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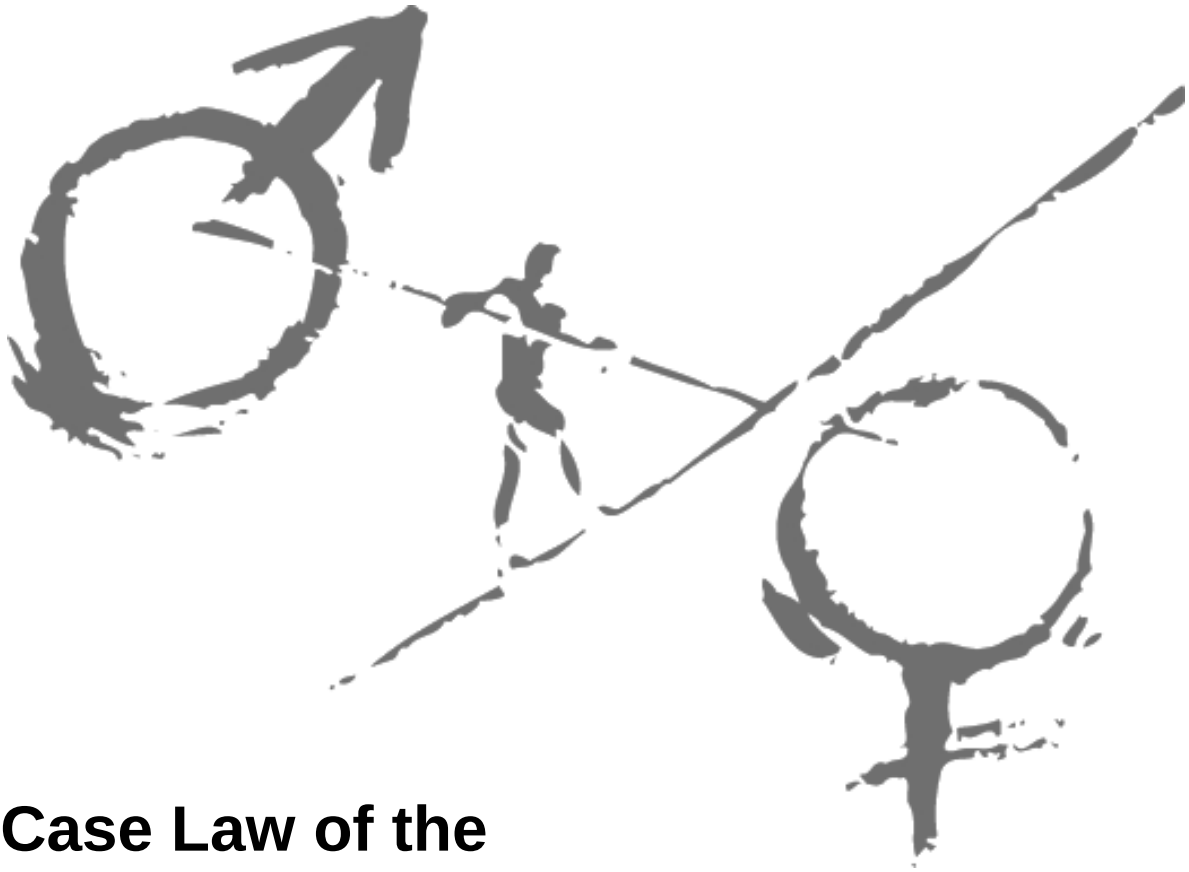

Case Law of the European Court of Human Rights in the field of Equality between Women And Men

Strasbourg November 2006

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CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE FIELD OF EQUALITY BETWEEN MEN AND WOMEN

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SUMMARIES OF THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS (PRESS RELEASES)

1. *Marckx v. Belgium*, judgment of 13 June 1979, Series A No. 31 (Violation of Article 8 and Article 14 taken in conjunction with Article 8 of the Convention). Belgian law did not establish a bond of relationship between an unmarried mother and a child. Adoption was necessary for the child to acquire a family status.

2. *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32 (Violation of Article 6, not necessary to examine Article 14 of the Convention in conjunction with Article 6). Due to a lack of legal aid, the applicant did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation.

3. *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A No. 45 (Violation of Article 8, not necessary to examine Article 14 of the Convention). Existence in Northern Ireland of laws which had the effect of making certain homosexual acts between consenting adult males a criminal offence.

4. *Rasmussen v. Denmark*, judgment of 28 November 1984, Series A no. 87 (No violation of Article 14 taken in conjunction with Article 8 the Convention). The applicant's right to contest his paternity of a child born during a marriage was subject to time-limits, whereas his former wife was entitled to institute paternity proceedings at any time.

5. *X and Y v. The Netherlands*, judgment of 26 March 1985, Series A No. 91 (Violation of Article 8 of the Convention). Under Dutch law, it was impossible to prosecute the person suspected of having sexually assaulted the applicant in the absence of a complaint by the applicant herself. The girl, suffering from a severe mental disorder, was incapable of determining her will in this respect.

6. *Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment of 28 May 1985, Series A no. 94 (Violation of Article 14 taken in conjunction with Article 8 of the Convention) According to immigration rules it was easier for a man settled in the United Kingdom than for a woman so settled to obtain permission for his or her non-national spouse to enter or remain in the country for settlement.

7. *Rees v. The United Kingdom,* judgment of 17 October 1986, Series A No. 106 (No violation of Articles 8 and 12). Impossibility for the applicant as a transsexual to enter into a valid contract of marriage with a woman did not amount to a violation of his right to marry.

8. *Inze v. Austria*, judgment of 28 October 1987, Series A No. 126 (Violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 to the Convention). Limitations of hereditary rights which the applicant had already required on account of his illegitimate birth.

9. Cossey v. the United Kingdom, judgment of 27 September 1990 (No violation of Articles 8 and 12 of the Convention). Neither does the inability of the applicant, a post-operative male-to-female transsexual, to obtain a birth certificate showing her sex as female constitute a violation of Article 8, nor does her inability to contract a valid marriage with a man constitute a violation of Article 12.

10. *Vermeire v. Belgium*, judgment of 29 November 1991, Series A No. 214-C (Violation of Article 14 taken in conjunction with Article 8 of the Convention). The applicant was excluded from inheritance rights on the ground of her being an "illegitimate child".

11. *Schuler-Zraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263 (Violation of Article 14 taken in conjunction with Article 6-1 of the Convention). Termination of the applicant's invalidity pension, based on compulsory contribution from her salary, after she

had given birth to a child. The decision was based on the assumption that women gave up work when they gave birth to a child.

12. *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B (Violation of Article 14 taken in conjunction with Article 8 of the Convention). Refusal to allow the applicants to use the woman's surname as their family name.

13. *Keegan v. Ireland*, judgment of 26 May 1994, Series A No. 290 (Violation of Article 8 of the Convention). The law did not give a natural father the right to be appointed guardian of his child. He could only apply to be appointed guardian.

14. *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B (Violation of Article 14 taken in conjunction with Article 4-3-d). Only men were subject to the obligation to serve as firemen or pay a financial contribution. Error! Bookmark not defined.

15. *Kroon and others v. The Netherlands*, judgment of 27 October 1994, Series A No. 297-C (Violation of Article 8 of the Convention). The law provided that a child born during marriage or up to 306 days after dissolution of the marriage was the husband's, unless the mother had remarried. The mother could only contest the paternity of a child born in the 306 days period if another man recognised paternity and they marry within a year after the birth. A man could only contest paternity by bringing proceedings against the mother and the child.

16. *Van Raalte v. The Netherlands*, judgment of 21 February 1997, Reports 1997-1 (Violation of Article 14 of the Convention). Exemption from obligation to pay contributions under social welfare scheme applying to unmarried childless women aged 45 or over but not to men in the same position.

17. *Aydin v. Turkey*, judgment of 25 September 1997, Reports 1997-VI (Violation of Article 3 and Article 13 of the Convention). Alleged rape and ill-treatment of a female detainee and failure of authorities to conduct an effective investigation into her complaint that she was tortured in this way.

18. *Petrovic v. Austria*, judgment of 27 March 1998, Reports 1998-II (No Violation of Article 14 taken in conjunction with Article 8 of the Convention) Authorities' refusal to grant parental leave allowance to a father, on the ground that allowance was only available to mothers.

19. *Salgueiro da Silva Mouta v. Portugal*, judgment of 21 December 1999, judgment of 21 December 1999 (Violation of Article 14 in conjunction with Article 8 of the Convention). Refusal to grant parental responsibilities to a homosexual parent.

20. *Leary v. the United Kingdom and Cornwell v. the United Kingdom*, judgments of 25 April 2000 (Friendly settlement). The applicant applied for a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992. He was informed that his claim was invalid because the regulations governing the payment of widows' benefits were specific to women.

21. *A.D.T. v. United Kingdom*, judgment of 31 July 2000, Reports of Judgments and Decisions 2000-IX (Violation of Article 8). The applicant was convicted for his participation in sexual acts with more than one other consenting adult male in the privacy of his own home.

22. *Sutherland v. the United Kingdom*, judgment of 27 March 2001 (Friendly settlement). Existence of legislation that made it a criminal offence to engage in homosexual activities with men under 18 years of age whereas the age of consent for heterosexual activities was fixed at 16.

23. *Fogarty v. United Kingdom*, judgment of 21 November 2001, Report of Judgments and Decisions 2001-XI (No violation of Article 6 and Article 14 taken in conjunction with Article 6 of the Convention). Restriction of access to court with an anti-discrimination claim.

24. *Fielding v. the United Kingdom*, judgment of 29 January 2002 (Friendly settlement) The applicant applied for a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992. He was informed that his claim was invalid because the regulations governing the payment of widows' benefits were specific to women.

25. *Sawden v. United Kingdom*, judgment of 12 March 2002 (Friendly settlement). The applicant applied for a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992. He was informed that his claim was invalid because the regulations governing the payment of widows' benefits were specific to women.

26. *Loffelman v. the United Kingdom*, judgment of 26 March 2002. (Friendly settlement). The applicant applied for a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992. He was informed that his claim was invalid because the regulations governing the payment of widows' benefits were specific to women.

27. *Downie v. the United Kingdom*, judgment of 21 May 2002 (Friendly settlement). The applicant applied for a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992. He was informed that his claim was invalid because the regulations governing the payment of widows' benefits were specific to women.

28. *Wessels-Bergervoet v. The Netherlands*, judgment of 4 June 2002, Report of Judgments and Decisions 2002-IV (Violation of Article 14 taken in conjunction with Article 1 of Protocol no. 1 to the Convention). Reduction of the applicant pension was the result of a discriminatory difference in treatment between married men and women.

29. *Willis v. United Kingdom*, judgment of 11 June 2002 Report of Judgment and Decisions 2002 IV (Violation of Article 14 taken in conjunction with Article 1 of Protocol no. 1 to the Convention; no violation of Article 14 taken in conjunction with Article 8 in connection with widow's pension). Authorities' refusal to pay the applicant social-security benefits to which he would have been entitled had he been a woman in a similar position.

30. Christine Goodwin v. The United Kingdom, Reports of Judgments and Decisions 2002 (Violation of Article 8, 12 but no violation of Article 12 and 13 of the Convention). The applicant was a post-operative male to female transexual. The Court held that the state's failure to recongise gender-reassignment through changes to the birth register system amounted to a breach of Article 8. Similarly, in finding a breach of Article 12, the Court found that while it was for individual states to determine inter alia the conditions under which a person claiming legal recognition as a transsexual might establish that gender re-assignment had been properly effected and the formalities applicable to future marriages, there could be no justification for barring transsexuals from enjoying the right to marry under any circumstances.

31. *Rice v. the United Kingdom*, judgment of 1 October 2002 (Friendly settlement). The applicant applied for a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992. He was informed that his claim was invalid because the regulations governing the payment of widows' benefits were specific to women.

32. *L. and V v. Austria*, judgment of 9 January 2003, Report of Judgments and Decisions 2003-I (Violation of Article 14 taken in conjunction with Article 8 of the Convention). Austria's criminal code penalised homosexual acts of adult men with consenting adolescents aged between 14 and 18. Heterosexual and lesbian relations between adults and consenting adolescents over 14 years of age were on the other hand not punishable.

33. *Odièvre v. France,* judgment of 13 February 2003, Reports of Judgments and Decisions 2003-III (No violation of Article 8, no violation of Article 14 of the Convention taken together with Article 8). French law preventing the applicant of establishing parental ties with her

natural mother who had refused to disclose her identity rests within the margin of appreciation afforded to Contracting States in governing the abandonment of children.

34. *Atkinson v. the United Kingdom*, judgment of 8 April 2003 (Friendly settlement). The applicant applied for a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992. He was informed that his claim was invalid because the regulations governing the payment of widows' benefits were specific to women.

35. *Y.F. v. Turkey*, judgment of 22 July 2003, Reports of Judgments and Decisions 2003-IX (Violation of Article 8 of the Convention). Forced gynaecological examination of female detainees.

36. *M.C. v. Bulgaria*, judgment of 4 December 2003, Reports of Judgements and Decisions 2003-XII (extracts) (Violation of Article 3 and 8 of the Convention). Bulgarian law and practice did not provide effective protection against rape and sexual abuse, as only cases where the victim resists actively were prosecuted.

37. *Owens v. the United Kingdom*, judgment of 13. January 2004 (Friendly settlement). The applicant applied for a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992. He was informed that his claim was invalid because the regulations governing the payment of widows' benefits were specific to women.

38. *B.B. v. the United Kingdom*, judgment of 10 February 2004 (Violation of Article 14 taken in conjunction with Article 8 of the Convention). Existence of legislation that made it a criminal offence to engage in homosexual activities with men under 18 years of age whereas the age of consent for heterosexual activities was fixed at 16.

39. *Michael Matthews v. The United Kingdom*, judgment of 15 July 2002 (friendly settlement), Different treatment of men and women in eligibility for elderly person's travel permits. Under British law at the time, such a permit could only be provided to men who were aged 65 or over, whereas women were eligible to receive such a permit, subject to the provisions of their local scheme, at the age of 60 or over.

40. *Ünal Tekeli v. Turkey*, judgment of 16 November 2004 (Violation of Article 14 taken in conjunction with Article 8 of the Convention). Authorities' refusal to allow the applicant to bear only her maiden name after her marriage.

41. *Wolfmeyer v. Austria*, judgment of 26 May 2005 (Violation of Article 14 taken in conjunction with Article 8 of the Convention). The applicant was charged for having sexual relations with a male adolescent. Heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

42. *Siliadin v. France*, judgment of 26 July 2005, Reports of Judgments and Decisions 2005-VII (Violation of Article 4 of the Convention). Positive obligation to protect the applicant, a non-remunerated domestic worker of Togolese origin, from forced labour and servitude.

43. *Leyla Şahin v. Turkey*, judgment of 10 November 2005, Reports of Judgments and Decisions 2005-XI (No violation of Article 9, no violation of Article 2 of Protocol No.1, no violation of Article 8, no violation of Article 10 and no violation of Article 14 of the Convention). Prohibition of wearing the Islamic headscarf at Istanbul University.

44. *Mizzi c. Malta*, *, Mizzi c. Malta*, judgment of 12 January 2006, Reports of Judgments and Decisions 2006 (extraits/extracts). (Violation of Article 6, 8 et 14 taken in conjunction with Articles 6 and 8 of the Convention). Time limit of six months from the day of birth to introduce proceedings challenging the paternity of a child conceived in wedlock.

45. *Evans v. United Kingdom,* judgment of 7 March 2006, Reports of Judgments and Decisions 2006-.. (No violation of Articles 2, 8 and 14). British law required consent of the

applicant's former partner to the continued storage and use of embryos as a result of fertility treatment.

46. *Stec and others v. the United Kingdom*, Reports of Judgments and Decisions 2006, Reports of Judgments and Decisions 2006 (No violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1). The difference in treatment of men and women in relation to eligibility for reduced earnings allowances and retirement allowance under British law pursued a legitimate aim and was reasonably and objectively justified.

47. *Zarb Adami v. Malta*, judgment of 20 June 2006, Reports of Judgments and Decisions 2006 (Violation of Article 14 in conjunction with Article 4 of the Convention). Difference of treatment on the basis of sex because of a well-established practice exempting women from jury service.

48. *Zeman v. Austria*, Reports of Judgments and Decisions 2006 (Violation of Article 14 in conjunction with Article 1 of Protocol No. 1 the Convention). Difference in treatment between men and women as regards entitlement to survivor's pension in respect of spouses not based on any objective and reasonable justification.

49. Pearson v. The United Kingdom, Reports of Judgments and Decisions 2006 (No violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1) The applicant, aged sixty three, would not become eligible for a State pension until sixty five, whereas a woman could claim a state pension from age sixty. The Court found that the difference in treatment was adopted in order to mitigate financial inequality and hardship arising out of the woman's traditional unpaid role of caring for the family in the home rather than earning money in the workplace. As a result, it held that the differentiable pension ages were intended to correct factual inequalities and would continue to be justified until such time as social conditions changed so that women were no longer substantially prejudiced because of a shorter working life.

50. *Baczkowski And Others v. Poland* , Reports of Judgments and Decisions 2007 (Violation of Article 12, 13 and 14 of the Convention). The applicants wished to organise a march aimed at bring public attention to discrimination against minorities. Permission to hold the march was refused by the mayor of Warsaw on the grounds that freedom of assembly must not include propaganda about homosexuality. The Court concluded that the applicants' freedom of assembly had been breached in a discriminatory manner.

51. *Kontrova v. Slovakia*, Reports of Judgments and Decisions 2007 (Violation of Article 2 and Article 13 of the Convention). Applicant victim of domestic abuse. Failure by the domestic authorities to take appropriate action to protect the lives of the applicant's children. Failure to provide compensation for the non-pecuniary damage suffered by the applicant in connection with her children's death.

52. *Burden v. The United Kingdom*, Reports of Judgments and Decisions 2008 (No violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1). The applicants were two elderly sisters who jointly owned property and complained to the Court of discrimination on the basis that, should one of them die, the other would face a heavy inheritance tax bill, in stark contrast to the survivor of a marriage or civil partnership (both of whom enjoy a spousal exemption under the ITA 1984). The court held that siblings and spouses/civil partners were not in an analogous situation.

53. *Bevacqua and S v. Bulgaria*, Reports of Judgments and Decisions 2008 (Violation of Article 8 of the Convention but no violation of Article 6). Failure by the State to fulfil its

positive duty under Article 8 to assist the applicant victim of domestic violence and her son to secure respect for their private and family life.

54. *E.B. v. France*, Reports of Judgments and Decisions 2008 (Violation of Article 14 of the Convention in conjunction with Article 8). Refusal of right to adopt on basis of lack of male referent and status as a single person in breach of the applicant's right to private and family life.

55. *Opuz v. Turkey*, Reports of Judgments and Decisions 2009 (Violation of Article 2, 3 and 14 of the Convention). Failure to establish and apply effectively a system in which all forms of domestic violence are punished and sufficient safeguards are put in place to protect victims. The Court concluded that domestic violence affects mainly women and that the general and discriminatory judicial passivity displayed by the national authorities was gender-based.

56. *Schlumpf v. Switzerland*, Reports of Judgments and Decisions 2009 (Violation of Article 6 and 8 of the Convention). The applicant was a male to female transsexual. The case concerned the applicant's health insurers' refusal to pay the costs of her sex change operation on the ground that she had not complied with a two year waiting period to allow for reconsideration as required by the case law of the Federal Insurance Court. The Court considered that the period of two years was likely to influence the applicant's decision as to whether to have the operation, thus impairing her freedom to determine her gender identity under Article 8. At the same time, it held that it was disproportionate not to accept expert opinions especially as it was not in dispute that the applicant was ill and that the refusal to allow the applicant to adduce such evidence amounted to a breach of Article 6.

57. *Branko Tomasic and Others v. Croatia*, Reports of Judgments and Decisions 2009 (Violation of Article 2 of the Convention). Failure to take all reasonable steps to protect a victim of domestic abuse or her family from a spouse who has previously been convicted of threatening to kill her.

58. *Rantsev v. Cyprus and Russia*, Reports of Judgments and Decisions 2009 (Violation of Article 2, Article 4 and Article 5 of the Convention). Failure by Cyprus to investigate the death of the applicant's daughter effectively, to put in place an appropriate legal and administrative framework to combat trafficking and failure to abide by its positive obligation to protect individuals from unlawful detention. Failure by Russia to investigate how the applicant's daughter was recruited into trafficking and to take steps to identify those involved in such recruitment or their methods.

59. *Women and Waves and Others v. Portugal,* Reports of Judgments and Decisions 2009 (Violation of Article 10 of the Convention). The applicant associations campaigned in favour of the decriminalisation of abortion. In 2004, a ship was chartered with the intention of holding meetings on this subject. The ship was denied entry into Portuguese waters by ministerial order on the basis of maritime and portuguese health laws. The Court considered that the authorities had acted in breach of Article 10. The Court observed that in seeking to prevent disorder and protect health, the authorities could have resorted to other means that were less restrictive of the applicant association's rights.

60. *Schwizgebel v. Switzerland*, Reports of Judgments and Decisions 2010 (No violation of Article 14 taken together with Article 8 of the Convention). The applicant was refused permission to adopt a child (partly) on the basis that the age difference between herself and the child (between 46 and 48) years would be excessive and contrary to the child's interests. The Court found that the authorities had made their decision using comprehensive enquiries

and that the criterion of age-difference had been applied flexibly and having regard to all the circumstances of the situation. Moreover, the other arguments given in support of the decision, i.e. those not based on age, had not been unreasonable or arbitrary. The difference in treatment imposed on the applicant had not, therefore, been discriminatory.

61. *Schalk and Kopf v. Austria*, Reports of Judgments and Decisions 2010 (No violation of Article 12 and no violation of Article 14 in conjunction with Article 8 of the Convention). The applicants were a same-sex couple who had been refused permission to enter into a marriage contract by the national authorities. The Court held that the European Convention of Human Rights does not oblige states to ensure the right to marry to homosexual couples. The Court underlined that national authorities are best placed to assess and respond to the needs of society in this field. Nor was it convinced that where a state chooses to provide same sex couples with an alternative means of recognition, the status conferred must correspond to marriage in every respect. The Registered Partnership Act retained some substantial differences compared to marriage in respect of parental rights but as the applicants did not claim that they were directly affected by the remaining restrictions, the Court held that it would have gone beyond the scope of the case to establish whether these were justified.

62. *J.M. v. The United Kingdom,* Reports of Judgments and Decisions 2010 (Violation of Article 14 in conjunction with Article 1 of Protocol No. 1). Court held that the rules on child maintenance prior to the introduction of the Civil Partnership Act discriminated against those in same-sex relationships.

63. *Cechova v. Slovakia,* Reports of Judgments and Decisions 2010 (Violation of Article 6 of the Convention). The applicant's former husband lodged an action against her for distribution of matrimonial property. The Court found that the length of the constitutional court's proceedings violated Article 6.

64. *Kontantin Markin v. Russia*, Reports of Judgments and Decisions 2010 (Violation of Article 14 in conjunction with Article 8). The court held that the member state's refusal to grant serviceman parental leave, unlike their female counterparts, is discriminatory. While Article 8 does not include a right to parental leave, the Court underlined that if a state decides to create a parental leave scheme, it has to do so in a non-discriminatory manner. The Court found that advancing the equality of men and women is today a major goal in the Council of Europe member states and very weighty reasons have to be put forward before a difference in treatment between the sexes can be regarded as compatible with the Convention.

JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS (PRESS RELEASES)[*1]

[*] The complete texts of the Court's judgments are available on the Court's Internet website at www.echr.coe.int

79
13.6.1979

MARCKX v. BELGIUM
judgment of 13 June 1979

The Registrar of the European Court of Human Rights announces:

By judgment delivered at Strasbourg on 13 June 1979 in the Marckx case, which concerns the Kingdom of Belgium, the Court held that certain provisions of the Belgian Civil Code infringed Articles 8 and 14 of the Convention and Article 1 of Protocol No. 1 read in conjunction with Article 14 with respect to Paula and Alexandra Marckx or one or other of them, as the case may be. The Belgian provisions in question relate to the manner of establishing the maternal affiliation of an "illegitimate" child and to the effects of establishing such affiliation as regards the extent of the child's family relationships and the patrimonial rights of the child and the mother.

The Court decided that there had been no breach of Articles 3 and 12 of the Convention which had also been relied on by the applicants.

The Judgment was read out at a public hearing by Mr. Gérard Wiarda, Vice-President of the Court.

I.
BACKGROUND OF THE CASE

A. Principal facts

1. Alexandra Marckx was born on 16 October 1973 at Wilrijk near Antwerp. She is the daughter of Paula Marckx, a Belgian national, who is unmarried and a journalist by profession.

On 29 October 1973, in pursuance of Article 334 of the Belgian Civil Code, Alexandra's mother legally recognised her in order to establish affiliation. Subsequently, on 20 October 1974, the mother adopted her daughter in accordance with Article 349 of the Civil Code; the procedure were concluded 18 April 1975 but its effects were retroactive to the date of the instrument of adoption.

2. Under Belgian law, an unmarried mother may establish the maternal affiliation of her child only by recognition, whereas the maternal affiliation of a "legitimate" child is established by the simple fact of the birth. The "illegitimate" child who has been recognised or even adopted by his mother remains in principle outside the latter's family. Furthermore, as far as inheritance on intestacy and voluntary dispositions are concerned, the Belgian Civil Code limits in varying degrees the rights of the "illegitimate" child and the unmarried mother in comparison with the rights enjoyed by the "legitimate" child and his mother.

On 15 February 1978, the Belgian Government introduced before the Senate a Bill which "seeks to institute equality in law between all children".

B. Proceedings before the Commission

3. Before the Commission, the applicants alleged that the provisions in issue infringed their right to respect for family life (Article 8 of the Convention), that these provisions involve a discrimination prohibited by Article 14 between “illegitimate” and “legitimate” children as well as between unmarried and married mothers, and that they, the applicants, are the victims of degrading treatment in breach of Article 3. They further claimed that Article 1 of Protocol No. 1 is violated by the fact that an unmarried mother may not freely dispose of her property in favour of her child. In addition, the Commission decided of its own motion to examine the case under Article 12 which sets forth the right to marry and to found a family.

In its report of 10 December 1977, the Commission expressed the opinion, with various majorities, that the impugned legislation contravenes Article 8 of the Convention taken alone and in conjunction with Article 14, with respect to both applicants, and Article 1 of Protocol No. 1 taken in conjunction with Article 14, with respect to Paula Marckx. On the other hand, the Commission did not consider it necessary to examine the case under Article 3 of the Convention and came to the unanimous view that Article 12 is not relevant.

II.
SUMMARY OF THE JUDGMENT

4. The Court noted first of all that the present proceedings are essentially concerned with Articles 8 and 14 of the Convention. Before turning to examine the different aspects of the case under these two provisions, the Court specified notably that Article 8 applies to the “family life” of the “illegitimate” family as it does to that of the “legitimate” family. Furthermore, in the Court’s view, the right to respect for family life implies, amongst other things, that when the State determines the régime applicable to certain family ties, it should act in a manner calculated to allow those concerned to lead a normal family life. In so acting as regards the unmarried mother and her child, “the State must avoid any discrimination grounded on birth” (Article 14 taken in conjunction with Article 8).

[paragraphs 28 to 34 of the judgment]

A. On the manner of establishing Alexandra Marckx’s maternal affiliation

5. As concerns Paula Marckx, the Court considered in particular that the necessity to recognise her daughter Alexandra in order to establish affiliation stemmed from a refusal to acknowledge fully her maternity from the moment of birth. The Court also drew attention to certain disadvantageous consequences in patrimonial terms resulting from recognition: if the unmarried mother recognises her child, she will at the same time prejudice him since, pursuant to the Belgian Civil Code, her capacity to give or bequeath her property to him will be restricted; if she desires to retain toe possibility of making such dispositions as she chooses in her child’s favour, she will be obliged to renounce establishing a family tie with him in law. In the Court’s view, this dilemma facing the mother is not consonant with respect for her family life.

The Court arrived at the same conclusion as far as Alexandra Marckx is concerned, since she was in the eyes of the law motherless from her birth until her recognition.

The Court therefore found a breach of Article 8 of the Convention with respect to both applicants.

[paragraphs 36 and 37 of the judgment; items 2 and 4 of the operative provisions.]

6. The Court next examined whether Paula and/or Alexandra Marckx have also been the victims of discrimination in breach of Article 14 taken in conjunction with Article 8.

In the Court's judgment, the fact that some unmarried mothers do not wish to take care of their child cannot justify the rule of Belgian law whereby the establishment of their maternity is conditional on, inter alia, voluntary recognition. Moreover, the interest of an "illegitimate" child in having such a bond established is no less than that of a "legitimate" child.

What is more, whilst recognising as legitimate or even praiseworthy the aim pursued by the Belgian legislation – namely, protection of the child and the traditional family - , the Court stated that in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the "illegitimate" family.

Finally, in reply to an argument advanced by the Government, the Court acknowledged that, at the time when the Convention was drafted, it was regarded as permissible and normal in many European countries to draw distinction in this area between the "illegitimate" and the "legitimate" family. The Court however recalled that the Convention is to be interpreted in the light of present-day conditions; it could not but be struck, it stressed, by the evolution in the domestic law of the great majority of the member States of the Council of Europe towards equality between "legitimate" and "illegitimate" children on the point under consideration. In this connection, the Court made reference to, amongst other matters, the official statement of reasons accompanying the Bill introduced by the Belgian Government before the Senate on 15 February 1978; this statement notes that "lawyers and public opinion are becoming increasingly convinced that the discrimination against [illegitimate] children should be ended".

The Court therefore found that the distinction complained of lacks objective and reasonable justification and violates, with respect to both applicants, Article 14 taken in conjunction with Article 8.

[paragraphs 38 to 43 of the judgment; items 3 and 5 of the operative provision]

B. <u>On the extent in law of Alexandra Marckx's family relationships</u>

7. The Court considered that "family life" within the meaning of Article 8 includes at least the ties between near relatives and that "respect" for family life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally. Yet the development of the family life of an unmarried mother and her child whom she has recognised may be hindered if the child does not become a member of the mother's family and if the establishment of affiliation has effects only as between the two of them.

The Court, moreover, discerned no objective and reasonable justification for the difference between the extent of Alexandra Marckx's family relationships and those of a "legitimate" child.

The Court accordingly found a breach, with respect to both applicants, of Article 8 taken alone and taken in conjunction with Article 14.

[paragraphs 44 to 48 of the judgment; items 6 and 7 of the operative provisions]

C. <u>On the patrimonial rights relied on by the applicants</u>

8. The Court considered that Articles 1 of Protocol No. 1, which embodies the right of everyone to the peaceful enjoyment of "his" possessions, does not guarantee the right to acquire possessions whether on intestacy or through voluntary disposition. As concerns Alexandra Marckx, the Court took its stand solely on Article 8, its opinion being the following:

matters of succession – and of dispositions – between near relatives prove to be intimately connected with family life, which does not include only social, moral or cultural relations but comprises also interest of material kind.

In the Court's view, it is not a requirement of Article 8 that a child should be entitled to some share in the estates of his parents or even of other near relatives. Consequently, the restrictions that the Belgian Civil Code places of Alexandra Marckx's inheritance rights on intestacy are not of themselves in conflict with Article 8. Similar reasoning is to be applied to the question of voluntary dispositions.

On the other hand, the Court judged that the distinction made in this sphere between "illegitimate" and "legitimate" children lacks objective and reasonable justification. Accordingly, Alexandra Marckx has been the victim of a breach of Article 14, read in conjunction with Article 8, by reason both of the restrictions on her capacity to receive property from her mother and of her total lack of inheritance rights on intestacy over the estates of her near relatives on her mother's side.

[paragraphs 50 to 59 of the judgment; items 9 and 10 of the operative provisions]

9. As regards Paula Marckx, the Court pointed out that Article 8 of the Convention does not of itself guarantee to a mother complete freedom to give or bequeath her property to her child. The Court considered on the other hand that the distinction made in this area between unmarried and married mothers lacks objective and reasonable justification and, with respect to Paula Marckx, is therefore contrary to Article 14 taken in conjunction with Article 8 of the Convention.

[paragraphs 61 and 62 of the judgment; items 11 and 12 of the operative provisions]

The Court also examined this issue under Article 1 of Protocol No.1 which, in its judgment, in substance guarantees the right of property, "a traditional and fundamental aspect" of which is "the right to dispose of one's property". Nevertheless, the Court noted, the general interest may in certain cases induce a legislature to control the use of property in the area of dispositions inter vivos or by will; consequently, the Court considered that the limitation complained of by Paula Marckx is not of itself in conflict with Article 1 of Protocol No. 1. On the other hand, since this limitation applies only to unmarried mothers an not to married mothers, and since the resultant distinction lacks objective and reasonable justification, the Court found, with respect to Paula Marckx, a breach of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

[paragraphs 63 to 65 of the judgment; items 13 to 15 of the operative provisions]

D. <u>On Articles 3 and 12 of the Convention</u>

10. The Court found no breach of Articles 3 or 12 of the Convention (respectively, the prohibition of degrading treatment and the right to marry and to found a family).

[paragraphs 66 and 67 of the judgment; item 16 of the operative provisions]

E. <u>On just satisfaction (Article 50 of the Convention)</u>

11. The lawyer who had represented the applicants before the Commission had asked the Court to grant to each applicant, under Article 50 of the Convention, one Belgian franc as compensation for moral damage.

The Court however considered that, in the particular circumstances of the case, it was not necessary to afford the applicants any just satisfaction other than that resulting from the finding of several violations of their rights.

[paragraph 68 of the judgment; item 17 of the operative provisions]

The Court gave judgment at a plenary sitting, in accordance with Rule 48 of the Rules of Court, and was composed as follows:

Mr. G. Balladore Pallieri (Italian), President, Mr. G. Wiarda (Dutch), Mr. M. Zekia (Cypriot), Mr. P. O'Donoghue (Irish), Mrs. H. Pedersen (Danish), Mr. Thor Vilhjálmsson (Icelandic), Mr. W. Ganshof van der Meersch (Belgian), Sir Gerald Fitzmaurice (British), Mrs. D. Bindschedler-Robert (Swiss), Mr. D. Evrigenis (Greek), Mr. G. Lagergren (Swedish), Mr. F. Gölcüklü (Turkish), Mr. F. Matscher (Austrian), Mr. J. Pinheiro Farinha (Portuguese), Mr. E. Garcia de Enterría (Spanish), Judges, and also Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar.

Several Judges expressed separate opinions which are annexed to the judgment.

31
9.10.1979

AIREY v. IRELAND
judgment of 9 October 1979

By judgment delivered at Strasbourg on 9 October 1979 in the Airey case, which concerns Ireland, the Court held that there had been violations of:

- Article 6 § 1 of the European Convention on Human Rights, by reason of the fact that Mrs Johanna Airey did not enjoy an effective right of access to the High Court to seek a decree of judicial separation (five votes to two);

- Article 8, because the means of protection her private life that such a decree would have constituted was not effectively accessible to her (four votes to three).[2]

The judgment was read at a pubic hearing by Mr Gérard J. Wiarda, Vice-President of the Court.

I.
BACKGROUND OF THE CASE

A. Principal facts

In June 1972, Mrs. Airey's husband, who had previously been convicted of assaulting her, left the matrimonial home in Cork. He has not since returned there to live.
In Ireland, there is no divorce in the sense of dissolution of a marriage. Spouses may, however, be relieved from the duty of living together either by a deed of separation concluded between then or by a decree of judicial separation which can be granted only by the High Court. Having attempted unsuccessfully to procure her husband's agreement to sign a deed of separation, Mrs. Airey has, since 1972, been trying to obtain a court decree. She has consulted several solicitors but has been unable to find one willing to act for her. Legal aid is not at present available in Ireland for the purpose of seeking a judicial separation and Mrs. Airey has insufficient means to pay the cost of proceeding herself.

B. Proceedings before the European Commission of Human Rights

In her appreciation of 14 June 1973 t the Commission, Mrs. Airey alleged, inter alia, that there had been violations of:

- Article 6 § 1 of the Convention, by reason of the fact that her right of access to a court for the purpose of petitioning for a decree of judicial separation was effectively denied due to prohibitive legal costs;

- Article 8, by reason of the failure of the State to ensure that there is an accessible legal procedure to determine rights and obligations created by legislation regulating family matters;

- Article 13, in that she was deprived of an effective remedy before a national authority for the violations complained of;

[2] The text of Articles 6 § 1 and 8, also of Articles 13, 14 and 50, of the Convention is set out in the appendix hereto.

- Article 14 in conjunction with Article 6, in that judicial separation is more easily available to those who can afford to pay than to those without financial resources.

In its report of 9 March 1978, the Commission expressed the opinion:

- unanimously, that the failure of the Sate to ensure the applicant's effective access to court to enable her to obtain a judicial separation amounted to a breach of Article 6 § 1 of the Convention;

- that it was not necessary, in view of the preceding conclusion, to pursue an examination of the issues under Articles 13 and 14 (unanimously) or under Article 8 (twelve votes to one, with one abstention).

II.
SUMMARY OF THE JUDGMENT[3]

A. Preliminary issues

The court rejected unanimously the Irish Government's submission that the Commission should have declared Mrs. Airey's application inadmissible for manifest lack of foundation. It also rejected, by six votes to one, a submission to the same effect based on her alleged failure to exhaust domestic remedies as is required by Article 26 of the Convention. [paragraphs 16-19 and 23-24 of the judgment and items 1-3 of the operative provisions]

B. Article 6 § 1

Following its decision in the Golder case, the Court first held that Article 6 § 1 comprised a right for Mrs. Airey to have access to the High Court to seek a separation decree.

The Court then replied as follows to various arguments relied on by the Government.

1. The Convention is intended to guarantee not theoretical or illusory but practical and effective rights. Having regard to the complexity of the procedure and points of law involved, to the evidential questions arising and to the emotional involvement entailed by marital disputes, the possibility open to Mrs. Airey of conducting her case herself did not provide her with an effective right of access. This view was supported by statistics showing that all those who had petitioned for judicial separation between 1972 and 1978 had been represented by a lawyer.

2. The fact that the alleged lack of access stemmed solely from Mrs. Airey's personal circumstances was not decisive. Hindrance in fact can constitute a violation of the Convention just like a legal impediment and certain Convention obligations, such as that to secure an effective right of access to the courts, on occasion necessitate positive State action.

3. Although the Convention contains no provision on civil legal aid, Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when it proves indispensable. However, contrary to the Government's contention, it does not follow that free legal aid must be available for every dispute relating to a civil right. Firstly, the possibility of conducting one's own case without a lawyer may in certain eventualities provide an effective right of access to the courts. Secondly, the institution of a legal aid scheme is one means of

[3] This summary, prepared by the Registry, does not in any way bind the Court.

securing such access but there are others, such as a simplification of procedure, and Article 6 § 1 leaves to the State a free choice of the means to be used.

4. The mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights is to a decisive factor against that interpretation: there is no water-tight division between that sphere and the field covered by the Convention.

The Court concluded, by give votes to two, that, having regard to all the circumstances, Mrs,. Airey did not enjoy an effective right of access to the High Court and that there had accordingly been a breach of Article 6 § 1. [paragraphs 20-28 of the judgment and item 4 of the operative provisions]

C. Article 8

After recalling that this Article may impose on States positive obligations inherent in an effective respect for private or family life, the Court held, by four votes to three, as follows. The existence of the remedy of judicial separation amounts to recognition of the fact that the protection of private or family life may sometimes necessitate spouses' being relieved from the duty of cohabitation. Effective respect for such life obliges Ireland to make this means of protection effectively accessible, when appropriate, but this was not so in Mrs. Airey's case because of her inability to apply to the High Court. Accordingly, she had been the victim of a violation of Article 8. [paragraphs 31-33 of the judgment and item 6 of the operative provisions]

D. Articles 13 and 14

The Court held, by four votes to three, that it was not necessary for it to examine the case under these Article s[paragraphs 29-30 and 34-35 of the judgment and items 5 and 7 of the operative provisions]

E. Article 50

The applicant had claimed, by way of just satisfaction under this Article, effective access to a remedy for breakdown of marriage and monetary compensation for pain, suffering and mental anguish and for costs incurred. The Court reserved this questions and invited the Commission to submit, within two months, its observations thereon, including notification of any settlement arrived at between the Government and the applicant [paragraphs 36-37 of the judgment and item 8 of the operative provisions]

In accordance with the Convention, judgment was given by a Chamber composed of seven judges, namely Mr. G. Wiarda (Dutch), President, Mr. P. O'Donoghue (Irish), Mr. Thor Vilhjàlmsson (Icelandic), Mr. W,. Ganshof van der Meersch (Belgian), Mr. D., Evrigenis (Greek), Mr. L. Liesch (Luxembourger) and Mr. F. Gölcüklü (Turkish), and of Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar.

Three separate opinion are attached to the judgment.

55
21.10.1981

DUDGEON v. UNITED KINGDOM
judgment of 22 October 1981

By judgment delivered at Strasbourg on 22 October 1981 in the Dudgeon case, which concerns the United Kingdom, the Court held by fifteen votes to four that the existence in Northern Ireland of laws which have the general effect of criminalising homosexual relations in private between consenting adult males gives rise to a breach of the applicant's rights under Article 8 of the European Convention on Human Rights[4].

The judgment was read out at a public hearing by Judge John J. Cremona.

I.
BACKGROUND OF THE CASE

A. Principal facts

In Northern Ireland, under the Offences against the Person Act 1861 and the Criminal Law Amendment Act 1885 acts of buggery and gross indecency between men, whether committed in private or in public, are made criminal offences punishable with maximum sentences of life imprisonment and two years' imprisonment respectively. Homosexual acts between consenting adult women are not criminal offences.

Subject to certain exceptions concerning mental patients, members of the armed forces and merchant seamen, homosexual acts committed in private between two consenting males aged 21 or over have ceased to be criminal offences in England and Wales since the passing of the Sexual Offences Act 1967 and in Scotland since the passing of the Criminal Justice (Scotland) Act 1980.

In July 1978, the United Kingdom Government published a proposal for draft legislation to bring Northern Ireland law on the matter broadly into line with that of England and Wales. However, following consultation of the population of Northern Ireland, the Government announced in July 1979 that they did not intend to pursue the proposed legislative change.

Mr. Dudgeon, a United Kingdom citizen in his mid-thirties resident in Northern Ireland, is a homosexual. For some time he and others have been conducting a campaign aimed at reforming Northern Ireland law on homosexuality. He was himself questioned by the police in January 1976 about alleged homosexual activities. The matter was referred to the Director of Public Prosecutions, but Mr. Dudgeon was informed in February 1977 that he was not to be prosecuted.

B. Proceedings before the European Commission of Human Rights

The case originated in an application lodged by Mr. Dudgeon with the Commission in May 1976. Mr. Dudgeon submitted that the criminal laws in force in Northern Ireland prohibiting homosexual activities in private between consenting male adults involve an unjustified interference with his rights, under Article 8 of the Convention, to respect for his private life. He further claimed to be a victim of discrimination in breach of Ar5icle 14 of the Convention in that, as a male homosexual, he is subject to greater restrictions than are male homosexuals in other parts of the United Kingdom and heterosexuals and female homosexuals in Northern Ireland itself.

[4] The text of the Convention Articles referred to in this release is set out in the appendix hereto.

In its report adopted on 13 March 19809, the Commission expressed the opinion that:

- The legal prohibition of private consensual homosexual acts involving male persons under 21 years of age was not in breach of the applicant's rights either under Article 8 (eight votes to two) or Article 14 read in conjunction with Article 8 (either votes to one, with one abstention);

- The legal prohibition of such acts between male persons over 21 years of age breached the applicant's right to respect for private life under Article 8 (nine votes to one);

- It was not necessary to examine the question whether the last-mentioned prohibition also violated Article 14 read in conjunction with Article 8 (nine votes to one).

The Commission referred the case to the Court on 18 July 1980.

II.
SUMMARY OF THE JUDGMENT[5]

A. Article 8

The very existence of the impugned legislation, the Court held, constitutes a continuing interference with the applicant's right to respect for his private life - which includes his sexual life - within the meaning of paragraph 1 of Article 8. Moreover, the police investigation in January 1976 showed that the threat represented by the legislation was real.
[paragraph 40 to 41 of the judgment]

The Government had argued that the interference with Mr. Dudgeon's private life is justified since the present laws in Northern Ireland relating to homosexual acts are necessary in a democratic society for, inter alia, the protection of morals with the meaning of paragraph 2 of Article 8.

The Court recognised the legitimate need in a democratic society for some degree of regulation of male homosexual conduct, as indeed of other corms of sexual conduct, by means of the criminal law. The application of penal sanctions was justifiable where there was a call to protect the public at large from offences and injury and, even in relation to consensual acts committed in private, to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth.
[paragraphs 48 to 49 of the judgment]

The judgment, after specifying that the Court is not concerned with making any value judgment as to the morality of homosexual relations between adult males, proceeds to examine whether the reasons purporting to justify the actual interference with Mr. Dudgeon's private life are relevant and sufficient under Article 8 § 2. It deals firstly with the various arguments advanced by the Government to contest the Commission's conclusion that the penal prohibition of consensual homosexual acts involving male persons over 21 years of age is not justified.
[paragraphs 50 to 55 of the judgment]

Amongst other things, the Court acknowledged the differences of attitude and public opinion between Northern Ireland and Great Britain in relation to questions of morality do exist to a

[5] This summary, prepared by the Registry, does not in any way bind the Court.

certain extent and are a relevant factor. It therefore followed that the moral climate in sexual matters in Northern Ireland, in particular as evidenced by the opposition to the proposed legislative change, was one of the matters which the national authorities could properly take in to account in assessing whether or not there was a "pressing social need" to keep the law in force unamended.
[paragraphs 56 to 59 of the judgment]

The Court then turned to determine whether the reasons found to be relevant were sufficient. As compared with the era when the impugned legislation was enacted, there is not a better understanding of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer judged to be necessary or appropriate to treat homosexual practices of the kind in question as in themselves a matter to which the sanctions of the criminal law should be applied. The judgment adverts to the fact that in Northern Ireland itself the authorities have in recent years refrained from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years. It could not be maintained in these circumstances that here is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society, for example the young, or by the effects on the public. The Court considered that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in issue can have on the life of a person of homosexual orientation like the applicant.

Accordingly the reasons given by the Government, although relevant, were not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent.
[paragraphs 60-61 of the judgment]

The Court did not rule, as the Commission had done in its opinion, on the question whether the interference complained of by the applicant could, in so far, as he is prevented from having sexual relations with males under 21 years of age, be justified as necessary for the moral protection of young persons. The Court explained that it falls in the first instance to the national authorities to decide on the appropriate safeguards required in this respect and, in particular, to fix the age under which young people should have the protection of the criminal law.
[paragraph 62 of the judgment]

The Court concluded by fifteen votes to four that, in breach of Article 8, Mr. Dudgeon had suffered and continues to suffer an unjustified interference with this right to respect for his private life.
[paragraph 63 of the judgment and point 1 of the operative provisions]

B. Article 14

By fourteen votes to five, the Court held that, in the particular circumstances, it was not necessary to examine the case under Article 14 as well.
[paragraph 64 to 70 of the judgment and point 2 of the operative provisions]

C. Article 50 (Just Satisfaction)

The applicant had claimed just satisfaction in respect of distress and suffering he had undergone and various expenses incurred. This question was found not be ready for decision; it was reserved and referred back to the Chamber originally constituted to hear the case and which had relinquished jurisdiction in favour of the plenary Court in January 1981.

[paragraphs 71 to 72 of the judgment and point 3 of the operative provisions]

The Court gave judgment at a plenary sitting, in accordance with Rule 48 of the Rules of Court, and was composed as follows:

Mr R. Ryssdal (Norwegian), President, Mr. M. Zekia (Cypriot), Mr. J. Cremona (Maltese), Mr. Thór Vilhjálmsson (Icelandic), Mr. W,. Ganshof van der Meersch (Belgian), Mr. D. Binderschedler-Robert (Swiss), Mr. D. Evrigenis (Greek), Mr. G. Lagergren (Swedish), Mr. L. Liesch (Luxemburger), Mr. F. Gölcüklü (Turkish), Mr. F. Matscher (Austrian), Mr. J. Pinheiro Farinha (Portuguese)m, Mr. E. García de Enterría (Spanish), Mr. L.-E. Pettiti (French), Mr. B. Walsh (Irish), Sir Vincent Evans (British), Mr. R. Macdonald (Canadian),m Mr. C. Russo (Italian), Mr. R. Bernhardt (German), Judges, and also Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar.

Several judges expressed separate opinions which are annexed to the judgment.

