act. According to the authorities, at present it does not appear (including from the European Court's judgments) that this remedy is ineffective.

Analysis by the Secretariat

Measures taken for the detection, preservation and exhumation of burial sites and graves in the Chechen Republic

The information provided by the Russian authorities is interesting but appears relevant primarily for the issues related to the search for missing persons. It is thus proposed that the Committee of Ministers assesses it in that context.

State of the criminal investigations – global overview

As explained by the authorities (see notably table 2), the investigations continue in the vast majority of the 246 cases under this group. The information submitted does not, however, attest to more tangible results in most cases and indicates that a great number of investigations are presently suspended for failure to identify the perpetrators (on the basis of table 2, in 225 cases). It also appears that in none of the cases did the investigation lead to the prosecution and punishment of the perpetrators.

The authorities stress that the mere fact that investigations are suspended does not mean that operational search activities have stopped. These continue. This is in principle welcome, even if experience suggests that evidentiary opportunities diminish in important ways as time passes.

As regards the 11 cases reported as closed, it is noted that closure decisions may be reopened, as has occurred in two cases. In one with tangible results, as a suspect was identified and put on the wanted list (*Isayev and Others*, No. 43368/04). In total there are thus now five cases where suspects are currently on the wanted list. The continuing scrutiny of the situation also in closed cases is welcome and should be encouraged.

It is further noted that in eight of the cases, investigations were closed for lack of *corpus delicti* (lack of elements of crime). In three cases, the authorities indicated that investigations were terminated due to the prescription periods (*Magomadov and Magomadov*, *Khantiyeva and Others*, *Estamirova*) (see below).

An important problem which emerges is that some of these cases were closed on the basis of conclusions which do not appear to have taken into account those of the European Court, see e.g. the cases of *Khatsiyeva and Others* (5108/02) and *Chitayev and Chitayev* (59334/00). This problem was specially highlighted by the Court when examining the investigations carried out in the wake of the *Isayeva* case (57950/00 – judgment of 2005) concerning the bombardment of Katyr-Yurt in 2000. In its recent judgment of *Abakarova* (16664/07, final on 14/03/2016), the Court examined the third investigation carried out into these events and concluded that none of the issues raised as regards the earlier two investigations had been resolved (the second investigation was dealt with in the *Abuyeva and Others* (27065/05) judgment of 2010).

This continuing failure to address shortcomings, even after several European Court judgments concerning the same events, is a source of great concern. It is important that the authorities urgently take remedial action, notably in the light of the Court's indications as to possible responses in the *Abakarova* judgment under Article 46. It is recalled that the Court stressed both the need to continue the criminal investigations and to explore other avenues, including recourse to non-judicial mechanisms (see further above, under case description).

One aspect of the criminal investigations which appears to have functioned well is the system for access to case files provided for by the Code of Criminal Procedure.

It thus appears that applicant's and/or their representatives have regularly been granted access to non-confidential parts of the case-file. One single incident has been reported, namely in the *Albekov and Others* case, where the applicants' representatives alleged that that the authorities had refused their request to make copies of non-confidential documents from the criminal case-file (see DH-DD(2016)311). It would be useful to receive clarification in this regard.

As regards refusal to grant access to confidential parts of the file, it is noted that such refusal can be subject to judicial review under Article 125 of the Code of Criminal Procedure and that the issue of the effectiveness of the judicial control of criminal investigations is followed in the *Mikheyev* group of cases.

A further important issue relates to prescription. In view of the approaching end of the 15 year prescription period for the crime of kidnapping (a qualification of events frequently used in the cases concerning missing persons), it should again be emphasised that the investigative authorities should continue their investigations on the basis that missing persons should, as repeatedly stressed by the Court, be presumed dead, not just kidnapped. Such a presumption would allow investigators and courts to use the competence accorded by Article 78 of the Criminal Code to make exceptions from the 15 year rule and thus prevent impunity.[6] The absence of any confirmation that this presumption has been integrated in practice is in this perspective a source of concern. It is noted in this context that, of three cases closed on the basis of prescription, two concern events qualified as kidnappings (*Magomadov and Magomadov, Khantiyeva and Others*).

These concerns are not relieved by the information provided that a decision by an investigator to close an investigation on the basis of the qualification of the events as kidnapping can be appealed to the courts by the representatives of the missing. If the presumption of death is not applied by courts, such an appeal is not likely to constitute substantial protection against prescription.

As regards in particular the three cases closed on the basis of prescription periods (see above), further clarification would be of interest given that, as indicated by the Russian authorities, domestic law provides that an investigation can be closed on the basis of prescription only after the circumstances of the case have been clarified and suspects identified.

General conclusion:

It is recalled that the Committee has followed the progress of the criminal investigations in the individual cases in this group since 2005, not only as a matter of individual measures, but also in order to assess the effectiveness of the general measures reported.

It is also recalled that, in Interim Resolution CM/ResDH(2011)292, the Committee noted with satisfaction the continuous improvement of the institutional, legal and regulatory framework for domestic investigations in order to bring it in line with the requirements of the Convention and the Russian authorities' efforts aimed at remedying the shortcomings of initial investigations and ensuring their effectiveness. The Committee, however, also expressed deep concern that, notwithstanding the measures adopted, no decisive progress had been made in domestic investigations carried out in respect of the grave human rights' violations identified in the judgments in the vast majority of cases.

Developments have been followed since, as reflected in numerous decisions by the Committee. In this context, the Committee has notably emphasised the need for priority and comprehensive action in order to increase the effectiveness of domestic investigations, bearing in mind the risk that with further delay, the criminal liability of those responsible may become time barred.

The general conclusion today, in the light of the information provided by the Russian authorities as to the state of investigations (as detailed in table 2), some 10-15 years after the events at issue in these judgments, is that results continue to be largely absent.

[6] In accordance with this provision, in the context of prosecution for a crime punishable by life imprisonment, such as aggravated murder, it remains within the discretion of a trial court to decide whether the accused should benefit from the prescription period in the light of the circumstances of the case.

In face of this situation, further action has to be taken. It is first important that investigations continue and that action to counter the problems observed with respect to their effectiveness, in particular the effects of prescription, is taken to prevent impunity. In addition, other avenues should be explored, “aimed at learning lessons and ensuring the non-repetition of similar occurrences in the future”, including through non-judicial mechanisms. It is recalled that this issue was addressed in the same spirit in the *Abakarova* judgment.

The situation also highlights the importance of setting up other mechanisms outside criminal investigations in order to establish the truth, in particular as regards the fate of missing persons (this issue was last examined at the 1259th meeting (June 2016) (DH)).

In addition, the issue of effective redress to victims needs to be examined again (it was last dealt with in depth in the context of the adoption of Interim Resolution CM/ResDH(2011)292 – cf. also the Court’s conclusions under Article 46 in the *Abakarova* judgment).

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-25

Khashiyev and Akayeva group v. the Russian Federation (Application No. 57942/00)
Supervision of the execution of the European Court's judgments
CM/ResDH(2015)45, CM/ResDH(2011)292, H/Exec(2016)5-rev, H/Exec(2015)5-rev, DH-DD(2016)1208, DH-DD(2016)752, DH-DD(2016)556, DH-DD(2015)934, DH-DD(2015)845, DH-DD(2015)773, DH-DD(2015)257, DH-DD(2015)23, CM/Del/Dec(2016)1259/H46-27

Decisions

The Deputies

1. noted with interest the detailed information provided by the Russian authorities in response to the Committee's previous decisions and the questions submitted by delegations and noted with satisfaction that the applicants and/or their representatives have regularly been granted access to the non-confidential parts of case-files;

2. noted, however, with regret that in the vast majority of reported cases, the investigations have been suspended on the ground of failure to identify the perpetrator; that in no case has the investigation so far led to the prosecution and punishment of those responsible; and that in only five cases have the authorities been able to identify suspects, who have been put on the wanted list;

3. expressed, in this context, their grave concern about the continuing failure to address the shortcomings of the successive investigations carried out into the events at issue in the *Isayeva* case as evidenced by the *Abuyeva and others* judgment (concerning the second investigation) and the recent *Abakarova* judgment (concerning the third investigation);

4. stressed the importance, in order to prevent impunity, of pursuing the investigations in the cases in this group and of rapidly taking further action to counter the problems observed with respect to their effectiveness, in particular the effects of prescription;

5. called upon the authorities, in this last respect, to ensure that investigations into enforced disappearances are made on the basis of a presumption of the death of missing person to allow the exceptions to the rules on prescription in Article 78 of the Criminal Code to come into play (applicable in cases of aggravated murder);

6. invited also the authorities to provide clarifications as regards the qualification given to the crimes at issue in three cases which have so far been reported closed on the basis of prescription;

7. stressed further the importance of exploring other avenues, aimed at learning lessons and ensuring the non-repetition of similar occurrences in the future, including through non-judicial mechanisms, in line also with the Court's findings under Article 46 in the *Abakarova* judgment;

8. recalled, finally, that the question of judicial control of criminal investigations is followed by the Committee in the *Mikheyev* group of cases.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-26 8 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-26 OAO Neftyanaya Kompaniya Yukos v. the Russian Federation (Application No. 14902/04)

Supervision of the execution of the European Court's judgments

Reference documents:
H/Exec(2015)2rev, DH-DD(2016)703, DH-DD(2016)217, DH-DD(2015)665, DH-DD(2015)640, DH-DD(2015)244, DH-DD(2015)224, DH-DD(2013)565, CM/Del/Dec(2016)1259/H46-29

Action – Item proposed with debate
To debate the case on the basis of the points for consideration with a view to the preparation of a draft decision.

Application	Case	Judgment of	Final on	Indicator for the classification
14902/04	OAO NEFTYANAYA KOMPANIYA YUKOS	20/09/2011 31/07/2014	08/03/2012 15/12/2014	Complex problem

Case description

The case concerns different violations concerning tax and enforcement proceedings brought against the applicant oil company, leading to its liquidation in 2007:

- insufficient time allowed for the preparation of its defence at first instance and on appeal during the 2000 tax-assessment proceedings (violation of Article 6 § 1, taken in conjunction with Article 6 § 3(b));
- unlawful imposition and calculation of penalties in the 2000-2001 tax assessments on account of the retroactive application of a change of case law as regards the time-limit for liability for tax offences (violation of Article 1 of Protocol No. 1);
- failure to strike a fair balance between the legitimate aim of enforcement proceedings, concerning the payment of the taxes and penalties imposed, and the measures employed (violation of Article 1 of Protocol No. 1):
  - no global assessment of the consequences of the chosen enforcement actions for the applicant company;
  - imposition of a fixed 7% enforcement fee completely out of proportion with the expenses incurred; and
  - unyielding inflexibility as to the pace of the enforcement actions.

In its judgment on just satisfaction (final on 15 December 2014), the European Court held the following:

a) *Non-pecuniary damage*: The finding of a violation constitutes sufficient just satisfaction.

[1] This document has been classified restricted until examination by the Committee of Ministers.

b) *Pecuniary damage*: The Court awarded a total of EUR 1,866,104,634. Given that the applicant company had ceased to exist, the Court held that "the aforementioned amount should be paid… to the applicant company's shareholders and their legal successors and heirs, as the case may be, in proportion to their nominal participation in the company's stock …."
In order to facilitate the government's task, the Court referred to the list of the applicant company's shareholders, as they stood at the time of the company's liquidation, which is held by ZAO VTB Registrator, the company which had held and run the register of the applicant company (§ 38). The Court further held that "the respondent State must produce, in co-operation with the Committee of Ministers, within six months from the date on which this judgment becomes final, a comprehensive plan, including a binding time-frame, for the distribution of this award of just satisfaction" (point 2 of the operative part).
c) *Costs and expenses*: The Court awarded EUR 300,000, to be paid to the Yukos International Foundation.

Status of execution

The Russian authorities provided an action plan on general measures on 15 May 2013 (see DH-DD(2013)565; an executive summary thereof prepared by the Secretariat is provided in document H/Exec(2015)2-rev).

At its 1222nd meeting (March 2015) (DH), the Committee took note of the judgment on just satisfaction in which the Court indicated that the Russian authorities were to produce by 15 June 2015, in co-operation with the Committee of Ministers, a comprehensive plan, including a binding time frame, for the distribution of the just satisfaction awarded in respect of pecuniary damage. The Committee therefore invited the Russian authorities to take all necessary steps to abide by this deadline and to co-operate actively with the Secretariat in drawing up the plan, as well as regularly to inform the Committee of the progress made.

At its 1230th meeting (June 2015) (DH), the Committee recalled the Russian authorities' aforementioned obligation and, considering that the deadline would expire in the next few days and that the Committee had had no indication from the Russian authorities as to the drawing-up of the required plan, urged them to deploy all their efforts in close co-operation with the Secretariat to respect the relevant operative part of the European Court's judgment.

On 16 June 2015, the Russian authorities submitted a communication (see DH-DD(2015)640), indicating that information on their further actions related to the execution of the judgment in this case could not be provided at the present time, as on 11 June 2015 several Deputies of the State Duma had submitted a request to the Constitutional Court. The authorities further indicated that the outcome of the consideration of this request would be determinative for the procedure and the possibility of executing the judgment.

In its decision adopted at the 1236th meeting (September 2015) (DH), the Committee expressed serious concern that no plan had been submitted by the Russian authorities within the deadline set by the European Court in respect of the distribution of the just satisfaction awarded for pecuniary damage and, consequently, strongly urged the authorities to present the required plan without further delay. The Committee further urged them to provide information on the payment of the just satisfaction awarded in respect of costs and expenses. At its 1250th meeting (March 2016) (DH), the Committee recalled its September 2015 decision and noted with regret the prolonged absence of information concerning the distribution plan for the just satisfaction awarded in respect of pecuniary damage. It consequently reiterated its call upon the Russian Federation to duly co-operate and to continue its dialogue with the Committee and the Secretariat with a view to executing the present judgment, in compliance with Article 46 of the Convention. At its 1259th meeting (June 2016) (DH), the Committee recalled the unconditional obligation under Article 46 of the Convention to abide by the judgments of the European Court, including to pay the just satisfaction. It firmly reiterated its call upon the Russian authorities to co-operate fully and to continue its dialogue with the Committee and the Secretariat, and urged them to supplement the information provided at the meeting with precise explanations in writing, including on possible constitutional issues which the authorities believe they could face during the execution of this judgment. The Committee also decided to resume consideration of the present case at the 1273rd meeting (December 2016) (DH).

A number of communications have been received from the representative of the two former majority shareholders of the applicant company, including one dated 17 June 2015 setting out a possible model for the required distribution plan (see DH-DD(2015)665).

Analysis by the Secretariat / Points for consideration

So far, no information has been provided in response to the Committee's latest decision. It appears, however, from the website of the Ministry of Justice, that it has seized the Constitutional Court with a request for its opinion regarding the execution of the European Court's judgment under Article 41.

The Secretariat wrote to the authorities on 18 October 2016 requesting them to provide the Committee with information on this issue. It is also recalled that when questions were raised by delegations with respect to this procedure during the 1268th Deputies' meeting (18 October 2016), the representative of the Russian Federation indicated that there would be an opportunity to discuss this issue at the 1273rd meeting.

On 8 November 2016, the Russian authorities confirmed that "a request concerning the possibility of execution of … [this] judgment" had been sent to the Constitutional Court. Accordingly, the Russian delegation requested to postpone consideration of this case. The Committee will be invited to decide in response to this request for postponement.

Financing assured: YES

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-27-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-27 Zorica Jovanović v. Serbia (Application No. 21794/08)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1244, DH-DD(2016)1151, DH-DD(2016)963, DH-DD(2016)824, DH-DD(2016)254, DH-DD(2016)219, DH-DD(2016)170, DH-DD(2015)1378, DH-DD(2015)1255, DH-DD(2015)396, DH-DD(2015)68, CM/Del/Dec(2016)1265/H46-25

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
21794/08	ZORICA JOVANOVIĆ	26/03/2013	09/09/2013	Complex problem

Case description

This case concerns a violation of the applicant's right to respect for her family life on account of the respondent State's continuing failure to provide her with credible information as to the fate of her son, who allegedly died three days after his birth in a maternity ward in 1983. His body has never been transferred to her and she has never been informed where he was allegedly buried. In addition, his death has never been properly investigated and officially recorded (violation of Article 8).

In view of the significant number of potential applicants, the European Court held that "the respondent State must, within one year from the date on which the present judgment becomes final…, take all appropriate measures, preferably by means of a *lex specialis*… to secure the establishment of a mechanism aimed at providing individual redress to all parents in a situation such as, or sufficiently similar to, the applicant's" (i.e. by 9 September 2014). According to the Court, "[t]his mechanism should be supervised by an independent body, with adequate powers, which would be capable of providing credible answers regarding the fate of each child and affording adequate compensation as appropriate". At the same time, the European Court decided to adjourn for one year the examination of all similar applications pending the adoption of the general measures at issue.

Status of execution

The Serbian authorities set up a working group which prepared a draft law in response to the Court's findings. This draft law introduces a mechanism aimed at providing individual redress to parents of "missing" babies. Four high courts will be competent to examine complaints from the parents of missing babies provided that they established contact with the authorities to obtain information on the fate of their missing babies before 9 September 2014, regardless of the date of the child's birth. The complaints will be examined in a fast-track, non-contentious procedure before these four courts. Their decisions will be subject to judicial review. The courts will have competence to summon any witness or expert and to use coercive powers if witnesses fail to appear.

[1] This document has been classified restricted until examination by the Committee of Ministers.

They will have the power to award just satisfaction (up to a limit of EUR 10,000) to parents on the basis of the facts established (for detailed information on the draft law, see the notes for the 1243rd meeting (December 2015) (DH).

It is recalled that certain aspects of the draft law as regards the eligibility criteria and procedure for obtaining evidence were revised by the Serbian authorities on the basis of the assessment made by the Committee of Ministers at its 1243rd meeting as well as observations submitted by civil society. At its 1250th meeting (March 2016), the Committee noted with interest these revisions but noted that the revised draft law still left various issues outstanding, such as the authority of the civil courts and special police units to take certain procedural and investigatory steps with a view to establishing the fate of missing babies as well as the procedure for declassification of medical information.

In its last decision adopted at 1265th meeting (September 2016) (DH) the Committee strongly urged the authorities to intensify their efforts with a view to adopting the revised draft law as a matter of utmost priority and, in that context, to continue to engage with the Secretariat in order to ensure that the law addresses the above-mentioned outstanding issues. If no tangible progress had been reported in the adoption of the law necessary to execute this judgment, the Committee instructed the Secretariat to prepare and circulate a draft interim resolution for their 1273rd meeting (December 2016) (DH).

In line with the Committee's decision, the Secretariat held bilateral consultations with the authorities in Belgrade in October 2016 to discuss the legislative calendar as well as the outstanding questions identified by the Committee at its 1265th meeting. Following these consultations, the authorities informed the Committee on the following points:

a) *Legislative calendar:* On 15 September 2016 the Minister of Justice signed the revised draft law and transmitted it to various authorities for their opinion. After having obtained these opinions, the Ministry of Justice ~~will~~ transmitted the text of the revised draft law to the government for approval. ~~This legislative procedure is expected to be concluded by November 2016. Once~~ On 27 October 2016 the revised draft law ~~is~~ was approved by the government, ~~it will be~~ On 31 October 2016, the government tabled it before Parliament for adoption. The authorities reassured the Committee that the law will be adopted ~~without further delay~~ by the end of November or the beginning of December 2016 in the fast track procedure and in any case before the end of 2016.

b) *Outstanding issues identified by the Committee:*

(i) Concerning the issue of the *authority of civil courts and the special police unit,* the authorities clarified that it would be possible for domestic courts to call witnesses, interrogate them and to order expert reports or to take other investigatory steps. No witness or expert could withhold testimony during the procedure. The courts will be thus able to summon or fine any witness or expert witness failing to appear.

The Serbian authorities clarified that the revised draft law no longer provides the setting-up of a special police unit to deal with cases concerning missing babies, as envisaged initially. This task will be assigned to selected police officers with special qualifications and training. The authorities furthermore clarified that the revised draft law provides that the selected police officers will assist civil courts in carrying out investigatory steps and collecting evidence, including carrying out police surveillance, polygraph interrogation, searches, taking of samples and criminal forensic testimonies and analyses, executing search warrants, controlling the identity of individuals, bringing suspects to police premises, data collection, survey of premises, buildings and documentation etc.

(ii) As regards the *procedure for declassification of medical information*, the authorities clarified that, according to the Law on Protection of Patients' Rights, doctors and medical staff may be released from their duty to keep medical information confidential with the express consent of the patient involved or, in respect of a minor patient, of his legal representative(s). The Law also provides that the competent court can order doctors and medical staff to provide information, including testimony, on facts made available to them in the exercise of their duty without the consent of the patients involved.

Analysis by the Secretariat

Legislative calendar: Bearing in mind the time that has already elapsed (the deadline set by the European Court for the adoption of the measures expired on 9 September 2014) it is crucial that the revised draft law is adopted before the end of 2016 as planned by the authorities. The Serbian authorities might therefore be strongly urged to sustain their efforts to adopt the revised draft law and to keep the Committee informed of the steps taken in this respect.

Outstanding issues identified by the Committee: The clarifications provided by the Serbian authorities show that the domestic civil courts will be given special authority to order certain investigatory measures including to summon the medical doctors and staff to testify. The revised draft law therefore appears to comply with the Court's indications and should be capable of resolving this complex problem at national level, provided that it is implemented in an effective manner. It would be therefore useful if the authorities could provide information to the Committee on the implementation of the legislation after it comes into force.

Conclusion: It is recalled that the Committee instructed the Secretariat to prepare a draft interim resolution in case no tangible progress had been achieved in the legislative process. In response to the Committee's decision, the authorities provided a legislative calendar as set out above. In these circumstances, it does not appear necessary that a draft interim resolution be prepared for the 1273rd meeting. It is proposed to resume consideration of the case at the 1280th meeting (March 2017) (DH) to take stock of the developments and, should the revised draft law not been adopted as foreseen, to do so in the light of an interim resolution to be prepared by the Secretariat.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-27

Zorica Jovanović v. Serbia (Application No. 21794/08)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1244, DH-DD(2016)1151, DH-DD(2016)963, DH-DD(2016)824, DH-DD(2016)254, DH-DD(2016)219, DH-DD(2016)170, DH-DD(2015)1378, DH-DD(2015)1255, DH-DD(2015)396, DH-DD(2015)68, CM/Del/Dec(2016)1265/H46-25

Decisions

The Deputies

1. noted the detailed explanations given by the authorities on the outstanding issues identified by the Committee at its 1250th meeting (March 2016) (DH), notably on the powers to be vested in the civil courts and the police and the procedure for declassification of medical information;

2. noted further the assurances given by the authorities that the revised draft law necessary for the execution of this judgment will be adopted before the end of 2016 and, in this respect, strongly urged them to sustain their efforts to adopt it within this time frame;

3. decided to resume the examination of this item at their 1280th meeting (March 2017) (DH) to take stock of the progress made and, in case the revised draft law is not adopted within the above-mentioned time-frame, instructed the Secretariat to prepare a draft interim resolution to be circulated with the draft Order of Business for that meeting.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-28 8 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-28 Ališić and others v. Serbia and Slovenia[2] (Application No. 60642/08)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1303, DH-DD(2016)1301, DH-DD(2016)1183, DH-DD(2016)1145, DH-DD(2016)637, DH-DD(2016)169, DH-DD(2015)759, DH-DD(2015)397, DH-DD(2015)69, CM/Del/Dec(2016)1259/H46-30

Action – Item proposed without debate
To adopt the draft decisions below.

At the present meeting the Committee will examine this case only with respect to Serbia. For the measures taken and envisaged by Slovenia, see the notes prepared for the 1259th meeting (June 2016) (DH). For the updated information provided by Slovenia, see DH-DD(2016)1183.

Application	Case	Judgment of	Final on	Indicator for the classification
60642/08	ALIŠIĆ AND OTHERS	16/07/2014	Grand Chamber	Pilot judgment

Case description

The case concerns violations of the applicants' right to peaceful enjoyment of their property on account of their inability to recover their "old" foreign-currency savings deposited in Bosnian-Herzegovinian branches of banks with head offices in Serbia and Slovenia respectively (violations of Article 1 of Protocol No. 1).

"Old" foreign-currency savings are savings deposited in banks on the territory of the Socialist Federative Republic of Yugoslavia ("SFRY") prior to its dissolution. Following the collapse of the SFRY and its banking system, many depositors lost access to their foreign-currency savings. The new successor States of the SFRY subsequently introduced different repayment schemes aimed at reimbursing depositors for these lost savings. These schemes made repayment subject to different conditions, such as territoriality of deposits or nationality of depositors.

Serbia, in particular, offered to repay the "old" foreign-currency savings deposited with the Serbian banks in Serbia or abroad if the depositor had a qualifying nationality. The nationals of the other States which emerged from the SFRY were unable to obtain repayment under this scheme. Since Mr Šahdanović, a national of Bosnia and Herzegovina, did not hold the qualifying nationality for the Serbian repayment scheme, he could not recover his "old" foreign-currency savings deposited in a Belgrade-based bank in its branch located in Bosnia and Herzegovina.

[1] This document has been classified restricted until examination by the Committee of Ministers.
[2] Case against Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the Former Yugoslav Republic of Macedonia" but the Court found violations only in respect of Serbia and Slovenia.

On the other hand, Slovenia made repayment subject to the territoriality principle: only savings deposited with a branch of any bank on the territory of Slovenia qualified for the repayment scheme, whether the bank had its head office in Slovenia or abroad (including in other Republics of the SFRY). Since Ms Ališić and Mr Sadžak deposited their savings in Bosnia and Herzegovina, i.e. outside Slovenia, in a branch of the Ljubljana-based bank, they could not recover their "old" foreign-currency savings under the Slovenian repayment scheme.

The European Court observed, in this respect, that the banks in question – Ljubljanska Banka Ljubljana and Investbanka Belgrade – were State-owned and controlled by the Slovenian and Serbian Governments, respectively (§§ 116-117 of the judgment). The Court therefore found that there were sufficient grounds to deem Slovenia and Serbia responsible for their respective debts.

The case also concerns the lack of an effective remedy in respect of the applicants' claims (violations of Article 13).

Under Article 46 of the Convention the European Court held that the failure of the Serbian and Slovenian Governments to include the present applicants, and all others in their situation, in their respective schemes for the repayment of "old" foreign-currency savings represented a systemic problem (§ 9 of the operative part of the judgment). The Court therefore applied the pilot judgment procedure and requested Serbia and Slovenia to make all necessary arrangements, including legislative amendments, within one year (i.e. by 16 July 2015) in order to allow the applicants and all others in their situation to recover their "old" foreign-currency savings under the same conditions, respectively, as Serbian citizens who had such savings in domestic branches of Serbian banks and as those who had such savings in domestic branches of Slovenian banks (§§ 10-11 of the operative part of the judgment).

At the same time, the Court decided to adjourn for one year its examination of all similar cases against Serbia and Slovenia (§ 12 of the operative part of the judgment).

Status of execution

Individual measures: In their action plan of 9 January 2015 (DH-DD(2015)69), the Serbian authorities indicated that individual measures allowing Mr Šahdanović to recover his "old" foreign currency savings would be taken within the framework of the repayment scheme to be set up in accordance with the Court's indications in this case (§ 146 of the judgment).

General measures: In response to the European Court's judgment, the Serbian authorities prepared a draft law aimed at introducing a repayment scheme for the "old" currency-savings deposited in foreign branches of their banks (the details of the repayment scheme are set out in the notes prepared for the 1236th and 1250th meetings). The initial draft law was later revised to secure the overall result of comprehensively regulating the issue of "old" foreign-currency savings deposited in Serbian-based banks.

In its decision adopted at its 1250th meeting (March 2016) (DH), the Committee of Ministers noted that the Serbian authorities had revised the draft law prepared in response to the European Court's judgment in the present case with a view to allowing depositors who are nationals of the other successor States to recover foreign currency savings under the same conditions as Serbian citizens.

In its last decision adopted at its 1259th meeting (June 2016) (DH), the Committee urged the Serbian authorities to ensure that the above-mentioned draft law was adopted as a matter of priority and to provide information to the Committee in this respect no later than 1 October 2016. The Committee also decided to resume consideration of this issue at its 1273rd meeting (December 2016) (DH) and, in the event that no progress has been achieved in the adoption of the above-mentioned draft law, instructed the Secretariat to prepare a draft interim resolution to be circulated with the draft Order of Business for that meeting.

Bilateral consultations were held with the Serbian authorities in Belgrade in October 2016 on the progress achieved regarding the adoption of the draft law. Following these consultations, the Serbian authorities informed the Committee on the following points:

a) *As regards the contents of the revised draft law:* On 12 September 2016 the provision of the revised draft law which concerns the repayment schedule was amended. In particular, the repayment will be made within five years, in ten equal biannual instalments, payable on 31 August and 28 February each year, from 2018 to 2023 (the revised draft law initially provided for repayment under the same terms and conditions from 30 November 2017 to 31 May 2022). This change was a consequence of the delay in the adoption of the draft law. The authorities however clarified that all other provisions of the revised draft law have remained unchanged (i.e. the same text as was examined by the Committee of Ministers at its 1250th meeting).

b) *As regards the legislative calendar:* At the end of September 2016 the Ministry of Finance submitted the revised draft law to various departments within the Ministry of Finance for their internal opinion. Once the internal opinions had been obtained, on 19 October 2016 the Ministry of Finance submitted the revised draft law to various external authorities for their opinions. The revised draft law will be then forwarded to the government for its approval. The government will examine the revised draft law rapidly and transmit it to Parliament for adoption in a fast-track procedure at the end of December 2016 or at the beginning of January 2017. The authorities reassured the Committee that the law will be adopted without further delay.

Analysis by the Secretariat

As regards the contents of the revised draft law: It is recalled at the outset that the Committee examined the previous versions of the draft law at its 1230th and 1236th meetings (June and September 2015) as well as at its 1250th meeting (March 2016) (DH). At its 1236th meeting, in particular, the Committee "noted with satisfaction the detailed explanations given by the Serbian authorities as regards the manner in which the proposed repayment scheme will comply with the Court's judgment".

It appears from the information provided for the present meeting that the only change in the revised draft is the starting day for its implementation, which was changed from 2017 to 2018. In these circumstances it can be concluded that the assessment made by the Committee at its previous meetings is still relevant for the revised draft law.

As regards the legislative calendar: It appears from the latest information that the legislative process is expected to be brought to an end before the end of December 2016 or at the beginning of January 2017 at the latest. In light of the fact that the deadline for the adoption of the measures expired almost a year and a half ago, it is crucial that the revised draft law is adopted within this time frame. The Serbian authorities might therefore be strongly urged to sustain their efforts to adopt the revised draft law and to keep the Committee informed of the steps taken in this respect.

Conclusion: It is recalled that the Committee instructed the Secretariat to prepare a draft interim resolution in case no progress was achieved in the legislative process. In response to the Committee's decision the Serbian authorities provided a legislative calendar. In these circumstances, it does not appear necessary for a draft interim resolution to be prepared for the 1273rd meeting. The Committee might wish to resume examination of this item with respect to Serbia at its 1280th meeting (March 2017) with a view to assessing the draft law as adopted as well as measures taken for its implementation. In case the draft law is not adopted within the announced time-frame, the Committee might wish to resume examination of this item in light of a draft interim resolution to be prepared by the Secretariat.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-28

Ališić and others v. Serbia and Slovenia[3] (Application No. 60642/08)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1303, DH-DD(2016)1301, DH-DD(2016)1183, DH-DD(2016)1145, DH-DD(2016)637, DH-DD(2016)169, DH-DD(2015)759, DH-DD(2015)397, DH-DD(2015)69, CM/Del/Dec(2016)1259/H46-30

Decisions

The Deputies

1. noted, as in their previous decisions, that the Serbian authorities have prepared a draft law, in response to the European Court's judgment with a view to allowing the applicants and all others in their situation to recover their "old" foreign-currency savings under the same conditions as Serbian citizens who had such savings in domestic branches of Serbian banks;

2. noted the assurances given by the Serbian authorities that the revised draft law will be adopted before the end of December 2016 or at the beginning of January 2017 at the latest and strongly urged them to sustain their efforts to adopt this draft law within the announced time frame;

3. decided to resume examination of this item with respect to Serbia at their 1280th meeting (March 2017) (DH) and, in case the revised draft law has not by then been adopted, instructed the Secretariat to prepare a draft interim resolution to be circulated with the draft Order of Business for that meeting.

[3] Case against Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the Former Yugoslav Republic of Macedonia" but the Court found violations only in respect of Serbia and Slovenia.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-29-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-29 Cyprus v. Turkey (Application No. 25781/94)

Supervision of the execution of the European Court's judgments

Reference documents:
H/Exec(2014)8, CM/ResDH(2007)25, ResDH(2005)44, DH-DD(2016)707, DH-DD(2016)688, DH-DD(2015)1115, DH-DD(2014)1446, DH-DD(2014)1414, CM/Del/Dec(2016)1250/H46-26

Action – Item proposed with debate
To debate the question of the missing persons on the basis of the analysis of the Secretariat with a view to deciding on the follow-up.

Application	Case	Judgment of	Final on	Indicator for the classification
25781/94	CYPRUS v. TURKEY	10/05/2001 12/05/2014	Grand Chamber	Inter-state case

Case description

The case concerns fourteen violations in relation to the situation in the northern part of Cyprus since the military intervention by Turkey in July and August 1974 concerning:
- homes and immovable property of displaced Greek Cypriots (violation of Article 8 and 13 and Article 1 of Protocol No. 1)
- living conditions of Greek Cypriots in the Karpas region of the northern part of Cyprus (violation of Articles 3, 8, 9, 10 and 13 and Articles 1 and 2 of Protocol No. 1)
- Greek Cypriot missing persons and their relatives (violation of Articles 2, 3 and 5)
- rights of Turkish Cypriots living in northern part of Cyprus (violation of Article 6).