1096
28.11.1984

RASMUSSEN v. DENMARK
judgment of 28 November 1984

By judgment delivered at Strasbourg on 28 November 1984 in the Rasmussen case, which concerns Denmark, the European Court of Human Rights held unanimously that there had been no violation of Article 14 taken in conjunction with Article 6 or with Article 8 of the European Convention on Human Rights.

I.
BACKGROUND OF THE CASE

A. Principal facts

Mr. Rasmussen married in 1966 and in January 1971 his wife gave birth to a female child. Doubts arose as to the paternity of the child, but the applicant refrained from bringing any action to contest paternity in order to save the marriage.

The applicant and his wife divorced in July 1975. In accordance with an agreement concluded previously with his wife, Mr. Rasmussen undertook not to institute any proceedings to contest paternity and his wife abandoned any claim for maintenance of the child.

In January 1976, the applicant's former wife wrote to him contenting that she was not bound by this agreement. He thereupon applied to the Court of Appeal for leave to institute proceedings to contest paternity, the time-limits prescribed by section 5 (2) of the 1960 Act on the legal Status of Children having expired. However, the Court of Appeal refused leave on 12 April 1976 on the ground that there were no special circumstances to warrant granting any exemption from the requisite time-limits.

After having obtained fresh information, Mr. Rasmussen applied once more to the Court of Appeal in November 1978, but leave was again refused. This decision was subsequently upheld by the Supreme Court in January 1979.

B. Procedure before the European Commission of Human Rights

The case originated in an application lodged with the Commission by Mr. Rasmussen on 21 May 1979. He claimed that he had been the victim of discrimination based on sex, in that, under the relevant Danish legislation, his right of access to the courts in order to challenge paternity was subject to time-limits, whereas his former wife could have applied at any time. He relied on Article 14 taken in conjunction with Articles 6 and/or Article 8 of the Convention.

On 8 December 1981, the Commission declared Mr. Rasmussen's application admissible. In its report of 5 July 1983, the Commission expressed the opinion (by eights votes to five) that there had been a breach of Article 14 taken in conjunction with Article 6 and 8.

The Commission referred the case to the Court on 12 October 1983.

II.
SUMMARY OF THE JUDGMENT

I. Applicability of Article 6 and/or 8

Article 14 has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by the Convention.

The Court considered that the public interest involved – which had been emphasised by the Government – could not exclude the applicability of Article 6 to litigation which was, by its very nature, "civil" in character: an action contesting paternity had that character since it was a matter of family law. Furthermore, the proceedings in question undoubtedly concerned the applicant's private life. The facts of the case thus fell within the ambit of Articles 6 and 8.

[paragraphs 29-33 of the judgment]

II. Was there a difference of treatment?

The Court found that there was a difference of treatment as between Mr. Rasmussen and his former wife, since under the 1960 Act the husband, unlike the mother, had to institute paternity proceedings within prescribed time-limits. There was no call to determine on what ground this difference was based, the list appearing in Article 14 not being exhaustive.

[paragraphs 33-37 of the judgment]

III. Were the applicant and his former wife placed in analogous situations?

The Government supported the conclusion of the minority of the Commission that husband and wife were not placed in analogous situations. The Court did not consider that it had to resolve this issue.

[paragraphs 35-37 of the judgment]

IV. Was there an objective and reasonable justification?

The Government had pleaded that the difference of treatment was justified, notably in the interest of the child, and had relied on the States' "margin of appreciation" in the matter.

The Court pointed out that this "margin of appreciation" varied according to the circumstances, the subject-matter and its background; in this respect, the existence or non-existence of common ground between the laws of the Contracting States might be relevant. It found that there was no such common ground in the area in question.

The Court had close regard to the circumstances and the general background. Bearing in mind the authorities' margin of appreciation in the matter, the Court concluded that they were entitled to think at the relevant time that the introduction of time-limits solely for the husband was justified for legitimate purposes, namely to ensure legal certainty and to protect the interests of the child, with which the mother's interests usually coincided. The Court also considered that the authorities had not transgressed the principle of proportionality. Accordingly, the difference of treatment complained of was not discriminatory, within the meaning of Article 14, and there had therefore been no violation of that Article taken in conjunction with Article 6 or with Article 8.

[paragraphs 38-42 and the operative provisions of the judgment]

In accordance with the Convention, the judgment was delivered by a Chamber composed of seven judges, namely Mr. G. Wiarda (Dutch), President, Mr. W. Ganshof van der Meersch (Belgian), Mrs. D. Bindschedler-Robert (Swiss), Mr. F. Matscher (Austrian), Mr. R. Macdonald (Canadian), Mr. C. Russo (Italian) and Mr. J. Gersing (Danish), and of Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar.

One judge expressed a separate opinion which is annexed to the judgment.

24
26.3.1985

X AND Y v. THE NETHERLANDS
judgment of 26 March 1985

By judgment delivered at Strasbourg on 26 March 1985 in the case of X and Y v. the Netherlands, the European Court of Human Rights held unanimously:

- that the applicant Mill Y, who had been the victim of a sexual assault, had not had the protection under criminal law which, in the circumstances of the case, was required in order to secure respect for her private life, within the meaning of Article 8 of the Convention;

- that it was not necessary to give a separate decision on her other complaints or on those of Mr. X, her father;

- that the Netherlands was to pay 3,000 Dutch Guilders to Miss Y by way of just satisfaction under Article 50.

I.
BACKGROUND OF THE CASE

A. Principal facts

Miss Y, who is mentally handicapped and was born on 13 December 1961, was living in a home for mentally handicapped children, where she was receiving special care. In the night of 14 to 15 December 1977, she was sexually assaulted by Mr. B.

On 16 December 1977, Mr. X, acting in his capacity of father of Miss Y, lodged a complaint with the local police. His daughter, although sixteen years of age, was mentally incapable of acting in person.

On 29 May 1978, the public prosecutor's office decided not to prosecute Mr. B because the complaint had not been filed in due time by the victim herself. On 12 July 1979, the Arnhem Court of Appeal dismissed Mr. X's appeal against this decision: Article 248 ter of the Criminal Code, under which acts of the kind on question were punishable, would have been applicable only if the victim herself had taken action; the father's complaint was not a substitute for the complaint which should have been lodged by Miss Y, had she been able to do so (which was not the case). There was on this point a gap in the law.

B. Proceedings before the European Commission of Human Rights

The case originated in an application against the Netherlands lodged with the Commission in January 1980 by Mr. X on his won behalf and on behalf of Miss Y.

Mr. X claimed that his daughter had been subjected to treatment that was "inhuman and degrading", within the meaning of Article 3 of the Convention, and that he and his daughter had both been victims of a breach of their right to "respect for private life", as guaranteed by Article 8. He further contended that the right to "respect for family life", set out in the same Article, meant that parents must be able to have recourse to remedies in the event of sexual assaults on their children, especially if the children were minors and the father was their legal representative. He also claimed that he and his daughter had not had an "effective remedy

before a national authority" as required by Article 13, and that the situation complained of was discriminatory and contrary to Article 14.

The Commission declared the application admissible on 17 December 1981. In its report of 5 July 1983, it expressed the opinion:

- as regards Miss Y:
  - that there had been a breach of Article 8 of the Convention (unanimously) but not of Article 3 (fifteen votes to one);
  - that it was not necessary to examine the application either under Article 14 taken in conjunction with Article 8 or 3 or under Article 13;
  - as regards Mr. X, that no separate issue arose concerning his right to respect for family life.

The Commission referred the case to the Court on 13 December 1983.

II.
SUMMARY OF THE JUDGMENT

I. Article 8, taken alone, as regards Miss Y

The applicability of Article 8 to the facts of the case was not disputed. This Article may involve, in addition to the obligation there under to abstain from interference, the adoption of positive measures concerning the relations of individuals between themselves.

[see paragraphs 21-23 of the judgment]

1. Necessity for criminal-law provision

The Court considered the protection afforded by the civil law to be insufficient in the case of wrongdoing of the kind in question, which affects fundamental values and essential aspects of private life: only criminal-law provisions can achieve the deterrence which is indispensable.

[see paragraphs 24-27 of the judgment]

2. Compatibility of the Netherlands legislation with Article 8

The Court regarded it as established that criminal proceedings could not be instituted on the basis of Article 248 ter of the Criminal Code; this was shown by the judgment of the Arnhem Court of Appeal.

Since no other provision afforded practical and effective protection, Miss Y had been the victim of a violation of Article 8.

[see paragraphs 28-30 of the judgment and point 1 of the operative provisions]

II. Article 14, taken in conjunction with Article 8, as regards Miss Y

An examination of the case under Article 14 is not required when the Court has found a violation of the Article enshrining a right, unless a clear inequality of treatment in the

enjoyment of that right is a fundamental aspect of the case. The latter situation did not obtain here.

Accordingly, the Court did not deem it necessary to examine this issue.

[see paragraphs 31-32 of the judgment and point 2 of the operative provisions]

III. Article 3, taken alone or in conjunction with Article 14, as regards Miss Y

Having found that Article 8 had been violated, the Court did not consider it necessary to examine the case under Article 3 as well.

[see paragraphs 33-34 of the judgment and point 2 of the operative provisions]

IV Article 13 as regards Miss Y

The Court had already considered under Article 8 the consequences of the absence of a means of obtaining a remedy and therefore did not have to do so under Article 13.

[see paragraphs 35-36 of the judgment and point 2 of the operative provisions]

V. Complaints of Mr. X

Counsel for the applicants had not reverted to this aspect of the case at the hearings; the Court saw no necessity to give a decision thereon.

[see paragraph 37 of the judgment and point 2 of the operative provisions]

VI Article 50

The Court awarded Miss Y 3,000 Dutch Guilders by way of just satisfaction for non-pecuniary damage.

[see paragraphs 38-40 of the judgment and point 3 of the operative provisions]

49
28.5.1985

ABDULAZIZ, CABALES AND BALKANDALI v. THE UNITED KINGDOM
judgment of 28 May 1985

By the judgment delivered at Strasbourg on 28 May 1985 in the case of Abdulaziz, Cabales and Balkandali, which concerns the United Kingdom, the European Court of Human Rights held unanimously that:

- The authorities' refusal, under the immigration rules, to permit Mr. Abdulaziz, Mr. Cabales, and Mr. Balkandali to remain with or join the applicants in the United Kingdom as their husbands did not constitute lack of respect for the applicants' family life (Article 8 of the European Convention on Human Rights) or degrading treatment (Article 3);

- since wives could, under the rules, be accepted for settlement in the United Kingdom more easily than husbands, the applicants had been victims of discrimination on the ground of sex, in violation of Article 14; they had also had no effective remedy of this point, in violation of Article 13;

-the applicants had not been victims of discrimination of the ground of race or (in the case of Mrs. Balkandali) on the ground of birth;

-the United Kingdom was to pay to the applicants a specified sum for their costs and expenses, but not monetary compensation for non-pecuniary damage.

The judgment was read out at a public hearing by Mr. Gérard Wiarda, the President of the Court.

I.
BACKGROUND OF THE CASE

A. Principal facts

1. Mrs. Abdulaziz, who is of Indian origin, was born in Malawi in 1948. She claims to be stateless. She has lived in the United Kingdom, with leave, since 1977 and in May 1979 was given leave to remain there indefinitely. In December 1979, she married Mr. Abdulaziz, a Portuguese national who had emigrated to Portugal from India, where he was born, and was then in the United Kingdom with leave to remain for a limited period. In July 1980, the authorities refused him leave to remain permanently; an appeal against this decision was unsuccessful.

Subsequently, Mr. Abdulaziz remained, and still remains, in the United Kingdom, without leave. A son was born to the couple in 1982.

2. Mrs. Cabales, who is of Asian origin, was born in the Philippines in 1939. She has lived in the United Kingdom, with leave, since 1967 and in June 1971 was given leave to remain there indefinitely. In 1980, she and Mr. Cabales, a citizen of the Philippines, went through a ceremony of marriage in that country. In February 1981, the authorities refused him a visa to join Mrs. Cabales for settlement in the United Kingdom; an appeal against this decision was unsuccessful. At that time, she was also a citizen of the Philippines.

Between 1980 and 1984, Mr. Cabales continued to live in the Philippines and the couple were separated, apart from a short period in 1983. In 1984, Mrs. Cabales obtained, under recent legislation, naturalisation as a British citizen. The United Kingdom authorities, who considered that the Philippine marriage was invalid, subsequently again refused Mr. Cabales leave to settle permanently as a husband but allowed him to enter the country temporarily as the fiancé of a British citizen. The parties were married in the United Kingdom in January 1985, whereupon Mr. Cabales was granted leave to remain, as a husband, for twelve months; on the expiry of that period, he will be eligible to apply for indefinite leave.

3. Mrs. Balkandali was born in Egypt in 1946 or 1948. She has lived in the United Kingdom, with leave, since 1973. By virtue of her marriage in 1978 to a United Kingdom citizen – which marriage was later dissolved -, she obtained indefinite leave to remain in the United Kingdom and also citizenship of the United Kingdom and Colonies. In 1981, she married Mr. Balkandali, a Turkish citizen, who was then in the United Kingdom without leave. In May of that year, the authorities refused an application for leave for him to remain in the country. The couple have a son.

Following the authorities' decision, Mr. Balkandali remained in the United Kingdom, without leave. However, by virtue of intervening legislation, his wife subsequently became a British citizen; as the husband of such a citizen, Mr. Balkandali was granted, in 1983, limited leave and, in 1984, indefinite leave to remain in the United Kingdom.

4. The authorities' decision mentioned above were taken in accordance with the immigration rules in force at the relevant time. Prior to 1983, their general affect was that a foreign husband wishing to join or remain with his wife lawfully settled in the United Kingdom would not be granted leave to enter or stay unless, inter alia, she was a citizen of the United Kingdom and Colonies who or one of whose parents had been born in the United Kingdom. Since 1983, this condition has been replaced by a requirement that the wife be a British citizen, the place of her own or her parents' birth no longer being material.

On the other hand, a foreign wife wishing to join or remain with her husband lawfully settled in the United Kingdom could, prior to 1983, obtain leave to enter or sty, whether or not he was a citizen of the United Kingdom and Colonies with the territorial birth link; since 1983, she can obtain such leave, whether or not he is a British citizen.

B. Proceedings before the European Commission of Human Rights

The application of Mrs. Abdulaziz was lodged with the Commission in December 1980 and those of Mrs. Cabales and Mrs. Balkandali in August 1981. On 11 May 1982, the Commission declared the three applications admissible and ordered their joinder.

Having attempted without success to secure a friendly settlement, the Commission drew up a report establishing the facts and stating its opinion as to whether they disclosed a breach by the United Kingdom of its obligations under the Convention.

In the report, which was adopted on 12 May 1983, the Commission expressed the opinion that:

- the three applicants had been victims of discrimination on the ground of sex, contrary to Article 14 in conjunction with Article 8 (unanimously), but not of discrimination on the ground of race (nine votes to three);

- in the case of Mrs. Balkandali, the original application of the immigration rules had constituted discrimination on the ground of birth, contrary to the same Articles (eleven votes with one abstention;

- the absence of effective domestic remedies for the three applicants' claims under Article 3, 8 and 14 constituted a violation of Article 13 (eleven votes to one),

- it was not necessary to pursue a further examination of the matter in the light of Articles 3 and 8.

The Commission referred the case to the Court on 14 October 1983.

II.
SUMMARY OF THE JUDGMENT

I. Article 8 of the Convention, taken alone

1. The Court first rejected various arguments advanced by the United Kingdom Government in support of a plea that Article 8 was not applicable.

a) Although some aspects of the right to enter a country were governed by Protocol No. 4 to the Convention (which Protocol had not been ratified by the United Kingdom), it was not to be excluded that measures in the field of immigration might affect the right to respect for family life under Article 8 of the Convention. The applicants were complaining not of being refused leave to enter or remain in the United Kingdom, but of being deprived or threatened with deprivation of the society of their spouses there.

b) Whilst Article 8 presupposed the existence of a family, not all intended family life fell entirely outside its ambit; the word "family" had at any rate to include the relationship arising from a lawful and genuine marriage, such as that contracted by Mrs. Abdulaziz and Mrs. Balkandali.

c) The Court did not have to resolve the difference of opinion concerning the validity of the marriage ceremony which Mr. and Mrs. Cabales had gone through in the Philippines. The evidence confirmed that they believed themselves to be married and that they genuinely wished to cohabit and lead a normal family life. The committed relationship thus established was, in the circumstance, sufficient to attract the application of Article 8.

[see paragraphs 58-65 of the judgment and point 1 of the operative provisions]

2. Although the essential object of Article 8 was to protect the individual against arbitrary interference by the public authorities, there might in addition be positive obligations inherent in an effective respect for family life. In this area, the Contracting States enjoyed a wide margin of appreciation in determining the steps to be taken.

3. The duty imposed by Article 8 could not be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their residence and to accept the non-national spouses for settlement there. The applicants, who at the time of their marriage could or should have known the effect of the immigration rules, had not shown that there were obstacles to establishing family life in their own or their husbands' home countries or that there were special reasons why this could not be expected of them. There had therefore been no lack of respect for their family life and no breach of Article 8 taken alone.

[see paragraphs 66-69 of the judgment and point 1 of the operative provisions]

II. Article 14 of the Convention, taken together with Article 8

Although Article 8 taken alone had not been violated, the facts of the case fell within its ambit, with the result that Article 14 was applicable. Under the latter Article, a difference of treatment was discriminatory if it had no objective and reasonable justification.

[see paragraphs 70-73 of the judgment and point 2 of the operative provisions]

A. Alleged discrimination on the ground of sex

1. Under relevant immigration rules, it was easier for a man settled in the United Kingdom than for a woman so settled to obtain permission for his or her non-national spouse to enter or remain in the country for settlement.

2. The Court accepted that the rules had the aim, which was legitimate, of protecting the domestic labour marked at a time of high unemployment. However, since advancement of the equality of the sexes was a major goal in the Council of Europe member States, a difference of treatment on the ground of sex could be regarded as compatible with the Convention only if very weighty reasons were advanced.

3. Having considered the statistics supplied to it, the Court was not convinced that the difference that might exist between the respective impact of men and of women on the labour marked was sufficiently important to justify the difference of treatment. Neither was it persuaded that the rules' additional aim of advancing public tranquillity was served by the distinction drawn therein between men and women. Again, the fact that the United Kingdom might have acted, as regards the admission of wives for settlement, more generously that the Convention required did not of itself preclude a violation of Article 14.

4. The Court thus held that the three applicants had been victims of discrimination on the ground of sex, contrary to Article 14 taken together with Article 8, in the securing of their right to respect for family life.

[see paragraphs 74-83 of the judgment and point 3 of the operative provisions]

Alleged discrimination on the ground of race

1. The Court noted that the relevant immigration rules made no distinction on the ground of race: they were applicable across the board to all intending immigrants and were grounded not on objections regarding their origin but on the need to reduce immigration with a view to protecting the domestic labour market. This conclusion was not altered by certain special features of the rules on which the applicants relied. Again, the fact that at the relevant time fewer white people that others were affected by the rules derived not from their content but from the preponderance, amongst would-be immigrants, of some ethnic groups.

2. The applicants had therefore not been victims of discrimination on the ground of race.

[see paragraphs 84-86 of the judgment and point 4 of the operative provisions]

C. Alleged discrimination on the ground of birth

1. Mrs. Balkandali complained of the fact that, as between women citizens of the United Kingdom and Colonies settled in the United Kingdom, only those born or having a parent born there could, under the relevant immigration rules, have their non-national husband accepted for settlement.

2. The Court found that this difference of treatment on the ground of birth had an objective and reasonable justification, namely the concern to avoid the hardship which women having close ties to the United Kingdom stemming from birth there would encounter if, on marriage, they were obliged to move abroad in order to remain with their husbands.

3. Mrs. Balkandali had accordingly not been the victim of discrimination on the ground of birth.

[see paragraphs 87-89 of the judgment and point 4 of the operative provisions]

III. Article 3 of the Convention

The Court rejected the applicants' claim that they had been victims of "degrading" treatment, in breach of Article 3: the difference of treatment complained of did not denote contempt or lack of respect for their personality and was not designed to, and did not, humiliate or debase.

[see paragraphs 90-91 of the judgment and point 5 of the operative provisions]

IV. Article 13 of the Convention

Since the Convention had not been incorporated into United Kingdom domestic law, there could be no effective remedy before a national authority in regard to the discrimination on the ground of sex of which the applicants had been victims. There had thus, in this respect, been a breach of Article 13.

[see paragraphs 92-93 of the judgment and point 6 of the operative provisions]

V. Article 50 of the Convention

1. The Court did not accept a claim by the applicants for "substantial" compensation for non-pecuniary damage. Whilst accepting that they had suffered distress and anxiety, the Court held that its findings of violation of themselves constituted sufficient just satisfaction; it noted, inter alia, that the couples concerned could have lived in Portugal, the Philippines or Turkey, respectively, and that Mr. and Mrs. Abdulaziz and Mr. and Mrs. Balkandali had not, in fact, been prevented from living together in the United Kingdom.

2. The Court held that the United Kingdom was to pay to the applicants the amounts which they had claimed in respect of their costs and expenses referable to the Strasbourg proceedings.

[see paragraphs 94-100 of the judgment and point 7 of the operative provisions]

The Court gave judgment at a plenary sitting, in accordance with Rule 50 of the Rules of Court, and was composed as follows:
Mr. G. Wiarda (Dutch), President, Mr. R. Ryssdal (Norwegian), Mr. J. Cremona (Maltese), Mr. Thór Vilhjálmsson (Icelandic), Mr. W. Ganshof van der Meersch (Belgian), Mr. D. Evrigenis (Greek), Mr. F. Gölcüklü (Turkish), Mr. F. Matscher (Austrian), Mr. L.öE. Pettiti (French), Mr. B. Walsh (Irish), Sir Vincent Evans (British), Mr. C. Russo (Italian), Mr. R. Bernhardt (German) and Mr. J. Gersing (Danish), Judges, and also Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar.

Four judges expressed separate opinions which are annexed to the judgment.

91
17.10.1986

REES V. THE UNITED KINGDOM
judgment of 17 October 1986

By judgment delivered at Strasbourg on 17 October 1986 in the Rees case, which concerns the United Kingdom, the European Court of Human Rights held that there is no violation of the European Convention on Human Rights. The Court rejected, by twelve votes to three, the claim of Mr. Mark Rees, a transsexual, that he was a victim of national legislation and practices contrary to his right to respect for his private life, enshrined in Article 8 of the Convention, and, unanimously, his claim that the impossibility under English law for him to enter into a valid contract of marriage with a woman amounted to a violation of his right to marry as guaranteed by Article 12 of the Convention[6].

The judgment was read out at a public hearing by Mr. Rolv Ryssdal, the President of the Court.

I.
BACKGROUND OF THE CASE

A. Principal facts

At birth, in 1942, the applicant possessed all the physical and biological characteristics of a child of the female sex. However, already from a tender age the child started to exhibit masculine behaviour and was ambiguous in appearance. Treatment for sexual conversion began in 1970 and the applicant changed her female forenames to masculine one in 1971. He has been living as a male ever since and he is socially accepted as such. In 1977 he changed his name again, to Mark Nicholas Alban Rees, which is his present name. Except for his birth certificate, all official documents (such as passport, etc.) today refer to him by his new names and the prefix “Mr.”, where such prefix is used. His application to have also the birth register corrected so as to reflect his change of sexual identify was turned down by the Registrar General on 25 November 1980.

In the United Kingdom no uniform, general decision has been adopted either by the legislature or by the courts as to the civil status of post-operative transsexuals. However, with regard to e.g. marriage, which under English law is open only to persons of opposite sex, the established case-law is that of the four criteria typically determining sex – chromosomal, gonadal, genital and psychological factors – the first three, i.e. the biological ones, determine whether the persons concerned are respectively man and women.

There is furthermore no integrated system of civil status registration, but only separate registers for births, marriages, deaths and adoptions, which record the relevant events in the manner they occur, i.e. as historical facts, without, except in special circumstances (such as adoption or legitimation), mentioning changes (of names, address, etc.) which in other states are registered. Persons are free to change their names at will with little or no formality. Civil status certificates or equivalent current identity documents are not in sue or required. Where some form of identification is needed, this is normally met by the production of a driving licence or a passport.

Sexual reassignment operations are permitted without legal formalities. The operations and treatment may, as in the case of Mr. Rees, be carried out under the National Health Service.

B. Proceedings before the European Commission of Human Rights

[6] The test of the Articles in question is set out in the appendix hereto.

The application was brought before the Commission on 18 April 1979 and was declared admissible on 15 March 1984.

Having unsuccessfully attempted to achieve a friendly settlement, the Commission drew up a report establishing the facts and stating an opinion as to whether or not they disclosed a breach by the United Kingdom of its obligations under the Convention. In its report of 12 December 1984, it expressed the unanimous opinion that there had been a breach of Article 8 but not of Article 12.[7]

The Commission referred the case to the Court on 14 March 1985.

II.
SUMMARY OF THE JUDGMENT[8]

A. Article 8 of the Convention

1. Interpretation of Article 8 in the context of the present case.

The Court first pointed out that Mr. Rees' complaint under Article 8 raised the question of what positive obligations may be inherent in an effective respect for private life.

It held that the existence and scope of these obligations in this area – where there is little common ground between the legal situations obtaining in the different Contract States, which therefore enjoy a wide margin of appreciation – depends on the fair balance to be struck between the general interest of the community and the interests of the individual, and that in achieving this balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance.
[paragraphs 35-37 of the judgment]

2. Compliance with Article 8

The Court noted that the United Kingdom has endeavoured to meet the applicant's demands as far as possible under its existing system, in which the birth certificate is a record of historical fact only and there is no provision for legally valid civil status certificates.

It found that, in these circumstances, the striking of a fair balance cannot be considered to require what would from one perspective seem to be the essence of the applicant's demands, namely, the introduction of a new type of documentation showing and constituting proof of current civil status; such a change has not hitherto been considered necessary in the United Kingdom, would have important administrative consequences and would impose new duties on the rest of the population.

Interpreted somewhat more narrowly, the applicant's complaint could be seen as a request to have an incidental adjustment in the form of an annotation to the present birth register, kept secret from third parties. The Court, however, held that the striking of the requisite balance cannot be considered to call for such a "secret" annotation either: it would involve difficult problems in many areas of public interest, for example by complicating factual issues arising in family and succession law, which could be overcome only by detailed legislation as to the effects of the change in various contexts and as to the circumstances in which secrecy should yield to the public interest.

[7] The report is available to the press and the public on request to the Registrar of the Court.
[8] This summary, prepared by the Registry, does not in any way bind the Court.

Accordingly, the Court concluded that there is no breach of Article 8 in the circumstances of the present case. It did nevertheless add:

"That being so, it must for the time being be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals. However, the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances… The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments."
[paragraphs 38-47 of the judgment and point 1 of the operative provisions]

B. Article 12 of the Convention

The Court held that the right to marry enshrined in Article 12 refers to traditional marriage between persons of opposite biological sex.

It added that limitations on this right must not restrict or reduce it in such a way or to such an extent that its very existence is impaired. In the present case the Court found that the legal impediments in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind.

Consequently, the Court found no violation of this Article.
[paragraphs 48-51 of the judgment and point 2 of the operative provisions]

The Court gave judgment at a plenary session in accordance with Rule 50 of the Rules of Court and was composed as follows:

Mr R. Ryssdal (Norwegian), President, Mr. Thór Vilhjálmsson (Icelandic), Mr. D. Binderschedler-Robert (Swiss), Mr. G. Lagergren (Swedish), Mr. F. Gölcüklü (Turkish), Mr. F. Matscher (Austrian), Mr. J. Pinheiro Farinha (Portuguese), Mr. L.-E. Pettiti (French), Mr. B. Walsh (Irish), Sir Vincent Evans (British), Mr. C. Russo (Italian), Mr. R. Bernhardt (German), Mr. J. Gersing (Danish), Mr. L. Liesch (Luxemburger), Mr. A.M. Donner (Dutch), Judges, and also Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar.

Three judges expressed a dissenting opinion which is appended to the judgment.

87
28.10.1987

INZE v. AUSTRIA
judgment of 28 October 1987

By judgment delivered at Strasbourg on 28 October 1987 in the Inze case, which concerns the Republic of Austria, the European Court of Human Rights held unanimously that there had been a violation of Article 14 of the European Convention on Human Rights, taken in conjunction with Article 1 of Protocol No. 1[9].

The judgment was read out in open court by Mr. John Cremona, Vice-President of the Court.

I.
BACKGROUND OF THE CASE

A. Principal facts

Mr. Inze was born out of wedlock in 1942. Following his mother's death intestate in 1975, her farm was attributed, after court proceedings which ended in 1981, to his half-brother, who had been born in wedlock in 1954. The court applied the Carinthian Hereditary Farms Act 1903, which gives precedence to legitimate over illegitimate children.

However, by a subsequent judicial settlement, the applicant obtained a piece of land which had been promised to him by his mother during her lifetime.

B. Proceedings before the European Commission of Human Rights

The application was lodged on 20 June 1979 and declared admissible on 5 December 1984.

After attempting unsuccessfully to achieve a friendly settlement, the Commission drew up a report[10], adopted on 4 March 1986, establishing the facts and expressing the opinion (by six votes to four) that there had been a violation of Article 14 of the Convention, taken in conjunction with Article 1 of Protocol No. 1.

II.
SUMMARY OF THE JUDGMENT[11]

I. The applicant's status as "victim" (Article 25 of the Convention)

The Court first rejected unanimously the Government's plea that Mr. Inze could no longer be considered a "victim". The existence of a violation was conceivable even in the absence of prejudice and, in any event, the judicial settlement between the applicant and his half-brother had only alleviated the financial consequences of the situation complained of. In addition, it was concluded at a time when Mr. Inze could no longer hope to obtain his mother's farm.
[see paragraphs 30-34 of the reasoning and point 1 of the operative provisions]

[9] The text of the Articles mentioned in this release is appended.
[10] The report is available to the press and the public on request to the Registrar.
[11] This summary, prepared by the Registry, does not in any way bind the Court.

II. Alleged violation of Article 14 of the Convention, taken together with Article 1 of Protocol No. 1.

A. Applicability

The applicant did not allege a violation of Article 1 of Protocol No. 1, taken alone, and the Court did not find it necessary to examine the question ex officio; it sufficed to ascertain whether his complaints fell within the ambit of this provision.

The Court pointed out that Article 1 of Protocol No. 1 in substance guaranteed the right of property. Here, the applicant had already acquired by inheritance, under the Austrian Civil Code, a right to a share of his deceased mother's estate, including the farm, subject to a distribution of the asset in accordance with the relevant Carinthian legislation. Furthermore, he and his co-heirs had already accepted their respective shares; the estate was accordingly their joint property, although none of them had an immediate right to a specific asset.

The applicant did not challenge the system of hereditary farms as such, whereby only on heir may inherit the property, but only the fact that under the relevant legislation he was, on the sole ground of his illegitimate birth, deprived of any possibility of obtaining his mother's farm.

The Court concluded that the facts thus fell within the ambit of Article 1 of Protocol No. 1 and that Article 14 of the Convention, taken together with that provision, was applicable.
[paragraphs 35-40 of the reasoning]

B. Compliance

According to the Court's established case-law, a difference of treatment was discriminatory if it had no objective and reasonable justification. In assessing whether a difference of treatment was justified, the Contracting States enjoyed a certain margin of appreciation but its scope would vary according to the circumstances, the subject-matter and its background.

The Court recalled that the Convention was a living instrument, to be interpreted in the light of present-day conditions. In the member States of the Council of Europe importance was today given to the question of equality between children born in and out of wedlock; this was shown by the 1975 Convention on the Legal Status of children born out of Wedlock, which had been ratified by nine States, including Austria. Very weighty reasons would accordingly have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention.

The arguments advanced by the Government to justify the difference of treatment in the present case did not convince the Court, since they were based on general and abstract considerations. In particular, the argument relating to the convictions of the rural population merely reflected the traditional outlook. The Government themselves had recognised the ongoing developments in rural society and prepared a Bill, modify the Carinthian legislation on the point at issue, which took them into account. Although this fact did not demonstrate that the previous rules were contrary to the Convention, it showed that the aim of the legislation could also have been achieved by apply criteria other than that based on birth in or out of wedlock.

There had accordingly been, in the Court's unanimous opinion, a breach of Article 14 of the Convention, taken together with Article 1 of Protocol No.1.
[paragraphs 41-45 of the reasoning and point 2 of the operative provisions]

III. Application of Article 50 of the Convention

A. Damage

The Court pointed out that, although Article 1 of Protocol No. 1 did not entitle Mr. Inze to inherit his mother's farm specifically, he nevertheless lost real opportunities of taking it over. Furthermore, the judicial settlement mentioned above did not completely efface the initial disadvantage suffered by him.

Since the said loss of opportunities did not readily lend itself to precise quantification, the Court, making an assessment on an equitable basis, awarded Mr. Inze the sum of ATS 150,000.
[see paragraphs 47-51 of the judgment and points 3-4 of the operative provisions]

B. Costs and expenses

The Court first awarded the applicant ATS 25,539 for costs and expenses incurred in Austria; it rejected in this context a plea by the Government that certain lawyer's and expert's fees had not been necessary.

With regard to lawyer's fees before the Convention institutions, the Government did not contest that the applicant had incurred liability for sums additional to those covered by the legal aid received from the Council of Europe, but argued that the figures claimed were excessive. In the circumstances of the case, the Court felt unable to award the totality of the sums claimed, but considered on an equitable basis, that the applicant should be reimbursed ATS 55,067.

The total award of ATS 80,606 had to be reduced by the amount received by way of legal aid and increased by any turnover tax due.
[paragraphs 52-57 of the judgment and points 3-4 of the operative provisions].

In accordance with the Convention, the judgment was delivered by a Chamber composed of seven judges, namely Mr. J. Cremona (Maltese), President, Mr. Thór Vilhjálmsson (Icelandic), Mr. G. Lagergren (Swedish), Mr. F. Gölcüklü (Turkish), Mr. F. Matscher (Austrian), Mr. L.-E. Pettiti (French), Mr. R. Bernhardt (German), Judges and also of Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar.

334
27.9.1990

COSSEY v. THE UNITED KINGDOM
judgment of 27 September 1990

By judgment delivered in Strasbourg on 27 September 1990 in the Cossey case, which concerns the United Kingdom, the European Court of Human Rights held that: (i) the inability of the applicant, a post-operative male-to-female transsexual, to obtain a birth certificate showing her sex as female did not constitute a violation of Article 8 of the European Convention on Human Rights; (ii) her inability to contract a valid marriage with a man did not constitute a violation of Article 12[12].

The judgment was read out at a public hearing by Mr. Rolv Ryssdal, the President of the Court.

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant was registered at birth, in 1954, as being of male sex. By the age of 15 or 16, she understood that she was psychologically of the female sex. In 1972 she assumed a female Christian name and has, since then, used that name for all purposes and adopted a female role.

In 1974 the applicant underwent gender reassignment surgery in a London hospital since when, according to a 1984 medical report, she has lived a full life as a female, both psychologically and physically. From about 1979 to 1986 she was a successful fashion model.

At the time of the report of the European Commission of Human Rights, Miss Cossey wished to marry Mr. L., an Italian citizen, who was willing to marry her, but the United Kingdom authorities had informed her that such a marriage would be void because English law would treat here as a male. They had issued her with a passport as a female, but had told her that she could not be issued with a birth certificate showing her sex as female.

After the date of the Commission's report, the applicant purported to marry, in London, a Mr. X, but their relationship terminated shortly afterwards. The marriage was subsequently declared by the High Court to be void by reason of the parties not being respectively male and female.

B. Proceedings before the Commission

The application to the Commission, which was lodged on 24 February 1984, was declared admissible on 5 July 1985.

Having attempted unsuccessfully to secure a friendly settlement, the Commission drew up a report[13] on 9 May 1989 establishing the facts and expressing the opinion, by 10 votes to 6, that there had been a violation of Article 12 of the Convention, but not of Article 8.

[12] The text of the Convention Articles referred to in this release is appended.
[13] The report is available to the press and the public on request to the Registrar of the Court.

The case was referred to the Court by the United Kingdom Government on 4 July and by the Commission on 13 July 1989.

II.
SUMMARY OF THE JUDGMENT[14]

1. The present case was not materially distinguishable on its facts from the Rees case, in which similar issues ha arisen and in which the Court had given judgment on 17 October 1986.
[see paragraphs 31-34 of the judgment]

2. Whilst the Court, in the interests of legal certainty, usually followed its own precedents, it could depart from an earlier decision if there cogent reasons for doing so, for example in order to ensure that the interpretation of the Convention remained in line with present-day conditions
[see paragraph 35 of the judgment]

A. Alleged violation of Article 8

3. The applicant complained that she was obliged to reveal intimate personal details whenever she had to produce a birth certificate, since she could not obtain one showing her sex as female. The question was, therefore, whether an effective respect for her private life imposed a positive obligation on the United Kingdom to modify its birth-registration system. In answering this question, regard had to be had to the fair balance that had to be struck between the general interest of the community and the interests of the individual.

4. In the Rees case the Court had concluded that there was no such obligation. In so doing, it had noted a number of points – relating to such matters as access by the public to the register of births and its function as a record of historical facts – which it considered to be equally cogent in Miss Cossey's case. It observed in particular that the details which she did not wish to have disclosed would be revealed unless the public character of the register were altered.

5. There had been no significant scientific developments since the date of the Rees judgment; in particular, it was still true that gender reassignment surgery did not result in the acquisition of all the biological characteristics of the other sex. Whilst there had been certain developments in the law of some of the Council of Europe's member States, there was still little common ground between them in this area. A department from the Rees judgment could therefore not be said t be warranted in order to reflect present-day conditions.

6. The Court thus concluded, by 10 votes to 8, that there was no violation of Article 8. it added, however, that since the Convention had to be interpreted in the light of current circumstances, the need for appropriate measures in this area should be kept under review.
[see paragraphs 36-42 of the judgment and point 1 of the operative provisions]

B. Alleged violation of Article 12

7. The applicant emphasised that she could not marry at all: as a woman, she could not realistically marry another woman and English law prevented her from marrying a man.

The Court recalled that limitations introduced by national laws much not have the effect of impairing the very essence of the right to marry. However, the applicant's inability to marry a woman did not stem from any legal impediment. As to her inability to marry a man, the

[14] This summary, prepared by the Registry, does not in any way bind the Court.

criteria of English law were in conformity with the concept of marriage to which the right guaranteed by Article 12 referred, name to the traditional marriage between persons of opposite biological sex.

8. Although some States would now regard as valid a marriage between a person in Miss Cossey';s situation and a man, the developments which had occurred did not evidence any general abandonment of the traditional concept of marriage. In these circumstances, it was not open to the Court to take a new approach to the interpretation of Article 12 on this issue. Furthermore, attachment to that concept provided sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage.

9. The Court thus concluded, by 14 votes to 4, that there was no violation of Article 12. [see paragraphs 43-48 of the judgment and point 2 of the operative provisions]

The Court gave judgment at a plenary session in accordance with Rule 51 of the Rules of Court, and was composed as follows: Mr R. Ryssdal (Norwegian), President, Mr. J. Cremona (Maltese), Mr. Thór Vilhjálmsson (Icelandic), Mr. D. Binderschedler-Robert (Swiss), Mr. F. Gölcüklü (Turkish), Mr. F. Matscher (Austrian), Mr. L.-E. Pettiti (French), Mr. B. Walsh (Irish), Sir Vincent Evans (British), Mr. R. Macdonald (Canadian), Mr. C. Russo (Italian), Mr. R. Bernhardt (German), Mr. L. Liesch (Luxemburger), Mr. A.M. Donner (Dutch), Mrs. E. Palm (Swedish), Mr. I. Foighel (Danish), Mr. R. Pekkanen (Finnish) and Mr. J. M. Morenilla Rodriguez (Spanish), and Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar.

Several judges expressed separate opinions, the these are appended to the judgment.

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29.11.1991

VERMEIRE v. BELGIUM
judgment of 29 November 1991

In a judgment delivered at Strasbourg on 29 November 1991 in the case of Vermeire v. Belgium, the European Court of Human Rights held unanimously inter alia that the applicant's exclusion from the estate of the grandfather from whom she was illegitimately descended violated Article 14 in conjunction with Article 8 of the European Convention on Human Rights[15]

The judgment was read out in open court by Mr. Rolv Ryssdal, President of the Court.

I.
BACKGROUND OF THE CASE

A. Principal facts

Mrs Astrid Vermeire, a Belgian national, is the recognised illegitimate daughter of Jérôme Vermeire, who was one of the three children of the marriage of Cariel Vermeire and Irma Van den Berghe. After her father's death in 1939, the applicant was brought up by her grandparents, who died intestate on 22 July 1980 and 16 January 1975 respectively. Their estates were wound up after the death of Carmiel, at which time their assets were distributed among their surviving legitimate heirs, namely the two children of their son Robert. Mrs. Vermeire was excluded as Article 756 (since repealed) of the Belgian Civil Code provided that recognised illegitimate children had no rights over the estates of the relatives of their father and mother.

In June 1981 the applicant instituted proceedings against the legitimate grandchildren before the Brussels Court of First Instance. In a judgment of 3 June 1983 the court, relying on the Marckx judgment of 13 June 1979 of the European Court of Human Rights, held that Mrs Vermeire did have inheritance rights over grandparents' estates, in that no distinction could be made between legitimate and illegitimate children. On appear by the legitimate grandchildren, this judgment was reversed in May 1985 by the Brussels Court of Appeal which held that the Marckx judgment was not legally binding on the courts. The applicant's appear on a point of law was dismissed by the Court of Cassation in February 1987.

B. Proceedings before the European Commission of Human Rights

The application to the Commission, which was lodged on 1 April 1987, was declared admissible on 8 November 1988. Having attempted unsuccessfully to secure a friendly settlement, the Commission drew up a report[16] on 5 April 1990 in which it established the facts and expressed the opinion that there had been a violation of Article 8 in conjunction with Article 14 as regards the grandfather's estate (unanimously) but not as regards the grandmother's estate (seven votes to six).

The case was referred to the Court by the Commission on 11 July 1990.

[15] The text of the articles mentioned in this press release is appended.
[16] Available to the press and public on request to the Registrar of the Court.

II.
SUMMARY OF THE JUDGMENT[17]

A. Article 14 in conjunction with Article 8

Mrs Vermeire complained of having been excluded from inheritance rights in her grandparents' estates. She maintained that the domestic courts should have applied Articles 8 and 14, as interpreted by the European Court in its Marckx judgment of 13 June 1979, directly to the estates in which she was interested; at the very least the Belgian legislature should have given the Law of 31 March 1987, amending the legislation complained of, retrospective effect as from the date of that judgment.

As the principle of legal certainty has dispenses the Belgian State from reopening legal acts or situations antedating the delivery of the Marckx judgment, the Court considered separately the estate of the grandmother, where succession had taken place before that date, and that of the grandfather, where it took place afterwards.
[see paragraphs 19-20 of the judgment]

The Court found, firstly, that succession to the grandmother's estate had taken place on her death and the estate devolved on her legitimate heirs as of that date. This was therefore a legal situation antedating the delivery of the Marckx judgment; consequently, there was no occasion to reopen it (eight votes to one).
[see paragraphs 21-22 of the judgment and point 1 of the operative provisions]

With reference to the grandfather's estate, the Court pointed out that the Marckx judgment had held that the total lack of inheritance rights on intestacy, based only on the illegitimate nature of the affiliation, was discriminatory. It considered that this finding related to facts which were so close to chose of the present case that it applied equally to the succession in issue which took place after its delivery. It did not see what could have prevented the Brussels Court of Appeal and the Court of Cassation from complying with the findings of the Marckx judgment, as the Court of First Instance had done, as there was nothing imprecise or incomplete about the rule which prohibited discrimination against Astrid Vermeire compared with her cousins Francine and Michel, on the grounds of the illegitimate nature of the kinship between her and the deceased.

An overall revision of the legislation, with the aim of carrying out a thoroughgoing and consistent amendment of the whole of the law on affiliation and inheritance on intestacy, had not been necessary at all as a n essential preliminary to compliance with the Convention as interpreted by the Court in the Marckx case.

The freedom of choice allowed to a State as to the means of fulfilling its obligation under Article 53 could not allow it to suspend the application of the Convention while waiting for such a reform to be completed, to the extent of compelling the European Court to reject in 1991, with respect to a succession which took effect on 22 July 1980, complaints identical to those which it had upheld on 13 June 1979.
[see paragraphs 23-28 of the judgment and point 2 of the operative provisions]

B. Article 50

Mrs Vermeire claimed compensation and also sought reimbursement of her costs and expenses.

[17] This summary, prepared by the Registry, does not in any way bind the Court.

As the Court considered that the question of the application of Article 50 was not ready for decision, it unanimously reserved it, and invited the Belgian Government and the applicant to submit their observations on this point.
[see paragraphs 29-32 of the judgment and point 3 of the operative provisions]

In accordance with the Convention, the judgment was delivered by a Chamber composed of nine judges, namely, Mr R. Ryssdal (Norwegian), President, Mr. Thór Vilhjálmsson (Icelandic), Mr. D. Binderschedler-Robert (Swiss), Mr. B. Walsh (Irish), Mr. A. Spielmann (Luxemburger), Mr J. De Meyer (Belgian), Mr S.K. Martens (Dutch), Mr A.N. Loizou (Cypriot) and Mr. J.M. Morenilla (Spanish) and also Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar.

One judge expressed a separate opinion which is annexed to the judgment.

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24.6.1993

SCHULER-ZGRAGGEN V. SWITZERLAND
judgment of 24 June 1993

In a judgment delivered at Strasbourg on 24 June 1993 in the case of Schuler-Zgraggen v. Switzerland, the European Court of Human Rights held by eight votes to one that there had been no violation of Article 6-1 of the European Convention on Human Rights either on account of insufficient access to the file of the Canton of Uri Invalidity Insurance Appeals Board or because there had been no hearing in the Federal Insurance Court. On the other hand, it found by eight votes to one that there had been a violation of Article 14 taken together with Article 6-1, as the assumption made by the Federal Insurance Court that, once she had become a mother, the applicant would have given up work even is she had not had health problems amounted to discrimination on the ground of sex.

The judgment was read out in open court by Mr Rudolf Bernhardt, President of the Chamber.

I.
BACKGROUND OF THE CASE

I. Principal facts

In 1979 Mrs Schuler-Zgraggen, who worked for a firm and had been paying federal invalidity-insurance contributions, was granted a half-pension by the appropriate Compensation Office, as she had contracted tuberculosis. She was dismissed with effect from 1979 on account of her illness, and she was subsequently granted a full pension, which was confirmed in 1981 and 1982. In May 1984 she gave birth to a son.

Following a medical examination of the applicant, on which the medical centre and two doctors produced reports, the Invalidity Insurance Board of the Canton of Uri cancelled Mrs. Schuler-Zgraggen's pension in 1986; it ruled that her family circumstances had changed appreciably after the birth of her child, that her health had improved and that she was 60-70% able to look after her home and her child.

An appeal by the applicant to the Canton of Uri Invalidity Insurance Appeals Board, in which she had claimed a full pension or, alternatively, a half-pension, was dismissed in May 1987.

In June 1988 the Federal Insurance Court allowed in part an administrative-law appear she had brought, holding that she was entitled to a half-pension if she was in financial difficulties; it remitted the case to the Compensation Office with a direction to determine whether this condition had been satisfied. The court considered to what extent the applicant was restricted in her activities as a housewife but not her ability to work in her former job, as it proceeded on the assumption that, having a young child, she would have given up gainful employment even if she had not had health problems.

II. Proceedings before the European Commission of Human Rights

The application to the Commission, which was lodged on 29 December 1988, was declared admissible on 30 May 1991.

Having attempted unsuccessfully to secure a friendly settlement, the Commission adopted a report[18] on 7 April 1992 in which it established the facts and expressed the opinion that

[18] The report is available to the press and the public on application to the Registrar of the Court.

(a) there had been no violation of Article 6 § 1 either on account of the failure to hold a hearing (by ten votes t five) or in respect of access to the file (by thirteen votes to two); and

(b) there had been no violation of Article 14 taken together with Article 6 § 1 (by nine voted to six).

The Commission referred the case to the Court on 25 May 1992. The Swiss Government did likewise on 5 August.

II.
SUMMARY OF THE JUDGMENT[19]

I. Article 6 § 1

A. Applicability of Article 6 § 1

The Court reiterated that State intervention was not sufficient to establish that Article 6 § 1 was inapplicable, as the government had argued. The case had public-law features, but Mrs Schuler-Zgraggen, who had suffered an interference with her means of subsistence, was claiming an individual, economic right flowing from specific rules laid down in a federal statute. The Court saw no convincing reason to distinguish between the applicant's right to an invalidity pension and to the rights to social-insurance benefits in issue in the cases of Feldbrugge v. the Netherlands and Deumeland v. Germany.

Article 6 § 1 therefore applied (unanimously).
[See paragraphs 44-46 of the judgment and point 1 of the operative provisions.]

B. Compliance with Article 6 § 1

1. Access to the Appeals Board's file

(a) The Government's preliminary objection

In the Government's submission, Mrs Schuler-Zgraggen did not have the status of a victim, because she had not availed herself of the opportunity of examining the file at the Appeals Board's registry.

The Court noted that the applicant's complaint related rather to having documents handed over or, at any rate, securing photocopies of the. It therefore dismissed the objection.
[See paragraphs 48-49 of the judgment and point 2 of the operative provisions.]

(b) Merits of the complaint

The Court found that the proceedings before the Appeals Board had not enable Mrs Schuler-Zgraggen to have a complete, detailed picture of the particulars supplied to the Board. It considered, however, that the Federal Insurance Court remedied that shortcoming by requesting the Board to make all the documents available to the applicant – who was able, among other things, to make copies – and then forwarding the file to her lawyer. It also noted that neither the Appeals Board nor the Federal Insurance Court had had a report on the applicant's lungs before it. Since, taken as a whole, the impugned proceedings had therefore been fair, there had been no violation of Article 6 § 1 in that respect (eight votes to one).

[19] This summary, prepared by the Registry, does not in any way bind the Court.

[See paragraphs 50-52 of the judgment and point 4 of the operative provisions].

2. Federal Insurance Court hearing

(a) The Government's preliminary objection

In the Government's submission, Mrs. Schuler-Zgraggen had not exhausted domestic remedies, as she had failed to apply to the Federal Insurance Court for the proceedings to be oral and public.

As the objection had been raised before the Commission only after the decision on admissibility, there was estoppel (unanimously).
[See paragraphs 54-55 of the judgment and point 2 of the operative provisions.]

(b) Merits of the complaint

In the Court's view, it could reasonably be considered that the applicant had unequivocally waived her right to a public hearing in the Federal Insurance Court, although the possibility of one was provided for in that court's Rules of Procedure. Above all, it did not appear that the dispute raised issues of public importance such as to make a hearing necessary; being highly technical, it was better dealt with in writing than in oral argument. Lastly, it was understandable that in the sphere concerned the national authorities should have regard to the demands of efficiency and economy: systematically holding hearings could be an obstacle to the particular diligence required in social-security cases. There had accordingly been no violation of Article 6 § 1 in that respect (eight votes to one).
[See paragraphs 56-58 of the judgment and point 4 of the operative provisions.]

3. Independence of the medical experts

That was a new complaint, which had not been raised before the Commission. The Court held that it had no jurisdiction to consider it.
[See paragraphs 56-58 of the judgment and point 4 of the operative provisions.]

II. Article 14 taken together with Article 6 § 1

A. The Government's preliminary objection

The Government objected that Mrs Schuler-Zgraggen had not made a precise complaint to the Federal Insurance Court relating to a precise complaint to the Federal Insurance Court relating to discrimination in the exercise of right secured by the Convention.

The Court dismissed the objection that domestic remedies had not been exhausted (unanimously): no appeal lay against the Federal Insurance Court's judgment and the applicant had already criticised the decision of the Appeals Board.
[See paragraphs 62-63 of the judgment and point 2 of the operative provisions.]

B. Merits of the complaint

The Federal Insurance Court had adopted in its entirety the Appeals Board's assumption that women gave up work when they gave birth to a child; it had not attempted to probe the validity of that assumption itself by weighing arguments to the contrary. The assumption constituted the sole basis for the reasoning, thus being decisive, and introduced a difference of treatment based on the ground of sex only. The advancement of the equality of the sexes was today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be

regarded as compatible with the Convention. The Court discerned no such reason in the case before it. For want of any reasonable and objective justification, there had been a violation of Article 14 taken together with Article 6 § 1 (eight votes to one).
[See paragraphs 64-67 of the judgment and point 5 of the operative provisions.]

III. Article 50

A. Damage

1. Non-pecuniary damage

The Court considered that Mrs Schuler-Zgraggen might have suffered non-pecuniary damage but that the judgment provided her with sufficient just satisfaction for it (unanimously).
[See paragraphs 69-71 of the judgment and point 6 of the operative provisions.]

2. Pecuniary damage

As Swiss law enabled the applicant to apply for a reopening of the proceedings, the Court reserved the question (unanimously).
[See paragraphs 72-74 of the judgment and point 8 of the operative procedure].

B. Costs and expenses

Mrs Schuler-Zgraggen had sought 21,426.60 Swiss francs (CHF) in respect of costs and expenses incurred in Switzerland and at Strasbourg. Making its assessment on an equitable basis, the Court awarded her, as matters stood, CHF 7,500 (eight to one).
[See paragraphs 75-76 of the judgment and point 7 of the operative provisions.]

In accordance with the Convention, the judgment was delivered by a Chamber composed of nine judges, namely Mr. R. Bernhardt (German), President, Mr. F. Gölcüklü (Turkish), Mr. B. Walsh (Irish), Mr C. Russo (Italian), Mr. A. Spielmann (Luxemburger), Mr. I. Foighel (Danish), Mr A.N. Loizou (Cypriot), Mr. M.A. Lopes Rocha (Portuguese) and Mr. L. Wildhaber (Swiss) and also Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar.

Two judges expressed dissenting opinions, and these are appended to the judgment.

70
2.2.94

BURGHARTZ V. SWITZERLAND
judgment of 22 February 1994

In a judgment delivered at Strasbourg on 22 February 1994 in the case of Burghartz v. Switzerland, the European Court of Human Rights held by five votes to four that the fact that the applicant was not able to put his own surname in front of his wife's, which had been taken as the family name, amounted to discrimination on the ground of sex, contrary to Article 14 of the European Convention on Human Rights[20] taken together with Article 8.

The judgment was read out in open court by Mr Rolv Ryssdal, President of the Court.

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicants' names before their marriage were Susanna Burghartz and Albert Schnyder. The husband is a Swiss citizen, while the wife has both Swiss and German nationality.

They married in the Federal Republic of Germany in 1984. In accordance with that country's law, the wife took the name of "Burghartz", which had been chosen as the family name, and the husband the name of "Schnyder Burghartz". The Swiss registry office having recorded "Schnyder" as their joint surname, the couple applied to substitute "Burghartz" as the family surname and "Schnyder Burghartz" as the husband's surname. On 6 November 1984 the cantonal government of Basle Rural turned down the application.

On 26 October 1988 the applicants made a further application to the cantonal Department of Justice of Basle Urban, following an amendment to the Civil Code as regards the effects of marriage, which had come into force on 1 January 1988. Their application was again refused on 12 December 1988. On 8 June 1989 the Federal Court allowed an appeal by them in so far as they complained that they had not been permitted to use "Burghartz" as their family name but it refused to allow the husband to take the name of "Schnyder Burghartz". The court noted, however, that in practice the husband could use that name informally.

B. Proceedings before the European Commission of Human Rights

The application made on 26 January 1990 was declared admissible by the Commission on 19 February 1992. Having attempted unsuccessfully to achieve a friendly settlement, the Commission adopted a report[21] on 21 October 1992 in which it established the facts and expressed the opinion that there had been a violation of Article 14 of the Convention taken together with Article 8 (eighteen votes to one) and that it was not necessary to examine the case under Article 8 taken alone (thirteen votes to six).

[20] The text of the provisions referred to is appended.
[21] Available to the press and the public on application to the Registrar of the Court.

II.
SUMMARY OF THE JUDGMENT[22]

I. Preliminary objections

A. Whether the wife was a victim

The Government had contested that Mrs Burghartz was a victim within the meaning of Article 25 of the Convention — no one but Mr Burghartz had been aggrieved by the refusal of his request, the only one in issue in the case as his wife had obtained satisfaction from the Federal Court, which had allowed her to keep her maiden name.

The Court pointed out that the case originated in a joint application by Mr and Mrs Burghartz to change their joint family name and the husband's surname simultaneously. Having regard to the concept of family prevailing in the Convention system, it considered that Mrs Burghartz could claim to be a victim of the impugned decisions, at least indirectly. It consequently dismissed the objection (unanimously).

[See paragraphs 16-18 of the judgment and point 1 of the operative provisions.]

B. Exhaustion of domestic remedies

The Court held that the applicants could not be blamed for having founded their appeal solely on domestic law seeing that their arguments had been identical in substance with those they had submitted to the Commission. As to a public-law appeal, its subsidiary nature prevented it from being considered in this instance an adequate remedy which Article 26 of the Convention would also have required the applicants to exhaust. The Court therefore dismissed this objection likewise (unanimously).

[See paragraphs 19-20 of the judgment and point 1 of the operative provisions.]

II. Article 14 of the Convention taken together with Article 8

A. Applicability

The Government had argued that Articles 8 and 14 were not applicable. Since the entry into force of Protocol No. 7 on 1 November 1988, the equality of spouses in the choice of surname had, they said, been governed exclusively by Article 5 of that Protocol, covering equality of rights and responsibilities of a private-law character between spouses, as a lex specialis.

The Court pointed out that under Article 7 of Protocol No. 7, Article 5 was to be regarded as an addition to the Convention, including Articles 8 and 60. Consequently, it could not replace Article 8 or reduce its scope.

It noted that Article 8 of the Convention did not contain any explicit provisions on names, unlike some other international instruments. As a means of personal identification and of linking to a family, a person's name nonetheless concerned his or her private and family life. The fact that society and the State had an interest in regulating the use of names did not exclude this, since these public-law aspects were compatible with private life conceived of as

[22] This summary by the registry does not bind the Court.

including, to a certain degree, the right to establish and develop relationships with other human beings, in professional or business contexts as in others.

In the instant case, the applicant's retention of the surname by which, according to him, he had become known in academic circles could significantly affect his career. Article 8 therefore applied (six votes to three).

[See paragraphs 22-24 of the judgment and point 2 of the operative provisions.]

B. Compliance

Mr and Mrs Burghartz had complained that the authorities had withheld from Mr Burghartz the right to put his own surname before their family name although Swiss law afforded that possibility to married women who had chosen their husband's surname as their family name. The Court reiterated that the advancement of the equality of the sexes was today a major goal in the member States of the Council of Europe; this meant that very weighty reasons would have to be put forward before a difference of treatment on the sole ground of sex could be regarded as compatible with the Convention.

In support of the system complained of, the Government had relied, firstly, on the Swiss legislature's concern that family unity should be reflected in a single joint surname. The Court was not persuaded by that argument, since family unity would be no less reflected if the husband added his own surname to his wife's, adopted as the joint family name, than it was by the converse arrangement allowed by the Civil Code.

In the second place, it could not, so the Court held, be said that a genuine tradition was at issue in the case. Married women had enjoyed the right from which the applicant sought to benefit only since 1984. In any event, the Convention had to be interpreted in the light of present-day conditions, especially the importance of the principle of non-discrimination.

Nor was there any distinction to be derived from the spouses' choice of one of their surnames as the family name in preference to the other. Contrary to what the Government had contended, it could not be said to represent greater deliberateness on the part of the husband than on the part of the wife. It was therefore unjustified to provide for different consequences in each case.

As to the other types of surname, such as a double-barrelled name or any other informal manner of use, the Federal Court itself had distinguished them from the legal family name, which was the only one that could appear in a person's official papers. They therefore could not be regarded as equivalent to it.

In sum, the difference of treatment complained of lacked an objective and reasonable justification and accordingly contravened Article 14 taken together with Article 8 (five votes to four).

[See paragraphs 25-29 of the judgment and point 3 of the operative provisions.]

Having regard to that conclusion, the Court deemed it unnecessary to determine whether there had also been a violation of Article 8 taken alone (unanimously).

[See paragraph 30 of the judgment and point 4 of the operative provisions.]

III. Article 50 of the Convention

The applicants had claimed the costs of legal representation before the national authorities and the Strasbourg institutions in the sum of 31,000 Swiss francs (CHF).

Making its assessment on the basis of the observations by those who had appeared before it and of the criteria laid down in its case-law, the Court awarded the applicants CHF 20,000 (unanimously).

[See paragraphs 31-33 of the judgment and points 5 and 6 of the operative provisions.]

In accordance with the Convention, the judgment was delivered by a Chamber composed of nine judges, namely Mr R. Ryssdal (Norwegian), President, Mr Thór Vilhjálmsson (Icelandic), Mr F. Gölcüklü (Turkish), Mr L.-E. Pettiti (French), Mr C. Russo (Italian), Mr N. Valticos (Greek), Mr J.M. Morenilla (Spanish), Mr A.B. Baka (Hungarian) and Mr L. Wildhaber (Swiss), and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar.

Four judges expressed dissenting opinions, and these are appended to the judgment.

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26.5.94

KEEGAN V. IRELAND
judgment of 26 May 1994

By judgment delivered in Strasbourg on 26 May 1994 in the case of Keegan v. Ireland, the European Court of Human Rights held unanimously that there had been a violation of Articles 8 and 6 § 1 of the European Convention on Human Rights[23] arising out of the placement of the applicant's child for adoption.

The judgment was read out in open court by Mr Rolv Ryssdal, President of the Court.

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant's girlfriend gave birth on 29 September 1988 to a daughter, S., of whom he was the father. On 17 November 1988 S. was placed for adoption by her mother, who subsequently informed the applicant.

The latter instituted proceedings to be appointed guardian of S. under Section 6A of the Guardianship of Infants Act 1964, which would have enabled him to oppose the adoption and be awarded custody. On 29 May 1989 the Circuit Court appointed the applicant guardian and awarded him custody.

The mother and the prospective adopters appealed to the High Court. This Court found in July 1989 that the applicant was fit to be appointed guardian and that there were no circumstances involving the welfare of the child requiring a refusal. However, it referred the case to the Supreme Court by way of case stated on two points of interpretation of the relevant legislation. On 1 December 1989, the Supreme Court gave its ruling. It held, inter alia, that a natural father did not have a right to be guardian but only a right to apply to be guardian. The first and paramount consideration was the welfare of the child.

The High Court resumed examination of the case in the light of the Supreme Court's judgment and held on 9 February 1990 that the applicant's request for guardianship and custody should be dismissed, because with the additional passage of time the child's attachment to the prospective adopters had grown stronger and, accordingly, the likely traumatic effect on the child of any move would be greater. An adoption order was subsequently made in respect of the child.

B. Proceedings before the European Commission of Human Rights

In his application of 1 May 1991 to the Commission, Mr Keegan complained that there had been a violation of his right to respect for family life (Article 8), in that his child had been placed for adoption without his knowledge or consent and that national law did not afford him even a defeasible right to be appointed guardian. He further complained of a denial of his right of access to court (Article 6 § 1) in that he had no standing in the proceedings before the Adoption Board. He also alleged that, as a natural father, he had been discriminated against in the exercise of the above-mentioned rights when his position was compared to that of a married father (Article 14 in conjunction with Article 6 and 8).

[23]. The text of the Articles mentioned in the release is appended.

The Commission declared the application admissible on 13 February 1992. In its report[24] of 17 February 1993, it expressed the opinion that there had been a violation of Article 8 and of Article 6 § 1 (unanimously) and that it was not necessary to examine whether there had been also a violation of Article 14 taken together with these provisions (by eleven votes to one).

II.
SUMMARY OF THE JUDGMENT[25]

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Whether the applicant can complain on his daughter's behalf

In the course of the hearing before the Court the applicant indicated that it would no longer be appropriate for him to pursue any claim in respect of alleged infringements of his daughter's rights since an adoption order had now been made.

In view of this position, the Court considered that it was only called upon to examine allegations concerning violations of the applicant's rights.

[see paragraphs 33-35 of the judgment and point 1 of the operative provisions]

B. Whether the applicant failed to exhaust domestic remedies

The Court found that the Government were estopped from claiming that the applicant had not appealed to the Supreme Court against the final determination of the guardianship and custody proceedings by the High Court since this point had not been raised before the Commission.

The Government had also claimed:

(1) that the applicant had failed to complain before the Irish courts of the fact that the law did not enable him to become involved in the adoption process and, in particular, to be consulted by the Adoption Board prior to any adoption;

(2) that he had not challenged the constitutionality of the legal provisions relating to a natural father by bringing proceedings in the High Court alleging that the State had failed to afford him equal treatment compared to a married father and had failed to vindicate his personal rights.

The Court considered that the applicant would have had no prospect of success in making these claims before the courts having regard to the case-law of the Supreme Court which denies to a natural father any constitutional right to take part in the adoption process.

The Government's objections based on non-exhaustion of domestic remedies were thus rejected.

[see paragraphs 36-40 of the judgment and point 2 of the operative provisions]

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[24]. Available to the press and the public on application to the Registrar of the Court.
[25]. This summary by the registry does not bind the Court.

II. ALLEGED VIOLATION OF ARTICLE 8

A. Applicability of Article 8

The Court recalled that the notion of the "family" in this provision is not confined solely to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together outside of marriage. A child born out of such a relationship is ipso iure part of that "family" unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer co-habiting or if their relationship has then ended.

The relationship between the applicant and the child's mother lasted for two years during one of which they co-habited. Moreover, the conception of their child was the result of a deliberate decision and they had also planned to get married. Their relationship at this time had thus the hallmark of family life for the purposes of Article 8.

[see paragraphs 42-45 of the judgment]

B. Compliance

1. Paragraph 1 of Article 8

According to the principles developed by the Court in its case-law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth the child's integration in his family. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down.

In the present case the fact that Irish law permitted the secret placement of the child for adoption without the applicant's knowledge or consent, leading to the bonding of the child with the proposed adopters and to the subsequent making of an adoption order, amounted to an interference with his right to respect for family life. Such interference is permissible only if the conditions set out in paragraph 2 of Article 8 are satisfied.

[see paragraphs 46-52 of the judgment]

2. Paragraph 2 of Article 8

(a) In accordance with the law and legitimate aim

The Court found that the decision to place the child for adoption without the father's knowledge or consent was in accordance with Irish law as were the decisions taken by the courts. They pursued the legitimate aim of protecting the rights and freedoms of the child.
[see paragraph 53 of the judgment]

(b) Necessity in a democratic society

The Court noted that the applicant was afforded an opportunity under Irish law to claim the guardianship and custody of his daughter and that his interests were fairly weighed in the balance by the High Court in its evaluation of her welfare. However, the essential problem in the present case was not with this assessment but rather with the fact that Irish law permitted the child to have been placed for adoption shortly after her birth without the applicant's knowledge or consent. Where a child is placed with alternative carers he or she may in the

course of time establish with them new bonds which it might not be in his or her interests to disturb or interrupt by reversing a previous decision as to care. Such a state of affairs not only jeopardised the proper development of the applicant's ties with the child but also set in motion a process which was likely to prove to be irreversible, thereby putting the applicant at a significant disadvantage in his contest with the prospective adopters for the custody of the child.

There had thus been a violation of Article 8.

[see paragraphs 54-55 of the judgment and point 3 of the operative provisions]

III. ALLEGED VIOLATION OF ARTICLE 6 § 1

A. Applicability

The applicability of this provision had not been seriously contested by the Government in the proceedings before the Court.

B. Compliance

The central problem in the present case related to the placement of the child for adoption without the prior knowledge and consent of the applicant. He had no rights under Irish law to challenge this decision either before the Adoption Board or before the courts or, indeed, any standing in the adoption procedure generally. His only recourse to impede the adoption of his daughter was to bring guardianship and custody proceedings. By the time these proceedings had terminated the scales concerning the child's welfare had tilted inevitably in favour of the prospective adopters.

There had thus been a breach of Article 6 § 1.

[see paragraphs 56-60 of the judgment and point 4 of the operative provisions]

IV. ALLEGED VIOLATION OF ARTICLE 14

Having regard to its findings in respect of Articles 8 and 6 § 1 the Court did not consider it necessary to examine this complaint.

[see paragraphs 61-62 of the judgment and point 5 of the operative provisions]

V. APPLICATION OF ARTICLE 50

A. Damage

1. Pecuniary loss

The applicant claimed IR £2000 which he had been obliged to pay before his entitlement to legal aid in respect of the guardianship and custody proceedings.

The Court considered that this sum should be awarded in full.

2. Non-pecuniary loss

The applicant submitted that he should be awarded substantial damages. He emphasised that he was not seeking to overturn the adoption order.

The Court considered that damages were appropriate in this case having regard to the trauma, anxiety and feelings of injustice that the applicant must have experienced as a result of the procedure leading to the adoption of his daughter as well as the guardianship and custody proceedings. It awarded him IR £10,000 under this head.

B. Costs and expenses

The Court awarded the applicant the total amount of IR £42,863 for costs and expenses less 51,691.29 French francs already paid by way of legal aid.

This amount was to be increased by any value-added tax that may be chargeable.

[see paragraphs 63-71 of the judgment and point 6 of the operative provisions]

In accordance with the Convention, judgment was given by a Chamber composed of nine judges, namely Mr R. Ryssdal (Norwegian), President, Mr J. De Meyer (Belgian), Mr S.K. Martens (Dutch), Mrs E. Palm (Swedish), Mr R. Pekkanen (Finnish), Mr A.N. Loizou (Cypriot), Mr J.M. Morenilla (Spanish), Mr J. Makarczyk (Polish), Judges, Mr J. Blayney (Irish), ad hoc Judge, and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar.

326
18.7.1994

KARLHEINZ SCHMIDT V. GERMANY
judgment of 18 July 1994

In a judgment delivered in Strasbourg on 18 July 1994 in the case of Karlheinz Schmidt v. Germany, the European Court of Human Rights held, by six votes to three, that there had been a violation of Article 14 of the Convention of Human Rights[26] taken in conjunction with Article 4 § 3 (d).

The judgment was read out in open court by Mr Rolv Ryssdal, President of the Court.

I.
BACKGROUND OF THE CASE

A. Principal facts

On 30 April 1982 the municipal authorities of Tettnang in the Land of Baden-Württemberg required the applicant to pay a fire service levy of DM 75 for 1982. Their decision was founded on section 43 of the Land's Fire Brigades Act as amended on 27 November 1978 and on the municipal decree of 5 December 1979. On 20 July 1982 the Bodensee district administrative authority rejected the applicant's appeal against the town's decision.

His appeal to the Administrative Court of Sigmaringen, alleging sex discrimination, was dismissed on 18 August 1983; a further appeal to the Administrative Appeals Court of the Land was likewise dismissed on 25 March 1986, and at the same time he was refused leave to appeal on points of law. He unsuccessfully contested this refusal in the Federal Administrative Court. On 31 January 1987 the Federal Constitutional Court declined to accept a constitutional appeal for adjudication, holding that such an appeal would not have sufficient prospects of success.

B. Proceedings before the European Commission of Human Rights

The application was lodged with the Commission on 11 August 1987; it was declared admissible on 8 January 1992.

Having attempted unsuccessfully to secure a friendly settlement, the Commission drew up a report[27] on 14 January 1993 in which it established the facts of the case and expressed the opinion by fourteen votes to three that there had been a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 and with Article 4 § 3 (d) of the Convention.

[26]. The text of the Articles of the Convention and of Protocol No. 1 mentioned in the release is appended.
[27] Available to the press and the public on application to the Registrar of the Court.

II.
SUMMARY OF THE JUDGMENT[28]

I.. Article 14 of the Convention taken in conjunction with Article 4 § 3 (d)

A. Applicability

Like the participants in the proceedings, the Court considered that compulsory fire service such as existed in Baden-Württemberg was one of the "normal civic obligations" envisaged in Article 4 § 3 (d). It concluded that, on account of its close links with the obligation to serve, the obligation to pay also fell within the scope of Article 4 § 3 (d).

It followed that Article 14 read in conjunction with Article 4 § 3 (d) was applicable.

[see paragraph 23 of the judgment and point 1 of the operative provisions]

B. Compliance

The Court noted that some German Länder did not impose different obligations for the two sexes in this field and that even in Baden-Württemberg women were accepted for voluntary service in the fire brigade.

Irrespective of whether or not there could nowadays exist any justification for treating men and women differently as regards compulsory service in the fire brigade, what was finally decisive in the case before the Court was that the obligation to perform such service was exclusively one of law and theory. In view of the continuing existence of a sufficient number of volunteers, no male person was in practice obliged to serve in a fire brigade. The financial contribution had - not in law but in fact - lost its compensatory character and had become the only effective duty. In the imposition of a financial burden such as this, a difference of treatment on the ground of sex could hardly be justified.

There had accordingly been a violation of Article 14 taken in conjunction with Article 4 § 3 (d) of the Convention.

[see paragraphs 28-29 of the judgment and point 2 of the operative provisions]

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

In the light of its foregoing finding, the Court did not consider it necessary also to examine this complaint.

[see paragraph 30 of the judgment and point 3 of the operative provisions]

III. Article 50 of the Convention

The Court allowed the applicant's claims in their entirety (reimbursement of the fire service levy in respect of the years 1982 to 1984 - DM 225 - and of the costs and expenses incurred before the national courts - DM 395).

[see paragraphs 32-33 of the judgment and point 4 of the operative provisions]

[28]. This summary by the registry does not bind the Court.

In accordance with the Convention, judgment was given by a Chamber composed of nine judges, namely Mr R. Ryssdal (Norwegian), President, Mr R. Bernhardt (German), Mr F. Matscher (Austrian), Mr A. Spielmann (Luxemburger), Mrs E. Palm (Swedish), Mr J.M. Morenilla (Spanish), Sir John Freeland (British), Mr G. Mifsud Bonnici (Maltese) and Mr D. Gotchev (Bulgarian) and of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar.

Three judges expressed dissenting opinions and one judge a concurring opinion; they are annexed to the judgment.

480
27.10.1994

KROON AND OTHERS V. THE NETHERLANDS
judgment of 27 October 1994

By judgment delivered in Strasbourg on 27 October 1994 in the case of Kroon and Others v. the Netherlands, the European Court of Human Rights held, by seven votes to two, that the lack of a possibility under Netherlands law for a married woman to deny her husband's paternity of her child and for the establishment of legal family ties between the child and its biological father violated Article 8 of the European Convention on Human Rights[29]. The Court also awarded the applicants under Article 50 a certain amount for lawyer's fees.

The judgment was read out in open court by Mr Rolv Ryssdal, President of the Court.

I.
BACKGROUND OF THE CASE

A. Principal facts

Mrs Kroon had married Mr M. in 1979. He subsequently disappeared and his whereabouts remain unknown.

Mrs Kroon established a permanent relationship with Mr Zerrouk and their son, Samir M'Hallem-Driss, was born in October 1987. Mrs Kroon remained, however, legally married to Mr M. until their marriage was dissolved in July 1988 following divorce proceedings.

A request to enable Mrs Kroon to declare that Mr M. was not the father of Samir and have this biological reality recognised was refused by the registrar of births, deaths and marriages on 21 October 1988. An application to the Amsterdam Regional Court for an order to the registrar to file such a declaration was refused on 13 June 1989; this decision was confirmed by the Amsterdam Court of Appeal on 5 February 1990 and by the Supreme Court on 16 November 1990.

B. Proceedings before the European Commission of Human Rights

In their application of 15 May 1991 to the Commission, the applicants complained that they were unable under Netherlands law to obtain recognition of Mr Zerrouk's paternity of Samir and that while a married man might deny the paternity of a child born in wedlock, it was not open to a married woman to do so; they relied on Article 8, both taken alone and in conjunction with Article 14. They further argued that by not accepting these claims the Supreme Court had denied them an effective remedy within the meaning of Article 13.

On 31 August 1992 the Commission declared the application admissible as to the complaints relating to Articles 8 and 14 of the Convention and inadmissible as to the remainder. In its report[30] of 7 April 1993, it expressed the opinion, by twelve votes to six, that there had been a

29. The text of the Articles mentioned in the release is appended.
30 Available to the press and the public on application to the Registrar of the Court.

violation of Article 8 taken alone and, unanimously, that there had been no violation of Article 14 in conjunction with Article 8.

II.
SUMMARY OF THE JUDGMENT[31]

A. Alleged violation of Article 8 of the Convention

1. Applicability of Article 8

Throughout the domestic proceedings it had been assumed by all concerned, including the registrar of births, deaths and marriages, that the relationship in question constituted "family life" and that Article 8 was applicable; this had also been accepted by the Netherlands courts. In any case, the notion of "family life" in Article 8 was not confined solely to marriage-based relationships and might encompass other de facto "family ties" where parties are living together outside marriage. Although**,** as a rule**,** living together might be a requirement for such a relationship, exceptionally other factors might also serve to demonstrate that a relationship had sufficient constancy to create de facto "family ties"; such was the case here, as since 1987 four children had been born to Mrs Kroon and Mr Zerrouk.

A child born of such a relationship was ipso jure part of that "family unit" from the moment of its birth and by the very fact of it. Whatever the contribution of Mr Zerrouk to his son's care and upbringing — which had been called into question by the Government —, there thus existed between him and Samir a bond amounting to family life.

Article 8 was therefore applicable.

[see paragraphs 29 and 30 of the judgment and point 1 of the operative provisions]

2. General principles

The Court reiterated that the essential object of Article 8 was to protect the individual against arbitrary action by the public authorities. There might in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision did not lend themselves to precise definition. The applicable principles were nonetheless similar. In both contexts regard must be had to the fair balance that had to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoyed a certain margin of appreciation.

According to the principles set out by the Court in its case-law, where the existence of a family tie with a child had been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child's integration in his family.

[see paragraphs 31 and 32 of the judgment]

3. Compliance with Article 8

As it had been established that the relationship between the applicants qualifies as "family life", the Court held that there was a positive obligation on the part of the competent authorities to

[31]. This summary by the registry does not bind the Court.

allow complete legal family ties to be formed between Mr Zerrouk and his son Samir as expeditiously as possible.

The Government argued that solutions to the applicants' problems existed, so that, even assuming "family life" to exist, the Netherlands had complied fully with any positive obligations it might have as regards the applicants.

The first possible solution suggested by the Government, "step-parent adoption" (i.e. adoption of Samir by Mrs Kroon and Mr Zerrouk), would make Samir the "legitimate" child of Mr Zerrouk and Mrs Kroon. However, it would require Mrs Kroon and Mr Zerrouk to marry each other. For whatever reason, they did not wish to do so. In the opinion of the Court, a solution which only allowed a father to create a legal tie with a child with whom he has a bond amounting to family life if he married the child's mother could not be regarded as compatible with the notion of "respect" for family life.

Nor did the Court accept the second possible solution suggested by the Government, namely that of joint custody (for which legislation was being prepared). Even if the legislation came into force as the Government anticipated, joint custody will leave the legal ties between Samir and Mrs Kroon's former husband intact and would continue to preclude the formation of such ties between Samir and Mr Zerrouk.

In the Court's opinion, "respect" for "family life" required that biological and social reality prevail over a legal presumption which, as in the present case, flew in the face of both established fact and the wishes of those concerned without actually benefiting anyone. Accordingly, even having regard to the margin of appreciation left to the State, the Netherlands had failed to secure to the applicants the "respect" for their family life to which they are entitled under the Convention.

There has accordingly been a violation of Article 8.

[see paragraphs 33-40 of the judgment and point 2 of the operative provisions]

B. Alleged violation of Article 14 taken in conjunction with Article 8 of the Convention

This complaint was essentially the same as the one under Article 8. Having found a violation of that provision taken alone, the Court did not consider that any separate issue arose under that Article in conjunction with Article 14.

[see paragraphs 41 and 42 of the judgment and point 3 of the operative provisions]

C. Application of Article 50 of the Convention

1. Damage

The Court considered it likely that the impossibility of obtaining legal recognition of their family ties had caused the applicants some frustration. However, this was sufficiently compensated by the finding of a violation of the Convention.

2. Costs and expenses

In the instant case the Court found it reasonable to award NLG 20,000 for lawyer's fees**,** less the sums paid and payable by the Council of Europe in legal aid.

[see paragraphs 43-47 of the judgment and points 4 to 6 of the operative provisions]

In accordance with the Convention, judgment was given by a Chamber composed of nine judges, namely Mr R. Ryssdal (Norwegian), President, Mr F. Gölcüklü (Turkish), Mr S.K. Martens (Netherlands), Mr I. Foighel (Danish), Mr A.N. Loizou (Cypriot), Mr J.M. Morenilla (Spanish), Mr A.B. Baka (Hungarian), Mr G. Mifsud Bonnici (Maltese) and Mr D. Gotchev (Bulgarian), and also of Mr H. Petzold, Acting Registrar,

Two judges expressed dissenting opinions, which are attached to the judgment.

95
21.2.1997

VAN RAALTE V. THE NETHERLANDS
judgment of 21 February 1997

In a judgment delivered in Strasbourg on 21 February 1997 in the case of Van Raalte v. the Netherlands, the European Court of Human Rights held unanimously that there had been a violation of Article 14 of the European Convention on Human Rights taken together with Article 1 of Protocol No. 1 in that an exemption from the obligation to pay contributions under a child benefits scheme enjoyed by unmarried childless women aged 45 or over did not also apply to unmarried childless men of like age. The Court declined to award the applicant compensation but awarded him a specified sum to cover his costs and expenses.

The judgment was read out in open court by Mr Rolv Ryssdal, the President of the Court.

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, Mr Anton Gerard van Raalte, was born in 1924 and lives in Amstelveen. He has never been married and has no children.

On 30 September 1987 the tax authorities issued an assessment of contributions payable by the applicant for 1985 under various compulsory social security schemes, including that set up by the General Child Allowance Act.

The applicant filed an objection to the Inspector of Direct Taxes. He argued that since the General Child Allowance Act exempted unmarried women over the age of 45, as opposed to unmarried men of such age, from the obligation to pay contributions under the scheme set up by that Act, the assessment constituted discriminatory treatment. The Inspector of Direct Taxes rejected this objection on 25 November 1987.

The applicant lodged an appeal with the Tax Division of the Amsterdam Court of Appeal, submitting statistics from which it appeared that very few children were born to men over 45. This appeal was dismissed on 6 October 1989, the Court of Appeal holding that the difference in treatment complained of was based not on a difference in sex as such but on the biological difference between men and women over 45 as regards their ability to procreate.

An appeal on points of law was dismissed by the Supreme Court on 11 December 1991. Noting that the exemption for women over 45 had in the meantime been abolished with effect from 1989, the Supreme Court held, *inter alia*, that there was no reason to declare that the exemption also applied, for the year 1985, to unmarried men over 45.

B. Proceedings before the European Commission of Human Rights
The application to the Commission, which was lodged on 23 April 1992, was declared admissible on 10 April 1995.

Having attempted unsuccessfully to secure a friendly settlement, the Commission drew up a report on 17 October 1995 in which it established the facts and expressed the opinion that

there had been a violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1 (twenty-three votes to five).

II
SUMMARY OF THE JUDGMENT

A. Article 14 of the Convention taken together with Article 1 of Protocol No. 1

The Court first recalled that Article 14 had no independent existence but complemented the other substantive provisions of the Convention and its Protocols, and consequently it could not be applied unless the facts of the case came within the ambit of one or more of those other provisions. The Court found that the present case concerned the right of the State to "secure the payment of taxes or other contributions" (mentioned in Article 1 of Protocol No. 1); Article 14 was therefore held to apply.

After restating the principles emerging from its case-law under Article 14, the Court considered the question whether there had been a difference in treatment between persons in similar situations. This question it answered in the affirmative, finding also that the difference in question was based on gender.

The Government sought to justify this difference by the need, as perceived at the time the relevant legislation was enacted, to spare the feelings of women of a certain age who did not, and in all probability never would, have children.

While recognising that States enjoyed a certain margin of appreciation in introducing exemptions to the obligation to contribute to social-security schemes, the Court considered that such exemptions should apply even-handedly to both men and women unless there were compelling reasons to justify a difference in treatment.

In the instant case the Court was not persuaded that such reasons existed. Just as women over 45 might give birth to children, there were on the other hand men of 45 or younger who may be unable to procreate.

Furthermore, an unmarried childless woman aged 45 or over might well become eligible for benefits under the act in question; she might, for example, marry a man who already had children from a previous marriage.

Finally, the argument that to levy contributions under a child benefits scheme from unmarried childless women would impose an unfair emotional burden on them might equally well apply to unmarried childless men or to childless couples.

Accordingly, irrespective of whether the desire to spare the feelings of childless women of a certain age could be regarded as a legitimate aim, such an objective could not provide a justification for the gender-based difference of treatment in the present case.

There had therefore been a violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1.

[see paragraphs 33-45 of the judgment and point 1 of the operative provisions]

B. Article 50 of the Convention

The applicant claimed repayment of his contributions under the General Child Benefits Act for 1985-1988 as well as compensation for non-pecuniary damage and reimbursement of his legal costs.

The Court noted that the finding of a violation of Article 14 taken together with Article 1 of Protocol No. 1 did not entitle the applicant to retrospective exemption from the obligation to pay contributions. It also considered that its judgment constituted in itself sufficient just satisfaction for any non-pecuniary damage. On the other hand, it accepted the applicant's claims for legal costs in their entirety.

[see paragraphs 47-53 of the judgment and points 2-4 of the operative provisions]

In accordance with the Convention, judgment was given by a Chamber composed of nine judges, namely Mr R. Ryssdal (Norwegian), *President*, Mr C. Russo (Italian), Mr N. Valticos (Greek), Mrs E. Palm (Swedish), Mr I. Foighel (Danish), Mr A.B. Baka (Hungarian), Mr J. Makarczyk (Polish), Mr K. Jungwiert (Czech) and Mr P. van Dijk (Dutch), and also of Mr H. Petzold, *Registrar*, and Mr P.J. Mahoney, *Deputy Registrar*.

One judge expressed a separate opinion, and this is annexed to the judgment.

528
25.9.1997

AYDIN V. TURKEY
judgment of 25 September 1997

In a judgment delivered in Strasbourg on 25 September 1997 in the case of Aydin v. Turkey, the European Court of Human Rights dismissed the Government's preliminary objections concerning the exhaustion of domestic remedies under Article 26 of the European Convention on Human Rights[32] (18 votes to 3) and abuse of process (unanimously). It also held that the applicant had been subjected to torture through being raped and otherwise ill-treated, contrary to Article 3 of the Convention (14 votes to 7); that she had not been afforded an effective remedy in respect of her complaint that she had been tortured in this manner, contrary to Article 13 (16 votes to 5); that it was not necessary to consider the applicant's complaint that she had been denied access to a court under Article 6 § 1 (20 votes to 1); that no violation of Article 25 § 1 had been established (unanimously); that it was not necessary to consider the applicant's complaints under Articles 28 § 1(a) and 53 of the Convention (unanimously). The Court also held that Turkey should pay compensation to the applicant (18 votes to 3) and awarded her a major part of the legal costs and expenses claimed (16 votes to 5).

The judgment was read out in open court by Mr Rolv Ryssdal, the President of the Court.

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant was born in 1976 and currently lives in Derik in South East Turkey. At the time of the events complained of she was living with her family in Tasit, near Derik.

The facts of the case are disputed. According to the applicant, she was arrested in the early hours of 29 June 1993 together with her father and her sister-in-law in their village. They were taken by village guards and gendarme officers to the Derik gendarmerie headquarters. During her detention the applicant was blindfolded. She was beaten, stripped naked, placed in a tyre and hosed with pressurised water. She was then taken to another room where she was raped by a member of the security forces. She and the other members of her family were released after three days, on or about 2 July 1993.

According to the Government, the applicant and the other members of her family were never taken into custody in Derik gendarmerie headquarters, and her allegations were entirely unsubstantiated.

On 8 July 1993, the applicant, her father and her sister-in-law complained about their treatment in custody to the Derik Public Prosecutor's Office. The Public Prosecutor took their statements and sent them to the Derik State Hospital for a medical examination. A report on each person was issued on the same day. Two further medical reports were issued on the applicant on 9 July and 17 August 1993. In reply to an inquiry by the Public Prosecutor, the Derik gendarme headquarters stated that the applicant and the other members of her family had never been in custody there. On 13 May 1994 the Public Prosecutor reported to the

[32] The text of the Convention Articles mentioned in this release is appended.

Principal State Counsel in Mardin that there was no evidence to support the applicant's complaints but that the investigation was continuing.

B. Proceedings before the European Commission of Human Rights

The application was lodged with the Commission on 21 December 1993 and declared admissible on 28 November 1994.

Evidence was heard by a delegation of the Commission in the presence of the parties in Ankara from 12 to 14 July 1995 and in Strasbourg from 18 to 19 October 1995.

Having attempted unsuccessfully to secure a friendly settlement, the Commission drew up a report on 7 March 1996 in which it established the facts and expressed the opinion that there had been a violation of Articles 3 (by 26 votes to 1) and 6 § 1 (by 19 votes to 8) of the Convention and that no separate issue arose under Article 13 (by 19 votes to 8). It also concluded that Turkey had failed to comply with its obligations under Article 25 of the Convention (by 25 votes to 2).

II.
SUMMARY OF THE JUDGMENT[33]

1. The Government's preliminary objections

A. Exhaustion of domestic remedies

The Government requested the Court to reject the applicant's complaints on the ground that she had not exhausted the remedies available to her under domestic law.

The Court noted that the Government had not challenged the admissibility of the application at the admissibility stage of the proceedings before the Commission. It concluded therefore that they were estopped from raising this objection before the Court.

[see paragraph 58 of the judgment and point 1 of the operative provisions]

B. Abuse of process

The Government asserted that the alleged complaints had been fabricated and the application to the Convention institutions deliberately manipulated for political purposes.

The Court dismissed this objection also. It had not been raised at the admissibility stage of the proceedings before the Commission and the Government were estopped from introducing it before the Court.

[see paragraph 60 of the judgment and point 2 of the operative provisions]

2. Article 3 of the Convention

A. The Court's assessment of the facts

The Court recalled its consistent case-law that under the Convention system the establishment and verification of the facts is primarily a matter for the Commission. In the instant case a delegation of the Commission heard oral evidence from key witnesses,

[33] This summary by the registry does not bind the Court.

including the applicant, her father and gendarme officers on duty at the Derik headquarters at the time of the alleged events. The Court considered that it should accept the facts as established by the Commission, having been satisfied that the Commission could properly conclude from the evidence before it that the applicant's allegations were proved beyond reasonable doubt.

[see paragraphs 70-73 of the judgment]

B. Arguments of participants in the proceedings

The Court stressed that rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment which leaves deep psychological scars on the victim. In the instant case the applicant must have felt debased and violated both physically and emotionally as a result of the sexual assault. Furthermore, the applicant suffered a series of particularly terrifying and humiliating experiences during her detention. She was kept blindfolded throughout her ordeal and must have been in a constant state of physical pain and mental anguish as a result of the beatings which she suffered during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances and on one occasion pummelled with high-pressure water while being spun around in a tyre.

The Court was satisfied that the accumulation of acts of physical and mental violence and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. The Court also noted that it would have reached the same conclusion on either of these grounds taken separately.

[see paragraphs 83-87 and point 3 of the operative provisions]

3. Article 6 § 1 of the Convention

The applicant alleged that the authorities had failed to conduct an adequate investigation into her complaints with the result that she was denied an effective access to a court to seek compensation for the suffering she experienced while in detention. The Government refuted her contention that the criminal investigation conducted was inadequate.

The Court considered that the essence of the applicant's complaint under Article 6 § 1 concerned the failure of the authorities to conduct an effective investigation which would have enhanced her prospects of succeeding with a claim for compensation. The Court therefore concluded that it would be appropriate to examine her complaint under Article 13 of the Convention which imposes a more general obligation on Contracting States to provide an effective remedy in respect of violations of the Convention.

[see paragraphs 99-102 of the judgment and point 5 of the operative provisions]

4. Article 13 of the Convention

The Court stressed the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims. It recalled that Article 13 imposes an obligation on States to carry out a thorough and effective investigation into incidents of torture.

Having regard to these principles the Court noted that the authorities in the instant case only carried out an incomplete inquiry to determine the veracity of the applicant's allegation to the public prosecutor that she had been raped. The prosecutor could reasonably have been expected to appreciate the seriousness of her allegations notwithstanding that she did not

outwardly display any visible signs of having been raped and ill-treated. He failed to seek out possible eye-witnesses to the detention of the Aydin family; nor did he take any meaningful measures to determine whether the family members were held at the gendarmerie headquarters as alleged. He failed to look for corroborating evidence at the headquarters and was overly disposed to accepting the Gendarmes officers' denials that the Aydins had been held in custody over the relevant period.

The Court also considered that the medical examinations ordered by the prosecutor were not consistent with the requirements of a fair and effective investigation into an allegation of rape in custody. The medical tests carried out had not been directed at establishing whether the applicant had been raped; rather they were focused on whether she had lost her virginity. No attempt was made to evaluate, psychologically, whether the applicant's attitude and behaviour conformed to those of a rape victim. For the Court the requirement of a thorough and effective investigation into an allegation of rape in custody at the hands of an official of the State also implies that the victim be examined, with all appropriate sensitivity, by medical professionals with particular experience in this area and whose independence is not circumscribed by instructions given by the prosecuting authority as to the scope of the examination. It could not be concluded that the medical examinations ordered by the prosecutor fulfilled these requirements.

The Court concluded that the investigation was seriously deficient and undermined the effectiveness of any other remedies which may have been available to the applicant, including the pursuit of compensation. There had thus been a violation of Article 13 of the Convention.

[see paragraphs 103-109 of the judgment and point 4 of the operative provisions]

5. Article 25 § 1 of the Convention

The applicant complained that the authorities had harassed and intimidated both her and members of her family because she had initiated proceedings before the Convention institutions. The Court's evaluation of the evidence in this regard led it to find that there was an insufficient factual basis to support this allegation. It therefore considered that there was no breach of Article 25 § 1 of the Convention.

[see paragraphs 115-117 of the judgment and point 6 of the operative provisions]

6. Article 28 § 1(a) and Article 53 of the Convention

The Court concluded that it was unnecessary to examine these complaints having regard to its finding under Article 25 § 1 of the Convention.

[see paragraph 120 the judgment, point 7 of the operative provisions]

7. Article 50 of the Convention

In view of the extremely serious violation of the Convention suffered by the applicant and the enduring psychological harm which she may be considered to have suffered on account of being raped, the Court decided to award her the sum of £25,000 sterling together with a substantial part of the legal costs and expenses claimed.

[see paragraphs 131 and 135 of the judgment and points 8 and 9 of the operative provisions]

Judgment was given by a Grand Chamber composed of twenty-one judges, namely Mr R. Ryssdal, President, (Norwegian), Mr R. Bernhardt (German), Mr Thór Vilhjálmsson

(Icelandic), Mr F. Gölcüklü (Turkish), Mr F. Matscher (Austrian), Mr L.-E. Pettiti (French), Mr B. Walsh (Irish), Mr C. Russo (Italian), Mr J. De Meyer (Belgian), Mr N. Valticos (Greek), Mrs E. Palm (Swedish), Mr R. Pekkanen (Finnish), Mr A.N. Loizou (Cypriot), Sir John Freeland (British), Mr A. B. Baka (Hungarian), Mr M. A. Lopes Rocha (Portuguese), Mr L. Wildhaber (Swiss), Mr J. Makarczyk (Polish), Mr D. Gotchev (Bulgarian), Mr K. Jungwiert (Czech), Mr P. Kūris (Lithuanian), and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar.

Six separate opinions are annexed to the judgment

200
27.3.1998

PETROVIC V. AUSTRIA
judgment of 27 March 1998

In a judgment delivered at Strasbourg on 27 March 1998 in the case of Petrovic v. Austria, the European Court of Human Rights held by 7 votes to 2 that there had been no violation of Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for private and family life) of the European Convention on Human Rights. The applicant had complained of a refusal to grant him a parental leave allowance and of the discriminatory nature of that decision.
The judgment was read out in open court by Mr Rudolf Bernhardt, the President of the Court.

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, Mr Antun Petrovic, an Austrian national, was born in 1950 and lives in Vienna (Austria).

On 25 April 1989 the applicant applied a for parental leave allowance so that he could look after his child, who was born on 27 February 1989, while his wife, a civil-servant, continued to work. His application was, however, turned down by the employment office on 26 May 1989, on the ground that, under the Unemployment Benefit Act 1977, only mothers could claim such an allowance.

The applicant's appeal to the Regional Employment Office, in which he contended that the relevant provisions were discriminatory and therefore unconstitutional, was dismissed on 4 July 1989. On 18 August 1989 the applicant lodged a complaint with the Constitutional Court arguing that the terms of the Act restricting the right to parental leave allowance to mothers were discriminatory and were therefore in breach of the Federal Constitution. He also relied on Article 8 of the Convention guaranteeing the right to respect for family life.