Status of execution

I. Issues currently examined by the Committee of Ministers

1) Home and immovable property of displaced Greek Cypriots (1259th meeting, June 2016)

a) Measures taken by the respondent State and findings of the European Court in this respect
Following the judgment of 22/12/2005 in the *Xenides-Arestis* case, an "Immovable Property Commission" was set up in the northern part of Cyprus under "Law No. 67/2005 on the compensation, exchange or restitution of immovable property". In its judgment on the application of Article 41 in the *Xenides-Arestis* case, the Court found that "the new compensation and restitution mechanism, in principle, has taken care of the requirements of the decision of the Court on admissibility of 14 March 2005 and the judgment on the merits of 22 December 2005".

In its inadmissibility decision in *Demopoulos and others,* delivered on 5 March 2010, the Grand Chamber found that Law No. 67/2005, which set up the Immovable Property Commission in the northern part of Cyprus, "provides an accessible and effective framework of redress in respect of complaints about interference with the property owned by Greek Cypriots" (§ 127 of that decision).

[1] This document has been classified restricted until examination by the Committee of Ministers.

In the judgment *Cyprus v. Turkey* (just satisfaction), delivered on 12 May 2014, the Court found that Turkey had not yet complied with the conclusion of the main judgment according to which there had been a violation of the property rights of the displaced persons as they had been denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights. The Court said that "the compliance" with this conclusion "could not be consistent with any possible permission, participation, acquiescence or otherwise complicity in any unlawful sale or exploitation of Greek Cypriot homes and property in the northern part of Cyprus". The Court also said that "the Court's decision in the case of *Demopoulos and Others* to the effect that cases presented by individuals concerning violation of property complaints were to be rejected for non-exhaustion of domestic remedies, cannot be considered, on its own, to dispose of the question of Turkey's compliance with section III of the operative provisions of the principal judgment in the inter-State case" (see § 63 of the judgment on just satisfaction of 12 May 2014).

b) Assessment of the Committee of Ministers
At the June and September 2010 meetings, the Committee examined the consequences of the Grand Chamber's inadmissibility decision in the *Demopoulos* case. For more details on the positions expressed in that regard, see the Records of the June 2010 meeting (confidential document CM/Del/Act/DH(2010)1086-final) and the information document CM/Inf/DH(2011)32. The Secretariat's assessment of this issue is presented in two information documents, namely CM/Inf/DH(2010)21 and CM/Inf/DH(2010)36.

At the 1128th meeting (December 2011) (DH), the delegation of Cyprus requested the Committee to suspend its examination of this question until the Court had pronounced on the application filed with it by the Government of Cyprus, in November 2011, under Article 41 of the Convention. The Court pronounced on this request in its judgment on just satisfaction delivered on 12 May 2014 (see above).

The Cypriot authorities presented a memorandum on the impact of this judgment on 19 November 2014 (DH-DD(2014)1414). The Turkish authorities also presented a memorandum on this question on 25/11/2014 (DH-DD(2014)1446). The analysis of the Secretariat on the impact of the judgment of 12 May 2014 on the question of the property rights of displaced persons is presented in document H/Exec(2014)8.

At its 1214th meeting (December 2014) (DH), the Committee took note with interest of this document and invited the delegations to submit, at the latest by 29 January 2015, any proposed measures that might be requested from the respondent State to ensure a focused debate on full implementation of the judgment in relation to the property rights of displaced persons.

At its 1236th meeting (September 2015) (DH), delegations were invited to submit to the Secretariat, at the latest by 22 October 2015, any questions they considered useful to allow a focused debate on the impact of the judgment in the context of the discussion on the property rights of displaced persons. Only the delegation of Cyprus submitted questions in response to this invitation. They concerned the issue of the property rights of enclaved persons (see DH-DD(2015)1115). On 30 May 2016, the delegation of Cyprus also submitted a memorandum on the property rights of displaced persons (DH-DD(2016)688).

At its 1259th meeting (June 2016) (DH), the Committee decided to resume consideration of the issue of the homes and immovable property of displaced Greek Cypriots at their Human Rights meeting in March 2017.

2) Property rights of Greek Cypriots residing in the northern part of Cyprus (1265th meeting, September 2016)

The measures taken by the respondent State are summarised in the information document CM/Inf/DH(2013)23 prepared by the Secretariat.

At its 1172nd meeting (June 2013) (DH), the Committee took note of the assessment of these questions presented in the above-mentioned information document. The Committee invited interested delegations to provide the Secretariat by 30 June 2013 with the precise questions they considered still needed to be clarified and decided to resume the examination of the property rights of enclaved persons at the latest at its 1201st meeting (June 2014), in the light of the responses submitted by the Turkish delegation to these questions. Only the delegation of Cyprus submitted questions within the time limit (see DH-DD(2013)741).

The Turkish authorities replied to these questions in a memorandum submitted on 04/04/2014 (see DH-DD(2014)457). The Cypriot authorities submitted a memorandum on this issue by letter dated 19/05/2014 (see DH-DD(2014)697).The Turkish authorities presented an additional memorandum on 30/05/2014 (see DH-DD(2014)722).

At its 1236th meeting (September 2015) (DH), the Committee expressed its appreciation of the measures taken as regards the property rights of enclaved Greek Cypriots and their heirs. It wished however to examine the possible consequences for these questions of the just satisfaction judgment of 12 May 2014. Therefore, it decided to come back to this question in June 2016 following its debate foreseen in December 2015 on the impact of this judgment in the context of the discussion on the property rights of displaced persons. At the 1243rd meeting (December 2015) (DH), the Committee decided to postpone the examination of this case and to come back to the issue of the property rights of the enclaved persons at the 1265th meeting (September 2016) (DH). At this latter meeting, it decided to resume consideration of this issue at the June 2017 DH meeting.

3) Greek Cypriot missing persons and their relatives (1273rd meeting, December 2016)

The principal developments as regards the status of execution of this issue are reflected in the decision adopted by the Committee at its 1250th meeting (March 2016) (DH). The Deputies noted with satisfaction that in November 2015 the Turkish authorities granted the Committee on Missing Persons in Cyprus (CMP) access to thirty additional military areas. They welcomed the call made in December 2015 by the leaders of the two communities, Greek Cypriot and Turkish Cypriot, inviting any person possessing information on the possible burial places of missing persons to submit it to the CMP.

The Deputies reaffirmed, due to the passage of time, the urgency for the Turkish authorities to intensify their proactive approach to providing the CMP with all necessary assistance to continue to achieve tangible results as quickly as possible. In this respect they called upon the Turkish authorities to give unhindered access to the CMP to all possible military zones located in the northern part of Cyprus and to examine *proprio motu* the reports and military archives in their possession containing information on burial sites, including of relocated remains, and to transmit it to the CMP.

They took note with interest of the additional information provided by the Turkish authorities on the progress made in the investigations conducted by the Missing Persons Unit, including the finalisation of a number of these investigations. The Deputies called upon the Turkish authorities to ensure the effectiveness of these investigations and their rapid conclusion and invited them to continue to keep the Committee informed of the progress made. They decided to resume consideration of the issue of missing persons at their 1273rd meeting (December 2016) (DH).

II. Issues which have not yet been examined by the Committee

1) Breach of the right to respect for private and family life and home of Greek Cypriots living in northern Cyprus, in particular arising from the restrictions on family visits and the surveillance of their contacts and movements (violation of Article 8);

2) Discrimination against Greek Cypriots living in the Karpas region amounting to degrading treatment due to the restrictions imposed on their community (violation of Article 3). This finding was based in particular on:
- the restrictions imposed on freedom of movement;
- the surveillance to which the community was subjected;
- the absence of prospects for renewal or enlargement of the community;
- the absence of secondary education;
- the impossibility to bequeath immovable property to members of the family.

3) Lack of remedies in respect of the authorities' interference with the rights of Greek Cypriots living in northern Cyprus under Articles 3, 8, 9 and 10 of the Convention and under Article 2 of Protocol No. 1 (violation of Article 13).

III. Issues whose examination has been closed:

Following the measures adopted by the authorities of the respondent State with a view to complying with the present judgment, the Committee of Ministers decided to close the examination of the following issues:

1) living conditions of Greek Cypriots in northern Cyprus as regards secondary education, the censorship of schoolbooks and freedom of religion (violation of Articles 9 and 10 and of Article 2 of Protocol No. 1),

2) rights of Turkish Cypriots living in the northern part of Cyprus (competence of the military courts) (violation of Article 6).

For more details, see Interim Resolutions ResDH(2005)44 and CM/ResDH(2007)25.

IV. Just satisfaction awarded by the Court in its judgment of 12 May 2014

In this judgment, the Grand Chamber said that Turkey was to pay the Government of Cyprus 30,000,000 euros in respect of non-pecuniary damage suffered by the relatives of the missing persons and 60,000,000 euros in respect of non-pecuniary damage suffered by the enclaved Greek Cypriot residents of the Karpas peninsula. The Court indicated that these amounts should be distributed afterwards by the Government of Cyprus to the individual victims under the supervision of the Committee of Ministers within eighteen months of the date of the payment or within any other period considered appropriate by the Committee of Ministers.

During each of its meetings since June 2015, the Committee recalled that the obligation to pay the just satisfaction awarded by the Court was unconditional and called upon the Turkish authorities to pay the sums awarded in the judgment on just satisfaction of 12 May 2014.

Analysis by the Secretariat

In accordance with the decisions adopted, the Committee will be focusing at the present meeting on the issue of missing Greek Cypriots and their relatives.[2]

The position of the Turkish authorities in respect of the status of execution of this issue is presented in the document DH-DD(2014)1446 and that of the Cypriot authorities in the document DH-DD(2014)1414. The Secretariat presented its assessment of this issue in documents H/Exec(2014)8 and CM/Inf/DH(2013)23.

Point for consideration

No new information has been submitted since the last examination of this issue, in March 2016. It is expected that the Turkish authorities will provide information in due time for the meeting ~~revised draft Order of Business~~.

Financing assured: YES

[2] See decisions adopted at the 1236th meeting (September 2015 (DH) and at the 1243rd meeting, December 2015 (DH), Item A1: Approval of the Order of Business.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-30 9 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-30 Dink v. Turkey (Application No. 2668/07)

Supervision of the execution of the European Court's judgments

Reference documents: DH-DD(2016)1169, DH-DD(2015)487, DH-DD(2011)811

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
2668/07+	DINK	14/09/2010	14/12/2010	Complex problem

Case description

The case concerns the failure of the Turkish authorities to protect the right to life of Fırat Dink (a journalist and the editor of the Agos newspaper) in that they did not take action to prevent his assassination having been reasonably informed of a real and imminent threat to his life (material violation of Article 2). The case further concerns the failure of the Turkish authorities to conduct an effective investigation to identify and punish the authorities who failed to take any action to prevent Mr Dink's assassination, as well as against a chief police officer who allegedly revealed his ultra-nationalist opinions and support for the suspects (procedural violation of Article 2). In this vein, the Court also criticised the lack of independence of the Governorship and Provincial Administrative Council in investigating the allegations against members of security forces as well as the restrictions on access for Mr Dink's close relatives to the investigation files.

The case also concerns a violation of the right to freedom of expression on account of Mr Dink's conviction for denigrating Turkishness under Article 301 of the Criminal Code (violation of Article 10).

The case further concerns a violation of the right to an effective remedy on account of the inability of the applicants to claim damages (violation of Article 13 in conjunction with Article 2).

Status of execution

Individual measures:

Criminal Proceedings: The applicants' request for the investigations to be reopened following the delivery of the European Court's judgment was accepted and several investigations were initiated against a number of public officials at different hierarchical levels. It appears that all these investigations were closed between 2011 and 2014, either by means of non-prosecution or non-jurisdiction decisions delivered by public prosecutors.

[1] This document has been classified restricted until examination by the Committee of Ministers.

In another case permission to investigate was not granted by the Provincial Administrative Council in line with Law no 4483 (Law on the Prosecution of Civil Servants and Public Officials). As regards the chief police officer who allegedly revealed his ultra-nationalist opinions and support for the suspects, he was sentenced to five months' imprisonment in 2013 for abuse of power. However the activation of the decision against him was suspended. In connection with the same offence, criminal proceedings against the two other police officers were suspended following the investigations launched in this respect.

Consequently, the applicants lodged two applications with the Constitutional Court (2012 and 2014), claiming that the Turkish authorities had failed to execute the European Court's judgment. The Constitutional Court joined the two applications and delivered its decision on 17/07/2014. It concluded that the criminal investigations initiated after the European Court's judgment had been ineffective. The decision of the Constitutional Court was forwarded to the relevant Public Prosecution Offices and the Ministry of Justice for its execution.

Subsequently, in December 2015 and April 2016, the public prosecutor filed indictments with the Istanbul Assize Court against a number of public officials who were at different hierarchical levels at the time of the incident and charged them with the offences of "establishing and leading an armed terrorist organization, being a member of an armed terrorist organization, abuse of office, homicide, counterfeiting of official documents". At an unspecified date the public prosecutor initiated another investigation and issued an arrest warrant in respect of numerous suspects, including members of security forces and intelligence services. A number of persons have recently been placed under detention. Proceedings are pending.

Civil proceedings: On 27/10/2010 Istanbul Administrative Court awarded two of the applicants (Mr Dink's brothers) non-pecuniary damages in respect of the failure of the State to comply with its positive obligation to protect the life of their relative. In another set of proceedings before the same court, Mr Dink's wife and relatives were awarded pecuniary and non-pecuniary damages on 08/03/2012.

Disciplinary proceedings: Following a disciplinary investigation for neglect of duty, the Chief of the Intelligence Service of the Istanbul Security Directorate was suspended from office on 14/02/2008. His objection before the administrative courts was rejected in 2014. In addition, the Ministry of Interior initiated an administrative investigation in respect of certain public officials.

General Measures:

The authorities did not submit any information regarding the general measures in their last submissions but referred to their previous submissions dating back to September 2011 (DH-DD(2011)811).

Analysis by the Secretariat

Individual Measures:

It appears that the criminal investigations initiated following the European Court's judgment did not yield to any results and the applicants were subsequently compelled to lodge two applications with the Constitutional Court.

It is noted with satisfaction that in its decision of 17/07/2014 the Constitutional Court followed the European Court's well-established case law while examining the effectiveness of the investigations initiated after the European Court's judgment. In its decision, the Constitutional Court also recalled Article 46 of the Convention and underlined the Contracting States' obligation to abide by the final judgments of the European Court. Finally, the Constitutional Court transmitted its decision to the offices of competent public prosecutors for re-initiation of the investigations. Subsequently, the investigations were re-initiated and arrest warrants were issued with respect to numerous suspects.

These recent developments are noted with interest. However, in view of the passage of time since the judgments of both the European Court and the Constitutional Court, it is essential that the Turkish authorities intensify their efforts with a view to concluding these investigations in line with the clear standards set by both Courts. Further information on the state of these pending investigations is therefore awaited without further delay.

General Measures:

It is recalled that the main cause of the violations was the *failure of the authorities to protect the right to life* of a journalist despite the fact that they had been reasonably informed of a real and imminent threat to his life. It does not appear that the authorities have provided any information with regard to the measures they have taken or envisaged to protect the right to life of a journalist who might find himself / herself in a similar situation. In view of the special role played by journalists in a democratic society, which was highlighted in the Court's case law as well as in other relevant international law material, including the Recommendation of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors (CM/Rec(2016)4, 13/04/2016), specific measures are needed to protect the right to life of journalists. Information in this respect is therefore awaited.

Other violations found in this case related to the *lack of an effective investigation (including the issue of obtaining administrative authorisation to prosecute civil servants and public officials) and lack of an effective remedy on account of the inability to claim damages* are examined by the Committee under the *Batı* group of cases against Turkey (see the decision adopted at the 1265th meeting (September 2016) (DH)). As regards the *conviction of persons for denigrating Turkishness under Article 301* of the Criminal Code, it is recalled that this issue is examined by the Committee within the context of the *Incal* group of cases (see the decision adopted at the 1265th meeting (September 2016) (DH)) as well as *Altuğ Taner Akçam* case.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-30

Dink v. Turkey (Application No. 2668/07)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1169, DH-DD(2015)487, DH-DD(2011)811

Decisions

The Deputies

1. recalled that the main cause of the violations in this case was the failure of the authorities to protect the right to life of a journalist despite the fact that they had been reasonably informed of a real and imminent threat to his life;

Individual measures

2. noted that the applicants were compelled to apply to the Turkish Constitutional Court when the authorities failed to carry out effective investigations following the European Court's judgment in this case;

3. noted with satisfaction the judgment of the Constitutional Court which applied the fundamental Convention principles with regard to the effectiveness of investigations while also referring to the obligation of Contracting States to abide by the judgments of the European Court;

4. noted the investigations which were re-initiated after the Constitutional Court's judgment; urged the Turkish authorities to intensify their efforts to ensure that these investigations are conducted effectively and in compliance with Convention standards so that all those responsible for the violations found in this case are held accountable;

General measures

5. strongly urged the Turkish authorities to provide precise and detailed information on the general measures taken or envisaged with a view to protecting the right to life of journalists when they face real and imminent threat to their lives;

6. strongly encouraged the Turkish authorities to take into consideration the relevant materials of the Council of Europe in this respect, including the Recommendation of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors (CM/Rec(2016)4);

6. invited the Turkish authorities to provide information to the Committee on individual and general measures before 1 March 2017.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-31 8 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-31 Sinan Işık v. Turkey (Application No. 21924/05)

Supervision of the execution of the European Court's judgments

Reference documents: DH-DD(2016)1156, DH-DD(2016)1025, DH-DD(2016)465, DH-DD(2015)329, DH-DD(2011)560, CM/Del/Dec(2016)1259/H46-36

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
21924/05	SİNAN IŞIK	02/02/2010	02/05/2010	Structural problem

Case description

The case concerns a violation of the applicant's freedom not to disclose his religion, in that he was under an obligation to disclose his beliefs as a result of the obligatory indication of religion on his identity card (violation of Article 9).

The European Court underlined under Article 46 of the Convention that "indicating a citizen's religion in civil registers or on identity cards is incompatible with the freedom not to disclose one's religion". According to the Court, the violation in this case "has arisen out of a problem relating to the indication – whether obligatory or optional – of religion on identity cards". The Court considered in this regard that "the removal of the religion box could constitute an appropriate form of redress to put an end to the breach it has found" (§ 60).

Status of execution

The information provided by the Turkish authorities up to April 2016 is summarised in document DH-DD(2016)465 and the decision of the Committee adopted at the 1259th meeting, (June 2016) can be found in CM/Del/Dec(2016)1259/H46-36.

Individual measures:

The Turkish authorities indicated that the individual measures were linked to the general measures in this case.

General measures:

At the 1259th meeting, the Turkish authorities informed the Committee that new identity cards which did not contain a "religion box" would start to be delivered in the second half of 2016. The legal framework governing the new identity cards was introduced with the amendments made to Law No. 5490 on Civil Registry Services (which came into force on 14 January 2016). The city of Kırıkkale was chosen as a pilot city and the new identity cards have been supplied there since 14 March 2016.

[1] This document has been classified restricted until examination by the Committee of Ministers.

The Turkish authorities also indicated that the new identity cards would contain an electronic chip. A citizen may request that information regarding his/her religious affiliation be stored in the electronic chip on his identity card.

The Turkish authorities clarified that, according to Law No. 5490, as regards civil registers, all Turkish citizens have the right to request, in writing, to register, change or leave blank their religious affiliation in civil registers,

At the same meeting the Committee requested the following clarifications from the Turkish authorities:

a) whether the electronic chips on the new identity cards were designed to store information on the religious affiliation of citizens and, if so, on what legal basis and according to which procedures this information would be stored;

b) which public authorities would be able to have access to the information that would be stored on the new identity cards and for what purposes;

c) whether the information currently contained in civil registers regarding religious affiliation would be transferred to electronic chips.

The Turkish authorities' submissions in response to these questions are summarised below (DH-DD(2016)465 and DH-DD(2016)1025).

a) Electronic chips on the new identity cards may contain information on a person's religious affiliation only if s/he expressly consents in the new identity card application form (the Turkish authorities provided a sample copy of the application form). This procedure is in line with Law No. 6698 on the Protection of Personal Data which prohibits processing personal data without obtaining the explicit consent of the owner unless otherwise specified by law.

b) In their initial submissions the authorities indicated that a directive was being drafted detailing which authorities would have access to information on the new identity cards. In their more recent submissions the authorities clarified that the information on electronic chips was classified and therefore the power to access it could be granted only by law, not through regulations or circulars (or the draft directive). Consequently only authorities explicitly granted this right by law could access the information stored in chips, and only as far as strictly necessary for the exercise of their duties.

c) Information on religious affiliation in civil registers shall not be transferred to electronic chips unless the person applying for a new identity card explicitly consents that this type of information be transferred.

Analysis by the Secretariat

It is recalled at the outset that, as indicated by the European Court in this judgment (§ 60), the removal of the "religion box" from identity cards could constitute an appropriate form of redress for the breach it found. Consequently, during its last examination of this case, the Committee noted with satisfaction that the new identity cards to be distributed in the second half of 2016 would no longer contain a "religion box" (i.e. no information on religious affiliation would appear on the new identity cards).

As regards the clarifications requested at the same meeting, it appears from the copy of the sample application form submitted by the Turkish authorities that information on religious affiliation shall appear in the electronic chip on the identity cards only if the person requesting a new identity card explicitly consents.

However, which authorities will have access to the information in the electronic chip still needs to be clarified, because the frequency of use and degree of accessibility of information on identity cards were considered determining factors in finding a violation in this judgment. Further clarification is therefore needed as to the legal framework regarding access to the chips.

In view of the above explanations and of the progress achieved in the execution of this judgment, in particular that "religion box" will no longer exist on the new identity cards, it is proposed that the Committee transfers the *Sinan Işık* case from the enhanced to the standard supervision procedure.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-31

Sinan Işık v. Turkey (Application No. 21924/05)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1156, DH-DD(2016)1025, DH-DD(2016)465, DH-DD(2015)329, DH-DD(2011)560, CM/Del/Dec(2016)1259/H46-36

Decisions

The Deputies

1. recalled the decision adopted at their 1259th meeting (June 2016) in which they noted with satisfaction that the new identity cards that would be distributed in the second half of 2016 would no longer contain a "religion box" and stressed that the deletion of the "religion box" from identity cards constitutes the main measure taken in response to the Court's indication under Article 46 of the Convention in this case;

2. noted the clarifications provided by the Turkish authorities in response to the questions raised at the above-mentioned meeting and invited them to provide explicit information as to which authorities would have access to the information on religious affiliation which, if the person in question so consented, would henceforth be stored on the electronic chip embedded in the card;

3. in view of the progress achieved in the execution of this judgment, decided to transfer this case from enhanced to standard supervision procedure.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-32 8 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-32 Varnava and others v. Turkey (Application No. 16064/90)

Supervision of the execution of the European Court's judgments

Reference documents:
H/Exec(2014)6, CM/ResDH(2014)185, CM/ResDH(2013)201, DH-DD(2016)573, CM/Del/Dec(2016)1265/H46-30

Action – Item proposed with debate
To discuss the issue of individual measures and of the payment of the just satisfaction on the basis of the points for consideration in order to prepare a draft decision.

Application	Case	Judgment of	Final on	Indicator for the classification
16064/90+	VARNAVA AND OTHERS	18/09/2009	Grand Chamber	Complex problem

Case description

The case concerns the failure to conduct effective investigations into the fate of nine Greek Cypriots who disappeared during the military operations carried out by Turkey in Cyprus in 1974 (violation of Article 2); inhuman treatment of the relatives of the missing persons due to the authorities' silence in face of their real concerns (violation of Article 3); and failure to conduct effective investigations into the whereabouts of two of the nine missing men, in respect of whom there was an arguable claim that they had been detained at the time of their disappearance (violation of Article 5).

Status of execution

Individual measures:

a) effective investigations: in their memorandum of 8 January 2016 on missing persons, the Turkish authorities indicated that the investigation opened in the case of Savvas Hadjipantelli had been completed and that the Attorney General had delivered his final report (see DH-DD(2016)29). In the light of the results of the investigation, the Attorney General concluded that the available evidence was insufficient to charge anybody and that, pending further evidence, the investigation should be considered closed. If new information emerged and was brought to the attention of the police, it would be transmitted to the Attorney General's office for consideration. According to the Turkish authorities, the Court had examined similar investigations carried out by the Cypriot authorities and considered them in conformity with the Convention (see the inadmissibility decision *Gürtekin and Others v. Cyprus* of 11 March 2014).

The Turkish authorities also indicated that the remains of another missing person (Andreas Varnava) were identified by the Committee of Missing Persons in Cyprus (CMP) in 2014 and that the file was transmitted to the investigators. At its 1230th meeting (June 2015) (DH), the Committee invited the authorities to continue to keep it informed of the progress of this investigation as well as the individual measures taken in respect of the seven other persons who were still missing.

[1] This document has been classified restricted until examination by the Committee of Ministers.

At the 1250th meeting (March 2016), the Committee examined the individual measures in this case together with the general measures related to the issue of missing persons in the *Cyprus v. Turkey* case. Following this examination, the Deputies took note with interest of the additional information provided by the Turkish authorities on the progress made in the investigations conducted by the Missing Persons Unit, including the finalisation of a number of these investigations (including that in respect of Savvas Hadjipanteli).

The Deputies called upon the Turkish authorities to ensure the effectiveness of these investigations and their rapid conclusion and invited them to continue to keep the Committee informed of the progress made, particularly in the investigation concerning Andreas Varnava. They decided to resume consideration of the issue of missing persons at their 1273rd meeting (December 2016) (DH).

b) Payment of the just satisfaction: at the 1208th meeting (September 2014) (DH), the Committee adopted an Interim resolution deeply deploring that, to date, despite the interim resolutions adopted in the cases of *Xenides-Arestis* and *Varnava,*[2] the Turkish authorities had not complied with their obligation to pay the amounts awarded by the Court to the applicants in those cases, as well as in 32 other cases in the *Xenides-Arestis* group, on the ground that this payment could not be dissociated from the measures of substance in these cases.

In its interim resolution the Committee also recalled that the then Chairmen of the Committee of Ministers had stressed on behalf of the Committee, in two letters addressed to the Turkish Minister of Foreign Affairs,[3] that the obligation to comply with the judgments of the Court was unconditional.

The Committee declared that the continued refusal by Turkey to pay the just satisfaction awarded in the case of *Varnava* and in 33 cases of the *Xenides-Arestis* group is in flagrant conflict with its international obligations, both as a High Contracting Party to the Convention and as a member State of the Council of Europe. It exhorted Turkey to review its position and to pay without any further delay the just satisfaction awarded to the applicants by the Court, as well as the default interest due.

At its 1214th meeting (December 2014) (DH), the Committee expressed its deepest concern in view of the lack of response from the Turkish authorities to the two letters sent by the Chair of the Committee of Ministers to the Turkish Minister of Foreign Affairs, as well as to the interim resolution adopted in September 2014. The Committee exhorted once again the Turkish authorities to review their position and to pay without further delay the just satisfaction awarded by the Court.

At its 1230th (June 2015), 1236th (September 2015), 1243rd (December 2015) and 1250th (March 2016) meetings (DH), the Committee deeply deplored the lack of payment of the just satisfaction and exhorted once again the Turkish authorities to pay without further delay the sums awarded by the Court to the applicants, as well as the default interest due. The Committee also invited the Secretary General to raise the issue of payment of the just satisfaction in these cases in his contacts with the Turkish authorities, calling on them to take the measures necessary to pay it.

At its 1236th meeting (September 2015) (DH), the Committee also encouraged the authorities of the member States to do the same.

On 28 April 2016, the Secretary General sent a letter to the Minister for Foreign Affairs of Turkey trusting that the Turkish authorities would take the necessary measures to ensure the prompt payment of the just satisfaction awarded in these cases (see DH-DD(2016)573).

At its latest examinations of this issue (1259th meeting – June 2016 and 1265th meeting – September 2016), the Committee firmly insisted once again on Turkey's unconditional obligation to pay the just satisfaction awarded by the European Court in these cases and deeply deplored the absence of progress in this respect, again exhorting Turkey to comply with this obligation without further delay. The Committee agreed to resume consideration of this issue at their 1273rd meeting (December 2016) (DH).

At the time of distribution of these Notes, no information has been received from the authorities.

General measures: see the measures examined within the framework of the *Cyprus v. Turkey* case.

[2] Interim Resolutions CM/ResDH(2008)99 and CM/ResDH(2010)33, adopted respectively in 2008 and 2010 in the case of *Xenides-Arestis* and Interim Resolution CM/ResDH(2013)201, adopted in 2013 in the *Varnava* case.
[3] Letters sent respectively in October 2009, in the case of *Xenides-Arestis*, and in April 2014, for all these cases.

Analysis by the Secretariat

It is proposed to examine this issue together with that of the payment of the just satisfaction awarded by the Court in the *Xenides-Arestis* group of cases (see under *Xenides-Arestis*).

Points for consideration

In the absence of confirmation of the payment of the just satisfaction, it will be for the Committee to decide the measures it considers adequate to ensure the payment.

Financing assured: YES

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-33 8 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-33 Xenides-Arestis group v. Turkey (Application No. 46347/99)

Supervision of the execution of the European Court's judgments

Reference documents:
H/Exec(2014)6, CM/Inf/DH(2010)21, CM/ResDH(2014)185, CM/ResDH(2010)33, CM/ResDH(2008)99, DH-DD(2016)1189, DH-DD(2016)573, DH-DD(2016)257, DH-DD(2016)256, DH-DD(2016)244, DH-DD(2015)536, CM/Del/Dec(2016)1265/H46-30

Action – Item proposed with debate
To discuss the issue of payment of the just satisfaction on the basis of the points for consideration in order to prepare a draft decision.

Application	Case	Judgment of	Final on	Indicator for the classification
46347/99	XENIDES-ARESTIS GROUP (list of cases CM/Notes/1273/H46-33-app)	22/12/2005 07/12/2006	22/03/2006 23/05/2007	Just satisfaction payment

Case description

These cases concern the continuous denial of access to property in the northern part of Cyprus and consequent loss of control thereof (Article 1 of Protocol No. 1). Some cases also concern the violation of the applicants' right to respect for their homes (Article 8).

Status of execution

Individual measures:

a) Payment of the just satisfaction: In the *Loizidou* case the just satisfaction was paid in 2003. The cases of *Alexandrou* and *Eugenia Michaelidou Developments and Michael Tymvios* do not raise any issue in respect of the payment of just satisfaction, as the applicants concluded friendly settlements with the respondent State regarding Article 41 (see below under "individual measures concerning the applicants' property"). The Turkish authorities paid the just satisfaction awarded in the *Xenides-Arestis* judgment of 22/12/2005 in respect of costs and expenses.

As regards the *Xenides-Arestis* judgment of 07/12/2006, the sums awarded for material and moral damages and for costs and expenses have been due since 2007. In the *Demades* case, the sums awarded for just satisfaction have been due since 2009 and, in the more recent cases, since 2010-2012. In the *Xenides-Arestis* case the Committee of Ministers adopted two interim resolutions, in 2008 and 2010, strongly urging Turkey to pay the just satisfaction awarded by the European Court in the judgment of 07/12/2006, together with the default interest due. In the majority of these cases, the applicants or their representatives have addressed the Committee of Ministers on several occasions to complain about the lack of payment of the just satisfaction awarded to them.

[1] This document has been classified restricted until examination by the Committee of Ministers.

At the 1208th meeting (September 2014) (DH), the Committee adopted an interim resolution deeply deploring that, to date, despite the interim resolutions adopted in the cases of *Xenides-Arestis* and *Varnava,*[2] the Turkish authorities, on the ground that this payment could not be dissociated from the measures of substance in these cases, had not complied with their obligation to pay the amounts awarded by the Court to the applicants in those cases, as well as in 32 other cases in the *Xenides-Arestis* group,.

In its interim resolution, the Committee also recalled that the then Chairmen of the Committee of Ministers had stressed on behalf of the Committee, in two letters addressed to the Turkish Minister of Foreign Affairs,[3] that the obligation to comply with the judgments of the Court was unconditional. The Committee declared that the continued refusal by Turkey to pay the just satisfaction awarded in the case of *Varnava* and in 33 cases of the *Xenides-Arestis* group was in flagrant conflict with its international obligations, both as a High Contracting Party to the Convention and as a member State of the Council of Europe. It exhorted Turkey to review its position and to pay without any further delay the just satisfaction awarded by the Court, as well as the default interest due.

At its 1214th meeting (December 2014) (DH), the Committee expressed its deepest concern in view of the lack of response from the Turkish authorities to the two letters sent by the Chair of the Committee of Ministers to the Turkish Minister of Foreign Affairs, as well as to the interim resolution adopted in September 2014. The Committee exhorted once again the Turkish authorities to review their position and to pay without further delay the just satisfaction awarded by the Court.

At its 1230th (June 2015), 1236th (September 2015), 1243rd (December 2015) and 1250th (March 2016) meetings (DH), the Committee deeply deplored the lack of payment of the just satisfaction and exhorted once again the Turkish authorities to pay without further delay the sums awarded by the Court to the applicants, as well as the default interest due. The Committee also invited the Secretary General to raise the issue of payment of the just satisfaction in these cases in his contacts with the Turkish authorities, calling on them to take the measures necessary to pay it.

At its 1236th meeting (September 2015) (DH), the Committee also encouraged the authorities of the member States to do the same.

On 28 April 2016, the Secretary General sent a letter to the Minister for Foreign Affairs of Turkey trusting that the Turkish authorities would take the necessary measures to ensure the prompt payment of the just satisfaction awarded in these cases (see DH-DD(2016)573).

At its latest examinations of this issue (1259th meeting – June 2016 and 1265th meeting – September 2016), the Committee firmly insisted once again on Turkey's unconditional obligation to pay the just satisfaction awarded by the European Court in these cases and deeply deplored the absence of progress in this respect, again exhorting Turkey to comply with this obligation without further delay. The Committee agreed to resume consideration of this issue at their 1273rd meeting (December 2016) (DH).