On 12 December 1991 the Constitutional Court declined to accept the complaint for adjudication. It referred to its previous case-law and took the view that the amendments to the Federal Unemployment Act that had been introduced in the meantime made no difference to the applicant's case.

With effect from 1 January 1990 an amendment to that Act made it possible for fathers to claim parental leave allowance, but only in respect of children born after 31 December 1989. It did not therefore apply to the applicant.

B. Proceedings before the European Commission of Human Rights

The application to the Commission, which was lodged on 3 August 1992, was declared admissible on 5 July 1995.

Having attempted unsuccessfully to secure a friendly settlement, the Commission adopted a report on 15 October 1996 in which it established the facts and expressed the opinion that there had been a violation of Article 14 taken together with Article 8 (25 votes to 5).

II.
SUMMARY OF THE JUDGMENT

A. Alleged violation of Article 14 of the Convention taken together with Article 8

The applicant had complained of the Austrian authorities' refusal to award him a parental leave allowance under section 26(1) of the Unemployment Benefit Act 1977, which provided that only mothers were entitled to receive such payments.

1. Applicability of Article 14 taken together with Article 8

The Court had to determine whether the facts of the case before it came within the scope of Article 8 and, consequently, of Article 14 of the Convention.

In that connection, the Court, like the Commission, considered that the refusal to grant Mr Petrovic a parental leave allowance could not amount to a failure to respect family life, since Article 8 did not impose any positive obligation on States to provide the financial assistance in question.

Nonetheless, that allowance paid by the State was intended to promote family life and necessarily affected the way in which the latter was organised as, in conjunction with parental leave, it enabled one of the parents to stay at home to look after the children.

By granting parental leave allowance States were able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the allowance therefore came within the scope of that provision. It followed that Article 14 taken together with Article 8 was applicable.

[See paragraphs 22-29 of the judgment.]

2. Compliance with Article 14 taken together with Article 8

The Court noted that at the material time parental leave allowances were paid only to mothers, not fathers, once a period of eight weeks had elapsed after the birth and the right to a maternity allowance had been exhausted.

It had not been disputed that that amounted to a difference in treatment on grounds of sex.
The Court recalled that the Contracting States enjoyed a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justified a different treatment in law. The scope of the margin of appreciation varied according to the circumstances, the subject-matter and its background; in that respect, one of the relevant factors might be the existence or non-existence of common ground between the laws of the Contracting States.

It was clear that at the material time, that is at the end of the 1980s, there had been no common standard in this field, as the majority of the Contracting States had not provided for parental leave allowances to be paid to fathers.

The idea of the State giving financial assistance to the mother or the father, at the couple's option, so that the parent concerned could stay at home to look after the children was

relatively recent. Originally, welfare measures of that sort – such as parental leave – had primarily been intended to protect mothers and to enable them to look after very young children. Only gradually, as society had moved towards a more equal sharing between men and women of responsibilities for the bringing up of their children, had the Contracting States introduced measures extending to fathers, like entitlement to parental leave.

In that respect Austrian law had evolved in the same way, the Austrian legislature enacting legislation in 1989 to provide for parental leave for fathers. In parallel, eligibility for the parental leave allowance had been extended to fathers in 1990.

It therefore appeared difficult to criticise the Austrian legislature for having introduced in a gradual manner, reflecting the evolution of society in that sphere, legislation which was, all things considered, very progressive in Europe.

There still remained a very great disparity between the legal systems of the Contracting States in that field. While measures to give fathers an entitlement to parental leave had now been taken by a large number of States, the same was not true of the parental leave allowance, which only a very few States granted to fathers.

The Austrian authorities' refusal to grant the applicant a parental leave allowance had not, therefore, exceeded the margin of appreciation allowed to them. Consequently, the difference in treatment complained of had not been discriminatory within the meaning of Article 14.

[see paragraphs 30-43 of the judgment and the operative provision]

Judgment was given by a Chamber composed of nine judges, namely Mr R. Bernhardt (German), *President*, Mr F. Matscher (Austrian), Mr L.-E. Pettiti (French), Mr B. Walsh (Irish), Mr A. Spielmann (Luxemburger), Sir John Freeland (British), Mr M.A. Lopes Rocha (Portuguese), Mr B. Repik (Slovakian) and Mr J. Casadevall (Andorran), and also of Mr H. Petzold, *Registrar*, and Mr P.J. Mahoney, *Deputy Registrar*.

Judge Pettiti expressed a concurring opinion and Judges Bernhardt and Spielmann a joint dissenting opinion and these are annexed to the judgment.

741
21.12.1999

SALGUEIRO DA SILVA MOUTA v. Portugal
judgment of 21 December 1999

In a judgment[1] delivered at Strasbourg on 21 December 1999 in the case of Salgueiro da Silva Mouta v. Portugal, the European Court of Human Rights held unanimously that there had been a violation of Article 8 (right to respect for private and family life) taken together with Article 14 (prohibition of discrimination) of the European Convention on Human Rights, and that it was unnecessary to rule on the complaints made under Article 8 taken alone. Under Article 41 (just satisfaction) of the Convention, the Court held that the judgment constituted of itself sufficient just satisfaction for the damage alleged by the applicant; it awarded him 1,800,000 Portuguese escudos (PTE) for costs and PTE 350,000 for expenses.

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, João Manuel Salgueiro da Silva Mouta, a Portuguese national, was born in 1961 and lives in Queluz (Portugal).

He was prevented by his ex-wife from visiting his daughter M., in breach of an agreement reached at the time of their divorce. He sought an order giving him parental responsibility for the child, which was granted by the Lisbon Family Affairs Court in 1994. M. lived with the applicant until 1995 when, he alleges, she was abducted by her mother. On appeal, the mother was given parental responsibility whereas the applicant was granted a contact order which, he maintained, he was unable to exercise. The Lisbon Court of Appeal gave two reasons in its judgment for granting parental responsibility for M. to her mother, namely the interest of the child and the fact that the applicant was a homosexual and living with another man.

B. Procedure and composition of the Court

The application was lodged with the European Commission of Human Rights on 12 February 1996.

The case was transmitted to the Court on 1 November 1998 under the transitional provisions of Protocol No. 11 to the Convention and declared admissible on 1 December 1998. A hearing was held on 28 September 1999 in private.

Judgment was given by a Chamber of seven judges, composed as follows:

Matti Pellonpää (Finnish), *President*,
Georg Ress (German),
Antonio Pastor Ridruejo (Spanish),
Lucius Caflisch[34] (Swiss),
Jerzy Makarczyk (Polish),

[34] Elected as the judge in respect of Liechtenstein

Ireneu Cabral Barreto (Portuguese),
Nina Vajić (Croatian), *Judges*,

and also Vincent Berger, *Section Registrar*

II.
SUMMARY OF THE JUDGMENT[35]

A. Complaints

The applicant complained of an unjustified interference with his right to respect for his private and family life, as guaranteed by Article 8 of the Convention and discrimination contrary to Article 14 of the Convention. He maintained, too, that contrary to Article 8 he had been forced by the court of appeal to hide his homosexuality when seeing his daughter.

B. Decision of the Court

Article 8 taken together with Article 14 of the Convention

The Court noted at the outset that under the case-law of the Convention institutions Article 8 applied to decisions concerning granting parental responsibility for a child to one of the parents on a divorce or separation. The judgment of the Lisbon Court of Appeal constituted an interference with the applicant's right to respect for his family life in that it had reversed the judgment of the Lisbon Family Affairs Court granting parental responsibility to the applicant.

The Court went on to observe that although the court of appeal had considered the interest of the child in deciding to reverse the judgment of the Lisbon Family Affairs Court and, consequently, to grant parental responsibility to the mother rather than the father, it had had regard to a new factor, namely the fact that the applicant was a homosexual and living with another man. There had therefore been a difference in treatment between the applicant and M.'s mother based on the applicant's sexual orientation, a notion that fell within Article 14 of the Convention. Such a difference in treatment was discriminatory under that provision if it had no objective or reasonable justification, that is if it did not pursue a legitimate aim or if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

The court of appeal had pursued a legitimate aim in reaching its decision, namely the protection of the child's health and rights. In order to decide whether there was no reasonable basis for the decision that was finally made, the Court examined whether the new factor taken into account by the Lisbon Court of Appeal – the applicant's homosexuality – was a mere *obiter dictum* with no direct impact on the final decision, or whether, on the contrary, it was a decisive factor. To that end, the Court reviewed the Lisbon Court of Appeal's judgment and noted that after finding that there were no sufficient reasons for depriving the mother of parental responsibility – which the parents had agreed she should exercise – it had gone on to say: "... even if that had not so, we consider that the mother should be granted custody of the child". In so doing the court of appeal had noted that the applicant was a homosexual and living with another man and had stated: "the child must live in ... a traditional Portuguese family" and "it is unnecessary to examine whether or not homosexuality is an illness or a sexual orientation towards people of the same sex. Either way, it is an abnormality and children must not grow up in the shadow of abnormal situations".

[35] This summary by the registry does not bind the Court.

The Court was of the view that those passages from the judgment of the Lisbon Court of Appeal were not simply clumsy or unfortunate, or mere *obiter dicta*; they suggested that the applicant's homosexuality had been decisive in the final decision and thus amounted to a distinction dictated by factors relating to the applicant's sexual orientation that it was not permissible to draw under the Convention. That conclusion was supported by the fact that, when ruling on the applicant's contact rights, the court of appeal had discouraged the applicant from behaving during visits in a way that would make the child aware that he was living with another man "as if they were spouses".

The Court therefore held that there had been a violation of Article 8 taken together with Article 14.

Article 8 of the Convention taken alone

The Court held that it was unnecessary to rule on the alleged violation of Article 8 taken alone as the case made out on that point was, in substance, the same as that considered under Article 8 taken together with Article 14.

Article 41 of the Convention

The applicant had sought "just reparation" but had failed to quantify his claim. In the circumstances, the Court held that the finding of a violation in the judgment was of itself sufficient just satisfaction for the alleged damage.

However, it awarded the applicant PTE 2,150,000 for costs and expenses.

287
25.4.2000

LEARY v. THE UNITED KINGDOM
judgment of 25 April 2000
(no. 38890/97) *Friendly settlement*

John Leary, a British national, married in 1981 and had three daughters, born in 1987, 1990 and 1994. His wife died in 1997 leaving him as the administrator of her estate. On 4 August 1997, the applicant applied to the Benefits Agency for social security benefits. These benefits are equivalent to those to which a widow, whose husband had died in similar circumstances to those of his wife, would have been entitled, namely a Widow's Payment and a WMA. By a letter dated 6 August 1997, the Benefits Agency informed the applicant that they were unable to accept his application as a valid claim because the regulations governing the payment of widows' benefits were specific to women.

The applicant complained that British social security legislation discriminated against him on grounds of sex, in breach of Article 14 of the Convention, taken in conjunction with both Article 8 and Article 1 of Protocol No. 1.

The case has been struck out following a friendly settlement in which Mr Leary is to be paid GBP 12,226.20 in respect of benefits which he would have received from 27 May 1997 to 12 July 1999 had he been a bereaved widow. He will further receive weekly payments, backdated to 12 July 1999, which he would receive as WMA if he were a bereaved widow, until the Welfare Reform and Pensions Bill enters into force. (Judgment in English.)

Cornwell v. the United Kingdom (*Application number 36578/97)* ***Friendly settlement***

David Cornwell is a British national whose wife died on 24 October 1989. He has a son, born on 24 April 1988, whom he cares for and in respect of whom he receives Child Benefit. On 7 February 1997 the applicant's representative contacted the Benefits Agency of the Department of Social Security to inquire about the statutory provisions for receiving widows' benefits, namely a Widowed Mother's Allowance (WMA) and a Widow's Payment, payable under the Social Security and Benefits Act 1992. On 23 April 1997 the Benefits Agency confirmed that if the applicant were a woman and his wife had been a man, he would, following her death, have been entitled to receive Widowed Mother's Allowance at the full 100% basic rate plus additional pension money which had been earned by virtue of the rate of contributions paid after 1978.

The applicant complained that the lack of benefits for widowers under British social security legislation discriminated against him on grounds of sex, in breach of Article 14 (prohibition of discrimination) of the European Convention on Human Rights, taken in conjunction with both Article 8 (right to respect for private and family life) and Article 1 of Protocol No. 1 (protection of property) to the Convention.

The case has been struck out following a friendly settlement in which Mr Cornwell is to be paid 11,904.60 British pounds (GBP) in respect of benefits which he would have received from 7 February 1997 to 12 July 1999 had he been a bereaved widow. He will further receive weekly payments, backdated to 12 July 1999, which he would have received as WMA if he had been a bereaved widow, until the Welfare Reform and Pensions Bill enters into force. The judgment exists only in English.

559
31.7.2000

A.D.T. v. THE UNITED KINGDOM
judgment of 31 July 2000

The European Court of Human Rights has today notified in writing judgment in the case of A. D. T. v. the United Kingdom. The Court held unanimously that there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights and that it was not necessary to examine the case under Article 14 (prohibition of discrimination). Under Article 41 (just satisfaction), the Court awarded the applicant 20,929.05 pounds sterling (GBP) in respect of damages, and GBP 12,391.83 for legal costs and expenses.

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, a British national born in 1948, is homosexual. Following a police search of his home, he was arrested and taken to the local station where he admitted that certain videos seized during the search contained footage of himself and up to four adult men engaging in sexual acts in his home. He was convicted of gross indecency between men contrary to Section 13 of the Sexual Offences Act 1956 and on 20 November 1996 was conditionally discharged for two years.

The applicant submits that being charged and convicted for his participation in sexual acts with more than one other consenting adult male in the privacy of his own home constituted an interference with his private life, as guaranteed by Article 8 of the Convention. He further complains of discrimination, under Article 14 of the Convention, as a group of heterosexual individuals or homosexual females involved in similar sexual activities would not have been prosecuted, there being no legislation prohibiting such acts.

B. Procedure and composition of the Court

The application was lodged with the European Commission of Human Rights on 25 March 1997.

On 16 March 1999 the Court (Third Section) declared the application admissible. A hearing was held on 30 November 1999. Judgment was given by a Chamber of seven judges, composed as follows:

Jean-Paul Costa, (French), *President*,
Willi Fuhrmann (Austrian),
Loukis Loucaides (Cypriot),
Pranas Kuris (Lithuanian),
Sir Nicolas Bratza (British),
Hanne Sophie Greve (Norwegian),
Kristaq Traja (Albanian), *judges*,
and also Sally Dollé, Section *Registrar*.

II.
SUMMARY OF THE JUDGMENT

Complaints

The applicant complained that his rights guaranteed under Articles 8 and 14 of the European Convention on Human Rights had been violated.

C. Decision of the Court

Article 8

The Court found an interference with the applicant's right to respect for his private life both as regards the existence of the law prohibiting consensual sexual acts between more than two men in private, and as regards the conviction itself.

The Court noted that the conviction was based not on the fact that the recordings had been made, but on the activities themselves. Further, the activities in the case were purely and genuinely private in the sense that there was no real likelihood of the video recordings entering the public domain. In such circumstances, the margin of appreciation allowed to the respondent State was narrow.

The Court found no "pressing social need" which could justify either the legislation at issue in the case or its application in the proceedings against the applicant, and therefore found a violation of Article 8.

Article 14 taken in conjunction with Article 8

Having found a violation of Article 8, the Court considered that it was not necessary to examine the case under Article 14 as well.

Article 41

The Court awarded the applicant the sum of GBP 20,929.05 for damages and GBP 12,391.83 for costs and expenses.

208
27.3.2001

SUTHERLAND v. THE UNITED KINGDOM
judgment of 27 March 2001
(application no. 25186/94) *Struck out*

Euan Sutherland, a British national, born in 1977 and resident in London, complained that fixing the minimum age for lawful sexual activities between men in the United Kingdom at 18, rather than 16 (the age limit between women), violated his right to respect for his private life guaranteed under Article 8 (right to respect for family life) of the European Convention on Human Rights. He also relied on Article 14 (freedom from discrimination).

Mr Sutherland had become aware, at about the age of 12, that he was sexually attracted to boys. When he was 14 he had tried going out with a girl, but the experience had confirmed for him that he could only find a fulfilling relationship with another man. He had had his first homosexual encounter when he was 16, with another person of his age who also was homosexual. They had sexual relations but were both worried about the fact that under the law, as applicable at the time, it was a criminal offence.

In 1990, 455 prosecutions had given rise to 342 convictions and, in 1991, 213 prosecutions gave rise to 169 convictions. The applicant was never prosecuted.

Following the European Commission of Human Right's report of 1 July 1997, concluding that the applicant was the victim of a violation of Article 8 of the Convention, taken in conjunction with Article 14, the United Kingdom Government proposed in June 1998 a Crime and Disorder Bill to Parliament for a reduction of the age of consent for homosexual acts between men from 18 to 16. The Sexual Offences (Amendment) Act 2000, equalising the age of consent for homosexual acts between consenting males to 16, came into force on 8 January 2001.

After the entry into force of this act, the European Court of Human Rights received a request from both parties to strike out the case, together with confirmation that the Government had reimbursed the applicant's legal costs. In the light of this information, and noting that the new provisions removed the risk or threat of prosecution which had prompted the application, the Court has struck out the case. (The judgment is available in English and in French.)

873
21.11.2001

FOGARTY v. THE UNITED KINGDOM
judgment of 21 November 2001

- by 16 votes to one, that there had been no violation of Article 6 § 1,
- unanimously, that there had been no violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 6 § **1**.

I.
BACKGROUND OF THE CASE

A. Principal facts

Mary Fogarty is an Irish national, born in 1959 and living in London. On 8 November 1993 she started working as an administrative assistant at the United States Embassy in London, in the Foreign Broadcasting Information Service, a subsidiary of the Central Intelligence Agency. After being dismissed in February 1995, she issued proceedings against the United States Government before an industrial tribunal. She claimed that her dismissal had been the result of sex discrimination, contrary to the Sex Discrimination Act 1975 (the 1975 Act), alleging that she had suffered persistent sexual harassment from her supervisor and that working relationships had broken down in consequence. On 13 May 1996 the tribunal upheld her complaint and she was paid 12,000 pounds sterling in compensation.

In June 1996 and August 1996 she applied unsuccessfully for two posts at the US Embassy. On 15 September 1996 she issued a second application before an industrial tribunal, claiming the embassy had refused to re-employ her as a consequence of her previous successful sex discrimination claim, which constituted victimisation and discrimination under the 1975 Act. On 6 February 1997 she was advised that the United States Government were entitled to claim immunity under the 1978 Act, which grants immunity from suit in relation to administrative and technical staff of a diplomatic mission seeking to bring proceedings concerning their contract of employment.

II.
SUMMARY OF THE JUDGMENT

Complaints

Ms Fogarty complained, relying on Articles 6 § 1 and 14, of lack of access to a court and discrimination.

Decision of the Court concerning Art. 14

The Court recalled that the applicant was prevented from pursuing her claim in the Industrial Tribunal by virtue of sections 1 and 16(1)(a) of the 1978 Act, which conferred an immunity in respect of proceedings concerning the employment of embassy staff. This immunity applied in relation to all such employment-related disputes, irrespective of their subject-matter and of the sex, nationality, place of residence or other attributes of the complainant. It could not therefore be said that the applicant was treated any differently from other people wishing to bring employment-related proceedings against an embassy, or that the restriction placed on

her right to access to court was discriminatory. It followed that there had been no violation of Article 14 in conjunction with Article 6 § 1.

057
29.1.2002

FIELDING v. THE UNITED KINGDOM
judgment of 29 January 2002
(application no. 25186/94) ***Friendly Settlement***

The applicant, David Fielding, a United Kingdom national, married in 1973 and had three children, born in 1974, 1976 and 1988. His wife, who died in 1996, worked throughout the marriage, only taking breaks to have the three children, and paid full social security contributions as an employed earner. The applicant works full-time, earning approximately 29,500 pounds sterling (GBP) a year, from which he has to pay the mortgage on the family home and support himself and the children, the two eldest of whom are currently at university and the youngest of whom lives with the applicant and is partly cared for by a child-minder.

In January 1997 the applicant applied for social security benefits equivalent to those to which a widow - whose husband had died in similar circumstances to his wife - would have been entitled, namely a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992 ("the 1992 Act"). He was informed that his claim was invalid because the regulations governing the payment of widows' benefits were specific to women. An appeal against such a decision would be bound to fail given that no social security benefits were payable to widowers under United Kingdom law. Mr Fielding also applied for bereavement tax allowance, but was informed that he did not qualify, because the law provided only for payments to widows.

On 9 April 2001 the Welfare Reform and Pensions Act 1999 came into force, making bereavement benefits available to both men and women.

The case has been struck out following a friendly settlement in which the United Kingdom Government is to pay Mr Fielding GBP 14,573.32. According to the Government, this is the amount he would have received (had he been a woman) in Widow's Payment and Widowed Mother's Allowance from his wife's death until 9 April 2001 and the amount the Widow's Bereavement Tax Allowance would have been worth to him - plus GBP 5,000 for legal costs and expenses. (The judgment is available only in English.)

129
12.3.2002

SAWDEN v. THE UNITED KINGDOM
judgment of 12 March 2002
(application no. 38550/97) ***Friendly settlement***

The applicant, Dean Sawden, a British national, married in 1994 and had two children, born in 1989 and 1992. His wife died in August 1997, leaving him as the administrator of her estate.

The applicant's wife was employed as a shop assistant for four years and contributed about half of their joint income. She paid full social security contributions as an employed earner, except when she gave up work to care for their children, and was subsequently entitled to contribution credits as a person who was incapable of work. The applicant gave up work to nurse his wife and care for their children in January 1997.

In September 1997 the applicant applied for social security benefits equivalent to those to which a widow - whose husband had died in similar circumstances to his wife - would have been entitled, namely a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992. He was informed that his claim was invalid because the regulations governing the payment of widows' benefits were specific to women. He lodged an unsuccessful appeal against this decision on 2 October 1997.

Mr Sawden wished to increase his income and continue to care for his children by working part time. However, under Income Support Rules, any earnings over 15 pounds sterling (GBP) per week would be deducted from his benefit. His family's standard of living was thus effectively fixed at a low level until circumstances changed to allow him to return to full-time work. If he had been entitled to receive social security benefits equivalent to those to which a woman in similar circumstance to himself would have been entitled, he could have worked part time and would have received benefits of around GPB 85 per week. He would also have received a one off Widow's Payment of GPB 1,000.

On 9 April 2001 the Welfare Reform and Pensions Act 1999 came into force, making bereavement benefits available to both men and women.

The applicant complained that British social security and tax legislation discriminated against him on grounds of sex, in breach of Article 14 (prohibition of discrimination) of the European Convention on Human Rights, taken in conjunction with both Article 8 (right to respect for family life) and Article 1 of Protocol No. 1 (protection of property). He further complained under Article 13 (right to an effective remedy).

The case has been struck out following a friendly settlement in which GBP 1,000 is to be paid for any non-pecuniary and pecuniary damage, costs and expenses. (The judgment is available only in English.)

167
26.3.2002

LOFFELMAN v. THE UNITED KINGDOM
judgment of 26 March 2002
(application no. 44585/98) ***Friendly settlement***

The applicant, Joseph M. Loffelman, a British national, married in 1987 and had two children, born in 1988 and 1990. His wife died in 1998, leaving him as the administrator of her estate.

The applicant's wife was employed from 1976, most recently as a receptionist, and thus contributed to the joint income of the marriage. She paid full social security contributions as an employed earner until her death. The applicant, a lorry driver, continues in full-time work and has to meet the expense of childcare from the existing family income.

In May 1998 the applicant applied for social security benefits equivalent to those to which a widow - whose husband had died in similar circumstances to his wife - would have been entitled, namely a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992. He was informed that his claim was invalid because the regulations governing the payment of widows' benefits were specific to women. An appeal against such a decision would be bound to fail given that no social security benefits are payable to widowers under United Kingdom law.

A widow in a similar situation could claim Widow's Payment and Widowed Mother's Allowance, which are payable regardless of income and savings. He would also have received a one-off Widow's Payment of GBP 1,000.

On 9 April 2001 the Welfare Reform and Pensions Act 1999 came into force, making bereavement benefits available to both men and women.

The applicant complained that British social security and tax legislation discriminated against him on grounds of sex, in breach of Article 14 (prohibition of discrimination), taken in conjunction with both Article 8 (right to respect for family life) and Article 1 of Protocol No. 1 (protection of property).

The case has been struck out following a friendly settlement in which GBP 19,744.53 is to be paid for any non-pecuniary and pecuniary damage, costs and expenses. (The judgment is available only in English.)

271
21.5.2002

DOWNIE v. THE UNITED KINGDOM
21 May 2002

(application no. 40161/98) ***Friendly settlement***

The applicant, Nicholas Downie, a British national, married in 1978 and had three daughters, born in 1980, 1981 and 1986. His wife died in 1993, leaving him as the administrator of her estate.

The applicant's wife was employed as a private caterer for at least three years and, while working, contributed to the joint income of the marriage. She paid social security contributions as an employed earner until her death. The applicant, a solicitor, continues in full-time work and has to meet the expense of childcare from the existing family income.

In July 1997 the applicant applied for social security benefits equivalent to those to which a widow - whose husband had died in similar circumstances to his wife - would have been entitled, namely a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992. He was informed that his claim was invalid because the regulations governing the payment of widows' benefits were specific to women.

When he lodged his application, the applicant received weekly Child Benefit payments at the Lone Parent rate. His income precluded him from qualifying for means-tested benefits such as Income Support or Family Credit. A widow in a similar situation could have claimed Widow's Payment and Widowed Mother's Allowance, which were payable regardless of income and savings. If the applicant had been entitled to receive those social security benefits, he calculated that he would have been around GBP 80 per week better off. He would also have received a one-off Widow's Payment of GBP 1,000.

On 9 April 2001 the Welfare Reform and Pensions Act 1999 came into force, making bereavement benefits available to both men and women.

The applicant complained that British social security and tax legislation discriminated against him on grounds of sex, in breach of Article 14 (prohibition of discrimination) of the Convention, taken in conjunction with both Article 8 (right to respect for family life) and Article 1 of Protocol No. 1 (protection of property).

The case has been struck out following a friendly settlement in which 21,084.22 pounds sterling is to be paid for any non-pecuniary and pecuniary, costs and expenses. (The judgment is available only in English.)

296
4.6.2002

WESSELS-BERGERVOET v. THE NETHERLANDS
judgment of 4 June 2002
(application no. 34462/97) ***Friendly settlement***

R.E.W. Wessels-Bergervoet, a Dutch national, and her husband have always lived in the Netherlands. Her husband was granted a married person's old age pension under the General Old Age Pension Act (*Algemene Ouderdomswet*; "AOW") as from 1 August 1984. However, his pension was reduced by 38% as he had not been insured under the Act during a period totalling 19 years, when he had worked in Germany and had been insured under German social security legislation. No appeal was filed against this decision.

The applicant was granted an old age pension under the AOW as from 1 March 1989 on the same basis as her husband's pension; reduced by 38%. She appealed unsuccessfully.
She complained that the only reason for the reduction in her pension was that she was married to a man who was not insured under the AOW on the grounds of his employment abroad and that a married man in the same situation would not have had his pension reduced for this reason. She maintained, in particular, that the reduction in her pension is the result of discriminatory treatment.

The Court held, unanimously, that there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 1 of Protocol No. 1 (protection of property). It also held that the question of the application of Article 41 was not ready for decision.

307
11.6.2002

WILLIS v. THE UNITED KINGDOM
judgment of 11 June 2006

The European Court of Human Rights has today notified in writing a judgment in the case of *Willis v. the United Kingdom* (application no. 36042/97). The Court held unanimously that:

- there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 1 of Protocol No. 1 (protection of property) of the European Convention on Human Rights concerning the applicant's non-entitlement to a *Widow's Payment* and a *Widowed Mother's Allowance*;
- there had been no violation of Article 14 taken in conjunction with Article 8 (right to respect for private and family life) or Article 1 of Protocol No. 1 concerning the applicant's non-entitlement to a *Widow's Pension*;
- there had been no violation of Article 13 (right to an effective remedy);
- it was not necessary to consider the applicant's other complaints.

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicant 25,000 pounds sterling (GBP) for pecuniary damage and GBP 12,500 for costs and expenses. (The judgment is available only in English.)

I.
BACKGROUND OF THE CASE

A. Principal facts

Kevin Willis is a British citizen, born in 1956 and living in Bristol. He married in December 1984 and the couple had two children, Natasha Uma, born 24 March 1989, and Ross Amal, born 2 August 1990. His wife Marlene died of cancer on 7 June 1996, aged 39, leaving her husband administrator of her estate.

Mrs Willis was employed as a Local Authority Housing Officer and, for the greater part of their married life, was the primary breadwinner. She paid full social security contributions as an employed earner until 1994, and was subsequently entitled to contribution credits as a person incapable of work. Mr Willis gave up work to nurse his wife and care for their children on 3 November 1995. Following his wife's death he worked part-time between 2 September 1996 and 6 November 1996, at an annual salary of GBP 4,393, but since this proved uneconomic, he gave up his job to care full-time for the children.

He applied for benefits equivalent to those which a widow whose husband had died in similar circumstances to those of Mrs Willis would have been entitled, namely a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992 ("the 1992 Act"). His claim was rejected.

B. Procedure and composition of the Court

The application was lodged with the European Commission of Human Rights on 24 April 1997 and transferred to the Court on 1 November 1998. It was declared admissible on 11 May 1999.

II.
SUMMARY OF THE JUDGMENT

A. Complaints

Mr Willis complained about the discrimination suffered by him and his late wife in respect of the decision to refuse him the Widow's Payment and Widowed Mother's Allowance, and in respect of his future non-entitlement to a Widow's Pension, notwithstanding the social security contributions made by his wife during her lifetime. He alleged that British social security legislation was discriminatory on grounds of sex, in breach of Article 14 taken in conjunction with Articles 8 and Article 1 of Protocol No. 1 of the European Convention on Human Rights. He also complained, under Article 13, that he had no effective remedy, because the discrimination of which he complained was contained within unambiguous primary legislation.

B. Decision of the Court

Article 14 in conjunction Article 1 of Protocol No. 1

Concerning the applicant's non-entitlement to the Widow's Payment and Widowed Mother's Allowance, the Court observed that it had not been argued that the applicant did not satisfy the various statutory conditions for payment of the two benefits. The only reason for his being refused the benefits in question was that he is a man. A female in the same position would have had a right, enforceable under domestic law, to receive both.

The Court noted that the applicant's wife worked throughout the majority of her marriage to the applicant, paying full social security contributions as an employed earner in exactly the same way as a man in her position would have done. It also noted that the applicant gave up work to nurse his wife and care for their children on 3 November 1995 and that, being a relatively low earner, it proved uneconomic for him to return to work on a part-time basis following his wife's death. Despite all this, he was entitled to significantly fewer financial benefits upon his wife's death than he would have been had he been a woman and his wife a man.

The Court considered that the difference in treatment between men and women regarding entitlement to the Widow's Payment and Widowed Mother's Allowance was not based on any objective and reasonable justification and that there had, therefore, been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Concerning the applicant's non-entitlement to the Widow's Pension, the Court found that, even if the applicant had been a woman, he would not have qualified for a Widow's Pension under the conditions set out in the 1992 Act. Indeed, a widow in the applicant's position would not qualify for the pension until at least 2006 and might never qualify due to the effect of other statutory conditions requiring, for example, that a claimant does not re-marry before the date on which her entitlement would otherwise crystallise.

The Court therefore concluded that, since the applicant had not been treated differently from a woman in an analogous situation, no issue of discrimination contrary to Article 14 arose regarding his entitlement to a Widow's Pension. The Court therefore found no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 concerning the applicant's non-entitlement to a Widow's Pension.

Article 14 in conjunction with Article 8

Having concluded that there had been a breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 as regards the applicant's non-entitlement to a Widowed Mother's Allowance and Widow's Payment, the Court did not consider it necessary to examine his complaints in that regard under Article 14 taken in conjunction with Article 8.

Having concluded that no issue of discrimination contrary to Article 14 arose regarding the applicant's entitlement to a Widow's Pension, the Court found no violation of Article 14 in conjunction with Article 8 in that respect.

Article 14

The Court did not consider it necessary to consider the complaints raised under Article 14 in respect of the applicant's late wife.

Article 13

The Court recalled that Article 13 did not go so far as to guarantee a remedy allowing a Contracting State's primary legislation to be challenged before a national authority on the grounds that it was contrary to the Convention. There had, therefore, been no violation of Article 13.

EUROPEAN COURT OF HUMAN RIGHTS

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11.7.2002

Press release issued by the Registrar

GRAND CHAMBER JUDGMENT IN THE CASE OF

CHRISTINE GOODWIN v. THE UNITED KINGDOM

In a judgment delivered at Strasbourg on 11 July 2002 in the case of *Christine Goodwin v. the United Kingdom* (application no. 28957/95), the European Court of Human Rights held unanimously that:

- there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights;
- there had been a violation of Article 12 (right to marry and to found a family);
- no separate issue had arisen under Article 14 (prohibition of discrimination);
- there had been no violation of Article 13 (right to an effective remedy).

The Court held, unanimously, that the finding of violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant and awarded the applicant 39,000 euros for costs and expenses.

1. Principal facts

The applicant, Christine Goodwin, a United Kingdom national born in 1937, is a post-operative male to female transsexual.

The applicant claimed that she had problems and faced sexual harassment at work during and following her gender re-assignment. Most recently, she experienced difficulties concerning her national insurance (NI) contributions. As legally she is still a man, she has to continue to pay NI contributions until the age of 65. If she had been recognised as a woman, she would have ceased to be liable at the age of 60 in April 1997. She has had to make special arrangements to continue paying her NI contributions directly herself to avoid questions being raised by her employers about the anomaly. She also alleged that the fact that she keeps the same NI number has meant that her employer has been able to discover that she previously worked for them under another name and gender, with resulting embarrassment and humiliation.

2. Procedure and composition of the Court

The application was lodged with the European Commission of Human Rights on 5 June 1995 and declared admissible on 1 December 1997. The case was transmitted to the European Court of Human Rights on 1 November 1998. On 11 September 2001 a Chamber of the Court (Third Section) relinquished the case to the Grand Chamber and a hearing was held on 20 March 2002.

Judgment was given by a Grand Chamber of 17 judges, composed as follows:

Luzius Wildhaber (Swiss), *President*,
Jean-Paul Costa (French),
Nicolas Bratza (British),
Elisabeth Palm (Swedish),
Lucius Caflisch[1] (Swiss),
Riza Türmen (Turkish),
Françoise Tulkens (Belgian),
Karel Jungwiert (Czech),
Marc Fischbach (Luxemburger),
Volodymyr Butkevych (Ukrainian),
Nina Vajić (Croatian),
John Hedigan (Irish),
Hanne Sophie Greve (Norwegian),
András Baka (Hungarian),
Kristaq Traja (Albanian),
Mindia Ugrekhelidze (Georgian),
Antonella Mularoni (San Marinese), *judges*,

and also Paul Mahoney, *Registrar*.

3. Summary of the judgment[2]

Complaints

The applicant complained about the lack of legal recognition of her post-operative sex and about the legal status of transsexuals in the United Kingdom. She complained, in particular, about her treatment in relation to employment, social security and pensions and her inability to marry. She relied on Articles 8, 12, 13 and 14 of the Convention.

Decision of the Court

Article 8

Although the applicant had undergone gender re-assignment surgery provided by the national health service and lived in society as a female, she remained for legal purposes a male. This had effects on her life where sex was of legal relevance, such as in the area of pensions, retirement age etc. A serious interference with private life also arose from the conflict between social reality and law which placed the transsexuals in an anomalous position in which they could experience feelings of vulnerability, humiliation and anxiety. Though there were no conclusive findings as to the cause of transsexualism, the Court considered it more significant that the condition had a wide international recognition for which treatment was provided. It was not convinced that the inability of the transsexual to acquire all the biological characteristics took on decisive importance. There was clear and uncontested evidence of a continuing international trend in favour of not only increased social acceptance of transsexuals but also of legal recognition of the new sexual identity of post-operative transsexuals. There was no material before the Court to show that third parties would suffer any material prejudice from any possible changes to the birth register system that might flow from allowing recognition of the gender re-assigment and it was noted that the Government were currently discussing proposals for reform of the registration system in order to allow ongoing amendment of civil status data.

While the difficulties and anomalies of the applicant's situation as a post-operative transsexual did not attain the level of daily interference suffered by the applicant in B. v. France (judgment of 25 March 1992, Series A no. 232), the Court emphasised that the very essence of the Convention was respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy was an important principle underlying the interpretation of its guarantees, protection was given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings. In the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society could no longer be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. Domestic recognition of this evaluation could be found in the report of the Interdepartmental Working Group on Transsexual People and the Court of Appeal's judgment of *Bellinger v. Bellinger* (EWCA Civ 1140 [2001]).

Though the Court did not underestimate the important repercussions which any major change in the system would inevitably have, not only in the field of birth registration, but also for example in the areas of access to records, family law, affiliation, inheritance, social security and insurance, these problems were far from insuperable, as shown by the Working Group's proposals. No concrete or substantial hardship or detriment to the public interest had indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considered that society might reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost. Despite the Court's re-iteration since 1986 and most recently in 1998 of the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments, nothing had effectively been done by the respondent Government. Having regard to the above considerations, the Court found that the respondent Government could no longer claim that the matter fell within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. It concluded that the fair balance that was inherent in the Convention now tilted decisively in favour of the applicant. There had, accordingly, been a failure to respect her right to private life in breach of Article 8.

Article 12

While it was true that Article 12 referred in express terms to the right of a man and woman to marry, the Court was not persuaded that at the date of this case these terms restricted the determination of gender to purely biological criteria. There had been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court had found above, under Article 8 of the Convention, that a test of congruent biological factors could no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There were other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceived that they properly belonged and the assumption by the transsexual of the social role of the assigned gender.

As the right under Article 8 to respect for private life did not however subsume all the issues under Article 12, where conditions imposed by national laws are accorded a specific mention, the Court went on to consider whether the allocation of sex in national law to that registered at birth was a limitation impairing the very essence of the right to marry in this case. In that regard, it found that it was artificial to assert that post-operative transsexuals had not been deprived of the right to marry as, according to law, they remained able to marry a person of

their former opposite sex. The applicant in this case lived as a woman and would only wish to marry a man. As she had no possibility of doing so, she could therefore claim that the very essence of her right to marry had been infringed. Though fewer countries permitted the marriage of transsexuals in their assigned gender than recognised the change of gender itself, the Court did not find that this supported an argument for leaving the matter entirely within the Contracting States' margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation could not extend so far. While it was for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual established that gender re-assignment has been properly effected and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the Court found no justification for barring the transsexual from enjoying the right to marry under any circumstances. It concluded that there had been a breach of Article 12.

Article 14

The Court considered that the lack of legal recognition of the change of gender of a post-operative transsexual lay at the heart of the applicant's complaints under Article 14 of the Convention. These issues had been examined under Article 8 and resulted in the finding of a violation of that provision. In the circumstances, the Court found that no separate issue arose under Article 14 and made no separate finding.

Article 13

The case-law of the Convention institutions indicated that Article 13 could not be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention. Insofar therefore as no remedy existed in domestic law prior to 2 October 2000 when the Human Rights Act 1998 took effect, the applicant's complaints fell foul of this principle. Following that date, it would have been possible for the applicant to raise her complaints before the domestic courts, which would have had a range of possible redress available to them. In the circumstances no breach of Article 13 arose.

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The Court's judgments are accessible on its Internet site (http://www.echr.coe.int).

Registry of the European Court of Human Rights
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The European Court of Human Rights was set up in Strasbourg in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights. On 1 November 1998 a full-time Court was established, replacing the original two-tier system of a part-time Commission and Court.

1. Judge elected in respect of Liechtenstein.

2. This summary by the Registry does not bind the Court.

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462
1.10.2002

RICE v. THE UNITED KINGDOM
judgment of 1 October 2002
(Application no. 65905/01) ***Friendly settlement***

The applicant, Alan John Rice, a British national, was born in 1957 and lives in Bebington. He and his wife were married in 1980 and had one child, born in 1991. The applicant's wife died on 13 February 2000.

In June 2000 the applicant applied for social security benefits equivalent to those to which a widow – whose husband had died in similar circumstances to his wife – would have been entitled, namely a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992. He was informed on 26 June 2000 that his claim was invalid because the regulations governing the payment of widows' benefits were specific to women. He was told that he had no right of appeal since his claim had not been considered.

On 9 April 2001 the Welfare Reform and Pensions Act 1999 came into force, making bereavement benefits available to both men and women.

The applicant complained that United Kingdom social security and tax legislation discriminated against him on grounds of sex, in breach of Article 14 (prohibition of discrimination) of the Convention, taken in conjunction with both Article 8 (right to respect for family life) and Article 1 of Protocol No. 1 (protection of property).

The case has been struck out following a friendly settlement in which 5,710.32 pounds sterling is to be paid for any non-pecuniary and pecuniary damage, costs and expenses. (The judgment is available only in English.)

008
9.1.2003

L. AND V. AND S.L. v. AUSTRIA

The European Court of Human Rights has today notified in writing two judgments in the cases of *L. and V. v. Austria* (application nos. 39392/98 and 39829/98) and *S.L. v. Austria* (no. 45330/99). The Court held unanimously, in each case, that:

- there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private life) of the European Convention on Human Rights;
- there was no need to rule on the complaints lodged under Article 8 of the Convention alone.

Under Article 41 (just satisfaction), the Court awarded:

- unanimously - in *L. and V.* - 15,000 euros (EUR) to each of the appplicants for non-pecuniary damage and EUR 10,633.53 to *L.* and EUR 6,500 to *V.* for costs and expenses;
- by four votes to three - in *S.L.* - EUR 5,000 to the applicant for non-pecuniary damage and EUR 5,000 for costs and expenses.

(The judgments are available only in English.)

I.
BACKGROUND OF THE CASE

A. Principal facts

G.L., A.V., and S.L., all Austrian nationals, were born in 1967, 1968 and 1981 respectively. The first two live in Vienna and S.L. lives in Bad Gastein (Austria).

G.L. - was convicted on 8 February 1996 by Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) of homosexual acts with adolescents under Article 209 of the Criminal Code (*Strafgesetzbuch)*, which penalises the homosexual acts of adult men with consenting adolescents aged between 14 and 18. He was sentenced to one year's imprisonment, suspended on probation for three years. Relying mainly on his diary, in which he had made entries about his sexual encounters, the court found it established that between 1989 and 1994 he had had, in Austria and in a number of other countries, homosexual relations either by way of oral sex or masturbation with numerous unidentified young men aged 14 to 18.

The judgment regarding the offences committed abroad was later quashed and the applicant's sentence reduced to 11 months' imprisonment suspended on probation for three years. On appeal the sentence was further reduced to eight months.

On 27 May 1997 the Supreme Court dismissed G.L.'s plea of nullity in which he had complained that the application of Article 209 violated his right to respect for his private life and his right to non-discrimination. He had also asked for a review of the constitutionality of Article 209.

A.V. -was convicted on 21 February 1997 by Vienna Regional Criminal Court under Article 209 of homosexual acts with adolescents, and on one minor count of misappropriation. He was sentenced to six months' imprisonment suspended on probation for three years. The Court found it established that on one occasion A.V. had had oral sex with a 15-year-old.

On 22 May 1997 Vienna Court of Appeal dismissed his appeal on points of law. It also dismissed his appeal against sentence.

S.L. -began to be aware of his sexual orientation aged about 11 or 12. While other boys were attracted by women, he realised that he was emotionally and sexually attracted by men, in particular by men who are older than himself. Aged 15, he was sure of his homosexuality.

S.L. submitted that he lived in a rural area where homosexuality was still taboo. He suffered from the fact that he had to hide his homosexuality and that - before the age of 18 - he could not enter into any fulfilling sexual relationship with an adult partner for fear of exposing that person to criminal prosecution under Article 209, of being obliged to testify as a witness on the most intimate aspects of his private life and of being stigmatised by society should his sexual orientation become known.

B. Procedure and composition of the Court

The applications were lodged with the European Commission of Human Rights on 20 June 1997, 10 December 1997 and 19 October 1998 respectively and transmitted to the European Court of Human Rights on 1 November 1998. The first two applications were declared partly admissible and the third application admissible on 22 November 2001.

Judgment was given by a Chamber of seven judges, composed as follows:

Christos Rozakis (Greek), *President*,
Françoise Tulkens (Belgian),
Giovanni Bonello (Maltese),
Nina Vajić (Croatian),
Snejana Botoucharova (Bulgarian),
Anatoli Kovler (Russian),
Elisabeth Steiner (Austrian), *judges*,

and also Søren Nielsen, *Deputy Section Registrar*.

II.
SUMMARY OF THE JUDGMENT

A. Complaints

The applicants alleged, in particular, that the maintenance in force of Article 209 - as well (in the case *L. and V* only) as their convictions under that provision - violated their right to respect for their private lives and were discriminatory. They relied on Articles 8 and 14 of the Convention.

B. Decision of the Court

Articles 8 and 14

The Court noted that, following the Constitutional Court's judgment of 21 June 2002, Article 209 of the Austrian Criminal Code was repealed on 10 July 2002. The amendment in question entered into force on 14 August 2002. Nonetheless, in *L. and V*., the applicants were convicted under the contested provision and their respective convictions remain unaffected by the change in the law. In *S.L*., the Court recalled that the applicant was prevented by Article 209 from entering into any sexual relationship corresponding to his disposition. Accordingly, it found that he was directly affected by the maintenance in force of Article 209 before the age of 18. The Court considered that the Constitutional Court's judgment had not acknowledged let alone afforded redress for the alleged breaches of the Convention. Nor had it resolved the issue in question.

The Court observed that, in previous cases relied on by the Austrian Government relating to Article 209, the European Commission of Human Rights had found no violation of Articles 8 or 14. However, the Court had frequently held that the Convention was a living instrument, which had to be interpreted in the light of present-day conditions. What was decisive, was whether there was an objective and reasonable justification why young men in the 14 to 18-year age bracket needed protection against any sexual relationship with adult men, while young women in the same age bracket did not need such protection against relations with either adult men or women. In this connection the Court reiterated that the scope of the margin of appreciation left to the country concerned would vary according to the circumstances. One of the relevant factors might be the existence or non-existence of common ground between the laws of the countries which had ratified the Convention. In that respect, there was, the Court observed, an ever-growing European consensus that equal ages of consent should apply to heterosexual, lesbian and homosexual relations.

The Government relied on the Constitutional Court's judgment of 3 October 1989, which had considered Article 209 necessary to avoid "a dangerous strain" being "placed by homosexual experiences upon the sexual development of young males". However, during the 1995 Parliamentary debate on a possible repeal of Article 209, the vast majority of experts heard in Parliament clearly supported an equal age of consent, finding in particular that sexual orientation was in most cases established before the age of puberty, thus disproving the theory that male adolescents were "recruited" into homosexuality. Notwithstanding its knowledge of these changes in the scientific approach to the issue, Parliament decided in November 1996, shortly before the convictions of *L.* and *V.*, to keep Article 209 on the statute book.

To the extent that Article 209 embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes could not of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour.

Finding that the Austrian Government had not offered convincing and weighty reasons justifying the maintenance in force of Article 209 or, in *L. and V.,* the applicants' convictions, the Court held that there had been, in both cases, a violation of Article 14 taken in conjunction with Article 8. The Court did not consider it necessary to rule on the question of whether there had been a violation of Article 8 taken alone.

086
13.2.2003

ODIÈVRE v. FRANCE
judgment of 13 February 2003

The European Court of Human Rights has delivered at a public hearing today a judgment[1] in the case of *Odièvre v. France* (application no. 42326/98). The European Court of Human Rights held:

● by ten votes to seven that there had been no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights;

● by ten votes to seven that there had been no violation of Article 14 (prohibition of discrimination) of the Convention, taken together with Article 8.

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, Pascale Odièvre, is a French national, who was born in 1965 and lives in Paris. She is unemployed.

Her application concerns the rules governing confidentiality on birth, which have prevented her from obtaining information about her natural family.

She was born on 23 March 1965 in Paris. Her mother requested that the birth be kept secret and completed a form at the Health and Social Security Department abandoning her rights to her child. The applicant was placed in the care of the Children's Welfare and Youth-Protection Service and registered as being in State care. She was subsequently fully adopted by Mr and Mrs Odièvre, whose surname she continues to use.