At the time of distribution of these Notes, no information has been received from the authorities.

b) Individual measures concerning the applicants' properties: The Committee decided to close its examination of the individual measures in one of these cases (*Eugenia Michaelidou Developments and Michael Tymvios*, decision taken at the 1043rd meeting (December 2008) (DH). In the *Alexandrou* case, the Turkish authorities having complied with the friendly settlement according to which they had to pay the applicant and return the immovable property at stake, it was noted that no further individual measures were needed (see the public notes of the 1092nd meeting (September 2010) (DH).

The Secretariat's assessment of the individual measures in the cases of *Loizidou*, *Xenides-Arestis*, *Demades and Eugenia Michaelidou Developments Ltd and Michael Tymvios* is presented in the information document CM/Inf/DH(2010)21 of 17 May 2010. This assessment is valid for the other cases of this group in which the judgments on the just satisfaction became final after 2010.

General measures: these are examined in the framework of the case *Cyprus v. Turkey*.

[2] Interim Resolutions CM/ResDH(2008)99 and CM/ResDH(2010)33, adopted respectively in 2008 and 2010 in the case of *Xenides-Arestis* and Interim Resolution CM/ResDH(2013)201, adopted in 2013 in the *Varnava* case.
[3] Letters sent respectively in October 2009, in the case of *Xenides-Arestis*, and in April 2014, for all these cases.

Analysis by the Secretariat

It is proposed that the Committee examines the issue of the payment of the just satisfaction in 33 cases of the *Xenides-Arestis* group together with that of the payment of the just satisfaction in the *Varnava* case.

To date, no information has been submitted on the payment of the just satisfaction in these cases.

Points for consideration

In the absence of confirmation of the payment of the just satisfaction, it will be for the Committee to decide the measures it considers adequate to ensure the payment.

Financing assured: YES

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-34-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-34 Agrokompleks v. Ukraine (Application No. 23465/03)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1165, DH-DD(2016)328, DH-DD(2015)1370, DH-DD(2015)762, DH-DD(2015)702, DH-DD(2013)191, DH-DD(2012)1179, CM/Del/Dec(2016)1259/H46-39

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
23465/03	AGROKOMPLEKS	06/10/2011 25/072013	08/03/2012 09/12/2013	Complex problem

Case description

The case concerns the unfairness of insolvency proceedings initiated by the applicant company against, at the time, the country's biggest oil refinery (LyNOS) in which the State was the major shareholder. The violations occurred due to the lack of independence and impartiality of the domestic courts hearing the case, the excessive length of the proceedings (1997-2004) and the quashing of the final judicial decision awarding payments of arrears to the applicant company under newly-discovered circumstances in breach of the principle of legal certainty (three violations of Article 6 § 1).

In particular:

- persistent attempts by the executive and legislative branches of the State to intervene in the court proceedings and lack of sufficient safeguards ensuring internal judicial independence as the President of the Higher Arbitrage Court gave direct instructions to his two deputies to reconsider a particular ruling (see §§ 129-138 of the judgment on the merits);

- the reopening of the final ruling establishing the amount of arrears due was based merely on the State authorities' disagreement with the amount, this being disguised as a newly-discovered circumstance (§ 151 of the judgment on the merits);

- the excessive length of proceedings was caused mainly by the authorities' efforts to have the amount of the debt owed to the applicant company revised, despite a final judicial decision in that regard (§ 157 of the judgment on the merits).

The case also concerns the interference with the applicant company's rights to peaceful enjoyment of its possessions on account of the reduction of the amount of the debt due to it under the final and binding judgment, as a result of the reopening of the case on the basis of newly-discovered circumstances. The Court noted, in particular, that no "fair balance" was struck between the demands of the public interest and the need to protect the applicant company's right to peaceful enjoyment of its possessions (violation of Article 1 of Protocol No. 1).

[1] This document has been classified restricted until examination by the Committee of Ministers.

In its judgment on just satisfaction, the Court held that the State was to pay the applicant company the total sum of EUR 27,000,000 in respect of pecuniary and non-pecuniary damage and provided a specific time frame for the payment (EUR 13,500,000 within 12 months, i.e. by 9 December 2014, and the remaining EUR 13,500,000 within 24 months of the date on which the judgment became final, i.e. by 9 December 2015). The Court also awarded the applicant company EUR 30,000 in respect of costs and expenses.

Status of execution

Individual measures:

In their most recent communication of 19 October 2016 (DH-DD(2016)1165), the authorities indicated that they had paid the outstanding amount of just satisfaction, including the default interest. They also indicated that, owing to the change of the official currency exchange rate, they had overpaid the amount due to the applicant company. The applicant company complained to the Secretariat that the authorities had not paid in full the default interest for the late payment of just satisfaction, providing its calculation of the amount allegedly due. The Secretariat is working with the authorities and the applicant company in order to solve this minor outstanding issue.

It is recalled that no other individual measure except the payment of just satisfaction is required in the present case.[2]

General measures:

In their most recent action plan (DH-DD(2016)1165), the authorities provided the following information.

Internal independence of judges

The authorities indicated that the current legal framework, notably the Law "On the Judiciary and the Status of Judges", provides sufficient safeguards against undue pressure from fellow judges or any other undue influence by hierarchically superior judges. In particular, in accordance with the legislation in force, judges shall be independent from any unlawful influence; the presidents of the higher courts have no authority over judges regarding the administration of justice in concrete cases; and judges benefit from self-governance. Specifically as regards specifically judicial self-governance, the authorities referred to the opinion on the draft law on the Judicial System and the Status of Judges of March 2010, in which the provisions relating to self-governance were positively assessed by the Venice Commission.

The authorities also indicated that an analytical review prepared in the framework of the Council of Europe project "Support to the Implementation of the Judicial Reform in Ukraine" in the *Salov* group of cases addressed the issue of influence of the presidents of the relevant courts "over the judgments of the ordinary judges". According to this review, the 2010 Law of Ukraine "On the Judiciary and the Status of Judges" narrowed the powers of the presidents of courts, in particular depriving them of the right to initiate disciplinary proceedings against a judge. The remaining influence, according to the review, is of an informal character and cannot be remedied through legislation alone.

Review of the final judicial decisions

The authorities indicated that the review of final judicial decisions in commercial cases is regulated by the Code of Commercial Procedure, which was significantly amended in 2010. They also indicated that Article 112 of the Code of Commercial Procedure as worded at the material time set out in general terms the power of the court to review its final judgment on the ground of new circumstances that were essential for the case and that had not been known to the parties of the case. Article 113 of the Code provided for a two-month period to lodge a request for review after the discovery of the new circumstances. According to the authorities, on 7 July 2010 these provisions were amended to include an exhaustive list of five grounds for judicial review under new circumstances, reducing the period to lodge a request for the review from two months to one month. A court judgment cannot be reviewed on any ground more than three years after it became final. In addition, on 26 December 2011, the Higher Commercial Court of Ukraine issued a ruling on the review of judicial decisions upon newly discovered circumstances, providing guidance to courts on its application, in particular, specifying the nature of the grounds that may be considered as new circumstances.

[2] See the Notes for the June 2016 DH meeting for full details.

The Ukrainian authorities have also indicated that they will keep the Committee of Ministers informed about further developments and measures taken.

It is recalled that some of the aspects relating to the functioning of the judiciary, in particular as regards the legal and practical guarantees of judicial independence vis-à-vis the executive and legislative, are examined in other cases/groups of cases, most notably the *Oleksandr Volkov* case and the *Salov* group of cases.[3] It is also recalled that the general measures in response to the problem of excessively lengthy civil proceedings, as identified in the present case, are examined within the context of the *Svetlana Naumenko* group of cases.

Analysis by the Secretariat

Individual measures:

The full payment of just satisfaction awarded by the Court to the applicant company is a welcome development. As indicated above,[4] the Secretariat is currently working with the authorities and the applicant company to resolve the minor outstanding issue relating to whether further default interest is due to the applicant company.

General measures:

The Committee has been concentrating its analysis in the present case on the issue of internal judicial independence only.[5] This issue is closely related to other aspects of the deficiencies in the functioning of the judiciary, which are examined in the framework of other cases/groups of cases. It is noted that the Ukrainian authorities have adopted in the past few years important legislative changes with regard to the judiciary, most recently the constitutional amendments that entered into force on 30 September 2016.[6]

As regards the issue of the ***internal independence of judges***, the legislative measures taken by the authorities appear to be adequate overall. Nevertheless, it would be useful if the authorities could confirm that the most recent constitutional changes on the judiciary, referred to above, as well as proposed secondary legislation,[7] also address the problem at issue in the present case. Moreover, as the authorities have themselves acknowledged, the problem of influence of the presidents of courts is difficult to address owing to its informal character. Therefore, the authorities could complement the information provided by indicating measures other than legislative aimed at eradicating the practice of undue influence on judges, in particular informal influence by presidents of the courts on judicial careers. The authorities should also provide information as to the measures taken in the domestic law to prevent similar breaches on the part of the executive and legislative branches of the State, which "reveal a lack of respect for the judicial office itself" (see § 134 of the judgment). They should also, in their on-going judicial reform efforts, be encouraged to follow the existing Council of Europe recommendations as to the independent functioning of the judiciary. The authorities could also draw inspiration from the recent Opinion No. 19 of the Consultative Council of European Judges (CCJE) on the role of court presidents.[8]

As regards the issue of ***the review of final judicial decisions***, the information provided by the authorities is convincing. Indeed, it is noteworthy that, since October 2011, there have not been any judgments delivered by the European Court; nor have similar issues been communicated to the Ukrainian Government by the European Court.[9] In these circumstances, it would appear that the legislative measures introduced in 2010, together with the Ruling of the Plenum of the Higher Commercial Court "On certain Issues of the Practice of Review of Judgments, Rulings and Resolutions owing to newly discovered circumstances" No. 17 dated 26 December 2011, are sufficient to prevent other similar violations.

Financing assured: YES

[3] It is recalled that the *Salov* group of cases also covers the following issues: the violations of the applicants' right to a fair trial, in particular due to the lack of impartiality and/or independence of the courts; the lack of judicial independence on account of a judge demanding and accepting assets from the defendant company etc.
[4] See under "status of execution".
[5] In the present case, the executive and legislative branches exercised undue influence on the president of the Higher Arbitration Court, who, in turn, exercised similarly undue influence on judges examining particular cases (see §§ 129-130 of the judgment).
[6] See the notes in the cases *Oleksandr Volkov/Salov* for the present meeting with more extensive information about these reforms.
[7] The new draft law on the Higher Council of Justice (recently submitted to the Parliament of Ukraine), which strengthen, the role of the Higher Council of Justice in judicial careers.
[8] Adopted at its 17th plenary meeting that took place on 8 - 10 November 2016 in Strasbourg (http://www.coe.int/t/DGHL/cooperation/ccje/default_en.asp)
[9] According to the HUDOC database of the Court.

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-34

Agrokompleks v. Ukraine (Application No. 23465/03)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1165, DH-DD(2016)328, DH-DD(2015)1370, DH-DD(2015)762, DH-DD(2015)702, DH-DD(2013)191, DH-DD(2012)1179, CM/Del/Dec(2016)1259/H46-39

Decisions

The Deputies

As regards individual measures

1. noted that the Ukrainian authorities have paid the full amount of just satisfaction to the applicant company but that a minor issue of default interest is still pending resolution; therefore, invited the Ukrainian authorities to pursue their co-operation with the Secretariat, to find a solution to this outstanding issue;

As regards general measures

2. recalled that, in the present case, the Committee is focusing on the issue of internal judicial independence and that broader issues surrounding the independence of the judiciary vis-à-vis the executive and legislative branches of power are examined in the *Oleksandr Volkov* case and the *Salov* group of cases;

3. noted with interest the information provided with respect to the internal independence of judges and the review of final judicial decisions;

4. invited the Ukrainian authorities to provide additional information on the internal independence of judges in light of the most recent constitutional amendments on the judiciary and on measures other than legislative aimed at eradicating the practice of undue influence on judges, in particular as to the exclusion of the influence of hierarchically superior judges over their peers;

5. considered that the measures taken in respect of the review of final judicial decisions are sufficient to prevent similar violations.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-35 8 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-35 East/West Alliance Limited v. Ukraine (Application No. 19336/04)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1150, DH-DD(2016)327, DH-DD(2015)431, CM/Del/Dec(2016)1259/H46-40

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
19336/04	EAST/WEST ALLIANCE LIMITED	23/01/2014	02/06/2014	Complex problem

Case description

This case concerns arbitrary and unlawful acts of the tax authorities against the applicant company, resulting in the company's loss of ownership over fourteen An-28 and L-410 aircraft purchased by it in 1999 and 2000. In particular, the tax authorities acted without any legal basis in conducting criminal investigations into allegations of tax evasion against the company seized the aircraft, following which the aircraft were sold to third parties and damaged.

The European Court found that these "numerous and multifaceted" interferences with the applicant company's property rights were conducted in an utterly arbitrary manner and contrary to the rule of law principle (violation of Article 1 of Protocol No. 1). The Court also considered that, despite its strenuous efforts before various authorities for over twelve years, the applicant company was unable to recover its property and that it had no opportunity in practice to obtain effective remedies for its complaints (violation of Article 13).

Status of execution

Individual measures

Just satisfaction: The Court awarded the applicant company just satisfaction in respect of pecuniary loss (compensation for the value of the aircraft and lost profit) and non-pecuniary damages in the amount of EUR 5,000,000. The Court also awarded the applicant company EUR 8,000 in respect of costs and expenses.

In their updated action plan of 18 October 2016 (see DH-DD(2016)1150), the Ukrainian authorities indicated that they have paid the outstanding just satisfaction in full.

[1] This document has been classified restricted until examination by the Committee of Ministers.
Internet : http://www.coe.int/cm

General measures:

During the last examination of this case at their 1259th meeting, the Deputies noted that the violations found by the Court in the present case originated from unjustified interferences with the applicant company's property rights, which were conducted in an utterly arbitrary manner, in breach of the principle of rule of law and the Ukrainian legislation. Therefore, the Deputies strongly invited the Ukrainian authorities to consider taking specific measures to ensure that similar types of violations are prevented in the future, including by way of issuing instructions by the highest authorities stressing the need for the tax and other competent authorities to act in accordance with the law and recalling that failure to do so could result in criminal and/or disciplinary sanctions. The Deputies also invited the Ukrainian authorities to consider taking additional measures with a view to preventing the arbitrary application of the law by state officials, as well as enhancing the principle of rule of law, including measures aimed at providing effective judicial review against decisions of the tax authorities.

In their updated action plan (DH-DD(2016)1150), the Ukrainian authorities emphasised that "they recognise the urgency of the problem that occurred in the Court's judgment" and provided information on the measures taken, which can be summarised as follows.

Responsibility of officials for deliberate non-enforcement of court judgments

Under Ukrainian law, criminal and administrative liability shall be incurred for failure to comply with a final judicial decision. The authorities have also indicated that "enhancing criminal and administrative liability will encourage the immediate enforcement of court decisions".

New legal framework for enforcement of judicial decisions

On 2 June 2016 two new laws aimed at reforming the procedure of enforcement of court decisions in Ukraine were adopted, namely the Law of Ukraine "On Enforcement Proceedings" and the Law of Ukraine "On Authorities and Individuals Carrying Compulsory Enforcement of Court Decisions and Decisions of Other Authorities". On 6 October 2016 these laws entered into force.

Under the new legislation, private bailiffs shall be entitled to enforce certain types of judicial decisions. According to the authorities, these laws provide for an improved legal framework for the enforcement of judicial decisions in Ukraine.

Other measures

The Ukrainian authorities also indicated other measures taken with a view to executing the present judgment namely the dissemination of the European Court's judgments to courts of all levels and training provided by the National School of Judges.

Analysis by the Secretariat

Individual measures:

The full payment of just satisfaction was the only outstanding individual measure. Given that the Ukrainian authorities have paid in full, including the default interest, no additional individual measure is required.

General measures:

The information provided by the Ukrainian authorities does not appear fully to address the Committee's decisions adopted at the 1259th meeting. In particular, no information has been provided with regard to measures taken and/or envisaged with a view to ensuring that similar types of violation are prevented in the future, including by way of issuing instructions by the highest authorities stressing the need for the tax and other competent authorities to act in accordance with the law and recalling that failure to do so could result in criminal and/or disciplinary sanctions. Similarly, no information has been provided with regard to additional measures taken and/or envisaged with a view to preventing the arbitrary application of the law by state officials, as well as enhancing the principle of rule of law, including measures aimed at providing effective judicial review against decisions of the tax authorities.

The information provided by the Ukrainian authorities concerning liability for failure to comply with judicial decisions and the reform of the enforcement procedure is of interest; however it is not sufficiently precise to demonstrate that the situation has improved since the facts at stake. It is recalled that the failure to comply with the final domestic judicial decision is only one aspect of the present case[2].

Furthermore, the Ukrainian authorities should provide information as to the measures they have taken to ensure coherence and consistency of the relevant applicable norms of secondary legislation and bylaws issued by the tax authorities and other competent public officials, with a view to ensuring full and timely compliance with final domestic judgments. It also remains unclear whether any new legal acts or instructions for the tax authorities and other public officials have been adopted recently with a view to preventing similar violations.

It is to be noted that according to the most recent constitutional amendments on the judiciary of 2 June 2016 (which entered into force on 3 October 2016), the "State shall guarantee enforcement of the judicial decision in accordance with a procedure prescribed by law". Moreover, "control over enforcement of the judicial decision shall be ensured by a court". It is necessary for the Ukrainian authorities to provide further information as to whether secondary legislation, relevant bylaws and judicial arrangements exist to reinforce these constitutional amendments on judicial control over enforcement of judgments.

One was to address the problem of non-compliance with the law and disrespect of final judicial decisions would be to ensure that disciplinary and criminal sanctions are not only introduced in law, but also operate effectively in practice. It appears that the existing sanctions in the Code of Administrative Offences[3] and the Criminal Code[4] do not fully address the problem of failure to respect final judicial decisions by the public officials or/and their possible negligent behavior. It is also unclear whether the suggested administrative and criminal liabilities are applied in practice. Moreover, it remains unclear whether the above-mentioned provisions were in force at the material time and, if so, whether they could have been applied in this case.

The authorities should also be invited to indicate whether effective remedies exist for similar complaints, and in particular, whether there is remedy with preventive, suspensive effect or any other form of redress (§ 228) for, *inter alia,* lengthy failure of the domestic public authorities to abide by the law and comply with final judicial decisions. Furthermore, they should be invited to provide information as to whether the general measures taken in respect of this judgment are similar or partly coincide with those relating to *Zhovner/Ivanov* group of cases[5], which is to be examined by the Committee at the 1280th meeting (March 2017) (DH).

Financing assured: YES

[2] Partly addressed by the general measures in the cases of *Zhovner / Ivanov v. Ukraine* (which will be examined at the 1280th meeting (March 2017) (DH).
[3] Article 188-13.
[4] Article 382.
[5] See the last notes and decisions relating to this group (1265th DH meeting, September 2016).

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-35

East/West Alliance Limited v. Ukraine (Application No. 19336/04)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1150, DH-DD(2016)327, DH-DD(2015)431, CM/Del/Dec(2016)1259/H46-40

Decisions

The Deputies

As regards individual measures

1. noted that the Ukrainian authorities have paid in full the just satisfaction awarded by the European Court to the applicant company, including the default interest, and that no further individual measure is required in the present case;

As regards general measures

2. noted the information provided by the Ukrainian authorities with regard to the liability of officials for failure to comply with final judicial decisions and the reform of the enforcement procedure; invited them to provide additional information in this respect, in light of the recent constitutional amendments on the judiciary, as well as on implementation;

3. noted, in addition, that the authorities have not provided the information requested at the 1259th meeting (June 2016) (DH) with regard to other measures required for the full execution of the present case; therefore, strongly invited the authorities to provide the requested information without any further delay;

4. invited the authorities also to provide information on the existence of effective remedies for similar complaints, taking into account the Court's findings in this judgment.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-36 9 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-36 Khaylo group v. Ukraine (Application No. 39964/02)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1161, DH-DD(2013)427, DH-DD(2012)231

Action – Item proposed without debate
To adopt the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
39964/02	KHAYLO GROUP (list of cases CM/Notes/1273/H46-36-app)	13/11/2008	13/02/2009	Complex problem

Case description

These 35 cases concern procedural violations of Article 2 of the Convention on account of lack of effective investigations into the deaths of the applicants' relatives caused, *inter alia,* by road traffic accidents, illegal acts of private individuals and in unclear circumstances.

The shortcomings identified by the Court include: repeated refusals to initiate criminal proceedings; failure to secure and preserve initial evidence and evidence collected in the course of investigation; poor quality of forensic evidence; lack of thorough inquiry into the cases; multiple and repetitive breaches of procedural law; failure to reconcile contradictions and to present consistent conclusions as well as frequent gross delays in the proceedings. In addition the Court criticised the statutory inability of the victim to study the case materials at the pre-trial stage, thus limiting the victim's effective participation in the proceedings as well as lack of impartiality of investigation (see, among others, *Masneva*, No. 5952/07, §§ 56 and 57). The Court, in particular, highlighted the deficiencies in the investigation by the number of remittals of a case for re-examination. This demonstrated a recurring problem of quality of investigations in Ukraine. The subsequent resumptions had often been based on the failure of the police to comply with the instructions of the prosecution and the courts (see e.g., *Lyubov Efimenko*, No. 75726/01, § 71 and *Oleynikova*, No. 38765/05, § 81). The domestic authorities acknowledged this issue and in some cases imposed disciplinary sanctions against police officers and investigators (see e.g., *Yuriy Slyusar*, No. 39797/05, § 81 and *Serdyuk*, No. 61876/08, §§ 27 and 28).

In the case of *Chumak* (No. 60790/12, § 32-39) the Court also found a violation of Article 6 § 1 on account of excessive length of civil proceedings against the perpetrator of the road traffic accident. The general measures in response to the problem of excessively lengthy civil proceedings are examined within the context of the *Svetlana Naumenko* group of cases.

[1] This document has been classified restricted until examination by the Committee of Ministers.

Status of execution

It is noted from the outset that this group of cases will be examined for the first time by the Committee.[2] This group is proposed for examination because the number of similar cases pending before the Committee is increasing. In addition, the European Court continues to communicate to the government new cases raising similar issues.[3] The authorities submitted action plans on 10/11/2011 and on 19/10/2016 (DH-DD(2016)1161), a summary of which is set out below.

Individual measures:

At the time of the delivery of the judgments, investigations were pending in 17 cases. In their action plan of 19 October 2016 the authorities indicated that they would inform the Committee shortly about the state of the investigations in these cases.

General measures:

In the action plan of 19 October 2016, the authorities noted positive amendments in the legislation governing the conduct of criminal investigations. In particular, according to the new Code of Criminal Procedure (in force since November 2012), the investigator or prosecutor is required to initiate an investigation into a crime no later than 24 hours after it has been reported. Information on the criminal investigation is then automatically entered into the Unified Register of Pre-Trial Investigations. Failures of the investigator or prosecutor to act may be challenged before the domestic courts. In this respect, the authorities refer to the measures taken in the *Kaverzin* and *Afanasyev* groups (examined recently at the 1265th meeting (September 2016) (DH)).[4]

The authorities have also indicated that a comprehensive reform of law-enforcement bodies was launched in 2014 and is on-going. This includes separation between the functions of the Ministry of Interior and the national police, a reform which is in line with the European Code of Police Ethics. The authorities have also stated that other changes aimed at promoting protection of human rights were introduced into the domestic legislation. Furthermore, the authorities routinely request the General Prosecutor's Office to conduct effective investigations in the cases where the European Court has established a breach of Article 2. Information as to the progress of investigations in those cases is regularly updated in the Register of Offences at the request of the Government Agent's office.

Analysis by the Secretariat

Individual measures:

It is a source of concern that the authorities have not provided information on the state of investigation in the cases of the present group, which were either pending or terminated at the time of delivery of the judgments by the European Court. It is essential that the authorities provide such information without further delay.

General measures:

The present group of cases does not involve direct responsibility of state agents for loss of life, but rather poor quality and efficiency of investigations into loss of life.

The recent information provided by the authorities includes important reforms to the procedure of criminal investigations in general and supervision of the execution process by the authorities. It is clear therefore that the process for improving the system of investigations has already started. However, the information does not allow for a clear analysis of the specific measures taken to improve the quality of investigations in similar cases. In addition, the European Court continues to communicate to the government new cases raising issues of effective investigation into deaths (see status of execution above).

[2] Since the new working methods.
[3] See, *inter alia, Bliznyuk* (No. 20789/14, communicated on 4 May 2016), *Kabanova* (No. 17317/08 communicated on 4 May 2016), *Azovtseva* (No. 64932/12, communicated on 6 October 2015), *Mandryka* (No. 12991/10, communicated on 1 June 2015) and other applications.
[4] See the notes and decisions adopted at the 1265th meeting (September 2016) (DH).

Indeed, it would appear that there are a number of measures that are still needed to improve investigations in similar cases. These measures are likely to require further changes to the legislation and judicial and administrative practice. In particular, these measures should concern, *inter alia,* steps to ensure that investigations comply with the requirements of Article 2 of the Convention as to the practical independence of investigators; effective procedural management of investigations by the General Prosecutor's Office and its supervision by the courts; clear rules on competence of different bodies to investigate allegations; promptness of investigations; the requirement of public scrutiny; the involvement of victims and next-of-kin in criminal investigations; and remedies to accelerate investigations in situations of delay. It is important for the authorities to improve investigations in practice in similar cases by providing a manual for investigators and conducting training of police officers with special emphasis on the provisions of the 2012 Code of Criminal Procedure, which has received positive feedback from Council of Europe experts,[5] and the standards of investigations as outlined in the jurisprudence of the European Court.

The authorities should also be invited to continue to engage in bilateral dialogue with the Secretariat and to participate actively in cooperation activities offered by the Council of Europe.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016
Item H46-36

Khaylo group v. Ukraine (Application No. 39964/02)
Supervision of the execution of the European Court's judgments
DH-DD(2016)1161, DH-DD(2013)427, DH-DD(2012)231

Decisions

The Deputies

1. recalled that in the present group of cases the European Court found procedural violations of Article 2 of the Convention on account of the lack of effective investigations into the deaths of the applicants' relatives caused, *inter alia,* by road traffic accidents, illegal acts of private individuals and in unclear circumstances;

2. *as regards individual measures*, noted with concern that the authorities have not provided information on the status of the pending investigations, nor have they provided information on the measures undertaken with a view to correcting the deficiencies established by the European Court in the cases in which the proceedings were terminated; strongly invited the authorities to provide such information without any further delay;

3. *as regards general measures*, noted the important judicial reforms undertaken relating to the conduct of criminal investigations in general;

4. regretted, however, that the authorities have not provided comprehensive information on the specific measures taken and/or envisaged with a view to addressing deficiencies in investigations into deaths as in the present cases or their assessment of the practical impact of the reforms introduced by the new Code of Criminal Procedure;

5. strongly urged the authorities to inform the Committee about the implementation of the legislation in question as well as other measures taken to respond to the European Court's criticisms concerning the investigations in these cases;

6. invited the authorities to pursue their bilateral dialogue with the Secretariat and to participate actively in the cooperation activities offered by the Council of Europe and encouraged them to continue to take full benefit of such opportunities in the future;

7. invited the authorities to submit the information requested by 15 March 2017 at the latest.

[5] See Report on the evaluation of the implementation of the Criminal Procedure Code of Ukraine of April 2015.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-37-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-37 Salov group (Application No. 65518/01) and Oleksandr Volkov (Application No. 21722/11) v. Ukraine

Supervision of the execution of the European Court's judgments

Reference documents:
ResDH(2004)14, CM/ResDH(2014)275, DH-DD(2016)1162, DH-DD(2015)404, DH-DD(2015)145, DH-DD(2015)27, CM/Del/Dec(2015)1230/27

Action – Item proposed with debate
To debate the cases on the basis of the draft decisions below.

Application	Case	Judgment of	Final on	Indicator for the classification
SALOV GROUP				
65518/01	SALOV	06/09/2005	06/12/2005	Complex problem
33949/02	BELUKHA	09/11/2006	09/03/2007	
76556/01+	FELDMAN	08/04/2010	04/10/2010	
48553/99	SOVTRANSAVTO HOLDING	25/07/2002 02/10/2003	06/11/2002 24/03/2004	
21722/11	OLEKSANDR VOLKOV	09/01/2013	27/05/2013	Complex problem

Case description

The *Oleksandr Volkov* case concerns four violations of the applicant's right to a fair hearing on account of his unlawful dismissal from his post as a judge at the Supreme Court of Ukraine in June 2010 (Article 6 § 1):

1) Dismissal proceedings before a body that was not independent or impartial, and lack of effective judicial review;
2) Absence, in domestic legislation, of a limitation period for the proceedings against the applicant;
3) Different irregularities in the voting process before Parliament concerning the applicant's dismissal (absence of the majority of MPs, and those present deliberately and unlawfully cast multiple votes belonging to their absent peers);
4) Irregularities in the setting-up and composition of the special chamber of the High Administrative Court dealing with the applicant's case.

The dismissal was also found to amount to a violation of the applicant's right to respect for private life (Article 8) as the interference was not compatible with domestic law and as, moreover, the domestic law did not meet the requirements of foreseeability and did not provide appropriate protection against arbitrariness.

Considering the special circumstances identified in the judgment, the Court made specific indications under Article 46 for its execution, as follows:

[1] This document has been classified restricted until examination by the Committee of Ministers.

On individual measures:

The Court held "that the respondent State shall secure the applicant's reinstatement in the post of judge of the Supreme Court at the earliest possible date" (§§ 207-208).

On general measures:

The Court noted that "the present case discloses serious systemic problems as regards the functioning of the Ukrainian judiciary" (§ 199). It indicated that Ukraine should urgently put in place general reforms to its legal system, notably by taking "a number of general measures aimed at reforming the system of judicial discipline. These measures should include legislative reform involving the restructuring of the institutional basis of the system. Furthermore, these measures should entail the development of appropriate forms and principles of coherent application of domestic law in this field" (§§ 200 and 202).

The cases of the *Salov group*[2] concern violations of the applicants' right to a fair trial (Article 6 § 1), in particular due to the lack of impartiality and/or independence of the courts hearing their cases. In the *Salov* judgment, the Court pinned its relevant findings primarily on the excessively wide powers of the presidiums of the regional courts, referring in particular to the "lack of clear criteria and procedures in domestic law concerning the promotion, disciplinary liability, appraisal and career development of judges or limits to the discretionary powers vested in the presidents of the higher courts" (§ 83), as well as "the binding nature of the instructions given by the presidium of regional courts…" (§ 86).

In the *Belukha* case, the impartiality of the court was tainted by the judge demanding and accepting assets from the defendant company (§ 54). The distinguishing feature of the *Sovtransavto Holding* case was the interventions of the executive branch of the State in the court proceedings. In the *Feldman* case, the violation of the principle of independence and impartiality was found due to the statements made by the state authorities, including the country's President, in respect of the charges against the applicant, the unjustified change of territorial jurisdiction over the case and actions taken by the authorities against the applicant's lawyer.

The cases of the *Salov* group also concern other violations of the Convention and the Protocols thereto (*Salov*: Article 6 § 1, Article 5§3, Article 10; *Sovtransavto Holding*: Article 6 and Article 1 of Protocol No. 1; *Feldman*: Article 5 §§ 1, 3 and 4).

Status of execution

The information provided by the Ukrainian authorities at this stage concerns only the *Oleksandr Volkov* case.

Individual measures:

The Court awarded the applicant just satisfaction in respect of non-pecuniary damage. As regards the question of compensation for pecuniary damage, the Court held that it was not ready for decision and accordingly reserved that question.

As regards the applicant's reinstatement in his previous post, it is recalled that, in February 2015, the Supreme Court reinstated the applicant in his post.[3]

General measures:

At its last examination of the *Oleksandr Volkov* case in June 2015, the Committee noted that the Ukrainian authorities had taken certain measures to improve the legal framework for judicial discipline in Ukraine. However, the Committee also noted that only constitutional amendments could solve the problems at issue in the present case, notably with regard to the restructuring of the institutional basis of the system of judicial discipline, as called for by the Court's judgment. Therefore, the Committee encouraged the Ukrainian authorities to ensure that rapid advances were made in the constitutional reform and invited them to keep the Committee regularly informed about all relevant developments.

[2] These cases are proposed for examination for the first time together with the *Oleksandr Volkov* case in view of their similarity.
[3] See the notes of the 1230th meeting (June 2015) (DH) for full details.

In their most recent communication of 19 October 2016 (see DH-DD(2016)1162), the Ukrainian authorities indicated that the long-awaited constitutional reform on the judiciary had been adopted, with the direct support of the Council of Europe, notably through the Project "Support to the Implementation of the Judicial Reform in Ukraine". The authorities also provided detailed information on the current legal framework relating to judicial discipline, as amended by the most recent constitutional changes.[4]

Analysis by the Secretariat

Individual measures:

It is recalled that the only outstanding individual measure in the case of *Oleksandr Volkov* regards compensation for pecuniary damage, which has been reserved by the Court and is still pending before it. It appears from the most recent communication of the Ukrainian authorities of 19 October 2016 (see DH-DD(2016)1162) that they intend to settle the issue. It is expected that they will provide additional information to the Committee in due course.

General measures:

The constitutional amendments on the judiciary represent an important development, which should be welcomed. In accordance with the newly designed legal framework, the High Council of Justice is an independent and professional body charged with the examination of all questions related to judicial discipline and careers. In addition, Parliament is no longer involved in the process of dismissal of judges. Nevertheless, it also appears that the full adoption of the new legal framework is still underway[5] and that certain new provisions may raise questions as to judicial discipline and careers of judges that require further examination.[6]

Considering the complexity and scope of the measures taken, and in order to give the Committee a comprehensive analysis, it is proposed that the Committee instruct the Secretariat to prepare a detailed assessment of the information provided as well as of the scope of measures taken and envisaged to execute the present judgment before its 1280th meeting (March 2017) (DH) with a view to enabling a full examination.