The applicant consulted her file at the Children's Welfare Service of the *département* of Seine in 1990 and was able to obtain non-identifying information about her natural family. On 27 January 1998 she applied to the Paris *tribunal de grande instance* for an order "for disclosure of confidential information concerning her birth and permission to obtain copies of any documents, public records or full birth certificates". She explained to the court that she had learnt that her natural parents had had a son in 1963 and two other sons after 1965. However, the Children's Welfare Service had refused to provide her with details regarding her brothers' identity on the ground that it would entail a breach of confidence. She submitted that having discovered the existence of her brothers, her application for disclosure of information about her birth was well-founded.

On 2 February 1998 the court registrar returned the case file to the applicant's lawyer stating "... it appears that the applicant should perhaps apply to the administrative court to obtain, if possible, an order requiring the authorities to disclose the information, although such an order would in any event contravene the Law of 8 January 1993". (The statute lays down that an application for disclosure of details identifying the natural mother is inadmissible if confidentiality was agreed at birth).

B. Procedure and composition of the Court

The application was lodged with the European Commission of Human Rights on 12 March 1998 and transmitted to the Court on 1 November 1998. Following a hearing on admissibility and the merits, it was declared admissible by a Chamber from the Third Section on 16 October 2001. On 24 June 2002 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties being opposed thereto. A hearing was held on 9 October 2002.

Judgment was given by a Grand Chamber of 17 judges, composed as follows:

Luzius Wildhaber (Swiss), *President*
Christos Rozakis (Greek),
Jean-Paul Costa (French),
Georg Ress (German),
Nicolas Bratza (British),
Giovanni Bonello (Maltese),
Loukis Loucaides (Cypriot),
Pranas Kūris (Lithuanian),
Ireneu Cabral Barreto (Portuguese),
Françoise Tulkens (Belgian),
Karel Jungwiert (Czech),
Matti Pellonpää (Finnish),
Hanne Sophie Greve (Norwegian),
Snejana Botoucharova (Bulgarian),
Mindia Ugrekhelidze (Georgian),
Stanislav Pavlovschi (Moldovan),
Lech Garlicki (Polish), *judges*

and also Paul Mahoney, *Registrar*.

II.
SUMMARY OF THE JUDGMENT[2]

A. Complaint

The applicant complained that she had been unable to obtain details identifying her natural family, contrary to Article 8 (right to respect for private and family life) of the European Convention on Human Rights. She said that her inability to do so was highly damaging to her as it deprived her of the chance of reconstituting her life history. She further submitted that the French rules on confidentiality governing birth amounted to discrimination on the ground of birth, contrary to Article 14 (prohibition of discrimination).

B. Decision of the Court

Article 8 of the Convention

Applicability of Article 8

The Court considered it necessary to examine the case from the perspective of private life, not family life, since the applicant's claim to be entitled, in the name of biological truth, to

know her personal history was based on her inability to gain access to information about her origin and to related identifying data.

The Court reiterated that Article 8 protected, among other interests, the right to personal development. Matters of relevance to personal development included details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents. Birth, and in particular the circumstances in which a child was born, formed part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention. That provision was therefore applicable in the instant case.

Compliance with Article 8

The applicant had complained that France had failed to ensure respect for her private life by its legal system, which totally precluded an action being brought to establish maternity if the natural mother had requested confidentiality and which, above all, prohibited access being given to information identifying her.

The Court observed that there were two competing interests in the case before it: on the one hand, the right to know one's origins and the child's vital interest in its personal development and, on the other, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions. Those interests were not easily reconciled, as they concerned two adults, each endowed with free will.

In addition, the problem of anonymous births could not be dealt with in isolation from the issue of the protection of third parties, essentially the adoptive parents, the father and the other members of the natural family. The Court noted in that connection that the applicant was now 38 years old, having been adopted at the age of four, and that non-consensual disclosure could entail substantial risks, not only for the mother herself, but also for the adoptive family which had brought up the applicant, and her natural father and siblings, each of whom also had a right to respect for his or her private and family life.

The general interest was also at stake, as French legislation aimed to protect the mother's and child's health at the birth and to avoid abortions, in particular illegal abortions, and children being abandoned other than under the proper procedure. The right to respect for life was thus one of the aims pursued by the French system.

The Court reiterated that the Contracting States had a margin of appreciation in the choice of measures for securing compliance with Article 8 in the sphere of relations between individuals. Most of the Contracting States did not have legislation comparable to that applicable in France, which prevented parental ties ever being established with the natural mother if she refused to disclose her identity. However, it noted that some countries did not impose a duty on natural parents to declare their identities on the birth of their children and that there had been cases of child abandonment in various other countries that had given rise to a debate about the right to give birth anonymously. In the light of the diversity of practice to be found among the legal systems and traditions and of the fact that children were being abandoned, the Court considered that States had to be afforded a margin of appreciation to decide which measures were apt to ensure that the rights guaranteed by the Convention were secured.

The Court observed that the applicant had been given access to non-identifying information about her mother and natural family that had enabled her to trace some of her roots, while ensuring the protection of third-party interests. In addition, while preserving the principle that

mothers were entitled to give birth anonymously, the law of 22 of January 2002 facilitated searches for information about a person's biological origins by setting up a National Council on Access to Information about Personal Origins. The legislation was already in force and the applicant could use it to request disclosure of her mother's identity, subject to the latter's consent being obtained.

The French legislation thus sought to strike a balance and to ensure sufficient proportion between the competing interests. Consequently, France had not overstepped the margin of appreciation which it had to be afforded in view of the complex and sensitive nature of the issue of access to information about one's origins, an issue that concerned the right to know one's personal history, the choice of the natural parents, the existing family ties and the adoptive parents. Consequently, there had been no violation of Article 8 of the Convention.

Article 14 of the Convention, taken together with Article 8

The Court observed that the applicant had complained that restrictions had been imposed on her ability to receive property from her natural mother. The Court noted that the applicant's complaint under Article 14 of the Convention concerned her inability to find out her origins, not a desire to establish a parental tie that would enable her to claim an inheritance. It considered that, though presented from a different perspective, that complaint was in practice the same as the complaint it had already examined under Article 8 of the Convention. In summary, the Court considered that the applicant had suffered no discrimination with regard to her filiation, as she had parental ties with her adoptive parents and a prospective interest in their property and estate and, furthermore, could not claim that her situation with regard to her natural mother was comparable to that of children who enjoyed established parental ties with their natural mother. Consequently, the Court held that there had been no violation of Article 14 of the Convention, taken together with Article 8.

Judges Rozakis, Ress, Kūris and Greve expressed concurring opinions. Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää expressed a joint dissenting opinion. These opinions are annexed to the judgment.

192
8.4.2003

ATKINSON v. THE UNITED KINGDOM
judgment of 8 April 2003
(Application no. 65334/01) ***Friendly settlement***

The applicant, Peter George Atkinson, a British national, born in 1945 and living in Maidenhead, married in 1992 and had two children. His wife died in 1998.

On 23 July 2000 Mr Atkinson applied to the Benefits Agency for social-security benefits. He sought benefits equivalent to those to which a widow whose husband had died in similar circumstances to those of his wife would have been entitled, namely a Widow's Payment and a Widowed Mother's Allowance, followed by a Widow's Pension. He was informed that his claim was invalid because the regulations governing the payment of widows' benefits were specific to women, and that he had no right of appeal because his claim had not been considered.

On 9 April 2001 the Welfare Reform and Pensions Act 1999 came into force, making bereavement benefits available to both men and women.

Mr Atkinson complained that British social-security legislation had discriminated against him on grounds of sex, in breach of Article 14 (prohibition of discrimination), taken in conjunction with both Article 8 (right to respect for family life) and Article 1 of Protocol No. 1 (right of property).

The case has been struck out following a friendly settlement in which 10,488.12 pounds sterling is to be paid for any non-pecuniary and pecuniary damage, costs and expenses. (The judgment is available only in English.)

402
22.7.2003

Y.F. v. TURKEY
judgment of 22 July 2003
(Application no. 24209/94) ***Violation of Art. 8***

Y.F., a Turkish national, was born in 1951 and lives in Bingöl (Turkey). In October 1993 he and his wife were taken into police custody on suspicion of aiding and abetting the PKK (Workers' Party of Kurdistan). Mrs F was held in police custody for four days. She alleged that she was kept blindfolded and that police officers hit her with truncheons, verbally insulted her and threatened to rape her. On 20 October 1993 she was examined by a doctor and taken to a gynecologist for a further examination. The police officers remained on the premises while she was examined behind a curtain. On 23 March 1994 the applicant and his wife were acquitted. On 19 December 1995 three police officers were charged with violating Mrs F.'s private life by forcing her to undergo a gynecological examination. They were acquitted on 16 May 1996.

The applicant alleged that the forced gynecological examination of his wife had breached Article 8 (right to respect for private life) of the Convention.

The Court reiterated that it was open to the applicant, as a close relative of the victim, to raise a complaint on her behalf, particularly having regard to her vulnerable position in the special circumstances of this case. It considered that, given her vulnerability in the hands of the authorities who had exercised full control over her during her detention, she could not be expected to have put up resistance to the gynecological examination. There had accordingly been an interference with her right to respect for her private life. The Government had failed to demonstrate the existence of a medical necessity or other circumstances defined by law. While the Court accepted their argument that the medical examination of detainees by a forensic medical doctor could be an important safeguard against false accusations of sexual harassment or ill-treatment, it considered that any interference with a person's physical integrity had to be prescribed by law and required that person's consent. As this had not been the case here, the interference had not been in accordance with the law.

The Court held unanimously that there had been a violation of Article 8 of the Convention and awarded the applicant EUR 4,000 for non-pecuniary damage, to be held for his wife, and EUR 3,000 for costs and expenses. (The judgment is available only in English.)

621
4.12.2003

M.C. v. BULGARIA
judgment of 4 December 2003

The European Court of Human Rights has today notified in writing a judgment[36][1] in the case of *M.C. v. Bulgaria* (application no. 39272/98).

The Court held, unanimously, that there had been:

- a violation of Article 3 (prohibition of degrading treatment) and Article 8 (right to respect for private life) of the European Convention on Human Rights as the respondent State failed to comply with its positive obligations under those provisions ;
- that no separate issue arose under Article 13 (right to an effective remedy);
- and that is not necessary to examine the applicant's complaint under Article 14 (prohibition of discrimination).

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicant 8,000 euros (EUR) for non-pecuniary damage and EUR 4,110 for costs and expenses. (The judgment is available only in English.)

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, M.C., is a Bulgarian national born in 1980 who alleged that she was raped by two men, A. and P., aged 20 and 21, when she was 14 years old, the age of consent for sexual intercourse in Bulgaria.

M.C. claimed that, on 31 July 1995, she went to a disco with the two men and a friend of hers. She then agreed to go on to another disco with the men. On the way back, A. suggested stopping at a reservoir for a swim. M.C. remained in the car. P. came back before the others, allegedly forcing M.C. to have sexual intercourse with him. M.C. maintained that she was left in a very disturbed state. In the early hours of the following morning, she was taken to a private home. She claimed that A. forced her to have sex with him at the house and that she cried continually both during and after the rape. She was later found by her mother and taken to hospital where a medical examination found that her hymen had been torn.

A. and P. both denied raping M.C.

The criminal investigations conducted found insufficient evidence that M.C. had been compelled to have sex with A. and P.. The proceedings were terminated on 17 March 1997 by the District Prosecutor, who found that the use of force or threats had not been established beyond reasonable doubt. In particular, no resistance on the applicant's part or

[36] Under Article 43 of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

attempts to seek help from others had been established. The applicant appealed unsuccessfully.

Written expert opinions submitted to the European Court of Human Rights by M.C. identified "frozen fright" (traumatic psychological infantilism syndrome) as the most common response to rape, where the terrorised victim either submits passively to or dissociates her or himself psychologically from the rape. Of the 25 rape cases analysed, concerning women in Bulgaria aged between 14 and 20, 24 of the victims had responded to their aggressor in this way.

B. Procedure and composition of the Court

The application was lodged with the European Commission of Human Rights on 23 December 1997 and transmitted to the Court on 1 November 1998. It was declared admissible on 5 December 2002. *Interrights*, a non-governmental organisation based in London, submitted comments after being given leave to intervene as a third party.

Judgment was given by a Chamber of seven judges, composed as follows:

Christos **Rozakis** (Greek), ***President***,
Françoise **Tulkens** (Belgian),
Nina **Vajić** (Croatian),
Egil **Levits** (Latvian),
Snejana **Botoucharova** (Bulgarian),
Anatoli **Kovler** (Russian),
Vladimiro **Zagrebelsky** (Italian), ***judges***,

and also Søren **Nielsen**, ***Deputy Section Registrar***.

II.
SUMMARY OF THE JUDGMENT[37][2]

A. Complaints

M.C. complained that Bulgarian law and practice do not provide effective protection against rape and sexual abuse, as only cases where the victim resists actively are prosecuted. She submitted that Bulgaria has a positive obligation under the European Convention on Human Rights to protect the individual's physical integrity and private life and to provide an effective remedy. She also complained that the authorities had not effectively investigated the events in question. She relied on Article 3 (prohibition of degrading treatment), Article 8 (right to respect for private life), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination).

B. Decision of the Court

Articles 3 and 8 of the Convention

The Court reiterated that, under Articles 3 and 8 of the Convention, Member States had a positive obligation both to enact criminal legislation to effectively punish rape and to apply this legislation through effective investigation and prosecution.

The Court then observed that, historically, proof of the use of physical force by the perpetrator and physical resistance on the part of the victim was sometimes required under

[37] This summary by the Registry does not bind the Court.

domestic law and practice in rape cases in a number of countries. However, it appeared that this was no longer required in European countries. In common-law jurisdictions, in Europe and elsewhere, any reference to physical force had been removed from legislation and/or case-law. Although in most European countries influenced by the continental legal tradition, the definition of rape contained references to the use of violence or threats of violence by the perpetrator, in case-law and legal theory, it was lack of consent, not force, that was critical in defining rape.

The Court also noted that the Member States of the Council of Europe had agreed that penalising non-consensual sexual acts, whether or not the victim had resisted, was necessary for the effective protection of women against violence and had urged the implementation of further reforms in this area. In addition, the International Criminal Tribunal for the former Yugoslavia had recently found that, in international criminal law, any sexual penetration without the victim's consent constituted rape, reflecting a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse. As *Interights* had submitted, victims of sexual abuse - in particular, girls below the age of majority – often failed to resist for a variety of psychological reasons or through fear of further violence from the perpetrator. In general, law and legal practice concerning rape were developing to reflect changing social attitudes requiring respect for the individual's sexual autonomy and for equality. Given contemporary standards and trends, Member States' positive obligation under Articles 3 and 8 of the Convention requires the penalisation and effective prosecution of any non-consensual sexual act, even where the victim had not resisted physically.

The applicant alleged that the authorities' attitude in her case was rooted in defective legislation and reflected a practice of prosecuting rape perpetrators only where there was evidence of significant physical resistance. In the absence of case-law explicitly dealing with the question, the Court considered it difficult to arrive at safe general conclusions on the issue. However, the Bulgarian Government were unable to provide copies of judgments or legal commentaries clearly disproving the applicant's allegations of a restrictive approach in the prosecution of rape. Her claim was therefore based on reasonable arguments which had not been disproved.

The presence of two irreconcilable versions of the facts obviously called for a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances. Little was done, however, to test the credibility of the version of events put forward by P. and A. – even the assertion that the applicant, aged 14, had started caressing A. minutes after having had sex for the first time in her life with another man – or to test the credibility of the witnesses called by the accused or the precise timing of the events. Neither were the applicant and her representative able to question witnesses, whom she had accused of perjury. The authorities had therefore failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made.

The reason for that failure appeared to be that the investigator and prosecutor considered that a "date rape" had occurred, and, in the absence of "direct" proof of rape such as traces of violence and resistance or calls for help, that they could not infer proof of lack of consent and, therefore, of rape from an assessment of all the surrounding circumstances. While the prosecutors did not exclude the possibility that the applicant might not have consented, they adopted the view, in the absence of proof of resistance, that it could not be concluded that the perpetrators had understood that the applicant had not consented. They did not assess evidence that P. and A. had deliberately misled the applicant in order to take her to a deserted area, thus creating an environment of coercion, or judge the credibility of the versions of the facts proposed by the three men and witnesses called by them.

The Court considered that the Bulgarian authorities should have explored all the facts and should have decided on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions should also have been centred on the issue of non-consent. Without expressing an opinion on the guilt of P. and A., the Court found that the effectiveness of the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors fell short of Bulgaria's positive obligations under Articles 3 and 8 of the Convention - viewed in the light of the relevant modern standards in comparative and international law - to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.

Articles 13 and 14 of the Convention

The Court found that no separate issue arose under Article 13 and that it was not necessary to examine the complaint under article 14.

Judge Tulkens expressed a concurring opinion which is annexed to the judgment

012
13.1.2004

OWENS v. THE UNITED KINGDOM
judgment of 13 January 2004
(Application no. 61036/00) ***Friendly settlement***

The applicant, Geoffrey Owens, is a United Kingdom national, born in 1950 and living in Liverpool. He is a widower. His wife, whom he had married in 1977, died in 1997. They had two children, born in 1983 and 1989. The applicant's wife had worked as a schoolteacher for approximately 21 years and paid full social security contributions.

Mr Owens applied for the Widowed Mother's Allowance, to which a widow, whose husband had died in similar circumstances to those of his wife, would have been entitled. He was informed that the benefit was payable only to widows. He appealed unsuccessfully. A widow would also have received a Christmas bonus of 10 pounds sterling (GBP) for the year 2000.

He complained of discrimination on the grounds of sex relying on Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for family life) and Article 1 of Protocol No. 1 (protection of property).

The case has been struck out following a friendly settlement in which Mr Owens is to receive GBP 11,477.60 for any pecuniary or non-pecuniary damage, costs and expenses.

067
10.02.2004

BB v. THE UNITED KINGDOM
judgment of 10 February 2004

The applicant, B.B., is a British national, born in 1957 and living in London.

The case concerned events which took place between January 1998 and February 1999.

BB. contacted the police after being attacked by a young man with whom he had had homosexual relations. He was arrested for allegedly engaging in buggery with a young man aged 16 years of age contrary to section 12(1) and schedule 2 of the Sexual Offences Act 1956. The applicant underwent a medical examination with his consent during which samples were taken and his residence was searched by police. He was released on police bail the following day and was subsequently formally charged. He appeared before both the Magistrates' Court and the Central Criminal Court, before which he was later acquitted.

The applicant complained that he was discriminated against on the grounds of his sexual orientation by the existence of, and by his prosecution under, legislation that made it a criminal offence to engage in homosexual activities with men under 18 years of age whereas the age of consent for hetereosexual activities was fixed at 16. He also complained that he was discriminated against on the grounds of age by the decision to prosecute him but not the 16-year-old. He complained of a violation of Article 14 (prohibition of discrimination) of the Convention in conjunction with Article 8 (right to respect for private life, alleging discrimination on the grounds of sexual orientation and age.

The Court noted that, since 2001, the age of consent for homosexual and heterosexual activity had been equalised in the United Kingdom. However, B.B. was prosecuted under the legislation then in place which made it a criminal offence to engage in homosexual activities with men under 18 years of age while the age of consent for heterosexual relations was fixed at 16. The Court held, unanimously, that the existence of, and the applicant's prosecution under, the legislation applicable at the relevant time constituted a violation of Article 14 taken in conjunction with Article 8. B.B. was awarded EUR 7,000 for non-pecuniary damage and EUR 600 for costs and expenses. (The judgment is available only in English.)

374
15.7.2002

MICHAEL MATTHEWS v. THE UNITED KINGDOM
judgment of 15 July 2002

(Application no. 40302/98) *Friendly settlement*

Michael Matthews was born in 1933 and lives in London. On 10 October 1997, aged 64, he applied at his local post office for an elderly person's travel permit, which would have entitled him to free travel on most public transport in Greater London. His application was refused because, under British law at the time, such a permit could only be provided to men who were aged 65 or over, whereas women were eligible to receive such a permit, subject to the provisions of their local scheme, at the age of 60 or over.

He complained of discrimination on grounds of sex in relation to his right to property, contrary to Article 14 (prohibition of discrimination) and Article 1 of Protocol No. 1 (protection of property).

The case has been struck out following a friendly settlement in which GBP 242 is to be paid for any non-pecuniary damage and GBP 25,000 for costs and expenses. (The judgment is available only in English.)

571
16.11.2004

UNAL TEKELI v. TURKEY
judgment of 16 November 2004

The European Court of Human Rights has today notified in writing a judgment in the case of *Ünal Tekeli v. Turkey* (application no. 29865/96). The Court held unanimously that there had been a violation of Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The Court considered that the finding of a violation amounted to adequate just satisfaction for the non-pecuniary damage sustained by the applicant, and awarded her 1,750 euros (EUR) for costs and expenses.

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, Ayten Ünal Tekeli, is a Turkish national who was born in 1965 and lives in Izmir.

Following her marriage in 1990 the applicant, who was then a trainee lawyer, took her husband's surname. As she was known by her maiden name in her professional life she continued using it in front of her legal surname, which was that of her husband. She could not use both names together on official documents however.

In 1995 the applicant brought proceedings in the Karşıyaka Court of First Instance for permission to bear only her maiden name, "Ünal". On 4 April 1995 the Court of First Instance dismissed the applicant's request on the ground that, under the Turkish Civil Code, married women had to bear their husband's name throughout their married life. She unsuccessfully appealed to the Court of Cassation.

Turkish law was reformed in 1997 to allow married women to put their maiden name in front of their husband's name. However, the applicant sought to bear her maiden name alone as her surname.

I.
SUMMARY OF THE JUDGMENT

A. Complaints

The applicant alleged, under Article 8 of the Convention, that the refusal by the domestic courts to allow her to bear only her maiden name had unjustifiably interfered with her right to protection of her private life. She also complained that she had been discriminated against in that married men could continue to bear their own family name after they married. In that connection she relied on Article 14, taken together with Article 8 of the Convention.

B. Decision of the Court

The fact that married women could not bear their maiden name alone after they married, whereas married men kept their surname, undoubtedly amounted to a "difference in treatment" on grounds of sex between persons in an analogous situation.

As to whether that difference in treatment could be justified, the Court reiterated first of all that the advancement of the equality of the sexes was today a major goal in the member States of the Council of Europe. Two texts of the Committee of Ministers, dated 1978 and 1985, called on the States to eradicate all discrimination on grounds of sex in the choice of surname. That objective could also be seen in the work of the Parliamentary Assembly, the European Committee on Legal Co-operation and also developments at the United Nations regarding equality of the sexes.

Moreover, a consensus had emerged among the Contracting States of the Council of Europe in favour of choosing the spouses' family name on an equal footing. Turkey appeared to be the only Member State which legally imposed the husband's surname as the couple's surname – and thus the automatic loss of the woman's own surname on her marriage – even if the couple had decided otherwise.

Admittedly, reforms carried out in Turkey in November 2001 had aimed to place married women on an equal footing with their husband as regards representing the couple, economic activities and decisions to be taken affecting the family and children. However, the provisions concerning the family name after marriage, including those obliging married women to take their husband's surname, had remained unchanged.

The Court considered that the Turkish Government's argument that the fact of giving the husband's surname to the family stemmed from a tradition designed to reflect family unity by having the same name was not a decisive factor. Family unity could result from the choice of the wife's surname or a joint name chosen by the married couple.

Moreover, family unity could also be preserved and consolidated where a married couple chose not to bear a joint family name, as was confirmed by the solution adopted in other European legal systems. Accordingly, the obligation imposed on married women, in the interests of family unity, to bear their husband's surname – even if they could put their maiden name in front of it – had no objective and reasonable justification.

Consequently, the Court held that the difference in treatment in question contravened Article 14 taken in conjunction with Article 8 and considered, having regard to that conclusion, that it was not necessary to determine whether there had also been a breach of Article 8 taken alone.

281
26.5.2005

WOLFMEYER v. AUSTRIA
judgment of 26 May 2005

(Application no 5263/03) ***Violation of Article 14 in conjunction with Article 8***

The applicant, Thomas Wolfmeyer, is an Austrian national, born in 1968 and living in Bludenz (Austria).

On 23 November 2000 Feldkirch Regional Court (*Landesgericht*) convicted the applicant of having committed homosexual acts with adolescents contrary to Article 209 of the Criminal Code and sentenced him to six months' imprisonment suspended on probation. It found that, in 1997, he had performed homosexual acts with two adolescents.

The applicant appealed. On 21 June 2002 the Constitutional Court held that Article 209 of the Criminal Code was unconstitutional and, on 17 July 2002, the applicant was acquitted.

He requested the reimbursement of his defence costs.

On 12 November 2002 Innsbruck Court of Appeal partly granted the applicant's appeal, finding that the law provided that only a maximum amount of EUR 1,091 could be reimbursed as a contribution to the defence costs. In addition EUR 748.38 was awarded for cash expenses.

The applicant complained that Article 209 was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable. He also complained about the conduct of the criminal proceedings against him under that provision. He relied on Article 8 (right to respect for private life) of the European Convention on Human Rights taken alone and in conjunction with Article 14 (prohibition of discrimination).

The European Court of Human Rights noted that the applicant had had to stand trial and was convicted. In such circumstances, it was inconceivable that an acquittal without any compensation for damages and accompanied by the reimbursement of a minor part of the necessary defence costs could have provided adequate redress. The Court emphasised that it had itself awarded substantial amounts of compensation for non-pecuniary damage in comparable cases, having particular regard to the fact that such a trial, during which the most intimate details about the applicant's private life were laid open to the public, had to be considered profoundly destabilising for the applicant.

In conclusion, the Court found that the applicant's acquittal, which did not acknowledge the alleged breach of the Convention and was not accompanied by adequate redress, did not remove the applicant's status as a victim and that his application was therefore admissible.

Accordingly, the Court held unanimously that there had been a violation of Article 14, taken in conjunction with Article 8, given the maintenance in force of Article 209 and the conduct of the criminal proceedings against the applicant on the basis of that provision. The Court did not consider it necessary to rule on the question whether there had also been a violation of Article 8 taken alone. The Court awarded the applicant 10,000 euros (EUR) for non-pecuniary damage and EUR 18,000 for costs and expenses. (The judgment is available only in English.)

415
26.7.2005

SILIADIN v. FRANCE
judgment of 26 July 2005

The European Court of Human Rights has today notified in writing a judgment[1] in the case of *Siliadin v. France* (application no. 73316/01). The Court held unanimously that there had been a violation of Article 4 (prohibition of servitude) of the European Convention on Human Rights.

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicant 26,209.69 euros (EUR) for costs and expenses. As Ms Siliadin had made no claim for compensation in respect of damage sustained, the Court made no award. (The judgment is available only in French.)

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, Siwa-Akofa Siliadin, is a Togolese national who was born in 1978 and lives in Paris.

In January 1994 the applicant, who was then fifteen and a half years old, arrived in France with a French national of Togolese origin, Mrs D. The latter had undertaken to regularise the girl's immigration status and to arrange for her education, while the applicant was to do housework for Mrs D. until she had earned enough to pay her back for her air ticket. The applicant effectively became an unpaid servant to Mr and Mrs D. and her passport was confiscated.

In around October 1994 Mrs D. "lent" the applicant to a couple of friends, Mr and Mrs B., to help them with household chores and to look after their young children. She was supposed to stay for only a few days until Mrs B. gave birth. However, after her child was born, Mrs B. decided to keep the applicant on. She became a "maid of all work" to the couple, who made her work from 7.30 a.m. until 10.30 p.m. every day with no days off, giving her special permission to go to mass on certain Sundays. The applicant slept in the children's bedroom on a mattress on the floor and wore old clothes. She was never paid, but received one or two 500-franc notes, the equivalent of 76.22 EUR, from Mrs B.'s mother.

In July 1998 Ms Siliadin confided in a neighbour, who informed the Committee against Modern Slavery, which reported the matter to the prosecuting authorities. Criminal proceedings were brought against Mr and Mrs B. for wrongfully obtaining unpaid or insufficiently paid services from a vulnerable or dependent person, an offence under Article 225-13 of the Criminal Code, and for subjecting that person to working or living conditions incompatible with human dignity, an offence under Article 225-14 of the Code.

The defendants were convicted at first instance and sentenced to, among other penalties, 12 months' imprisonment (seven of which were suspended), but were acquitted on appeal on 19 October 2000. In a judgment of 15 May 2003 Versailles Court of Appeal, to which the case had subsequently been referred by the Court of Cassation, found Mr and Mrs B. guilty of making the applicant, a vulnerable and dependent person, work unpaid for them but considered that her working and living conditions were not incompatible with human dignity. It accordingly ordered them to pay the applicant the equivalent of EUR 15,245 in damages.

In October 2003 an employment tribunal awarded the applicant a sum that included EUR 31,238 in salary arrears.

B. Procedure and composition of the Court

The application was lodged on 17 April 2001 and declared partly admissible on 1 February 2005. A hearing took place in public in the Human Rights Building, Strasbourg, on 3 May 2005.

Judgment was given by a Chamber of seven judges, composed as follows:

Ireneu Cabral Barreto (Portuguese), *President*,
Jean-Paul Costa (French),
Riza Türmen (Turkish),
Karel Jungwiert (Czech),
Volodymyr Butkevych (Ukrainian),
Antonella Mularoni (San Marinese),
Elisabet Fura-Sandström (Swedish), *judges*,

and also Stanley Naismith, *Deputy Section Registrar*.

II.
SUMMARY OF THE JUDGMENT[2]

A. Complaint

Relying on Article 4 (prohibition of forced labour) of the European Convention on Human Rights, the applicant submitted that French criminal law did not afford her sufficient and effective protection against the "servitude" in which she had been held, or at the very least against the "forced and compulsory" labour she had been required to perform, which in practice had made her a domestic slave.

B. Decision of the Court

As to the applicability of Article 4 and the positive obligations arising from it

The Court considered that Article 4 of the Convention enshrined one of the fundamental values of the democratic societies which make up the Council of Europe. It was one of those Convention provisions with regard to which the fact that a State had refrained from infringing the guaranteed rights did not suffice to conclude that it had complied with its obligations; it gave rise to positive obligations on States, consisting in the adoption and effective implementation of criminal-law provisions making the practices set out in Article 4 a punishable offence.

As to the violation of Article 4

The Court noted that, in addition to the Convention, numerous international treaties had as their aim the protection of human beings from slavery, servitude and forced or compulsory labour. As the Parliamentary Assembly of the Council of Europe had pointed out, although slavery was officially abolished more than 150 years ago, "domestic slavery" persisted in Europe and concerned thousands of people, the majority of whom were women. In accordance with modern standards and trends in that area, the Court considered that States

were under an obligation to penalise and punish any act aimed at maintaining a person in a situation incompatible with Article 4.

In order to classify the state in which the applicant was held, the Court noted that Ms Siliadin had worked for years for Mr and Mrs B., without respite, against her will, and without being paid. The applicant, who was a minor at the relevant time, was unlawfully present in a foreign country and was afraid of being arrested by the police. Indeed, Mr and Mrs B. maintained that fear and led her to believe that her status would be regularised.

In those circumstances, the Court considered that Ms Siliadin had, at the least, been subjected to forced labour within the meaning of Article 4 of the Convention.

The Court had then to determine whether the applicant had also been held in slavery or servitude.

With regard to slavery, although the applicant had been deprived of her personal autonomy, the evidence did not suggest that she had been held in slavery in the proper sense, in other words that Mr and Mrs B. had exercised a genuine right of ownership over her, thus reducing her to the status of an object. Accordingly, the Court held that it could not be considered that Ms Siliadin had been held in slavery in the traditional sense of that concept.

As to servitude, that was to be regarded as an obligation to provide one's services under coercion, and was to be linked to the concept of "slavery". In that regard, the Court noted that the forced labour imposed on the applicant lasted almost 15 hours a day, seven days a week. Brought to France by a relative of her father's, Ms Siliadin had not chosen to work for Mr and Mrs B. As a minor, she had no resources and was vulnerable and isolated, and had no means of subsistence other than in the home of Mr and Mrs B., where she shared the children's bedroom.

The applicant was entirely at Mr and Mrs B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred. Nor did Ms Siliadin, who was afraid of being arrested by the police, have any freedom of movement or free time. In addition, as she had not been sent to school, despite the promises made to her father, the applicant could not hope that her situation would improve and was completely dependent on Mr and Mrs B.

In those circumstances, the Court considered that Ms Siliadin, a minor at the relevant time, had been held in servitude within the meaning of Article 4.

Accordingly, it fell to the Court to determine whether French legislation had afforded the applicant sufficient protection in the light of the positive obligations incumbent on France under Article 4. In that connection, it noted that the Parliamentary Assembly had regretted in its Recommendation 1523(2001) that "none of the Council of Europe member states expressly [made] domestic slavery an offence in their criminal codes". Slavery and servitude were not as such classified as criminal offences in the French criminal-law legislation.

Mr and Mrs B., who were prosecuted under Articles 225-13 and 225-14 of the Criminal Code, were not convicted under criminal law. In that connection, the Court noted that, as the Principal Public Prosecutor had not appealed on points of law against the Court of Appeal's judgment of 19 October 2000, an appeal to the Court of Cassation was made only in respect of the civil aspect of the case and Mr and Mrs B.'s acquittal thus became final. In addition, according to a report drawn up in 2001 by the French National Assembly's joint committee on the various forms of modern slavery, those provisions of the Criminal Code were open to very differing interpretation from one court to the next.

In those circumstances, the Court considered that the criminal-law legislation in force at the material time had not afforded the applicant specific and effective protection against the actions of which she had been a victim. It emphasised that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably required greater firmness in assessing breaches of the fundamental values of democratic societies.

Consequently, the Court concluded that France had not fulfilled its positive obligations under Article 4.

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10.11.2005

LEYLA ŞAHİN v. TURKEY
judgment of 10 November 2005

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment[1] in the case of *Leyla Şahin v. Turkey* (application no. 44774/98).

The Court held:

- by sixteen votes to one, that there had been no violation of Article 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights;
- by sixteen votes to one, that there had been no violation of Article 2 of Protocol No. 1 (right to education);
- unanimously, that there had been no violation of Article 8 (right to respect for private and family life);
- unanimously, that there had been no violation of Article 10 (freedom of expression);
- unanimously, that there had been no violation of Article 14 (prohibition of discrimination).

(The judgment is available in English and French.)

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, Leyla Şahin, is a Turkish national who was born in 1973. She has lived in Vienna since 1999, when she left Istanbul to pursue her medical studies at the Faculty of Medicine at Vienna University. She comes from a traditional family of practising Muslims and considers it her religious duty to wear the Islamic headscarf.

At the material time she was a fifth-year student at the faculty of medicine of Istanbul University. On 23 February 1998 the Vice-Chancellor of the University issued a circular directing that students with beards and students wearing the Islamic headscarf would be refused admission to lectures, courses and tutorials.

In March 1998 the applicant was refused access to a written examination on one of the subjects she was studying because was wearing the Islamic headscarf. Subsequently the university authorities refused on the same grounds to enrol her on a course, or to admit her to various lectures and a written examination.

The faculty also issued her with a warning for contravening the university's rules on dress and suspended her from the university for a semester for taking part in an unauthorised assembly that had gathered to protest against them. All the disciplinary penalties imposed on the applicant were revoked under an amnesty law.

B. Procedure and composition of the Court

The application was lodged with the European Commission on Human Rights on 21 July 1998 and transmitted to the Court on 1 November 1998. It was declared admissible on 2 July 2002. The Chamber held a hearing in public in Strasbourg on 19 November 2002.

In its judgment of 29 June 2004 the Chamber held that there had been no violation of Article 9 and that no separate question arose under Articles 8 and 10, Article 14 taken together with Article 9, and Article 2 of Protocol No. 1 to the Convention.

On 27 September 2004 the applicant asked for the case to be referred to the Grand Chamber, in accordance with Article 43[2] of the Convention. On 10 November 2004 a panel of the Grand Chamber accepted her request. The Grand Chamber held a hearing in public in Strasbourg on 18 May 2005.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Luzius Wildhaber (Swiss), *President*,
Christos Rozakis (Greek),
Jean-Paul Costa (French),
Boštjan M. Zupančič (Slovenian),
Riza Türmen (Turkish),
Françoise Tulkens (Belgian),
Corneliu Bîrsan (Romanian)
Karel Jungwiert (Czech),
Volodymyr Butkevych (Ukrainian),
Nina Vajić (Croatian),
Mindia Ugrekhelidze (Georgian),
Antonella Mularoni (San Marinese),
Javier Borrego Borrego (Spanish),
Elisabet Fura-Sandström (Swedish),
Alvina Gyulumyan (Armenian),
Egbert Myjer (Netherlands),
Sverre Erik Jebens (Norwegian), *judges*,

and also Lawrence Early, *Deputy Grand Chamber Registrar*.

II.
SUMMARY OF THE JUDGMENT[3]

A. Complaints

The applicant complained under Article 9 that she had been prohibited from wearing the Islamic headscarf at university, of an unjustified interference with her right to education, within the meaning of Article 2 of Protocol No. 1 and of a violation of Article 14, taken together with Article 9, arguing that the prohibition on wearing the Islamic headscarf obliged students to choose between education and religion and discriminated between believers and non-believers. Lastly, she relied on Articles 8 and 10.

B. Decision of the Court

Article 9

Like the Chamber, the Grand Chamber proceeded on the assumption that the circular in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion.

As to whether the interference had been "prescribed by law", the Court noted that the circular had been issued by the Vice-Chancellor within the statutory framework set out in section 13 of Law no. 2547 and in accordance with the regulatory provisions that had been adopted earlier. According to the applicant, the circular was not compatible with transitional section 17 of that law, which did not proscribe the headscarf but instead provided that students were free to dress as they wished provided that their choice did not contravene the law.

The Court reiterated that, under its case-law, "law" was the provision in force as the competent courts had interpreted it. In that connection, it noted that the Constitutional Court had ruled that freedom of dress in institutions of higher education was not absolute. The Constitutional Court had held that authorising students to "cover the neck and hair with a veil or headscarf for reasons of religious conviction" in the universities was contrary to the Constitution. That decision of the Constitutional Court, which was both binding and accessible, as it had been published in the Official Gazette of 31 July 1991, supplemented the letter of transitional section 17 and followed the Constitutional Court's previous case-law. In addition, the Supreme Administrative Court had by then consistently held for a number of years that wearing the Islamic headscarf at university was not compatible with the fundamental principles of the Republic. Furthermore, regulations on wearing the Islamic headscarf had existed at Istanbul University since 1994 at the latest, well before the applicant enrolled there.

In these circumstances, the Court found that there was a legal basis for the interference in Turkish law and that it would have been clear to the applicant, from the moment she entered the university, that there were restrictions on wearing the Islamic headscarf and, from the date the circular was issued in 1998, that she was liable to be refused access to lectures and examinations if she continued to wear the headscarf.

The Court considered that the impugned interference primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order.

As to whether the interference was necessary, the Court noted that it was based in particular on the principles of secularism and equality. According to the case-law of the Constitutional Court, secularism, as the guarantor of democratic values, was the meeting point of liberty and equality. The principle prevented the State from manifesting a preference for a particular religion or belief; it thereby guided the State in its role of impartial arbiter, and necessarily entailed freedom of religion and conscience. It also served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements. The Constitutional Court added that freedom to manifest one's religion could be restricted in order to defend those values and principles.

Like the Chamber, the Grand Chamber considered that notion of secularism to be consistent with the values underpinning the Convention. Upholding that principle could be considered necessary to protect the democratic system in Turkey.

The Court also noted the emphasis placed in the Turkish constitutional system on the protection of the rights of women. Gender equality – recognised by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe – had also been found by the Turkish Constitutional Court to be a principle implicit in the values underlying the Constitution.

In addition, like the Constitutional Court, the Court considered that, when examining the question of the Islamic headscarf in the Turkish context, there had to be borne in mind the impact which wearing such a symbol, which was presented or perceived as a compulsory religious duty, may have on those who chose not to wear it. As had already been noted, the issues at stake included the protection of the "rights and freedoms of others" and the "maintenance of public order" in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhered to the Islamic faith. Imposing limitations on the freedom to wear the headscarf could, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since that religious symbol had taken on political significance in Turkey in recent years.

The Court did not lose sight of the fact that there were extremist political movements in Turkey which sought to impose on society as a whole their religious symbols and conception of a society founded on religious precepts.

Against that background, it was the principle of secularism which was the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women were being taught and applied in practice, it was understandable that the relevant authorities should consider it contrary to such values to allow religious attire, including, as in the case before the Court, the Islamic headscarf, to be worn on university premises.

As regards the conduct of the university authorities, the Court noted that it was common ground that practising Muslim students in Turkish universities were free, within the limits imposed by educational organisational constraints, to manifest their religion in accordance with habitual forms of Muslim observance. In addition, a resolution that had been adopted by Istanbul University on 9 July 1998 showed that various other forms of religious attire were also forbidden on the university premises.

When the issue of whether students should be allowed to wear the Islamic headscarf had surfaced at Istanbul University in 1994 in relation to the medical courses, the university authorities had reminded them of the relevant rules. Further, throughout the decision-making process that had culminated in the resolution of 9 July 1998 the university authorities had sought to adapt to the evolving situation in a way that would not bar access to the university to students wearing the Islamic headscarf, through continued dialogue with those concerned, while at the same time ensuring that order was maintained on the premises.

As to how compliance with the internal rules of the educational institutions should have been secured, it was not for the Court to substitute its view for that of the university authorities. Besides, having found that the regulations pursued a legitimate aim, it was not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution's "internal rules" devoid of purpose. Article 9 did not always guarantee the right to behave in a manner governed by a religious belief and did not confer on people who did so the right to disregard rules that had proved to be justified.

In those circumstances, and having regard to the Contracting States' margin of appreciation, the Court found that the interference in issue was justified in principle and proportionate to the aims pursued, and could therefore be considered to have been "necessary in a democratic society". It therefore found no violation of Article 9.

Article 2 of Protocol No. 1

Contrary to the decision of the Chamber on this complaint, the Grand Chamber was of the view that, having regard to the special circumstances of the case, the fundamental importance of the right to education and the position of the parties, the complaint under Article 2 of Protocol No. 1 could be considered as separate from the complaint under Article 9 and therefore warranted separate examination.

On the question of the applicability of Article 2 of Protocol No. 1, the Court reiterated that it was of crucial importance that the Convention was interpreted and applied in a manner which rendered its rights practical and effective, not theoretical and illusory. Moreover, the Convention was a living instrument which had to be interpreted in the light of present-day conditions. While the first sentence of Article 2 essentially established access to primary and secondary education, there was no watertight division separating higher education from other forms of education. In a number of recently adopted instruments, the Council of Europe had stressed the key role and importance of higher education in the promotion of human rights and fundamental freedoms and the strengthening of democracy. Consequently, it would be hard to imagine that institutions of higher education existing at a given time did not come within the scope of the first sentence of Article 2 of Protocol No 1. Although that Article did not impose a duty on the Contracting States to set up such institutions, any State that did so was under an obligation to afford an effective right of access to them. In a democratic society, the right to education, which was indispensable to the furtherance of human rights, played such a fundamental role that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not be consistent with the aim or purpose of that provision.

Consequently, the Court considered that any institutions of higher education existing at a given time came within the scope of the first sentence of Article 2 of Protocol No. 1, since the right of access to such institutions was an inherent part of the right set out in that provision.

In the case before it, by analogy with its reasoning on the question of the existence of interference under Article 9, the Court accepted that the regulations on the basis of which the applicant had been refused access to various lectures and examinations for wearing the Islamic headscarf constituted a restriction on her right to education, notwithstanding the fact that she had had access to the university and been able to read the subject of her choice in accordance with the results she had achieved in the university entrance examination. As with Article 9, the restriction was foreseeable and pursued legitimate aims and the means used were proportionate.

The measures in question manifestly did not hinder the students in performing the duties imposed by the habitual forms of religious observance. Secondly, the decision-making process for applying the internal regulations satisfied, so far as was possible, the requirement to weigh up the various interests at stake. The university authorities judiciously sought a means whereby they could avoid having to turn away students wearing the headscarf and at the same time honour their obligation to protect the rights of others and the interests of the education system. Lastly, the process also appeared to have been accompanied by safeguards – the rule requiring conformity with statute and judicial review – that were apt to protect the students' interests.

Further, the applicant could reasonably have foreseen that she ran the risk of being refused access to lectures and examinations if, as subsequently happened, she continued to wear the Islamic headscarf after 23 February 1998.

In these circumstances, the ban on wearing the Islamic headscarf had not impaired the very essence of the applicant's right to education and, in the light of the Court's findings with respect to the other Articles relied on by the applicant. Neither did it conflict with other rights enshrined in the Convention or its Protocols. The Court therefore found that there had been no violation of Article 2 of Protocol No. 1.

Articles 8, 10 and 14

The Court did not find any violation of Articles 8 or 10, the arguments advanced by the applicant being a mere reformulation of her complaint under Article 9 and Article 2 of Protocol No. 1, in respect of which the Court had concluded that there had been no violation.

As regards the complaint under Article 14, the Court noted that the applicant had not provided detailed particulars in her pleadings before the Grand Chamber. Furthermore, as had already been noted, the regulations on the Islamic headscarf were not directed against the applicant's religious affiliation, but pursued, among other things, the legitimate aim of protecting order and the rights and freedoms of others and were manifestly intended to preserve the secular nature of educational institutions.

Consequently the Court held that there had been no violation of Articles 8, 10 or 14.

Judges Rozakis and Vajić expressed a joint concurring opinion and Judge Tulkens expressed a dissenting opinion. These opinions are annexed to the judgment.

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12.1.2006

MIZZI v. MALTA
judgment of 12 January 2006

The European Court of Human Rights has today notified in writing its Chamber judgment[1] in the case of *Mizzi v. Malta* (application no. 26111/02).

The Court held unanimously that there had been:

- a violation of Article 6 § 1 (right to a fair hearing within a reasonable time) of the European Convention on Human Rights;
- a violation of Article 8 (right to respect for private and family life) of the Convention;
- a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 6 § 1 and Article 8.

Under Article 41 (just satisfaction), the Court awarded the applicant, by six votes to one, 5,000 euros (EUR) for non-pecuniary damage and EUR 40,000 for costs and expenses. (The judgment is available only in English.)

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, Maurice Mizzi, is a Maltese national who born in 1936 and lives in Bidnija (Malta).

The applicant is a well-known businessman in Malta. In 1966, his wife X became pregnant. In March 1967 the applicant and X separated and stopped living together and, on 4 July 1967, X gave birth to a daughter, Y. The applicant was automatically considered to be Y's father under Maltese law and was registered as her natural father. Following a DNA test which, according to the applicant, established that he was not Y's father, the applicant tried unsuccessfully to bring civil proceedings to repudiate his paternity of Y.

According to the Maltese Civil Code, a husband could challenge the paternity of a child conceived in wedlock if he could prove both the adultery of his wife and that the birth had been concealed from him. This latter condition was dropped when the law was amended in 1993 and a time limit of six months from the day of the child's birth was set as the cut off point for introducing such proceedings.

In May 1997 the Civil Court accepted the applicant's request for a declaration that, notwithstanding the provisions of the Civil Code, he had a right to proceed with a paternity action and found that there had been a violation of Article 8 of the European Convention on Human Rights. That judgment was subsequently revoked by the Constitutional Court.

B. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 5 July 2002 and declared admissible on 9 December 2004.

Judgment was given by a Chamber of seven judges, composed as follows:

Christos Rozakis (Greek), *President*,
Loukis Loucaides (Cypriot),
Françoise Tulkens (Belgian),
Nina Vajić (Croatian),
Dean Spielmann (Luxemburger),
Sverre Erik Jebens (Norwegian), *judges*,
Justice Joseph Filletti (Maltese), *ad hoc judge*,

and also Santiago Quesada, *Deputy Section Registrar*.

II.
SUMMARY OF THE JUDGMENT[2]

A. Complaints

The applicant complained that he was denied access to a court and that the irrefutable presumption of paternity applied in his case amounted to a disproportionate interference with his right for respect of private and family life. He also complained that he suffered discrimination, because other parties with an interest in establishing paternity in the case were not subject to the same strict conditions and time limits. He relied on Article 8 (right to respect for private and family life), Article 6 § 1 (access to court) and Article 14 (prohibition of discrimination).

B. Decision of the Court

Article 6 § 1

The Court considered that the applicant had an arguable right to deny paternity under Maltese law. Furthermore, it held that the fact that a time-limit precluded the applicant from benefiting from the 1993 amendments did not impair the existence in itself of that right and as such was only a procedural pre-condition for having access to the domestic courts.

While it noted that it was open to the applicant to file an application before the Civil Court, the Court stressed that a degree of access to a court limited to the right to ask a preliminary question could not be considered sufficient to secure the applicant's "right to a court". It recalled that the Civil Court's favourable decision was revoked by the Constitutional Court and held that this, coupled with the wording of the relevant domestic provisions, deprived the applicant of the possibility of obtaining a judicial determination of his claim.

The Court accepted that under certain circumstances, the institution of time-limits for the introduction of a paternity action might serve the interests of legal certainty and the interests of the children. However, the application of the rules in question should not have prevented litigants from making use of an available remedy. The Court found that the practical impossibility for the applicant to deny his paternity from the day Y's was born until the present day impaired, in essence, his right of access to a court.

The Court held that the domestic courts had failed to strike a fair balance between the applicant's legitimate interest of having a judicial ruling over his presumed paternity and the protection of legal certainty and of the interests of the other people involved in his case. The interference thus imposed an excessive burden on the applicant. There had therefore been a violation of Article 6 § 1.

Article 8

The Court observed that the applicant had never had the possibility of having the results of his daughter's blood test examined by a tribunal. It was only after the 1993 amendments removing the condition concerning concealment, that the applicant would have had the right to contest paternity on the basis of scientific evidence and of proof of adultery, had it been possible to lodge the action within six months of Y's birth.

The Court noted that the only means of redress open to him to obtain the reopening of the time-limit was to apply to the Civil Court. Had the Civil Court and the Constitutional Court accepted his request, they would have adequately secured the interests of the applicant who had legitimate reasons to believe that Y might not be his daughter and wished to challenge in court the legal presumption of his paternity.

The Court was not convinced that such a radical restriction of the applicant's right to take legal action was "necessary in a democratic society". It found that the potential interest of Y to enjoy the "social reality" of being the daughter of the applicant could not outweigh the latter's legitimate right of having at least one occasion to reject the paternity of a child who, according to scientific evidence that the applicant alleged to have obtained, was not his own.

The Court considered that the fact that the applicant was never allowed to disclaim paternity was not proportionate to the legitimate aims pursued. It followed that a fair balance had not been struck between the general interest of the protection of legal certainty of family relationships and the applicant's right to have the legal presumption of his paternity reviewed in the light of the biological evidence. Therefore, the domestic authorities failed to secure to the applicant the respect for his private life, to which he was entitled and there had been a violation of Article 8.

Article 14 in conjunction with Article 6 § 1 and Article 8

The Court observed that in bringing an action to contest his paternity the applicant was subject to time-limits which did not apply to other "interested parties". The Court found that the rigid application of the time-limit along with the Constitutional Court's refusal to allow an exception deprived the applicant of the exercise of his rights guaranteed by Articles 6 and 8 which were and still are, on the contrary, enjoyed by the other interested parties.

It followed that there had been a violation of Article 14 read in conjunction with Articles 6 § 1 and 8.

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7.3.2006

EVANS v. THE UNITED KINGDOM
judgment of 7 March 2006

The European Court of Human Rights has today notified in writing its Chamber judgment[1] in the case of *Evans v. the United Kingdom* (application no. 6339/05).

The Court held:

- unanimously, that there had been no violation of Article 2 (right to life) of the European Convention on Human Rights concerning the applicant's embryos;
- by five votes to two, that there had been no violation of Article 8 (right to respect for private and family life) of the Convention concerning the applicant; and,
- unanimously, that there had been no violation of Article 14 (prohibition of discrimination), concerning the applicant.

The Court decided to continue to indicate to the United Kingdom Government under Rule 39 (interim measures) of the Rules of Court that it was desirable in the interests of the proper conduct of the proceedings that the Government take appropriate measures to ensure that the applicant's embryos were preserved until the Court's judgment became final or pending any further order.

(The judgment is available in English and in French.)

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, Natallie Evans, is a 34-year-old British national who lives in Wiltshire (United Kingdom).

On 12 July Ms Evans and her partner J started fertility treatment at the Bath Assisted Conception Clinic. On 10 October 2000, during an appointment at the clinic, Ms Evans was diagnosed with a pre-cancerous condition of her ovaries and was offered one cycle of *in vitro* fertilization (IVF) treatment prior to the surgical removal of her ovaries. During the consultation held that day with medical staff, Ms Evans and her partner J were informed that they would each need to sign a form consenting to the treatment and that, in accordance with the provisions of the Human Fertilisation and Embryology Act 1990 ("the 1990 Act"), it would be possible for either of them to withdraw his or her consent at any time before the embryos were implanted in the applicant's uterus.

Ms Evans considered whether she should explore other means of having her remaining eggs fertilised, to guard against the possibility of her relationship with J ending. J reassured her that that would not happen.

On 12 November 2001 the couple attended the clinic for treatment, resulting in the creation of six embryos which were placed in storage and, on 26 November 2001, Ms Evans

underwent an operation to remove her ovaries. She was told she would need to wait for two years before the implantation of the embryos in her uterus.

In May 2002 the relationship between the applicant and J ended and subsequently, in accordance with the 1990 Act, he withdrew his consent to the continued storage of the embryos or use of them by the applicant.

The applicant brought proceedings before the High Court seeking, among other things, an injunction to require J. to restore his consent. Her claim was refused on 1 October 2003, J having been found to have acted in good faith, as he had embarked on the treatment on the basis that his relationship with Ms Evans would continue. On 1 October 2004, the Court of Appeal upheld the High Court's judgment. Leave to appeal was refused.

On 26 January 2005 the clinic informed the applicant that it was under a legal obligation to destroy the embryos, and intended to do so on 23 February 2005.

On 27 February 2005 the Court, to whom the applicant had applied, requested, under Rule 39 of the Rules of Court, that the United Kingdom Government take appropriate measures to prevent the embryos being destroyed by the clinic before the Court had been able to examine the case. The embryos were not destroyed.

The applicant, for whom the embryos represent her only chance of bearing a child to which she is genetically related, has undergone successful treatment for her pre-cancerous condition and is medically fit to continue with implantation of the embryos. It was understood that the Bath clinic was willing to treat her, subject to J's consent.

B. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 11 February 2005. A hearing on admissibility and merits took place in public in the Human Rights Building, Strasbourg, on 27 September 2005

Judgment was given by a Chamber of seven judges, composed as follows:

Josep Casadevall (Andorran), *President*,
Nicolas Bratza (British),
Matti Pellonpää (Finnish),
Rait Maruste (Estonian),
Kristaq Traja (Albanian),
Ljiljana Mijović (citizen of Bosnia and Herzegovina),
Ján Šikuta (Slovakian), *judges*,

and also Michael O'Boyle, *Section Registrar*.

II.
SUMMARY OF THE JUDGMENT[2]

A. Complaints

The applicant complained that requiring the father's consent for the continued storage and implantation of the fertilised eggs was in breach of her rights under Articles 8 and 14 of the Convention and the rights of the embryos, under Article 2.

B. Decision of the Court

Article 2

The Court recalled that the issue of when the right to life began came within the margin of appreciation of the State concerned. Under English law an embryo did not have independent rights or interests and could not claim—or have claimed on its behalf—a right to life under Article 2. The Court therefore found that there had not been a violation of Article 2.

Article 8

The Court accepted that J acted in good faith in embarking on IVF treatment with the applicant, and that he did so only on the basis that their relationship would continue.

The Court observed that there was no international consensus with regard to the regulation of IVF treatment or to the use of embryos created by such treatment, and that the United Kingdom was not the only Member State of the Council of Europe to give a right to either party freely to withdraw his or her consent at any stage up to the moment of implantation of the embryo. Since the use of IVF treatment gave rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touched on areas where there was no clear common ground in Europe, the Court considered that the margin of appreciation to be afforded to the State had to be a wide one which had, in principle, to extend both to its decision to intervene in the area and, once having intervened, to the detailed rules it laid down in order to achieve a balance between the competing public and private interests.

The Court next observed that the legislation at issue in the applicant's case was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology. The United Kingdom was particularly quick to respond to the scientific advances in that field. Four years after the birth of the first child conceived by IVF, an expert Committee of Inquiry was appointed under the chairmanship of Dame Mary Warnock DBE. After the Committee had reported, its recommendations, so far as they related to IVF treatment, were set out in a Green Paper issued for public consultation. After receipt of representations from interested parties, they were included in a White Paper and were eventually embodied in the 1989 Bill which became, after Parliamentary debate, the 1990 Act. Central to the Committee's recommendations and to the policy of the legislation was the primacy of the continuing consent to IVF treatment by both parties to the treatment. It was true that neither the Warnock Report nor the Green Paper discussed what was to happen if the parties became estranged during treatment. However, the White Paper emphasised that donors of genetic material would have the right under the proposed legislation to vary or withdraw their consent at any time before the embryos were used and the policy of the Act was to ensure continuing consent from the start of treatment to the point of implantation in the woman.

Thus, Schedule 3 to the 1990 Act placed a legal obligation on any clinic carrying out IVF treatment to explain to a person embarking on such treatment that either gamete provider had the freedom to terminate the process at any time prior to implantation. To ensure further that that position was known and understood, each donor had by law to sign a form setting out the necessary consents. In the applicant's case, while the pressing nature of her medical condition required that she and J reach a decision about the fertilisation of her eggs without as much time for reflection and advice as might ordinarily be desired, it was undisputed that it was explained to them both that either was free to withdraw consent at any time before any resulting embryo was implanted in the applicant's uterus.

The Court reiterated that it was not contrary to the requirements of Article 8 for a State to adopt legislation governing important aspects of private life which did not allow for the weighing of competing interests in the circumstances of each individual case. The Court found that strong policy considerations underlay the decision of the legislature to favour a clear or "bright-line" rule which would serve both to produce legal certainty and to maintain public confidence in the law in a highly sensitive field. As the Court of Appeal had observed, to have made the withdrawal of the male donor's consent relevant but not conclusive, or to have granted a power to the clinic, to the court or to another independent authority to override the need for a donor's consent, would not only have given rise to acute problems of evaluation of the weight to be attached to the respective rights of the parties concerned, particularly where their personal circumstances had changed in the period since the outset of the IVF treatment, but would have created "new and even more intractable difficulties of arbitrariness and inconsistency".

The Court was not persuaded by the applicant's argument that the situation of the male and female parties to IVF treatment could not be equated and that a fair balance could in general be preserved only by holding the male donor to his consent. While there was clearly a difference of degree between the involvement of the two parties in the process of IVF treatment, the Court did not accept that the Article 8 rights of the male donor would necessarily be less worthy of protection than those of the female; nor did it regard it as self-evident that the balance of interests would always tip decisively in favour of the female party.

The Court, like the national courts, had great sympathy for the plight of the applicant who, if implantation did not take place, would be deprived of the ability to give birth to her own child. However, like the national courts, the Court did not find that the absence of a power to override a genetic parent's withdrawal of consent, even in the exceptional circumstances of the applicant's case, was such as to upset the fair balance required by Article 8. The personal circumstances of the parties had changed and, even in the applicant's case, it would be difficult for a court to judge whether the effect on the applicant of J's withdrawal of consent would be greater than the impact of the invalidation of that withdrawal of consent would have on J.

The Court accepted that a different balance might have been struck by Parliament, by, for instance, making the consent of the male donor irrevocable or by drawing the "bright-line" at the point of creation of the embryo. However, the central question in terms of Article 8 was not whether a different solution might have been found by the legislature which would arguably have struck a fairer balance, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that article. In determining that question, the Court attached some importance to the fact that the United Kingdom was by no means the only country in Europe to grant both parties to IVF treatment the right to withdraw consent to the use or storage of their genetic material at any stage up to the moment of implantation of the resulting embryo. The Court further noted a similar emphasis on the primacy of consent reflected in the relevant international instruments concerned with medical interventions.

The Court therefore found that, in adopting in the 1990 Act a clear and principled rule, which was explained to the parties to IVF treatment and clearly set out in the forms they both signed, whereby the consent of either party might be withdrawn at any stage up to the point of implantation of an embryo, the United Kingdom did not exceed the margin of appreciation afforded to it or upset the fair balance required under Article 8. There had not therefore been a violation of Article 8.

Article 14

The Court was not required to decide in the applicant's case whether she could properly complain of a difference of treatment as compared to another woman in an analogous position, because it considered that the reasons given for finding that there was no violation of Article 8 also afforded a reasonable and objective justification under Article 14. Consequently, the Court held that there had been no violation of Article 14.

Judges Traja and Mijović expressed a joint dissenting opinion which is annexed to the judgment.

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12.4.2006

STEC AND OTHERS v. THE UNITED KINGDOM
judgment of 12 April 2006

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment[38] in the case of *Stec and Others v. the United Kingdom* (application no. 65731/01).

The Court held, by sixteen votes to one, that there had been no violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights taken in conjunction with Article 1 of Protocol No. 1 (protection of property).

(The judgment is available in English and French.)

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicants, all United Kingdom nationals, are: Anna Stec, born in 1933 and living in Stoke-on-Trent; Patrick Lunn, born in 1923 and living in Stockton-on-Tees; Sybil Spencer, born in 1926 and living in Bury; and, Oliver Kimber, born in 1924 and living in Pevensey. (Regina Hepple, born in 1933 and living in Wakefield withdrew from the case.)

The applicants all complain about sex-based differences in eligibility for reduced earnings allowance (REA) and retirement allowance (RA), which are earnings-related benefits payable to employed or formerly employed people who have suffered an impairment of earning capacity from a work-related injury or disease.

Before 1986 there was a continued right to REA after retirement, which was payable concurrently with the State pension. From 1986 a succession of legislative measures attempted to remove or reduce the REA being received by claimants no longer of working age, by imposing cut-off or limiting conditions at 65 for men and 60 for women (the ages used by the statutory old-age pension scheme).

All the applicants received REA.

When Mrs *Stec* reached the age of 60, it was decided that, from 31 March 1996, her REA should be replaced by RA, a lower payment. She complained that a man of the same age would have continued to receive REA.

From 17 May 1993 and 29 September 1994 respectively Mr *Lunn* and Mr *Kimber* received a statutory retirement pension. Their REA was subsequently replaced by RA. They complained that a woman in the same circumstances would have been treated as having retired on or before the more stringent rules came into force in 1989 and so would have been entitled to a frozen rate of REA for life.

[38] Grand Chamber judgments are final (Article 44 of the Convention).

From 23 December 1986 Mrs Spencer started to receive a retirement pension. Her REA was subsequently frozen for life. She complained that, had she been a man, she would have continued to receive unfrozen REA.

All five applicants' cases were joined by the Social Security Commissioner who referred two questions to the European Court of Justice (ECJ). The ECJ gave judgment on 23 May 2000, finding that the discriminatory criteria in relation to REA were not incompatible with European Community law because they were linked to receipt of old-age benefit and thus fell outside the scope of Directive 79/7/EEC on the implementation of the principle of equal treatment in matters of social security. On 31 July 2000 the Commissioner, following the ECJ's ruling, struck out the applicants' cases where they were the appellants.

B. Procedure and composition of the Court

The case originated in two applications (nos. 65731/01 and 65900/01) which were lodged with the European Court of Human Rights on 30 January 2001 and 22 November 2000 respectively.

The Chamber decided to join the two applications on 5 March 2002. On 24 August 2004 the Chamber of the Court dealing with the case relinquished jurisdiction in favour of the Grand Chamber, under Article 30[39] of the Convention.

On 25 February 2005 Mrs Hepple, informed the Court that, for personal reasons, she no longer wished to continue with the case. Considering that respect for human rights did not require it to continue examining it, the Court decided to strike out Mrs Hepple's application.

A Grand Chamber hearing took place in the Human Rights building in Strasbourg on 9 March 2005.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Luzius Wildhaber (Swiss), *President*,
Christos Rozakis (Greek),
Nicolas Bratza (British),
Boštjan M. Zupančič (Slovenian),
Loukis Loucaides (Cypriot),
Josep Casadevall (Andorran),
John Hedigan (Irish)
Matti Pellonpää (Finnish),
Margarita Tsatsa-Nikolovska (citizen of "the former Yugoslav Republic of Macedonia"),
Rait Maruste (Estonian),
Kristaq Traja (Albanian),
Anatoli Kovler (Russian),
Stanislav Pavlovschi (Moldovan),
Lech Garlicki (Polish),
Javier Borrego Borrego (Spanish),
Dean Spielmann (Luxemburger),
Egbert Myjer (Netherlands), *judges*,

and also Lawrence Early, *Deputy Grand Chamber Registrar*.

[39] Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

II.
SUMMARY OF THE JUDGMENT[40]

A. Complaint

The applicants complained that they suffered sex discrimination as a result of changes to the REA scheme linking it to State pensionable age. They all relied on Article 1 of Protocol No. 1 (protection of property) to the Convention, combined with Article 14 (prohibition of discrimination).

B. Decision of the Court

The Court considered that both the United Kingdom Government's policy decision to stop paying REA to those who would otherwise have retired from paid employment, and the decision to achieve that aim by linking the cut-off age for REA to the notional "end of working life", or State pensionable age, pursued a legitimate aim and were reasonably and objectively justified.

It remained to be examined whether or not the underlying difference in treatment between men and women in the State pension scheme was acceptable under Article 14.

Differential pensionable ages were first introduced for men and women in the United Kingdom in 1940, well before the Convention had come into existence. The difference in treatment was adopted in order to mitigate financial inequality and hardship arising out of the woman's traditional unpaid role of caring for the family in the home rather than earning money in the workplace. At their origin, therefore, the differential pensionable ages were intended to correct "factual inequalities" between men and women and appeared therefore to have been objectively justified under Article 14.

It followed that the difference in pensionable ages continued to be justified until such time that social conditions had changed so that women were no longer substantially prejudiced because of a shorter working life. That change, had, by its very nature, to have been gradual, and it would be difficult or impossible to pinpoint any particular moment when the unfairness to men caused by differential pensionable ages began to outweigh the need to correct the disadvantaged position of women. Certain indications were available to the Court. For example, in the 1993 White Paper, the Government asserted that the proportion of women in paid employment had increased from 37% in 1967 to 50% in 1992.

According to the information before the Court, the Government made a first, concrete, move towards establishing the same pensionable age for both sexes with the publication of the Green Paper in December 1991. It would, no doubt, be possible to argue that that step could, or should, have been made earlier. However, the development of parity in the working lives of men and women had been a gradual process, and one which the national authorities were better placed to assess. Moreover, it was significant that many other countries in Europe maintained a difference in the ages at which men and women become eligible for the State retirement pension[41].

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[40] This summary by the Registry does not bind the Court.

[41] According to information provided by the United Kingdom Government in December 2004, men and women became eligible to receive an old age pension at the same age in Andorra, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Liechtenstein, Luxembourg, Monaco, The Netherlands, Norway, Portugal, San Marino, Slovakia, Spain and Sweden.
Women were entitled to receive a pension at a younger age than men in Albania, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Italy, Latvia, Lithuania, Malta, Moldova,

In the light of the original justification for the measure as correcting financial inequality between the sexes, the slowly evolving nature of the change in women's working lives, and in the absence of a common standard among European States, the Court found that the United Kingdom could not be criticised for not having started earlier on the road towards a single pensionable age.

Having once begun the move towards equality, moreover, the Court did not consider it unreasonable of the Government to carry out a thorough process of consultation and review, nor could Parliament be condemned for deciding in 1995 to introduce the reform slowly and in stages, given the extremely far-reaching and serious implications, for women and for the economy in general.

Conclusion

In conclusion, the Court found that the difference in State pensionable age between men and women in the United Kingdom was originally intended to correct the disadvantaged economic position of women. It continued to be reasonably and objectively justified on that ground until such time that social and economic changes removed the need for special treatment for women. The United Kingdom Government's decisions as to the precise timing and means of putting right the inequality were not manifestly unreasonable. Similarly, the decision to link eligibility for REA to the pension system was reasonably and objectively justified, given that the benefit was intended to compensate for reduced earning capacity during a person's working life. There had not, therefore, been a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

Judge Borrego-Borrego expressed a concurring opinion and Judge Loucaides expressed a dissenting opinion which are annexed to the judgment.

Poland, Romania, the Russian Federation, Serbia and Montenegro, Slovenia, Switzerland, the Former Yugoslav Republic of Macedonia, and Ukraine. Many of those countries were phasing in equalisation of pensionable age. That was to take place in Austria between 2024-33; in Azerbaijan by 2012; in Belgium between 1997 and 2009; in Estonia before 2016; in Hungary by 2009; in Latvia by 2008; and in Lithuania by 2006.

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20.6.2006

ZARB ADAMI v. MALTA
judgment of 20 June 2006

The European Court of Human Rights has today notified in writing its Chamber judgment[1] in the case of *Zarb Adami v. Malta* (application no. 17209/02).

The Court held by six votes to one that there had been a violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights, read in conjunction with Article 4 § 3 (d) (prohibition of slavery and forced labour) of the Convention.

Under Article 41 (just satisfaction), the Court awarded the applicant 7,752 euros (EUR) for costs and expenses. (The judgment is available only in English.)

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, Maurice Zarb Adami, is a Maltese national who lives in Attard (Malta). He is a pharmacist.

From 1971 he was placed on the list of jurors in Malta and remained on the list until at least 2002. Between 1971 and 1997 he served as both a juror and foreman in three different sets of criminal proceedings.

In 1997 he was called again to serve as a juror, but failed to appear and was fined approximately EUR 240.

As the applicant failed to pay the fine, he was summoned before the Criminal Court. He pleaded that the fine imposed on him was discriminatory in terms of Article 45 of the Constitution and Article 14 of the Convention, taken in conjunction with Article 4 § 3 (d), as other people in his position were not subjected to the burdens and duties of jury service and the law and/or the domestic practice exempted women from jury service, but not men.

His case was referred to the First Hall of the Civil Court, before which the applicant alleged that the Maltese system penalised men and favoured women; during the preceding five years only 3.05% of women had served as jurors as opposed to 96.95% of men. Moreover, the burden of jury service was not equitably distributed; in 1997 the list of jurors represented only 3.4% of the list of voters. On 5 February 1999 the First Hall of the Civil Court rejected the applicant's claims.

He appealed, stressing that jury service was a burden, as jurors were required to leave their work to attend court hearings regularly. It also imposed a moral burden to judge the innocence or guilt of a person. His appeal was rejected.

In 2003, as a lecturer at the University of Malta, the applicant unsuccessfully sought exemption from jury service, under Article 604(1) of the Criminal Code (CC).

Having been summoned once again to serve as a juror in another trial, in 2004 the applicant requested to be exempted from jury service under Article 607 of the CC. His application was refused.

On 18 April 2005 the applicant again requested to be exempted from jury service, relying on Article 604 (1) of the CC, which provides an exemption for full-time lecturers at the University. On 25 April 2005 his request was accepted.

B. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 22 April 2002. Following a hearing on 24 May 2005, the application was declared admissible.

Judgment was given by a Chamber of seven judges, composed as follows:

Nicolas Bratza (British), *President*,
Josep Casadevall (Andorran),
Kristaq Traja (Albanian),
Lech Garlicki (Polish),
Javier Borrego Borrego (Spanish),
Ljiljana Mijović (citizen of Bosnia and Herzegovina), *judges*,
Justice Joseph Filletti (Maltese), ad hoc *judge*,

and also Lawrence Early, *Section Registrar*

II.
SUMMARY OF THE JUDGMENT[2]

A. Complaint

The applicant complained that he had been the victim of discrimination on the ground of sex, as the percentage of women requested to undertake jury service in Malta was negligible, and that he had been obliged to face criminal proceedings in relation to the imposition of a discriminatory civic obligation. He relied on Article 14 of the Convention taken in conjunction with Articles 4 § 3 and Article 6 (right to a fair hearing).

B. Decision of the Court

Article 14 read in conjunction with Article 4 § 3

Applicability

The Court considered that compulsory jury service as it exists in Malta is one of the "normal civic obligations" envisaged in Article 4 § 3 (d) of the Convention. It further observed that the applicant did not offer himself voluntarily for jury service and that his failure to appear led to the imposition of a fine, which could be converted into a term of imprisonment. On account of its close links with the obligation to serve, the obligation to pay the fine also fell within the scope of Article 4 § 3 (d). It followed that the facts in question came within the ambit of Article 4 and that Article 14 was accordingly applicable.

Difference in treatment between people in similar situations

The Court observed that it was accepted by the applicant that the difference in treatment complained of did not depend on the wording of Maltese law in force at the relevant time, which made no distinction between sexes, both men and women being equally eligible for jury service. The discrimination at issue was on the contrary based on what the applicant described as a well-established practice, characterised by a number of factors, such as the manner in which the lists of jurors were compiled and the criteria for exemption from jury service. As a result, only a negligible percentage of women were called to serve as jurors.

The Court reiterated that statistics were not by themselves sufficient to disclose a practice which could be classified as discriminatory. At the same time, the Court considered that discrimination potentially contrary to the Convention might result not only from a legislative measure, but also from a *de facto* situation.

The Court noted that in 1997 – the year in which the applicant was called to serve as a juror and failed to attend the court's meeting – the number of men (7,503) enrolled on the lists of jurors was three times the number of women (2,494). In the previous year that difference was even more significant, as only 147 women were placed on the lists of jurors, as opposed to 4,298 men. The Court was also struck by the fact that in 1996, five women and 174 men served as jurors. The Court considered that those figures showed that the civic obligation of jury service had been placed predominantly on men. Therefore, there had been a difference in treatment between two groups – men and women – which, with respect to jury service, were in a similar situation.

The Court accepted that, since 1997 an administrative process had been set in motion in order to bring the number of women registered as jurors in line with that of men. As a result, in 2004, 6,344 women and 10,195 men were enrolled on the list of jurors. However, that did not undermine the finding that at the relevant time only a negligible percentage of women were enrolled on the lists of jurors and were actually requested to perform jury service.

Objective and reasonable justification

The Court recalled that if a policy or general measure had disproportionate prejudicial effects on a group of people, the possibility of its being considered discriminatory could not be ruled out even if it was not specifically aimed or directed at that group. Moreover, very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of sex as compatible with the Convention.

In the applicant's case, the Maltese Government argued that the difference in treatment depended on a number of factors. Jurors were chosen from the part of the population which was active in the economy and in the professions. Moreover, according to Article 604 (3) of the CC, an exemption from jury service might be granted to those taking care of their family and more women than men could successfully rely on such a provision. Finally, "for reasons of cultural orientation", defence lawyers might have had a tendency to challenge female jurors.

The Court doubted whether the factors indicated by the Government were sufficient to explain the significant discrepancy in the repartition of jury service. It furthermore noted that the second and third factors related only to the number of females who actually performed jury service and did not explain the very low number of women enrolled on the lists of jurors. In any event, the factors highlighted by the Government only constituted explanations of the mechanisms which had led to the difference in treatment complained of. No valid argument had been put before the Court in order to provide a proper justification for it. In particular, it had not been shown that the difference in treatment pursued a legitimate aim and that there

was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

The Court therefore found that there had been a violation of Article 14, read in conjunction with Article 4 § 3 (d).

That conclusion dispensed the Court from examining whether the applicant had also been discriminated against *vis-à-vis* other men who, though eligible for jury service, had never been summoned to serve as jurors.

Article 14 read in conjunction with Article 6

The Court observed that the applicant did not allege that the proceedings directed against him were in any way unfair or that any of the rights guaranteed by Article 6 had been violated. In any case, it noted that the criminal proceedings were a mere consequence of the existence of the discriminatory civic obligation. Having regard to its finding that there had been a violation of Article 14 taken in conjunction with Article 4 § 3 (d), the Court did not consider it necessary to examine whether there had also been a violation of Article 14 read in conjunction with Article 6.

Judges Bratza and Garlicki expressed concurring opinions and Judge Casadevall expressed a dissenting opinion, which are annexed to the judgment.

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29.6.2006

ZEMAN v. AUSTRIA
judgment of 29 June 2006
(Application no. 23960/02) Violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1

The applicant, Walter Zeman, is an Austrian national who was born in 1939 and lives in Vienna.

Following his wife's death, the applicant was granted a survivor's pension from the Vienna Municipality under the relevant provisions of the Pension Act of 1966 and the Pension Allowance Act. Section 15 of the Pension Act provided for a survivor's pension which was 60 % of the retirement pension of the applicant's late wife. A proportionate supplementary allowance under the Pension Allowance Act was added to that. According to the transitory provision contained in Article II of the Pension Act, the monthly payments to which the applicant was entitled amounted to one-third of the survivor's pension from 1 July 1988, two-thirds of the survivor's pension from 1 January 1989 and the full survivor's pension from 1 January 1995.

On 1 January 1995, when the applicant was due to receive the full pension, an amendment came into force reducing his entitlement to between 40% and 60% of his late wife's pension. According to Section 64e of that act, former Section 15 was still applicable to entitlements to a widow's pension (or to the pension of a widower who was incapable of gainful employment and indigent) which had been acquired before 1 January 1995.

On 2 January 1995 the applicant's pension was reduced to 40% of his late wife's retirement pension. He appealed, submitting that, had he been a woman in a similar position, former Section 15 would have applied and he would have been entitled to 60%. His appeals were dismissed.

The applicant complained about the reduction of his survivor's pension under the amended Pension Act and the Pension Allowance Act, relying on Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights and Article 14 (prohibition of discrimination) of the Convention.

The European Court of Human Rights considered that the difference in treatment between men and women as regards entitlement to survivor's pensions acquired prior to 1995 was not based on any "objective and reasonable justification": It therefore held unanimously that there had been a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 and that that finding rendered it unnecessary for the Court to consider separately the applicant's complaint under Article 1 of Protocol No. 1.

The Court considered that the question of the application of Article 41 (just satisfaction) was not ready for decision. The Court invited the Government and the applicant to submit, within three months, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach.

On 9 October 2007 the Government informed the Court that a settlement had been reached between the competent authorities and the applicant.

(The judgment is available only in English.)

FOURTH SECTION

CASE OF PEARSON v. THE UNITED KINGDOM

(Application no. 8374/03)

JUDGMENT

STRASBOURG

22 August 2006

FINAL

11/12/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Pearson v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr J. Casadevall, *President*,
Sir Nicolas Bratza,
Mr G. Bonello,
Mr M. Pellonpää,
Mr K. Traja,
Mr S. Pavlovschi,
Mr J. Šikuta, *judges*,
and Mr T.L. Early, *Section Registrar*,

Having deliberated in private on 27 April 2004 and 11 July 2006,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 8374/03) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Sydney George Pearson ("the applicant"), on 27 February 2003.

2. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton of the Foreign and Commonwealth Office, London.

3. The applicant complained that as a man he was unable to receive his State pension until age 65 whereas a woman could claim her State pension at age 60. He invoked Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 27 April 2004, the Court declared the application partly admissible.

6. The applicant, but not the Government, filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

7. Following the judgment of the Grand Chamber in *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, 12 April 2006), the applicant and the Government submitted further observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1942 and lives in Birmingham.

8. The applicant, aged sixty three, would not become eligible for a State pension until he was sixty five, whereas a woman could claim a State pension from age sixty. He was currently unemployed but if he returned to work he and any potential employer would be liable to make national insurance contributions.

9. On 4 February 2002, the applicant issued proceedings for damages in the High Court against the Benefits Agency, alleging *inter alia* that the refusal to pay him a pension from the age of sixty was discriminatory. On 2 October 2002, the applicant's claim was struck out on the basis that the particulars of claim disclosed no reasonable grounds for bringing the claim (Civil Procedure Rule 3.4.2.). On 27 February 2003, permission to appeal was refused.

II. RELEVANT DOMESTIC LAW AND PRACTICE

10. Section 122 of the Social Security Contributions and Benefits Act 1992 defines "pensionable age" as:

> "(a) the age of 65, in the case of a man; and
>
> (b) the age of 60, in the case of a woman".

11. Section 126 of the Pensions Act 1995 provides for the equalisation of State pension ages for men and women to the age of 65. The State pension age for women will increase gradually from 2010 and the equalisation will be complete in 2020. At the same time, the age until which women are liable to pay national insurance contributions will gradually increase in line with the increase in the State pension age.

III. EUROPEAN UNION LAW

12. Council Directive 79/7/EEC of 19 December 1978 provides for the progressive implementation of the principle of equal treatment for men and women in matters of social security. However, in Article 7(1)(a) the Directive provides for derogation in the matter of "the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences therefore for other benefits".

13. In Case C-9/91 *The Queen v. Secretary of State for Social Security, ex parte Equal Opportunities Commission* [1992] ECR 1-4297 ("the EOC case" concerning a reference for a preliminary ruling from the High Court), the European Court of Justice found that:

- Article 7(1)a had to be interpreted as authorising the determination of a statutory pensionable age which differs according to sex for the purposes of granting old-age and retirement pensions and also forms of discrimination which are necessarily linked to that difference;
- Inequality between men and women with respect to the length of contribution periods required to obtain a pension constitutes such discrimination where, having regard to the financial equilibrium of the national pension system in the context in which it appears, it cannot be dissociated from a difference in pensionable age;
- In view of the advantages allowed to women by national pension systems, in particular as regards statutory pensionable age and length of contribution periods, and the disruption that would necessarily be caused to the equilibrium of those systems if the principle of equality between the sexes were to be applied from one day to the next in respect of those periods, the Community legislature intended to authorise the progressive implementation of that principle by the member States and that progressive nature could not be ensured if the scope of the derogation authorised by Article 7(1)a were to be interpreted restrictively.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No. 1

14. The applicant complained that his entitlement to a State pension accrued at age 65, five years later than for a woman. The relevant provisions of the Convention provide:

Article 14 of the Convention:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 1 of Protocol No. 1:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. The parties' submissions

1. The applicant

15. The applicant considered that it was blatant discrimination that almost double the number of women to men were in receipt of the State pension yet they had paid less towards the fund, became eligible earlier and lived longer. Men also had increasing difficulty in finding employment, over half of men over 50 being unemployed, forced into early retirement or in low paid part-time jobs.

16. The applicant criticised the Government's policy in reducing the value of the pension and availability of pensions, submitting that economic reasons did not justify the failure to provide pensions in accordance with their citizens' human rights since they were able to find billions of pounds for military and security purposes and also to subsidise the private company pension schemes. Given the National Insurance Fund had a GBP 30 billion surplus, there was, in his view, no legal or economic basis preventing the Government from equalising State pensions immediately.

17. The applicant considered there was a blatant violation of European Union directives, the Human Rights Act and the European Union Social Charter. The Government had for over twenty years made excuses for not equalising State pensions, although economically stronger than France and other countries that did conform. He argued, as regarded the Government's position that it was necessary to wait to 2020 for equalisation as the change could affect women's lifestyles, that this had no relevance to human rights or equality and did not justify denying the other half of the population their rights.

2. The Government

18. The Government accepted that Article 1 of Protocol No. 1 applied to the case and that Article 14 was applicable to any discrimination in relation to the availability of the State retirement pension. They submitted that the differential age for men and women had, however, an objective and reasonable justification. They emphasised that the social, historic and economic basis for the provision of the State retirement pension, as well as the decision to

equalise the age progressively from 2010-2020 involved complex social and economic judgments in respect of which the Government enjoyed a broad margin of appreciation. It was not a simple case of sex discrimination but involved issues of fair balance under Article 1 of Protocol No. 1 where the Court had stated that it would respect the legislator's assessment in such matters unless it was devoid of reasonable foundation.

19. The Government submitted that Parliament decided to implement the reform to equalise State pensionable ages from 2020 as the measure had enormous financial implications both for individuals and the State. In particular, sudden change would adversely affect the interests of women who had been expecting to receive a State pension at age 60 and a long transitional period gave time for people to adjust their expectations and arrange their affairs accordingly. Nor would it be economically feasible for the Government to provide all 60-year-old men with pensions pending equalisation in 2020 as it would involve the diversion of substantial resources from other State needs (an estimated cost of GBP 75 billion). After a full public consultation exercise, the Government decided to bring the age up to 65 for all based on the considerations that people lived longer and healthier lives, there would be more pensioners supported by fewer people of working age, public expenditure on pensions was set to double by 2035 and occupational schemes were predominantly equalising at the age of 65 already. They pointed out that the European Union had accepted that member States must be allowed a period of transition to plan and implement the move to equal ages. The United Kingdom's plans were in line with other developed nations and the European Commission had never suggested that its measures were in any way deficient or disproportionate but had impliedly accepted them.

20. The Government referred to the recent judgment in *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, 12 April 2006, submitting that this had addressed and disposed of the material issues in the case, in particular that there was a very generous margin of appreciation and that the decisions as to the precise timing and means of putting right the inequality were not so manifestly unreasonable as to exceed this margin.

B. The Court's assessment

21. Article 14 of the Convention has no independent existence; it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. There can be no room for its application unless the facts at issue fall within the ambit of one or more of them (see, amongst other authorities, *Gaygusuz v. Austria*, judgment of 16 September 1996, *Reports of Judgments and Decisions*, 1996-IV, § 36). The Court notes that the Government do not contest in this case that the right to receive a State pension falls within the scope of Article 1 of Protocol No. 1 and thus that Article 14 is applicable to any complaint of discrimination in that respect. Article 14 is accordingly engaged.

22. The principal issue in this case is whether the difference in treatment whereby this applicant was unable to receive his State pension until the age of 65 whereas a woman became entitled at age 60, discloses discrimination contrary to Article 14 of the Convention.

23. According to the Court's case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a certain margin of appreciation in assessing whether or not and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons are required before the Court would regard a difference of treatment based exclusively on the grounds of sex as compatible with the Convention (see, among other authorities, *Willis v. the United Kingdom*, no. 36042/97, ECHR 2002-IV, § 39).

24. Against this must be balanced the countervailing proposition that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one (see, *inter alia*, *James v. the United Kingdom*, judgment of 21 February 1986, Series A, no. 98, § 46). This applies to systems of taxation or contributions which must inevitably differentiate between groups of tax-payers and the implementation of which unavoidably creates marginal situations. A Government may often have to strike a balance between the need to raise revenue and reflecting other social objectives in taxation policies. The national authorities are obviously in a better position than the Court to assess those needs and requirements, which in the present case involve complex concerns about the financing of pensions which impact on the community as a whole. In such an area the Court will generally respect the legislature's policy choice unless it is manifestly unreasonable (see, as the latest authority, *Stec and Others v. the United Kingdom*, cited above, § 52).

25. The Court recalls that in the afore-mentioned *Stec* case the Grand Chamber had occasion to examine the alleged inequality arising out of entitlement to the reduced earnings allowance which was linked to the State pension. It had this to say about the difference in treatment between men and women as regarded the State pension age.

> "61. Differential pensionable ages were first introduced for men and women in the United Kingdom in 1940, well before the Convention had come into existence, although the disparity persists to the present day (see paragraph 32 above). It would appear that the difference in treatment was adopted in order to mitigate financial inequality and hardship arising out of the woman's traditional unpaid role of caring for the family in the home rather than earning money in the workplace. At their origin, therefore, the differential pensionable ages were intended to correct 'factual inequalities' between men and women and appear therefore to have been objectively justified under Article 14 (see paragraph 51 above).
>
> 62. It follows that the difference in pensionable ages continued to be justified until such time that social conditions had changed so that women were no longer substantially prejudiced because of a shorter working life. This change, must, by its very nature, have been gradual, and it would be difficult or impossible to pinpoint any particular moment when the unfairness to men caused by differential pensionable ages began to outweigh the need to correct the disadvantaged position of women. Certain indications are available to the Court. Thus, in the 1993 White Paper, the Government asserted that the number of women in paid employment had increased significantly, so that whereas in 1967 only 37% of employees were women, the proportion had increased to 50% in 1992. In addition, various reforms to the way in which pension entitlement was assessed had been introduced in 1977 and 1978, to the benefit of women who spent long periods out of paid employment. As of 1986, it was unlawful for an employer to have different retirement ages for men and women (see paragraph 33 above).
>
> 63. According to the information before the Court, the Government made a first, concrete, move towards establishing the same pensionable age for both sexes with the publication of the Green Paper in December 1991. It would, no doubt, be possible to argue that this step could, or should, have been made earlier. However, as the Court has observed, the development of parity in the working lives of men and women has been a gradual process, and one which the national authorities are better placed to assess (see paragraph 52 above). Moreover, it is significant that many of the other Contracting States still maintain a difference in the ages at which men and women become eligible for the State retirement pension (see paragraph 37 above). Within the European Union, this position is recognised by the exception contained in the Directive (see paragraph 38 above).
>
> 64. In the light of the original justification for the measure as correcting financial inequality between the sexes, the slowly evolving nature of the change in women's working lives, and in the absence of a common standard amongst the Contracting States (see Petrovic, cited above, §§ 36-43), the Court finds that the United Kingdom cannot be criticised for not having started earlier on the road towards a single pensionable age.
>
> 65. Having once begun the move towards equality, moreover, the Court does not consider it unreasonable of the Government to carry out a thorough process of consultation and review, nor can Parliament be condemned for deciding in 1995 to introduce the reform slowly and in stages. Given the extremely far-reaching and serious implications, for women and for the economy in general, these are matters which clearly fall within the State's margin of appreciation."

26. The alleged discrimination in the present case concerns exactly the difference in ages of entitlement to the State pension discussed above. In light of the Grand Chamber's finding that the policy adopted by the legislature in deferring equalisation of the pension age for men and women until 2020 fell within the State's margin of appreciation, the Court cannot but reach the same conclusion in the present case.

27. There has, accordingly, been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 of the Convention.

Done in English, and notified in writing on 22 August 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. Early Josep Casadevall
Registrar President

PEARSON v. THE UNITED KINGDOM JUDGMENT

EUROPEAN COURT OF HUMAN RIGHTS

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3.5.2007

Press release issued by the Registrar

CHAMBER JUDGMENT
BĄCZKOWSKI AND OTHERS v. POLAND

The European Court of Human Rights has today notified in writing its Chamber judgment[1] in the case of *Bączkowski and Others v. Poland* (application no. 1543/06).

The Court held unanimously that there had been:

- a violation of Article 11 (freedom of association and assembly) of the European Convention on Human Rights;
- a violation of Article 13 (right to an effective remedy) of the Convention; and
- a violation of Article 14 (prohibition of discrimination).

The applicants made no claim under Article 41 (just satisfaction). (The judgment is available only in English.)

1. Principal facts

The applicants are the Foundation for Equality (*Fundacja Równości*) and five of its members, namely Tomasz Bączkowski, Robert Biedroń, Krzysztof Kliszczyński, Inga Kostrzewa and Tomasz Szypuła, also members of non-governmental organisations who campaign on behalf of persons of homosexual orientation.

In the context of a campaign called Equality Days organised from 10 to 12 June 2005 by the Foundation, the applicants wished to organise a march to take place in the streets of Warsaw. The march was aimed at bringing public attention to discrimination against minorities, women and the disabled. The applicants also intended to hold rallies on 12 June in seven different squares in Warsaw some of which were intended to protest about discrimination against various minorities and others about discrimination against women.

The applicants submitted their request for permission to organise the march on 12 May 2005 and the rallies on 3 June 2005.

On 20 May 2005 the "*Gazeta Wyborcza*", a national newspaper, published an interview with the Mayor of Warsaw who, in reply to questions about the applicants' pending request to hold a demonstration, said that he would ban it in all circumstances and that, in his view, "propaganda about homosexuality is not tantamount to exercising one's freedom of assembly".

On 3 June 2005 a representative of the Mayor of Warsaw refused permission for the march. The reason for that decision was based on the organisers' failure to submit a "traffic organisation plan" in accordance with Article 65 (a) of the Road Traffic Act. The applicants alleged that they had never been requested to submit such a document.

On 9 June 2005 the Mayor gave decisions banning the rallies organised by Mr Bączkowski, Mr Biedroń, Mr Kliszczyński, Ms Kostrzewa and Mr Szypuła. In his decision the Mayor relied on the argument that, under the provisions of the Assemblies Act of 1990, rallies had to be organised away from roads used for road traffic given that more stringent requirements applied when using roads so as to avoid disturbance. Permission was also refused on the ground that there had been a number of other requests to organise rallies with opposing ideas and intentions and that it could have resulted in clashes between the demonstrators.

On the same day the rallies concerning discrimination against women were given permission to take place. Permission was also granted to various other demonstrations with such themes as: "Against propaganda for partnerships"; "Christians who respect God's and nature's laws are citizens of the first rank" and "Against adoption of children by homosexual couples".

Despite the decision of 3 June the march did take place on 11 June 2005. It was attended by approximately 3,000 people and was protected by the police. The rallies with permission to take place were held on the same day.

On 17 June and 22 August 2005 the appellate authorities quashed the decisions of 3 and 9 June on the ground that they had been poorly justified and in breach of the applicable laws. Those decisions of 17 June and 22 August 2005 were pronounced after the dates on which the applicants had planned to hold the demonstrations. The proceedings, henceforth devoid of purpose, were therefore discontinued.

On 18 January 2006 the Constitutional Court examined a request submitted to it by the Ombudsman to determine the compatibility with the Constituiton of certain provisions of the Road Traffic Act. It gave a judgment in which it found that the provisions of the Road Traffic Act as applied in the applicants' case had been incompatible with constitutional guarantees of freedom of assembly.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 16 December 2005 and declared admissible on 5 December 2006.

Judgment was given by a Chamber of seven judges, composed as follows:

Nicolas Bratza (British), *President*,
Josep Casadevall (Andorran),
Stanislav Pavlovschi (Moldovan),
Lech Garlicki (Polish),
Ljiljana Mijović (citizen of Bosnia and Herzegovina),
Ján Šikuta (Slovak),
Pâivi Hirvelä (Finnish), *judges*,

and also Lawrence Early, *Section Registrar*.

3. Summary of the judgment[2]

Complaints

The applicants complained that their right to peaceful assembly had been breached by the way in which the domestic authorities had applied relevant domestic law to their case. They also complained that they had not had at their disposal any procedure which would have allowed them to obtain a final decision before the date of the planned demonstrations. They further alleged that they had been treated in a discriminatory manner in that they had been refused permission to organise certain demonstrations whereas other organisers had obtained permission. They relied on Article 11 and Articles 13 and 14 in conjunction with Article 11.

Decision of the Court

Article 11
The Court reiterated that it attached particular importance to pluralism, tolerance and broadmindedness. Pluralism was also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of people and groups with varied identities was essential for achieving social cohesion. It was only natural that, where a civil society functioned in a healthy manner, the participation of citizens in the democratic process was to a large extent achieved through belonging to associations in which they might integrate with each other and pursue common objectives collectively. The positive obligation of a State to secure genuine and effective respect for freedom of association and assembly was of particular importance to those with unpopular views or belonging to minorities, because they were more vulnerable to victimisation.

The Court acknowledged that the demonstrations had eventually been held on the planned dates. However, the applicants had taken a risk given the official ban in force at that time. The Court observed that that could have discouraged the applicants and others from having participated in the demonstrations on the ground that, not having been given official authorisation, no official protection could be ensured by the authorities against potentially hostile demonstrators.

That situation could not have been rectified either by legal remedies available to the applicants since the relevant decisions had been given after the date on which the demonstrations had been held.

Therefore, the Court found that there had been an interference with the applicants' rights as guaranteed under Article 11. Furthermore, given the decisions of 17 June and 22 August whereby the first-instance decisions had been quashed, that interference had not been "prescribed by law".

That conclusion could only be reinforced by the Constitutional Court's judgment of 18 January 2006.

The Court therefore concluded that there had been a violation of Article 11.

Article 13 in conjunction with Article 11

The Court considered that it was in the nature of democratic debate that the timing of public meetings held in order to voice certain opinions might be crucial for its political and social weight. If a public assembly was organised after a given social issue lost its relevance or importance in a current social or political debate, the impact of the meeting might be seriously diminished. The freedom of assembly – if prevented from being exercised in good time – could even be rendered meaningless. Hence, in the circumstances, the notion of an effective remedy had implied the possibility to obtain a ruling before the time of the planned events.

The organisers had given sufficient forewarning of their plans to the authorities (12 May for the march and 3 June 2005 for the rallies): under Section 7 of the Assemblies Act a request to hold a demonstration had to be submitted to the municipality no earlier than 30 days and no later than three days before the event's date. A similar law did not exist, however, whereby the authorities had been obliged by a legally binding time-frame to give their final decision before the demonstrations were to take place.

The Court was not persuaded that the remedies available, all *post hoc*, could have provided adequate redress to the applicants and found that they had therefore been denied an effective domestic remedy in respect of their complaint. There had therefore been a violation of Article 13 in conjunction with Article 11.

Article 14 in conjunction with Article 11

The Court noted that there was no overt discrimination behind the first-instance decisions as they were focused on technical aspects of the organisation of the demonstrations and their compliance with certain requirements.

The refusal of the march had been based on the applicants' failure to submit a "traffic organisation plan" whereas, the Court observed, other organisers had not been subject to a similar requirement.

As concerned the rallies, they had been refused due, in particular, to the risk of violent clashes on 12 June between demonstrators. It was not, however, disputed that the authorities had given permission to other groups to hold their counter-demonstrations on that very same day.