Given that the authorities have not provided information on the *Salov* group of cases, it is also essential that they provide the necessary information without further delay to enable the Committee to assess the progress made with respect to this group of cases at its 1280th meeting.

Financing assured: YES

[4] Amendments of 2 June 2016 (which entered into force on 30 September 2016).
[5] The law on the High Council of Justice is yet to be adopted. There are currently (as of 19 October 2016) two draft laws pending before Parliament (nos. 5180 and 5180-1). Furthermore, it appears that several pieces of other secondary legislation still need to be adopted in order to implement fully the judicial reform.
[6] For instance, the existing legislation raises questions as to the grounds for dismissal of a judge; the definition of "gross misconduct that undermines the public trust in the judiciary" contained in the Law of Ukraine "On the Judiciary and the Status of Judges" may require further clarification as to its actual scope, etc.

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-37

Salov group (Application No. 65518/01) and Oleksandr Volkov (Application No. 21722/11) v. Ukraine
Supervision of the execution of the European Court's judgments
ResDH(2004)14, CM/ResDH(2014)275, DH-DD(2016)1162, DH-DD(2015)404, DH-DD(2015)145, DH-DD(2015)27, CM/Del/Dec(2015)1230/27

Decisions

The Deputies

1. welcomed the adoption by the Ukrainian authorities of the constitutional amendments, in force since 30 September 2016, which provide for a new legal framework for the judiciary in Ukraine, including in respect of judicial discipline;

2. instructed the Secretariat to prepare a detailed assessment of the information provided as well as the measures taken and envisaged to execute the *Oleksandr Volkov* judgment before their 1280th meeting (March 2017) (DH) with a view to a full assessment of the progress made;

3. invited the Ukrainian authorities to provide information on the execution of the *Salov* group of cases by 15 December 2016 at the latest and decided to resume consideration of all these cases at its 1280th meeting.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-38-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-38 Vyerentsov group v. Ukraine (Application No. 20372/11)

Supervision of the execution of the European Court's judgments

Reference documents:
DH-DD(2016)1241, DH-DD(2016)1163, DH-DD(2015)1133, DH-DD(2015)593, DH-DD(2014)458, DH-DD(2013)1270, CM/Del/Dec(2015)1243/H46-24

Action – Item proposed with debate
To debate the cases on the basis of the draft decision below.

Application	Case	Judgment of	Final on	Indicator for the classification
20372/11	VYERENTSOV	11/04/2013	11/07/2013	Structural problem
3276/10	SHMUSHKOVYCH	14/11/2013	14/02/2014	

Case description

The *Vyerentsov* case concerns violations of the applicant's right to freedom of assembly and the principle of "no punishment without law" on account of his conviction for having organised, on behalf of a human rights NGO, a peaceful demonstration in October 2010 (violations of Articles 7 and 11).

The applicant was convicted and sentenced to three days of administrative detention on the basis of Articles 185 and 185-1 of the Code on Administrative Offences because he "breached the procedure for organising and holding a demonstration". The European Court held that the application of this Code provided the legal basis for the applicant's conviction. However, given that there was no clear and foreseeable law regulating the procedure for organising and holding demonstrations, the applicant's conviction for violating a non-existing procedure was incompatible with Article 7.

The Court held that the violations under Articles 7 and 11 "stem[med] from a legislative lacuna concerning freedom of assembly which remain[ed] in the Ukrainian legal system for more than two decades". Therefore, the Court made a specific indication under Article 46 of the Convention: "Having regard to the structural nature of the problem disclosed in the present case, the Court stress[ed] that specific reforms in Ukraine's legislation and administrative practice should be urgently implemented in order to bring such legislation and practice into line with the Court's conclusions in the present judgment and to ensure their compliance with the requirements of Articles 7 and 11 of the Convention".

The Court also found the following violations of the applicant's right to a fair trial: a) the applicant was not given adequate time and facilities to prepare his defence; b) his request to be represented by a lawyer was refused by the domestic courts; c) his request to have a witness examined was rejected by the domestic courts; d) the domestic courts' decisions sentencing the applicant lacked adequate reasoning (violations of Article 6 §§ 1, 3(b), (c) and (d)). These violations are dealt with within the context of the *Kornev and Karpenko* case and the *Nechiporuk and Yonkalo* case.

[1] This document has been classified restricted until examination by the Committee of Ministers.

In the *Shmushkovych* case, the European Court found a violation of Article 11 due to the fine imposed upon the applicant for the purportedly late notification of the picket he had organised in March 2009 in the absence of clear and foreseeable law regulating the procedure for organising and holding demonstrations.

Status of execution

Individual measures:

At its 1243rd meeting (December 2015) (DH), the Committee noted that in the absence of a clear and foreseeable legislative framework both applicants might still risk the imposition of an administrative sanction, should they organise new demonstrations, notwithstanding that the applicant's conviction in the *Vyerentsov* judgment was quashed by the Supreme Court following the judgment of the European Court.

General measures:

In their action plan of 19 October 2016 (DH-DD(2016)1163), the Ukrainian authorities indicated that, on 8 September 2016, the Constitutional Court of Ukraine declared that the Decree of the "Presidium of the Supreme Soviet of the USSR" of 28 July 1988 on the procedure for organising and holding meetings, rallies, street marches and demonstrations in the USSR was unconstitutional.

The authorities confirmed that two draft laws are currently pending before Parliament (nos. 3587 and 3587-1) and underlined that they are accelerating their efforts to adopt this legislation. At their 108th Plenary Session, on 14-15 October 2016, the Venice Commission adopted a Joint Opinion[2] on these draft laws, which is overall positive (see below for details).

The authorities also indicated that a conference on the issue of freedom of assembly and the absence of a law in that respect in Ukraine was held in Kyiv on 12 October 2016, attended by members of NGOs, international organisations, representatives of Parliament and Ministries and a representative of the Department for the Execution of Judgments of the European Court.

Analysis by the Secretariat

Individual measures:

As indicated above, the individual measures are linked to general measures in these cases.

General measures:

At the outset, it is recalled that the European Court gave specific indications in its *Vyerentsov* judgment, namely that the authorities should bring the legislation and practice in line with its conclusions and ensure their compliance with the requirements of both Articles 7 and 11 of the Convention. It is to be noted in this respect that progress has been achieved since the Committee's last examination of these cases with regard to the general measures under Article 11 of the Convention, given the judgment of 8 September 2016 of the Constitutional Court of Ukraine. It is also to be noted that the Constitutional Court also underlined that restrictions on holding peaceful demonstrations should be established by law.[3]

The Venice Commission considers that "both drafts, submitted for assessment, large parts of which are in line with international standards, constitute a genuine attempt to fill the existing legislative lacuna in this area, as highlighted by the ECtHR in its *Vyerentsov v. Ukraine* judgment".[4] It is also worth noting that "it is up to the Ukrainian authorities to choose the most appropriate way to satisfy the requirements of this judgment, either by enacting a specific law on freedom of assembly or by introducing amendments to the existing legislation in order to regulate this field. […] Subject to further improvements, both draft laws would form a good basis for a future legal framework".[5]

[2] Joint Opinion No. 854/2016 of the Venice Commission, the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe and the OSCE/ODIHR "On Two Draft Laws On Guarantees for Freedom of Peaceful Assembly" (Adopted by the Venice Commission at its 108th Plenary Session).
[3] Judgment of the Constitutional Court of Ukraine of 8 September 2016 (link: http://www.ccu.gov.ua/sites/default/files/docs/6-pn.pdf, in Ukrainian only). This requirement is also referred to in Article 39 § 2 of the Constitution of Ukraine.
[4] Paragraph 11 of the opinion.
[5] Paragraph 12 of the opinion.

It would be useful for the Committee to encourage the authorities to follow the recommendations expressed in the above mentioned Joint Opinion, including the recommendations that concern the procedure of judicial supervision over peaceful assemblies specified in the draft Articles 182 and 183 of the Code of Administrative Proceedings.[6] Finally, it is to be noted that the opinion suggests that both draft laws propose for the Cabinet of Ministers to bring legal acts of central and local executive authorities into compliance with the provisions of the drafts,[7] which would be a welcome logical consequence of the adoption of the laws.

Furthermore, both draft laws align the issues related to administrative liability under Articles 185 and 185-1 of the Code of Administrative Offences with the requirements of the *Vyerenstov* judgment, with the draft law No. 3587-1 suggesting the abolishment of administrative liability for an "unpermitted assembly".

It is now essential that the authorities accelerate the process and adopt the relevant legislative changes in order to align the domestic practices with the Court's conclusions. Pending the adoption of this legislation, it is important to ensure that the practice of the municipal authorities, domestic courts and the police is compliant with Convention principles as highlighted at the 1201st meeting (June 2014).

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-38

Vyerentsov group v. Ukraine (Application No. 20372/11)
Supervision of the execution of the European Court's judgments
DH-DD(2016)124, 1DH-DD(2016)1163, DH-DD(2015)1133, DH-DD(2015)593, DH-DD(2014)458, DH-DD(2013)1270, CM/Del/Dec(2015)1243/H46-24

Decisions

The Deputies

1. welcomed the adoption by the Constitutional Court of the judgment declaring unconstitutional the Decree of the "Presidium of the Supreme Soviet of the USSR" of 28 July 1988 on the procedure for organising and holding meetings, rallies, street marches and demonstrations;

2. noted that two draft laws are currently pending before Parliament and that they have been positively assessed by the Venice Commission, the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe and the OSCE/ODIHR; therefore, called upon the Ukrainian authorities to accelerate the legislative process with a view to adopting the legislation required for the execution of - these judgments;

3. urged the Ukrainian authorities to take the necessary measures to ensure that, pending the adoption of the relevant legislation, the practice of the municipal authorities, domestic courts and the police is aligned with the principles of the Convention;

4. welcomed the Ukrainian authorities' active cooperation with the Secretariat and encouraged them to continue such co-operation in the future;

5. decided to resume consideration of these cases at their 1288th meeting (June 2017) (DH).

[6] Paragraphs 103 and 104 of the opinion.
[7] Paragraph 108 of the opinion.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-39-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-39 Hirst No. 2 group v. the United Kingdom (Application No. 74025/01)

Supervision of the execution of the European Court's judgments

Reference documents:
CM/ResDH(2009)160, DH-DD(2016)1201, DH-DD(2016)1170, DH-DD(2016)734, DH-DD(2016)188, DH-DD(2015)1280, DH-DD(2015)782, DH-DD(2015)767, DH-DD(2015)6, DH-DD(2014)768, DH-DD(2014)289, CM/Del/Dec(2015)1243/H46-26

Action – Item proposed with debate
To debate the cases on the basis in the light of the draft decision below.

Application	Case	Judgment of	Final on	Indicator for the classification
74025/01	HIRST No. 2	06/10/2005	Grand Chamber	Complex problem Pilot judgment
60041/08+	GREENS AND M.T.	23/11/2010	11/04/2011	
47784/09+	FIRTH AND OTHERS	12/08/2014	15/12/2014	
51987/08+	McHUGH AND OTHERS	10/02/2015	10/02/2015	
44473/14+	MILLBANK AND OTHERS	30/06/2016	30/06/2016	

Case description

These cases concern the blanket ban on voting imposed automatically on the applicants due to their status as convicted offenders detained in prison (violations of Article 3 of Protocol No. 1). Pilot judgment of 23/11/2010, *Greens and M.T.* (60041/08 and 60054/08, final on 11/04/2011).

Status of execution

Individual measures:

In the event that the applicants are still detained, their eligibility to vote will depend on the general measures adopted (see §§ 72, 93 and 94 of the judgment in *Hirst No. 2*).

General measures:

Following its initial judgment in *Hirst No. 2* (final on 06/10/2005), the European Court adopted the pilot judgment *Greens and M.T.* (final on 11/04/11), which concluded that the authorities needed to introduce legislative proposals to amend the blanket ban on prisoner voting (provided for by section 3 of the Representation of the People's Act 1983). On 22 November 2012, the authorities introduced to Parliament legislative proposals setting out three options to amend the voting rights of convicted offenders detained in prison.

[1] This document has been classified restricted until examination by the Committee of Ministers.

The proposals were examined by a specially appointed Parliamentary Committee which, in its detailed report of December 2013, recommended that: “the Government introduce a Bill at the start of the 2014-2015 [parliamentary] session, which should provide that all prisoners serving sentences of 12 months or less should be entitled to vote in all UK parliamentary, local and European elections; and moreover that prisoners should be entitled to apply, up to 6 months before their scheduled release date, to be registered to vote in the constituency into which they are due to be released”.

At its last examination of the cases at the 1243rd meeting (December 2015), the Committee adopted an interim resolution in which it expressed profound concern that the blanket ban on the right of convicted prisoners in custody to vote remained in place and reaffirmed that, as for all Contracting Parties, the United Kingdom had an obligation under Article 46 of the Convention to abide by judgments of the Court. The Committee also invited the Secretary General to raise the issue of implementation of these judgments in his contacts with the United Kingdom authorities, calling on them to take the measures necessary to amend the blanket ban on prisoner voting and encouraged the authorities of the member States to do the same. The Committee moreover called upon the United Kingdom authorities to follow up their commitment to continuing high-level dialogue on this issue leading to the presentation of concrete information on how the United Kingdom intends to abide by the judgment. The Committee further noted the United Kingdom’s commitment to report regularly on the steps taken and achieved in this respect and decided to resume consideration of these cases in the light of those reports at the latest at their 1273rd meeting (December 2016) (DH).

On 5 February 2016, 2 June 2016 and 20 October 2016, the authorities submitted updates on the high-level dialogue process foreseen in the interim resolution (see DH-DD(2016)188, DH-DD(2016)734 and DH-DD(2016)1170). They indicated that meetings had taken place between the Minister for Human Rights and the President of the European Court, the President of the Parliamentary Assembly and the Council of Europe Commissioner for Human Rights in December 2015 and January 2016 respectively. In addition, in February 2016 the Constitution Director at the Cabinet Office had visited Strasbourg and met the Director General of Human Rights and the Department for the Execution of Judgments. In April 2016, two Committees from the United Kingdom Parliament held discussions in Strasbourg with key actors in the Council of Europe, including on the spectrum of views in the United Kingdom Parliament on prisoner voting rights. In May 2016, the issue was also explored by a panel of parliamentarians at a conference in London jointly organised by the Council of Europe and the University of Liverpool entitled “Challenges to Implementing the Judgments of the European Court of Human Rights: Dialogues on Prisoner Voting Rights”. In October 2016, Sir Oliver Heald, the newly appointed Minister of State for Courts and Justice, with responsibility for human rights, discussed the issues with the Director of the Council of Europe Human Rights' Directorate.

On 25 October 2016, the authorities submitted an updated action plan (DH-DD(2016)1201) in which they reiterated that since the Committee’s last examination of the cases, they have engaged in a period of dialogue with both the Secretariat of the Council of Europe and other Council of Europe member States, gathering ideas and options as to how to respond to the violation found by the European Court without amending section 3 of the Representation of the People Act 1983. They indicate that the Parliament continues to oppose the passage of such legislation.

They will now filter the options gathered and consider developing further options to assess which are the most suitable and achievable in order to present these at a future Human Rights meeting of the Committee. They explain that premature disclosure of the options, which may not be deliverable or meet the Committee’s expectations, would harm their ability to implement the required general measures.

They also explain that they are not yet in a position to fix a definitive time scale given the large negotiation that is impacting on the work of the government in light of the referendum result in favour of leaving the European Union. Nevertheless, they anticipate that a further nine to twelve months should allow them to develop options, assess whether they are feasible and adequate and agree how they would be implemented. They confirm that, in the meantime, they will continue to engage with the Secretariat and member States and will keep the Committee informed.

Financing assured: YES

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-39

Hirst No. 2 group v. the United Kingdom (Application No. 74025/01)
Supervision of the execution of the European Court's judgments
CM/ResDH(2009)160, DH-DD(2016)1201, DH-DD(2016)1170, DH-DD(2016)734, DH-DD(2016)188, DH-DD(2015)1280, DH-DD(2015)782, DH-DD(2015)767, DH-DD(2015)6, DH-DD(2014)768, DH-DD(2014)289, CM/Del/Dec(2015)1243/H46-26

Decisions

The Deputies

1. welcomed the presence of the Minister of State for Courts and Justice;

2. noted the information provided by the authorities on the enhanced dialogue, which was foreseen in Interim Resolution CM/ResDH(2015)251 and which has taken place since the Committee's last examination of these cases in December 2015, and the authorities' indication that they are actively working on measures to respond to these judgments;

3. emphasised that, as for all Contracting Parties, the United Kingdom has an obligation under Article 46 of the Convention to abide by the judgments of the Court;

4. underlined that, prior to the Committee's next examination of the cases and at the latest by 1 September 2017, the authorities should submit concrete proposals to comply with these judgments, together with an indicative timetable for their implementation;

5. decided to resume consideration of these cases, in light of the proposals submitted, at their 1302nd meeting (December 2017) (DH) at the latest.

Ministers' Deputies

Notes on the Agenda

CM/Notes/1273/H46-40-rev 29 November 2016[1]

1273 Meeting, 6-8 December 2016

Human rights

H46-40 McKerr group v. the United Kingdom (Application No. 28883/95)

Supervision of the execution of the European Court's judgments

Reference documents:
CM/ResDH(2009)44, CM/ResDH(2007)73, ResDH(2005)20, CM/Inf/DH(2014)16-rev, DH-DD(2016)1213, DH-DD(2016)1203, DH-DD(2016)1191, DH-DD(2016)1184, DH-DD(2016)970, DH-DD(2016)547, DH-DD(2016)546, DH-DD(2016)545, DH-DD(2016)528, DH-DD(2016)430, DH-DD(2015)1379, DH-DD(2015)1346, DH-DD(2015)1330, DH-DD(2015)1291, DH-DD(2015)1223, DH-DD(2015)1096, DH-DD(2015)1155, DH-DD(2015)1040, DH-DD(2015)641, DH-DD(2015)629, DH-DD(2015)500, DH-DD(2015)119, DH-DD(2015)81, CM/Del/Dec(2016)1259/H46-42

Action – Item proposed with debate
To debate the cases in the light of the draft decision below

Application	Case	Judgment of	Final on	Indicator for the classification
28883/95	MCKERR	04/05/2001	04/08/2001	Structural and/or complex problems
37715/97	SHANAGHAN	04/05/2001	04/08/2001	
24746/94	HUGH JORDAN	04/05/2001	04/08/2001	
30054/96	KELLY AND OTHERS	04/05/2001	04/08/2001	
43290/98	MCSHANE	28/05/2002	28/08/2002	
29178/95	FINUCANE	01/07/2003	01/10/2003	
43098/09	McCAUGHEY AND OTHERS	16/07/2013	16/10/2013	
58559/09	COLLETTE AND MICHAEL HEMSWORTH	16/07/2013	16/10/2013	

Case description

These cases concern investigations into the deaths of the applicants' next-of-kin in Northern Ireland in the 1980s and 1990s either during security forces operations or in circumstances giving rise to suspicion of collusion with those forces.

McKerr group: the European Court found various combinations of the following shortcomings in the subsequent investigation of deaths: lack of independence of investigating police officers; lack of public scrutiny and information to victims' families on reasons for decisions not to prosecute; defects in the police investigations; limitations on the role and scope of the inquest procedure; absence of legal aid for the representation of the victims' families; and delays in inquest proceedings (procedural violations of Article 2). The *McShane* case also concerns a failure by the State to comply with its obligations under Article 34.

McCaughey and others and *Hemsworth*: the European Court found that there had been excessive delay in the inquest proceedings which had concluded in 2012 and 2011 respectively (procedural violations of Article 2). Causes of delay included periods of inactivity; the quality and timeliness of the disclosure of material; and delays stemming from legal actions necessary to clarify coronial law and practice.

[1] This document has been classified restricted until examination by the Committee of Ministers.

Under Article 46 of the Convention, the Court indicated that the authorities had to take, as a matter of priority, all necessary and appropriate measures to ensure, in similar cases of killings by the security forces in Northern Ireland where inquests were pending, that the procedural requirements of Article 2 would be complied with expeditiously.

Status of execution

Individual measures:

The individual measures have taken the form of either one or a combination of three types of investigation: inquests, Police Ombudsman reports and/or Historical Enquiries Team ("HET") reports. Investigations in five cases in this group are still outstanding due to problems examined under the general measures, including delays in the inquest procedure and/or delay in the work of the Police Ombudsman and the HET (see information document CM/Inf/DH(2014)16-rev for more details). All the investigations are affected by the implementation of the Stormont House Agreement and, in particular, the establishment of the Historical Investigations Unit (HIU) which will take forward all Police Ombudsman and HET investigations and the measures taken to improve the legacy inquest procedure (see general measures).

At the 1243rd meeting (December 2015) (DH), the Committee noted various developments in the case of *Finucane*, closed in 2009, as well as the applicant's request to reopen the individual measures. The Committee decided, in light of the ongoing domestic litigation in relation to Mr Finucane's case, which the authorities have committed to updating the Committee about, to resume consideration of reopening the individual measures once the domestic processes had concluded. The Committee also called upon the authorities to take all measures to ensure that the resumed Police Service of Northern Ireland ("PSNI") and Director of Public Prosecutions (Northern Ireland) ("DPP(NI)") review is completed as quickly as possible.

For the avoidance of any doubt, the domestic litigation is still pending, and appeal concerning Mr Finucane is due to be heard by the Court of Appeal in November 2016. No information has been submitted on the outcome of the PSNI and DPP(NI) review.

General measures:

Many general measures have already been adopted in the *McKerr* group of cases and the Committee has closed its supervision of the majority of them. However, questions remained outstanding regarding the functioning of the Police Ombudsman, the HET and the inquest system (for more information, see information document CM/Inf/DH(2014)16-rev).

On 23 December 2014, the United Kingdom Government and Irish Government published the Stormont House Agreement (see DH-DD(2015)81), which was welcomed by the Committee. The Agreement relates to a number of issues, but most significantly for the execution of this group of cases, it announced the establishment by legislation of a single independent investigative body, the Historical Investigations Unit (HIU), to take over the investigation of legacy cases from both the Police Ombudsman and the HET process. It also announced that appropriate steps would be taken to improve the way the legacy inquests function to reduce delay. The United Kingdom Government has indicated that an additional £150 million of funding will be available for the measures in the Stormont House Agreement to deal with the Troubles.

On 1 November 2015, the Lord Chief Justice of Northern Ireland became President of the coroners' courts. He reinforced some key personnel in the coroner's service and took a number of important steps to review the pending legacy cases and establish a strategy for the future.[2] In February 2016, he proposed that it should be possible to complete the existing legacy inquest caseload within a period of five years, subject to the support of a properly resourced Legacy Inquest Unit, co-operation from the relevant justice bodies (the PSNI and the Ministry of Defence) and the required resources being made available.

[2] A full summary of the steps taken is set out in the Notes for the 1259th meeting.

At the 1259th meeting (June 2016) (DH), the Committee recalled its calls to the United Kingdom authorities to introduce into Parliament on an agreed basis legislation to establish the HIU, noted the significant progress made on this issue at the cross-party talks in autumn 2015, but deeply regretted that the talks concluded without the necessary consensus to bring forward the legislation required. The Committee called upon the authorities to take all necessary measures to ensure the HIU could be established and start its work without any further delay, particularly in light of the time that has already passed since these judgments became final and the failure of previous initiatives to achieve effective, expeditious investigations.

As regards legacy inquests, the Committee noted with satisfaction the assumption of the presidency of the coroners' courts by the Lord Chief Justice of Northern Ireland and his constructive approach to the backlog of legacy inquests. It considered that such an approach, as well as a reformed inquest system, had the potential to make significant progress. It therefore urged the authorities to take all necessary measures to ensure that the Legacy Inquest Unit is established, properly resourced and staffed without delay to enable effective investigations to be concluded and that the coroners' courts receive the full co-operation of the relevant statutory agencies.

Since then, the authorities submitted an action plan on 5 September 2016 (DH-DD(2016)970) and further information on 21 October 2016 (DH-DD(2016)1184) to update the Committee on developments.

The HIU
In their most recent submissions, the authorities explain that they continue to seek agreement on the key remaining issue necessary for the legislation required[3] for the implementation of the Stormont House Agreement:[4] how best to balance disclosure to the families with the government's national security duties.

Since the Fresh Start Agreement in November 2015,[5] the government has been carrying out a process of engagement to ensure that the views of victims are taken into account and that they have input into the discussions. The authorities underline that the new Prime Minister and the new Secretary of State for Northern Ireland[6] have made it clear that they support the establishment of the bodies identified in the Stormont House Agreement, including the HIU, and consider that these bodies provide the most effective way to make progress.

Furthermore, since his appointment in July 2016, the new Secretary of State has continued to meet with key stakeholders, including victims and survivors' groups. He has publicly recognised the desire for progress to be made quickly on these issues. As a result of these discussions, on 9 September 2016, he made an announcement that there would be a public phase which would give all stakeholders the possibility to comment on the detail of the HIU that has been developed through the discussions during and since the Fresh Start cross-party talks. The Secretary of State wants wider society, including victims, to be able to have a say and believes that this is an important element in building confidence in the new bodies. The new bodies will only be able to work if they have support and confidence from across the community.

The government is currently reflecting on what form this public phase might take, and the Secretary of State is in the process of discussing this with the Northern Ireland parties and wider stakeholders. The authorities indicate that they anticipate being in a position to report more fully on emerging developments before the 1273rd meeting.

Legacy Inquests (inquests into the deaths of persons at the hand of the security forces during the Troubles)
In their most recent action plan (see DH-DD(2016)970), the authorities indicate that an experienced investigator has taken up post within the coroners' service to assist in progressing the legacy cases. The Criminal Justice Inspectorate of Northern Ireland has commenced an inspection of the arrangements in place in the Police Service of Northern Ireland to manage and disclose information to the coroners' courts.

The Department of Justice is now developing a five year funding model for legacy inquests. This will be considered initially by the Northern Ireland Executive before being considered by the government as part of the overall funding package for dealing with legacy issues.

[3] A summary of a policy paper, published in September 2015, detailing key elements of the proposed legislation to establish the HIU, and the Secretariat's assessment of the same, is set out in the Notes for the 1243rd meeting.
[4] See DH-DD(2016)430 for further details.
[5] See the United Kingdom's action plan of April 2016 (DH-DD(2016)430) for further details.
[6] In post since 14 July 2016.

The Coroner's Service of Northern Ireland has more broadly taken a number of steps to improve inquest proceedings in general, not related to deaths of persons at the hands of the security forces during the Troubles.[7]

Latest information received from NGOs

A number of submissions have been received on these cases during the Committee's examination of these cases, highlighting the ongoing problems in accessing a prompt and effective investigation into the deaths of their relatives during the Troubles.[8] A summary of these submissions and the authorities' response are set out in the Notes for the 1259th meeting.

In their most recent submissions (see DH-DD(2016)1191 ~~and~~ DH-DD(2016)1203 and DH-DD(2016)1213), Relatives for Justice, ~~and~~ the Committee on the Administration of Justice and the Pat Finucane Centre have, *inter alia,* reiterated their concerns about the lack of progress in the establishment of the HIU due to the ongoing disagreement about the extent of disclosure of information to the victims' families. They state that delays in legacy inquest proceedings continue, that the police and Ministry of Defence are not co-operating fully as regards disclosure to the coroners' courts and share the frustration of the Lord Chief Justice of Northern Ireland that the necessary resources have not been made available to deal with the backlog of legacy inquests (see below under Analysis).[9]

Analysis by the Secretariat

Individual measures

It is recalled that the authorities have committed to updating the Committee about ongoing domestic litigation in relation to Mr Finucane's case and that the Committee decided to resume its consideration of reopening the individual measures in that case once the domestic litigation had concluded. The Committee further called upon the authorities to take all measures to ensure that the PSNI and DPP(NI) review is completed as quickly as possible.

The completion of the investigations for the other cases in the group is linked to the progress made under the general measures further underlining the need to take those measures without delay.

General measures

HIU

After the Stormont House Agreement was published in December 2014, it was hoped that the legislation to establish the HIU would be adopted by summer 2016 and that the HIU would be operational by autumn 2016. However, notwithstanding the Committee's calls on the authorities in December 2015 and June 2016 to introduce into Parliament on an agreed basis legislation to establish the HIU and to take all necessary measures to ensure the HIU could be established and start its work without any further delay, the HIU is still far from being established because agreement has not been reached on all details of its operation.

In this regard, it is encouraging that the authorities have continued to engage with civil society and victims' families, something which the Committee has strongly encouraged in the past. It is also positive that, in an attempt to end the impasse, the authorities have recently announced their intention to launch a public phase to allow victims and other stakeholders to comment in public on the detail of the proposed HIU. Indeed, as stated by the authorities, in light of the failure of previous initiatives to achieve effective, expeditious investigations (see CM/Inf/DH(2014)16-rev for more details), it is critical to the future credibility and viability of the HIU and the other legacy bodies, that they have public and cross-community support from the outset.

Nevertheless, it remains a matter of concern that the legacy institutions agreed upon in December 2014 after months of talks have still not been established. If the authorities believe that a public phase is necessary to obtain the necessary agreement to introduce legislation to Parliament, this phase should be launched as soon as possible and with a clear timetable so that the HIU can be established and commence its work. Any further delay is likely to lead to the loss of confidence of victims' groups and other stakeholders in the process.

[7] See the action report in the case of *McDonnell* v. the United Kingdom (DH-DD(2016)1157) for full details of these measures.
[8] See DH-DD(2016)528, DH-DD(2016)545, DH-DD(2016)546 and DH-DD(2016)547.
[9] See the Lord Chief Justice of Northern Ireland's speech to the opening of the legal year on 5 September 2016.

Inquests

Despite the apparent broad support for the Lord Chief Justice of Northern Ireland's new approach for dealing with the backlog of legacy inquests, an approach which was noted with satisfaction by the Committee at its last examination of these cases as having the potential to make significant progress, no concrete progress has since been made on this issue.

It is recalled that, in February 2016, the Lord Chief Justice set a timescale of five years for completion of the existing legacy cases, "from the point at which resources are provided".[10] He had underlined that his "plan is predicated on the creation of this new [Legacy] Unit since it is evident that the existing Coroners Service is simply not designed to carry the weight of legacy cases".[11] He had also indicated that the failure to deal with these cases "casts a long shadow over the entire justice system".[12] In September 2016, the Lord Chief Justice reiterated the need for the necessary resources to be provided and for the full co-operation of the relevant statutory agencies.[13] He underlined that if the status quo continues, it will be decades before all the outstanding cases are complete.[14] Despite this, the necessary resources have not yet been made available.

Any further delay by the authorities in the provision of the necessary resources and the establishment of the Legacy Inquest Unit will lead to further delay in the conclusion of the examination of these cases by the coroners' courts which will be "yet another devastating blow to the families".[15]

Financing assured: YES

[10] See for example his statement on 12 February 2016 after meeting with families connected to the legacy inquests and his speech on 9 March 2016 to the Commission for Victims and Survivors Conference both available at http://www.lawsoc-ni.org/publications/

[11] See his speech on 9 March 2016 to the Commission for Victims and Survivors Conference.

[12] See his opening address to the legacy engagement event with families on 12 February 2016.

[13] See his speech to the opening of the legal year on 5 September 2016.

[14] See the Lord Chief Justice's speech to the opening of the legal year on 5 September 2016. In addition, in November 2014, the Lord Chief Justice had also indicated that "if the existing legacy inquests are to be brought to a conclusion under the present system someone could easily be hearing some of these cases in 2040". See *Jordan, Re applications for judicial review* [2014] NICA 76.

[15] See the Lord Chief Justice's speech to the opening of the legal year on 5 September 2016.

DRAFT DECISIONS

1273rd meeting – 6-8 December 2016

Item H46-40

McKerr group v. the United Kingdom (Application No. 28883/95)
Supervision of the execution of the European Court's judgments
CM/ResDH(2009)44, CM/ResDH(2007)73, ResDH(2005)20, CM/Inf/DH(2014)16-rev, DH-DD(2016)1213, DH-DD(2016)1203, DH-DD(2016)1191, DH-DD(2016)1184, DH-DD(2016)970, DH-DD(2016)547, DH-DD(2016)546, DH-DD(2016)545, DH-DD(2016)528, DH-DD(2016)430, DH-DD(2015)1379, DH-DD(2015)1346, DH-DD(2015)1330, DH-DD(2015)1291, DH-DD(2015)1223, DH-DD(2015)1096, DH-DD(2015)1155, DH-DD(2015)1040, DH-DD(2015)641, DH-DD(2015)629, DH-DD(2015)500, DH-DD(2015)119, DH-DD(2015)81, CM/Del/Dec(2016)1259/H46-42

Decisions

The Deputies

1. *concerning the individual measures*, recalled that the completion of the outstanding investigations in the group is linked to the progress made under the general measures and underlined the urgent need to take those measures without further delay; recalled also the Committee's decision of December 2015 in relation to the *Finucane* case to resume consideration of the reopening of individual measures once the domestic litigation has concluded;

2. *concerning the general measures*, expressed their concern that the Historical Investigations Unit (HIU) and other legacy institutions agreed upon in December 2014 have still not been established because agreement on the legislation has not yet been reached;

3. noted with satisfaction the authorities' ongoing engagement with all relevant stakeholders and strongly encouraged them further to ensure that the proposed public consultation phase regarding the HIU legislation is launched and concluded within a clear timescale to ensure that the legislation can be presented to Parliament and the HIU established and made operational without any further delay;

4. regretted that the necessary resources have not been provided to enable the Legacy Inquest Unit to be established and for effective legacy inquests to be concluded within a reasonable time; called upon the authorities to take, as a matter of urgency, all necessary measures to ensure both that the legacy inquest system is properly resourced and staffed and that the Coroners' Service receives the full co-operation of the relevant statutory agencies to enable effective investigations to be concluded;

5. decided to review the progress made in these cases at their 1288th meeting (June 2017) (DH), at the latest.