The Court could not speculate on the existence of motives other than those expressly referred to in the administrative decisions. It could not though overlook the Mayor's interview of 20 May 2005 in which he had expressed strong personal opinions about freedom of assembly and "propaganda about homosexuality" and had stated that he would refuse permission to hold the demonstrations.

The Court reiterated that there was little room under Article 10 for restrictions on political speech or debate. That freedom, however, with respect to elected politicians who at the same time held public offices at executive level of the government, entailed particular responsibility. They should therefore show restraint when exercising this freedom, especially having borne in mind that their views could be regarded as instructions by civil servants, whose employment and careers depended on their approval.

It observed that the decisions concerning the applicants' request for permission to hold the demonstrations had been given by the municipal authorities acting on the Mayor's behalf and after he had already made known to the public his opinion on the matter.

The Court concluded that it could be reasonably surmised that the Mayor's opinions affected the decision-making process and, as a result, infringed the applicants' right to freedom of assembly in a discriminatory manner.

Accordingly, the Court was of the view that there had been a violation of Article 14 in conjunction with Article 11.

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31.5.2007

KONTROVÁ v. SLOVAKIA
judgment of 31 May 2007

By judgment delivered in Strasbourg on 31 May 2007 in the case of Kontrová v. Slovakia, the European Court of Human Rights held unanimously that there had been a violation of Article 2 (right to life) and Article 13 (right to an effective remedy) of the European Convention on Human Rights.

The applicant alleged, in particular, that the police had failed to take appropriate action to protect her children's lives, eventually killed by their father.

Under Article 41 (just satisfaction), the Court awarded the applicant EUR 25,000 for non-pecuniary damage and EUR 4,300 for costs and expenses.

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, Dana Kontrová, is a Slovakian national who was born in 1974 and lives in Michalovce (Slovakia). She was married and had two children with her husband : a daughter born in 1997 and a son born in 2001.

In November 2002 the applicant filed a criminal complaint against her husband, accusing him of having assaulted her. She also gave a long account of physical and psychological abuse by her husband. Accompanied by her husband, she later tried to withdraw her criminal complaint. On the advice of a police officer, she consequently modified the complaint such that her husband's alleged actions were treated as a minor offence which called for no further action.

During the night of 26 to 27 December 2002, the applicant and her relative called the local police to report that the applicant's husband had a shotgun and was threatening to kill himself and the children. As the husband had left the scene prior to the arrival of the police patrol, the policemen took the applicant to her parents' home and asked her to come to the police station so that a formal record of the incident could be drawn up. On 27 December and 31 December 2002, she went to the local police, enquiring about her criminal complaints.

Later, on 31 December 2002 the applicant's husband shot dead their two children and himself.

The domestic courts found that the shooting had been a direct consequence of the police officers' failure to act. In 2006 the police officers involved were convicted of negligent dereliction of their duties.

The applicant's complaints to the Constitutional Court seeking compensation for non-pecuniary damage were declared inadmissible for lack of jurisdiction.

B. Procedure and composition of the Court

The applicant was lodged with the European Court of Human Rights on 20 February and declared partly admissible on 13 June 2006.

Judgment was given by a Chamber of seven judges, composed as follows :

Nicolas Bratza (British), *President*,
Josep Casadevall (Andorran),

Giovanni Bonello (Maltese),
Kristaq Traja (Albanian),
Lech Garlicki (Polish),
Ljiljana Mijović (citizen of Bosnia and Herzegovina),
Ján Šikuta (Slovak), *judges*,
and also Lawrence Early, *Section Registrar*.

II.
SUMMARY OF THE JUDGMENT

A. Complaints

The applicant relied on Article 2 (right to life), Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy) and Article 6 (right to a fair hearing).

B. Decision of the Court

Alleged on violation of Article 2 of the Convention

The applicant complained that the State had failed to protect the life of her two children and alleged a violation of Article 2 of the Convention, which in so far as relevant reads as follows :

> "1. Everyone's right to life shall be protected by law."

The Court observed that, under section 2 (1) (a) and (b) of the Police Corps Act of 1993, it was one of the main tasks of the police to protect fundamental rights and freedoms, life and health. The situation in the applicant's family was known to the local police department given, among other things, the criminal complaint of 2 November 2002 and the emergency phone calls of the night of 26 to 27 December 2002.

In response to the applicant's situation, under the applicable provisions of the Code of Criminal Procedure and service regulations, the police were obliged, among other things, to:

- register the applicant's criminal complaint,
- launch a criminal investigation and criminal proceedings against the applicant's husband immediately,
- keep a proper record of the emergency calls and advise the next shift of the situation,
- take action concerning the allegation that the applicant's husband had a shotgun and had threatened to use it.

However, as the domestic courts established, the police failed to ensure that those obligations were complied with. On the contrary, one of the officers involved assisted the applicant and her husband in modifying her criminal complaint of 2 November 2002 so that it could be treated as a minor offence calling for no further action. As found by the domestic courts, the direct consequence of those failures was the death of the applicant's children.

In the light of its conclusions above, and the Slovakian Government's acknowledgment that the domestic authorities had failed to take appropriate action to protect the lives of the applicant's children, the Court found that there had been a violation of Article 2.

Alleged on violation of Article 13 of the Convention

The Court found that the applicant should have been able to apply for compensation for the non-pecuniary damage suffered by herself and her children in connection with their death, but that she had no such remedy available to her, in violation of Article 13.

Other Articles of the Convention

The Court considered that it was not necessary to examine the facts of the case separately under Article 6 and Article 8.

EUROPEAN COURT OF HUMAN RIGHTS

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29.4.2008

Press release issued by the Registrar

GRAND CHAMBER JUDGMENT
BURDEN v. THE UNITED KINGDOM

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment[1] in the case of *Burden v. the United Kingdom* (application no. 13378/05).

The Court held, by 15 votes to two, that there had been no violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights taken in conjunction with Article 1 of Protocol No. 1 (protection of property) to the Convention.

(The judgment is available in English and French.)

1. Principal facts

The case concerned two British nationals, Joyce and Sybil Burden, who were born in 1918 and 1925 respectively. They are unmarried sisters and live in Marlborough (the United Kingdom).

The applicants have lived together all their lives; for the last 30 years in a house built on land they inherited from their parents. Each sister has made a will leaving all her property to the other sister.

The sisters, both in their eighties, are concerned that, when one of them dies, the other will be forced to sell the house to pay inheritance tax. Under the 1984 Inheritance Tax Act, inheritance tax is charged at 40% on the value of a person's property. That rate applies to any amount in excess of 285,000 pounds sterling (GBP) (420,844 euros (EUR)) for transfers during the tax year 2006-2007 and GBP 300,000 (EUR 442,994) for 2007-2008.

Property passing from the deceased to his or her spouse or "civil partner" (a category introduced under the 2004 Civil Partnership Act for same-sex couples, which does not cover family members living together) is currently exempt from charge.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 29 March 2005. A hearing on the admissibility and merits took place in public in the Human Rights Building, Strasbourg, on 12 September 2006.

In its Chamber judgment of 12 December 2006, the Court held, by four votes to three, that there had been no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

On 8 March 2007 the applicants requested that the case be referred to the Grand Chamber under Article 43[2] (referral to the Grand Chamber) and on 23 May 2007 the panel of the Grand Chamber accepted that request.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Jean-Paul Costa (French), *President*,
Nicolas Bratza (British),
Boštjan M. Zupančič (Slovenian),
Françoise Tulkens (Belgian),
Rıza Türmen (Turkish),
Corneliu Bîrsan (Romanian),
Nina Vajić (Croatian)
Margarita Tsatsa-Nikolovska (citizen of "the former Yugoslav Republic of Macedonia"),
András Baka (Hungarian),
Mindia Ugrekhelidze (Georgian),
Anatoly Kovler (Russian),
Elisabeth Steiner (Austrian),
Javier Borrego Borrego (Spanish),
Egbert Myjer (Dutch),
David Thór Björgvinsson (Icelandic),
Ineta Ziemele (Latvian),
Isabelle Berro-Lefèvre (Monegasque), *judges*,

and also Vincent Berger, *Jurisconsult*.

3. Summary of the judgment[3]

Complaint

The applicants complained that, when one of them dies, the survivor will face a heavy inheritance tax bill, unlike the survivor of a marriage or a civil partnership. They relied on Article 1 of Protocol No. 1 taken in conjunction with Article 14.

Decision of the Court

Whether the applicants could claim to be victims of a violation of the Convention

The Grand Chamber agreed with the Chamber that, given the applicants' age, the wills they had made and the value of the property each owned, they had established that there was a real risk that, in the not too distant future, one of them would be required to pay substantial inheritance tax on the property inherited from her sister. In those circumstances, they could claim to be victims of the alleged discriminatory treatment.

Exhaustion of domestic remedies

The Grand Chamber rejected the United Kingdom Government's argument that the applicants had failed to make use of an available domestic remedy. According to the Government, under the Human Rights Act, the applicants could have applied to a court for a declaration that the legislation in question was incompatible with the Convention, which would have given a discretionary power to the relevant government minister to take steps to amend the offending legal provision, either by a remedial order or by introducing a Bill in Parliament. The Grand Chamber agreed with the Chamber that it could not be excluded that at some time in the future the practice of amending legislation following a declaration of incompatibility with the Convention could be seen as a binding obligation. In those circumstances, except where an

effective remedy necessitated the award of damages, applicants would be required first to exhaust that remedy before making an application to the Court. As that was not as yet the case, however, the Grand Chamber considered that the applicants had not failed to exhaust domestic remedies.

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

The Grand Chamber observed that the relationship between siblings was of a different nature to that between married couples and homosexual civil partners under the United Kingdom's Civil Partnership Act. One of the defining characteristics of a marriage or Civil Partnership Act union was that it was forbidden to close family members. The fact that the applicants had chosen to live together all their adult lives did not alter that essential difference between the two types of relationship.

Moreover, the Grand Chamber noted that it had already held that marriage conferred a special status on those who entered into it. The exercise of the right to marry was protected by Article 12 of the Convention and gave rise to social, personal and legal consequences.

Since the coming into force of the Civil Partnership Act in the United Kingdom, a homosexual couple also had the choice to enter into a legal relationship designed by Parliament to correspond as far as possible to marriage. As with marriage, the Grand Chamber considered that the legal consequences of civil partnership under the 2004 Act, which couples expressly and deliberately decided to incur, set those types of relationship apart from other forms of co-habitation. Rather than the length or the supportive nature of the relationship, what was determinative was the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. Just as there could be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who chose to live together but not to become husband and wife or civil partners, on the other hand, the absence of such a legally-binding agreement between the applicants rendered their relationship of co-habitation, despite its long duration, fundamentally different to that of a married or civil partnership couple.

That view was unaffected by the fact that different rules of succession had been adopted in the 47 European countries which were members of the Council of Europe[4]. Different countries had similarly adopted different policies regarding inheritance tax exemptions to the various categories of survivor; States, in principle, remaining free to devise different rules in the field of taxation policy.

The Grand Chamber concluded that the applicants, as co-habiting sisters, could not be compared for the purposes of Article 14 to a married or Civil Partnership Act couple. It followed that there had been no discrimination and, therefore, no violation of Article 14 taken in conjunction with Article 1 of Protocol No.1.

Judges Bratza and Björgvinsson expressed concurring opinions, and Judges Zupančič and Borrego Borrego expressed dissenting opinions, which are all annexed to the judgment.

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The Court's judgments are accessible on its Internet site (http://www.echr.coe.int).

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

[1] Grand Chamber judgments are final (Article 44 of the Convention).

[2] Under Article 43 of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

[3] This summary by the Registry does not bind the Court.

[4] While in common law systems there had traditionally been freedom of testamentary devolution, in civil law systems the order of succession was generally established by statute or code, with some particularly privileged categories of heirs, normally the spouse and close relatives, being granted automatic rights to a portion of the estate (the so-called reserved shares), which could not generally be modified by the decedent's will. The position of each heir depended therefore on the combined effect of family law and tax law.

From the information available to the Court, some form of civil partnership, with varying effects on matters of inheritance, appeared to be available in 16 countries: Andorra, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Iceland, Luxembourg, the Netherlands, Norway, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. Spouses and close relatives, including siblings, were granted statutory inheritance rights in virtually all Member States of the Council of Europe. In a majority, siblings were treated less favourably in terms of succession rights than the surviving spouse but more favourably than the surviving civil partner; and only a few Member States granted the surviving civil partner inheritance rights equal to those of the surviving spouse. Inheritance tax schemes usually followed the order of succession, although in certain countries, such as France and Germany, the surviving spouse was granted a more favourable tax exemption than any other category of heir.

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12.6.2008

BEVACQUA and S. v. BULGARIA
judgment of 12 June 2008

By judgment delivered on 12 June 2008 in the case of Bevacqua and S. v. Bulgaria, the European Court of Human Rights held by six votes to one that there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, and held unanimously that there had been no violation of Article 6 § 1 (right to a fair hearing within a reasonable time) of the Convention.

The applicants alleged, in particular, that the courts failed to rule within a reasonable time on the dispute concerning the custody of the second applicant and failed to assist the first applicant, who was the victim of domestic violence by her former husband.

Under Article 41 (just satisfaction), the Court awarded the applicant EUR 4,000 for non-pecuniary damage and EUR 3,000 for costs and expenses.

I.
BACKGROUND OF THE CASE

A. Principal facts

The first applicant, Mrs Valentina Nikolaeva Bevacqua, is a Bulgarian national who was born in 1974 and at the relevant time lived in Sofia. In 2003 or 2004 she moved to Italy. The application is submitted by the first applicant on her own behalf and also on behalf of her son S. ("the second applicant"), a minor, who was born in 1997.

The first applicant married Mr N. in 1995 and gave birth to S. in January 1997. Later, the relations between the spouses soured, Mr N. became aggressive and on 1 March 2000 the first applicant left the family home with her son and moved into her parents' apartment. On the same day the first applicant filed for divorce and sought an interim custody order, stating, *inter alia*, that Mr N. often used offensive language, battered her "without any reason" and did not contribute to the household budget.

During the first two months following the separation, Mr N. visited his son every day and took him to his apartment on weekends, with the first applicant's consent.

On 6 May 2000 Mr N. did not bring S. home after a walk. He telephoned the first applicant and told her that his son would live with him. For the next six days he refused the first applicant's requests for meetings or telephone conversations with her son. On 9 May 2000 the first applicant complained to the prosecuting authorities. The relevant prosecutor apparently gave instructions that Mr N. should be summoned and served with an official warning. That was not done until 22 June 2000.

On 12 May 2000 the first applicant went to see her son at the kindergarten and took him to her home. In the evening Mr N. telephoned and then appeared outside the first applicant's home. He was shouting and banging on the door, thus frightening the child and the first applicant. Mr N. eventually managed to enter the apartment, when the first applicant's father came home. He allegedly hit or pushed the first applicant in the presence of her parents and the child. Eventually, Mr N. left with the child. On 18 May 2000 the first applicant visited a forensic doctor who noted a small bruise on her face and a bruise on her hip. On 25 May 2000 she filed a complaint with the District Prosecutor's Office and enclosed the medical certificate. The first applicant also sought the help of a non-governmental organisation assisting female victims of domestic violence. She was offered the possibility to stay with her son in a hostel for such victims in Bourgas. On 25 May 2000 the first applicant collected her son

from the kindergarten and travelled with him to Bourgas. She spent four days at the hostel there without disclosing her whereabouts to Mr N.

Mr N. complained to the local Juveniles Pedagogic Unit, stating that the first applicant had abducted their son. The first applicant was summoned by the police. On 31 May 2000 she returned to Sofia and met the district juveniles inspector. She explained that she had been the victim of violence and that her son's health was in danger because of the father's violent behaviour. It appears that the inspector disbelieved the first applicant's version of the events and allegedly insisted that she could be prosecuted for having abducted her son. On the same day in the evening Mr N. visited the first applicant in her home, allegedly threatened her and took their son away.

On 13 June 2000 the first applicant appeared before the District Court for a hearing in the divorce proceedings. She was not legally represented. Mr N. did not appear. His lawyer was present. The first applicant stated that she wished to pursue her claims. The court did not examine the request for an interim order. The first applicant did not raise the issue. The court fixed a time-limit for reconciliation, as required by law, and adjourned the examination of the case until 29 September 2000.

On 22 June 2000 the police summoned Mr N. and gave him an official warning in relation to the first applicant's complaint of 9 May 2000 (see above). As a result Mr N. allegedly became aggressive. On 28 June 2000, when he brought S. for a visit to his mother's apartment, Mr N. reacted angrily to remarks by the first applicant and hit her in their son's presence. On the next day the first applicant visited a medical doctor who noted a bruise on her left eyelid and a swollen cheek. She also reported pain in her right wrist.

On 3 and 6 July 2000 the first applicant complained to the juveniles inspector at the local police station but was told that nothing could be done and that the dispute should be decided by the courts.

In July and August 2000 the first applicant complained to the Ministry of the Interior, stating that they should assist her to obtain the custody of her child and that measures should be taken to protect her son, who was in danger because Mr N. was not taking care of him properly and was aggressive towards her. The first applicant complained that nothing had been done in this respect by the police. In August 2000 she received replies stating that the matter had been examined and that no unlawful conduct on the part of police officers had been noted. The police had done what they could and the remaining issues concerned a private dispute.

The last hearing in the divorce proceedings was held on 24 April 2001. In accordance with the Child Protection Act (see paragraph 47 below), an expert of the newly created local Social Care Office gave an opinion after having studied the file and met the child. He reported that the child was afraid of his father as he had battered his mother and that the child preferred to live with his mother.

By judgment of 23 May 2001 the District Court pronounced the divorce and found that both spouses had been responsible for the failure of their marriage. The court further considered that both parties had been good parents but that in view of the low age of the boy he needed his mother. Therefore, the first applicant obtained custody of her child and Mr N. was given visiting rights.

Mr N. appealed, arguing that the allegations that he had been violent were untrue and that he had always cared better for his child. In the appeal proceedings the Sofia City Court held a hearing on 19 March 2002. It heard two witnesses who confirmed Mr N.'s aggressive behaviour.

On 21 March 2002 the Sofia City Court upheld the lower court's judgment but considered that there was ample evidence that Mr N. had been aggressive and had battered the first applicant during their marriage. Such behaviour was a bad example for a young boy to witness. The first applicant was therefore better suited to raise the child.

On 18 June 2002 the first applicant visited Mr N.'s apartment, accompanied by two friends, to collect her belongings. Her former husband became aggressive and battered her. On the following day the first applicant visited a forensic doctor who noted bruises on her face, right arm and armpit and her left hip. She complained to the prosecution authorities, which by decisions of October and December

2002 and January 2003 refused to institute criminal proceedings against Mr N., noting that it was open to the first applicant to bring private prosecution proceedings, as the alleged injuries fell into the category of light bodily injuries.

II.
SUMMARY OF THE JUDGMENT

A. Complaints

The applicants rely, in particular, on Article 6 § 1 (right to a fair hearing within a reasonable time) and Article 8 (right to respect for private and family life).

B. Decision of the Court

Alleged on violation of Article 8 of the Convention

Relying on Articles 3, 8, 13 and 14, the applicants complained that the authorities failed to take the necessary measures to secure respect for their family life and failed to protect the first applicant against the violent behaviour of her former husband.

The Court considers that in the particular circumstances of the present case these complaints fall to be examined under Article 8 of the Convention which reads, in so far as relevant:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective "respect" for private and family life and these obligations may involve the adoption of measures in the sphere of the relations of individuals between themselves. Children and other vulnerable individuals, in particular, are entitled to effective protection.
(see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, pp. 11-13, §§ 23-24 and 27, and *August v. the United Kingdom* (dec.), no. 36505/02, 21 January 2003)

The right to respect for one's family life under Article 8 includes a parent's right to the taking of measures with a view to his or her being reunited with his or her child and an obligation – albeit not absolute – on the national authorities to take such action.
(see, as a recent authority, *Šobota-Gajić v. Bosnia and Herzegovina*, no. 27966/06, § 51, 6 November 2007, with further references)

As regards respect for private life, the Court has previously held, in various contexts, that the concept of private life includes a person's physical and psychological integrity. Furthermore, the authorities' positive obligations – in some cases under Articles 2 or 3 and in other instances under Article 8 taken alone or in combination with Article 3 of the Convention – may include, in certain circumstances, a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (see the judgments cited in paragraph 85 above and, also, *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, §§ 128-130, and *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII).

The Court notes in this respect that the particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection has been emphasised in a number of international instruments.

In the Court's view, the cumulative effects of the District Court's failure to adopt interim custody measures without delay in a situation which affected adversely the applicants and, above all, the well-being of the second applicant and the lack of sufficient measures by the authorities during the same period in reaction to Mr N.'s behaviour amounted to a failure to assist the applicants contrary to the State positive obligations under Article 8 of the Convention to secure respect for their private and family life.

Alleged on violation of Article 6 § 1 of the Convention

The applicants complained of the length of the custody proceedings. Article 6 § 1 reads, in so far as relevant :

"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

The Court observes that the period to be taken into consideration began on 1 March 2000 and ended on 21 March 2002. It thus lasted two years and three weeks for two levels of jurisdiction.

The Court is mindful that in cases relating to civil status, special diligence is required in view of the possible consequences which the excessive length of proceedings may have, notably on enjoyment of the right to respect for family life (*Laino v. Italy* [GC], no. 3158/96, § 18, ECHR 1999-I). It has examined above, in the context of Article 8, the effects of the delays in the examination of the first applicant's request for interim custody measures. The issue under Article 6 § 1 is different as it concerns the examination of the merits of the civil case and the question whether that was done within a reasonable time.

The Court, having regard to the relevant criteria as established in its case-law (see *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII) and taking into consideration, in particular, the nature of the proceedings but also their overall length which was far from being unreasonable as such and the fact that the examination of witnesses and collection of other evidence inevitably required time, considers that the child custody dispute was determined within a reasonable time as required by Article 6 § 1 of the Convention. It follows that there has been no violation of that provision.

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Judge Maruste is annexed to the judgment.

038
22.1.2008

E.B. v. FRANCE
judgment of 22 January 2008

By judgment delivered in Strasbourg on 22 January 2008 in the case of E.B. v. France, the European Court of Human Rights held by ten votes to seven that there had been violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The applicant complained of a refusal to grant approval for the purpose of adoption, on the ground of her life-style, a lesbian living with another woman.

Under Article 41 (just satisfaction) of the Convention, the Court by eleven votes to six awarded the applicant EUR 10,000 in respect of non-pecuniary damage and EUR 14,528 for costs and expenses.

I.
BACKGROUND OF THE CASE

A. Principal facts

E.B. is a French national aged 45. She is a nursery school teacher and has been living with another woman R., who is a psychologist, since 1990.

In the age of 38, the applicant began the administrative procedures to obtain the required authorisation for adopting a child. She was informed of a first refusal in November 1998 following completion of the preliminary social report, than of second refusal in March 1999, after an additional investigation. Those refusals were based on the absence of a father figure and on the lack of involvement by the applicant's girlfriend in the adoption project.

The applicant lodged an application with Besançon Administrative Court, which set both decisions aside on 24 February 2000. The *département* of the Jura appealed against the judgment. Nancy Administrative Court of Appeal set aside the Administrative Court's judgment on 21 December 2000. It held that the refusal to grant the applicant authorisation had not been based on her choice of lifestyle and had not therefore given rise to a breach of Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention on Human Rights.

The applicant appealed on points of law, arguing in particular that her application to adopt had been rejected on account of her sexual orientation. In a judgment of 5 June 2002, the *Conseil d'Etat* dismissed E.B.'s appeal on the ground, among other things, that the Administrative Court of Appeal had not based its decision on a position of principle regarding the applicant's sexual orientation, but had had regard to the needs and interests of an adopted child.

B. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 2 December 2002.

On 19 September 2006, the Chamber to which the cases had been allocated relinquished jurisdiction in favour of the Grand Chamber, under Article 30 of the Convention.

Judgment was given by the Grand Chamber of 17 judges, composed as follows :

Christos Rozakis (Greek), *President*,
Jean-Paul Costa (French),
Nicolas Bratza (British),
Boštjan M. Zupančič (Slovenian),
Peer Lorenzen (Danish),
Françoise Tulkens (Belgian),
Loukis Loucaides (Cypriot)
Ireneu Cabral Barreto (Portuguese),
Rıza Türmen (Turkish),
Mindia Ugrekhelidze (Georgian),
Antonella Mularoni (San Marinese),
Elisabeth Steiner (Austrian),
Elisabet Fura-Sandström (Swedish),
Egbert Myjer (Dutch),
Danutė Jočienė (Lithuanian),
Dragoljub Popović (Serbian),
Sverre Erik Jebens (Norwegian) *judges*,
and also Michael O'Boyle, *Deputy Registrar*.

II.
SUMMARY OF THE JUDGMENT

A. Complaints

Relying on Article 14 of the Convention, taken in conjunction with Article 8, the applicant alleged that at every stage of her application for authorisation to adopt she had suffered discriminatory treatment that had been based on her sexual orientation and had interfered with her right to respect for her private life.

B. Decision of the Court

Admissibility

The present case concerned the procedure for obtaining authorisation to adopt rather than adoption itself. Accordingly, the Court was not required to rule whether the right to adopt did or did not fall within the ambit of Article 8 of the Convention taken alone. Given that French legislation expressly granted single persons the right to apply for authorisation to adopt and established a procedure to that end, the facts of this case undoubtedly fell within the ambit of Article 8 of the Convention.

Consequently, the Court considered that the State, which had gone beyond its obligations under Article 8 in creating such a right, could not take discriminatory measures when applying it. The applicant alleged that, in the exercise of her right under the domestic law, she had been discriminated against on the ground of her sexual orientation, which was a concept covered by Article 14.

Article 14 of the Convention, taken in conjunction with Article 8, was therefore applicable in the present case.

Article 14 of the Convention, taken together with Article 8

After drawing a parallel with a previous case, the Court pointed out that the domestic administrative authorities, and then the courts that heard the applicant's appeal, had based their decision to reject

her application for authorisation to adopt on two main grounds: the lack of a paternal referent in the applicant's household, and the attitude of the applicant's declared partner.

The Court found that the attitude of the applicant's partner was not without interest or relevance in assessing the application. In the Court's view, it was legitimate for the authorities to ensure that all safeguards were in place before a child was taken into a family, particularly where not one but two adults were found to be living in the household. In the Court's opinion, that ground had nothing to do with any consideration relating to the applicant's sexual orientation.

With regard to the ground relied on by the domestic authorities relating to the lack of a paternal referent in the household, the Court considered that this did not necessarily raise a problem in itself. However, in the present case it was permissible to question the merits of such a ground as the application had been made by a single person and not a couple. In the Court's view, that ground might therefore have led to an arbitrary refusal and have served as a pretext for rejecting the applicant's application on grounds of her homosexuality, and the Government had been unable to prove that use of that ground at domestic level had not been leading to discrimination. Regarding the systematic reference to the lack of a "paternal referent", the Court disputed not the desirability of addressing the issue, but the importance attached to it by the domestic authorities in the context of adoption by a single person.

The fact that the applicant's homosexuality had featured to such an extent in the reasoning of the domestic authorities was significant despite the fact that the courts had considered that the refusal to grant her authorisation had not been based on that. Besides their considerations regarding the applicant's "lifestyle", they had above all confirmed the decision of the president of the council for the *département* recommending that the application for authorisation be refused and giving as reasons the two impugned grounds: the wording of certain opinions revealed that the applicant's homosexuality or, at other times, her status as a single person had been a determining factor in refusing her authorisation whereas the law made express provision for the right of single persons to apply for authorisation to adopt.

The Court considered that the reference to the applicant's homosexuality had been, if not explicit, at least implicit; the influence of her homosexuality on the assessment of her application had not only been established but had also been a decisive factor leading to the decision to refuse her authorisation to adopt.

Accordingly, it considered that the applicant had suffered a difference in treatment. If the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant's sexual orientation this amounted to discrimination under the Convention. In any event, particularly convincing and weighty reasons had to be made out in order to justify such a difference in treatment regarding rights falling within the ambit of Article 8. There were no such reasons in the present case because French law allowed single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual. Furthermore, the Civil Code remained silent as to the necessity of a referent of the other sex and, moreover, the applicant presented – in the terms of the judgment of the *Conseil d'Etat* – "undoubted personal qualities and an aptitude for bringing up children".

The Court noted that the applicant's situation had been assessed overall by the domestic authorities, who had not based their decision on one ground alone but on "all" the factors, and considered that the two main grounds had to be examined concurrently. Consequently, the illegitimacy of one of the grounds (lack of a paternal referent) had the effect of contaminating the entire decision.

The Court concluded that the decision refusing the applicant authorisation was incompatible with the Convention and that there had been a violation of Article 14 of the Convention, taken in conjunction with Article 8.

Judges Lorenzen and Jebens expressed a concurring opinion, and Judges Costa, Türmen, Ugrekhelidze, Jočienė, as well as Judges Zupančič, Loucaides and Mularoni, expressed dissenting opinions. These are annexed to the judgment.

455
09.6.2009

OPUZ v. TURKEY
judgment of 9 June 2009

By judgment delivered in Strasbourg on 9 June 2009 in the case of Opuz v. Turkey, the European Court of Human Rights held unanimously that :

- there had been a **violation of Article 2** (right to life) of the European Convention on Human rights in respect of the applicant's mother who was killed by the applicant's ex-husband despite the fact that the domestic authorities had been repeatedly alerted about his violent behaviour.
- there had been a **violation of Article 3** (prohibition of torture and of inhuman and degrading treatment) on account of the authorities' failure to protect the applicant against her ex-husband's violent and abusive behaviour.
- there had been a **violation of Article 14** (prohibition of discrimination) read in conjunction with Articles 2 and 3 on account of the violence suffered by the applicant and her mother having been gender-based, which amounted to a form of discrimination against women, especially bearing in mind that, in cases of domestic violence in Turkey, the general passivity of the judicial system and impunity enjoyed by aggressors mainly affected women.

The main issue of that case is fatal injuries sustained by applicant's mother in domestic violence case in which authorities had been aware of the perpetrator's history of violence.

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicant EUR 30,000 in respect of non-pecuniary pecuniary damage and EUR 6,500 for costs and expenses.

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, Nahide Opuz, is a Turkish national who was born in 1972 and lives in Diyarbakır (Turkey). In 1990 Ms Opuz started living with H.O., the son of her mother's husband. Ms Opuz and H.O. got married in November 1995 and had three children in 1993, 1994 and 1996. They had serious arguments from the beginning of their relationship and are now divorced.

Between April 1995 and March 1998 there were four incidents of H.O.'s violent and threatening behaviour which came to the notice of the authorities. Those incidents involved several beatings, a fight during which H.O. pulled out a knife and H.O. running the two women down with his car. Following those assaults the women were examined by doctors who testified in their reports to various injuries, including bleeding, bruising, bumps, grazes and scratches. Both women were medically certified as having sustained life-threatening injuries: the applicant as a result of one particularly violent beating; and, her mother following the assault with the car.

Criminal proceedings were brought against H.O. on three of those occasions for death threats, actual, aggravated and grievous bodily harm and attempted murder. As regards the knife incident, it was decided not to prosecute for lack of evidence. H.O. was twice remanded in custody and released pending trial.

However, as the applicant and her mother withdrew their complaints during each of those proceedings, the domestic courts discontinued the cases, their complaints being required under

Article 456 § 4 of the Criminal Code to pursue any further. The proceedings concerning the car incident were nevertheless continued in respect of the applicant's mother, given the seriousness of her injuries, and H.O. was convicted to three months' imprisonment, later commuted to a fine.

On 29 October 2001 the applicant was stabbed seven times by H.O. and taken to hospital. H.O. was charged with knife assault and given another fine of almost 840,000 Turkish lira (the equivalent of approximately EUR 385) which he could pay in eight instalments. In his statement to the police he claimed that he and his wife, who frequently argued about her mother interfering in their marriage, had had an argument which had got out of hand.

Following that incident, the applicant's mother requested that H.O. be detained on remand, maintaining that on previous occasions her and her daughter had had to withdraw their complaints against him due to his persistent pressure and death threats.

In April 1998, October and November 2001 and February 2002 the applicant and her mother filed complaints with the prosecution authorities about H.O.'s threats and harassment, claiming that their lives were in immediate danger and requesting that the authorities take immediate action such as H.O.'s detention. In response to those requests for protection, H.O. was questioned and his statements taken down; he was then released.

Finally, on 11 March 2002 the applicant's mother, having decided to move to Izmir with her daughter, was travelling in the removal van when H.O. forced the van to pull over, opened the passenger door and shot her. The applicant's mother died instantly.

In March 2008 H.O. was convicted for murder and illegal possession of a firearm and sentenced to life imprisonment. Released pending the appeal proceedings, he claims that he killed the applicant's mother because his honour had been at stake as she had taken his wife and children away from him and had led his wife into an immoral way of life.

In April 2008 the applicant filed another criminal complaint with the prosecution authorities in which she requested the authorities to take measures to protect her as, since his release, her ex-husband had started threatening her again, via her new boyfriend. In May and November 2008 the applicant's representative informed the European Court of Human Rights that no such measures had been taken and the Court requested an explanation. The authorities have since taken specific measures to protect the applicant, notably by distributing her ex-husband's photograph and fingerprints to police stations with the order to arrest him if he was spotted near the applicant's place of residence.

In the meantime, in January 1998, Law no. 4320 of the Family Protection Act entered into Force in Turkey which provides for specific measures for protection against domestic violence.

B. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 15 July 2002 and was examined for admissibility and merits at the same time. Third-party comments were received from Interights which was given leave to intervene in the Court's proceedings under Article 36 § 2 of the Convention (third party intervention) and Rule 44 § 2 of the Rules of Court. A hearing was held in public in the Human Rights Building, Strasbourg, on 7 October 2008.

Judgment was given by a Chamber of seven judges, composed as follows:

Josep Casadevall (Andorra), *President*,
Elisabet Fura-Sandström (Sweden),
Corneliu Bîrsan (Romania),
Alvina Gyulumyan (Armenia),
Egbert Myjer (the Netherlands),
Ineta Ziemele (Latvia),

Işıl Karakaş (Turkey), *judges*,
and also Santiago Quesada, *Section Registrar*.

II.
SUMMARY OF THE JUDGMENT

A. Complaints

The applicant alleged that the Turkish authorities failed to protect the right to life of her mother and that they were negligent in the face of the repeated violence, death threats and injury to which she herself was subjected. She relied on Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), 6 (right to a fair trial within a reasonable time) and 13 (right to an effective remedy). She further complained about the lack of protection of women against domestic violence under Turkish domestic law, in violation of Article 14 (prohibition of discrimination).

B. Decision of the Court

Alleged on violation of Article 2 of the Convention

The Court considered that, in the applicant's case, further violence, indeed a lethal attack, had not only been possible but even foreseeable, given the history of H.O.'s violent behaviour and criminal record in respect of his wife and her mother and his continuing threat to their health and safety. Both the applicant and her mother had suffered physical injuries on many occasions and been subjected to psychological pressure and constant death threats, resulting in anguish and fear. The violence had escalated to such a degree that H.O. had used lethal weapons, such as a knife or a shotgun. The applicant's mother had become a target of the violence as a result of her perceived involvement in the couple's relationship; the couple's children could also be considered as victims on account of the psychological effects of the ongoing violence in the family home. As concerned the killing of the applicant's mother, H.O. had planned the attack, since he had been carrying a knife and a gun and had been wandering around the victim's house prior to the attack.

According to common practice in the member States, the more serious the offence or the greater the risk of further offences, the more likely it should be that the prosecution continue in the public interest, even if victims withdrew their complaints. However, when repeatedly deciding to discontinue the criminal proceedings against H.O., the authorities referred exclusively to the need to refrain from interfering in what they perceived to be a "family matter". The authorities had not apparently considered the motives behind the withdrawal of the complaints, despite the applicant's mother's statements to the prosecution authorities that she and her daughter had felt obliged to do so because of H.O.'s death threats and pressure. It was also striking that the victims had withdrawn their complaints when H.O. had been at liberty or following his release from custody.

Despite the withdrawal of the victims' complaints, the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. on the basis that his violent behaviour had been sufficiently serious to warrant prosecution and that there had been a constant threat to the applicant's physical integrity. Turkey had therefore failed to establish and apply effectively a system by which all forms of domestic violence could be punished and sufficient safeguards for the victims be provided.

Indeed, the local authorities could have ordered protective measures under Law no. 4320 or issued an injunction banning H.O. from contacting, communicating with or approaching the applicant's mother or entering defined areas. On the contrary, in response to the applicant's mother's repeated requests for protection, notably at the end of February 2002, the authorities, apart from taking down H.O.'s statements and then releasing him, had remained passive; two weeks later H.O. shot dead the applicant's mother.

The Court therefore concluded that the national authorities had not shown due diligence in preventing violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O.. Nor could the investigation into the killing, to which there had been a confession, be described as effective, it having lasted so far more than six years. Moreover, the criminal law system had had no deterrent effect in the present case. Nor could the authorities rely on the victims' attitude for the failure to take adequate measures. The Turkish authorities had therefore failed to protect the right to life of the applicant's mother, in violation of Article 2.

Alleged on violation of Article 3 of the Convention

The Court considered that the response to H.O.'s conduct had been manifestly inadequate in the face of the gravity of his offences. The judicial decisions, which had had no noticeable preventive or deterrent effect on H.O., had been ineffective and even disclosed a certain degree of tolerance towards his acts. Notably, after the car incident, H.O. had spent just 25 days in prison and only received a fine for the serious injuries he had inflicted on the applicant's mother. Even more striking, as punishment for stabbing the applicant seven times, he was merely imposed with a small fine, which could be paid in instalments.

Nor had Turkish law provided for specific administrative and policing measures to protect vulnerable persons against domestic violence before January 1998, when Law No. 4320 came into force. Even after that date, the domestic authorities had not effectively applied those measures and sanctions in order to protect the applicant.

Finally, the Court noted with grave concern that the violence suffered by the applicant had not in fact ended and that the authorities continued to display inaction. Despite the applicant's request in April 2008, nothing was done until after the Court requested the Government to provide information about the protection measures it had taken.

The Court therefore concluded that there had been a violation of Article 3 as a result of the authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her ex-husband.

Alleged on violation of Article 14 of the Convention

The Court first looked at the provisions related to discrimination against women and violence according to some specialised international human rights instruments, in particular the Convention for the Elimination of Discrimination Against Women and the Belem do para Convention, as well as at the relevant documents and decisions of international legal bodies, such as the United Nations Commission on Human Rights and the Inter-American Commission. It transpired from the international-law rules and principles, accepted by the vast majority of States, that the State's failure – even if unintentional - to protect women against domestic violence breached women's right to equal protection of the law.

According to reports submitted by the applicant drawn up by two leading non-governmental organisations, the Diyarbakır Bar Association and Amnesty International, and uncontested by the Government, the highest number of reported victims of domestic violence was in Diyarbakır, where the applicant had lived at the relevant time. All those victims were women, the great majority of whom were of Kurdish origin, illiterate or of a low level of education and generally without any independent source of income.

Indeed, the reports suggested that domestic violence was tolerated by the authorities and that the remedies indicated by the Government did not function effectively. Research showed that, despite Law no. 4320, when victims reported domestic violence to police stations, police officers did not investigate their complaints but sought to assume the role of mediator by trying to convince the victims to return home and drop their complaint. Delays were frequent when issuing and serving injunctions under Law no. 4320, given the negative attitude of the police officers and that the courts

treated the injunctions as a form of divorce action. Moreover, the perpetrators of domestic violence did not receive dissuasive punishments; courts mitigated sentences on the grounds of custom, tradition or honour.

The Court therefore considered that the applicant had been able to show that domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence. Bearing that in mind, the violence suffered by the applicant and her mother could be regarded as gender-based, which constituted a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the applicant's case, indicated that there was insufficient commitment to take appropriate action to address domestic violence. The Court therefore concluded that there had been a violation of Article 14, in conjunction with Articles 2 and 3.

Other Articles

Given the above findings, the Court did not find it necessary to examine the same facts in the context of Articles 6 and 13.

EUROPEAN COURT OF HUMAN RIGHTS

007
9.1.2009

Press release issued by the Registrar

CHAMBER JUDGMENT
SCHLUMPF v. SWITZERLAND

The European Court of Human Rights yesterday notified in writing its Chamber judgment[1] in the case of *Schlumpf v. Switzerland* (application no. 29002/06). (The judgment is available only in French.)

The Court held:

- unanimously, that there had been a violation of Article 6 § 1 of the European Convention on Human Rights as regards the right to a fair trial;
- unanimously, that there had been a violation of Article 6 § 1 as the regards the right to a public hearing;
- by five votes to two, that there had been a violation of Article 8 (right to respect for private and family life).

In accordance with Article 41 of the Convention (just satisfaction), the Court awarded the applicant 15,000 euros (EUR) for non-pecuniary damage and EUR 8,000 for costs and expenses).

1. Principal facts

The applicant, Nadine Schlumpf, is a Swiss national who was born in 1937 and lives in Aarau (Switzerland). She was registered at birth under the name Max Schlumpf, of male sex.

The case concerned the applicant's health insurers' refusal to pay the costs of her sex-change operation on the ground that she had not complied with a two-year waiting period to allow for reconsideration, as required by the case-law of the Federal Insurance Court as a condition for payment of the costs of such operations.

The applicant submitted that the psychological suffering caused by her gender identity disorder went back as far as her childhood and had repeatedly led her to the brink of suicide. In spite of everything, and although by the age of about 40 she was already certain of being transsexual, she had accepted the responsibilities of a husband and father until her children had grown up and her wife had died of cancer in 2002.
The applicant decided in 2002 to change sex and from then on lived her daily life as a woman. She began hormonal therapy and psychiatric and endocrinological treatment in 2003.

An expert medical report in October 2004 confirmed the diagnosis of male-female transsexualism and stated that the applicant satisfied the conditions for a sex-change operation.

In November 2004 the applicant asked SWICA, her health insurers, to pay the costs of the sex-change operation, and supplied a copy of the expert report. On 29 November 2004

SWICA refused to reimburse the costs, noting that according to the case-law of the Federal Insurance Court the mandatory clause providing for reimbursement of the costs of a sex-change operation which health-insurance policies were required to include applied only in cases of "true transsexualism", which could not be established until there had been an observation period of two years.

On 30 November 2004 the applicant nevertheless successfully underwent the operation. In mid-December 2004 she again applied to SWICA, who again refused.

In late January 2005 the applicant appealed unsuccessfully against that decision. She attempted to show that at the stage medical science had then reached it was possible to identify true cases of transsexualism without waiting for two years to elapse. She also proposed that the Senior Consultant of the Zurich Psychiatric Clinic be asked to give evidence in the context of a further investigation.

On 14 February 2005 the applicant's civil status was modified to reflect her sex-change and she was registered under the forename of Nadine.

In early April 2005 the applicant appealed to the cantonal insurance court and asked for a public hearing. When the cantonal insurance court informed her of the possibility of sending the case back to the health-insurers for a further investigation the applicant withdrew that request in the event of the case being remitted. However, she said that waiver would not apply if the case were to go to the Federal Insurance Court or the European Court of Human Rights.

In June 2005, without holding a hearing, the cantonal insurance court set aside the health-insurers' refusal to pay the costs of the sex-change operation and remitted the case for a further investigation and reconsideration.

In July 2005 SWICA appealed to the Federal Insurance Court, arguing that the cantonal insurance court had disregarded the Federal Court's case-law to the effect that costs could only be reimbursed after a period of two years and submitting in addition that the existence of an illness had not been established.

In September 2005 the applicant explicitly asked the Federal Insurance Court for a public hearing and requested that it call expert witnesses to answer questions on the treatment of transsexualism. Her request was refused, among other reasons because the Federal Court considered that the relevant issues were legal questions, so that a public hearing was not necessary. It also reaffirmed the pertinence of the two-year observation period. It noted that despite what various experts had submitted during the proceedings and the stage modern medical science had reached, caution was vital, given in particular the irreversibility of the operation and the need to avoid unjustified operations.

The Federal Insurance Court noted that at the time of the operation the applicant had been under psychiatric observation for less than two years and held that the health-insurers had been justified in refusing to reimburse the costs.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 7 July 2006.

Judgment was given by a Chamber of seven judges, composed as follows:

Christos Rozakis (Greece), *President*,
Nina Vajić (Croatia),
Khanlar Hajiyev (Azerbaijan),
Dean Spielmann (Luxembourg),
Sverre Erik Jebens (Norway),
Giorgio Malinverni (Switzerland),
George Nicolaou (Cyprus), *judges*,

and also Søren Nielsen, *Section Registrar*.

3. Summary of the judgment[2]

Complaints

Relying on Article 6 § 1 (right to a fair trial), the applicant complained of an infringement of her right to a fair trial and to a public hearing. She further alleged that a fair balance had not been preserved between her interests and those of her health-insurers, contrary to Article 8 (right to respect for private life).

Decision of the Court

Article 6 § 1

The Court considered that it was disproportionate not to accept expert opinions especially as it was not in dispute that the applicant was ill. By refusing to allow the applicant to adduce such evidence, on the basis of an abstract rule which had its origin in two of its own decisions in 1988, the Federal Insurance Court had substituted its view for that of the medical profession, whereas the Court had previously ruled that determination of the need for sex-change measures was not a matter for judicial assessment.

The Court held that the applicant's right to a fair hearing before the Federal Insurance Court had been infringed, contrary to Article 6 § 1.

The Court reiterated that the public nature of judicial proceedings was a fundamental principle of any democratic society and emphasised a litigant's right to a public hearing at at least one level of jurisdiction. It observed that the applicant could not be considered to have waived the right to a public hearing before the Federal Court.

The Court observed that as the question of the applicant's sex-change was not an exclusively legal or technical matter, and given the difference of opinion between the parties as to the necessity of the observation period, a public hearing was necessary.

Consequently, the Court held that the applicant's right to a public hearing had not been respected, contrary to Article 6 § 1.

Article 8

The Swiss Government submitted that in order to restrict health-insurance costs in the general interest it was necessary to place limits on the services to be reimbursed. The applicant submitted that her age justified an exception and asserted that she had not learned of the two-year waiting period until after the operation.

The Court considered that the period of two years, particularly at the applicant's age of 67, was likely to influence her decision as to whether to have the operation, thus impairing her freedom to determine her gender identity.

It pointed out that the Convention guaranteed the right to personal self-fulfilment and reiterated that the concept of "private life" could include aspects of gender identity. It noted the particular importance of questions concerning one of the most intimate aspects of private life, namely a person's gender identity, for the balancing of the general interest with the interests of the individual.

The Court considered that respect for the applicant's private life required account to be taken of the medical, biological and psychological facts, expressed unequivocally by the medical experts, to avoid the mechanical application of the two-year delay. It concluded that, regard being had to the applicant's very particular situation, and bearing in mind the respondent State's latitude in relation to a question concerning one of the most intimate aspects of private life, a fair balance had not been struck between the interests of the insurance company and those of the applicant.

There had therefore been a violation of Article 8.

Judges Vajić and Jebens expressed a joint partly dissenting opinion, which is annexed to the judgment.

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The Court's judgments are accessible on its Internet site (http://www.echr.coe.int).

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

[1] Under Article 43 of the Convention, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

[2] This summary by the Registry does not bind the Court.

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15.1.2009

BRANKO TOMAŠIĆ AND OTHERS v. CROATIA
judgment of 15 January 2009

By judgment deliverred in Strasbourg on 15 January 2009 in the case of Branko Tomašić and Others v. Croatia, the European court of Human Rights held unanimously that there had been a violation of Article 2 (right to life) of the European Convention on Human Rights.

The applicants alleged that there had been a failure to take all reasonable steps to protect lives of their relatives from a person who had previously been convicted of threatening to kill them.

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicants, jointly, 40,000 euros (EUR) in respect of non-pecuniary damage and EUR 1,300 for costs and expenses.

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicants are Branko Tomašić, his wife, Đurđa Tomašić, and their children, Marko Tomašić, Tomislav Tomašić and Ana Tomašić. They are Croatian nationals who were born in 1956, 1963, 1985, 1995 and 2001 respectively and live in Čakovec (Croatia). The applicants are the relatives of M.T. and her child, V.T., born in March 2005, who were both killed in August 2006 by M. M., V.T.'s father.

M.T. and M.M. lived together in the home of M.T.'s parents until July 2005, when M.M. moved out after disputes with the members of the household.

In January 2006, M.T. lodged a criminal complaint against M.M. for death threats he had allegedly made. On 15 March 2006 the first instance court found M.M. guilty of repeatedly threatening M.T. that he would kill her, himself and their child with a bomb. He was sentenced to five months' imprisonment and, as a security measure, was ordered to have compulsory psychiatric treatment during his imprisonment and afterwards as necessary. On 28 April 2006 the appeal court reduced that treatment to the duration of M.M.'s prison sentence.

M.M. served his sentence and was released on 3 July 2006.

On 15 August 2006 he shot dead M.T. and their daughter, V.T., before committing suicide by turning the gun on himself.

B. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 30 October 2006.

Judgment was given by a Chamber of seven judges, composed as follows :

Christos Rozakis (Greece), *President*,
Nina Vajić (Croatia),
Anatoly Kovler (Russia),
Elisabeth Steiner (Austria),
Dean Spielmann (Luxembourgr),
Giorgio Malinverni (Switzerland),

George Nicolaou (Cyprus), *judges*,
and also Søren Nielsen, *Section Registrar*.

II.
SUMMARY OF THE JUDGMENT

A. Complaints

The applicants complained, under Article 2 (right to life) and Article 13 (right to an effective remedy), that the State had failed to take adequate measures to protect M.T. and V.T. and had not conducted an effective investigation into the possible responsibility of the State for their deaths.

B. Decision of the Court

Alleged on violation of Article 2 of the Convention

The findings of the domestic courts and the conclusions of the psychiatric examination undoubtedly showed that the authorities had been aware that the threats made against the lives of M.T. and V.T. had been serious and that all reasonable steps should have been taken to protect them.

The Court noted, however, that no search of M.M.'s premises and vehicle had been carried out during the initial criminal proceedings against him, despite the fact that he had repeatedly threatened to use a bomb. In addition, although the psychiatric report drawn up for the purposes of those criminal proceedings had stressed the need for continued psychiatric treatment, the Government had failed to show that M.M. had actually been properly treated. Indeed, M.M. had not followed an individual programme during his prison term even though it had been required by law. Nor had he been examined immediately before his release from prison in order to assess whether he had posed a risk of carrying out his death threats against M.T. and V.T. once free.

The Court therefore concluded that no adequate measures had been taken by the relevant domestic authorities to protect the lives of M.T. and V.T., in violation of Article 2.

The Court held unanimously that there was no need to examine separately the complaint under Article 2 regarding the failure of the State to carry out a thorough investigation into the possible responsibility of its agents for the deaths of M.T. and V.T.

Alleged on violation of Article 13 of the Convention

Lastly, the Court held that there was no need to examine the applicants' complaint under Article 13 given that it had established the State's responsibility under Article 2.

Judge Nicolaou expressed a concurring opinion, which is annexed to the judgment.

EUROPEAN COURT OF HUMAN RIGHTS

78
3.2.2009

Press release issued by the Registrar

CHAMBER JUDGMENT
WOMEN ON WAVES AND OTHERS v. PORTUGAL

The European Court of Human Rights has today notified in writing its Chamber judgment[1] in the case of *Women on Waves and Others v. Portugal* (application no. 31276/05), concerning the Portuguese authorities' decision to prohibit the ship *Borndiep*, which had been chartered with a view to staging activities promoting the decriminalisation of abortion, from entering Portuguese territorial waters.

The Court held unanimously that there had been a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

Under Article 41 (just satisfaction) of the Convention, the Court awarded each applicant 2,000 euros (EUR) in respect of non-pecuniary damage and EUR 3,309.40 for costs and expenses, less the EUR 1,500 already paid by the Council of Europe in legal aid. (The judgment is available only in French.)

1. Principal facts

The applicants are Women on Waves, a Dutch foundation based in Amsterdam, and two Portuguese associations, Clube Safo and Não te Prives (Group for the defence of sexual rights), based in Santarém and Coimbra (Portugal) respectively. The three applicant associations are particularly active in promoting debate on reproductive rights.

In 2004 Women on Waves chartered the ship *Borndiep* and sailed towards Portugal after being invited by the two other applicant associations to campaign in favour of the decriminalisation of abortion. Meetings on the prevention of sexually transmitted diseases, family planning and the decriminalisation of abortion were scheduled to take place on board from 30 August to 12 September 2004.

On 27 August 2004 the ship was banned from entering Portuguese territorial waters by a ministerial order, on the basis of maritime law and Portuguese health laws, and its entry was blocked by a Portuguese warship.

On 6 September 2004 the Administrative Court rejected a request by the applicant associations for an order allowing the ship's immediate entry. The court took the view that the associations appeared to be intending to give Portuguese women access to abortion procedures and medicines that were illegal in Portugal.

The applicant associations appealed against that decision but without success. They subsequently applied to the Supreme Administrative Court, which found that the matter in dispute was not of sufficient legal or social significance to justify its intervention.

According to Women on Waves, a number of demonstrations in support of the three associations took place in Figueira da Foz and Lisbon and the situation attracted considerable media attention.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 18 August 2005.

Judgment was given by a Chamber of seven judges, composed as follows:

Françoise Tulkens (Belgium), *President*,
Ireneu Cabral Barreto (Portugal),
Vladimiro Zagrebelsky (Italy),
Danutė Jočienė (Lithuania),
Dragoljub Popović (Serbia),
András Sajó (Hungary),
Işıl Karakaş (Turkey), *judges*,

and also Françoise Elens-Passos, *Deputy Section Registrar*.

3. Summary of the judgment[2]

Complaints

The applicant associations complained under Article 5 (right to liberty and security) and Article 2 of Protocol No. 4 (freedom of movement) that the refusal to allow the *Borndiep* to enter Portuguese territorial waters was illegal. They also relied on Articles 6 (right to a fair hearing), 10 (freedom of expression) and 11 (freedom of assembly and association).

Decision of the Court

Article 10

The Court decided, firstly, that in the light of the circumstances of the case, the situation complained of should be examined under Article 10 of the Convention alone.

While the Court acknowledged the legitimate aims pursued by the Portuguese authorities, namely the prevention of disorder and the protection of health, it reiterated that pluralism, tolerance and broadmindedness towards ideas that offended, shocked or disturbed were prerequisites for a "democratic society".

It pointed out that the right to freedom of expression included the choice of the form in which ideas were conveyed, without unreasonable interference by the authorities, particularly in the case of symbolic protest activities. The Court considered that in this case, the restrictions imposed by the authorities had affected the substance of the ideas and information imparted. It noted that the choice of the *Borndiep* for the events planned by the applicant associations had been crucially important to them and in line with the activities which *Women on Waves* had carried out for some time in other European States.

The Court observed that the applicant associations had not trespassed on private land or publicly owned property, and noted the lack of sufficiently strong evidence of any intention on their part to deliberately breach Portuguese abortion legislation. It reiterated that freedom to express opinions in the course of a peaceful assembly could not be restricted in any way, so long as the person concerned did not commit any reprehensible acts.

The Court considered that in seeking to prevent disorder and protect health, the Portuguese authorities could have resorted to other means that were less restrictive of the applicant associations' rights, such as seizing the medicines on board. It highlighted the deterrent effect for freedom of expression in general of such a radical act as dispatching a warship.

The Court therefore concluded that there had been a violation of Article 10 as the interference by the authorities had been disproportionate to the aims pursued.

Other Articles

The Court further held that it was unnecessary to examine separately the complaints under Articles 5, 6 and 11 of the Convention and Article 2 of Protocol No. 4 to the Convention.

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[2] This summary by the Registry does not bind the Court.

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005
07.1.2010

RANTSEV v. CYPRUS and RUSSIA
judgment of 7 January 2010

By judgment delivered in Strasbourg on 7 January 2010 in the case of Rantsev v. Cyprus and Russia, the European Court of Human Rights held unanimously that :

- there had a **violation of Article 2** (right to life) of the European Convention on Human Rights, for failure to conduct effective investigation by Cyprus and **no violation** of this Article by Russia
- there had been **violations of Article 4** (prohibition of slavery and forced labour) by Cyprus and Russia
- there had been a **violation of Article 5** (right to liberty and security) by Cyprus.

The applicant alleged that Cypriot and Russian authorities failed to protect 20-year old Russian cabaret artist from human trafficking.

Under Article 41 (just satisfaction) of the Convention, the Court held that Cyprus had to pay the applicant EUR 40,000 in respect of non-pecuniary damage and EUR 3,150 for costs and expenses, and that Russia had to pay him EUR 2,000 in respect of non-pecuniary damages.

I.
BACKGROUND OF THE CASE

A. Principal facts

The applicant, Mr Nikolay Rantsev, is a Russian national who was born in 1938 and lives in Svetlogorsk, Russia. He is the father of Ms Oxana Rantseva, also a Russian national, born in 1980, who died in strange and unestablished circumstances having fallen from a window of a private home in Cyprus in March 2001.

Ms Rantseva arrived in Cyprus on 5 March 2001 on an “artiste” visa. She started work on 16 March 2001 as an artiste in a cabaret in Cyprus only to abandon her place of work and lodging three days later leaving a note that she was going back to Russia. After finding her in a discotheque in Limassol some ten days later, at around 4 a.m. on 28 March 2001, the manager of the cabaret where she had worked took her to the police asking them to declare her illegal in the country and to detain her, apparently with a view to expelling her so that he could have her replaced in his cabaret. The police, after checking their database, concluded that Ms Rantseva did not appear to be illegal and refused to detain her. They asked the cabaret manager to collect her from the police station and to return with her later that morning to make further inquiries into her immigration status. The cabaret manager collected Ms Rantseva at around 5.20 a.m.

Ms Rantseva was taken by the cabaret manager to the house of another employee of the cabaret, where she was taken to a room on the sixth floor of the apartment block. The cabaret manager remained in the apartment. At about 6.30 a.m. on 28 March 2001 Ms

Rantseva was found dead in the street below the apartment. A bedspread was found looped through the railing of the apartment's balcony.

Following Ms Rantseva's death, those present in the apartment were interviewed. A neighbour who had seen Ms Rantseva's body fall to the ground was also interviewed, as were the police officers on duty at Limassol police station earlier that morning when the cabaret manager had brought Ms Rantseva from the discotheque. An autopsy was carried out which concluded that Ms Rantseva's injuries were the result of her fall and that the fall was the cause of her death. The applicant subsequently visited the police station in Limassol and requested to participate in the inquest proceedings. An inquest hearing was finally held on 27 December 2001 in the applicant's absence. The court decided that Ms Rantseva died in strange circumstances resembling an accident, in an attempt to escape from the apartment in which she was a guest, but that there was no evidence to suggest criminal liability for her death.

Upon a request by Ms Rantseva's father, after the body was repatriated from Cyprus to Russia. Forensic medical experts in Russia carried out a separate autopsy and the findings of the Russian authorities, which concluded that Ms Rantseva had died in strange and unestablished circumstances requiring additional investigation, were forwarded to the Cypriot authorities in the form of a request for mutual legal assistance under treaties in which Cyprus and Russia were parties. The request asked, inter alia, that further investigation be carried out, that the institution of criminal proceedings in respect of Ms Rantseva's death be considered and that the applicant be allowed to participate effectively in the proceedings.

In October 2006, Cyprus confirmed to the Russian Prosecution Service that the inquest into Ms Rantseva's death was completed on 27 December 2001 and that the verdict delivered by the court was final. The applicant has continued to press for an effective investigation into his daughter's death.

The Cypriot Ombudsman, the Council of Europe's Human Rights Commissioner and the United States State Department have published reports which refer to the prevalence of trafficking in human beings for commercial sexual exploitation in Cyprus and the role of the cabaret industry and "artiste" visas in facilitating trafficking in Cyprus.

B. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 26 May 2004.

Judgment was given by a Chamber of seven judges, composed as follows:

Christos Rozakis (Greece), *President,*
Anatoly Kovler (Russia),
Elisabeth Steiner (Austria),
Dean Spielmann (Luxembourg),
Sverre Erik Jebens (Norway)
Giorgio Malinverni (Switzerland),
George Nicolaou (Cyprus), *judges,*
and Søren Nielsen, *Section Registrar*.

II.
SUMMARY OF THE JUDGMENT

A. Complaints

Relying on Articles 2 (right to life), 3 (prohibition of torture and inhuman and degrading treatment), 4 (prohibition of slavery and forced labour), 5 (right to liberty and security) and 8 (right to private and family life), Mr Rantsev complained about the investigation into the circumstances of the death of his daughter, about the failure of the Cypriot police to take measures to protect her while she was still alive and about the failure of the Cypriot authorities to take steps to punish those responsible for her death and ill-treatment.

He also complained under Articles 2 and 4 about the failure of the Russian authorities to investigate his daughter's alleged trafficking and subsequent death and to take steps to protect her from the risk of trafficking.

Finally, he complained under Article 6 (right to a fair trial) of the Convention about the inquest proceedings and an alleged lack of access to court in Cyprus.

B. Decision of the Court

Unilateral declaration by Cyprus

The Cypriot authorities made a unilateral declaration acknowledging that they had violated Articles 2, 3, 4, 5 and 6 of the Convention, offering to pay pecuniary and non-pecuniary damages to the applicant, and advising that on 5 February 2009 three independent experts had been appointed to investigate the circumstances of Ms Rantseva's death, employment and stay in Cyprus and the possible commission of any unlawful act against her.
The Court reiterated that as well as deciding on the particular case before it, its judgments served to elucidate, safeguard and develop the rules instituted by the Convention. It also emphasised its scarce case law on the question of the interpretation and application of Article 4 to trafficking in human beings. It concluded that, in light of the above and the serious nature of the allegations of trafficking in the case, respect for human rights in general required it to continue its examination of the case, notwithstanding the unilateral declaration of the Cypriot Government.

Admissibility

The Court did not accept the Russian Government's submission that they had no jurisdiction over, and hence no responsibility for, the events to which the application pertained as it found that if trafficking occurred it had started in Russia and that a complaint existed against Russia's failure to investigate properly the events which occurred on Russian territory. It declared the applicant's complaints under Article 2, 3, 4 and 5 admissible.

Alleged violation of Article 2 of the Convention : Right to life

As regards Cyprus, the Court considered that the chain of events leading to Ms Rantseva's death could not have been foreseen by the Cypriot authorities and, in the circumstances, they had therefore no obligation to take practical measures to prevent a risk to her life.

However, a number of flaws had occurred in the investigation carried out by the Cypriot authorities: there had been conflicting testimonies which had not been resolved; no steps to clarify the strange circumstances of Ms Rantseva's death had been made after the verdict of the court in the inquest proceedings; the applicant had not been advised of the date of the inquest and as a result had been absent from the hearing when the verdict had been handed down; and although the facts had occurred in 2001 there had not yet been a clear explanation as to what had happened. There had therefore been a violation of Article 2 as a result of the failure of the Cypriot authorities to investigate effectively Ms Rantseva's death.

As regards Russia, the Court concluded that there it had not violated Article 2 as the Russian authorities were not obliged themselves to investigate Ms Rantseva's death, which had occurred outside their jurisdiction. The Court emphasised that the Russian authorities had requested several times that Cyprus carry out additional investigation and had cooperated with the Cypriot authorities.

Alleged violation of Article 3 of the Convention : Freedom from ill-treatment

The Court held that any ill-treatment which Ms Rantseva may have suffered before her death had been inherently linked to her alleged trafficking and exploitation and that it would consider this complaint under Article 4.

Alleged violation of Article 4 of the Convention : Failure to protect from trafficking

Two non-governmental organisations, Interights and the AIRE Centre, made submissions before the Court arguing that the modern day definition of slavery included situations such as the one arising in the present case, in which the victim was subjected to violence and coercion giving the perpetrator total control over the victim.

The Court noted that, like slavery, trafficking in human beings, by its very nature and aim of exploitation, was based on the exercise of powers attaching to the right of ownership ; it treated human beings as commodities to be bought and sold and put to forced labour; it implied close surveillance of the activities of victims, whose movements were often circumscribed; and it involved the use of violence and threats against victims. Accordingly the Court held that trafficking itself was prohibited by Article 4. It concluded that there had been a violation by Cyprus of its positive obligations arising under that Article on two counts: first, its failure to put in place an appropriate legal and administrative framework to combat trafficking as a result of the existing regime of artiste visas, and, second, the failure of the police to take operational measures to protect Ms Rantseva from trafficking, despite circumstances which had given rise to a credible suspicion that she might have been a victim of trafficking. In light of its findings as to the inadequacy of the Cypriot police investigation under Article 2, the Court did not consider it necessary to examine the effectiveness of the police investigation separately under Article 4.

There had also been a violation of this Article by Russia on account of its failure to investigate how and where Ms Rantseva had been recruited and, in particular, to take steps to identify those involved in Ms Rantseva's recruitment or the methods of recruitment used.

Alleged violation of Article 5 of the Convention : Deprivation of liberty

The Court found that the detention of Ms Rantseva for about an hour at the police station and her subsequent confinement to the private apartment, also for about an hour, did engage the responsibility of Cyprus. It held that the detention by the police following the confirmation that Ms Rantseva was not illegal had no basis in domestic law. It further held that her subsequent detention in the apartment had been both arbitrary and unlawful. There was therefore a violation of Article 5 § 1 by Cyprus.

The Court rejected the applicant's other complaints.

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10.06.2010

Press release issued by the Registrar
Chamber judgment[1]

http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=869652&portal=hbkm&source=externalbydocnumber&tabl***Schwizgebel v. Switzerland (application no. 25762/07)***

REFUSAL TO AUTHORISE ADOPTION MAINLY ON ACCOUNT OF APPLICANT'S AGE WAS NOT DISCRIMINATORY

No violation of Article 14 (prohibition of discrimination)
in conjunction with Article 8 (right to respect for private and family life)
of the European Convention on Human Rights

Principal facts

The applicant, Ariane Schwizgebel, is a Swiss national who was born in 1957 and lives in Geneva. She is single. In 1996 she filed her first application for authorisation to take in a child with a view to adoption (adoption by a single parent being possible under Swiss law) with the authorities of the Canton of Geneva. However, after being informed that she would probably receive an unfavourable response, she withdrew that application. She filed a new application in 1998 with the authorities of the Republic and Canton of the Jura, the area to which she had moved. She obtained the necessary authorisation from the social services and in 2000 took in a Vietnamese child, whom she adopted in June 2002.

From July 2002 onwards Ms Schwizgebel sought authorisation to take in a second child for adoption, this time a three-year-old from South America. The social services refused to grant authorisation and their refusal was upheld by the courts. After moving back to Geneva, the applicant twice requested authorisation from the authorities of that Canton in respect of a second child. Her applications were again rejected, in July 2004 and September 2005, and she was unsuccessful in appeals to the courts. In connection with the second of those applications, she appeared in person before the cantonal authority and stated that she wished to adopt a five-year-old child, if possible from Vietnam like her first child. In dismissing her appeal, on 24 April 2006, the Court of Justice of the Canton of Geneva did not call into question her child-raising capacities or her financial resources. It took the view, however, that the adoption of a second child could entail an unfair interference with the situation of the first and that the applicant had underestimated the difficulties of her new plan for international adoption. It further expressed reservations about her availability for another child. In the last instance, in a judgment of 5 December 2006, the Federal Court dismissed the applicant's administrative appeal. It had regard in particular to what would be in the child's best interests, together with Ms Schwizgebel's age and her age-difference in relation to the child (between 46 and 48 years, which was regarded as excessive).

Complaints, procedure and composition of the Court

Ms Schwizgebel complained that the Swiss authorities had prevented her from adopting because of her age (47 and a half at the time of her last application). She claimed among other things that she had been discriminated against in comparison with other women of her

age, who were able nowadays to give birth to children of their own. She relied in substance on Article 14, taken together with Article 8 of the Convention.

The application was lodged with the European Court of Human Rights on 15 June 2007.

Judgment was given by a Chamber of seven judges, composed as follows:

Christos Rozakis (Greece), *President*,
Nina Vajić (Croatia),
Khanlar Hajiyev (Azerbaijan),
Dean Spielmann (Luxembourg),
Sverre Erik Jebens (Norway),
Giorgio Malinverni (Switzerland),
George Nicolaou (Cyprus), *Judges*,

and Søren Nielsen, *Section Registrar*,

Decision of the Court

The Court first examined whether the applicant had been subjected to a difference of treatment by the Swiss authorities in relation to persons in a comparable situation. It found that this was not the case in relation to women who were able to give birth at that age (the State having no influence as regards the possibility for a woman to have genetically-related children or the contrary). It would be different, however, if her situation were compared with that of a younger unmarried woman, who, in the same circumstances, might succeed in obtaining authorisation to take in a second child for adoption. The applicant could therefore claim that she was a victim of a difference of treatment between persons in a comparable situation.

The Court then examined whether that difference of treatment had had an objective and reasonable justification. In the proceedings for the adoption of a second child, the authorities had in particular based their refusal on Ms Schwizgebel's age-difference with the child to be adopted (between 46 and 48 years), which was regarded as excessive and contrary to the child's interests. The Court sought to ascertain whether, in this area, there was a common denominator among the legal systems of the member States of the Council of Europe. It concluded that this was not so: a single person's right to adopt was not guaranteed in all States – in any event, not absolutely – and as regards the age of the adopter or the age-difference between the adopter and the child, the solutions differed considerably from one State to another. The Court thus took the view that, in the absence of any consensus, the Swiss authorities had considerable discretion to decide on such matters, and that both the domestic legislation and the decisions taken in the present case seemed to be consonant with the solutions adopted by the majority of the member States of the Council of Europe and, moreover, to be compliant with the applicable international law. Nor could any arbitrariness be detected in the present case: the authorities had taken their decisions in the context of adversarial proceedings allowing Ms Schwizgebel to submit her arguments, which had been duly taken into account by those authorities. Their decisions, containing ample reasoning, had been based in particular on the comprehensive enquiries by the cantonal authorities. They had considered not only the best interests of the child to be adopted, but also those of the child already adopted. Moreover, the Court emphasised that the criterion of the age-difference between the adopter and the child had been applied by the Federal Court flexibly and having regard to the circumstances of the situation. Lastly, the other arguments given in support of the decisions, i.e. those not based on age, had not been unreasonable or arbitrary.

In those circumstances, the difference of treatment imposed on Ms Schwizgebel had not been discriminatory. There had not therefore been a violation of Article 14 taken together with Article 8.

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The judgment is available only in French. This press release is a document produced by the Registry. It does not bind the Court. The judgments are available on its website (http://www.echr.coe.int).

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

[1] Under Article 43 of the Convention, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

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510
24.06.2010

Press release issued by the Registrar
Chamber judgment
Not Final[1]

Schalk and Kopf v. Austria (application no. 30141/04)

THE EUROPEAN CONVENTION OF HUMAN RIGHTS DOES NOT OBLIGE STATES TO ENSURE THE RIGHT TO MARRY TO HOMOSEXUAL COUPLES

No violation of Article 12 (right to marry)
No violation of Article 14 (prohibition of discrimination)
in conjunction with Article 8 (right to respect for private and family life)
of the European Convention on Human Rights

Principal facts

The applicants, Horst Michael Schalk and Johann Franz Kopf, are Austrian nationals who were born in 1962 and 1960 respectively and live in Vienna. They are a same-sex couple.

In September 2002 the applicants asked the competent authorities to allow them to contract marriage. Their request was refused by the Vienna Municipal Office on the grounds that marriage could only be contracted between two persons of opposite sex. The applicants lodged an appeal with the Vienna Regional Governor, who confirmed the Municipal Office's view in April 2003.

In a subsequent constitutional complaint, the applicants alleged in particular that the legal impossibility for them to get married constituted a violation of their right to respect for private and family life and of the principle of non-discrimination. The Constitutional Court dismissed their complaint in December 2003, holding in particular that neither the Austrian Constitution nor the European Convention on Human Rights required that the concept of marriage, as being geared to the possibility of parenthood, should be extended to relationships of a different kind and that the protection of same-sex relationships under the Convention did not give rise to an obligation to change the law of marriage.

On 1 January 2010, the Registered Partnership Act entered into force in Austria, aiming to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships. While the Act provides for many of the same rights and obligations for registered partners as for spouses, some difference remain, in particular registered partners are not allowed to adopt a child, nor are step-child adoption or artificial insemination allowed.

Complaints, procedure and composition of the Court

Relying on Article 12, the applicants complained of the authorities' refusal to allow them to contract marriage. Relying further on Article 14 in conjunction with Article 8 they complained that they were discriminated against on account of their sexual orientation since they were denied the right to marry and did not have any other possibility to have their relationship recognised by law before the entry into force of the Registered Partnership Act.

The application was lodged with the European Court of Human Rights on 5 August 2004. On 25 February 2010, a hearing was held in public in the Human Rights Building in Strasbourg.

Judgment was given by a Chamber of seven judges, composed as follows:

Christos Rozakis (Greece), *President,*
Anatoly Kovler (Russia),
Elisabeth Steiner (Austria),
Dean Spielmann (Luxembourg),
Sverre Erik Jebens (Norway),
Giorgio Malinverni (Switzerland),
George Nicolaou (Cyprus), *judges,*

and also André Wampach, *Deputy Section Registrar.*

Decision of the Court

Article 12

The Court first examined whether the right to marry granted to "men and women" under the Convention could be applied to the applicants' situation. As regards their argument that in today's society the procreation of children was no longer a decisive element in a civil marriage, the Court considered that in another case it had held that the inability to conceive a child could not be regarded in itself as removing the right to marry.[2] However, this finding and the Court's case-law according to which the Convention had to be interpreted in present-day conditions did not allow the conclusion, drawn by the applicants, that Article 12 should be read as obliging member States to provide for access to marriage for same-sex couples.

The Court observed that among Council of Europe member States there was no consensus regarding same-sex marriage. Having regard to the Charter of Fundamental Rights of the European Union, to which the Austrian Government had referred in their pleadings, the Court noted that the relevant Article, granting the right to marry, did not include a reference to men and women, which allowed the conclusion that the right to marry must not in all circumstances be limited to marriage between two persons of the opposite sex. At the same time the Charter left the decision whether or not to allow same-sex marriage to regulation by member States' national law. The Court underlined that national authorities were best placed to assess and respond to the needs of society in this field, given that marriage had deep-rooted social and cultural connotations differing largely from one society to another.

In conclusion, the Court found that Article 12 did not impose an obligation on the Austrian Government to grant a same-sex couple like the applicants access to marriage. It therefore unanimously held that there had been no violation of that Article.

Article 14 in conjunction with Article 8

The Court first addressed the issue whether the relationship of a same-sex couple like the applicants' fell not only within the notion of "private life" but also constituted "family life" within the meaning of Article 8. Over the last decade, a rapid evolution of social attitudes towards same-sex couples had taken place in many member States and a considerable number of States had afforded them legal recognition. The Court therefore concluded that the relationship of the applicants, a cohabiting same-sex couple living in a stable partnership, fell within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.

The Court had repeatedly held that different treatment based on sexual orientation required particularly serious reasons by way of justification. It had to be assumed that same-sex couples were just as capable as different-sex couples of entering into stable committed relationships; they were consequently in a relevantly similar situation as regards their need for legal recognition of their relationship. However, given that the Convention was to be read as a whole, having regard to the conclusion reached that Article 12 did not impose an obligation on States to grant same-sex couples access to marriage, the Court was unable to share the applicants' view that such an obligation could be derived from Article 14 taken in conjunction with Article 8.

Given that with the entry into force of the Registered Partnership Act in Austria it was open to the applicants to have their relationship formally recognised, it was not the Court's task to establish whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Article 14 taken in conjunction with Article 8 if this situation still persisted. It remained to be examined whether Austria should have provided the applicants with an alternative means of legal recognition of their partnership any earlier than it did. The Court observed that while there was an emerging European consensus towards legal recognition of same-sex couples, there was not yet a majority of States providing for it. The Austrian law reflected this evolution; though not in the vanguard, the Austrian legislator could not be reproached for not having introduced the Registered Partnership Act any earlier.

The Court was not convinced by the argument that if a State chose to provide same-sex couples with an alternative means of recognition, it was obliged to confer a status on them which corresponded to marriage in every respect. The fact that the Registered Partnership Act retained some substantial differences compared to marriage in respect of parental rights corresponded largely to the trend in other member States. Moreover, in the present case the Court did not have to examine every one of these differences in detail. As the applicants did not claim that they were directly affected by the remaining restrictions concerning parental rights, it would have gone beyond the scope of the case to establish whether these differences were justified.

In the light of these findings, the Court concluded, by four votes to three, that there had been no violation of Article 14 in conjunction with Article 8.

Judges Rozakis, Spielmann and Jebens expressed a dissenting opinion; Judges Kovler and Malinverni expressed a concurring opinion. The separate opinions are annexed to the judgment.

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The judgment is available only in English. This press release is a document produced by the Registry. It does not bind the Court. The judgments are available on its website (http://www.echr.coe.int).

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

[1] Under Article 43 of the Convention, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

[2] *Christine Goodwin v. the United Kingdom* [GC] (no. 28957/95, ECHR 2002 VI)

issued by the Registrar of the Court no. 699 28.9.2010

Rules on child maintenance prior to introduction of Civil Partnership Act discriminated against those in same-sex relationships

In today's Chamber judgment in the case J. M. v. the United Kingdom (Application no. 37060/06) which is not final[1], the European Court of Human Rights held, unanimously, that there had been a:
Violation of Article 14 (prohibition of discrimination) in conjunction with Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights

Principal facts

The applicant, J.M., a British national, is the mother of two children, born in 1991 and 1993. She and her husband subsequently divorced and the applicant left the family home. For the purposes of the UK's child support legislation, her former husband became the parent with care of the children and the applicant, as the non-resident parent, was required to contribute financially to the cost of their upbringing. Since 1998 the applicant has been living with another woman in an intimate relationship. Her child maintenance obligation was assessed in September 2001 in accordance with the regulations that applied at that time. These provided for a reduced amount where the absent parent had entered into a new relationship, married or unmarried, but took no account of same-sex relationships. The applicant complained that the difference was appreciable – she was required to pay approximately 47 British pounds (GBP) per week, whereas if she had formed a new relationship with a man the amount due would be around GBP 14.

Her complaint was upheld by three levels of jurisdiction, but the case was overturned by a majority ruling in the House of Lords in 2006. The applicant's reliance on Article 8 of the Convention, especially its family life aspect, was rejected. Two members of the majority held that the applicant's situation did not fall within the ambit of Article 8 of the Convention as the link between the regulations and her relationship with her partner was too tenuous. Even if it were not, they considered that the United Kingdom had remained within its margin of appreciation up to the point in time when the Civil Partnership Act 2004 removed the difference in treatment complained of. The other two members of the majority held that same-sex relationships were not, at that time, recognised by the Strasbourg case-law as a form of family life within the meaning of Article 8. All of the members of the majority rejected the argument that the situation was within the ambit of Article 1 of Protocol No. 1. They saw that provision as primarily concerned with the expropriation of assets for a public purpose and not with the enforcement of a personal

1 Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

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obligation of an absent parent. It would be artificial to view child support payments as a deprivation of the absent parent's possessions.

Complaints, procedure and composition of the Court

J.M. alleged that, when setting the level of child maintenance she was required to pay, the authorities had discriminated against her on the basis of her sexual orientation. She relied on Article 14 (prohibition of discrimination), submitting that that Article applied to her situation either in conjunction with Article 8 (right to respect for private and family life) and/or Article 1 of Protocol No. 1 (protection of property).

The application was lodged with the European Court of Human Rights on 6 September 2006.

Third-party comments were received from the Equality and Human Rights Commission, London.

Judgment was given by a Chamber of seven, composed as follows:

Lech Garlicki (Poland), *President*,
Nicolas Bratza (the United Kingdom),
Giovanni Bonello (Malta),
Ljiljana Mijović (Bosnia and Herzegovina),
Päivi Hirvelä (Finland),
Ledi Bianku (Albania),
Nebojša Vučinić (Montenegro)*, Judges*,
and also Fatoş Aracı, *Deputy Section Registrar.*

Decision of the Court

The Court decided that the case most naturally fell within the scope of Article 1 of Protocol No. 1. The sums paid by the applicant out of her own financial resources towards the upkeep of her children were to be considered as "contributions" (just like social security benefits or taxation) since payment was required by the relevant legislative provisions and enforced through the Child Support Agency. Article 14 thus applied to the situation complained of. The Court did not find it necessary to decide whether the facts of the case fell within the scope of Article 8.

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

In order for an issue to arise under Article 14, there had to be a difference in the treatment of persons in relevantly similar situations. Where the complaint was one of discrimination on grounds of sexual orientation, the State had to give particularly convincing and weighty reasons to justify such a difference in treatment.

The Court considered that J.M. could compare her situation to that of an absent parent who had formed a new relationship with a person of the opposite sex. The only point of difference between her and such persons was her sexual orientation. Therefore, her maintenance obligation towards her children had been assessed differently on account of the nature of her new relationship.

Yet, bearing in mind the purpose of the domestic regulations, which was to avoid placing an excessive financial burden on the absent parent in their new circumstances, the Court could see no reason for such difference in treatment. Indeed, it was not clear why the applicant's housing costs should have been taken into account differently than would

have been the case had she formed a relationship with a man. The Court therefore concluded that there lacked sufficient justification for such discrimination in 2001-2002. The reforms introduced by the Civil Partnership Act some years later, however laudable, had no bearing on the matter.

The Court therefore held that there had been a violation of Article 14 in conjunction with Article 1 of Protocol No. 1.

Other articles

Under Article 41 (just satisfaction) of the Convention, the Court held that the United Kingdom was to pay the applicant 3,000 euros (EUR) in respect of non-pecuniary damage, and EUR 18,000 for costs and expenses.

The decision is available only in English.
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FOURTH SECTION

CASE OF ČECHOVÁ v. SLOVAKIA

(Application no. 33378/06)

JUDGMENT

STRASBOURG

5 October 2010

This judgment is final but it may be subject to editorial revision.

In the case of Čechová v. Slovakia,

The European Court of Human Rights (Fourth Section), sitting as a Committee composed of:

Giovanni Bonello, *President,*
Lech Garlicki,
Ján Šikuta, *judges,*
and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 14 September 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 33378/06) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovak national, Ms Tatiana Čechová ("the applicant"), on 8 August 2006.

2. The applicant was represented by Mr M. Mandzák, a lawyer practising in Bratislava. The Slovak Government ("the Government") were represented by their Agent, Mrs M. Pirošíková.

3. On 2 April 2008 the President of the Fourth Section decided to give notice of the application to the Government. It was decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3). In accordance with Protocol No. 14, the application is assigned to a Committee of three Judges.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1967 and lives in Košice.

5. On 13 January 2000 the applicant's former husband lodged an action against the applicant for distribution of matrimonial property.

6. On 10 June 2004 the Constitutional Court found that the Košice II District Court had violated the applicant's right to a hearing within a reasonable time. It awarded the applicant the equivalent of 876 euros (at that time) as just satisfaction in respect of non-pecuniary damage, ordered the District Court to proceed and to reimburse the applicant's legal costs.

7. On 15 March 2006 it rejected the applicant's fresh complaint about the length of these proceedings as being manifestly ill-founded.

8. On 8 December 2009 the District Court delivered a judgment in the case. The applicant appealed and the proceedings are still pending.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

9. The applicant complained that the length of the proceedings had been incompatible with the "reasonable time" requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

A. Admissibility

10. The Government agreed with the Constitutional Court's findings of 2004 and 2006 and argued that the applicant should have lodged a fresh complaint in respect of the subsequent period.

11. The applicant reiterated her complaint.

12. At the time of the Constitutional Court's judgment of 2004 the proceedings had lasted four years and five months at one level of jurisdiction. They are still pending. In view of its established case-law (see *Becová v. Slovakia* (dec.), no. 23788/06, 18 September 2007), the Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

13. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

14. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Frydlender*, cited above).

15. Having examined all the materials submitted to it and having regard to its case-law on the subject, the Court concurs with the view expressed by the Constitutional Court on 10 June 2004 that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement. It finds further delays in the period after that judgment.

There has accordingly been a breach of Article 6 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

16. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

17. In the application form submitted on 8 August 2006 the applicant claimed, provisionally, EUR 10,000 in respect of non-pecuniary damage and EUR 500 for costs and expenses.

18. On 1 September 2008, after the application had been communicated to the respondent Government and the parties informed that the admissibility and merits of the case would be examined at the same time, the Court invited the applicant to submit her claims for just satisfaction by 10 October 2008. The relevant part of the Registry's letter reads as follows:

> "With regard to just-satisfaction claims, I would draw your attention to Rule 60 and would remind you that failure to submit within the time allowed quantified claims, together with the required supporting documents, entails the consequence that the Chamber will either make no award of just satisfaction or else

reject the claim in part. This applies even if the applicant has indicated her wishes concerning just satisfaction at an earlier stage of the proceedings."

19. The applicant did not submit any such claims within the time-limit fixed by the Court. Accordingly, the Court makes no award under Article 41 of the Convention (see, for example, *A. R., spol. s r. o. v. Slovakia*, no. 13960/06, §§ 62-65, 9 February 2010, with further references).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 5 October 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı Giovanni Bonello
Deputy Registrar President

ČECHOVÁ v. SLOVAKIA JUDGMENT

issued by the Registrar of the Court no. 731 07.10.2010

Refusal to grant serviceman parental leave, unlike their female counterparts, is discriminatory

In today's Chamber judgment in the case **Konstantin Markin v. Russia** (application no. 30078/06), which is not final[1], the European Court of Human Rights held, by a majority that there had been:
A violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the European Convention on Human Rights
The case concerned the authorities' refusal to grant the applicant parental leave, which represented a difference in treatment compared to female military personnel and civilians.

Principal facts

Konstantin Markin is a Russian military serviceman who was born in 1976 and lives in Novgorod.

Mr Markin and his wife divorced the same day their third child was born in September 2005. A few days later they entered into an agreement by which their three children would live with Mr Markin, and his wife would pay maintenance for them. He subsequently asked the head of his military unit for three years' parental leave. The request was rejected because parental leave of this duration could only be granted to female military personnel. Initially he was allowed to take three months' leave, but a few weeks later, in November 2005, he was recalled to duty. Mr Markin challenged the recall to duty, but his claims were eventually rejected by the military courts in April 2006.

In parallel, Mr Markin brought proceedings against his military unit, claiming three years' parental leave. In March and April 2006 the military courts dismissed his claim as having no basis in domestic law.

In October 2006, the head of his military unit granted Mr Markin parental leave until September 2008, when his youngest son would turn three. He subsequently received financial aid of the equivalent of 5,900 euros, being informed that the aid had been granted in particular in view of his difficult family situation and the absence of other sources of income. The military court issued a decision in December 2006 criticising the military unit for disregarding the courts' judgments.

In August 2008, Mr Markin applied to the Constitutional Court, claiming that the provisions of the military service act concerning the three-year parental leave were

1 Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

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incompatible with the equality clause in the Constitution. In January 2009, the Constitutional Court rejected his application, holding in particular that by entering the military, a serviceman accepted certain limitations on his civil rights in order to create appropriate conditions for efficient professional activity in defence of the country. The Constitutional Court also pointed out that the possibility for servicewomen to take parental leave took into account the limited participation of women in the military and the special social role of women associated with motherhood. If a serviceman decided to take care of his child himself, he was entitled to early termination of his service for family reasons.

Complaints, procedure and composition of the Court

Relying in particular on Article 14 taken in conjunction with Article 8, Mr Markin complained that the refusal to grant him parental leave amounted to discrimination on account of sex.

The application was lodged with the European Court of Human Rights on 21 May 2006.

Judgment was given by a Chamber of seven, composed as follows:

Christos **Rozakis** (Greece), *President*,
Nina **Vajić** (Croatia),
Anatoly **Kovler** (Russia),
Elisabeth **Steiner** (Austria),
Khanlar **Hajiyev** (Azerbaijan),
Dean **Spielmann** (Luxembourg),
Sverre Erik **Jebens** (Norway)*, Judges*,
and also Søren **Nielsen**, *Section Registrar.*

Decision of the Court

Article 37 (striking out applications)

The Court rejected the Russian Government's request for the application to be struck out of its list of cases in accordance with Article 37 in view of the measures taken by the domestic authorities to redress Mr Markin's situation. It underlined that its judgments served not only to provide individual relief, but also to safeguard and develop the rules instituted by the Convention. The alleged discrimination under Russian law against male military personnel as regards entitlement to parental leave involved an important question of general interest, which the Court had not yet examined.

Article 14 in conjunction with Article 8

While Article 8 did not include a right to parental leave, the Court underlined that if a State decided to create a parental leave scheme, it had to do so in a non-discriminatory manner. Advancing the equality of men and women was today a major goal in the Council of Europe member States and very weighty reasons had to be put forward before a difference in treatment between the sexes could be regarded as compatible with the Convention.

The Court was not convinced by the Russian Constitutional Court's argument that the different treatment of male and female military personnel concerning parental leave was justified by the special social role of mothers in the upbringing of children. In contrast to maternity leave, primarily intended to enable the mother to recover from the fatigue of childbirth and to breastfeed if she so wished, parental leave related to the subsequent

period and was intended to enable the parent to look after the infant at home. As regards this role, both parents were in a similar position.

Over the last decade, the legal situation as regards parental leave entitlements had evolved. In an absolute majority of Council of Europe member States the legislation now provided that parental leave could be taken by both mothers and fathers. Russia could therefore not rely on the absence of a common standard among European countries to justify such difference in treatment.

Furthermore, the Court was not convinced by the argument of the Russian Constitutional Court that military service required uninterrupted performance of duties and that therefore the taking of parental leave by servicemen on a large scale would have a negative effect on the operational effectiveness of the armed forces. Indeed, there was no expert study or statistical research on the number of servicemen who would be in a position to take three years' parental leave at any given time and who would be willing to do so. The Constitutional Court had thus based its decision on pure assumption. Its argument that a serviceman was free to resign if he wished to take personal care of his children was particularly striking, given the difficulty in directly transferring essentially military qualifications and experience to civilian life.

For these reasons, the Court considered that not entitling servicemen to parental leave, while servicewomen were entitled to such leave, was not reasonably justified. It therefore concluded, by six votes to one, that there had been a violation of Article 14 in conjunction with Article 8.

Article 41 (just satisfaction)

Given that Mr Markin had been allowed, on an exceptional basis, to take parental leave and received financial aid, the Court considered that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained.

Separate opinion

Judge Kovler expressed a dissenting opinion, which is annexed to the judgment.

The decision is available only in English.
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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

4

APPENDICES

APPENDIX I

CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, AS AMENDED BY PROTOCOL NO. 11

Rome, 4.XI.1950

The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed and Protocol No. 10 (ETS no. 146) has lost its purpose.

The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

Article 1[1] – Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Section I[1] – Rights and freedoms

Article 2[1] – Right to life

1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a in defence of any person from unlawful violence;

b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3[1] – Prohibition of torture

[1] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4[1] – Prohibition of slavery and forced labour

1 No one shall be held in slavery or servitude.

2 No one shall be required to perform forced or compulsory labour.

3 For the purpose of this article the term "forced or compulsory labour" shall not include:

a any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

c any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

d any work or service which forms part of normal civic obligations.

Article 5[1] – Right to liberty and security

1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a the lawful detention of a person after conviction by a competent court;

b the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

[1] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6[1] – Right to a fair trial

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b to have adequate time and facilities for the preparation of his defence;

c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[1] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

Article 7[1] – No punishment without law

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8[1] – Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9[1] – Freedom of thought, conscience and religion

1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10[1] – Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[1] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

Article 11[1] – Freedom of assembly and association

1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12[1] – Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13[1] – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14[1] – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15[1] – Derogation in time of emergency

1 In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3 Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

[1] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

Article 16[1] **– Restrictions on political activity of aliens**

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17[1] **– Prohibition of abuse of rights**

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18[1] **– Limitation on use of restrictions on rights**

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

Section II[2] – **European Court of Human Rights**

Article 19 – Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

Article 20 – Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21 – Criteria for office

1 The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

2 The judges shall sit on the Court in their individual capacity.

3 During their term of office the judges shall not engage in any activity which is incompatible with their independence**,** impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22 – Election of judges

1 The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

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1 Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

2 New Section II according to the provisions of Protocol No. 11 (ETS No. 155).

2 The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies.

Article 23 – Terms of office

1 The judges shall be elected for a period of six years. They may be re-elected. However, the terms of office of one-half of the judges elected at the first election shall expire at the end of three years.

2 The judges whose terms of office are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after their election.

3 In order to ensure that, as far as possible, the terms of office of one-half of the judges are renewed every three years, the Parliamentary Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more judges to be elected shall be for a period other than six years but not more than nine and not less than three years.

4 In cases where more than one term of office is involved and where the Parliamentary Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by a drawing of lots by the Secretary General of the Council of Europe immediately after the election.

5 A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of his predecessor's term.

6 The terms of office of judges shall expire when they reach the age of 70.

7 The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

Article 24 – Dismissal

No judge may be dismissed from his office unless the other judges decide by a majority of two-thirds that he has ceased to fulfil the required conditions.

Article 25 – Registry and legal secretaries

The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court. The Court shall be assisted by legal secretaries.

Article 26 – Plenary Court

The plenary Court shall

a elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;

b set up Chambers, constituted for a fixed period of time;

c elect the Presidents of the Chambers of the Court; they may be re-elected;

d adopt the rules of the Court, and

e elect the Registrar and one or more Deputy Registrars.

Article 27 – Committees, Chambers and Grand Chamber

1 To consider cases brought before it, the Court shall sit in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.

2 There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge.

3 The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the State Party concerned.

Article 28 – Declarations of inadmissibility by committees

A committee may, by a unanimous vote, declare inadmissible or strike out of its list of cases an application submitted under Article 34 where such a decision can be taken without further examination. The decision shall be final.

Article 29 – Decisions by Chambers on admissibility and merits

1 If no decision is taken under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34.

2 A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33.

3 The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

Article 30 – Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

Article 31 – Powers of the Grand Chamber

The Grand Chamber shall

1 a determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43; and

b consider requests for advisory opinions submitted under Article 47.

Article 32 – Jurisdiction of the Court

1 The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47.

2 In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 33 – Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

Article 34 – Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Article 35 – Admissibility criteria

1 The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2 The Court shall not deal with any application submitted under Article 34 that

a is anonymous; or

b is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3 The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.

4 The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

Article 36 – Third party intervention

1 In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2 The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

Article 37 – Striking out applications

1 The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

a the applicant does not intend to pursue his application; or

b the matter has been resolved; or

c for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.

2 The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

Article 38 – Examination of the case and friendly settlement proceedings

1 If the Court declares the application admissible, it shall

a pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;

b place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.

2 Proceedings conducted under paragraph 1.b shall be confidential.

Article 39 – Finding of a friendly settlement

If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

Article 40 – Public hearings and access to documents

1 Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.

2 Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

Article 41 – Just satisfaction

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Article 42 – Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

Article 43 – Referral to the Grand Chamber

1 Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2 A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.

3 If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

Article 44 – Final judgments

1 The judgment of the Grand Chamber shall be final.

2 The judgment of a Chamber shall become final

a when the parties declare that they will not request that the case be referred to the Grand Chamber; or

b three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or

c when the panel of the Grand Chamber rejects the request to refer under Article 43.

3 The final judgment shall be published.

Article 45 – Reasons for judgments and decisions

1 Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.

2 If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 46 – Binding force and execution of judgments

1 The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2 The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

Article 47 – Advisory opinions

1 The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.

2 Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3 Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

Article 48 – Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

Article 49 – Reasons for advisory opinions

1 Reasons shall be given for advisory opinions of the Court.

2 If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

3 Advisory opinions of the Court shall be communicated to the Committee of Ministers.

Article 50 – Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

Article 51 – Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Section III[1,2] – Miscellaneous provisions

Article 52[1] – Inquiries by the Secretary General

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

1 Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

2 The articles of this Section are renumbered according to the provisions of Protocol No. 11 (ETS No. 155).

Article 53[1] – Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

Article 54[1] – Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 55[1] – Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Article 56[1] – Territorial application

1[2] Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.

2 The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.

3 The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

4[2] Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

Article 57[1] – Reservations

1 Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.

2 Any reservation made under this article shall contain a brief statement of the law concerned.

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1 Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

2 Text amended according to the provisions of Protocol No. 11 (ETS No. 155).

Article 58[1] – Denunciation

1 A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

2 Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

3 Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

4[1] The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

Article 59[2] – Signature and ratification

1 This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.

2 The present Convention shall come into force after the deposit of ten instruments of ratification.

3 As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

4 The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

[1] Text amended according to the provisions of Protocol No. 11 (ETS No. 155).

[2] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

APPENDIX II

PROTOCOL TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, AS AMENDED BY PROTOCOL NO. 11

Paris, 20.III.1952Headings of articles added and text amended according to the provisions of Protocol No. 11 (ETS No. 155), as of its entry into force, on 1 November 1998.

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

Article 1 – Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2 – Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3 – Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 4[1] – Territorial application

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

1 Text amended according to the provisions of Protocol No. 11 (ETS No. 155).

Article 5 – Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 6 – Signature and ratification

This Protocol shall be open for signature by the members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

Done at Paris on the 20th day of March 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory governments.